NBCON-ALD

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

Objections of: Kimberly J. Scott	)	
	)	
	)	
To the Nomination	)	No.: 11-EB-ALD-117
Papers of: William D. "Will" Burns	)	
	)	Related Case: 11-EB-ALD-272
Candidate for the office of	)	
Alderman of the 4th Ward, City of Chicago	)	

FINDINGS AND DECISION

The duly constituted Electoral Board, consisting of Board of Election Commissioners of the City of Chicago Commissioners Langdon D. Neal, Richard A. Cowen, and Marisel A. Hernandez, 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 Kimberly J. Scott ("Objector") to the nomination papers ("Nomination Papers") of William D. "Will" Burns, candidate for the office of Alderman of the 4th Ward of the City of Chicago ("Candidate") to be elected at the Municipal General Election to be held on February 22, 2011, having convened on December 6, 2010, at 9:00 a.m., in Room 800, 69 West Washington Street, 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 December 6, 2010 and was continued from time to time.

5. The Electoral Board assigned this matter to Hearing Officer John R. Ashenden for further hearings and proceedings.

6. The Objector and the Candidate were directed by the Electoral Board's Call served upon them to appear before the Hearing Officer on the date and at the time designated in the Hearing Schedule. The following persons, among others, were present at such hearing: the Objector, Kimberly J. Scott, by attorney Alvin M. Foreman; the Candidate, William D. "Will" Burns, by attorney Michael J. Kasper.

7. The Hearing Officer has tendered to the Electoral Board his report and recommended decision. The Hearing Officer recommends that the Objections to the Candidate's Nomination Papers be overruled and that the Nomination Papers be declared valid.

8. The Electoral Board, having reviewed the record of proceedings in this matter and having considered the report and recommendations of the Hearing Officer, as well as all argument and evidence submitted by the parties, hereby adopts the Hearing Officer's recommended findings and conclusions of law. A copy of the Hearing Officer report and recommendations is attached hereto and is incorporated herein as part of the decision of the Electoral Board.

9. For the reasons stated above, the Electoral Board overrules the Objections to the Candidate's Nomination Papers and finds that the Candidate's Nomination Papers are valid.

IT IS THEREFORE ORDERED that the Objections of Kimberly J. Scott to the Nomination Papers of William D. "Will" Burns, candidate for election to the office of Alderman of the 4th Ward of the City of Chicago, are hereby OVERRULED and said Nomination Papers are hereby declared VALID and the name of William D. "Will" Burns, candidate for election to the office of Alderman of the 4th Ward of the City of Chicago, SHALL be printed on the official ballot for the Municipal General Election to be held on February 22, 2011.

Dated: Chicago, Illinois, on January 13, 2011.

Langdon D. Neal, Chairman

Richard A. Cowen, Commissioner

Marisel A. Hernandez, 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 5 days after service of the decision of the Electoral Board.

BOARD OF ELECTION COMISSIONER OF THE CITY OF CHICAGO

Objections of: KIMBERLY J. SCOTT,	)	
To the Nomination Papers of: WILLIAM D. "WILL" BURNS,	)	No. **11-EB-ALD-117**
Candidate for the Office of Alderman of the Fourth Ward, City of Chicago, County of Cook, State of Illinois, to be voted upon at the February 22, 2011 Municipal General Election.	)	John R. Ashenden Hearing Officer

2010 DEC 17 P 5:30
BOARD OF ELECTION

RECOMMENDED DECISION

This matter having come before the Chicago Board of Election Commissioners ("CBOE") on the Objections of Kimberly Scott ("Objector") to the nomination papers of William D. "Will" Burns ("Candidate"), John R. Ashenden, Hearing Officer, finds and recommends as follows:

1. The initial hearing commenced at 11:00 a.m., December 6, 2010. In attendance were The Objector through legal counsel, Alvin foreman and the Candidate appeared through counsel, Michael J. Kasper. Board Group Exhibits A through D were marked and admitted as Candidate's Nomination Papers, Objector's Petition, Returns of Service and Appearances, respectively.

2. The Hearing Officer identified the issues presented in Objector's five count Petition as follows: a) Candidate filed his nomination papers without striking any signatures when such signatures were of persons who resided outside the fourth ward; b) Candidate deceived voters by using the term "Democrat" and "Democratic Party" on promotional materials; c) Candidate nomination petitions with improper notarizations; d) Candidate allegedly committed fraud by submitting nomination petitions with forged signatures; and 5) Candidates overall behavior amounts to a clear pattern of fraud.

3. Candidate's Attorney filed with the Hearing Officer a motion to dismiss four of five counts of the *Verified Objection Petition.*

4. Candidate's Motion to Dismiss makes the following arguments:

   (a) Count I fails because: 1) even if the signatures are invalid, Candidate has submitted more than the required signatures and, 2) there is no duty for each circulator to independently investigate each signature to determine its validity.

