

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS**

Pat Devaney,)	
)	
Petitioner)	
)	
v.)	
)	
Champaign County Officers Electoral Board and its members, Mark Sheldon, Fred Wilkinson, Steven D. Ziegler, Mark Sheldon, in his capacity as Champaign County Clerk, and Frank Calabrese,)	NO: 08-MR-452
)	
Respondents.)	

**RESPONDENT-CANDIDATE’S RESPONSE TO
PETITIONER’S PETITION FOR JUDICIAL REVIEW**

Respondent-Candidate, FRANK CALABRESE (hereinafter “Candidate”), through his attorneys, for his Response to Petitioner’s Memorandum in Support of Petition for Judicial Review states the following:

I. Points and Authorities

1. Because the finding of “substantial compliance” with the Illinois Election Code is a question of fact, the reviewing court must find the decision of the electoral board is against the manifest weight of the evidence in order to reverse its decision. *Reynolds v. Champaign County Officers Electoral Board*, 379 Ill.App.3d 423, 424, 884 N.E.2d 1175, 1176, 318 Ill.Dec. 904, 906 (4th Dist. 2008).

2. The Champaign County Officials Electoral Board was correct in finding that the Candidate substantially complied with the Election Code in filing the names and addresses of the Representative Committee with the State Board of Elections.

3. This Petitioner's overbroad and vague argument that the objection process is rendered "meaningless" is not sufficient to warrant overturning the Champaign County Officials Electoral Board's decision.

4. The Petitioner's assertion that the opinion of the Champaign County Officials Electoral Board should be overturned because other tribunals have made contrary decisions on different fact patterns is irrelevant. Such a decision to overturn would require this court to re-try the evidence presented at trial in violation of Fourth District case law.

5. Notwithstanding the foregoing, the Candidate's name should be retained on the ballot for the reasons Candidate previously presented to the Electoral Board.

A. Section 8-5 of the Election Code is a separate and distinct statutory act from filling a vacancy in nomination under § 7-61.

B. Consistent with the Champaign County Officials Electoral Board decision, Candidate's April 18, 2008 filing, cured any potential breach and brought candidate into substantial compliance with the Illinois Election Code.

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

D. The filing of the addresses of the committee officers is not mandatory as each individual is an elected public official whose address is easily obtainable.

E. 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 practice and an alteration of the Election Code after the fact.

II. Introduction

The issue for review in this case is whether the Champaign County Officers Electoral Board was correct in finding that the Respondent-Candidate substantially complied with the Illinois Election Code in the process to fill the vacancy in nomination for the 103rd Representative District.

III. Issues for Review

The Petitioner-Objector (hereinafter “Objector”) appears to raise three issues for review:

1. Petitioner generally disputes the decision of the Electoral Board. In light of Petitioner’s Memorandum of Law in Support and the Board’s decision, Candidate interprets this argument as an objection to the finding that the Candidate was in substantial compliance with the Election Code. Petition for Expedited Judicial Review of the Decision of the Champaign County Officers Electoral Board, ¶ 14.

2. Petitioner makes the argument that the Electoral Board’s decision “renders the objection process meaningless.” Petition for Expedited Judicial Review of the Decision of the Champaign County Officers Electoral Board, ¶ 15.

3. The Petitioner argues that the Champaign County Officials Electoral Board’s decision is contrary to the decisions of other Electoral Boards. Petition for Expedited Judicial Review of the Decision of the Champaign County Officers Electoral Board, ¶ 16.

4. Notwithstanding the foregoing, the Candidate’s name should be retained on the ballot for the reasons Candidate previously presented to the Electoral Board.

A. Section 8-5 of the Election Code is a separate and distinct statutory act from filling a vacancy in nomination under § 7-61.

B. Consistent with the Champaign County Officials Electoral Board decision, Candidate's April 18, 2008 filing, cured any potential breach and brought candidate into substantial compliance with the Illinois Election Code.

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

D. The filing of the addresses of the committee officers is not mandatory as each individual is an elected public official whose address is easily obtainable.

E. 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 practice and an alteration of the Election Code after the fact.

IV. Standard of Review

1. Because the finding of "substantial compliance" with the Illinois Election Code is a question of fact, the reviewing court must find the decision of the electoral board is against the manifest weight of the evidence in order to reverse its decision.

