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

Objections of: William H. Balasa and Anthony P. Navarro	)	
To the Nomination Papers of: Jose R. Leon	)	No.: 11-EB-ALD-331
Candidate for the office of Alderman of the 10th 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 William H. BalasaAnthony P. Navarro ("Objector") to the nomination papers ("Nomination Papers") of Jose R. Leon, candidate for the office of Alderman of the 10th 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 was held on these Objections commencing on December 6, 2010 and was continued from time to time.

5. The Electoral Board assigned this matter to Hearing Officer Gerald B. Mullin for further hearings and proceedings.

6. The Objector and the Candidate were directed by the Electoral Board to appear before the Hearing Officer on the date and at the time designated in the Call. The following persons, among others, were present at such hearing; the Objector, William H. Balasa and Anthony P. Navarro, by attorney, Nicholas C. Kefalos; and the Candidate, Jose R. Leon, by attorney, James P. Nally.

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 Objector further alleges that certain signatures contained in the Nomination Papers are not valid and the Hearing Officer ordered that an examination of the voter 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.

23. The Hearing Officer directed all parties to appear and be present, either personally and/or by their authorized representatives during this records examination.

24. The Candidate and/or his duly authorized representative was present during the examination of the registration records.

25. The Objector and/or his duly authorized representative were present during the examination of the registration records.

26. The examination of the registration records of the Board was terminated after it was determined that even if all of the remaining objections to individual signatures on the petition were sustained in favor of the Objectors, Candidate would still have more than the minimum number of valid signature on his nominating petitions to qualify for a place on the ballot for the office of Alderman of the 10th Ward of the City of Chicago.

27. The Electoral Board finds that the number of valid signatures appearing on the Candidate's nominating petition following termination of the records examination exceeds the minimum number of valid signatures required by law to be placed upon the ballot as a candidate for election to the office of Alderman of the 10th Ward of the City of Chicago.

28. The Hearing Officer conducted an evidentiary hearing pursuant to the Objector's allegation that certain petition sheets purportedly signed by circulator Jose Leon were not circulated by him and, as a result, the Nomination papers demonstrate a pattern of fraud and disregard of the Election Code.

29. The Hearing Officer found that the affidavits submitted by Objector failed to established that Jose Leon was not the circulator of the sheets he purportedly circulated, and, therefore, the Hearing Officer overruled the allegation and found that no pattern of fraud was proven by the Objector.

30. The Hearing Officer has tendered to the Electoral Board a report and recommended decision. Based upon the evidence presented, the Hearing Officer found that the

Candidate's Nomination Papers contained 226 valid signatures, which exceeds the minimum number of valid signatures required by law to be placed upon the ballot as a candidate for election to the office of Alderman of the 10th Ward of the City of Chicago, and that the Candidate's Nomination Papers should be found valid.

31. The Electoral Board, having considered the evidence and arguments tendered by the parties and the Hearing Officer's report of recommended findings and conclusions of law, hereby adopts the Hearing Officer's recommended findings and conclusions of law.

32. For the reasons stated above, the Electoral Board finds that the Candidate has a sufficient number of valid signatures on his nominating petitions and that the Nomination Papers of Jose R. Leon are, therefore, valid.

IT IS THEREFORE ORDERED that the Objections of William H. Balasa and Anthony P. Navarro to the Nomination Papers of Jose R. Leon, candidate for election to the office of Alderman of the 10th Ward of the City of Chicago, are hereby OVERRULED and said Nomination Papers are hereby declared VALID and the name of JOSE R. LEON, candidate for election to the office of Alderman of the 10th 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 COMMISSIONERS OF THE CITY OF CHICAGO AS THE DULYCONSTITUTED ELECTORAL BOARD FOR THE HEARING AND PASSING UPON OBJECTIONS TO NOMINATION PAPERS OF CANDIDATES FOR ELECTION TO THE OFFICE OF ALDERMAN OF THE 10th WARD IN THE CITY OF CHICAGO TO BE VOTED UPON AT THE ELECTION TO BE HELD ON FEBRUARY 22, 2011

WILLIAM H. BALASA and ANTHONY P. NAVARROW
PETITIONERS-OBJECTORS)
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)
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V.) **11—EB-ALD-331**
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)
JOSE LEON)
CANDIDATE)

BOARD OF ELECTIONS
2011 JAN -4 A 9:50

Hearing officer: Gerald B. Mullin

HEARING OFFICER'S RECOMMENDATION

Objectors filed a multi-faceted objection to the Candidate's Nominating Papers. The Objections can be summarized as (1) the Candidate failed to timely file a Statement of Financial Interests as required by the Chicago Ethics Ordinance; (2) the Petitions did not contain the required 177 minimum valid signatures; and (3) the Nominating Petitions signed by Jose Leon as circulator were not circulated by him and this demonstrates a pattern of fraud and disregard of the Election Code that requires every sheet of the Nominating Petitions to be invalidated.

