

BEFORE THE ILLINOIS STATE OFFICERS ELECTORAL BOARD

David McSweeney)	
)	
Objector)	
)	
-v-)	11 SOEB GP 502
)	
)	
Kent Gaffney)	
Candidate)	

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

This matter was first heard on December 20, 2011 and assigned to this Hearing Officer. A case management conference was held on said date. The Objector appeared through counsel Richard Means and the Candidate appeared through counsel John Fogarty and counsel John Countryman.

The parties were given the opportunity to file preliminary motions. The Candidate filed a Motion to Strike Objector's Petition and the Objector filed Objector's Reply to Candidate's Motion to Strike Objector's Petition. The Objector's Petition at paragraph 2 alleges that certain sheets should be stricken because they were gathered on state time and /or with the use of state resources. Candidate moved to strike paragraph 2 as being outside the jurisdiction of the electoral board. The Objector's Petition at paragraph 4 alleges that certain sheets should be stricken because they were notarized by a notary who knew that the circulator's oath was false. Candidate moved to strike paragraph 4 as it failed to state a basis to invalidate the nominating sheets. Candidate also moved to strike paragraph 3 in that it failed to allege sufficient facts to put the Candidate on notice as to the alleged defect.

The motion to strike paragraph 2 was granted in that the electoral board has no jurisdiction over the issue of whether the signatures were gathered during state time or with state resources. The Candidate's motion to strike paragraph 4 of the Objector's Petition was granted in that the paragraph failed to set forth any cognizable basis to invalidate the petition sheets. The Candidate's motion was denied as to paragraph 3 in that the paragraph was sufficient to provide the Candidate with notice of the alleged defect.

Additionally, the objections contained allegations regarding the sufficiency of the signatures contained in the nominating papers and required a records examination. A records examination was conducted and the results were as follows:

- A.** The minimum number of valid signatures required by law for placement on the ballot for the office in question is 500.
- B.** The number of purportedly valid signatures appearing on the nominating petition filed by the Candidate total 1,059.
- C.** The number of signatures deemed invalid because of objections sustained in the records examination total 261.
- D.** The remaining number of signatures deemed valid as a result of the records examination total 798.

At the conclusion of the records examination, the Candidate had 298 signatures more than the required number of signatures for placement on the ballot. No motions were filed pursuant to the Rule 9 of the Board's Rules of Procedure. However, a further evidentiary hearing was held to address paragraph 3, the remaining allegation in the Objector's Petition. Paragraph 3 of the Objector's Petition provides as follows:

“The Nomination Papers herein contain petition pages which purport to have been circulated by Alan Hill. Those petition sheets are number 10-21, 28-34, 39-43, 72-77, 79, 103 and 104. In fact, those petition sheets were circulated by State of Illinois, House of Representatives Republican Staff employees Garret Hill and Nicholas McNeely who then conspired with each other and Alan Hill to procure Alan Hill’s perjured circulator affidavit on each such petition sheet. Because Garret Hill and Nicholas McNeely suborned Alan Hill’s perjury on those circulator affidavits, and because Alan Hill perjured himself in the circulator affidavits, Garret Hill, Alan Hill and Nicholas McNeely have demonstrated a pattern of fraud and disregard of the Election Code to such a degree that every signature on these petition sheets and on every sheet on which on its face, purports to have been circulated by Garret Hill and Nicholas McNeely is invalid, and should be invalidated, in order to protect the integrity of the electoral process. Such petition sheets are 10-21, 28-34, 39-43, 72-77, 79, 103 and 104 and 8, 9, 46-54, 56-65, 69-71,101,107, and 110 and each of such sheets are invalid in their entirety and none of their contents should be counted toward the Candidate’s minimum signature requirement.”

Prior to the evidentiary hearing, the parties filed Motions for Subpoenas and the Candidate filed a Motion in Limine. The Motions for Subpoenas were addressed by the Electoral Board and the Candidate’s Motion in Limine was granted which served to preclude any testimony regarding the stricken allegations contained in paragraphs 2 and 4 of the Objector’s petition.