The standard of review in this case, as set forth by the Fourth District, is whether the decision of the electoral board is against the manifest weight of the evidence. *Reynolds v. Champaign County Officers Electoral Board*, 379 Ill.App.3d 423, 424, 884 N.E.2d 1175, 1176, 318 Ill.Dec. 904, 906 (4th Dist. 2008). The *Reynolds* court clearly outlined the standard of review as follows:

The familiar principles that guide our review have been succinctly stated:

“The findings of fact of an electoral board are prima facie true and correct. [Citation.] The function of a court on judicial review is to ascertain whether the findings and decision of the electoral board are against the manifest weight of the evidence. [Citation.] A decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident. [Citation.] The fact that an opposite conclusion is reasonable or that the reviewing court might have ruled differently based upon the same evidence will not justify a reversal of the findings of an administrative agency. [Citation.] Determinations as to the weight of evidence and the credibility of witnesses are uniquely within the province of the agency [citation], and a court will not substitute its judgment for that of the agency on such matters [citation]. Where the findings of the agency are supported by competent evidence in the record, its decision should be affirmed. [Citation.]” King v. Justice Party, 284 Ill.App.3d 886, 888, 220 Ill.Dec. 83, 672 N.E.2d 900, 902 (1996).

Reynolds, at 424, 1176, 906 (citations omitted in original).

The *Reynolds* case, identical to the case at bar, involved the appeal of a decision by the Champaign County Officials Electoral Board finding substantial compliance with the Illinois Election Code. *Reynolds* involved a failure to consecutively number the petition pages in a set of nominating papers. The Fourth District affirmed the decision of the Champaign County Officers Electoral Board in holding that the numbering “was sufficient to sustain its finding that the defendant substantially complied” with the Election Code. *Reynolds*, at 426, 1178, 907.

Therefore, the same standard of review – whether the decision of the Electoral Board is against the manifest weight of the evidence -- is applicable here.

V. Finding of Facts by the Electoral Board

1. “No candidate [for] the office of Representative in the General Assembly for the 103rd Representative District appeared on the Republican Party primary ballot for the Primary Election held on February 5, 2008.” Champaign County Officials Electoral Board as the duly constituted Electoral Board, Finding and Order of the Board, ¶ 4, hereinafter cited as “Electoral Board Order.”

2. "On April 7, 2008, the Republican Party Representative Committee for the 103rd District, composed of members as authorized under 10 ILCS 5/8-5 of the Election Code, met, organized and nominated the Respondent-Candidate, FRANK CALABRESE, as the Republican candidate for said office." Electoral Board Order, ¶ 5.

3. "On April 7, 2008, the Respondent-Candidate, FRANK CALABRESE, filed his Statement of Candidacy, Loyalty Oath, and the Resolution to fill the Vacancy in Nomination with the Illinois State Board of Elections." Electoral Board Order, ¶ 6. The filed Resolution to fill the Vacancy in Nomination contained the names of the officers of the Republican Representative Committee for the 103rd District, namely, John J. Farney, Chair and Kristin Williamson, Secretary. Record, p. 455.

4. "The Petitioner-Objector has not challenged the composition of the Representative Committee or the means, method or timing of their selection of the Respondent-Candidate, nor has the Petitioner-Objector raised any issues related to compliance with 10 ILCS 5/7-61." Electoral Board Order, ¶ 7.

5. "The Representative Committee filed the Certificate of Organization, bearing the names and signatures of the Chairman and Secretary of the Committee, with the Illinois State Board of Elections on April 18, 2008. The addresses of the Chairman and the Secretary do not appear on the face of the Certificate of Organization, but their names and addresses are included in a partial list of Republican precinct committeemen for Champaign County which the parties stipulated was attached to the Certificate of Organization." Electoral Board Order, ¶ 8.

6. "The filing of the Certificate of Organization with the Illinois State Board of Elections occurred after the filing of the Objector's Petition herein and occurred after the deadline for the

filing of such an objection is this matter, which deadline was met by the Petitioner-Objector.”
Electoral Board Order, ¶ 9.

7. “At the conclusion of the hearing on May 30, 2008, the Electoral Board voted 3-0 to deny the Objector’s Petition. The Board finds the requirements of 10 ILCS 5/8-5 to be mandatory, but believed that they could be satisfied by substantial compliance. . . . [T]he Board finds that the Respondent-Candidate and the Representative Committee substantially complied with the requirements of 10 ILCS 5/8-5 taken as a whole as well as substantially complying with the particular requirement to “immediately” file the names and addresses of the chairman and secretary of the Representative committee with the State Board of Elections.” Electoral Board Order, ¶ 13.

VI. Argument

1. The Champaign County Officials Electoral Board was correct in finding that the Candidate substantially complied with the Election Code in filing the names and addresses of the Representative Committee with the State Board of Elections on April 18, 2008.