Insofar as the allegation of failure to comply with the City of Chicago Ethics Ordinance, in the course of the hearing, the Hearing Officer called to the parties attention and the parties tacitly recognized that, under a series of decisions of the Electoral Board, the failure, even if it occurred, historically has not been held a basis for disallowing the candidates name from being placed on the ballot for Alderman. Bocanegra v. Sanchez, 07-EB-Ald-107; Jones v. Monroe, 07 EB-ALD-143; (see string citations at page 31 of decisions of Electoral Board on this issue) The Hearing Officer finds no basis in the argument of counsel for the Objectors to contravene these long standing decisions.

Based upon the second argument, i.e., the Petitions did not contain the required 177 minimum valid signatures, a Records Check was ordered. That Records Check found that there were 499 signatures greater than the minimum required.

In support of the third argument, asserting that the Nominating Petitions signed by Jose Leon as circulator were not circulated by him, and that this demonstrates a pattern of fraud and disregard of the Election Code that requires every sheet of the Nominating Petitions to be invalidated, objectors produced five affidavits[1] and two witnesses. The Objector contended that the determination of a pattern of fraud should be decided upon a evidentiary test of the preponderance of the evidence as in other civil matters, and not based upon the Rule 8 (c) "If fraud is alleged, it must be proved by clear and convincing evidence." In this regard, Objectors conceded that seven of the Nominating Petition Sheets were not contested.

Objector cited a voluminous number of decisions in support of the assertions as to this issue and the issue of what evidence should be considered in the determination of a pattern of fraud. For example, in Huskey v. Municipal Officers Election Board, 156 Ill. App. 3d 210, cited by Objectors, the court held: "We find that the present case is controlled by our holding in Fortas v. Dixon. There, the invalidation of entire sheets, and not just individual signatures, was permitted because of clear evidence of fraud permeating the entire petition circulation process. False affidavits were filed in connection with the circulation of the sheets. Testimony established that many of the affidavits on the sheets were signed by someone other than the person who actually presented the sheets to the signers. We held that entire sheets could be invalidated because the testimony clearly evidenced a pattern of fraud, false swearing, and total disregard for the mandatory requirements of the Election Code. See Bowe v. Chicago Electoral Board; Havens v. Miller (1981), 102 Ill.App.3d 558, 57 Ill.Dec. 929, 429 N.E.2d 1292. Similarly, the circulator's affidavits here were false. The circulator's affidavit is one of the primary safeguards against fraudulent nomination petitions. (Fortas v. Dixon; Havens v. Miller.) For this reason, a circulator's false affidavit taints the entire sheet. *Here, the circulator admitted that at least half of the time, she was not the person who presented the petition for signature. Furthermore, she acknowledged that many of the signatures were not genuine, i.e., were signed by someone other than the person named.* We agree with the trial court's finding that this evidence constitutes a pattern of disregard for the mandatory requirements of the Election Code and affects the integrity of the political process. The fact that the circulator misunderstood her instructions or was not properly instructed, and thus did not have fraudulent intent does not alter our holding."

Nothing remotely similar occurred in this matter under consideration.

As to the issue raised by Objectors of circulation of Nominating Petitions for more than one candidate(argued but without evidence in support) it is clear that the applicable portion of Section 10-4 of the Election Code specifically prohibits dual circulation for an second candidate or candidates *in addition to one political party.* Absent are any express terms which prohibit a circulator from circulating nominating petitions for two or more *independent* candidates. Giving this statutory language its plain and ordinary meaning, the statute cannot, then, be interpreted to prohibit dual circulation for two independent

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[1] At this writing only five affidavits were produced or received by the Hearing Officer, however, counsel for the Objectors was given leave to file additional affidavits provided the additional affidavit were in identical form to the five filed affidavits. Counsel was directed to send the additional affidavits to the Hearing Officer by e-mail.

candidates. McGuilre v. Nogaj, 146 Ill. App. 2d 280. While the Hearing Officer obtained and reviewed the case reports cited as authority for various positions, on balance the cited authority did not support the arguments made, and it would serve little purpose here to describe the principles of law cited and explain the distinctions between those citations and the present matter. As to this issue of quantum of proof, Hearing Officer recommends that the Board enter an order affirming that the quantum of proof required to establish a pattern of fraud in this matter shall be as set forth in Rule 8 (c).

The affidavits filed were entirely insufficient to establish that there was a pattern of fraud or satisfy the burden of showing Jose Leon was not the circulator in the Nominating Petitions filed with his Nominating Papers. The affidavits did not establish who the affiant claimed, in fact, to be the circulator, and did not establish that Jose Leon could not have seen the signer at the time of signing the petitions. The two witnesses called testified only that they saw persons other than Jose Leon circulating petitions on November 20th and 21st, 2010. None of the evidence supports the conclusion that a pattern of fraud existed in the circulating of Nominating Petitions, even if the quantum of proof required had been a preponderance of the evidence.

Based upon the evidence, it is the recommendation of the Hearing Officer that the Petitioners' Objection be overruled, and that the name of Jose Leon be permitted to be placed on the ballot for the office of Alderman of the 10th Ward of the City of Chicago at the Municipal general Election to be held on February 22, 2011.

December 31, 2010

Gerald B. Mullin