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

Objections of: Paul L. Salzetta	)	
	)	
	)	
To the Nomination	)	No.: 11-EB-ALD-142
Papers of: John Arena	)	
	)	
Candidate for the office of	)	
Alderman of the 45th 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 Paul L. Salzetta ("Objector") to the nomination papers ("Nomination Papers") of John Arena, candidate for the office of Alderman of the 45th 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 Lynne R. Ostfeld 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, Paul L. Salzetta, by attorneyAdam W. Lasker; the Candidate, John Arena, by attorney Dan Johnson-Weinberger.

7. Objector alleges that the Candidate has not timely filed a Statement of Financial Interest with the City of Chicago Board of Ethics pursuant to section 2-164-0-50 of the Municipal Code of the City of Chicago ("City of Chicago Campaign Financing Ordinance"). Section 2-164-0-50 of the Municipal Code provides as follows:

> Every person who qualifies as a candidate shall thereby become a "reporting individual" for purposes of Chapter 2-156 of this code, and shall file a statement of financial interests, in the form prescribed by the Board of Ethics pursuant to said chapter, within five days after qualifying as a candidate. The provisions of Chapter 2-156 relating to time, place and manner of filing statements, delivering notices and receipts shall apply to statements of candidates. (Prior Code §26.3-5)

Section 2-164-060 of the Municipal Code provides as follows:

> No elected official shall be allowed to take the oath of office, continue in office or receive compensation from the City unless he has filed the statement of financial interest required by Section 2-164-050 and Chapter 2-156 of this code. (Prior Code §26.3-6)

8. Objector argues that because the Candidate failed to timely file a statement of financial interest, the Candidate cannot take the oath of office if elected and is, therefore, ineligible for elective municipal office in the City of Chicago.

9. Furthermore, Objector argues that, because Section 10-5 of the Illinois Election Code (10 ILCS 5/10-5) requires each candidate for office to swear or affirm under oath that he or she is legally qualified to hold such office, the Candidate's Statement of Candidacy claiming that the Candidate is qualified for the office sought is false.

10. Objector's argument is based upon the Illinois Supreme Court's decision in the case of *Cinkus v the Village of Stickney Municipal Officers electoral Board*, 886 N.E.2d 1011, 228 Ill. 2d 200 (2008). In *Cinkus*, a candidate, John Cinkus sought to run for village trustee. After Cinkus filed his nominating papers, he received notice by way of an objection that he owed a debt to the village in the amount of $100. The objection alleged that Section 3.1-10-5(b) of the Illinois Municipal Code (65 ILCS 5/3.1-10-5) precluded Cinkus from running for office because he was in violation of said section. Sec. 3.1-10-5(b) provides that:

> (b) A person is not eligible for an elective municipal office if that person is in arrears in the payment of a tax or other indebtedness due to the municipality or has been convicted in any court located in the United States of any infamous crime, bribery, perjury, or other felony.

Cinkus then paid or attempted to pay the debt with the village. The electoral board removed Cinkus from the ballot and the matter ultimately went to the Illinois Supreme Court wherein the Court addressed the question of whether a violation of the Illinois Municipal Code's arrearage prohibition, read in conjunction with the statement of candidacy provisions of Section 10-5 of the Election Code, bars a candidate from the ballot. The Supreme Court determined that

> ...reading these two statutes together, the disqualifications provided by section 3.1 - 10 - 5 (b) of the Illinois Municipal Code renders a candidate ineligible to run for

office if not remedied by the time the candidate files his or her nomination papers. 886 N. E. 2d 1023.

The import of *Cinkus* is that it was the first case to hold that an arrearage to a village not only precludes a person from taking office, but it also precludes a person from running for office.

11. The question presented to this Electoral Board is whether the City of Chicago Campaign Financing Ordinance imposes eligibility restrictions on candidates running for elective municipal office in the City of Chicago and, if so, whether they are enforceable by electoral boards by virtue of the case of *Cinkus v the Village of Stickney Municipal Officers Electoral Board*, 886 N.E.2d 1011, 228 Ill. 2d 200 (2008).

