

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

Objections of: JERRY WASHINGTON)	
)	
)	
)	
To the Nomination)	No. 08-EB-RGA-07
Papers of: DARRYL SMITH)	
)	
)	
Candidate for the office of Representative)	
of the 6th District, State of Illinois)	
Democratic Party)	

FINDINGS AND DECISION

The duly constituted Electoral Board, consisting of Chicago Board of Election 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 JERRY WASHINGTON ("Objector") to the nomination papers ("Nomination Papers") of DARRYL SMITH, candidate for the nomination of the Democratic Party to the office of Representative in the General Assembly for the 6th District, State of Illinois ("Candidate"), having convened on November 20, 2007, at 10:00 a.m., at 69 W. Washington Street, 8th Floor Conference Room, 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 November 20, 2007 and was continued from time to time.

5. The Electoral Board assigned this matter to Hearing Examiner Kelly McCloskey Cherf for further hearings and proceedings.

6. The Objector and the Candidate were directed by the Electoral Board to appear before the Hearing Examiner for a hearing on the date and at the time designated on the Electoral Board's docket. The following persons, among others, were present at such hearing: the Objector, JERRY WASHINGTON, appearing *pro se*; and the Candidate, DARRYL SMITH, appearing *pro se*.

7. The Objector alleges that the Candidate is a convicted felon and/or on probation for weapons charges and/or attempted murder. The Objector alleges that the Candidate is therefore ineligible to be a candidate for Representative in the General Assembly. The Objector further alleges that the Candidate was not truthful in his Statement of Candidacy when he swore under oath that he possessed the legal qualifications for the office of Representative in the General Assembly.

8. The Candidate filed a motion to strike and dismiss the Objections, contending that the Objector's petition failed to comply with the requirements of Section

10-8 of the Election Code that the objector's petition fully state the nature of the objection and the interest of the Objector. The Candidate argued further that a person convicted of a felony may hold an office created by the Constitution upon the completion of his or her sentence. Next, the Candidate argued that the Objection failed to provide any proof to support the allegations in his petition and that the Candidate was not on probation, as alleged by the Objector.

9. After considering the motions, pleadings, papers and exhibits submitted by the parties and after hearing argument by both sides, the Hearing Examiner has submitted her report and recommendations to the Electoral Board recommending that:

A. The Candidate's motion to strike and dismiss the Objector's Petition for failing to comply with the requirements of Section 10-8 of the Election Code be denied;

B. The Candidate's motion to strike and dismiss the Objector's Petition be granted for the following reasons:

(1) The Objector failed to meet his burden of proof in demonstrating that the Candidate was convicted of a felony and/or on probation in that the evidence offered by the Objector is not admissible;

(2) Assuming, *arguendo*, that such evidence was admissible, the Candidate completed his sentence and, under applicable law, a person convicted of a felony is eligible to hold an office created by the Illinois Constitution upon completion of his or her sentence; and

(3) The Objector failed to produce evidence that the Candidate was untruthful in his Nomination papers.

10. The Electoral Board hereby adopts the Hearing Examiner's recommended findings of fact and conclusions of law and a copy of the Hearing Examiner's report is attached hereto and incorporated herein as though set forth fully herein.

11. The Electoral Board finds that the Objections are overruled and that the Candidate's Nomination Papers are, therefore, deemed valid.

IT IS THEREFORE ORDERED, that the Objections of JERRY WASHINGTON to the Nomination papers of DARRYL SMITH, candidate for nomination of the Democratic Party to the office of Representative in the General Assembly for the 6th Representative District, State of Illinois are hereby OVERRULED and said Nomination Papers are hereby declared VALID and the name of DARRYL SMITH, candidate for nomination of the Democratic Party to the office of Representative in the General Assembly for the 6th Representative District, State of Illinois, SHALL be printed on the official ballot for the General Primary Election to be held on February 5, 2008.

Dated: Chicago, Illinois, this 4th day of December 2007.



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 10 days after the decision of the Electoral Board.

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

Objections of: Jerry Washington)	
)	
To the Nomination of Papers of:)	
Darryl D. Smith)	
)	No. 08-EB-RGA-07
Candidate for Democratic Representative)	
In the General Assembly for the)	
6 th Representative District of the)	
State of Illinois)	

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HEARING EXAMINER'S REPORT AND RECOMMENDATION

This matter coming before the duly constituted Electoral Board, consisting of Chicago Board of Election Commissioners, and before the undersigned Hearing Examiner, the Hearing Examiner hereby makes the following Report and Recommendation:

PRELIMINARY FACTS

1. The Candidate filed Nomination Papers as a Candidate for the Democratic Representative in the General Assembly for the 6th District of the State of Illinois. Such Nomination Papers consist of: a) Statement of Candidacy; b) Loyalty Oath; c) Nomination Petition Sheets; and d) Receipt for Filing the Statement of Economic Interests with the Secretary of State.

