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February 28, 2013

By e-mail to connie.mascillino@voislk.com

Hon. Connie Mascillino
Village of Island Lake
3720 Greenleaf Avenue
Island Lake, IL 60042

Re: Certification obligations upon receipt of facially insufficient, untimely resolution to fill vacancy

Dear Clerk Mascillino:

On February 25, 2013, you received a resolution filed on behalf of the "For the People Party" in the Village of Island Lake, purportedly filling a vacancy in nomination for the office of Mayor with a candidate previously stricken from the ballot by a local Electoral Board on February 4, 2013. That Resolution does not include a sworn statement indicating the date the Party selected the candidate to fill the vacancy. You have asked us whether you have a legal obligation to certify the name of a candidate under these circumstances. You have also indicated to us that you would like to stay out of the "politics" of the situation and that you are merely attempting to perform your legal obligations and functions as the Village's local election official. For the following reasons, we believe the Resolution is defective on its face and you have no legal obligation to issue an amended certification including the candidate's name.

I. Background Facts

On December 26, 2012, a group of candidates filed a petition forming a new political party in the Village of Island Lake, the "For The People Party" (the "Party"). The Party also filed a certificate of officers authorized to fill vacancies in nomination. On January 3, 2013, an objector filed petition to strike the Party's mayoral candidate (the "Candidate") from the ballot. On or before January 31, 2013, you transmitted ballot certifications to the Lake and McHenry County Clerks' offices indicating, among other things, there was an "objection pending" against the Candidate's nomination.

On February 4, 2013, the Electoral Board entered its final written decision, finding that the Candidate's statement of candidacy was false and invalid, and ordering that his name not be certified to the ballot. You submitted an amended certification to the county clerks on February 5, 2013 indicating the objection was no longer pending and removing the Candidate's name. The Candidate filed a petition for judicial review on February 5, 2013. The Candidate never sought a stay of the electoral board's decision before either the electoral board or the circuit court. Further, while the court entered a

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temporary restraining order against the Lake County Clerk (but not the McHenry County Clerk) from printing the ballots, the court never entered any order, at any time, restoring the Candidate to the ballot in both counties or overturning the electoral board's removal of the Candidate from the ballot. The Lake County Circuit Court ultimately dismissed the Candidate's petition for judicial review on February 19, 2013.

On February 25, 2013, the day before the Primary Election, the Party submitted to you a form entitled "Resolution to Fill a Vacancy in Nomination Occurring After Primary Election." The Party filed a Statement of Candidacy with you and a receipt for the filing of a Statement of Economic Interests, but did not file any other documentation with you regarding the actions of the Party, such as a notice of the Political Party meeting, meeting minutes, or any other documentation. While the Party obviously filed the incorrect form, such a problem could be overlooked if the form included the proper information as required by the statute. The Resolution does not specify, on its face, the date the Party selected the Candidate to fill the vacancy.

You have asked whether the Resolution is legally sufficient and whether it was timely filed. You have specifically inquired whether the Resolution is required to specify, on its face, the date the Party selected the Candidate to fill the vacancy. You have also asked whether the Resolution was timely filed. Finally, you have asked whether you have an obligation to certify the Candidate's name if the Resolution either: a) does not contain a date of selection as required by the Election Code or b) if it was not timely filed. You have been subjected to much criticism for seeking a legal opinion regarding your legal obligations and duties, and for not simply blindly certifying the Candidate's name without regard to the actual facts or law.

II. Failure to Include Date of Selection in Resolution

Section 10-11(c) of the Illinois Election Code, 10 ILCS 5/10-11(c), specifies that the resolution to fill a vacancy must include "upon its face" "the name and address of the nominee selected to fill the vacancy and the date of selection." See 10 ILCS 5/10-11 and 10-11(c) (emphasis added). The Illinois appellate court has held that the requirement that the resolution to fill a vacancy contain the date of selection is a mandatory requirement and has held that a resolution that does not specify a date of selection on its face is deficient. See Zerante v. Bloom Township Electoral Board, 287 Ill.App.3d 976 (1st Dist. 1997). In Zerante, the party filed a resolution that failed to include, on its face, the date of selection. The Party argued that the court should look at other dates in the resolution, such as the date the resolution was signed, to fill in that information although the date of selection was not specifically stated. The Zerante court rejected that argument.