12. While the *Cinkus* is clear that eligibility restrictions contained in the Illinois Municipal Code may bar a person's candidacy, the City of Chicago's Campaign Financing Ordinance has no similar effect.

13. It is argued that Section 21-35 of Article 20 of the Illinois Municipal Code (otherwise knows as the "Revised Cities and Villages Act") (65 ILCS 20/21-35) allows the Chicago City Council to enact eligibility requirements for elective municipal office in the City of Chicago. Section 21-35 provides that "all laws in force in the city of Chicago governing elections for municipal offices or applicable thereto and not inconsistent with the provisions of this article, shall apply to and govern all elections held under the terms of this article." Municipal ordinances, the argument goes, are intended to be included in the above cited phrase "all laws in force ...." It is also argued that Section 21-22 of Article 21 of the Illinois Municipal Code similarly empowers the City Council to enact eligibility requirements for its elected officers by providing in part, "All elections for aldermen shall be in accordance with the provisions of law in force and operative in the City of Chicago for such elections at the time the elections are held." (65 ILCS 20/21-22) Objector would read into these statutes the authority of

municipalities to enact, by municipal ordinance, additional eligibility requirements for election to an office created by state statute. However, no case has ever held that these provisions referring to "all laws in force" were intended to include municipal ordinances. More likely, this section is an outgrowth of Sections 3.1-5-5 ("This Article 3.1 applies to all officers elected or appointed under this Article and Articles 4 and 5, unless provided otherwise.") and 3.1-10-10 (" The general election law applies to the scheduling, manner of conducting, voting at, and contesting of municipal elections.") of the Illinois Municipal Code (65 ILCS 5/3.1-5-5 and 65 ILCS 5/3.1-10-10). The "general election law" referred to in Section 3.1-10-10 of the Illinois Municipal Code of course means the "general election law" found in the Illinois Election Code. See, Section 1-1 of the Election Code (10 ILCS 5/1-1) ("This Act is the general election law of Illinois and any reference in any other Act to 'the general election law' or the 'the general election law of this State' is a reference to this Act, as now or hereafter amended."). The Election Code and Article 3.1 of the Illinois Municipal Code are the laws that govern elections in the City of Chicago, except where they are inconsistent with the express provisions of Article 21 of the Illinois Municipal Code. See, e.g., *Robinson v. Jones*, 186 Ill.App.3d 82, 542 N.E.2d 127 (First Dist. 1989); *United Citizens v. Coalition*, 125 Ill.2d 332, 531 N.E.2d 802 (1988) (reconciling the Election Code and the Illinois Municipal Code). Except for cases addressing the exercise of home rule powers through referendum, not a single election case has been cited for the proposition that a municipality can, through ordinance, create ballot access barriers for candidates seeking elective municipal office.

14. Illinois courts have held, for instance, that where the Constitution undertakes to prescribe qualifications for office, its declaration is conclusive of the whole matter. *Thies v. State Bd. of Elections,* 124 Ill.2d 317, 325, 529 N.E.2d 565, 569 (1988). The legislature is without

authority to change or add to the qualifications unless the Constitution gives it the power. *Cusack v. Howlett* (1969), 44 Ill.2d 233, 242-43, 254 N.E.2d 506. The same principle, it seems, applies to offices created by the legislature. Where an office is created by statute, it is wholly within the power of the Legislature creating it. For example, the length of term and mode of appointment may be altered at pleasure by the legislature, and the office may be abolished altogether. *People ex rel. Hoyne v. McCormick*, 261 Ill. 413, 421, 103 N.E. 1053, 1057 (1913).

15. While a municipality may provide for its officer, their manner of selection and terms of office, they may do so only acting through home rule power, subject to referendum.

