

STATE OF ILLINOIS)
)
COUNTY OF IROQUOIS)

IN THE CIRCUIT COURT OF THE TWENTY-FIRST JUDICIAL CIRCUIT
IROQUOIS COUNTY, ILLINOIS

EUGENE K. BRUNS,)
)
Plaintiff,)
)
vs.)
)
JOHN M. KUNTZ, County Clerk,)
Iroquois County, Illinois,)
)
Defendant.)

No. 91-MR-

FILED

5 1991

Carl J. Ober
CLERK CIRCUIT COURT

MEMORANDUM OPINION

On October 22, 1991, Eugene K. Bruns (Bruns), the duly appointed and acting Supervisor of Assessments of Iroquois County (Supervisor), filed his Complaint in Mandamus seeking relief against John M. Kuntz (Kuntz), as County Clerk (and Supervisor of Elections)(Clerk) in connection with a public policy issue on the ballot for the November 5, 1991 general election. That public policy issue was initiated by a Petition filed with the Clerk under Section 28-7 of the Election Code (Code) on August 19, 1991. The Petition seeks to change the selection of the Assessor from appointive to elective as authorized by the Illinois Constitution of 1970, Article VII, Section 4(c). The Clerk's Answer essentially admits all allegations of the Complaint except a duty, under Code Section 10-8, to reject any petition (nominating or public policy) which is not in apparent conformity with the Code. An evidentiary hearing was held on Friday, November 1, 1991, only

two working days before the election. Following the hearing, this Court declined to enjoin the presentation of the question to the electorate or to enjoin the counting of the ballots thereafter. However, the Court did, by Interim Order, enjoin the certification of the election results while the Court had the matter under advisement for purposes of considering the evidence, arguments and citations to authority presented by counsel. The Court declined to enjoin the election and counting of ballots because, apart from mechanical difficulties, if the Court's decision should later be found to be erroneous, the issue would have to be re-submitted at a subsequent election, with its attendant additional costs and a further delay in implementing the ultimate election of the Assessor if the proposition was approved. While not a part of this record, all parties are now aware that the proposition was overwhelmingly approved. Nevertheless, and further not part of the record, the perception in some quarters that the Court's deferral of the ruling was for purposes of testing the election results is erroneous, the results being irrelevant to the issue before the Court, namely, whether the proposition should have been submitted. This Court has concluded that it should not, and the prior Interim Order is made permanent.

The parties agree that the facts are not in dispute and that the issue resolves itself into a question of law, namely, does Code Section 10-8 impose a duty on the Clerk which he failed to perform? This Court is of the clear opinion that it does and he

failed. However, some of the facts adduced from the evidence and mentioned hereafter are also instructive.

In pertinent part, Code Section 10-8 reads:

"Certificates of nomination and nomination papers, and petitions to submit public questions to a referendum, and being in apparent conformity with the provisions of this Act, shall be deemed to be valid unless objections thereto are filed..." (emphasis added)

At hearing, Clerk argues that this provision imposes no duty on the Clerk; that the statute doesn't define "apparent conformity"; that he, in effect, is only a mechanic receiving all papers filed; that he has no authority to reject a petition or nominating paper and, most importantly, that the electoral boards and related mechanisms have the exclusive duty to perform the functions that Plaintiff seeks to impose upon the Clerk. Clerk also argues that other Clerks and the State Election Board share this view.

To accept this view is to say that County Clerks and the State Election Board may ignore or, in effect, repeal the mandate which this Court believes is imposed by the Legislature on local election officials. Further, it is a basic and fundamental rule of statutory construction that the Legislature must have intended that the words used are to be given meaning. Moreover, to accept Clerk's argument is to erase a substantive and procedural safeguard imposed by the Legislature against spurious and facially inadequate petitions. While the electoral boards also perform an important (perhaps more important) function to reinforce this safeguard, the statute clearly contemplates that electoral boards

only concern themselves with defects not facially apparent. This is consistent with the notion that the latter defects are usually such as require the presentation of evidence as contrasted with patent and overt deficiencies. The duty imposed on local election officials by the plain and unambiguous words of the statute serve a number of important functions, not the least of which is to relieve electoral boards of the clutter of facially insufficient papers, relieve potential objectors of any duty to police filings which the Clerk should be better able to police, and alert those presenting papers to the need to correct facially obvious deficiencies.

The Clerk argues that he doesn't know the meaning of "being in apparent conformity with this Act". While it is true that there may be gray areas of doubt between the initial duties of the Clerk and subsequent duties of electoral boards, it is clear that many petitions do not create that problem. At a minimum, facially insufficient papers would include those without the requisite number of signatures. Where, as here, the petition is grossly insufficient as to signatures, the Clerk should have had no trouble in making a determination that the Petition was not "in apparent conformity with the provisions of this Act".

While the Clerk claims no duty is imposed by Section 10-8, he admits that he probably would not have filed a petition with no signatures, or only a few signatures, or with the requisite number of signatures but signed with the same name. That is no more than

an acknowledgement that he does have a duty to reject facially insufficient petitions. While not in issue here, the evidence shows that several signatures are of doubtful validity. That is the sort of thing, under most conditions, that would be left for later hearing before electoral boards.

