CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – COUNT DIVISION
1701 RICHARD J. DALEY CENTER
CHICAGO, ILLINOIS 60602
(312) 603.6194 Fax: (312) 603.4351
Email: CJCAL3@cookcountygov.com

Marie Spicuzza - 603-3000
Andrew Finko - 773-453-3266
Burton Odelson - 708-424-5755

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TO: _____ **DATE:** July 21, 2010

FROM: Hon Patrick McGann. **RECEIVER'S FAX** _____

SUBJECT: 10 COEL 02

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COMMENTS

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

Darius Hogans	)	
	)	
Plaintiff/Petitioner	)	
	)	
vs.	)	**10 CoEl 2**
	)	
County Officers Electoral Board, et al.	)	
	)	
Defendant/Respondent	)	

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on the Complaint of Darius Hogans seeking judicial review of the decision County Officers Electoral Board ("Electoral Board") rejecting his objections to the candidacy of Kenneth "Kenny" Williams as the Green Party candidate for State Representative for the 29th District.

I. Facts From Administrative Proceeding

In late 2009, Mr. Williams filed a statement of candidacy and other documents seeking the nomination of the Democratic Party in the February 2010 Primary Election as their candidate in the 2010 general election for the Office of State Representative for the 29th District. In that statement, he stated that he was a qualified voter of that political party.

Mr. Hogans lodged an objection to his candidacy. Mr. Williams withdrew his request to be nominated. He subsequently voted in the 2010 Primary Election affiliating himself with the Green Party. No person sought the nomination of the Green Party for the Office of State Representative, 29th District in the February 2010 Primary Election.

On April 10, 2010, Mr. Williams caused to be filed with the State Board of Elections the Resolution of the Green Party 29th Representative District Nominating Committee designating himself as the candidate, nominating petitions containing the signatures of voters and a statement of candidacy. In the latter document, he stated under oath that he was a "qualified primary voter of the Green Party."

The County Officer's Electoral Board made certain findings including that on March 24, 2010, a teleconference of the Central Committee of the Green Party was held. Mr. Williams was selected as the Thornton Township Committeeman.

The Board also found that the evidence presented at the hearing established that prior to March 2010 there was no Representative Committee in the District. Additionally, as the Green Party did not become a recognized political party in 2006, there was no outgoing chair to call a meeting of that Committee.

The 29th District of the General Assembly is comprised of a portion of the 9th Ward in the City of Chicago, Thornton and Bloom Townships in the southern part of Cook County. The Green Party Committeeman for the 9th Ward is one Anthony Holmes, Jr. Mr. Holmes was telephoned and told of the meeting to nominate a candidate for the vacant office in the evening of March 26, 2010. Bloom Township apparently does not have an active Green Party, as there is no committeeman for that area.

On March 27, 2010, Mr. Williams was the only voting attendee at the Green Party Meeting of their 29th District Representative Committee to select a candidate for the vacant office. Not surprisingly, Mr. Williams was selected to be the chair of the meeting. Robert Thomas was selected to serve as Secretary. The meeting concluded with the nomination of Mr. Williams as the candidate of the Green Party for State Representative from the 29th District in the November Election.

The Electoral Board found convincing Mr. Williams testimony, tangentially corroborated by other witnesses, that he had sent an undated letter to the State Board of Elections on April 5, 2010. This would be nine days after the March 27 meeting. This was accepted by the Electoral Board as evidence compliance with 10 ILCS 5/8-5. This statute requires any legislative or representative committee to "immediately upon completion of organization" forward the names of the chair and secretary of the committee. While the Electoral Board was troubled by the failure of the State Board of Elections to locate this correspondence, it determined that this default of proof was not fatal to Mr. Williams' candidacy.

As a result of these findings, the Electoral Board determined that Mr. Williams was a qualified primary voter of the Green Party when he filed his "Statement of Candidacy" in April, 2010. Further, it determined that the processes prescribed for the

selection and nomination of a candidate to fill a vacancy by an established party had been properly fulfilled.

II. Legal Standard

The standards for review of an electoral board decision are essentially identical to those applicable to review of an administrative agency decision. *Cinkus v. Village of Stickney Municipal Officers Electoral Board,* 228 Ill. 2d 200, 209-210 (2008).

An administrative agency's findings and conclusions on questions of fact are deemed to be prima facie true and correct. 735 ILCS 5/3-110 (West 1994). In examining an administrative agency's factual findings, a reviewing court does not weigh the evidence or substitute its judgment for that of an administrative agency. See *Abrahamson v. Illinois Department of Professional Regulation,* 153 Ill. 2d 76, 88, 180 Ill. Dec. 34, 606 N.E.2d 1111 (1992) Instead, a reviewing court is limited to ascertaining whether such findings of fact are against the manifest weight of the evidence. See Abrahamson, 153 Ill. 2d at 88. An administrative agency's factual determinations are contrary to the manifest weight of evidence where the opposite conclusion is clearly evident. See *Abrahamson,* 153 Ill. 2d at 88.