Petitioner generally disputes the holding of the Electoral Board, which based on the Electoral Board’s decision, Candidate reads as an objection to the finding that the Candidate was in substantial compliance with the Election Code. Petition for Judicial Review, ¶ 14, Petitioner’s Memorandum of Law in Support of Judicial Review, pp. 3-13, hereinafter “Petitioner’s Memorandum”.

By way of background, the process for filling a vacancy in nomination for State Representative is outlined in Section 7-61. 10 ICLS 5/7-61. Section 7-61 provides:

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.

Separate from the process to fill a vacancy in nomination, the nomination is filled by the appropriate representative committee. The process to organize the representative committee is contained in Section 8-5. 10 ILCS 5/8-5. Section 8-5 provides:

[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.

In applying these two statutes, the Champaign County Officials Electoral Board found, at a minimum, that the filing of the Certificate of Representative Committee Organization on April 18, 2008, substantially complied with Election Code provisions sufficiently to allow the Candidate to stay on the ballot for the November 4, 2008 election.

In opposition to this determination, Petitioner restates his arguments that: (1) the Certificate of Organization must be immediately filed upon organization of the committee, (2) the provision of § 8-5 regarding the transmittal of the address of the committee officers is mandatory, and (3) that the April 18, 2008 filing did not cure the alleged non-compliance (i.e. the April 18, 2008 filing did not provide “substantial compliance.”) Petitioner’s Memorandum, §§ II.A, B, C.

While Candidate disputes all three of Petitioner’s arguments, for purposes of requesting reversal of the Electoral Board decision, the first two arguments are irrelevant. When viewed in the light most favorable to the Petitioner, the Champaign County Officials Electoral Board, in part, held that both compliance with the § 8-5 immediacy element and the § 8-5 address element were both mandatory. However, even after these conclusions, the Champaign County Officials Electoral Board found that candidate was still in substantial compliance with § 8-5 sufficient to avoid removal from the ballot. Electoral Board Order, ¶¶ 12, 13. Therefore, even if the Petitioner is successful in convincing this court that these two elements of § 8-5 are mandatory, it does nothing to reverse the holding of the Champaign County Officials Electoral Board.

This leaves Petitioner’s third argument against the Champaign County Officials Electoral Board decision. In Section II. C., Petitioner argues that the filing of the Certificate of Organization on April 18, 2008, which contained the addresses of the officers, did not cure the

incomplete filing of the officer's names previously achieved on April 7, 2008. Using the terminology of the applicable caselaw and the Electoral Board decision, Petitioner argues that the April 18, 2008 filing date does not constitute substantial compliance with the Election Code. This argument, however, completely ignores the factual finding of the Electoral Board that the Candidate's compliance was sufficient. Electoral Board Order, ¶ 13.

Petitioner provides no rationale for holding the Electoral Board's finding of substantial compliance against the manifest weight of the evidence. In addressing a provision of the Election Code which the Fourth District concluded was mandatory, the *Reynolds* court stated: "Given the deference the court accords to Board decisions in such matters, we conclude the record contains sufficient evidence to support the Board's determination. Compliance was admittedly not strict, but it was substantial nonetheless." *Id.* Clearly, the Reynolds court sets forth the standard that "substantial compliance" is a factual issue to be determined by the Electoral Board. As Petitioner's Petition has offered no rationale to account for why the Electoral Board's decision might be against the manifest weight of the evidence of the record, Petitioner cannot prevail in overturning the decision. Finally, Candidate notes that, given Petitioner's failure to raise an argument against the Champaign County Officials Electoral Board factual finding of substantial compliance in its petition, Petitioner should not now be allowed to do so in a reply brief.

2. Petitioner's strawman argument that the objection process is rendered "meaningless" is not sufficient to warrant overturning the Champaign County Officials Electoral Board's decision.

Petitioner's Petition next argues that the decision of the Champaign County Officials Electoral Board should be overturned as it "effectively allows a committee to preclude an objection to its nominations by simply withholding the mandatory information until after the

objection deadline. Such a result renders the objection process meaningless and effectively writes these proceedings out of the Election Code.” Petition for Judicial Review, ¶ 15.

Contrary to this broad assertion, the holding in this case is clearly limited to the facts presented. The entire objection process has not been rendered meaningless by this ruling. For example, assume that a nominated candidate fails to live in the district, a nomination is not timely, or a candidate fails to file a Statement of Organization or Statement of Economic Interests, all required by the Election Code. The Champaign County Officials Electoral Board decision clearly does not preclude objections to such fundamental compliance with the Election Code. The ruling of the Champaign County Officials Electoral Board merely renders Petitioner’s objection denied—not the Election Code meaningless. *See, generally*, Electoral Board Order.