EVIDENTIARY HEARING

In support of paragraph 3 of the Objector’s Petition, the Objector offered 41 affidavits by signers of the Candidate’s nominating papers. Two versions of affidavits were submitted, one with the pictures of circulaor Garrett Hill, notary Tina Hill and circulator Alan Hill and the other version with the pictures of circulator Garrett Hill, circulator Nicholas McGreely and Circulator Alan Hill. Copies of these affidavits were made available to the Candidate on the first day of hearings at the case management conference. Samples of these affidavits are attached hereto. The purpose of the affidavits were to ascertain who the actual circulator with respect to the sheets signed

by the respective petition signers. In addition to questions that the petition signers were asked to answer in relation to individuals pictured in the affidavit, a line was available for the petition signers to add any additional information they recalled regarding the identity of the circulator.

To explain the affidavit gathering process, Joseph A. Tolomeo (“Tolomeo”) was called to testify. Tolomeo is a private investigator who was hired by the McSweeney campaign¹. He testified that he conducted field interviews with petition signers and that the petition signers were identified on a list supplied to him by the campaign. Tolomeo described the investigation process as follows: He went to the homes of the petition signers on the list, identified himself as a private investigator working for a campaign but did not specifically name which campaign, asked the petition signers if they could identify their signatures at the respective sheet and line, asked if they remembered who handed them the petition and asked who else was present. (Tr. 43). He then asked if they would be willing to sign an affidavit. For those who were willing to sign an affidavit and before they signed, he retrieved the notary who was waiting in Tolomeo’s car so that the notary could observe the signing. (Tr. 11,12)

Tolomeo also testified that after the first few interviews, none of the petition signers recalled seeing Tina Hill who was pictured on the first version of the affidavit but some recalled the presence of Nicholas McNeely. He so advised the campaign and a second affidavit form was created which omitted Tina Hill’s picture and replaced it with Nicholas McNeely’s picture. Tolomeo further testified that his interviews were conducted at night, generally under porch light or with the light from his flashlight. Tolomeo further testified that all of the information on the affidavits was completed by

the affiants, that all the writing contained thereon except for the notary's signature was placed on the affidavit by the affiants and that he did not do any of the writing on the affidavits. (Tr. 40). Tolomeo gathered some but not all of the affidavit. Some of the affidavits were obtained by another investigator, Michael Harrington with two other notaries. Tolomeo gave Harrington instructions on how to conduct the interviews with the petition signers .

Tolomeo also testified that he kept notes on the list of petition signers he received from the campaign. The list containing his notes was submitted as Objector's Exhibit 2. Tolomeo explained many of his notations on the list. He indicated where the signers were not home, if they were able to identify Alan Hill, whether they could recall identify their signature, at what location they signed the petition, etc. These notations were of significance because they served to establish that the investigator attempted to truthfully record the results of his investigation, even where the results of a particular interview did not assist the Objector's case.

THE TESTIMONY OF ALAN HILL

Alan Hill, the circulator whose sheets were the subject of the affidavits submitted, testified pursuant to subpoena from the Objector.² The nominating papers contain 33 sheets where Alan Hill signed as circulator. He testified that he circulated all of the sheets he signed as circulator and that he circulated in many locations. He recalled circulating at the Barrington Train station when Nicholas McNeely Elizabeth Gaffney was also present. He also recalled circulating at the Fox River turkey raffle with Tina Hill, Garret Hill and others, at the Cary Turkey raffle with Garret Hill and other with Tina

¹ Objector McSweeney is also a Candidate seeking the same office as the Candidate in the instant case.

² Alan Hill was accompanied by attorney Rebecca Lee who was present throughout his testimony.

Hill at a restaurant, at a fundraiser with Garret Hill, Tina Hill and others and door to door with Tina Hill. Alan Hill also testified that the turkey raffles were extremely crowded fundraisers where food and alcohol was served. He further testified that on some occasions he would hand his son Garret Hill a petition sheet and that Garret would hand the sheet to a petition signer. In every instance, according to Alan Hill, he observed the signer sign. (Tr. 95, 97, 98).

