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Elections—When does an arrearage make a person ineligible for an elective municipal office?

By John H. Brechin, Addison

Two recent cases have addressed questions concerning eligibility to run for political office and provide welcome guidance to municipal electoral boards which have to rule on objections raising these issues.

The first case, *Cinkus v. Village of Stickney Municipal Officers Electoral Board,* was decided by the Illinois Supreme Court on March 20, 2008.

Cinkus was issued a citation in April 2006 for disorderly conduct in violation of a Stickney ordinance. In May 2006, an administrative hearing was held on the citation. Cinkus appeared and contested the charge. The hearing officer found Cinkus liable and ordered him to pay a fine of $100. Cinkus failed to pay the fine and, in November 2006, the Village entered judgment against Cinkus for the fine. Cinkus later filed his nomination papers for village trustee in February 2007. An objector challenged his petition objecting to his candidacy invoking Section 3.1-10-5(b) of the Illinois Municipal Code. That statutory provision provides:

(a) A person is not eligible for an elective municipal office unless that person is a qualified elector of the municipality and has resided in the municipality at least one year next preceding the election.

(b) A person is not eligible for an elective municipal office if that person is in arrears in the payment of a tax or other indebtedness due to the municipality of has been convicted in any court located in the United States of any infamous crime, bribery, perjury, or other felony.

(c) A person is not eligible for the office of alderman of a ward unless that person has resided in the ward that the person seeks to represent, and a person is not eligible for the office of trustee of a district unless that person has resided in the municipality, at least one year next preceding the election of appointment, except as provided in subsection (c) of Section 3.1-20-25, subsection (b) of Section 3.1-25-75, Section 5-2-2, or Section 5-2-1." 65 ILCS 5/3.1-10-5 (West 2006)."

The objector claimed that Cinkus was ineligible to be elected as trustee for the Village. In his motion to dismiss, Cinkus alleged that he wrote a check payable to the Village for the $100 and dropped it off at the Village's business office around February 16, 2007. The Municipal Officers Electoral Board held a hearing on the objections over two dates. Cinkus, at the hearing, argued that the statute limits eligibility to the office but does not limit candidacy for that office. In other words, Cinkus' argument was that he could run for office even with a debt to the municipality and that the statute only applied to determine, if elected, whether he could serve. The Electoral Board found his nomination papers to be invalid and ordered that his name not be printed on the ballot for the April 17, 2007 election.

Cinkus then filed a petition for judicial review in the circuit court. The circuit court set aside the Board's decision and ordered his name to be placed on the ballot. After that, the objector then appealed and the appellate Ccurt found that Cinkus being in arrears to the municipality precludes his eligibility to run for municipal office. This was an unpublished opinion but was subsequently re-filed as a published opinion, 373 Ill. App. 3d 866.

In reaching a decision, the appellate court considered a series of cases

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involving the disqualifications of felons from municipal office and noted that the disqualifying language in the statute is the same for both felons and debtors and should be applied consistently. It further found that if a prior felony conviction is a bar to a candidate's eligibility to run for office, then it follows that the legislature intended that being in arrears of a debt to the municipality also precludes eligibility to run for office. The Supreme Court, in its opinion, first noted that the sole question presented involves the interpretation Section 3.1-10-5(b) of the Illinois Municipal Code. It then evaluated whether the claim was moot since the election had already occurred. Its opinion noted that there is an exception to the mootness doctrine which allows a court to resolve an otherwise moot issue if that issue involves a substantial public interest. The criteria to find in favor of the public interest exception are:

1) if the question presented is of a public nature
2) an authoritative resolution of the question is desirable to guide public officers, and
3) the question is likely to recur.

The Supreme Court found that the *Cinkus* case meets this test.

To the Supreme Court, the case hinged on the meaning of the word "eligible." In finding in favor of the decision of the Electoral Board, the Court found that Cinkus was ineligible to hold office according to the plain language of the statute and that the language "clearly compels a connotation to disqualify those who are unqualified to run for office." In arriving at its decision, the Supreme Court also noted the importance of Section 10-5 of the Election Code which provides for a statement of candidacy as a mandatory element of valid nomination papers. Therein, there is an affidavit where the candidate states that "I am legally qualified to hold such office." Since, at the time he filed his nomination papers, Cinkus had not satisfied his debt to the municipality, that statement was false. Since the statement of candidacy and the accompanying oath are mandatory requirements, Cinkus was ineligible to either run for the office or hold the office. The statutes together disqualify a candidate and render that person ineligible to run for the office if the disqualifications are not remedied before the time the candidate files his or her nomination papers. The second case, *Reynolds v. Champaign County Officers Electoral Board*, No. 4-08-0020, was decided by the Fourth District Appellate Court in an opinion filed January 24, 2008.