All parties agree that, apart from doubtful signatures, the Petition was 283 signatures short. Why? The evidence shows that Ron Hilligoss, the person circulating the Petition, erroneously believed that the requisite number needed was 10 percent of those electors who voted in the last general election. That assumption was based upon the use of a petition form used in another county some years ago. In 1971, the Legislature, implementing (in part) Article VII of the 1970 Constitution, enacted the predecessor of Section 28-7. As originally enacted, Section 28-7 required only 10 percent of those voting at the last election, as Hilligoss believed. However, that section was amended by the Legislature, effective May 26, 1982, to require 10 percent of all registered voters. Section 3-1.3, enacted effective December 13, 1983, further clarified this requirement. These statutes are clear and unambiguous and have been in effect more than nine years.

Clerk testified that he was unaware of the change in the law. Further, as previously noted, if he was aware, no duty exists to reject this facially insufficient Petition. The Clerk's interpretation conveniently relieves Clerks of any obligation to know the Election Law. This position is inconsistent with the

purposes of the Code. Clerks are mandated, in countless ways, to know the law. It is true that Clerk is not an attorney. He has no duty (and ought not) to give legal advice although the public, in practice, constantly demands it of him. But there is a distinction between being an advocate (which he should not be) and having sufficient knowledge of the Election Code to perform his duties in a non-partisan manner. This Court has often and long been impressed with Clerk's knowledge of the Election Code. That Code imposes upon him, among many other duties, the obligation to instruct Election Judges. If he is under no obligation to know the Code, he couldn't perform that or other duties. One of those duties is to reject facially defective petitions. To know the requisite number of signatures needed is not burdensome or complex, and is, in this Court's opinion, required by Section 10-8.

This duty imposed upon the Clerk seems, to this Court, to be even more important as it relates to public referendum petitions than to nominating petitions. This is true because there is no public notice provision with respect to public policy petitions submitted to local election officials as contrasted with those submitted to the circuit court. In the latter case, the court, in essence, performs the function of an electoral board and determines if the petition conforms to the law's requirements. The hearing before the court must be preceded by a published notice in a paper of general circulation throughout the area

involved. This alerts the public to the filing of the petition, its nature, and provides an opportunity to be heard. No such pre-publication exists with respect to such petitions filed with the Clerk. Consequently, it seems even more important for the Clerk to perform what amounts to a due process function. Papers filed by candidates for office are more likely to be scrutinized by potential opponents than a public policy petition presented to the Clerk without any published notice. Additionally, the minimum numerical signature requirement~~s~~ is a further protection that the petition be widely circulated so as to be a reasonable substitute for the published notice.

Since hearing arguments and evidence on November 1, 1991, the Court has had a brief opportunity to research collateral problems not before the Court for decision but which, in the public interest, the Court deems worthy of comment. Article VII, Section 4(c), which authorizes the referendum, provides that elected county officers shall serve for a term of four years and be elected at general elections as provided by law. While the Legislature has provided for general elections, it has not specifically dealt with the problem of when the elected Assessor is to be elected or when the term is to begin. At hearing, counsel seemed to agree that, if the referendum is valid, the elected Assessor would be elected at the general election in November, 1992 and take office, with other county officers, in December, 1992. This would require candidate filings within a few

weeks. Counsel agree that there is no implementing legislation to support that assumption. This Court, laboring under the accuracy of that assumption, therefore declined to enjoin the election or the counting of ballots so that, if this Court should find that the legally insufficient Petition vitiated the election but was later reversed on appeal, the election might still occur in 1992 and the change made effective as if this suit had not been filed. Now, however, the Court's brief research has cast serious doubt on this assumption. To put it plainly, while Bruns has not raised the issue (and was not required to), this Court believes that a proper construction of the Constitution and applicable law would make the election result effective only at the expiration of the term of the appointed Assessor. To hold otherwise would implicate serious Constitutional problems.

The Appellate Court has confirmed the authority of the electors, by referendum, to change the office of Assessor (and other county offices) from appointive to elective, and vice versa. See In re Cook, 122 App.3d 1068. However, the Legislature, acting under its clear authority, has provided that the appointed Assessor also serves for a term certain and cannot be removed during the term except for specified causes. See Macaluso vs. West, 40 App.3d 392. Thus, the appointed Assessor is not an employee at will and, whether elected or appointed, has a four-year term. There is no reason to distinguish between the rights of the Assessor to that term, whether elected or appointed.

the voters decide to reduce the term of Coroner to two years, it can scarcely be argued that the elected Coroner would have to undergo an election after only two years of her four-year term. The term, once entered, whether appointive or elective, creates vested rights. The protection of these rights is not inconsistent with the change provisions of Article VII which are clearly intended to become effective following the completion of any existing term of office, appointive or elective.

While various provisions of the Election Code inferentially acknowledge that an Assessor may be elected, this Court believes that the Legislature needs to address some of the problems created when the electors decide to make changes in the method of selection of county officers under Constitution Article VII. These should include provisions for a temporary appointment of an Assessor if the expiration of the term of the appointed Assessor does not coincide with the term of other regularly elected county officials. The constitutional provisions of Article VII are not self-executing and this case illustrates the need for legislation.

Attorney Berz is directed to present an Order in accord with this Opinion.

DATED THIS 5 day of December, 1991.

ENTER:


Judge