BCCON-WC

BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO AS THE DULY CONSTITUTED ELECTORAL BOARD

Objections of: CATHERINE A. KERPSACK	)
	)
To the Nomination	)
Papers of: CRAIG SIMMONS	)
	) No. 04-EB-WC-75
Candidate for the office of Ward Committeeman for	)
the 42nd Ward of the City of Chicago, Republican	)
Party	)

FINDINGS AND DECISION

The duly constituted Electoral Board, consisting of Chicago Board of Election Commissioners Langdon D. Neal, Theresa M. Petrone, and Richard A. Cowen, organized by law in response to a Call issued by Langdon D. Neal, Chairman of said Electoral Board, for the purpose of hearing and passing upon objections ("Objections") of CATHERINE A. KERPSACK ("Objector") to the nomination papers ("Nomination Papers") of CRAIG SIMMONS, candidate for election to the office of Ward Committeeman for the 42nd Ward of the City of Chicago, Republican Party ("Candidate"), having convened on January 5, 2004, at 2:00 p.m., in the City Council Chambers, 121 North LaSalle Street, 2nd Floor, Chicago, Illinois; and having heard and determined the Objections to the Nomination Papers in the above-entitled matter finds that:

1. Objections to the Nomination Papers of the Candidate herein were duly and timely filed.

2. The said Electoral Board has been legally constituted according to the laws of the State of Illinois.

3. A Call to the hearing on said Objections was duly issued by the Chairman of the Electoral Board and served upon the members of the Electoral Board, the Objector and the Candidate, by registered or certified mail and by Sheriff's service, as provided by statute.

4. A public hearing held on these Objections commenced on January 5, 2004 and was continued from time to time.

5. The Electoral Board assigned this matter to Hearing Examiner TERENCE E. FLYNN for further hearings and proceedings.

6. The Objector and the Candidate were directed by the Electoral Board to appear before the Hearing Examiner for a hearing on the date and at the time designated on the Electoral Board's docket. The following persons, among others, were present at such hearing: the Objector, CATHERINE A. KERPSACK, by her attorney; and the Candidate, CRAIG SIMMONS, pro se.

7. The Hearing Examiner ordered that an examination of the registration records be conducted by clerks and agents under the Board's direction and supervision, in accordance with the laws of Illinois and the rules of the Board.

8. The Hearing Examiner directed all parties to appear and be present, either personally and/or by their authorized representatives during the records examination.

9. The Candidate or his duly authorized representative(s) was present during the examination of the registration records.

10. The Objector or her duly authorized representative(s) was present during the examination of the registration records.

11. The examination of the registration records was completed and the Electoral Board hereby adopts and incorporates by reference the results of the records examination conducted by its clerks and agents. The written report of the results of the registration records examination is contained in the Electoral Board's file in this case and is available for inspection upon request of a party.

12. The Electoral Board has considered all evidence and arguments tendered by the parties.

13. The results of the records examination reflects that:

    a. The minimum number of valid signatures required by law for placement on the ballot for the office in question is 500;

    b. The number of purportedly valid signatures appearing on the nominating petition filed by the Candidate total 1,018;

    c. The number of signatures deemed invalid because of objections sustained total 422;

    d. The remaining number of signatures deemed valid total 596.

14. An evidentiary hearing was conducted on the issue whether or not the petition sheets circulated by the Candidate's wife, Susan Simmons, were signed in the "presence" of the circulator. For the reasons stated in the Hearing Examiner's report and recommendations, a copy of which is attached to and incorporated in

this decision, the Electoral Board finds that, with the exception of Sheet 65 of the nomination petition, the petition sheets in question were signed in the "presence" of the circulator of those sheets and that there was no "pattern of fraud" or "knowing disregard" of the Election Code. Therefore, the Objections of "pattern of fraud" and "knowing disregard" of the Election Code are overruled.

15. Regarding Sheet 65, the Electoral Board disagrees with the Hearing Examiner's findings and conclusion and finds that the testimony of Carmel and Lance Fifthian, who signed at lines 7 and 8 of that sheet, refutes a finding that at the time they signed the sheet they were sufficiently in the presence of Susan Simmons, who signed the sheet as the circulator of that sheet. The Electoral Board finds that Simmons was not in the immediate surroundings or vicinity within close view of the Fifthians when they signed Sheet 65. Accordingly, the Electoral Board finds that the circulator's affidavit was false when signed, invalidating all of the signatures on Sheet 65. Therefore, the Candidate loses another 8 signatures, leaving him with a total of 588 valid signatures.