2. The Objector's Petition to the Nomination Papers of the Candidate was timely filed on November 13, 2007. In the Petition, the Objector alleges that because the Candidate is a convicted felon and/or on probation for weapons charges and/or attempted murder, his name should not be placed on the ballot as a candidate for nomination for the Democratic Representative in the General Assembly for the 6th District of the State of Illinois. The Objector also generally alleges that the Candidate was not truthful in his Nomination Papers.

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 certified mail or by Sheriff's service, as provided by statute.

4. The initial hearing on these Objections was called on November 20, 2007. Both parties appeared *pro se*.

5. On November 26, 2007, the Candidate filed a Motion to Strike. In the Motion to Strike, the Candidate makes the following arguments: a) that the Objector's Petition fails to comply with 10 ILCS 5/10-8(b) because it does not fully state the nature

of the objection and does not state the interest of the Objector; b) that under the applicable law, a person convicted of a felony may hold an office created by the Constitution upon completion of his or her sentence; c) that the Objector has failed to provide any proof to support the allegations in his Petition; and d) that the Candidate is not on probation.

6. On November 27, 2007, a case management conference was held. Both parties appeared *pro se*. The Hearing Examiner advised the Objector that he had the initial burden of proving his Objections. Both parties advised the Hearing Examiner that they did not intend to call any witnesses and that they were ready to proceed with a hearing on the case on November 29, 2007.

7. On November 28, 2007, the Objector filed his Response to the Motion to Strike. Attached to the Objector's Response are 7 Exhibits which include copies of statutes, Articles of the Illinois Constitution and pages from the Index of Electoral Board Decisions. Exhibit 7 consists of copies of "Public Record Search Sheets" from "Sherlock, Inc."

8. On November 29, 2007, the Hearing Examiner conducted a hearing on this matter at which both parties appeared *pro se*. At the hearing, the following exhibits were marked: a) Exhibit G – Objector's "Public Record Search Sheets" from Sherlock, Inc.; b) Exhibit H – Candidate's Termination Order dated November 21, 2007 entered by Judge Porter of the Circuit Court of Cook County ordering that the Candidate's period of probation is terminated; c) Exhibit I – Candidate's Certified Statement of Conviction/Disposition for Case Number 88115094501 in the Circuit Court of Cook County; d) Exhibit J – Candidate's Certified Statement of Conviction/Disposition for Case Number 88112204301 in the Circuit Court of Cook County; and e) Exhibit K – Candidate's Certified Statement of Conviction/Disposition for Case Number 88CR0210802 in the Circuit Court of Cook County. The Hearing Examiner advised the parties that a ruling regarding the admission of said Exhibits into evidence would be considered with her Report and Recommendation. Upon completion of the parties' arguments, the Hearing Examiner advised the parties that she would timely submit her Report and Recommendation to the Board.

MOTION TO STRIKE

I. Compliance with 10 ILCS 5/10-8(b)

In his Motion to Strike, the Candidate argues that the Objector's Petition fails to comply with 10 ILCS 5/10-8(b) because: a) it fails to state fully the nature of the Objections; and b) it fails to state the interest of the Objector. The Hearing Examiner finds that the Objector's Petition does fully state the nature of his Objections in compliance with 10 ILCS 5/10-8(b) and therefore recommends that this portion of the Candidate's Motion to Strike be denied. The Hearing Examiner further finds that the Petition does state the interest of the Objector in that it states, "Therefore, I am also requesting his name not be printed on said ballot for February 2008 ballot election

(primary).” See Objector’s Petition at p.4. See *Beiszczat v. Daley*, 91-EB-ALD-94, CBEC, January 30, 1991. Therefore, the Hearing Examiner recommends that this portion of the Candidate’s Motion to Strike also be denied.

II. Evidence Regarding the Candidate’s Alleged Convictions and Probation

In his Motion to Strike, the Candidate argues that the Objector has failed to prove the allegations in the Objector’s Petition, namely that the Candidate was convicted of a felony and is on probation. At the hearing, the only piece of evidence that the Objector offered to support his allegations was Exhibit G which consists of “public record search sheets” from Sherlock, Inc. The sheets appear to be a computer print-out summary of the purported criminal charges brought against a Darryl D. Smith. Although not addressed by the Objector at the hearing, the Objector attached to his Petition (Group Exhibit B) a document which appears to be a computer print-out consisting of 16 pages. This printout also appears to be a summary of the criminal charge information related to a Darryl Smith.

