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May 1, 2013

Mr. Robert T. Saar
Executive Director
DuPage County Election Commission
421 N. County Farm Road
Wheaton, IL 60187

Re: Canvassing Board Duties Regarding Canvass of
Votes and Proclamation of Election Results
Our File No. 97-114

Dear Executive Director Saar:

Recently, an issue has been presented relative to the election of the two (2) Trustee positions on the Regional Board of School Trustees ("Regional Board"). As you are aware, the Regional Board composition is set forth by State law 105 ILCS 5/6-2. In light of the vote totals for the recent Election, the Regional Board could have an over representation from one particular Congressional Township. We have engaged in a dialogue with the DuPage County States Attorney in connection with this matter, as the States Attorney's Office serves as the Attorney for the Regional Board. The issue relating to the DuPage County Board of Election Commissioners ("Board") is a determination as to the roll and responsibility of the Canvassing Board relative to the proclamation of results of the candidates duly elected. This opinion letter is designed to address that issue.

QUESTION PRESENTED

In regard to the Regional Board races in the recent April 9, 2013, Consolidated Election, a determination must be made as to the effect of the Canvassing Board's canvass of votes and proclamation of election results, as provided for in Section 22-18 of the Election Code. In particular it must be determined, whether the Canvassing Board's computation of the votes, declaration of the results and the issuance of Certificates of Election to the two (2) candidates receiving the most votes from the same Congressional Township, one in the race to fill the vacancy and the in one of the full-term race, would make both Candidates eligible to be proclaimed elected.

BRIEF ANSWER

Both Regional Board Candidates would be entitled to be proclaimed elected, upon the completion of the Canvass and their being issued Certificates of Election, in accordance with the results of the Canvass. In canvassing and proclaiming the results of the Regional Board elections, the Canvassing Board may not take into consideration the legal issue of the eligibility of the candidates to assume office based upon their residency in the same congressional township. The

Canvassing Board performs a mere ministerial task and only computes the votes cast and declares the results. The Canvassing Board has no right to go beyond the vote tally. Further, the Canvassing Board has no right or power to decide legal issues.

DISCUSSION

In regard to the canvassing and declaration of results in the Consolidated Election, Section 22-18 of the Election Code, 10 ILCS 5/22-18, provides in relevant part:

The canvass of votes and the proclamation of results by the election authority . . . shall be conducted in accordance with the procedures and requirements otherwise provided in this Article

The county clerk [in the instant situation, the Election Commission] shall make out a certificate of election to each person declared elected to an office by the election authorities and transmit such certificate to the person so entitled, upon his application.

The referenced “procedures and requirements otherwise provided in this Article,” which the Board is required to follow in the canvass of votes and proclamation of results, is set out principally in Section 22-7 of the Election Code, 10 ILCS 5/22-7, the pertinent part of which states:

[T]he persons having the highest number of votes for the respective offices shall be declared duly elected

The legal authority on the rights of a candidate who has been declared duly elected by a Canvassing Board and issued a Certificate of Election is Chief Justice Caton’s 1861 decision, *People ex rel. John B. Cumming v. William T. Head*, 15 Peck, 325 (25 Ill. 325), a case which continues to be cited currently for its holdings in this regard, e.g., *McDunn v. Williams*, 156 Ill.2d 288, 620 N.E.2d 385, 406 (1993). In *Head*, the Relator, a Candidate for County Clerk, had been declared duly elected by the Canvassing Board and issued a Certificate of Election, and pursuant thereto had taken the Oath of Office and given bond. 25 Ill. at 325. However, the former Clerk filed an Election Contest and, for that reason, refused to surrender the Office to the Candidate, claiming that he, the former Clerk, was entitled to hold office until the outcome of the Election Contest was determined. *Id.* In rejecting the former Clerk’s claim of right to continue to hold office pending the outcome of the Election Contest, the Court stated:

The decision of the canvassers afforded *prima facie* evidence that the relator was legally elected, and entitled him to the office till that canvass should be set aside by a proceeding to be instituted by the defeated candidate, in the courts of justice and in the forms of law. [*Id.*]

The legal question presented is the ability of the Canvassing Board, in fulfilling its statutorily mandated Canvassing duties, to address this question. In regard to a Canvassing Board’s addressing legal issues arising from an election, *Head* holds:



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. . . . Theirs [the Canvassing Board] is a mere mechanical, or rather mathematical duty. They may properly judge whether the returns are in due form, but after that, they can only compute the votes cast for the several candidates and declare the result. [*Id.*]

A Canvassing Board, therefore, in canvassing the returns and declaring the candidate elected, is limited to a computation and verifications of the votes cast and a declaration of the election upon that basis. It may not take into consideration legal issues arising in connection with the vote in determining the candidate elected.

This purely ministerial nature of the Canvassing Board's task does not permit, nor can a court compel, the Canvassing Board to take into consideration legal issues as to the eligibility of a candidate to be seated in a particular Office. In *Wells v. Robertson*, 277 Ill. 534, 115 N.E. 654 (1917), the appellant had appealed the circuit court's dismissal of his mandamus action to compel the Canvassing Board to issue him a Certificate of Election, based upon his questioning the legality of women's votes being included in the election results. 115 N.E. at 656. In affirming the Trial Court's dismissal, the Supreme Court held that, as the Canvassing Board's function is merely ministerial, the board had no authority to decide legal issues. *Id.* Moreover, the Court held that, as the Canvassing Board had no authority to decide such issues and the circuit court had no right or power in the mandamus action to compel the Board to make such a decision. *Id.* Further in this regard, both *Head* and *Wells* note that mandamus is not the proper action to determine entitlement to office, the proper procedure being a *quo warranto* action against the office holder. *Head*, 25 Ill. at 325; *Wells*, 115 N.E. at 656, 657.

Accordingly, under these authorities, it would also be improper for the Board to seek a judicial determination, or be the subject of a judicial action to compel such a determination, of the legal issues of entitlement to office. Judicial action, if any, must be brought against, or in reference to, the Candidates' claim of right to the Office.

In conclusion, the Board is limited to declaring the winner of the Regional Board election based upon its review and tabulation of the results of the election. In making such a determination, it may not take into consideration legal issues relating to the vote.

Should you have any questions regarding this matter, please do not hesitate to contact me.

Very truly yours,

BOND, DICKSON & ASSOCIATES, P.C.

/s/ Patrick K. Bond

Patrick K. Bond

PKB/jlw