16. The Electoral Board finds that the number of valid signatures appearing on the Candidate's nominating petition following completion of the records examination and the evidentiary hearing exceeds the minimum number of valid signatures required by law to be placed upon the official ballot as a candidate for election to the office of Ward Committeeman for the 42nd Ward of the City of Chicago, Republican Party.

17. The Electoral Board finds, therefore, that the Objector's petition is overruled and that the Nomination Papers of CRAIG SIMMONS are valid.

IT IS THEREFORE ORDERED that the Objections of CATHERINE A. KERPSACK to the Nomination Papers of CRAIG SIMMONS, candidate for election to the office of Ward Committeeman for the 42nd Ward of the City of Chicago, Republican Party, are hereby OVERRULED and said Nomination Papers are hereby declared VALID and the name of CRAIG SIMMONS, candidate for election to the office of Ward Committeeman for the 42nd Ward of the City of Chicago, Republican Party, SHALL be printed on the official ballot for the General Primary Election to be held on March 16, 2004.

Dated: Chicago, Illinois, this 6th day of February, 2004.

Langdon D. Neal, Chairman

Theresa M. Petrone, Commissioner

Richard A. Cowen, Commissioner

NOTICE: Pursuant to Section 10-10.1 of the Election Code (10 ILCS 5/10-10.1) a party aggrieved of this decision and seeking judicial review of this decision must file a petition for judicial review with the Clerk of the Circuit Court of Cook County within 10 days after the decision of the Electoral Board.

BEFORE THE DULY CONSTITUTED ELECTORAL BOARD FOR THE HEARING AND PASSING UPON OBJECTIONS TO NOMINATION PAPERS OF CANDIDATES TO BE VOTED UPON AT THE MARCH 16, 2004 ELECTION

CATHERINE KERPSACK, Petitioner-Objector,	)	No. 04-EB-WC-75
v.	)	Office: 42nd Ward Republican Committeeman
CRAIG SIMMONS, Respondent-Candidate.	)	Minimum Signature Requirement: 500

REPORT AND RECOMMENDATION OF HEARING EXAMINER, TERENCE E. FLYNN

2004 JAN 30 A 11:13
BOARD OF ELECTION

Proposed Findings:

1. The initial hearing was held on January 6, 2004, at which time the parties appeared and a Rule 6 Records Exam was ordered. Also, a briefing schedule was ordered on the Candidate's motion to strike.

2. A second hearing was held on January 13, 2004, at which time, after argument, the motion to strike was denied in relevant part.

3. A third hearing was held on January 16, 2004, at which time the results of the Rule 6 exam were not available. Argument was heard on issuance of subpoenas and ruling was reserved.

4. At the status of January 20, 2004, the Rule 6 results were still not available. Candidate requested leave to file a Motion to Stay Subpoenas and Stay Evidentiary Hearing and for Summary Judgment. Leave was granted and a briefing schedule was set, with the next status date set for January 26, 2004. In the interim, the Rule 6 Exam results were received showing the Candidate with 96 signatures over the minimum signature requirement. On January 21, 2004, a Procedural Order was issued requiring Rule 8 motions to be filed by January 23, 2004. The Candidate filed a Rule 8 motion. The Objector did not.

5. The Rule 6 Records Exam results showed the following:

Signatures on petition:	1018
Objections overruled:	194
Objections sustained:	422
Signatures invalid because of circulator:	0

Valid signatures:	596[1]
Minimum signature requirement:	500

6. At the hearing of January 26, 2004, argument was held on the Candidate's motion to stay issuance of subpoenas and stay evidentiary hearing. Given that if Objector's "pattern of fraud" attack on a particular circulator were successful *in toto*, the Candidate would be brought below the minimum signature requirement, the Objector was entitled to an evidentiary hearing, and thus the Candidate's motion was denied. The matter was set by agreement for evidentiary hearing on January 29, 2004, authorization for subpoenas was executed, and the Candidate's Rule 8 motion was entered and continued.

7. An evidentiary hearing was conducted on January 29, 2004. Exhibits were admitted into evidence. They are:

Objector Exhibit 1: Affidavit of Mary Collins, going to Sheet 58, Line 11;
Objector Exhibit 2: Affidavit of Frank Lee, going to Sheet 55, Line 3;
Objector Exhibit 3: Return of service on subpoena for Brian Sprague (Sheet 32, Line 15).
Candidate's Exhibit 1:Affidavit of Circulator Susan Simmons, dated 1/6/04;
Candidate's Exhibit 2:Affidavit of Cathy L. Santos, dated 1/5/04;
Candidate's Exhibit 3: Affidavit of Circulator Susan Simmons, dated 1/22/04;
Candidate's Exhibit 4: Affidavit of Treva Milligan, dated 1/22/04;
Candidate's Exhibit 5: Affidavit of Shirley Dolinshik, dated 1/28/04.

