

**BEFORE THE DULY CONSTITUTED ELECTORAL BOARD
FOR THE HEARING AND PASSING UPON OF NOMINATION OBJECTIONS
TO NOMINATION PAPERS OF CANDIDATES FOR ELECTION TO THE
OFFICE OF REPRESENTATIVE IN THE GENERAL ASSEMBLY
FOR THE 103rd REPRESENTATIVE DISTRICT OF THE STATE OF ILLINOIS**

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|------------------------------|---|
| Pat Devaney, |) |
| |) |
| Petitioner-Objector |) |
| |) |
| v. |) |
| |) |
| Frank Calabrese, |) |
| |) |
| Respondent-Candidate. |) |

NOTICE OF FILING

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Please take notice that on May 21, 2008, I filed with the Electoral Board for the 103rd Representative District, the attached Respondent-Candidate's MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO MEMORANDUM IN SUPPORT OF OBJECTOR'S PETITION, a copy of which is hereby served upon you.

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| Respondent-Candidate. |) |

**RESPONDENT-CANDIDATE’S MOTION FOR SUMMARY JUDGMENT
AND
RESPONSE TO MEMORANDUM IN SUPPORT OF OBJECTOR’S PETITION**

I. Introduction

Respondent-Candidate, through his attorneys, hereby moves for Summary Judgment and in support thereof states the following:

II. Statement of Undisputed Facts

1. Respondent was nominated to fill a vacancy in nomination by the duly constituted legislative committee for the 103rd Representative District (hereinafter “Committee”). (Affidavit of Jason Barickman, ¶ 5.)

2. Pursuant to § 8-5 of the Illinois Election Code (10 ILCS 5/8-5), the Champaign County Republican Central Committee provided notice to its members, met and organized. (Barickman Affidavit ¶ 2.) A quorum was present for the meeting. (Barickman Affidavit ¶ 3.) A 103rd Legislative District Committee was created during

the meeting. (Barickman Affidavit ¶ 4). Members of the Representative committee were selected, the members being Jason Barickman, Kristin Williamson, and John Farney. *Id.* On April 7, the Representative Committee met after proper notification of the members, and selected Frank Calabrese to be the Candidate for the Office of State Representative in and for the 103rd Representative District. *Id.* The Certificate of Representative Committee Organization was created on April 7, 2008. *Id.* Petitioner makes no allegation regarding the foregoing actions for duly constituting the subject legislative committee. (See, Petitioner's Objection generally). Therefore, the legitimacy of the actual Committee is not at issue here.

3. Pursuant to § 7-61 of the Illinois Election Code (10 ILCS 5/7-61), the 103rd Representative Committee provided notice to its members, meet within the district and selected a candidate to fill the vacancy in nomination. (Barickman Affidavit ¶ 5.) The vacancy was filled within 60 days after the date of the general primary. The committee created a Resolution to Fill the Vacancy in Nomination form and filed it in accordance with the statutory requirements. *Id.* Petitioner makes no allegation regarding the foregoing actions for duly nominating Frank Calabrese as the Republican Candidate for the 103rd Representative District (See, Petitioner's Objection generally). Therefore, the legitimacy of the Resolution to Fill the Vacancy in Nomination is not at issue here.

4. On April 14, 2008, Petitioner filed the subject objection to Respondent's Nomination Papers alleging that the Committee committed a paperwork error by failing to file its Certificate of Representative Committee Organization with the State Board of Elections. (See, Petitioner's Objection, ¶6-10.) On the basis of this alleged paperwork error, Petitioner argues that Respondent's Nomination Papers are invalid in their entirety.

Petitioner requests the ultimate penalty be applied to Respondent in this instance – “a ruling that the name of Frank Calabrese shall not appear and not be printed on the ballot for election to the office [of] Representative in the General Assembly for the 103rd Representative District of the State of Illinois”. (See, Petitioner’s Objection, Final Paragraph.)

5. The Certificate of Representative Committee Organization was filed by the Respondent with the State Board of Elections on April 18, 2008. (Affidavit of Frank Calabrese, ¶ 4.) This occurred after the State Board of Elections refused to file the Certificate of Representative Committee Organization on April 16, 2008. (Calabrese Affidavit, ¶ 4.)