Reynolds had filed a written objection to the nominating petition so the defendant, Brendan McGinty, a Democratic candidate for the office of Champaign County Board District No. 9. The Electoral Board voted two to one in favor of the candidate and overruled the objection and on appeal to the Circuit Court, the Circuit Court reversed the Board's decision. The issue involved whether a defendant substantially complied with the requirements of Section 7-10 of the Election Code, which requires nominating petitions to be consecutively numbered.

Section 7-10 of the Election Code provides in relevant part that "such sheets before being filed shall be neatly fastened together in book form, by placing the sheets in a pile and fastening them together at one edge in a secure and suitable manner and the sheets shall then be numbered consecutively."

A majority of the Electoral Board held that the consecutive number was directory and not mandatory and alternatively, even if the provision was mandatory the petition was in substantial compliance with the statute.

In reaching its decision, the appellate court relied on earlier case law including *Williams v. Butler,* 35 Ill. App. 3d 532 (1976) and *Bowe v. Chicago Electoral Board*, 79 Ill. 2d 469 (1980). Before reaching its decision, the Court reviewed the purposes of the statute and noted that two purposes of it are to allow people to identify specific pages of a petition and to refer to information contained therein by reference to a page number and also to prevent tampering, thereby preserving not only the integrity of the petitions but also the election process in general. Under *Madden v. Schumann*, 105 Ill. App. 3d 900 (1982) substantial compliance with the code is acceptable when the invalidating charge concerns a technical violation of the statute that does not affect the legislative intent to guarantee a fair and honest election.

The appellate court concluded that the decision of the Board overruling the objection should have been sustained by the trial court, especially given the limited number of pages involved (4) and the fact that the two pages at issue are easily identified by the name of the individuals who circulated them and the lack of any claim of possible voter confusion, tampering or fraud.

This and That

In the February newsletter we reported on the First District Appellate Court decision in *Pooh Bah Enterprises v. County of Cook* involving adult uses and First Amendment rights. The case presents a question as to whether a Cook Country ordinance that grants amusement tax exemption for small fine arts venues but denies that exemption for adult entertainment cabarets is Constitutional. The appellate court, in reversing the trial court, found that the exclusion of adult entertainment cabarets from the tax exemption violated the plaintiff's First Amendment rights by discriminating against adult entertainment establishments on the basis of the content of the amusements. The Supreme Court docket numbers for this are 105971 and 105984.

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Indemnification agreements enforceable for municipality's own negligence

By Maureen E. Riggs, Moline

On February 29, 2008, in the case of *Nicor Gas Co. v. Village of Wilmette*, 2008 WL 564138, the First District Appellate Court upheld the validity of indemnification agreements that indemnify a municipality for its own negligence if such agreements are clear and explicit.

Nicor Gas Company had an agreement with the Village of Wilmette to construct, operate and maintain a gas operation system in the Village by means of a 50-year easement. Part of the agreement provided that Nicor "shall indemnify, become responsible for and forever save harmless the Municipality from any and all judgments, damages, decrees, costs and expenses, including attorneys' fees, which the Municipality may legally suffer or incur, or which may be legally obtained against the Municipality, for or by reason of the use and occupation of any Public Place in the Municipality by the Grantee [Nicor] pursuant to the terms of this ordinance or legally resulting from the exercise by the Grantee of any of the privileges herein granted."

In 2003, a broken subterranean water main caused a puncture in Nicor's gas main, and thousands of tons of water from the Village's water system poured into the gas main causing extensive damage and gas outages to residents within a 10-mile radius. Nicor sued the Village for negligence for the property damage that occurred. After several rounds of amended pleadings and motions to dismiss, Nicor filed a seconded amended complaint alleging four counts: 1) negligent maintenance of the water system; 2) res ipsa loquitur; 3) breach contract for interfering with right to quiet enjoyment of the easement, which Nicor alleged was an implied terms of the contract; and 4) intentional trespass by means of the water leak entering Nicor's property. The Village filed a 2-615 motion to dismiss on the basis that the agreement with Nicor included a clause indemnifying the Village for any damage resulting from Nicor's occupation of the easement. The trial court granted the motion to dismiss, and the First District affirmed.