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The same conclusion was reached by the appellate court in McSparin v. Saline County Electoral Board, 352 Ill.App.3d 352 (5th Dist. 2004). In McSparin, the candidate argued that two other dates on the petition should, “by implication,” be considered to be the applicable date. The court rejected this argument that a presumption could be made about what occurred on dates on the resolution.

It is clear from viewing the Resolution that it does not include any language whatsoever on its face indicating the date that the Party selected anyone to fill the vacancy. Instead, the Resolution states that a vacancy was created, the committee voted and the name of the nominated candidate. The Resolution contains three different dates within it – the date of the election, the date the court dismissed the petition for review, and a “date of meeting,” which is the same date the petition was signed. The Resolution does not specify what meeting it is talking about, nor that the Party met on a certain date to fill the vacancy, nor that the officers voted at a particular meeting on a particular date. In Zerante and McSparin, the court expressly stated, “We know of no case which holds that the events related in a signed document are presumed to have occurred on the date that the document was signed.” Zerante, at 979. Accordingly, without an express sworn statement on its face regarding the date the candidate was selected, the Resolution does not comply with the mandatory requirements of the Election Code.

As you are aware, the Election Code requires you, as the local election official, to certify the names of candidates in certain instances. 10 ILCS 5/10-15. In addition, Section 10-15 specifies that, “The local election official shall issue an amended certification whenever it is discovered that the original certification is in error.” Id. The statute does not specify a timeline within which you must issue an amended certification, but obviously there is a need to act quickly if an amendment is to occur, given the imminence of the ballot preparation for the April 9, 2013 election. Even though the Party waited 21 days to attempt to fill their vacancy, and the time line has not elapsed for an objector to file an objector’s petition, you are being urged to act immediately due to the ballot configuration issues.

Appellate court cases have clarified that municipal clerks must only certify the names of those candidates who have file nomination papers that are in apparent conformity with the mandatory provisions of the Illinois Election Code. See 10 ILCS 5/10-8 and North v. Hinkle, 295 Ill.App.3d 84 (2nd Dist. 1998) and Jenkins v. McIlvain, 338 Ill.App.3d 113 (1st Dist. 2003). Those cases have upheld the refusal of clerks to certify candidates who have filed nomination papers with, to summarize it, major defects which were apparent from the face of the filed materials.

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As you are aware, ballot access is a substantial right which should not be lightly denied. However, as the appellate court stated in the Zerante case, "It is true that Illinois courts favor ballot access for candidates who wish to run for public office. This does not mean, however, that mandatory requirements can be circumvented." 287 Ill.App. 3d 976, 980. You have indicated that you share our concern and that you do not want to disenfranchise the voters, but, on the other hand, you want to fulfill your legal obligations as the local election official by making sure that you only certify those candidates who have filed the proper paperwork in the appropriate legal fashion.

In the cases of North v. Hinkle, cited above, and Courtney v. County Officers Electoral Board, 314 Ill.App.3d 870, the appellate court has held that, when a candidate fails to follow a mandatory provision of the Election Code, the local election official does not have an obligation to certify the candidate's name. It is clear from the face of the Resolution that the Party filed with you that the Resolution is missing language that the statute requires and that the appellate court has deemed mandatory. Accordingly, you do not have a legal obligation to certify the names of the candidate for this reason alone.

III. Timeliness of Filing

Pursuant to Section 10-11 of the Illinois Election Code, a new political party must fill a vacancy in nomination occurring after certification but prior to 15 days before a regular election "within 8 days after the event creating the vacancy." On February 4, 2013, the electoral board issued a decision removing the Candidate from the ballot. On February 25, 2013, 21 days after the candidate was ruled off of the ballot by the electoral board, the Party filed the Resolution.