Five witnesses gave testimony at the hearing: Carmel and Lance Fifthian, the Candidate, the Candidate's spouse (circulator Susan Simmons) and a process server.

The Objector adduced evidence from Carmel and Lance Fifthian, who signed the Candidate's sheets at Lines 7 and 8 of Sheet 65, that two men came to their door, one the Candidate, and they signed at or inside the doorway to their condominium on the 12th floor of 165 N. Canal, which is at an intersection of hallways. They saw no women in the area, but Lance Fifthian testified that people could have been in the hallway unknown to him. Sheet 65 was purportedly circulated by the Candidate's wife, Susan Simmons. She testified that she was on the 12th floor of 165 N. Canal with another woman and with her husband and another man, knocking on doors and that she could see people sign, even if she was not the person who handed the sheet to the person. Of interest is that the Candidate testified that he stayed talking to the Fifthians for some time after they signed Sheet 65, while his wife went to different floors. Sheet 65 bears a different handwriting, not the Candidate's, for the word "Chicago" on Sheet 65 at lines 9-

[1] The attorney for Objector stated that there was a clerical error bringing the total to 588. No evidence was presented regarding that 8 signature difference, but given this recommendation, that is moot.

15 immediately after the Fifthians' signatures, with signatures at different floors at 165 N. Canal, lending some support to this testimony.

The Objector's best case is that if the Fifthians could not see Ms. Simmons, she could not see them. However, the circulator's testimony is not clearly and convincingly rebutted that she was not in the "presence" of the signer. Moreover, if she was not, and striking this sheet would be an available remedy, it still would not lead to the quality and quantity of evidence necessary to find a pattern of fraud.

8. The Objector also produced the affidavit of Mary Collins, to the same effect as the testimony above in Paragraph 7, at the address of 165 N. Canal, regarding Sheet 58, but again, the circulator's testimony was not clearly and convincingly rebutted.

9. Similarly, the Objector attacks Sheet 55, obtained at the 44th lobby floor of the Hancock Building, 175 East Delaware, with one affidavit of a Peter Lee, who states an older woman requested his signature and no one else was present. The circulator, Ms. Simmons, testified she was present with an older woman and was always in eyesight of petition signers in the 44th floor lobby.[2]

10. Thus, in summary, Objector attacks the 10 sheets circulated by Susan Simmons on the basis of only 4 people who did not remember her in the area. The Candidate's evidence attempts to explain these charges by stating the circulator was present in the area, always in a sight-line, even if she were obtaining another signature on another page in the same location.

11. The Candidate made a crucial statement in his final argument, stating that even if there were sloppiness or negligence, that does not rise to the "knowing disregard" required by the seminal cases[3] in pattern of fraud circulator cases.

Proposed Conclusions

12. It is clearly not "best practice" to have four people on one floor (even in groups of two) going to a number of different doors, even adjacent ones, and then have one person purport to be the circulator. Indeed, such practice invites a circulator attack such as this. Similarly, a lobby situation with multiple sheets being circulated simultaneously can easily lead to an affidavit as that of Mr. Lee. The

[2] There were also affidavits on behalf of the Candidate explanatory of the process. (See Candidate's Exhibit 5, albeit from Candidate's mother-in-law.)

[3] Fortas v. Dixon, 122 Ill.App.3d 697, 462 N.E.2d 615 (1st Dist. 1984);
Huskey v. Mun. Officers Electoral Bd., 156 Ill.App. 201, 509 N.E.2d 555 (1st Dist. 1987);
Canter v. Cook Cty. Off. Electoral Bd., 170 Ill.App.3d 364, 523 N.E.2d 1299 (1st Dist. 1988); and
Moscardini v. County Officers Electoral Bd., 224 Ill.App. 1059, 590 N.E.2d 84 (2nd Dist. 1992).