16. The Illinois Attorney General has taken up this question in various opinions, the most relevant being Attorney General Opinion 00-003 dated March 7, 2000. In that opinion, Attorney General Jim Ryan was faced with the question of whether a home rule municipality has the authority to lengthen the statutory durational residency requirement for candidates running in the municipality. The Attorney General first looked to article VII, section 6 of the Illinois Constitution of 1970 which provides in pertinent part:

> (f) A home rule unit shall have the power subject to approval by referendum to adopt, alter or repeal a form of government provide by law...A home rule municipality shall have the power to provide its officers, their manner of selection and terms of office only as approved by referendum or as otherwise authorized by law.

The Attorney General determined that the durational residency requirement of municipal officers is a provision relating to the manner of selection of those officers, for purposes of article VII, section 6 of the Constitution, and that the establishment of qualifications for public office is a key component of the manner in which elected officers are selected. Accordingly, the Attorney General determined that:

> the statutory qualifications for office established by statute may be altered by a referendum adopted in a home rule municipality pursuant to article VII, section 6 of the Constitution." (page 5) Emphasis added.

Attorney General Lisa Madigan had the opportunity to address a similar issue. In Attorney General Opinion 05-007 dated September 7, 2005, Attorney General Madigan took up the question of whether home rule municipalities may, by referendum, implement election systems, such as cumulative voting or instant run-off voting, that are not specifically authorized by the Election Code or the Illinois Municipal Code. She determined that

> "pursuant to article VII, section of the Illinois Constitution of 1970, a home rule municipality had such authority subject to referendum approval, to adopt procedures for selecting municipal officers that differ from those set forth in either the Election Code or the Municipal Code." (page 1) Emphasis added.

Attorney General Madigan further recognized that

> [a]lthough they have been granted extensive powers with respect to their local government and affairs (Ill. Const.1970, art. VII, Sec.(a), home rule municipalities may change their manner of selection of officers only: (1) as provided by statute; or (2) as approved by a referendum. See *Leck v Michaelson*, 111 Ill .2d 523, 528 (1986); *Clarke v Village of Arlington Heights*, 57 Ill. 2d 50, 54 (1974).

Attorneys General Ryan and Madigan have made clear that (a) a home rule unit's change in the qualifications for office is a change in the manner of selection of officers and that (b) such a change must be accomplished by referendum.

17. Applying these Attorneys General opinions and the cases they cite to the instant question of whether a violation of the City of Chicago Financing Ordinance affects a candidate's eligibility to be on the ballot for elective municipal office, the answer is that such a violation cannot act as a bar to the ballot.

18. The City of Chicago Financing Ordinance clearly seeks to change the qualifications for office of candidates running for municipal office in the City of Chicago. However, the ordinance was not approved by a referendum as required by Article VII, sec. 6 of the Illinois Constitution. Absent a referendum, the City is without authority to enact binding changes to the selection of its officers.

19. Because the ordinance was not enacted via referendum, it is not necessary to reach the question of whether this Electoral Board has jurisdiction to address violations of the City of Chicago Financing Ordinance. However, even if such a question was now before the Electoral Board, it is clear from Section 2-164-170(a) of the Chicago Municipal Code that jurisdiction rests with the City of Chicago Board of Ethics, not with this Electoral Board. Section 2-164-170(a) of the ordinance provides, as follows:

> 2-164-170 Powers and Duties of Board in Regard to Campaign Financing Ordinance. In addition to the other powers and duties conferred on it by this Code, the Board of Ethics shall have the following powers and duties:
>
> (a) To initiate and to receive complaints of violations of any of the provisions of this chapter and to investigate and act upon such complaints as provided by this chapter; provided, however, that the Board shall have no authority to investigate any complaint alleging a violation of any provision of this ordinance or alleging other misconduct by an alderman. If the Board receives a complaint alleging a violation or other misconduct by an alderman, the Board shall, within two days after receipt thereof, transmit such complaint to the standing committee of the City Council having jurisdiction over such complaints.