You have asked whether the "event creating the vacancy" is: 1) the date of the Electoral Board's decision striking the Candidate's name from the ballot; or 2) the date of the Circuit Court's decision dismissing the Candidate's petition for judicial review of the Electoral Board's decision for lack of subject matter jurisdiction.

A vacancy in nomination occurs when a nominated candidate dies before the election, declines the nomination, or for other reasons. 10 ILCS 5/10-2, 10-11. A vacancy in nomination for a new party may occur for "other reasons," including action by an electoral board. 10 ILCS 5/10-11. To fill a vacancy in nomination for a properly-formed new party, the party must timely transmit a resolution to the local election authority, along with a statement of candidacy and receipt for filing of a statement of economic interests. 10 ILCS 5/10-11. Compliance with the 8-day filing period is mandatory, as indicated by the use of the word "shall" and the provision of a penalty

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for noncompliance --- authorization to fill the vacancy with the original candidate. (Of course, in this case, the vacancy may not be filled with the original candidate because the Candidate's name was stricken by order of the Electoral Board).

The Electoral Board decision to strike the Candidate's name from the ballot was an event creating a vacancy in nomination that was required to be filled within 8 days of the event, February 12, 2013. The "event creating the vacancy" took place on February 4, 2013 because the Electoral Board's decision was final, appealable and binding. Therefore, if the Party had filed a Resolution on February 5, 2013, the act would have been valid and certainly, nobody would claim that there was not a vacancy to fill at that time.

The usual practice is for political parties to immediately act within the requisite 8 days of an adverse electoral board ruling to fill the vacancy created by the removal of a candidate. Then, if they successfully pursue judicial review, the vacancy is retroactively voided, as is any resolution filling the vacancy. Political parties do this to avoid the exact problem that has occurred in this instance, which is that their hesitation is a waiver of their ability to take action.

Some people contend that the filing of a petition for judicial review somehow "tolls" the statutory 8-day requirement. The statute does not state that the vacancy must be filled within 8 days of the act creating the vacancy unless a petition for judicial review is filed. We can find no case law that supports such a tolling, nor any case law that says that an electoral board's removal of a candidate from the ballot does not create a vacancy which may be filled. That is why political parties generally fill the vacancy simultaneously with seeking judicial review.

To the contrary, an obligation of the Party to fill the vacancy within the specified time period to protect their rights is supported by the Illinois Appellate Court's decision in Nelson v. Qualkinbush, 389 Ill.App.3d 79, 907 N.E.2d 400 (1st Dist. 2009). In Qualkinbush, two candidates were removed from the primary ballot by a municipal electoral board, and the board's decisions were affirmed on judicial review 62 and 63 days, respectively, prior to the election. The candidates quickly appealed the cases and, while the appeals were pending, they filed declarations of intent to be write-in candidates. Section 17-16.1 of the Election Code requires write-in declarations to be filed no later than 61 days before an election, unless an objection to a candidate's nomination papers is sustained by an electoral board, in which event the candidate removed from the ballot may file a write-in declaration no later than 7 days before an election. 10 ILCS 5/17-16.1.

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The objectors in Qualkinbush argued the appeals should be dismissed as moot because when the candidates filed their write-in declarations, they waived their right to seek partisan office such that the electoral board's decision regarding their partisan nomination papers no longer mattered. On the other hand, the candidates argued that they had to file their declarations 61 or more days before the election because they did not know whether the appellate court would reverse the board's decision. As such, they faced the possibility of not appearing on the ballot at all and they therefore had no choice but to file their write-in declarations 61 days before the election rather than 7 days before. The appellate court determined that the candidates took the proper actions by filing their write-in declarations while the appeals were pending to preserve their rights, and those actions would not have rendered their pending litigation moot. The appellate court held that prior case law "rejects the idea of a candidate appearing twice on a ballot, but does not foreclose a party who has appealed a sustained objection from appearing on the ballot as a write-in candidate should that candidate lose in court." *Id.* at 406.