Summaries, such as the ones offered by the Objector, may be admitted into evidence, but they must first comply with the best evidence and hearsay rules. *Veco Corp. v. Babcock*, 243 Ill. App. 3d 153, 166, 611 N.E. 2d 1054, 1063 (1st Dist.), *appeal denied*, 152 Ill. 2d 581, 622 N.E. 2d 1229 (1993). The best evidence rule provides that in order to establish the terms of a writing, such as criminal court records related to the Candidate, the original must be produced. *Sears, Roebuck and Co. v. Seneca Ins. Co.*, 254 Ill. App. 3d 686, 691, 627 N.E. 2d 173, 176 (1st Dist. 1993). However, a party may introduce secondary evidence if the party shows: (1) the prior existence of the original; (2) the loss, destruction or unavailability of the original; (3) the authenticity of the substitute; and (4) his own diligence in attempting to procure the original. *Id.*

As original court records are not always available for production, secondary evidence such as a copy of the record of conviction certified “under the signature of the clerk having the custody thereof, and the seal of the court, or by the judge of the court if there is not a clerk” satisfies the foregoing elements and has been recognized by the Illinois Courts as proof of a former conviction of a crime in a court within the State of Illinois. 735 ILCS 5/6-1202; *People v. Wheeler*, 5 Ill. 2d 474, 481-82, 126 N.E. 2d 228 (Ill. 1955). The summaries offered by the Objector, i.e. Exhibit G and the exhibits attached to his Petition (Group Exhibit B), do not satisfy the elements necessary under the best or secondary evidence rule. In particular, the Objector has failed to demonstrate the authenticity of the summaries. A certified copy of the court records as provided for in 735 ILCS 5/6-1202 would have resolved the authenticity issue.

As the summaries offered by the Objector are being offered for the truth of their contents, they also constitute hearsay evidence. See generally *Prodromos v. Everen Securities, Inc.*, 341 Ill. App. 3d 718, 728, 793 N.E. 2d 151, 159 (1st Dist. 2003). Hearsay evidence is inadmissible unless it falls within one of the exceptions to the rule. *Id.* One such exception is the business records exception. Ill. Sup. Ct. R. 236. See also *People v. Turner*, 233 Ill. App. 3d 449, 453, 599 N.E. 2d 104, 108 (4th Dist. 1992) (applying Ill.

Sup. Ct. R. 236). Business records, such as the computer print-out summaries introduced by the Objector, are admissible under the business records exception to the hearsay rule provided there is proper foundation and it is shown that: i) the electronic computing equipment is recognized as standard; ii) input is entered in the regular course of business reasonably close in time to the happening of the event recorded; and iii) foundation testimony establishes that the sources of information, method of preparation and time of preparation indicate their trustworthiness and justify their admission. *Id.*

The Objector failed to lay the proper foundation in order to satisfy the business records exception to the hearsay rule. At a minimum, the Objector should have introduced the testimony or affidavit of the person who prepared the computer print-out summaries (e.g. Joseph Chevalier who signed the computer print-out summaries marked as Exhibit G) to provide information regarding the method or preparation of the computer print-out summaries, the time of preparation and information related to the agency that conducted the search (i.e. Sherlock, Inc.).

Based upon the foregoing, the Hearing Examiner recommends that the evidence offered by the Objector, *i.e.* Exhibit G and the exhibits to his Petition at Exhibit B, not be admitted into evidence in this case.¹ If the exhibits are not admitted into evidence, the Hearing Officer recommends a finding that the Objector failed to meet his burden of proving that the Candidate was convicted of a felony and/or is on probation. The Hearing Examiner recommends that the Candidate's Motion to Strike be granted on the grounds that the Objector has not shown that the Candidate was convicted of a felony and/or is on probation.

III. Eligibility to Hold an Office

In his Petition, the Objector argues that a person convicted of a felony is ineligible to run for office in Illinois. In his Motion to Strike, the Candidate argues that a person convicted of a felony is eligible to hold an office created by the Illinois Constitution upon completion of his sentence.

As pointed out by both parties, Article XIII, Section 1 of the Constitution of the State of Illinois states that a person convicted of a felony shall be ineligible to hold an office created by this Constitution. Ill. Const., art. XIII, sec.1. However, this section of the Constitution also states that "Eligibility may be restored as provided by law." *Id.* Both parties also cite to 10 ILCS 5/29-15 which states, "Any person convicted of an infamous crime . . . shall be prohibited from holding any office of honor, trust or profit, unless such person is again restored to such rights by the terms of a pardon for the offense or otherwise according to law." 10 ILCS 5/29-15.

