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

Objections of: Mario Diaz	)	
	)	
	)	
To the Nomination	)	No.: 16-EB-RGA-01
Papers of: Benny Wong	)	
	)	
Candidate for the nomination of the	)	
Democratic Party for the office of	)	
Representative in the General Assembly of the	)	
2nd Representative District, State of Illinois	)	

FINDINGS AND DECISION

The duly constituted Electoral Board, consisting of Board of Election Commissioners for the City of Chicago Commissioners Marisel A. Hernandez, William J. Kresse and Jonathan T. Swain, organized by law in response to a Call issued by Marisel A. Hernandez, Chairman of said Electoral Board, for the purpose of hearing and passing upon objections ("Objections") of Mario Diaz ("Objector") to the nomination papers ("Nomination Papers") of Benny Wong, candidate for the nomination of the Democratic Party for the office of Representative in the General Assembly of the 2nd Representative District in the State of Illinois ("Candidate") at the General Primary Election to be held on March 15, 2016, having convened on December 14, 2015 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 14, 2015 and was continued from time to time.

5. The Electoral Board assigned this matter to Hearing Officer Christopher Cohen 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 Hearing Schedule. The following persons, among others, were present at such hearing: the Objector, Mario Diaz, by his attorney, Ed Mullen; and the Candidate, Benny Wong, by his attorney, Frank Avila.

7. The Candidate filed a motion to strike and dismiss the Objector's Petition. For the reasons stated in the Hearing Officer's report and recommended decision, he denied the motion.

8. 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.

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

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

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

12. 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 Electoral Board's file in this case and a copy has been provided or made available to the parties.

13. 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 500;

B. The number of purportedly valid signatures appearing on the nominating petition filed by the Candidate total 997;

C. The number of signatures deemed invalid because of objections sustained as a result of the records examination total 531;

D. The remaining number of signatures deemed valid as a result of the records examination total 466.

14. The Electoral Board finds that the number of valid signatures appearing on the Candidate's nominating petition following completion of the records examination was less than the minimum number of valid signatures required by law to be placed upon the official ballot as a candidate for the nomination of the Democratic Party for the office of Representative in the General Assembly of the 2nd Representative District of the State of Illinois.

15. Both parties filed Rule 8 motions objecting to the Board's clerk's findings during the records examination. The Hearing Officer conducted a hearing to allow the parties an opportunity to present evidence in support of their respective Rule 8 motions.

16. 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 only 495 valid signatures, which is less than the minimum number of valid signatures required by law to be placed upon the official ballot as a candidate for nomination of the Democratic Party for the office of Representative in the General Assembly for the 2nd Representative District of the State of Illinois, and that the Candidate's Nomination Papers should be found invalid.

17. Electoral boards have been permitted the flexibility to fashion their own rules of procedure and rules of evidence. See, e.g., *Carnell v. Madison County Officers Electoral Board,* 299 Ill.App.3d 419, 701 N.E.2d 548, 233 Ill.Dec. 698 (Fifth Dist. 1998). Of necessity, electoral boards are under significant pressure to settle all pre-election ballot access disputes as fairly and as quickly as possible. Time is of the essence.

18. If an objection is made that the signatures on a petition are not genuine, the customary practice of electoral boards in Illinois is to engage in an examination of the official voter registration records and make a comparison of the signature on the petition to the signature of the petitioner on his or her voter registration record. See, e.g., *Election Law* (IICLE, 2012), §§ 2.20, 2.43. This Electoral Board has adopted procedures for "records examinations" in Rule 6 of its Rules of Procedure. The procedure for conducting a records examination and making a comparison of the petition signer's signature on the petition with that found on the signer's voter registration record has found acceptance in the courts. See, e.g., *Daly v Stratton*, 215 F. Supp. 244, 245 (N.D. Ill. 1963) ("When a cursory comparison of a petition and the relevant voting lists reveals, as it does here, that fewer than the statutorily required number of signatories appearing in the former also appear in the latter, the petition is not genuine and the candidate need not be