As the foregoing provision indicates, the Board of Ethics – not the Board of Election Commissioners – has the power and duty over violations of *any provisions of this chapter* with the exception of violations involving incumbent alderman. It is significant to note that the provision carves out a jurisdictional exception for alderman but not for candidates. Accordingly, it must be concluded that the Board of Ethics would be the proper entity to address a candidate's failure to comply with the Ordinance.

20. Therefore, while the ordinance may attempt to impose eligibility restrictions on candidates, the ordinance is not enforceable by an electoral board by means of removing candidates from the ballot. The powers of electoral boards are only those prescribed by the legislature. *Kozel v. State Board of Elections*, 126 Ill.2d 58, 533 N.E.2d 796 (1988). This Electoral Board has long held that it does not have authority to invalidate nomination papers for an alleged failure to comply with the City of Chicago's municipal ordinance requiring the filing of statements of financial interests. See, e.g. *Bednarz v. Doherty*, 91-EB-ALD-53, CBEC, January 16, 1991; *Bocanegra v. Sanchez*, 07-EB-ALD-107, CBEC, January 9, 2007. While *Cinkus* stands for the proposition that eligibility requirements imposed by the Illinois Municipal Code may act as a bar to ballot access, there is no authority for the proposition that a municipality may enact additional eligibility requirements of its own (at least not in the absence of home rule power exercised and approved by referendum) to bar candidates from the ballot.

21. For these reasons, the Electoral Board overrules the objection based upon any alleged failure of the Candidate to timely file a Statement of Financial Interests required by municipal ordinance of the City of Chicago.

22. The Hearing Officer has tendered to the Electoral Board her 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.

23. 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.

24. 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 Paul L. Salzetta to the Nomination Papers of John Arena, candidate for election to the office of Alderman of the 45th Ward of the City of Chicago, are hereby OVERRULED and said Nomination Papers are hereby declared VALID and the name of John Arena, candidate for election to the office of Alderman of the 45th 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 18, 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.

Objections of: **PAUL L. SALZETTA,**	)	
Petitioner-Objector,	)	
To the Nomination Papers of: **JOHN ARENA,**	)	**No. 11-EB-ALD-142**
Candidate for the Office of **Alderman of the 45th Ward** in the City of Chicago	)	Lynne R. Ostfeld Hearing Officer

BOARD OF ELECTIONS
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RECOMMENDED DECISION

This matter having come before the Chicago Board of Election Commissioners ("CBOE") on objections of PAUL L. SALZETTA ("Objector") to the nomination papers of JOHN ARENA ("Candidate"), and the Candidate having filed a Motion to Strike, Lynne R. Ostfeld, Esq., Hearing Officer, finds and recommends as follows:

Background

1. The hearing was begun on December 6, 2010. In attendance at the hearing were the Objector, through his attorney Adam W. Lasker, Law Offices of Adam W. Lasker, and the Candidate, through his attorney, Dan Johnson-Weinberger

2. The Objector requested that John Arena's name not be printed on the ballot for election to the office of Alderman of the 45th Ward, City of Chicago, based on the allegation that the Candidate failed to timely file a mandatory Statement of Financial Interests with the Chicago Board of Ethics, pursuant to Chicago Municipal Code §§ 2-164-050 and -060. He did not file it within five days of becoming a candidate for Chicago elective office. He further argues that all matters of candidate eligibility must be perfected prior to the time a candidate files his statement of candidacy forms, pursuant to *Cinkus v. Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 886 N.E.2d 1011 (2008).

3. A briefing schedule was set. No records examination was requested.

4. The Candidate filed his Motion to Strike on December 9, 2010. He stated that the issue is whether an aldermanic candidate's failure to file a Statement of Financial Interest with the Chicago Board of Ethics has the same legal effect as owing a tax or other debt to the City of Chicago. He argues that it is not. He argues that, first, the Chicago ordinance applies to "elected officials" and not to "candidates", such as John Arena. Second, the remedy is that the elected official not be allowed to take the oath of office. He states that there is no authority to keep a candidate off the ballot. Finally, while the Objector admits that his argument is novel, this would be the first time in 20 years that the CBOE would keep a candidate off the ballot for failure to file this Statement and there is simply not the legal

authority to reverse this precedent.