3. The Petitioner’s argument that the opinion of the Champaign County Officials Electoral Board should be overturned because other tribunals have made contrary decisions is unconvincing. Such cases are not precedent and presented different fact patterns. Further, such a decision to overturn would require this court to re-try the evidence presented at trial in violation of Fourth District case law.

The final argument of Petitioner’s Petition for Judicial Review is that the Champaign County Officials Electoral Board decision should be overturned because it is contrary to decisions of other electoral boards. Petition for Judicial Review, ¶ 16. Petitioner asserts these nominations were made under “identical circumstances.” *Id.*

In Section II.D. of the Petitioner’s Memorandum of Law, Petitioner provides cursory remarks indicating the Cook County Officers Electoral Board and Chicago Officers Electoral Board have decided separate matters with results contrary to this case. Given that neither of these tribunals have precedential authority over this court and none of the matters were raised in the Fourth District, the disclosure of these decisions is of minimal consequence. The cited cases

involve committees which never filed a Certificate of Organization, illegible signatures, and Certificates of Organization which were filed more than a month after the deadline to file objections.¹ As none of these cases involves the Fourth District, it appears that none of the opinions address the test of substantial compliance as outlined in *Reynolds*. In addition, none of the Certificates of Organization in these matters were filed as early as the one in the case at bar. Despite the irrelevance of these decisions, it should be noted that the Objector mischaracterizes these decisions as “identical” for the fact patterns in the other cases diverge from the facts in the instant case.

As Petitioner is limited to the legal arguments raised in his initial filing, it is unclear how Petitioner could, in a Reply brief, provide legal analysis or compare factual patterns in these informational decisions

4. Notwithstanding the foregoing, the Candidate’s name should be retained on the ballot for the reasons Candidate previously presented to the Electoral Board.

A. Section 8-5 of the Election Code 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 the General Assembly. This process is outlined in earlier sections of this brief. *See, supra*, §V-1, 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

¹ In *Flanagan v. Shelstrom*, the Certificate of Organization was filed on April 23, 2008. *Flanagan v. Shelstrom*, 08-COEB-SS-01 (Cook County Officers Electoral Board, June 2, 2008). In *Lyons v. Anderson*, the Certificate of Organization was filed on May 9, 2008. *Lyons v. Anderson*, 08-COEB-RGA-02 (Cook County Officers Electoral Board, June 2, 2008). In *Stinson v. Yalden*, the Certificate of Organization was never filed. *Stinson v. Yalden*, 08-EB-RES-07 (City of Chicago Electoral Board, June 3, 2008). In *Gonzalez v. Delich*, the Certificate of Organization was filed on May 8, 2008. *Gonzalez v. Delich*, 08-EB-RES-03 (City of Chicago Electoral Board, June 3, 2008). In *Hines v. Garcia*, no Certificate of Organization was filed. *Hines v. Garcia*, 08-EB-RES-05 (City of Chicago Electoral Board, June 3, 2008). It is clear from these brief opinions that the same evidence was not presented, nor were identical legal arguments were made by the Candidates in any of these cases.

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.

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. Candidate again notes for the record that there was no allegation of failure to comply with either of these requirements. The undisputed facts here are that the actual Committee was legitimately constituted as to its membership and in meeting the 180 day time period. Electoral Board Order, ¶ 7. 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, although not required to be, in a Certificate of Representative Committee Organization. Again, Candidate 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 Candidate is not suggesting that the Committee does not have to comply with any of the text of § 8-5. However, Petitioner again asks this court 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 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's requested relief is to remove a candidate from the ballot.

B. Consistent with the Champaign County Officials Electoral Board decision, Candidate's April 18, 2008 filing, cured any potential breach and brought candidate into substantial compliance with the Illinois Election Code.

Candidate 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 18, 2008, a mere 11 days after the Committee organized. Electoral Board Order, ¶ 8. Given that the Committee had a 180 day window to act, Candidate submits that notification within 11 days is not necessarily unreasonable and meets any notion of substantial compliance.

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 and § 10-8, 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. Petitioner's Memorandum, p. 6. Petitioner goes into great length arguing the public policy for requiring such information before the § 7-61 deadline for filing such objections. *Id.* 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 “immediately” of 7 days based on the §§ 7-61 and 10-8 time periods for filing objections to resolutions for filling a vacancy in nomination.