certified"). In *In re Cook*, 122 Ill.App.3d 1068, 1072-73, 462 N.E.2d 557 (5 Dist. 1984), the court rejected an argument that the electoral board's method of authenticating signatures constituted reversible error. The court noted that the signatures were compared to each person's registration card. Likewise, a similar process was discussed in the *Bergman* v. *Vachata*, 347 Ill. App.3d 339, 343, 807 N.E.2d 558 (2004), noting "the parties participated in a binder check, which is used to initially determine the validity of objections to individual signatures and circulators." Moreover, "[T]he Cook County clerk sustained objections as to 'signatures not genuine signature of purported voter' where the petition signatures were printed or where the clerk believed the signature on the petition differed in any way from the signature on the voter registration signature cards." *Id.* The *Bergman* court found no disfavor with the process.

19. The Electoral Board's rules here provide that if any party to the records examination disagrees with a finding of the Board's records examiner made during the records examination, they may appeal that finding. See, Rule 6(h). In order to preserve such objection for future hearing, the party's "watcher" at the records examination is required to immediately inform the Board's records examiner of his or objection at the time such finding is made by the examiner and the objection shall be noted.

20. Rule 6(h) provides that "Any finding overruling or sustaining an objection that a signature appearing on the candidate's petition is not genuine that is timely and properly appealed by a party may be reviewed by a handwriting expert employed by the Board of Election Commissioners." If the handwriting expert reverses a finding or findings of the records examiner, the results of the records examination shall be amended accordingly and any such reversal shall be deemed to have been automatically appealed by both parties.

21. The parties are then "given an opportunity to address all such appeals properly taken and noted to the Electoral Board or to the hearing officer, if one has been assigned, at the evidentiary hearing on the merits of the objection scheduled and conducted pursuant to Rule 8 hereof." Rule 8(h). "The party making the appeal bears the burden of producing evidence proving that the records examiner's finding was in error." Id.

22. When given the opportunity to contest the findings of the Electoral Board's clerks made during the records examination, the burden is on the party wishing to reverse the clerks' finding of "producing evidence proving that the records examiner's finding was in error." Rule 6(h). Ideally, this evidence would take the form of live testimony from the petition signer stating either that he or she did sign the candidate's petition and that the signature that appears on the petition is his or her own or stating that the signature appearing on the petition is not genuine, as the case may be. The witness would then be subject to cross-examination.

23. Affidavits, however, are admissible as evidence under the Electoral Board's rules and "may be considered in determining whether signatures found not to be genuine during a records examination are, in fact, the genuine signatures of those signing the petition." Rule 10(c). The purpose of allowing affidavits in evidence is to avoid the need to subpoena and require the attendance of petition signers at electoral board hearings. This tends to avoid disrupting the daily lives of people who sign nominating petitions who would otherwise be required to attend electoral board hearings. This also tends to enhance the orderly and expeditious conduct of electoral board proceedings. The use of affidavits by electoral boards has been approved by the courts. See, *In re Cook*, 122 Ill.App.3d 1068, 462 N.E.2d 557 (5 Dist. 1984) (the court rejected arguments that the electoral board there could not rely on affidavits); *Bergman v. Vachata*, 347 Ill.App.3d 339, 807 N.E.2d 558 (1 Dist., 2004). But see, *Moscardini v.*

County Officers Electoral Board, 224 Ill.App.3d 1059 (2 Dist., 1992) (use of affidavits in electoral board hearings was improper).

24. Here, the Plaintiff chose to attempt to prove that the findings of the Board's records examiner were in error by bringing in affidavits of certain individuals whose names were on the petition instead of subpoenaing or otherwise bringing in such individuals to testify subject to cross-examination. Such a decision was permitted by the Board's rules.