5. The Objector filed his Objector's Response to Motion to Strike on December 13, 2010. In it he states that the Candidate misreads the law and that the Chicago Municipal Code applies to candidates as well as to elected officials because this Statement of Financial Interests ("SFI") is to be filed out by every person who qualifies as a "candidate". A person becomes a candidate earlier than when he files his nominating petitions with this Board. To honestly file nominating petitions with this Board, he must state that he is competent to be a candidate. That obligates him to have filed his SFI with the Board of Ethics within five days of becoming a candidate. That occurs when he takes any lawful step towards nomination, or spending or receiving any money for his campaign. The instant election cycle is the first time that the CBOE is able to apply the holdings of *Cinkus* to candidates for Alderman from the City of Chicago. Although electoral boards cannot enforce the provisions of the Illinois Municipal Code, the boards must still enforce requirements relative to swearing to an oath that a person is competent to be a candidate, which means meeting all eligibility requirements, which means timely filing the SFI. The CBOE has the authority to require no false swearing on a statement of candidacy.

6. The Candidate filed his Reply on December 14, 2010. It essentially restated case law that this Board does not have statutory authority to investigate alleged failures to comply with the City of Chicago's Ethics Ordinance and that the CBOE has no jurisdiction over the issue. *Bocanegra v Sanchez*, 07-EB-ALD-107

7. Hearing was held on December 15, 2010. The parties argued orally essentially as they had argued in their written briefs. The Candidate argued that this Board does not have the authority to enforce the Chicago ordinance and that the Candidate is not required to make this filing, because it applies to elected officials. The Objector argued that the SFI must be filed by all persons who are running for office as soon as they begin that run and that this Board must keep off the ballot any person who has falsely sworn to have complied with all requirements to be a candidate.

Findings of Fact and Conclusions of Law

8. To summarize the argument, the dispute concerns whether a person running for Alderman in the City of Chicago must file a Statement of Financial Interests with the Chicago Board of Ethics within five days of starting to circulate his petitions and whether this Board can keep him off the ballot if he has not done so in a timely manner, whether this Board can and must enforce a City of Chicago Ordinance regarding elections.

9. No support has been given that a municipality can keep a candidate off a ballot for elective municipal office through adoption of a municipal ordinance. Rather, municipal control over the selection and terms of office for its officers comes through home rule powers, subject to

referendum. No case has been cited that supports or requires this Board to enforce a municipal ordinance relative to ballot access for someone seeking elective municipal office.

10. No authority has been cited to authorize or compel this Board to overturn its own prior rulings that it has no jurisdiction over enforcement of the City ordinance relative to the City of Chicago Board of Ethics, and that compliance or non-compliance with the ordinance does not affect ballot access. *Bocanegra v Sanchez*, 07-EB-ALD-107, *citing*, *Jones v. Love*, 03-EB-ALD-157; *Smith v. Sherman*, 95-EB-ALD-20. This Board has long held that it has no authority to invalidate nomination papers for an alleged failure to comply with the City of Chicago's Ethics ordinance. *Bednarz v. Doherty*, 91-EB-ALD-53.

11. Further, no authority has been cited that a person becomes a candidate for office when he does minimal work, such as buying the paper and ink to put together nominating petitions, rather than the more formal act of submitting nominating petitions, and all else that is required, to an electoral board.

12. The Hearing Office recommends that this Board OVERRULE the objections filed by Paul Salzetta.

13. The Hearing Officer recommends that this Board find that the Nomination Papers of JOHN ARENA be declared to be VALID for the reasons stated above.

14. The Hearing Officer recommends that this Board order that the name of JOHN ARENA BE printed on the ballot for the Aldermanic Election, 45th Ward, City of Chicago, to be held on February 22, 2011, for the reasons stated above.

Dated: Chicago, Illinois, this 14th day of January, 2011

Lynne R. Ostfeld, Hearing Officer