¹ Since the Objector did not meet his burden regarding the felony conviction and/or probation issue, it was unnecessary for the Candidate to offer any evidence to rebut the Objector's allegations. Nevertheless, the Hearing Officer recommends that the Candidate's Exhibit H, the November 21, 2007 Termination Order, not be admitted into evidence because it also does not comply with 735 ILCS 5/6-1202.

In his Response to the Motion to Strike and at the Hearing, the Objector argued that the Candidate can not hold an office because he has not been pardoned. However, in making this argument, the Objector ignores the last part of 10 ILCS 5/29-15 which states that "such a person is again restored to such rights . . . otherwise according to law."

Under Illinois law, a person convicted of a felony is eligible to hold an office created by the Illinois Constitution. 730 ILCS 5/5-5-5. *Coles v. Ryan*, 91 Ill. App. 3d 382, 882 414 N.E. 2d 932, 935 (2nd Dist. 1980) (recognizing that the eligibility of a person convicted of an infamous crime to hold a constitutional office is restored by operation of law under section 5-5-5(b) of the Unified Code of Corrections upon completion of his sentence). The office at issue in this case, *i.e.*, Democratic Representative in the General Assembly for the 6th District of the State of Illinois, is an office created by the Illinois Constitution. See Ill. Const., art. IV, sec. 2. Assuming *arguendo*, that all of the evidence offered by both parties is admitted into evidence, Exhibit G shows that Candidate was convicted of at least one felony and that he was sentenced to two (2) years probation with a final disposition of March 13, 2007 and Exhibit H shows that by at least November 21, 2007, the Candidate's period of probation was terminated. Therefore, the Hearing Examiner recommends that in the event Exhibits G and/or H are admissible, said evidence shows that the Candidate has completed his sentence and is eligible to hold the office for Democratic Representative in the General Assembly for the 6th District of the State of Illinois.

IV. The Truthfulness of the Nominating Papers

In his Petition, the Objector also appears to argue that the Candidate's name not be placed on the ballot because he was not truthful in his Nominating Papers. The Objector failed to produce any evidence that demonstrated that the Candidate was untruthful on his Nominating Papers. To the extent the Objector's argument on this point is based upon his other Objections, *i.e.* that the Candidate was convicted of a felony and/or on probation, those Objections are discussed above. The Hearing Officer recommends that the Objection based upon the truthfulness of the Nominating Papers be overruled.²

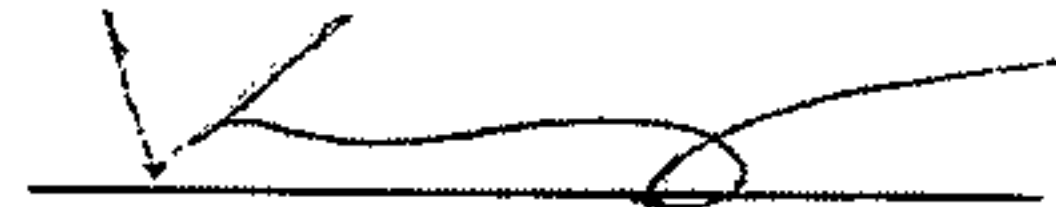
CONCLUSION

The Hearing Examiner recommends that the first argument in the Candidate's Motion to Strike, *i.e.*, that the Objector's Petition fails to comply with 10 ILCS 5/10(b), be denied. The Hearing Examiner further recommends that the remaining arguments in the Candidate's Motion to Strike be granted and that the Objections in the Objector's Petition be overruled because: i) the Objector failed to meet his burden of proof in demonstrating that the Candidate was convicted of a felony and/or on probation in that

² At the Hearing, the Objector argued that the Candidate violated 10 ILCS 5/29-10 which provides that any person who makes a false statement in any declarations required by the Election Code shall be guilty of a Class 3 felony. Not only is this statute inapplicable the current proceeding, it was not addressed in the Objector's Petition and to the extent the Board considers this argument, the Hearing Examiner recommends that it be overruled.

the evidence offered by the Objector is not admissible; ii) assuming *arguendo* all of the evidence offered by the parties is admissible, the Candidate has completed his sentence and under the applicable law, a person convicted of a felony is eligible to hold an office created by the Illinois Constitution after completion of his sentence; and iii) the Objector failed to produce any evidence that the Candidate was untruthful in his Nominating Papers. The Hearing Examiner recommends that Mr. Smith be certified for the ballot as a Candidate for the office of Democratic Representative in the General Assembly for the 6th District of the State of Illinois at the February 5, 2008 General Primary Election.

December 1, 2007



Kelly McCloskey Cherf
Hearing Examiner