25. Supreme Court Rule 191 allows the use of affidavits in lieu of testimony so long as they set forth with peculiarity the fact upon which the claim, counterclaim of defense is based. The process employed in examining affidavits in the electoral board setting on issues concerning the genuineness of petition signatures is that where the objector objected to a signature, and such objection was sustained by the Board's records examiner and its handwriting expert, the hearing officer can accept the use of an affidavit to overrule that ruling, unless it is clear from the face of the affidavit that the requisite particularity is not present, the facts shown are not within the personal knowledge of the person, or a reasonable person could not believe the truth of the statements. The hearing officer then proceeds to review each and every affidavit submitted by the party by comparing the signature on the affidavit with the signature on the petition and with the signature on the voter registration record card for that petition signer, taking into account that the original objection was sustained by the Board's records examiner and, in most cases, also sustained by the Board's handwriting expert. See, e.g., *Fritchey v. Romanelli*, 08-EB-WC-37 (CBEC 2008), affirmed *Romanelli v. Fritchey*, No. 1-08-0031 (1st Ill. App. 2008) (unpublished order) (petitioner was afforded procedural due process when the board-appointed hearing examiner accepted the affidavits submitted in support of rehabilitating the stricken signatures and weighed the affidavits against all of the evidence presented).

26. Not only is it possible for people to lie in affidavits -- that is, not only can they be falsified -- it also possible that the affidavits themselves can be manufactured or forged by unscrupulous persons. Unfortunately, Illinois has a notorious reputation for election fraud. See, e.g., *Nader v. Keith*, 385 F.3d 729 (7th Cir. 2004), which notes the importance for a procedure for verifying that candidates submit petitions that have been actually signed by registered voters and to weed out forgeries. Therefore, there needs to be some reasonable means to assess the veracity and trustworthiness of the affidavits and to accord them only the weight they truly deserve.

27. Section 10-10 of the Code does not specify that affidavits are required or may be used in electoral board proceedings. The statute certainly does not state that affidavits used in electoral board settings constitute "prima facie evidence" of the truth of the matter asserted therein. Thus, the legislature left it to electoral boards to decide whether to allow affidavits and what weight, if any, must be accorded them.

28. The Board's Rules of Procedure do not specify that affidavits are to be accorded any particular weight nor do they presume that such affidavits are legally binding. The rules simply state that affidavits may be considered to establish that signatures are genuine.

29. The process employed by the hearing officers in electoral board cases is not unlike that found in Section 8-1501 of the Code of Civil Procedure (735 ILCS 5/8-1501), which provides a means for determining the genuineness of signatures. It provides as follows: "In all courts of this State it shall be lawful to prove handwriting by comparison made by the witnesses or the jury with writings properly in the files of records of the case, admitted in evidence or treated as genuine or admitted to be genuine, by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the court." Although section 8-1501 refers to "the witnesses or the jury," it is proper for a jury or a judge to form an opinion as to the genuineness

of handwriting based upon a comparison of proven and disputed handwriting samples. *1601 South Michigan Partners v. Measuron*, 271 Ill.App.3d 415, 417-18, 648 N.E.2d 1008 (First Dist. 1995). Thus, it is proper to attempt to prove the authenticity of a signature without expert testimony, by requesting that a trial court, or in this case a hearing officer, as trier of fact, compare the signatures on a disputed document to the purportedly genuine signature of a person on another document.

30. In this case, the hearing officer used a procedure similar to that found in section 8-1501 and found that, in some cases, the signatures were genuine. In other cases, he found, based upon a comparison of the signature on the petition, the signature in the Board's voter registration records, and the signature on the affidavit, that the signatures were sufficiently dissimilar and that he concurred with the finding of the Board's records examiner and the Board's handwriting expert that those signatures on the petition were not genuine. The hearing officer found that the reasons for the dissimilarities between these signatures were not adequately explained by the affidavits.