6. The State Board of Elections, Division of Election Information provides the following information on the Board’s past and current practice regarding Resolutions to Fill a Vacancy in Nomination and Certificates of Organization: The State Board of Elections accepts Resolutions to Fill a Vacancy in Nomination. (Affidavit of Mark Mossman, ¶ 2-5.) Filings to fill a Vacancy in Nomination are handled by the Division of Election Information. (Mossman Affidavit, ¶ 2.) The State Board of Elections will accept a Certificate of Representative Committee Organization at any point within 180 days of the General Primary. (10 ILCS 5/7-9; 8-5; Mossman Affidavit, ¶ 7.) The State Board of Elections notes the filing of required documents on its website. (Affidavit of Mark Mossman, ¶ 8) The State Board of Elections does not note the filing of “documents which are ancillary to the petition filing” on its website. (Mossman Affidavit, ¶ 6.) The State Board of Elections does not note the filing of a Certificate of Representative Committee Organization on its website. (Mossman Affidavit, ¶ 7.) Pursuant to the

above-stated facts, the State Board of Elections' past and current practice is to treat Certificates of Organization as ancillary documents with respect to Resolutions to Fill a Vacancy in Nomination.

III. Argument

A. Filing the information in a Certificate of Representative Committee Organization with the State Board of Elections under § 8-5 is a separate and distinct statutory act from filling a vacancy in nomination under § 7-61.

The Illinois Election Code provides a process for filling a vacancy in nomination for the office of Representative in a General Assembly. This process is contained in 10 ILCS 5/7-61as follows:

Any vacancy in nomination . . . occurring on or after the primary and prior to certification of candidates. . . must be filed prior to the date of certification. . . Vacancies shall be filled by the . . . representative committee in the case of a candidate for State Representative in the General Assembly. . . .

The resolution to fill a vacancy in nomination shall be duly acknowledged before an officer qualified to take acknowledgements of deeds and shall include, upon its face, the following information:

- (a) the name of the original nominee and the office vacated;
- (b) the date on which the vacancy occurred;
- (c) the name and address of the nominee selected to fill the vacancy and the date of selection.

The resolution to fill a vacancy in nomination shall be accompanied by a Statement of Candidacy, as prescribed in Section 7-10, completed by the selected nominee and a receipt indicating that such nominee has filed a statement of economic interests as required by the Illinois Governmental Ethics Act. . . .

If the name of no established political party candidate was printed on the consolidated primary ballot for a particular office and if no person was nominated as a write-in candidate for such office, a vacancy in nomination shall be created which may be filled in accordance with the requirements of this Section. If the name of no established political party candidate was printed on the general primary ballot for a particular office and if no person was nominated as a write-in candidate for such office, a vacancy in nomination shall be created, but no candidate of the party for the office shall be listed on the ballot at the general election unless such vacancy is filled in accordance with the requirements of this Section within 60 days after the date of the general primary.

10 ILCS 5/7-61.

As can be seen from the statutory language set forth above, § 7-61 requires only the following: (1) the content of the Resolution to Fill a Vacancy in Nomination, (2) the date for the filing of the Resolution to Fill a Vacancy in Nomination, (3) a Statement of Candidacy to be filed with the Resolution to Fill a Vacancy in Nomination, and (4) a receipt indicating that such nominee has filed a statement of economic interests as required by the Illinois Governmental Ethics Act. 10 ILCS 5/7-61. Nowhere in §7-61 is the filing of the information in a Certificate of Representative Committee Organization mandated. Respondent submits that this interpretation explains the State Board of Elections' practice of considering Certificates of Organization be ancillary documents which need not be filed with a Resolution to Fill a Vacancy in Nomination. (Mossman Affidavit, ¶ 6, 7.)

Elsewhere in the Election Code is the statutory provision of § 8-5:

[I]f a legislative or representative district comprises only one county, or part of a county, its legislative or representative committee shall consist of the chairman of the county central committee and 2 members of the county central committee who reside in the legislative or representative district, as the case may be, elected by the county central committee. . . .

Within 180 days after the primary of each other even-numbered year, each legislative committee and representative committee shall meet and proceed to organize by electing from among its own number a chairman, and either from its own number or otherwise, such other officers as each committee may deem necessary or expedient. Immediately upon completion of organization, the chairman shall forward to the State Board of Elections, the names and addresses of the chairman and secretary of the committee. The outgoing chairman of such committee shall notify the members of the time and place (which shall be in the limits of such district) of such meeting.

10 ILCS 5/8-5.

As can be seen from the statutory language set forth above, § 8-5, as applied to the legislative district in this case, requires: (1) that the Committee be comprised of the “chairman of the county central committee and 2 members of the county central committee who reside in the legislative or representative district, as the case may be, elected by the county central committee” and (2) that the committee be formed within 180 days of the General Primary. 10 ILCS 5/8-5. Respondent again notes for the record that there is no allegation regarding either of these requirements. The undisputed facts here are that the actual Committee is legitimately constituted as to its membership and in meeting the 180 day time period. Thirdly, § 8-5 provides that “[i]mmediately upon completion of organization, the chairman shall forward to the State Board of Elections, the names and addresses of the chairman and secretary of the committee.” 10 ILCS 5/8-5. This information on the names and addresses of the chairman and secretary of the committee is typically included in a Certificate of Representative Committee Organization. Again, Respondent notes that this § 8-5 information requirement does not reference the process for filling a vacancy in nomination contained in § 7-61

Please note that Respondent is not suggesting that the Committee does not have to comply with § 8-5. However, Petitioner asks this tribunal to read § 8-5 of the Election Code as creating an additional filing burden which is not contained in §7-61, is not cross-referenced between the two sections and which has never been required by past or current practice of the Illinois State Board of Elections. The provisions of §7-61 and §8-5 are separate and unique and cannot be read together to create additional filing requirements that are nowhere in the text of either section or anywhere else in the Election Code. This

is particularly true here, where Petitioner requests Respondent to be removed from the ballot for state office.

B. Respondent's April 16, 2008, filing cures the specific allegations in Petitioner's Objector's Petition and to the extent Petitioner now makes arguments that exceed the scope of the original allegations in Petitioner's Objector's Petition, Respondent moves to strike all such new allegations of fact and legal arguments.

Petitioners' only factual basis in objecting to Respondent's Nomination Papers is that, "[d]ue to the foregoing failure to file a Certificate of Organization, or other evidence of organization, the Nomination Papers are invalid in their entirety." (See, Petitioner's Objection, ¶ 10.) However, the facts of this case show that a Certificate of Representative Committee Organization containing the addresses of the Committee Chairman and Secretary was filed with the State Board of Elections on April 16, 2008 and again on April 18, 2008. (Calabrese Affidavit, ¶ 3,4.) The only allegation actually stated in Objector's Petition is the failure to file. (See, Objector's Petition, ¶ 10.) Therefore, this filing technically cures Petitioner's objection, as said objection fails in any allegation to allege a failure to meet a statutory deadline (such as "immediately") as the reason for invalidation.

In Petitioner's Memorandum in Support of the Objector's Petition, however, Petitioner, in part, changes his argument to make a new argument, no longer that Committee failed to forward the appropriate information, but that the Committee failed to "immediately" forward the appropriate information. (See, Petitioner's Memorandum in Support of the Objector's Petition, pp. 2 and 10.) This is improper here, because the "new" factual allegation that Petitioner relies upon to make this modified argument – that the Committee did not "immediately" forward the appropriate information to the State Board of Elections – was known or reasonably should have been known to Petitioner at

the time of the filing of Petitioner's Objection. To the extent Petitioner now makes arguments that exceed the scope of the original allegations in Petitioner's Objector's Petition, Respondent moves to strike all such new allegations of fact and legal arguments.

Without waiving any objection to such new allegations of fact and legal arguments exceeding the scope of the original allegations in Petitioner's Objector's Petition, Respondent will address this new argument.