In its holding, the First District noted that Illinois law generally provides that contracts of indemnity are enforceable against one's own negligence as long as the indemnitor's obligations are set forth in clear and explicit language. The Court found that the "any and all" language in the agreement was not accompanied by any limiting language that would suggest that the indemnity provided was not intended to cover claims resulting from the Village's own negligence. Citing to the recent Illinois Supreme Court case of *Buenz v. Frontline Transportation Co.*, 2008 WL 217169 (January 28, 2008), the Appellate Court concluded that the express language of the agreement clearly and explicitly provided indemnification for the Village's own negligence, and thus, all of Nicor's claims were barred.

Reppert v. SIU: 4th District decision — A commentary

*By Phillip Lenzini, Peoria**

On August 15, 2007, the Fourth District Appellate Court filed its decision in the case of *Reppert v. Southern Illinois University*, 375 Ill.App.3d 502, 874 N.E.2d 905 (4th Dist. 2007) in a unanimous opinion authored by Justice Steigmann. Essentially the decision reversed the trial court's summary judgment on behalf of SIU in the Freedom of Information Act case seeking release of the employment contracts of several SIU employees. The decision reversed and remanded for further proceedings and has apparently not yet approached the attorney fees issue. S.I.U. decided not to seek leave to appeal to the Supreme Court.

Although the Fourth District Appellate Court may have a deserved reputation for its past logical analysis and rigorous reasoning, the decision in this case, in the author's view, is a poor example of any rigorous thought or serious analysis in reaching its conclusions, as this article will attempt to explain. In summary, the opinion fails to even mention, let alone cite, the pertinent Supreme Court case and makes only one fleeting reference to what has come to be known as the Supreme Court's "per se doctrine" when construing the Illinois Freedom of Information Act. Moreover, while the opinion concludes with a reference to the Third District Appellate Court's decision in *Copley Press v. Board of Education*, 359 Ill.App.3d 321, 834 N.E.2d 558 (3rd Dist. 2005), which had followed the Supreme Court precedent and applied the "per se doctrine," it does so simply in order for the Fourth District to say it "declines to follow" that opinion.

Although never referenced in the *Reppert* opinion, the Supreme Court's

decision in *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill.2d 401, 680 N.E.2d 374 (1997), established the "per se rule" under the Illinois Freedom of Information Act, applying the specific exemptions set forth in the subsections of Section 7(1)(b) of the Act. The specific per se exemption involved in all three cases was that found in Section 7(1)(b)(ii) covering:

> Personnel files and personal information maintained with respect to employees, appointees, or elected officials of any public body or applicants for those positions….

Further, under the "per se rule" the application of such specific exemptions is to be governed by whether or not the requested documents fall within one of the specifically enumerated categories and, if it is, as the Supreme Court says in *Lieber*, "the inquiry is over."

Instead of discussing at any length the per se rule, the *Reppert* court essentially relies on the general and overriding purpose of FOIA to open governmental records to the light of public scrutiny and essentially applies that legislative intent regardless of the exemptions of the statute, the specific legislative language of the exemptions, or any analysis thereof. In that way, the Fourth District's "analysis" actually confuses the portion of Section 7 commonly referred to as the "balancing test" that applies to the non-per se exemptions, with the previously identified "per se" exemptions. In fact the emphasized language in the court's opinion that: "the disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy" is actually included precisely in the context of the "balancing exemptions" and pertains thereto, not the "per se" exemptions.

In Section 7(1)(b), the legislature had initially set out a general exemption from inspection and copying where "information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information." Under that exemption language, both the government and reviewing courts are to essentially balance whether the information would indeed constitute a clearly unwarranted invasion and, therefore, the emphasized statement by the legislature quoted above bears on such a balancing analysis. However, as the *Lieber* court and the *Copley* court make clear, such a "balancing" exemption is separate and independent from the per se exemptions listed by the legislature. Unfortunately, the *Reppert* court never apparently comprehends this dichotomy in spite of the fact that both the trial judge and the government defendant in that case were focused solely on the per se exemption and never asserted the "balancing" exemption of personal privacy.

While it may be entirely proper, or at least procedurally correct, for the Appellate Court Fourth District to decline to follow its brethren on the Appellate Court Third District's decision in *Copley Press*, under our procedures, it definitely does not have such latitude when confronting the Supreme Court's precedents in cases such as *Lieber* which established the per se doctrine. To not cite, consider and attempt to distinguish the *Lieber* analysis or the per se doctrine is an unfortunate circumstance for both governmental units and FOIA requesters and serves only to further confuse the kind of rigorous analysis the statutory language deserves.