THE TESTIMONY OF GARRET HILL

Circulator Garret Hill was also subpoenaed to testify by the Objector.³ Garret is the son of Alan Hill and Tina Hill. He circulated a number of petition sheets at various locations. He circulated door to door, at a restaurant, at a fund raiser and at the Cary and Fox River Grove turkey raffles. He confirmed that the turkey raffles were crowded places where food and alcohol was served. He always circulated with other people. He circulated with his father and mother on some occasions and with others in various locations. He further testified that he never handled his father's petition sheets and that he never gave any of his father's petition sheets to anyone to sign. (Tr. 163, 164).

THE TESTIMONY OF NICHOLAS McNEELY

Nicholas McNeely was subpoenaed to testify by the Objector. McNeely testified that he worked with the Gaffney campaign and that he was the circulator of two of the sheets. He circulated his sheets on one day at the Barrington Hills Train station and Elizabeth Gaffney, the wife of the Candidate, and Alan Hill were also present at the time. He was present when other circulators circulated their petitions but he was the circulator on only those sheets.

³ Garret Hill was accompanied by attorney Rebecca Lee who was present throughout his testimony.

McNeely was asked by Candidate's counsel about Objector's Exhibit 26. The exhibit was the affidavit of Rosa M. Haakonsen who identified McNeely as the circulator of sheet 104, the sheet she signed. In the affidavit, Haakonsen indicted, "the reason why I remember who was present when I signed the petition sheet of Kent Gaffney is was [sic] in the Air Force and grew up in Fox River Grove. McNeely testified that he did not circulate sheet 104 and that he had never been in the air force and did not grow up in Fox River Grove. (Tr. 192-193)

McNeely was also asked about Objector's Exhibit 27, the affidavit of Raymond Haakonsen. He also identified McNeely as the circulator of sheet 104, the sheet Haakonsen signed. His affidavit indicated that "the reason I remember who was present was that he lived down the block and went to school around here..." McNeely testified that he never lived down the block and did not go to school around there. (Tr. 193-194).

THE TESTIMONY OF JIM THACKER

Jim Thacker ("Thacker") was called to testify by the Objector and was asked to identify pictures contained in Objector's Exhibit 3. He identified the pictures as having been found on the internet. He further testified that he cropped and edited the pictures so that they could be used in the Objector's affidavits. He indentified the persons in the photos as Alan Hill, Garret Hill, Nicholas McNeely and Tina Hill.⁴ (Tr. 78-92).

THE TESTIMONY OF TIMOTHY CORR

The Candidate called Timothy Carr ("Carr"). Carr testified that he signed the Candidate's nominating papers at sheet 40, line 8 of the Candidate's nominating

⁴ The Candidate raised issues regarding copyright infringement which this Hearing Officer deemed not relevant in this case.

papers. Corr further testified that he was handed the petition by Garret Hill at the Cary Grove Fire turkey raffle and that Garret Hill was present when he signed the petition. They were having a few beers at the time he signed. (tr.70). According to Corr, Alan Hill was also at the table, a couple of feet away. (Tr. 72).

Corr testified that he signed an affidavit. His affidavit, Objector's Exhibit 22, indicated that Garret Hill handed him the petition that Tina Hill was not present when he signed and that Alan Hill was not present when he signed. Corr could not recall the conversation that he had when he signed the affidavit. He did, however, acknowledge that while the affidavit said Alan Hill was not present when he signed the nominating papers, Alan Hill was in fact present.

During much of his testimony, Corr could not recall a number of matters. He also seemed confused. Below is an excerpt of his testimony.

Q. You're not sure who put the sheet number
1 and the line number?

2 A. No, I'm not sure. Was it you? There was
3 a private investigator that came to my house. Is
4 that what we're talking about?

5 Q. The question is, who was the one who
6 filled in the blank?

7 A. Oh, I can't tell you that. I don't know
8 that for sure.

9 Q. Okay. Look at Question Number 2. Who was
10 the one who circled the word "was" in that
11 question?

12 A. Again, I can't tell you. This may have

13 been -- I don't know. I can't recall that. I
14 don't remember him circling it right then and
15 there. I just remember meeting with him talking
16 about the petition and signing it.

17 Q. Do you remember the investigator or the
18 notary doing any writing on this document?

19 A. I can't recall that either, to be honest
20 with you.

21 Q. Okay.

22 A. You look like him by the way. I thought
23 it was you actually. Very similar to the
24 investigator that came to my house. I thought it
1 was you when I walked in the door.

2 Q. Okay.

3 A. But I don't know.

4 Q. Much younger guy. Even fatter than me.

5 MR. COUNTRYMAN: That's debatable.

6 BY MR. MEANS:

7 Q. Maybe. On Question Number 3, who circled
8 the "was not"?

9 A. The person whose photograph appears in
10 this page, that's Person A, that's Garret, right,
11 was not present when I signed the petition. I
12 don't know, but I wouldn't have signed that if I
13 had known what I was particularly reading.

14 Q. Person A is down below. That's Tina.

15 A. Oh. I don't know who circled it, but I
16 don't remember seeing her there either.

17 Q. And Number 4 says Person B was not there?

18 A. Yeah, he was.

19 Q. Who circled that?

20 A. I don't recall who circled that, to be
21 honest with you. I don't know who circled that.
22 But if I did it, and I don't think I did because it
23 doesn't even look like my handwriting. I don't do
24 circles like that. He was definitely there.

1 Q. Now who filled in the blank for Number 5,
2 I know him, His name is Garret?

3 A. You know what, I don't know who did that.
4 But that's definitely not my writing, let's put it
5 that way. That's not how I write.

6 Q. Okay.

7 A. But I may have stated that because I know
8 his name is Garret. I have met him before at other
9 political events, let's say.

10 Q. Okay. But on Number 4, you're not sure
11 who it was who circled the "was not"?

12 A. I don't recall. I don't remember seeing
13 anyone circle or fill in any of this, to be honest
14 with you. I don't recall anyone filling in these
15 specific . . .

16 Q. Nothing further.

17 A. As far as I signed it, though, to be quite
18 honest with you because I would not have signed
19 Number 4 like that. It might not have been filled
20 in, frankly, actually, if I signed that. If I read
21 the whole thing, I would have definitely not agreed

THE AFFIDAVIT OF KAYE KREHER

At the end of the hearing, the Candidate, without prior notice to the Objector, tendered the affidavit of Kaye Kreher (Kreher) which was marked as Candidate's Exhibit 5. The Kreher affidavit was provided to the Candidate's attorneys by Rebecca Lee, the attorney for circulators Alan Hill and Garret Hill. (Tr. 196). According to the Kreher affidavit, Kreher was the signer of the Candidate's nominating petition at sheet 10, line 1. She signed the petition at the Fox River Grove Turkey Raffle. Someone who was with a person she knew by the name of Dan Shea presented the petition to her. She did not have an independent recollection of what the person who was with Mr. Shea looked like.

Kreher was also the signer of an affidavit submitted by Objector as Exhibit 22. With respect to Exhibit 22, the current affidavit provided that Kreher was approached at her home by two individuals who asked her to confirm her signature on the nominating papers of Kent Gaffney and that she believed that by signing the affidavit she was attesting to her signature on the nominating papers only. She did not recall making the circles on it and did not mean to attest that the pictured individuals were not present. The affidavit further provided that if the statements contained therein were contrary to the affidavit submitted by Objector, the statements of the current affidavit should control "and overrule any prior affidavit." (Page 2 of Candidate's Ex. 5).

