BCCON-ALD

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

Objections of: Jesse E. Evans, Susana Ochoa and Willa Mae Cephus	)	
To the Nomination Papers of: Mitchell A. Newman	)	No.: 11-EB-ALD-338
Candidate for the office of Alderman of the 43rd 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 Jesse E. EvansSusana OchoaWilla Mae Cephus ("Objectors") to the nomination papers ("Nomination Papers") of Mitchell A. Newman, candidate for the office of Alderman of the 43rd 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 Objectors 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 Rodney W. Stewart for further hearings and proceedings.

6. The Objectors 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 Objectors, Jesse E. Evans, Susana Ochoa and Willa Mae Cephus, by attorney, Nicholas C. Kefalos; and the Candidate, Mitchell A. Newman, by attorney, Ellen K. Raymond.

7. The Objector alleges that the Statement of Candidacy is invalid because it does not contain the following language: "that I have filed (or will file within 5 days) a Statement of Financial Interests as required by the Chicago Financing Ordinance".

8. The Electoral Board finds that the Hearing Officer correctly granted the Candidate's Motion to Strike and Dismiss the aforementioned objection because there is no requirement in the Election Code that the Statement of Candidacy contain language regarding the filing of a Statement of Financial Interests and the omission of said language in the Statement of Candidacy is not a sufficient basis for invalidating the Candidate's Nomination Papers.

9. The Objector further alleges that the Candidate failed to file 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") and as a result, the Candidate's Nomination Papers are invalid.

10. 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)

11. 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.

12. 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.

13. 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.

14. 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).

15. 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.

16. 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.

17. 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).

18. 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.

19. 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.

20. 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.

21. 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.

22. 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.

23. The Objector further alleges that the petition sheets are defective because they do not contain the language " 'voters do hereby nominate by petition' or alternatively the petition sheets do not include any such declaration to that effect, and as such, said omission being in violation of the Law."

24. The Electoral Board finds that the Hearing Officer correctly granted the Candidate's Motion to Strike and Dismiss as to the alleged invalidity of the petition sheets. There is no requirement that the petition sheets contain the language specified by the Objector and the allegation does not set forth a valid basis to invalidate the Nomination Papers. Moreover, a review of the petition sheets establishes that they are in compliance with Section 10-4 of the Election Code. 10 ILCS 5/10-4.

25. The Objector alleges that certain signatures 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.

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

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

28. The Objectors and/or duly authorized representative were present during the examination of the registration records.

29. 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 result of the registration records examination is contained in the Board's file in this case and a copy has been provided or made available to the parties.

30. The results of the records examination indicate that:

A. The minimum number of valid signatures required by law for placement on the ballot for the office in question is 187.

B. The number of purportedly valid signatures appearing on the nominating petition filed by the Candidate total 890.

C. The number of signatures deemed invalid because of objections sustained as a result of the records examination total 311.

D. The remaining number of signatures deemed valid as a result of the records examination total 579.

31. The Electoral Board finds that the number of valid signatures appearing on the Candidate's nominating petition following completion 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 43rd Ward of the City of Chicago.

32. The Hearing Officer conducted a hearing to allow the Objectors an opportunity to present evidence in support of a Rule 8 motion objecting to the Board's clerk's findings during the records examination.

33. 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 579 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 43rd Ward of the City of Chicago, and that the Candidate's Nomination Papers should be found valid.

34. 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.

35. 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 Mitchell A. Newman are, therefore, valid.

IT IS THEREFORE ORDERED that the Objections of Jesse E. Evans,Susana Ochoa and Willa Mae Cephus to the Nomination Papers of Mitchell A. Newman, candidate for election to the office of Alderman of the 43rd Ward of the City of Chicago, are hereby OVERRULED and said Nomination Papers are hereby declared VALID and the name of MITCHELL A. NEWMAN,

candidate for election to the office of Alderman of the 43rd 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.