An administrative agency's findings on a question of law, on the other hand, are reviewed with less deference. A court reviews such determinations on a de novo basis. See *Branson v. Department of Revenue,* 168 Ill. 2d 247, 254 Il. Dec. 615 (1995). As such, an agency's decision on a question of law is not binding on a reviewing court. *Envirite Corp. v. Illinois Environmental Protection Agency,* 158 Ill. 2d 210, 214, (1994).

Finally, when the issue presented to the reviewing court is a mixed question of law and fact, the decision of the agency will stand unless it is "clearly erroneous." *City of Belvidere v. Illinois State Labor Relations Board,* 181 Ill. 2d 191, 205 (1998). A mixed question of law and fact is one "involving an examination of the legal effect of a given set of facts." Stated another way, a mixed question is one "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or whether the rule of law as applied to the established facts is or is not violated." When the decision of an administrative agency presents a mixed question of law and fact, the agency decision will be deemed "clearly erroneous" only where the reviewing court, on the entire record, is "left with the definite and firm

conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). That the clearly erroneous standard is largely deferential does not mean, however, that a reviewing court must blindly defer to the agency's decision.

III. Discussion

a. Voter Status Issue

Mr. Hogans' initial argument advances the position that the Electoral Board erred in determining that Mr. Williams' name could appear on the November General Election ballot as a candidate of the Green Party despite his statement that he is a "qualified voter in the [2010] Democratic Primary" This statement is found in the "Statement of Candidacy" filed with the State Board of Elections in connection with his efforts to be nominated for the Office of State Representative by the voters aligned with the Democratic Party.

This result obtains, Mr. Hogans posits, from a clear reading of 10 ILCS 5/7-44. That statute provides, in part: "no person declaring his affiliation with a statewide established political party may vote in the primary of any other statewide political party on the same election day." Consequently, Mr. Williams' abandoned effort to seek the nomination of the Democratic Party as their candidate for State Representative, 29th District, prevents him from becoming the Green Party in the General Election.

Mr. Williams initially observes that this argument is untimely. He asserts that this position was not advanced before the Electoral Board. This argument is misplaced. While it is true that citation to the specific statute was not made before the Electoral Board, Mr. Hogans argument to the Electoral Board, as well as his filed Objection[1] implicitly involves the interaction of Section 7-44 in this factual setting. There is no waiver.

The candidate also advances the position that the interpretation of the statute suggested by Mr. Hogans would violate the right to freely associate as discussed in *Kusper v. Pontikes,* 414 U.S. 51 (1973). Finally, on this point, he asserts that the plain reading of the statute does not require the result advocated by Mr. Hogans.

This Court believes that this presents a mixed question of law and fact. Thus absent a showing that the determination was clearly erroneous, the Board's decision must

[1] Record Vol. II, Page 15 (Paragraph 12 of Objection.).

be upheld.

In *Kusper v. Pontikes*, 414 U.S. 51 (1973), the Court determined that a 23 month "lock-in" to party affiliation preventing a voter from casting a ballot in the primary election of another political party was an unconstitutional infringement on the voter's First Amendment right of free association. *Id.* at p. 61. While not critical to that Court's analysis or decision, the State's interest in maintaining the integrity of the political process was recognized as having some application to treating candidates differently than voters.

In *Sperling v. County Officers Electoral Board,* 57 Ill. 2d 81 (1974), our Supreme Court expressed strong agreement with the overriding State interest in establishing different standards for allowing changes in party affiliation for voters and candidates. Nevertheless, it found a similar 23-month "lock-in" provision for candidates must fail because it was interwoven with the voter "regulation" scheme found objectionable in *Kusper.*

Recently, the Appellate Court has confronted this issue in two decisions. First, in *Cullerton v. DuPage County Officers Electoral Board*, 384 Ill. App. 3d 989 (2008), the Court determined that a candidate who had voted a Republican Party primary ballot in the last three primary elections could not accept the nomination of the Democratic Party to fill a vacancy in the general election ballot. His voting in the primary preceding the general election rendered him a qualified voter of the Republican Party. This disqualified him from affiliating himself with any other political party until the next primary election. In reaching this conclusion, the Court determined that the statement of candidacy requirement survived *Sperling.*

Subsequently, in *Hossfeld v Illinois State Board of Elections*, 398 Ill. App. 3d 737 (2010) (lv. to appeal, grtd., 236 Ill. 2d 504 (2010)), the Court determined that a putative candidate for nomination to the State Senate was a qualified voter in the 2010 Republican Primary despite the fact that he had voted a Democratic Ballot in a consolidated primary election earlier that year. The office to which the candidate sought nomination was not a part of the primary election in which the candidate voted a different party ballot.