Candidate should not be surprised that he and his campaign people have to account for their practices, and the objection is not "frivolous".[4]

13. Having said that, the testimony of Susan Simmons is credited by this Hearing Examiner and I believe she was in the "presence" of the signers as that term is used in the statute (10 ILCS 5/7-10) and case law (see footnote 3). Even if she were not in absolutely direct sign-lines at absolutely all times, the quantity and quality of the Objector's evidence only goes to Sheet 65 (the Fifthian testimony) and invalidating that sheet, if I thought the evidence so required, would not bring the Candidate below the minimum signature requirement of 500. Similarly, the one affidavit each regarding Sheets 58 (Collins) and 55 (Lee), also fail the clear and convincing evidence test. Even if I were to invalidate all three, that would still not bring the Candidate below the minimum signature requirement. I would have to extend the remedy to 7 other sheets on which no evidence was produced. If there were the requisite quality and quantity of evidence on those 3 sheets, the remedy would be available to strike all sheets of the circulator. (See footnote 3 above.) Again, however, the quality and quantity of evidence adduced by the Objector is insufficient to sustain a "pattern of fraud" claim on this circulator.[5]

14. The Rule 6 clerk's tally showed the Candidate with 596 signatures. The Objector's evidence, by both affidavit and live testimony fell far short of that necessary to sustain a pattern of fraud case. The Candidate's evidence, though "best practice" was not utilized, certainly rebutted any "pattern of fraud" allegation regarding "knowing disregard" of the Election Code. As a result, the Candidate has more than the minimum signature requirement of 500.[6]

Recommendation

Therefore, it is the recommendation that the name Craig Simmons should appear on the ballot in the March 16, 2004 election for the position of 42nd Ward Republican Committeeman.

Dated: January 30, 2004

Terence E. Flynn, Hearing Examiner

[4] Also, that 422 objections were sustained in the Rule 6 examination undercuts the claim of "frivolousness".

[5] Another witness called by Objector was the process server for the subpoenas: regarding one completed service where the witness did not come to the hearing, and an unsuccessful service on others, including supposed "evasions" of service. However, one witness who supposedly "evaded" service was in the hearing room, and the Record was open to call him but Objector declined. Further, Objector rested without attempting to keep the record open on any other witness.

[6] The Candidate's Rule 8 motion, filed pursuant to the Procedural Order of January 23, 2004, is therefore moot.

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT-COUNTY DIVISION

CATHERINE KERPSACK)
)
Plaintiff)
V.)
)
) **No.** 04 CO·EL·12
BOARD OF ELECTIONS OF THE CITY OF)
CHICAGO AS THE DULY CONSTITUTED)
ELECTORAL BOARD; and)
CRAIG SIMMONS, candidate)
)
Defendants)

ORDER

This cause coming on to be heard before the court on the defendants' motion to dismiss; and the court having considered the written arguments of the plaintiff and defendants; and the court having taken said motion under advisement without oral argument, it is hereby Ordered:

1. This case is hereby dismissed for the reasons set forth in the defendants' motion and supporting memorandum.
2. That the hearing of this case previously scheduled for March 8, 2004 is stricken.
3. There is no just cause to delay the enforcement or appeal of this order.

ENTER:

CIRCUIT COURT OF COOK COUNTY
E N T E R E D
FEB 27 2004
JUDGE NATHANIEL R. HOWSE, JR. 772

JUDGE

Judge Nathaniel R. Howse Jr.
Room 1711-Daley Center
50 W. Washington
Chicago, Il. 60601

Nathaniel R. Howse, Jr.
Circuit Court Judge - County Division
Room 1711 Daley Center
Chicago, Illinois, 60602

February 27, 2004

By FAX TRANSMITTAL

TO:

Mr. Russ Stewart	Mr. James Scanlon Ms. Joan T. Agnew	Mr. Craig Simmons
(847) 825-1969	(312) 782-8162	(312) 464-1584

Re: **Case No. 04 CO EL 12- Order on Motion to Dismiss**

Dear Counsel and Party of record:

Please find to follow a copy of the order entered in the above case today. Thank you for your briefs and your courtesy.

Very truly yours,

Nathaniel R. Howse, Jr.

JAMES M. SCANLON
& ASSOCIATES, P.C.

Privileged & Confidential Memorandum

To: Langdon D. Neal, Chairman
Richard A. Cowen, Commissioner
Theresa M. Petrone, Commissioner
Lance Gough, Executive Director
Tom Leach, Public Information

From: James M. Scanlon

CC: Bob Sawicki, Jeff Fedderke

Date: March 1, 2004

Re: Kerpsack v. CBEC & Craig Simmons

Enclosed is a copy of an order entered on February 27, 2004 by Judge Nathaniel Howse granting the Board's motion to dismiss the petition for judicial review. The petition for judicial review failed to name and serve the individual Commissioners as defendants and thus failed to comply with the requirements of Section 10-10.1 of the Election Code.

Craig Simmons continues to be a candidate for the office of Ward Committeeman of the 42nd Ward, Republican Party.

Enclosure