C. Respondent's April 16, 2008, filing satisfies the "immediate" notification standard in § 8-5.

To the contrary, Respondent first notes that the term "immediate" is not defined in § 8-5 or the Election Code generally. The only time frame set forth in § 8-5 is 180 days after the primary. The undisputed facts are that the Committee organized and prepared the Certificate of Representative Committee Organization on April 7, 2008, and said Certificate was first delivered to the State Board of Election on April 16, 2008, a mere 9 days after the Committee organized. Given that the Committee had a 180 day window to act, Respondent submits that notification within 9 days is not necessarily unreasonable.

In contrast, Petitioner argues to understand the term "immediately" not in its actual § 8-5 context of acting within a 180 day period, but in the context of § 7-61, specifically the § 7-61 adoption of the time period for filing objections to resolutions for filling a vacancy in nomination set forth in § 10-8. (*See*, Petitioner's Memorandum in Support of the Objector's Petition, p. 10-11.) Petitioner goes into great length arguing the public policy for requiring such information before the § 7-61 deadline for filing such objections. However, again, Petitioner is attempting to mix separate statutory provisions to not only create a new extra-statutory filing requirement but, now, a new extra-statutory

definition for “immediate” of 7 days based on the § 7-61 time period for filing objections to resolutions for filling a vacancy in nomination.

In conclusion, Respondent submits that the term “immediately” must be interpreted in the context of its § 8-5 and not, as Petitioner argues, § 7-61 located elsewhere in the Election Code, with no necessary cross references to connect the two provisions. In the § 8-5 context of a 180 day action period, notification within 9 days is not necessarily unreasonable. Further, it must be remembered that the Committee met the only specifically identified deadline in § 8-5, the 180 days after the primary. Finally, Respondent knows of no caselaw on this issue. Absent some authority, either statutory or caselaw, to the contrary, there is no basis for requiring “immediate” filing in the context of objection deadlines rather than allowing “immediate” filing under the conditions of a 180 day action period as occurred here.

D. Under the relevant caselaw, the § 8-5 provisions regarding forwarding Certificates of Organization to the State Board of Elections is directory and not mandatory.

Much of the body of case law under the Illinois Election Code turns on the issue of whether a specific act in the code is directory or mandatory. Cases generally hold that an enumerated action is mandatory if there is a penalty for non-compliance. Carnell v. Madison Co. Officers Electoral Board, 701 N.E.2d 548, 552, 299 Ill.App.3d 419, 424, *citing*, Pullen v. Mulligan, 138 Ill.2d 21, 46-47, 561 N.E.2d 585 (Ill. 1990). The language of §8-5 contains no such penalty. 10 ILCS 5/8-5. Section 8-5 only imposes a true deadline of 180 days from the Primary to file the Certificate of Representative Committee Organization. In contrast, the provisions of §7-61 have been held mandatory

in the sense that a candidate must file a Statement of Candidacy and Statement of Economic Interests. 10 ILCS 5/7-61.

Illinois cases also hold that a provision of the Illinois Election Code is directory rather than mandatory when there is an absence of fraud and no showing that the integrity of the election would be affected adversely. Peoples Independent Party v. Petroff, 191 Ill.App.3d 706, 708, 548 N.E.2d 145, 146, 138 Ill.Dec. 915, 916 (5th Dist. 1989) *citing*, Harris v. Powell, 35 Ill.2d 384, 387, 221 N.E.2d 274, 275 (Ill. 1966); People ex rel. Meyer v. Kerner, 35 Ill.2d 33, 39, 219 N.E.2d 617, 620. (Ill. 1966). The Petroff court specifically held the Certificate or Organization to be directory in the context of forming a new party, and placing the new party's candidates on the ballot. Petroff, at 146, 916, 708. Here, Petitioner has plead no claim of fraud nor that the integrity of the actual Committee action is at issue.

Petitioner argues that the Carnell case is instructive to this tribunal regarding the issue of mandatory versus directory provisions of the election code. *See*, Petitioner's Brief, p. 9, Carnell v. Madison County Officers Electoral Board, 299 Ill.App.3d 419, 701 N.E.2d 548, 233 Ill.Dec. 698 (5th Dist. 1989). The Carnell case involved a candidate who was nominated by a purported committee who had failed to select the legislative committee members in accordance with the statute. Carnell, at 422, 550, 700. In fact, the members of the purported legislative committee had never been submitted to a vote of the county central committee. *Id.* The rationale for the Carnell case is that § 8-5 requirements are mandatory in instances where a purported legislative committee in not legitimately constituted. Clearly, the Committee in the case at bar has been properly created and its creation is not at issue.