In reaching this conclusion, the majority reasoned that the only restriction on an individual candidacy, other than found in our Constitution, is that the individual must be

qualified to vote in the primary election of the party whose nomination he or she seeks. This issue of qualification is determined on primary election day when the voter without restriction announces his or her party affiliation. (10 ILCS5/7-43). To "lock in" the voter until after a subsequent primary election would, the Court found, be contrary to the public policy promoting ballot access. 398 Ill. App. 3d at 743.

The approach taken in *Cullerton* ignores the import of the decision of the Supreme Court in *Sperling v. County Officers Electoral Board*, supra.[2] That Division of the Appellate Court re-instated the primary to primary "lock-in" found objectionable in *Sperling* by finding an implied legislative re-instatement of a candidate "lock out" in the continuing requirement of a statement of candidacy containing a declaration of party affiliation. This Court finds the approach taken by the Court in *Hossfeld* more reasoned.

The integrity of the political process can be protected by reading the restriction created by the statement of candidacy, as the *Hossfeld* Court did, to mean a qualified voter in the primary election for which the individual declared an affiliation cannot seek office as a candidate put forth by an established political party in the general election which the primary election preceded. This would allow a person otherwise qualified to seek election to office in the next election cycle.

Left unresolved by either Court is the issue presented by this controversy. That is, whether a statement of party affiliation found in a withdrawn effort to gain a position on the primary ballot a binding declaration for that election cycle. This Court concludes that such a result is contrary to the public policy of promoting ballot access expressed in the decisions of the Illinois Supreme Court and The Election Code.[3] First, as noted, the time for declaration of party affiliation is the moment that one seeks a ballot on the date of the primary election. Secondly, a person is disqualified from seeking election as an independent only when he or she has filed as a partisan candidate and been defeated in the primary election. (10 ILCS 5/10-3).

It is true that Section 7-44 does provide that "no person declaring his affiliation with a statewide political party may vote in the primary of any other statewide party." Mr. Hogans' argument suggests that this clearly precludes Mr. Williams subsequent

[2] A fact that was apparent to them. (384 Ill. App. 3d at 997).
[3] 10 ILCS 5/ 1-1 et seq.

nomination. It appears to this Court that the Objector fails to read the statute as a whole in order to understand the legislature's intent. When one reads the first sentence of that statute, it is clear that the time a party affiliation is declared is when the ballot is requested at the time of voting in the primary election. This is consistent with Section 7-43. This interpretation also assists in the conduct of the election. The judges of election would not need access to sophisticated electronic data resources to determine if the voter has ever filed a contrary statement concerning party affiliation.

To accept Mr. Hogans' position would lead to the unfair result of allowing Mr. Williams to seek election as an independent candidate but not as a candidate for an established party he supported in the primary election.

b. The Selection Process

The Electoral Board determined that the Green Party had selected Mr. Williams to fill the vacancy in the 29th District in compliance with the applicable provisions of the Election Code. Mr. Hogans suggests that the decision ignores the facts that were established and misapplied the statutory requirements. As to the last argument, the Objector asserts that compliance with the statute is mandatory, not directory as stated by the Electoral Board. These objections create questions of fact, law and mixed questions of fact and law.

Articles 7 and 8 of the Election Code[4] establish the procedures to be followed by an established political party in nominating candidates for the primary and general elections to the General Assembly. The Election Code provides that each political party shall have a legislative and representative committee for each district. This body is empowered to select a candidate to select an individual to fill any vacancy in the party's slate of candidates for the general election. (10 ILCS 5/8-5).

Mr. Hogans asserts there must be strict compliance with every provision of this statute. This would include a meeting of all the members of the Committee and notification of its formation immediately thereafter to the State Board of Election. The Electoral Board found that compliance was directory as there is no penalty for failure to comply with its directions. This presents both a question of law and a mixed question of law and fact. The latter argument will be addressed initially.

[4] 10 ILCS 5/7-1 et seq. and 5/8-1 et seq.

In support of his argument regarding the composition of the Representative Committee, the Objector points to *Carnell v. Madison County Officers Election Board,* 299 Ill. App. 3d 419 (1998). There the Court held that the county central committee could not act as a substitute for the statutorily created legislative committee and make nominations to fill vacancies. Indeed, the Court noted that the political party admittedly made no effort to comply with the statute requiring nominations by a separate representative committee. That case is factually distinguishable from the instant matter.