Summary of Objector's Arguments

The Objector argued that the affidavits were known to the Candidate weeks before the hearing and that the affidavits were largely unrebutted. The testimony of Timothy Corr was equivocal at best. The affidavit of Kaye Kreher was also equivocal and was essentially "sprung" on the Objector's counsel at the evidentiary hearing. While the Candidate had the affidavits that the Objector was submitting for weeks prior to the hearing, the Kreher affidavit was never disclosed to the Objector and Objector had no notice as to its contents. Moreover, the testimony of the circulators was inconsistent. Additionally, in light of the unanticipated testimony of Timothy Corr as well as the affidavit of Kaye Kreher, Objector contends that he should be entitled to subpoena all of the affiants as witnesses, bring in the other investigator and notaries who gathered affidavits and bring in a handwriting expert to authenticate the writing on Timothy Corr's affidavit.

Summary of Candidate's Argument

The Candidate argued that the evidence did not, in any way, demonstrate a pattern of fraud or a conspiracy between the circulators. The Candidate further argues that the affidavits are inherently unreliable because the photographs suggest responses. The Candidate also takes issues with the affidavits because the affiants were asked questions about who circulated and who handed them the petitions which is inconsistent with the law regarding circulating as reflected in the case of *Moscardini v County Officers Electoral Board of DuPage County* 224, Ill. App. 3d 1059, 590 N.E.2d 84 (2nd Dist. 1983). In *Moscardini*, the Court determined that Section 7-10 of the Election Code required only that the person who signs the circulator's affidavit be present when

each signatory signs the sheet. The testimony of Timothy Corr, the affidavit of Kaye Kreher and the testimony of Nicholas McNeely established that the affidavits were confusing and in some instances simply wrong. Moreover, the condition under which the affidavits were gathered renders them unreliable in that it was dark and cold and the affidavits were completed quickly. Additionally, the testimony of the circulators was credible and contradicted the content of the affidavits. Finally, many petition signers signed at turkey raffles where it was crowded and where alcohol was being served.

DISCUSSION

The Candidate raised reasonable issues regarding the affidavits. The circumstances under which they were gathered were not ideal in that it was cold and dark. The affidavits contained pictures that may have tended to suggest an answer. There were some mistakes made on the affidavits as to sheet and line and as to why a circulator was recognizable to an affiant. However, while there may have been some problems with the affidavits, they were not so overwhelming as to render the affidavits wholly unreliable as the Candidate contends. Indeed, the evidence of problems with the affidavit process was unpersuasive at best. For example, the testimony of Timothy Corr, the only affiant whose live testimony was offered by the Candidate, established that Mr. Corr remembered little about the affidavit signing process and that he was confused about the identity of the investigator, having confused the investigator with counsel for the Objector. The other evidence presented by the Candidate to attack the Objector's affidavits was the affidavit of Kaye Kreher. While the affidavit indicated that she was confused when she signed the original affidavit, it is unclear how the subsequent affidavit was obtained and why such affidavit was provided by the attorney

for circulators Alan Hill and Garret Hill. Moreover, the existence of the Kreher affidavit was not made known to the Objector until the end of the hearing which precluded the Objector from cross examining her or making further inquiry as to the circumstances of both of her affidavit signings. The testimony of Nicholas McNeely served to establish that two affiants may have been confused about his identity.

The totality of the evidence presented by the Candidate to attack the reliability of the affidavits was minimal. In order for the Candidate's evidence to be persuasive, one would have to engage in extensive extrapolation. In other words, one would have to conclude from the testimony of two witnesses and an affiant, that each and every one of the affiants were confused by the questions on the affidavits, or misled by the pictures, or could not adequately see the pictures contained thereon, or that their original recollection was incorrect, or that the atmosphere in which they signed the nominating papers made it impossible for them to know who was actually present or that they were inebriated and that their memories were impaired when they signed the nominating papers.

There was simply an insufficient amount of evidence submitted by the Candidate to justify the drawing of such conclusions as to all of the affidavits. Therefore, the Candidate, in my opinion, failed to adequately rebut the sworn statements contained in the Objector's affidavits.

Unlike the Objector in this case, the Candidate had notice of all of the Objector's evidence weeks in advance. As the Objector has suggested, the Candidate could have brought in all of the affiants as their identities were known from the first hearing date. He could have submitted contrary affidavits explaining the problems with the Objector's

affidavits. With respect to thirty-nine (39) affidavits submitted by the Objector, the Candidate inexplicably did none of these things.