The Graham decision has also been cited in various pleadings as supportive of the Petitioner's Complaint. Graham v. State Officers Electoral Board, 269 Ill.App.3d 609, 646 N.E.2d 1357, 207 Ill.Dec 270 (4th Dist. 1995). The facts of the Graham case involved a purported meeting of a legislative committee to which fewer than all of the members of the committee were given notice of the alleged meeting. Graham at 611, 1359, 272. The court stated that the "failure to provide notice to Moggged [one of the county chairman entitled to notice] clearly affected the voters within the district represented by him." Graham, at 612, 273, 1360. [note added.] Again, in Graham, the court holds that a § 8-5 requirement is mandatory in a situation where a legislative committee is in fact not properly constituted. This is not the factual situation in the case at bar.

Carnell and Graham do nothing to resolve this case in favor of the Petitioners. In both cases, there was never a valid nomination due to the lack of a properly constituted representative committee. In Carnell, the wrong committee attempted to make a nomination. In Graham, not all of the members of the committee were given notice that a meeting was to be held. In contrast to the case at bar, segments of the affected voters in Graham and Carnell were improperly excluded from participating in the nominating decision. Excluding large groups of voters from the nominating process is contrary to the principles of democracy and was appropriately sanctioned by those courts. No such exclusion is involved in this case.

The case at bar presents this tribunal with an alleged paperwork error. The Illinois caselaw on this subject has never removed a candidate from the ballot absent a clear statutory penalty requiring removal, the existence of some type of fraud or a

showing that the integrity of the election would be adversely affected. For the foregoing reasons, the § 8-5 technicality complained of by Petitioner must be considered a directory and not a mandatory provision of the Election Code.

E. Assuming arguendo that the applicable § 8-5 provisions could be considered mandatory, the § 8-5 provision regarding the forwarding of the names and addresses must be considered merely directory in this case, as the required Committee Chairman and Secretary names were in fact filed with the State Board of Elections in the Resolution to Fill Vacancy in Nomination and as the addresses of said Committee members are already a matter of public record.

Petitioner correctly anticipates the obvious response to the Petitioner's Objection being based only on the Committee's mere failure to comply with the § 8-5 provision regarding the forwarding of the names and addresses of their Chairman and Secretary: "The Candidate may argue that while Carnell held that the § 8-5 provisions governing composition of a representative committee are mandatory, the forwarding of the names and addresses to the State Board of Elections are merely directory, especially where, as here, the officer's [sic] names were listed on the Resolution to Fill the Vacancy in Nomination and only the addresses are missing." (See Petitioner's Memorandum in Support of the Objector's Petition, pp. 6-7.) Petitioner then cites several cases holding that address requirements are mandatory. However, every case cited by Petitioner is distinguishable from the case at bar because, here, the addresses of the applicable Committee members are a matter of public record. The Committee Chairman is Mr. John Farney, Precinct Committeeman for Cunningham 19 and the Committee Secretary is Kristin Williamson, Precinct Committeeman for Cunningham 16. As elected Precinct Committeemen, Mr. Farney and Ms. Williamson's addresses are on file with the State Board of Elections (and the County Clerk of Champaign County) exactly the same as if

these addresses were filed with the State Board of Elections pursuant to a Certificate of Representative Committee Organization. 10 ILCS 5/7-10(i), 7-58.

Because of the public availability of the Committee Chairperson and Secretary's addresses, all of the rationales provided in Petitioner's caselaw for mandatory address filings evaporate. Petitioner cites Nader v. Keith, 385 F.3d 729, for the rationale of (1) preventing fraud and (2) verifying eligibility. Here, because the applicable Committee members are both elected officials with addresses that are public record, the necessary address information to protect against fraud and ineligibility are already present without the necessity of filing the Certificate of Representative Committee Organization.