Similarly, section 10-11 of the Election Code does not allow a candidate to appear twice on a ballot, but it does allow a new political party to fill a vacancy in nomination within 8 days of "the event creating the vacancy," whether or not the candidate also loses in court on judicial review. Following the clear language of section 10-11 and the guidance provided by the appellate court in its Qualkinbush decision, the Party should have filed its resolution to fill the vacancy within 8 days of the Electoral Board's decision to preserve their rights, even though the Candidate's petition for judicial was pending in the circuit court. As the appellate court expressed, the candidates in Qualkinbush would have lost their right to seek write-in candidacies had they not filed their declarations 61 or more days before the election, even though the appeals were pending. For that reason, the Party lost its right to fill this vacancy by not filing a resolution within 8 days of the electoral board's final and appealable decision.

In addition, all of the time lines under the Election Code exist for a reason – so that the ballot can be properly configured in order to meet all of the requirements for absentee ballots going out, early voting, etc. An example will demonstrate the unreasonableness of a position (that we can find no legal support for) that the "clock doesn't start ticking" for filing a vacancy until after a court issues a decision on judicial review. Say that an electoral board ruled on February 4th. A petition for judicial review needed to be filed within 5 business days (by February 11th). Pursuant to Section 10-10.1, a court "shall set the matter for hearing to be held within 30 days." So, the court could have ruled as late as March 13th on the matter. If a political party has 8 days from that date to fill the vacancy, that would require the resolution filling the vacancy to be filled by March 21. Objectors may then file a challenge to the resolution within 5 business days – March

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28. An electoral board would have to convene the first week of April, for an election occurring on April 9th. While that would be the time line if the court took action to initially remove a candidate from the ballot (for example, removing a candidate from the ballot who had been left on by the electoral board), there is no statute or case law specifying that a political party can simply ignore the express language of the statute and delay taking action to fill a vacancy by rolling the dice with judicial review.

Some people have also contended that the candidate was not removed from the ballot until the court issued its order dismissing the petition for judicial review for matters related to subject matter jurisdiction. That position is not supported by the facts. While a court certainly can remove a candidate on judicial review, in this situation, the Candidate was not removed from the ballot by action of the Court. The Candidate was removed by the act of the electoral board. The court dismissed the petition for judicial review of the electoral board's decision. That act did not create a vacancy. In fact, it took no action at all related to the vacancy that had been previously created by the electoral board.

It is a fundamental tenet of statutory construction that when the language of the statute is certain and unambiguous, it should be followed. If the General Assembly had intended for the 8-day period to be tolled by the filing of a petition for judicial review, the statutory language could say that. In fact, if quick timing was not required, the statute could have eliminated the 8-day time period altogether.

The Circuit Court's February 19, 2013 decision dismissing the Candidate's petition for judicial review was not an "event" creating a vacancy in nomination because: 1) nothing in the Election Code provides that the Candidate's filing of a petition for judicial review stays an electoral board's decision; and 2) the Circuit Court never had jurisdiction over the Candidate's petition. Further, the Candidate never requested a stay of the Electoral Board's decision, either from the Electoral Board or from the Circuit Court, at any time, which is a matter of public record in the court file.

In conclusion, a vacancy in nomination was created by the February 4, 2013 decision of the Electoral Board, and the Party was required to fill the vacancy in nomination within 8 days of that event, by February 12, 2013. Just as you have no legal obligation to certify the names of candidates who filed nomination papers with you after the December 26, 2013 filing deadline for candidate nomination papers, you have no obligation to certify the names of candidates who filed resolutions with you long after the February 12, 2013 deadline.

ANCEL, GLINK, DIAMOND, BUSH, DICIANNI & KRAFTHEFER, P.C.

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You have no legal obligation to certify the Candidate's name because the Resolution is not in apparent conformity with the mandatory provisions of the Election Code because it fails to specify, on its face, the date of selection and also because it was not filed in a timely fashion.

Please do not hesitate to contact me should you have any questions regarding this.

Very truly yours,

A handwritten signature in black ink, appearing to read "Keri-Lyn J. Krafthefer", with a long horizontal flourish extending to the right.

Keri-Lyn J. Krafthefer