The members of the Champaign County Officials Electoral Board realized the unintended implications of creating such a definition. Record, 141-145. For example, if the Committee organized on the 32nd day following the Primary, (which is the day after the final canvass by the Illinois State Board of Elections) but did not submit the organizing information to the Illinois State Board of Elections until the end of the filing period, then 35 days could have passed between the organization and the “immediate” filing of the Certificate of Organization information. 10 ILCS 5/22-7 (setting forth the 31 day final canvass deadline). In this instance, Petitioner’s argument would lead one to conclude that the 35 days prior to the Objection deadline is acceptable under the term “immediate,” but the 11 days in the instant case is too much. This conclusion would lack consistency.

Petitioner has also indicated that other provisions of § 8-5 are not mandatory. First, Petitioner concedes that notice may be provided by someone other than the outgoing county Chairman. Record, p. 143. Second, Petitioner is unwilling to conclude that the failure to organize within 180 would bar all future action by the committee. Record, p. 144. Therefore, Petitioner rejects his own argument that the generic language of § 8-1 makes all of § 8-5 mandatory. Petitioner’s Memorandum, p. 5.

In conclusion, Candidate submits that the term “immediately” must be interpreted in its existing context within § 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 11 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, Candidate 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. The Champaign County Officials Electoral Board concurred as they found Candidate’s compliance substantial. Electoral Board Decision, ¶ 12.

C. Under the relevant caselaw, the § 8-5 provisions regarding forwarding Certificates of Organization to the State Board of Elections are 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 Memorandum, 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 procedural 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. Electoral Board Order, ¶ 7.

The *Graham* decision is also relevant to the discussion of § 8-5. *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 procedural 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.

D. The filing of the addresses of the committee officers is not mandatory as each individual is an elected public official whose address is easily obtainable.

Petitioner submits that because some address provisions of the Illinois Election Code are mandatory, all address provisions of the Election Code are mandatory. Petitioner's Memorandum, p. 10. 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. The names of Mr. Farney and Ms. Williamson were filed on April 7, 2008 with the Resolution to Fill the Vacancy in Nomination. In addition, the names and addresses of the precinct committeeman in Champaign County are available from the Champaign County Clerk's website. *See, www.champaigncountyclerk.com* Thus, their addresses were publicly available on April 7, 2008 and therefore, a potential objector could find contact information for the relevant persons without leaving home.

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 propositions 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, the Champaign County Clerk's office, and on the Internet. Further, obtaining these addresses from any of these sources 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 Candidate be removed from the ballot for state office.

E. 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 practice and an alteration of the Election Code after the fact.

Based on the Affidavit of Mark Mossman of the State Board of Elections, the testimony of Candidate Frank Calabrese, and the 2008 Candidate's Guide, the State Board of Elections' current and past practice is to treat Certificates of Organization as ancillary or optional documents with respect to Resolutions to Fill a Vacancy in Nomination by an established political party. Record, p. 114-115, 116, 210-211. 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.*)

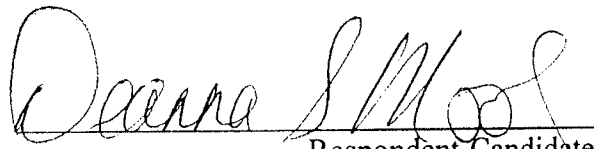
With respect to the facts in this case, the State Board of Elections considers the Certificate of Representative Committee Organization to be an ancillary document. Record, p. 334-335. The official 2008 Candidate's Guide of the Illinois State Board of Elections does not

indicate that established political parties need to file a Certificate of Organization within a specified time period while in the same document, the Candidate Guide tells new political parties that there is a penalty for not filing the Certificate of Organization. Record, p.210, 211. The Candidate presented uncontroverted evidence that both the Loyalty Oath and Certificate of Organization were listed as optional on a staff list of documents. Record, p. 116. This court 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 and optional 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 Candidate, but announced and enacted for next election cycle.

IV. Conclusion

WHEREFORE, for the foregoing reasons, Candidate respectfully requests that the Petition for Judicial Review be denied 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, and for all other relief deemed just and proper in the premises.


Respondent-Candidate
by one of his attorneys

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CERTIFICATE OF SERVICE

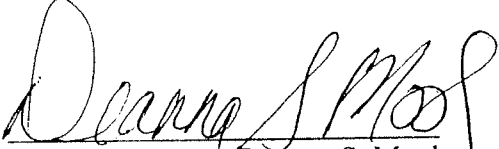
The undersigned attorney hereby certifies that the attached RESPONDENT-CANDIDATE'S RESPONSE TO PETITION FOR JUDICIAL REVIEW and MOTION FOR EXPEDITED REVIEW, has been served upon each of the individuals listed below, via U.S. mail and e-mail on Tuesday, July 8, 2008.

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