   (b) Count II fails because under §5/10-10, the power of the election Board is limited to making a determination as to whether a certificate of nomination or nomination papers or petition are valid pursuant to the election code.

   (c) Count III fails because only the sheets where the addresses differ should be held invalid and that even in spite of this; he retains the appropriate number of signatures.

   (d) Count IV fails because even striking those signatures, there is are still more than enough signatures to meet the minimum signature requirement.

5. A briefing schedule was set. The hearing date was December 9, 2010 at 2:00 p.m.[1]

6. On December 8, 2010, Objector filed his response, alleging:

   (a) failing to remove invalid signatures from the petition, Objector infers Candidate committed fraud.

   (b) Under §5/10-10 and the power of the Board, all aspects of the manner in which the signatures were acquired are to be considered.

   (c) some of the sheets appear to be falsely notarized, and so all of the sheets notarized by that notary are invalid.

   (d) Candidate committed fraud by filing petitions with apparently forged signatures and failure to remove signatures would invalidate Candidate's papers.

7. The hearing on Candidate's motion to dismiss was held On December 9, 2010.

[1] During the initial hearing, the objector filed a *Request to Admit.* The Hearing Examiner did not make any orders regarding it since its relevance is dependent on the outcome of candidate's *Motion to Dismiss.*

COUNT I: FRAUD IN FILING PETITIONS

8. The issue presented in Count I is whether a Candidate has an implied duty to strike invalid signatures from petitions and whether the act of not doing so amounts to fraud.

9. At common law, the elements of fraud are: (1) a false statement of material fact; (2) defendant's knowledge that the statement was false; (3) defendant's intent that the statement induce the plaintiff to act; (4) plaintiff's reliance upon truth of the statement; and (5) plaintiff's damages resulted from reliance of the statement. *Board of Education v. A, C, & S., 546 N.E.2d 580 (1989).* It is axiomatic, that a claim for fraud requires specific facts be alleged such that the necessary or probable inference is fraud. *Id.*

10. The Objector argues an "implied duty" for the Candidate or circulator to inspect petitions sheets for obviously invalid signatures. Objector contends the language of the circulator's affidavit, requiring each to swear to the validity of the signatures to his/her "knowledge and belief", implies this duty. In addition, the Objector refers to §5/10-3,4 of the Code for this implicit duty.

11. The relevant language of §5/10-3 establishes merely a procedure to strike a signature from a petition:

> The person circulating the petition, or the Candidate on whose behalf the petition is circulated, may strike any signature from the petition . . .

It is clear from the use of the word "may" instead of "must" the statute is merely granting the ability for a signature to be struck; not a requirement that be stricken.

12. Objector, argues that this Board apply the standard for "knowledge and belief" as adopted by the Illinois Supreme Court in *Golden Rule Insurance Company v. Schwartz*, 786 N.E.2d 1010. The *Golden Rule* standard is essentially that "knowledge and belief" is the same as actual knowledge. It is Objector's position that the boundaries of the fourth ward should be the actual

knowledge of a Candidate and/or his circulators. The *Golden Rule* standard is only used in matters concerning insurance policies regarding applicants' answers. Even when the courts allow for its use, insurance companies are not allowed "to seek refuge" in the higher standard of accuracy encompassed by a more rigid level of knowledge. Nonetheless, the hearing officer finds that using the Golden Rule standard in the case of circulating election petitions, allows for a person to be mistaken regarding the validity of a signature when swearing a circulators oath, without such a mistake amounting to fraud. 786 N.E.2d at 1016.

13. The Hearing Officer finds that the language of "knowledge and belief" in this case allows for mistakes or misunderstandings without a representations amounting to a fraud.

14. The Hearing Officer finds that that Candidate filed 7,052 signatures, of which only 939 are purported by Objector to be invalid.[2] [Objector's Pet. Pars. 3, 17, 18] The Hearing Officer finds that Objector fails to plead facts such that there is a *necessary or probable inference of fraud.* The inference most likely drawn from the ratio of valid to invalid signatures is one that there were mistakes or carelessness in the review of the petitions but not fraud. As such, the Hearing Officer recommends to the Board that Count I of Objector's Petition is insufficient to state a claim of fraud and that it be stricken.

COUNT II: VOTER DECEPTION

15. Objector argues this Board consider promotional materials circulated by the Candidate with his petition sheets in determining whether a Candidate complied with the Code. Objector

[2] The Objector alleges that the 939 signatures occur on 449 of 737 sheets and that a single invalid signature on a sheet is evidence that the whole sheet is fraudulent.

argues, without citation to case law, that the election Board may consider evidence "outside the four corners" of the nomination papers when determining a Candidate's validity.[3]

16. The Objector's Petition attached a photograph that showed the Circulators handing a flyer to the public which stated the Candidate was a "democrat for alderman". It is uncontroverted that the Candidate did not place the terms "Democrat" or "Democratic Party" on any of his nomination petition sheets.