While the circulators appeared to be credible witnesses, there was one significant instance where the testimony of Alan Hill and Garret Hill was wholly inconsistent. Circulator Alan Hill testified that he sometimes would hand the petition sheet to his son Garret Hill and that Garret Hill would then hand the sheet to a signer while the signers were also in Alan Hill's presence. The testimony of Timothy Corr seemed to suggest that that was the case when he signed the petition. However, Garret Hill testified that this **never** happened. If it had, it may have at least explained why some of the affiants swore that they were handed the petition sheet by Garret Hill even though Alan Hill signed as circulator. It may have even helped to establish that even if some of the petition signers may not have seen Alan Hill, Alan Hill could have seen them sign. If that was the testimony of both Garret Hill and Alan Hill, it may even have helped to establish that the circulation process was within the *Moscardini* interpretation of circulation. However, according to Garret Hill, this could **not** have happened because he **never** handled his father's petition sheets except to turn them in to Nicholas McNeely.

In my opinion, the inconsistent testimony of circulators Alan Hill and Garret Hill along with the confused testimony of Timothy Corr and the questions regarding how the affidavit of Kaye Kreher provided little assistance to the Candidate. Although the affidavits may have been gathered under less than ideal circumstances, the Candidate failed to establish that they were lacking in veracity. Accordingly, it is my opinion that the Objector successfully established that while Alan Hill signed certain sheets as

circulator, he was neither the person who handed those sheets to the signer nor was he present when some of the petition signers affixed their signatures to those petition sheets. The Objector's affidavits establish this fact as to sheets 10, 11, 12, 13, 14, 21, 29, 30, 34, 40, 41, 42, 43, 72, 73, 74, 79, 103, 104 and 105 and each of these sheets, in my opinion, must be stricken because they contain a circulator's oath that could not have been truthful.

The number of signatures remaining on these sheets after the records examination was 138. By striking these sheets, the number of valid signatures remaining in Candidate's nominating papers is 660, which is 160 more than the required minimum of 500.

The final question that arises as a result of the foregoing is whether or not there was sufficient evidence to establish that circulator Alan Hill engaged in a pattern of fraud and false swearing and whether circulator Garret Hill and circulator Nicholas McNeely engaged in a conspiracy which warrants the striking of all of their petitions. In my opinion, a pattern of fraud has not been established and such action is not warranted under the cases of *Fortas v Dixon*, 122 Ill. App.3d 697, 462 N.E.2d 615 (1st Dist. 1984); *Huskey v Municipal Officers Electoral Board*, 156 Ill. App. 3d 201, 509 N.E.2d 555 (1st Dist. 1987); *Canter v Cook County Officer Electoral Board* 170 Ill. App. 3d 364, 523 N.E. 2d, *Huskey v Municipal Officers Electoral Board*, 156 Ill. App.3d 201, 509 N.E.2d 555 (1st Dist. 1987); *Canter v Cook County Officers Electoral Board*, 170 Ill. App. 3d, 364, 523 N.E.2d 1299 (1st Dist. 1988).

The evidence established that Alan Hill did not circulate some of the sheets or parts of some of the sheets even though he signed as circulator on those sheets.

However, the record is devoid of any basis which would warrant the striking of any additional sheets of Alan Hill or any other circulator and there simply is no case law to support such an action.

RECOMMENDATION

In light of the foregoing, it is my recommendation that the objections of David McSweeney be **overruled** in conformity with the results of the records examination and the results of the evidentiary hearing. It is my further recommendation that the nominating papers of Candidate Kent Gaffney be deemed **valid** and that the name of Candidate Kent Gaffney for the Republican nomination to the office of Representative in the 52nd Representative District **be** printed on the ballot at the March 20, 2012 General Primary Election.

Respectfully submitted,

Barbara Goodman /s/
Barbara Goodman
Hearing Officer
1/22/12