The great irony in the *Reppert* decision is that the very result the court attempts to achieve (i.e., reversal and remand) would have been available had a rigorous analysis and proper depiction been utilized in the opinion. For instance, the court could well have said that the employment contracts sought by the FOIA request were claimed exempt under the per se exemption language of 7(1)(b)(ii) and that the inquiry as to the exempt status would normally end (consistent with *Lieber's* approach). However the court's analysis could then have properly focused on the real threshold issue for the per se exemption being the specific question of whether the "personnel file and personal information" exemption properly covers, or includes within its reach, the types of documents sought. While in the *Copley Press* case the trial court had concluded that the employee's performance evaluations and letter were not invasive of personal privacy, (i.e., the "balancing" exemption, even though not raised by the parties) it had not decided whether they were properly contained within the personnel file. Like the Fourth District court here, the *Copley* trial court made essentially the same analytical mistake as it totally misunderstood or ignored the per se doctrine's applicability. On review,

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OFFICE
Illinois Bar Center
424 S. 2nd Street
Springfield, IL 62701
Phones: (217) 525-1760 OR 800-252-8908

Web site: www.isba.org

Editor
John H. Brechin
619 S. Addison Rd.
Addison, 60101

Managing Editor/Production
Katie Underwood
kunderwood@isba.org

Postmaster: Please send address changes to the Illinois State Bar Association, 424 S. 2nd St., Springfield, IL 62701-1779.

the Appellate Court Third District did decide that such documents were "reasonably expected to [be] included" in the personnel file, and therefore under the per se exemption they were properly withheld, and under the per se doctrine the inquiry ended.

Whereas, the *Reppert* opinion indicates the statement by the Third District Appellate Court in *Copley Press* referencing "employment contract[s]" was broad dicta, it did not address whether or not employment contracts were properly within the per se exemption for personnel file and personal information, nor did the opinion furnish any logic or analysis as to how that conclusion can or should be reached. For all experienced practitioners and public bodies that struggle with construction of FOIA daily, the omission is not only glaring, it is truly regrettable, for the absence leaves all public bodies, and most FOIA requesters, who continue to grapple with the proper construction of the statute and its various exemptions without sensible judicial guidance on the point. A "point" one must readily agree is terribly elusive, since even a full panel of the Appellate Court Fourth District has missed it.

Instead, Justice Steigmann, relies on *CBS, Inc. v. Partee*, 198 Ill.App.3d 936, 556 N.E.2d 648 (1st Dist. 1990), for the proposition that "all information contained in a personnel file … simply because it is in a personnel file would permit a subversion of the board purposes of the [FOIA]." Therefore, the proper analysis as to whether or not the document requested is properly a part of the personnel file, or perhaps has been actually, physically located within the personnel file, is never addressed. Instead the court simply presumes use of the "personnel file" exemption to subvert the broad purposes of FOIA disclosure. The absence of any sensible analysis of the point of the exemption and its coverage is unfortunate. This question although alluded to in the *Reppert* decision is not at all discussed or adequately resolved. Certainly if the Fourth District Appellate Court determined that employment contracts were neither properly a part of the personnel file or, for some unstated reasons, were not properly limited to the personnel file and hence exempt, then the analysis of the status of employment contracts as per se exempt (or not) could be analyzed. As we are deprived of that analysis, statement of the precise question, and rigorous attention to a resolution of that question, the court's decision in *Reppert* is of far less value to attorneys, governments and FOIA requesters.

Perhaps in another case, as of yet unnamed, our Supreme Court will some day grant review and address the precise question which though properly raised in *Reppert* was never skillfully or fully addressed. Maybe then the Supreme Court, basing its review on fully addressing FOIA exemptions and the per se doctrine, will even consider whether employment contracts are properly a part of the personnel file and, therefore, that per se exemption, or, for whatever reasons (then developed in a rigorous analysis), those employment contracts are not limited to the personnel file and subject to disclosure. Such a decision would not only resolve the litigation presented therein, but also furnish a better guide as precedent for the future.

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* The author was the attorney for the government in the case of *Copley Press, Inc. v. Board of Ed.*, 359 Ill.App.3d 321, 834 N.E.2d 558 (3rd Dist. 2005).

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