17. In this case, the power of the election Board is *limited* to making a determination as to whether the nomination papers are valid. §5/10-10. The relevant case law list the authority of this Board as "limited to determining whether a challenged *nominating petition* complies with the provisions of the Election Code..." *Oberg v. Shcreiner*, 96-EB-NPP-1 (emphasis added).

18. It is uncontroverted that Elections for Alderman are nonpartisan and a Candidate may not appear on the header of the nominating petitions with any sort of party affiliation. For example in *Dix v. Terry*, 03-EB-ALD-071, this Board held that so long as the party affiliation is not in the header of the petition sheet and there is no evidence of the voter confusion about the Candidates stated or unstated political affiliation – the nomination papers are valid.[4]

19. As such, the Candidate did not violate any provision of the election code and is in full compliance with respect to the issue of his properly obtaining signatures. The Hearing Officer finds that no claim for voter deception exists against Candidate and recommends that Count II of the Verified Objections Petition be dismissed.

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[3] While objector fails to cite any cases in support of her argument, during argument Counsel stated this Board has specifically looked at the filing of ethical disclosures to determine whether or not a Candidate's nominating papers were valid.

[4] Objector's counsel agreed the only support are cases in which nomination papers were found invalid because a party affiliation was placed in the header. (12/9/10 transcript pages 19, 20)

COUNT III: FALSE NOTARIZATIONS REGARDING 15 PETITION SHEETS

20. The Objector argues there are two names of circulators with varying residential addresses listed in their affidavit. The Objector then infers that the variances are a result of improper notarization and questions the validity of any of the notarization performed by that notary.

21. For a notarization of a nomination petition to be proper, the circulator must appear before the notary in person. Under *Fortas v. Dix*, 462 N.E.2d 615 and *Bowe v. Chicago Electoral Board*, 404 N.E.2d 180, a failure to follow proper procedure for notarizations only invalidates the petition sheet for which there was failure to follow procedure.

22. Dianna Thompson notarized petition sheets. Persons named Maribely Rodriguez and Everett Harris circulated petition sheets.

23. Objector argues that eight of the petitions sheets circulated by persons named Maribely Rodriguez and seven of the petition sheet circulated by persons named Everett Harris were notarized by Dianna Thompson and contain varying residential addresses.

24. Under the applicable law, if these variances cannot be accounted for, e.g. multiple circulators with the same name, it would only be proper to invalidate the 15 sheets contested.

25. Furthermore, with regards to the claim of fraud, it is an uncontested fact that Candidate filed 737 notarized petition sheets. Objector only argues invalidities with fifteen of Candidate's nomination petitions. Even if true, allegations against fifteen of 737 sheets, does not create necessary or probable inference is fraud.

26. Thus, the Hearing Officer finds the allegations of Count III of the Verified Objector's Petition is insufficient at law to establish fraud and recommends it be dismissed.

COUNT IV: FORGED SIGNATURES

27. Objector alleges that twenty-two signatures are forged and that these forged signatures are further evidence of fraud against Candidate.

28. Once again, it is uncontroverted that Candidate acquired 7,052 signatures. Objector's allegation that 22 of 7,052 signatures are forged is insufficient to create a necessary or probable inference of fraud. The numerical discrepancy between what Objector alleges as improper signatures versus the genuine signatures is more likely to create a necessary or probable inference of mistake and not fraud.

29. The Hearing Officer finds the allegations of Count IV insufficient to allege fraud and recommends they be dismissed.

COUNT V: PATTERN OF FRAUD

32. Objector's argument in Count V is that the entire of Candidate's alleged activity amounts to a pattern of fraud and Candidate's nomination papers should be invalidated as a whole.

33. It is true that a pattern of fraud will invalidate a Candidate's nomination papers. This Board, however, can only find a Candidate engaged in a pattern of fraud where there is clear and convincing evidence that there was corruption, intentional filing of false affidavits of circulators or guilty knowledge in the filing of the petition. *McCord v. Penn*, 02-EB-RGA-15. This Board has further stated a pattern of fraud claim would have to show that the entirety of a candidate nomination papers were fraudulent. *See Summers et. al.v. Morrow*, 04-EB-WC-09, where the Board held that despite numerous pieces of evidence revealing invalid signatures, forged signatures, signatures of dead persons, and invalid notarizations – having more than enough signatures despite the ones deleted for being improper negated evidence that there was a pattern of fraud.

34. Objector's allegations, even if true, simply do not rise to a level that would create clear and convincing evidence that the entirety of Candidate's nomination papers were fraudulent such that a claim of a pattern of fraud would not be negated.

35. The Hearing Officer finds the *Verified Objection Petition* fails to allege facts sufficient to sustain a claim of pattern of fraud and therefore recommends that that Count V be dismissed.

CONCLUSION

36. For all of the foregoing reasons, the Hearing Officer Recommends that the name of William D. "Will" Burns appear on the ballot for Alderman of the Fourth Ward and the Objector's petition is dismissed in its entirety.

Date: December 17, 2010

Hearing Officer
John R. Ashenden