

BEFORE THE STATE BOARD OF ELECTIONS
STATE OF ILLINOIS

In the Matter Of:)
)
David W. Cooke,)
Complainant,)
) 16 CD 093
v.)
)
Committee for Frank J. Mautino,)
Respondent.)

NOTICE OF FILING

To: Ken Menzel (kmenzel@elections.il.gov)
Anthony Jacob (tjacob@hinshawlaw.com)
Sergio Acosta (sacosta@hinshawlaw.com)

Please take notice that on May 24, 2017, we filed with the Illinois State Board of Elections General Counsel Ken Menzel Complainant's Motion to Reconsider Final Order on Complaint, a copy of which is hereby served on you.

CERTIFICATE OF SERVICE

I, Jeffrey Schwab, an attorney, certify that on May 24, 2017, I caused the foregoing document to be served by electronic mail.



Jeffrey Schwab

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**COMPLAINANT’S MOTION TO RECONSIDER
FINAL ORDER ON COMPLAINT**

Complainant files this motion to seek reconsideration – as provided by 26 Ill. Adm. Code 125.440 (2015) – of the Illinois State Board of Elections’ Final Order on Complaint issued May 18, 2017 (“Order”). The Order found that the Respondent Committee for Frank J. Mautino (“Committee”) filed disclosure reports that were insufficient with regard to documentation, amount, and accuracy of reported expenditures to Spring Valley City Bank (“Bank”) and Happy’s Super Service Station (“Happy’s), but the Order – despite being labeled a Final Order – did not address the Complaint’s allegations that the Committee made prohibited expenditures by paying for gas and repairs of vehicles not owned or leased by the Committee and making expenditures in excess of fair market value under 10 ILCS 5/9-8.10. The Board is required and empowered to address the Complaint’s charges about prohibited expenditures made by the Committee under the Election Code and the Administrative Code.

I. Facts

On February 16, 2016, Complainant David W. Cooke filed a complaint with the Board challenging expenditures the Committee reported that it made to Happy’s and the Bank. The Complaint alleged violations of the Illinois Election Code, including but not limited to violations of 10 ILCS 5/9-7 for failure to keep detailed accounts and records of the full name and address of

every person to whom an expenditure was made, the date, and amount; and proof of payment for each expenditure and violations of 10 ILCS 5/9.8-10 for expenditures in excess of fair market value of the services, materials, facilities, and other things of value received.

On April 29, 2016, the Hearing Officer issued his recommendation following the closed preliminary hearing, finding that the Complaint was filed on justifiable grounds, denying Respondent's motion to strike and dismiss, and recommending that the matter proceed to a public hearing. On May 18, 2016, the Board adopted the Hearing Officer's recommendation finding justifiable grounds for the complaint. Neither the Hearing Officer's April 29, 2016 recommendation, nor the Board's May 18, 2016 order dismissed, set aside, or removed the Complaint's allegations of violations of 10 ILCS 5/9.8-10.

The Board's May 18, 2016 order also ordered the Committee to file amended reports, no later than July 1, 2016, that would: (1) provide an accurate breakdown between expenditures for gas and repairs at Happy's, and indicate whether the vehicles involved in each itemized expenditure to Happy's were owned or leased by the Committee or privately owned; and (2) identify the actual recipient and purpose of each itemized expenditure reported as a payment to the Bank. The Board extended the Committee's deadline to file amended reports by July 1, 2016 twice: on June 15, 2016, the Board extended the deadline to July 13, 2016, and on July 13, 2016, the Board extended the deadline to July 25, 2016. The Committee never filed amended reports as ordered by the Board.

Complainant issued discovery requests and sought subpoenas for documents for Frank Mautino, Committee treasurer Patricia Maunu, Happy's, and the Bank. Complainant also sought subpoenas for depositions of Mautino and Maunu. Mautino submitted a declaration stating that, if subpoenaed to testify at a deposition, he would assert his Fifth Amendment privilege to any

and all questions asked. In response, the Hearing Examiner recommended, and the General Counsel of the Board agreed, that the subpoena for deposition to Mautino should not be issued. The Board did issue a subpoena to Maunu, who was then deposed.

The Hearing Officer held a public hearing on April 20, 2017. The Hearing Officer expressed his understanding that the only issue to be determined at the hearing was whether the Committee was justified in not complying with the Board's May 18, 2016 order requiring the Committee to file amended reports – not the merits of Complainant's complaint. Counsel for Complainant objected to limiting the public hearing to this narrow issue. And notwithstanding the Hearing Officer's statement, the parties provided evidence, testimony, and argument at the public hearing related to both the narrow issue and the substantive issues in the Complaint.