Petitioner cites Pochie v. Cook County Officers Elec. Bd., 289 Ill.App.3d 585, for the proposition that the fact that voter information is available at the Chicago Board of Election does not negate the mandatory requirement for inclusion of voters' addresses, because checking such information would be an "undue burden" and require "extraordinary steps" to determine voter eligibility. Here, however, we do not have the applicable Committee member addresses included in the voter rolls, the addresses are filed at the State Board of Elections. Further, obtaining these addresses from the State Board of Elections does not rise to the "undue burden" or require "extraordinary steps" as described in Pochie.

Reviewing the applicable Committee members' addresses at the State Board of Elections on a Certificate of Representative Committee Organization or on the Board's listing of public officials is of little distinction, certainly not such a difference to justify Petitioner's request that Respondent be removed from the ballot for state office.

F. If the filing Certificate of Representative Committee Organization is held to be mandatory in order to fill a vacancy in nomination, such a decision would be arbitrary and capricious as it is contrary to State Board of Elections past and current practice and an alteration of the Election Code after the fact.

Based on the Affidavit of Mark Mossman of the State Board of Elections discussed previously in the Statement of Facts, the State Board of Elections' past and current practice is to treat Certificates of Organization as ancillary documents with respect to Resolutions to Fill a Vacancy in Nomination. To change this past and current practice at this time would be arbitrary and capricious.

It is long-established precedent that the construction of statutes and rules by an administrative agency is persuasive. Olin Corporation v. Environmental Protection Agency, 54 Ill.App.3d 480, 370 N.E. 2d 3, 6, 12 Ill. Dec. 380, 382 (5th Dist. 1977). "In determining the practical construction given by an administrative agency to a regulation or a statute, informal administrative practices as well as formal pronouncements are relevant. Actions, not words, establish and administrative construction. An agency may be bound by its own established custom and practice as well as by its official pronouncements and regulations." Olin at 383-4 (*citations omitted*.)

With respect to the facts in this case, the State Board of Elections considers the Certificate of Representative Committee Organization to be an ancillary document. This Electoral Board should give great deference to the State Board of Election's past and current practice that does not mandate filing of the Certificate of Representative Committee Organization in order for a Resolution to fill a Vacancy in Nomination to be complete or accepted for filing due to its ancillary nature.

Finally, if the Board were to decide that the State Board of Election's past and current practices are not consistent with the Election Code, fundamental fairness (a factor

considered in Olin) requires that such a change should not be enforced after the fact on Respondent, but announced and enacted for next election cycle.

G. Respondent's April 16, 2008, filing satisfies all information requirements of § 8-5.

Petitioner also raises the new argument that the Certificate of Representative Committee Organization filed by Respondent on April 16, 2008, does not contain the "officer's [sic]" addresses and, therefore, "does not contain the mandatory address information required by § 8-5." (Petitioner's Memorandum in Support of the Objector's Petition, p. 10.) Contrary to this assertion, said Certificate had attached to it, the names and addresses of all of the precinct committeeman within the 103rd Representative District. This list includes the names and addresses of the Committee's Chairman, John J. Farney, 2504 E. Florida, Avenue, Urbana, IL 61802 and Secretary, Kristin Williamson, 2101 Pond St., Urbana, IL 61801. (See, attachment to letter of John Maloney.) Further, addresses for the chairman and secretary are all that is suggested by § 8-5. Section 8-5 does not mention addresses of other officers. Therefore, Respondent's April 16, 2008, filing fully satisfies all information requirements of § 8-5.

IV. Conclusion

For the foregoing reasons, Respondent-Candidate respectfully requests Summary Judgment be granted in his favor and against Petitioner-Objector and that it be ordered that the name of Frank Calabrese shall appear and be printed on the ballot for election to the office of Representative in the General Assembly for the 103rd Representative District of the State of Illinois, to be voted for at the General Election to be held November 4, 2008.

Deanna S. Mool

Respondent-Candidate
by one of his attorneys

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the attached Motion for Summary Judgment and Brief in Response to Petitioner's Brief in Support of Objector's Petition, has been served upon each of the individuals listed below, via e-mail on Wednesday, May 21, 2008.

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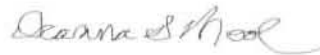
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