31. If the trier of fact (i.e., the hearing officer) is presented with evidence showing that the signatures on documents are dissimilar to each other, including the signature on the affidavit, the candidate may arguably require that the signature on the petition be found genuine simply because an affidavit says so. However, it is well settled that a fact finder is not bound to accept non-credible testimony, or testimony without a sufficient foundation, simply because it is uncontroverted. *Sorenson v. Industrial Commission*, 281 Ill.App.3d 373, 382-42, 666 N.E.2d 713 (1996). An affidavit may be contradicted by other documentary evidence. *Webb v. Mt. Sinai Hospital*, 347 Ill.App.3d 817, 826 (2004).

32. "It is the responsibility of the trier of fact to assess the credibility of the witnesses and the weight of their testimony, resolve conflicts in the evidence and draw reasonable inferences from the evidence ...." *People v. McCulloch*, 404 Ill.App.3d 125, 131-132, 936 N.E.2d 743 (2nd Dist. 2010). The administrative body, through its hearing officers, weighs the evidence, makes credibility determinations and resolves conflicting evidence. *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill.2d 76, 88, 606 N.E.2d 1111 (1992). Courts will not reweigh evidence or substitute their judgment for that of the hearing officer. *Abrahamson*, 153 Ill.2d at 88.

33. The weight a hearing officer chooses to give to evidence is left to his or her discretion as the trier of fact. *Sanchez v. Ryan*, 734 N.E.2d 920, 315 Ill. App. 3d 1079 (2000). A trier of fact abuses his discretion when he applies an improper legal standard. *Rockford Police Benevolent & Protective Ass'n v. Morrissey*, 398 Ill. App. 3d 145, 154 (2010). An abuse of discretion also occurs "when the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009).

34. A trier of fact's factual findings and conclusions are held to be prima facie true and correct and will be affirmed unless they are against the manifest weight of the evidence. "A factual finding is against the manifest weight of the evidence when the opposite conclusion is clearly evident or the finding is arbitrary, unreasonable, or not based in evidence." *Samour, Inc. v. Board of Election Commissioners of the City of Chicago*, 224 Ill. 2d 530, 544 (2007); *Cinkus v. Village of Stickney*, 886 N.E.2d 1011, 228 Ill.2d 200 (2008). The fact that opposite conclusion is reasonable or that reviewing court might have ruled differently based on same evidence will

not justify reversal of findings of electoral board upon judicial review. *King v. The Justice Party*, 284 Ill.App.3d 886, 672 N.E.2d. 900 (1996).

35. Here, the Hearing Officer's determinations as to the affidavits were made using the appropriate legal standards. He compared the signature on the affidavit with the signatures on the Candidate's nominating petitions and on the Board's voter registration record for the named petition signer to determine whether the signature on the Candidate's petition was made in proper person and was genuine. The Hearing Officer's findings as to the genuineness of the petition signatures were not unreasonable and were supported by the record. Thus, there was no abuse of discretion either in the legal standard employed in considering the evidence or in the weight given to the affidavits or other evidence before the Hearing Officer. Furthermore, such findings were not against the manifest weight of the evidence.

36. 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.

37. For the reasons stated above, the Electoral Board finds that the Candidate has an insufficient number of valid signatures on his nominating petitions and that the Nomination Papers of Benny Wong are, therefore, invalid.

IT IS THEREFORE ORDERED that the Objections of Mario Diaz to the Nomination Papers of Benny Wong, candidate for the nomination of the Democratic Party for election to the office of Representative in the General Assembly of the 2nd Representative District of the State of Illinois, are hereby SUSTAINED and said Nomination Papers are hereby declared INVALID and the name of Benny Wong, candidate for nomination of the Democratic Party for the office of Representative in the General Assembly for the 2nd Representative District of the State of Illinois, SHALL NOT be printed on the official ballot for the General Primary Election to be held on March 15, 2016.

Dated: Chicago, Illinois, on January 22, 2016.

Marisel A. Hernández, Chairman

William J. Kresse, Commissioner

Jonathan T. Swain, 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.