On May 5, 2017, the Hearing Officer issued his recommendations following public hearing. The Hearing Officer recommended that the Board find: (1) with respect to the records prior to 2014, the Committee had not willfully violated the Board's May 18, 2016 order because those records were lawfully destroyed; (2) with respect to the Board's order seeking information on whether the Committee owned or leased any vehicles, that the Committee had not willfully violated the Board's May 18, 2016 order because Treasurer Patricia Maunu testified in a deposition – taken by Complainant on March 21, 2017 – that the Committee never owned or leased any vehicles; and (3) that the Committee had willfully violated the Board's May 18, 2016 order with respect to expenditures in 2014 and 2015.

The Board considered the Hearing Officer's recommendation at its meeting of May 15, 2017. At that meeting, counsel for Complainant requested that the Board address the substantive issues alleged in the Complaint – specifically that the Committee has made prohibited expenditures under 10 ILCS 5/9.8-10. But the Board entered a Final Order addressing only the

question of whether the Committee willfully failed to comply with its May 18, 2016 order, agreeing with the Hearing Officer that the Committee had not willfully failed to comply with its order with respect to reports before 2014 because those records had been lawfully destroyed, and that the Committee had willfully failed to comply with its order respect to reports from 2014 and 2015. The Final Order did not, however, adopt the Hearing Officer’s recommended finding that the Committee was not willful in failing to comply with the part of the order requiring it to state whether the Committee owned or leased any vehicles and instead found that the Committee’s failure to do so was a willful violation of its May 18, 2016 order.

II. Argument

A. The Election Code requires the Board to address all of the allegations in the complaint that were found justified and not dismissed.

The Board cannot conclude this matter after only addressing the Committee’s failure to comply with an order to amend its reports. The Election Code requires it to consider and rule upon the merits of the complaint.

Any person may file a complaint alleging a violation of Article 9 of the Illinois Election Code, which regulates the disclosure and regulation of campaign contributions and expenditures. 10 ILCS 5/9-20. When a complaint is filed, the Board must hold a closed preliminary hearing to determine whether the complaint has been filed on justifiable grounds. 10 ILCS 5/9-21. If the Board finds that the complaint has been filed on justifiable grounds, it must hold a public hearing before issuing a final order on the complaint. 26 Ill. Adm. Code 125.262 (2011). When the Board orders a public hearing, the Board must “appoint a Hearing Officer to conduct a public hearing *on the complaint.*” 26 Ill. Adm. Code 125.272 (2011) (emphasis added); see also 26 Ill. Adm. Code 125.320 (2011) (requiring public hearings to “be initiated once the Board has determined that a complaint alleging a violation of Article 9 has been filed upon justifiable grounds”). The

Board must then review the reports submitted by the Hearing Officer and the General Counsel, and any objections, briefs, or memoranda filed by any party to the hearing, before issuing its final order. 26 Ill. Adm. Code 125.420(a) (2011). The Board may hear oral argument, either in person or via conference call, before issuing a final order. *Id.*

In particular, when a complaint alleges prohibited expenditures under 10 ILCS 5/9.8-10, the Election Code requires the Board to investigate. 10 ILCS 5/9.8-10(b). The Board may levy a fine on any person who knowingly makes expenditures in violation of § 9.8-10 that shall “not exceed \$500 for each expenditure of \$500 or less and shall not exceed the amount of the expenditure plus \$500 for each expenditure greater than \$500.” *Id.*

B. The Board has not addressed all the allegations in the Complaint and therefore must do so now.

Here, the Board has not addressed the merits of the Complaint as the Election Code requires.

In its order of May 2016, the Board adopted the Hearing Officer’s recommendation denying the Committee’s motion to dismiss and concluding that the Complaint – which alleged violations of 10 ILCS 5/9-7 for failure to keep detailed accounts and records of expenditures and violations of 10 ILCS 5/9.8-10 for making prohibited expenditures – was filed on justifiable grounds. The Board also ordered that “[t]he matter proceed to a public hearing” unless the Committee provided “reports with sufficient detail” regarding expenditures at Happy’s and Spring Valley City Bank within 60 days.

It is undisputed that, after receiving extensions of its deadline, the Committee did *not* provide “reports with sufficient detail.” Therefore, by the terms of the Board’s May 2016 order (and the terms of the Board’s order of September 21, 2016, which denied a motion to stay and ordered a public hearing to “be held in this matter as expeditiously as possible”), the Hearing

Officer was required to hold a public hearing on the merits of the Complaint. And that is also what the regulations governing proceedings before the Board required: given the Board's conclusion that the Complaint was filed on justifiable grounds, the Hearing Officer was obligated to conduct a public hearing "on the complaint." 26 Ill. Adm. Code 125.272 (2011).

But the Hearing Officer did not do that. Instead, the Hearing Officer – based on his "interpret[ation of] the Board's instructions regarding the parameters of the Public Hearing" – limited the public hearing to whether the Committee willfully refused to abide by the Board's May 18, 2016 order. But neither the Board's May 2016 order nor its September 2016 order contained any "instructions" from the Board that so limited the public hearing.

Nonetheless, the Board, in turn, also declined to consider the merits when it considered the Hearing Officer's recommendations at its May 2017 meeting,¹ and it issued a Final Order that, like the Hearing Officer's recommendation, was limited to the question of whether the Committee's failure to amend its reports was willful.

Although the Board has styled its May 2017 order as "Final," that order cannot conclude this matter. Again, the Election Code and the regulations governing the Board require it to rule on the merits of the Complaint. The Board should have ruled on the merits at its May 2017 hearing because all relevant evidence was presented at the April 2017 public hearing and then before the Board.² Alternatively, if the Board does not believe that the merits were properly

¹ Members of the Board, including the Chair, stated at the May 2017 meeting that the merits were not before it. The Members' basis for that conclusion is not clear. If Members believed that Frank Mautino's invocation of his Fifth Amendment rights prevented the Board from considering the merits, that is incorrect; the Fifth Amendment might protect Mr. Mautino from testifying, but it does not protect his Committee from being subject to a ruling against it for violating the Election Code. The Fifth Amendment provides a right against self-incrimination, but does not prohibit prosecution with other incriminating evidence.

² Were the Board to find a violation of § 9-7 for failure to maintain accurate receipts and documents regarding expenditures (and/or § 9-11 for failure to accurately report expenditures), the remedy would require the Board to determine that those sections were violated and order the Committee to correct such

before the Hearing Officer at the April 2017 hearing – and therefore not properly before the Board at its May 2017 meeting – then it must order the Hearing Officer to conduct an additional public hearing on the merits.

C. The Board must consider the merits of Complainant’s charges under Election Code § 9-8.10 in particular.

Although the Board’s May 2017 findings might appear to rule on the merits of Complainant’s charge under Election Code § 9-8.10, the Board did not actually do so. In its twelfth finding, the Board stated:

12. The evidence presented at public hearing established that the Respondent violated Section 9-8.10 of the Illinois Election Code by filing disclosure reports that were insufficient with regard to documentation, amount and accuracy of reported expenditures to Spring Valley City Bank and Happy’s Super Service.

This finding misstates the law because § 9-8.10 does not, as the finding implies, govern disclosure reports or documentation of expenditures. Rather, § 9-8.10 provides a list of prohibited expenditures, including (relevant here) expenditures “[c]learly in excess of the fair market value of the services, materials, facilities, or other things of value received in exchange,” 10 ILCS 5/9-8.10(a)(2), and expenditures to “insure, maintain, and repair a motor vehicle” that is not owned or leased by the Committee, and instead requires the Committee to reimburse persons using vehicles not purchased or leased by a committee “for actual mileage.” 10 ILCS 5/9-8.10(a)(9). Disclosure and documentation of expenditures are addressed in §§ 9-11(a)(12) and (13), which require that each report provide the full name and mailing address of each person to

violations. If the Committee failed to comply with the order to correct then, the Board could impose a fine of up to \$5,000. 10 ILCS 5/9-23. Since the Board’s May 2017 order finding the Committee in willful violation for failing to amend its reports and fining the Committee \$5,000 is similar to the remedy sought by Complainant for violations of §§ 9-7 and 9-11 (albeit without an explicit determination that the Committee violated those sections), Complainant focuses on its request that the Board address the merits of its charges that the Committee made prohibited expenditures in violation of § 9.8-10.

whom expenditures, including those for personal services, salaries, and reimbursed expenses, have been made by the committee within the reporting period in an aggregate amount or value in excess of \$150; the amount, date, and purpose of each of those expenditures; and the question of public policy or the name and address of, and the office sought by, each candidate on whose behalf that expenditure was made.

Therefore, although the Final Order does reference § 9-8.10, the Board did not actually rule on the merits of Complainant's charges that the Committee made expenditures to Happy's and purported expenditures to the Bank that were prohibited by § 9-8.10. Complainant substantiated those charges at the April 2017 public hearing and in his brief, but neither the Hearing Officer nor the Board addressed them – even though it never dismissed them and therefore is required to rule on them.

Complainant therefore requests reconsideration of the Board's Final Order so that the Board may consider and rule on the merits of Complainant's charges that the Committee made expenditures prohibited by § 9.8-10 and impose an appropriate penalty as the Code authorizes.

III. Conclusion

The Election Code and the Administrative Code provisions that govern proceedings before this Board require the Board to consider and rule on the merits of Complainant's charges against the Committee for Frank J. Mautino. Because the Board did not do so in its Final Order, Complainant respectfully requests that the Board reconsider that Order and either rule on the merits of Complainant's charges or direct the Hearing Officer to hold a Public Hearing on the merits.

Dated: May 24, 2017.



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