Here, the Electoral Board determined that the Green Party had been recognized only in 2006 and that no committeeman existed for Bloom or Thornton Township. This was partially cured on March 24, 2010 when Mr. Williams was selected as Township Committeeman for Thornton Township at a telephonic meeting of the Party's Central Committee. Consequently, here, the representative committee consisted of all of the then existing committeemen of the Green Party who were eligible to serve on the legislative or representative committee.

The Electoral Board also found that the Green Party Committeeman for the City of Chicago's 9th Ward received notice of the March 27, 2010 meeting of the Representative Committee. The testimony stands unrebutted that Mr. Holmes was notified of the time and place of the meeting in a telephone conversation with Mr. Craig Brozefsky, the Green Party's Central Committee Secretary. The testimony yielded that Mr. Holmes was available and would attend. His absence at the meeting, albeit unexplained, does not in and of itself undermine the Electoral Board's findings.

First, there is no statutorily defined form of notice. Thus, notice that would be reasonable under the circumstances is all that is required. Mr. Holmes received notice via telephone and agreed to attend. The By-laws of the Green party were available at hearing. There is nothing to suggest that the process employed was at odds with the procedures adopted by the Green Party. This situation is totally distinguishable from that in *Graham v. State Officers Electoral Board,* 269 Ill. App. 3d 609 (1995). There, no effort was undertaken to notify one of the qualified members of a representative committee of a meeting to nominate a candidate to fill a vacancy. The Court noted that such action denied voters represented by that committeeman of their right to participate in the election process. Here, the voters' representative was notified and chose not to attend.

Thus, the mandatory notification requirement was satisfied.

Mr. Hogans also complains that the failure of Mr. Williams to send notice of the formation of the 29th District Representative Committee "immediately" after formation to the State Board of Elections violated the mandatory provisions of 10 ILCS 5/8-5. The Electoral Board found that this requirement was directory. It was also determined that the required notification was sent by Mr. Williams on April 5, 2010. This would be nine days after the March 27 meeting.

Initially, the Objector asserts that because the Illinois State Board of Elections cannot find the letter, it was never sent. As noted, a contrary finding was made by the Electoral Board. Mr. Williams, while vague about the date of mailing, did testify to his actions. His testimony is somewhat corroborated by the email and attachment he received, as well as, his expression of concern when contacted by the State Board. While a contrary finding may well have been justified, the Electoral Board's finding is well within reason.

The Court reviews the Electoral Board's legal determination *de novo.* In *Craig v. Peterson,* 39 Ill. 2d 191, 196 (1968), the Court set out the long used standard to be applied in determining whether statutory requirements relating to elections are mandatory or directory. Thus, trial courts are advised that in construing statutory provisions regulating elections to hold directory those requirements as to which the legislature has not clearly indicated a contrary intention, particularly where such requirements do not contribute substantially to the integrity of the election process. (Citations omitted).

As the Electoral Board noted, the procedure for filing a vacancy has been changed. No longer does the political party select a candidate to fill a vacancy. Under the current procedure, an individual is designated to fill the vacancy. He or she must then go, in this case, to the voters in the 29th District and seek their support by signing nominating petitions. The designation of the representative committee accompanies the filing of the nominating petitions with the State Board. There does not appear to be anything in the record to establish how the State Board records or uses this information. The record suggests that the only information retained is a listing of ward and township committeemen. Thus, the is nothing to suggest the failure to mail this notice until nine days after the March 27 meeting would affect the integrity of the general election.

During argument, the Court expressed some concern that a timely filing of the notice of organization could deter thoughts of fraud or suggestions of *post hoc* "repairs" as argued here. However, the lack of any formal docketing or acknowledgement of receipt by the State Board is a convincing reason not to create a new mandate in the already rather technical process of placing one's name on the ballot.

The Electoral Board also determined that Mr. Williams was properly selected as the Thornton Township Committeeman of the Green Party on March 24, 2010. This is a factual determination. Mr. Hogans suggests that this event was a fictional re-creation of a non-existent event. However, the Board heard from three witnesses who participated in the meeting. The By-laws of the Green Party were introduced at the hearing. Again, there is nothing in the record to suggest that the process employed was at odds with the adopted practices of the Green Party. This finding is well supported by the evidence.

IV. Order

The decision of the County Officers Electoral Board is Affirmed.

ENTER: _____

Judge 1510

ENTERED
JUDGE PATRICK McGANN-1510
JUL 21 2010
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK