FIFTH DIVISION
December 7, 2012



1-12-0803

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| KEN ZUREK,<br><br>Petitioner/Appellant *pro se*,<br><br>v.<br><br>ILLINOIS STATE BOARD OF ELECTIONS, DEMOCRATIC PARTY OF LEYDEN TOWNSHIP, BARRETT F. PEDERSEN, and FRANCIS E. GRIEASHAMMER,<br><br>Respondents/Appellees. | ) | Appeal from the Illinois State Board of Elections<br><br>11 CD 212 |

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

**O R D E R**

HELD: Where conclusions drawn by administrative agency's board were supported by record, they were affirmed.

¶ 1 Ken Zurek, *pro se*, a resident of Franklin Park, Illinois, appeals from an order of the Illinois State Board of Elections (hereinafter Board) finding that no action was required on his complaint against Democratic Party of Leyden Township (hereinafter political party or committee); the political party's treasurer, Frank Grieashammer; and the political party's

chair/Franklin Park's mayor, Barrett F. Pedersen, about the campaign disclosure report the political party filed for the third quarter of 2011. Zurek contends we should reverse and remand for a public hearing and the imposition of civil penalties.

¶ 2 On November 22, 2011, Zurek filed a two-count complaint with the Board, alleging in Count I that the political party's Form D-2 2011 third quarterly report of campaign contributions and expenditures (July 1, 2011 to September 30, 2011) was signed by the political party's chair (Pedersen) instead of its treasurer (Grieashammer), contrary to section 9-11(e) of the Illinois Election Code. 10 ILCS 5/9-11(e) (West 2010) (hereinafter Election Code) ("each report shall be verified, dated, and signed by either the treasurer of the political committee or the candidate on whose behalf the report is filed"). In Count II, Zurek alleged the report disclosed a $7,500 contribution from John T. Gallagher and stated this man's occupation and employer had been "Requested," even though Pedersen personally knew this contributor to be a self-employed attorney, which was a violation of section 11(a)(4) of the Election Code. 10 ILCS 5/9-11(a)(4) (West 2010) (when a person has contributed more than $500, the political committee must disclose the person's occupation and employer or state that it has made a good faith effort to obtain the information). Zurek alleged on information and belief that Pedersen knew Gallagher's employment details, because Gallagher made the $7,500 donation at a Pedersen fund raising event on September 29, 2011, and asked for support of Gallagher's campaign for election as a judge in the Cook County's 4th Judicial Subcircuit.[1] Based on these allegations, Zurek concluded

[1] We note the inconsistency in Zurek's pleading, in that he alleged Pedersen violated the statute by not disclosing Gallagher's known details and by signing the political party's report, but Zurek claimed the political party should be penalized for Pedersen's failing.

the contents of the political party's Form D-2 quarterly report demonstrated its "utter indifference" and "conscious disregard" to truth and completeness and warranted a fine up to $5,000 as provided in section 9-26 of the Election Code. 10 ILCS 5/9-26 (West 2010) (willful failure to file or filing of false or incomplete information required by the Election Code shall constitute a business offense subject to a fine up to $5,000).[2]

¶ 3 Within a few weeks of Zurek's filing, the political party filed an amended D-2 Report on December 15, 2011, which specified Gallagher's occupation and employer and was signed by the political party's treasurer.

¶ 4 Once a complaint is filed, a closed preliminary hearing is conducted by a hearing officer "to elicit evidence on whether the complaint was filed on justifiable grounds and has some basis in fact and law." 26 Ill. Adm. Code § 125.245 (2011) (hearing officer shall be appointed and closed preliminary hearing shall be ordered), 26 Ill. Adm. Code § 125.252 (2011) (scope of preliminary hearing); 10 ILCS 5/9-21 (West 2010) (upon receipt of complaint, a closed preliminary hearing shall be conducted to determine whether the complaint has been filed on justifiable grounds). The general counsel for the Board reviews the hearing officer's recommendation and the evidence presented at the closed preliminary hearing. 26 Ill. Adm. Code § 125.253 (2011) (responsibilities of the general counsel). The general counsel makes his or her own recommendation to the Board. 26 Ill. Adm. Code § 125.253 (2011). The Board must

[2] On May 2, 2011, Zurek made similar allegations against the political party, Mayor Pedersen, and the political committee Friends of Barrett Pedersen regarding a 2011 first quarterly report; the Board dismissed the claims; and on June 29, 2012, we affirmed in part and remanded in part. *Zurek v. Illinois State Board of Elections*, 2012 IL App (1st) 112719-U.

decide whether the complaint was filed on justifiable grounds. 26 Ill. Adm. Code § 125.262(a) (2011). "If the Board determines that the complaint was filed on justifiable grounds, and if the respondent is unwilling to take action necessary to correct the violation or refrain from the conduct giving rise to the violation, it shall order a public hearing ***." 26 Ill. Adm. Code § 125.262(a) (2011). "If the Board fails to determine that the complaint has been filed on justifiable grounds, it shall dismiss the complaint without further hearing." 10 ILCS 5/9-21 (West 2010); *Cook County Republican Party v. Illinois State Board of Elections,* 232 Ill.2d 231, 239-40, 902 N.E.2d 652, 658 (2009). A dismissed complaint can be appealed directly to the appellate court. 10 ILCS 5/9-22 (West 2010).

¶ 5 A hearing officer for the Board conducted a closed preliminary hearing in Chicago on January 3, 2012. During or just prior to this hearing, Zurek submitted exhibits which included: (1) the party's unamended Form D-2, (2) an invitation to a Pedersen fund raising event held in Melrose Park, Illinois, on September 29, 2011; (3) Gallagher's petition for nomination as the Democratic candidate for the 4th Judicial Subcircuit of Cook County at the primary election to be held on March 20, 2012; and (4) an invitation to a fund raising event in Western Springs, Illinois, on December 8, 2011 for "Terry Gallagher." Zurek told the hearing officer that Gallagher attended Pedersen's Melrose Park event, tendered the $7,500 donation, and asked for Pedersen's support of Gallagher's run for judge. Zurek also told the hearing officer that the nominating petition sheets had been circulated by precinct captains of the defendant political party and then Grieashammer notarized some of the pages and Pedersen notarized some of the other pages. Zurek pointed out that the printed invitation to the Gallagher event listed Pedersen as one of the

event's "committeemen." Zurek's additional exhibits included a page he printed from the website maintained by the Illinois Attorney Registration and Disciplinary Commission, showing that "John Terrence Gallagher" was licensed to practice law in Illinois and that the business address registered for "Law Office of John T. Gallagher" was in the community of Northlake, Illinois. Zurek also tendered a Form D-1 Statement of Organization filed by "Citizens to Elect Terry Gallagher, also known as John T. Gallagher," indicating the candidate's political committee was formed on October 6, 2011. Zurek told the hearing officer that this was not the first time Pedersen filed a "false or incomplete report" and that he had brought this fact to the Board's attention by lodging a similar complaint in May 2012. See *Zurek v. Illinois State Board of Elections*, 2012 IL App (1st) 112719-U. Zurek acknowledged the report at issue had been amended, but he argued it was appropriate to fine the political party for initially filing "false and incomplete" information and for filing late because the amended report was an untimely disclosure of the required information.

¶ 6 The political party's attorney, Lawrence Andolino, responded that his client did not willfully file an incomplete quarterly report and had amended its report to provide the treasurer's signature and Gallagher's occupation and employer. Also, Gallagher was commonly known as "Terry" not as "John," the petition sheets Pedersen notarized listed "Terry" as the candidate, and Pedersen did not realize that the $7,500 donation to the political party from "John" was a donation from "Terry."

¶ 7 On January 9, 2012, the hearing officer filed a written report in which he summarized the proceedings and offered recommendations to the Board. The hearing officer indicated Zurek

showed justifiable grounds for his complaint that the political party's treasurer did not file the report as required by statute, but reasoned that the circumstances did not warrant a public hearing, because Pedersen was the person who initially formed the political party, the Board should accept his signature in this one instance, and all subsequent filings from the political party should include the signature specified by the Election Code. The hearing officer also concluded Zurek showed justifiable grounds for complaining about the nondisclosure of Gallagher's occupation and employer, however, the amended filing brought the political party into compliance and negated the need for a public hearing on this issue. The hearing officer also concluded Zurek failed to produce clear and convincing evidence that there had been a willful filing of a false or incomplete report, meaning that no public hearing was warranted on this last issue.

¶ 8 After considering all the materials submitted by the parties and the recommendation of the hearing officer, the Board issued a final order on February 23, 2012, concluding that no further action was required on Zurek's complaint.

¶ 9 Zurek filed a motion for reconsideration (see 26 Ill. Adm. Code 125.440 (2011)) in which he argued the Board committed three errors: by relying on attorney Andolino's statements as evidence, particularly when Rule 3.7 of the Illinois Rules of Professional Conduct prohibits an attorney from making "representations"; by requiring Zurek to meet the "clear and convincing" standard of proof at the preliminary hearing stage; and by failing to impose a civil penalty for nonfiling. On March 16, 2012, the Board's general counsel submitted a detailed, written recommendation to the Board that it deny Zurek's motion for reconsideration. On March 20,

2012, the Board voted unanimously to deny the motion for the reasons set out in its general counsel's recommendation and it issued an order to that effect.

¶ 10 When the Board dismisses a complaint without proceeding to public hearing, we review the Board's reasons for clear error. *Cook County Republican Party*, 232 Ill. 2d at 244, 902 N.E.2d at 661; *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88, 606 N.E.2d 1111, 1117 (1992) (on administrative review, it is not the court's function to reweigh the evidence or make an independent determination of the facts). The clear error standard is a deferential one that allows for reversal only when the reviewing court has a definite and firm conviction that a mistake of law was made. *Cook County Republican Party*, 232 Ill. 2d at 245, 902 N.E.2d at 661. A finding is clearly erroneous when there may be some evidence to support it, but the evidence in the entirety leaves the reviewing court to conclude the agency erred. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill.2d 380, 393, 763 N.E.2d 272, 280 (2001). The clearly erroneous standard provides some deference based upon the agency's experience and expertise in resolving matters within its ambit, and it falls between *de novo* review and manifest-weight-of-the-evidence review. *McKee v. Board of Trustees of the Champaign Police Pension Fund*, 367 Ill. App. 3d 538, 543, 855 N.E.2d 571, 575 (2006).

¶ 11 Zurek's three appellate contentions are similar to what he argued in his motion for the Board's reconsideration. He first argues the Board erred by relying on the "testimony" of the political party's counsel (Andolino) and by rejecting Zurek's contention that Rule 3.7 of the Illinois Rules of Professional Conduct (Ill. S. Ct. R. Prof'l Conduct R. 3.7, Comment 2 (eff. Jan.

1, 2010)) prohibited counsel from offering "explicit representations" in a contested matter. The Board responds that Zurek has not identified *any* statement that counsel made, let alone one that could be construed as testimony rather than permissible oral advocacy, and that an appellant's failure to provide reasoned argument and supporting citation to the record on appeal results in forfeiture of our review. Zurek replies that although the "Argument" section of his brief lacks any citation to the record on appeal, an earlier section, entitled "Statement of Facts," provides the necessary information by indicating: "[The political party's] entire case was based on the representations of Andolino (1) that Pedersen did not know that the $7,500 contribution from John Gallagher was actually a contribution from Terry Gallagher, and (2) Andolino personally indicated he has know[n] Mr. Gallagher as Terry his entire life not as John. R. 64." Zurek asks us to, nonetheless, address his argument about the rule governing attorney conduct.

¶ 12 Supreme Court Rule 341(h)(6) directs an appellant to divide his or her opening brief into distinct parts, including a "Statement of Facts" section "which shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment." 210 Ill. 2d R. 341(h)(6). Zurek's characterization of the political party's "entire case" is clearly argument and inappropriate in this section of his brief. Meanwhile, Supreme Court Rule 341(h)(7) mandates that the appellant's "Argument" section contain " '[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on.' " *Salgado v. Marquez*, 356 Ill. App. 3d 1072, 1074, 828 N.E.2d 805 (2005), quoting 210 Ill. 2d R. 341(h)(7). Zurek failed to comply with either mandatory rule. An issue that is not sufficiently presented fails to satisfy the standards of

appellate practice and is, therefore, waived. *Vincent v. Doebert,* 183 Ill. App. 3d 1081, 1087, 539 N.E.2d 856 (1989). Zurek's presentation is lacking and we could find that it has resulted in waiver. In our discretion, however, we will overlook Zurek's violations of the rules and resolve his argument.

¶ 13 We reject Rule 3.7 as a basis for reversing the Board's decision. Zurek has relied on Comment 2 to Rule 3.7, which explains, "A witness is required to testify on the basis of personal knowledge, while an [attorney] advocate is expected to explain and comment on the evidence ***." Ill. S. Ct. R. Prof'l Conduct R. 3.7(a), Comment 2 (eff. Jan. 1, 2010). Also, "the trier of fact may be confused or misled by a lawyer serving as both advocate and witness" and when a lawyer acts as a witness, the other party's rights may be prejudiced. Ill. S. Ct. R. Prof'l Conduct R. 3.7, Comment 2 (eff. Jan. 1, 2010). The advocate-witness rule itself states in pertinent part, "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness [unless the lawyer's testimony concerns an uncontested issue or legal services rendered or the lawyer's disqualification would work a substantial hardship to the client]." Ill. S. Ct. R. Prof'l Conduct R. 3.7(a) (eff. Jan. 1, 2010). Regardless of what attorney Andolino did or did not say to the hearing officer, nothing in the record indicates the Board relied on any verbal remarks. Instead, the Board disposed of Zurek's first allegation (failure of the political party's treasurer to sign the D-2 quarterly report) because Pedersen originally formed the political party, the Board disposed of the second allegation (failure to disclose the contributor's occupation and employer) because the political party amended its report to correct the omitted information, and the Board disposed of the third allegation (willful filing of false or incomplete report) due to Zurek's failure

to present evidence that the actions were willful. Thus, the Board did not rely on any "testimony" and the advocate-witness prohibition was not implicated in these proceedings. Zurek has not persuaded us that the Board erred and that its decision should be reversed.

¶ 14 Zurek next contends it was inappropriate at the preliminary hearing stage to hold him to the clear and convincing evidence standard regarding his allegation that the political party willfully filed a false or incomplete report and, therefore, violated section 11(a)(4) of the Election Code and should be fined pursuant to section 9-26 of the Election Code. See 10 ILCS 5/9-11(a)(4) (West 2010) (when a person has contributed more than $500, the political committee must disclose the person's occupation and employer or state it has made a good faith effort to obtain the information); 10 ILCS 5/9-26 (West 2010) (willful failure to file or filing of false or incomplete information required by the Election Code shall constitute a business offense subject to a fine up to $5,000). Zurek contends that at this initial phase of the proceedings, all he needed to show was that his complaint had some basis in fact and law. He contends that if the matter was convened for public hearing, he would call Gallagher to testify that when the original D-2 quarterly report was filed, Pedersen knew Gallagher was a self-employed attorney. He further contends that in Illinois, "willful" is construed as utter indifference to or conscious disregard and that the political party demonstrated the requisite utter indifference to or conscious disregard for its legal duty to file a true, accurate, and complete report. He bases this argument on tort law principles, including the contents of the Local Governmental and Governmental Employees Tort Immunity Act, which defines "willful and wanton conduct" as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter

indifference to or conscious disregard for the safety of others or their property." 745 ILCS 10/1-210 (West 2010). Zurek also relies on wrongful death and other tort law precedent, such as *Pfister v. Shusta*, 167 Ill. 2d 417, 421, 657 N.E.2d 1013, 1015 (1995) (contact sports injury case in college dormitory); *Poole v. City of Rolling Meadows*, 167 Ill. 2d 41, 656 N.E.2d 768 (1995) (negligence and civil rights action by resident injured in police shooting); *American National Bank and Trust Co. v. City of Chicago*, 192 Ill. 2d 274, 735 N.E.2d 551 (2000) (wrongful death and survival claims after 911 caller died from asthma attack); *Bartolucci v. Falletti*, 382 Ill. 168, 46 N.E.2d 980 (1943) (personal injuries sustained in automobile accident); and *Doe v. Calumet City*, 161 Ill. 2d 374, 641 N.E.2.d 498 (1994) (tort and civil rights claims regarding police officers' response to call for help).

¶ 15 The Board responds that there are several flaws to Zurek's argument, such as his resort to tort law when it has already been determined that "willful" in the context of section 9-26 of the Election Code is equivalent to "intentional." *Brennan v. Illinois State Board of Elections*, 336 Ill. App. 3d 749, 765, 784 N.E.2d 854, 867 (2003) (manifest weight of the evidence showed purposeful concealment of founder's identity and actual date of formation). The Board concedes that it may have held Zurek to too high a standard at the preliminary hearing and that Zurek needed only to show at that early stage that there was some basis in fact and law for his complaint. The Board also points out, however, that it considered this argument in Zurek's motion for reconsideration and then ultimately applied the correct standard when it denied Zurek's motion because there was no evidence whatsoever that the political party intentionally filed a false or incomplete quarterly report.

¶ 16 We find the Board's position persuasive and that Zurek's so-called "offer of proof" to elicit certain testimony from Gallagher is inconsequential. Even if Gallagher were to testify that Pedersen knew him and was aware of Gallagher's occupation and employer in time to include this information in the political party's original D-2 report, this would not be evidence that the political party intentionally filed false and incomplete information. This testimony would leave open the possibility of inadvertent error. This was apparently all the evidence that Zurek had and it was not enough to proceed to public hearing. Furthermore, the record substantiates inadvertence rather than the deliberate subterfuge that was at issue in *Brennan*. *Brennan*, 336 Ill. App. 3d at 765, 784 N.E.2d at 867. In that case, there was an intentional misstatement of a name, a date, and the source of campaign funding, in order to conceal the truth and subvert the disclosure requirements of the Election Code. *Brennan*, 336 Ill. App. 3d at 765, 784 N.E.2d at 867. In contrast, the political party here plainly used the word "Requested," openly indicating its intention to amend the filing with the necessary details and it has since amended its filing. The facts are not indicative of an intentional or "willful" effort to evade the disclosure law. Although it appears the Board may have initially held Zurek to an overly-high burden of proof, it is undisputed that the agency ultimately denied Zurek's motion for reconsideration because he presented no evidence that the political party intentionally filed a false or incomplete report. Zurek could point to only to the possibility of testimony from Gallagher which would add nothing to the existing documentary evidence that Gallagher and Pedersen were acquaintences. Thus, the record indicates the Board correctly interpreted and applied the statute's wording and employed the evidentiary standard that Zurek argues was appropriate. Accordingly, we conclude

the Board did not err when it did not proceed to a public hearing on this issue.

¶ 17 Zurek's next contention is that the Board should have imposed civil penalties against the political party because Pedersen's signature on the original D-2 did not satisfy the statutory requirement that a candidate or treasurer sign each quarterly report. Zurek's argument relies on a combination of legal principles, including administrative rules. The Election Code operates in conjunction with administrative rules and regulations that add the detail necessary to implement the statutory provisions. 10 ILCS 5/9-15 (West 2010). Zurek contends that section 100.40 of title 26 of the Administrative Code renders the original D-2 a "nonfiling." This rule states in pertinent part:

> "Section 100.40 Vacancies in Office - Custody of Records
>
> Reference: This Section interprets or applies Sections 9-2, 9-5, 9-7, 9-10, 9-13 and 9-15 of the Election Code.
>
> a) Death
>
> ***
>
> b) Removal from Office
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> ***
>
> c) Resignation
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> ***
>
> d) Inability to Sign
>
> All reports shall be verified, dated and signed by either the treasurer of the political committee making the statement or the candidate on whose behalf the

> statement is made. However, should it be impossible for the political committee to obtain the signature of the treasurer or candidate prior to the filing deadline, then another may sign for the treasurer, provided that the treasurer submits a letter within 30 days after the filing indicating that the substituted signature is authorized and the treasurer accepts responsibility as if he or she had signed. The substituted signature shall read, 'treasurer's name, by name of person signing'. If the treasurer failed to submit a letter within 30 days, then the report filed shall be considered a nonfiling." 26 Ill. Adm. Code § 100.40 (2011).

Zurek argues that because the original D-2 is rendered a "nonfiling" by the Administrative Code and because the amended D-2 was not signed and filed by the treasurer until early December 2011, the political party effectively submitted its D-2 report 59 days late. He contends this tardiness warrants a fine "for failure to file a report" as required by section 9-10(b) of the Election Code. 10 ILCS 5/9-10(b) (West 2010). He contends the Board improperly read an exception, limitation, or condition into the absolute statutory requirement that "each report shall be verified, dated, and signed by either the treasurer of the political committee or the candidate on whose behalf the report is filed." 10 ILCS 5/9-11(e) (West 2010); see *Ultsch v. Illinois Municipal Retirement Fund*, 226 Ill. 2d 169, 190, 874 N.E.2d 1, 13-14 (2007) (a court should apply plain and unambiguous statutory language and should not search for any subtle or not readily apparent meaning); *Kraft, Inc. v. Edgar*, 138 Ill. 2d 178, 189, 561 N.E.2d 656, 661 (1990) (a statute should be construed so that no word or meaning is rendered superfluous or meaningless). He concludes we should remand this matter for the imposition of an appropriate

fine.

¶ 18 The Board responds that, in its discretion, it adopted the recommendations of its hearing officer and general counsel to treat this violation as a technical, inadvertent, and non-fineable issue.

¶ 19 Zurek's argument is fundamentally flawed. The administrative rule he contends rendered the original report a "nonfiling" is a rule that expressly concerns a vacancy in the treasurer's office due to a person's death, removal or resignation from office, or other circumstances which would make it impossible to obtain his or her signature. The rule does not apply here where the treasurer was available but another person signed a disclosure report in error. The rule does not render the report at issue to be a "nonfiling." Moreover, the Election Code mandates detailed and exact disclosure of campaign contributions and expenditures, as Zurek argues, but it is also true that the statute's companion, section 100.10 of title 26 of the Administrative Code, specifies, "Inadvertent error or omission of a *de minimus* nature in the completion of a report, statement or document shall not be deemed to be a 'willful failure to file or a willful filing of false or incomplete information' under Section 9-26 of the Election Code." 26 Ill. Adm. Code 100.10 (2011). It was thus anticipated that the Board could determine certain filing errors or omissions were inadvertent, *de minimus* statutory violations which did not warrant further proceedings. The information which the Board evaluated in this instance included the original D-2 report which Zurek has complained about, the fact that the political party made a timely disclosure of the $7,500 contribution and specified that some information was forthcoming, the fact that contributor Gallagher was known by a given name and by a

nickname, and the fact that the political party provided all the information required by statute by amending the D-2 filing. This amending occurred within two months of its original filing and within a few weeks of Zurek's complaint. Zurek's argument also fails to take into account that section 125.262 of title 26 of the Administrative Code specifically provides that the Board may accept amended filings and not hold a public hearing in cases where a respondent is willing to take the action necessary to correct a violation and refrain from that conduct in the future. 26 Ill. Adm. Code § 125.262 (2011) ("If the Board determines that the complaint was filed on justifiable grounds, and if the respondent is unwilling to take action necessary to correct the violation or refrain from the conduct giving rise to the violation, it shall order a public hearing ***.") The Board was within its authority when it decided to accept the amended filing and caution the political party that it would accept Pedersen's signature in this single instance but all subsequent filings should include the signature specified in the Election Code.

¶ 20 In our opinion, Zurek has relied on selective application of the statutes and rules concerning the political party's disclosures. He has not persuaded us that the Board erred when it declined to impose a civil penalty for the contents and timing of the political party's disclosures.

¶ 21 Finding no error, we affirm the judgment of the Board.

¶ 22 Affirmed.