



Via Electronic Mail

September 11, 2019

Cynthia Price, Director
Brian Blair, Deputy Director
Marion County Board of Elections
222 West Center Street
Marion, Ohio 43302

Re: Tie Vote on the Independent Candidacy of Susan McGowan

Dear Director Price and Deputy Director Blair:

At a regular meeting of the Marion County Board of Elections (“Board”) on August 19, 2019, the Board considered a protest of the candidacy of Susan McGowan for Mayor of the City of Marion. The county prosecutor was present and, among other things, advised the Board to conduct a formal hearing on the protest. The Board proceeded against this advice. After hearing informal statements from the protestor and the candidate, Board Member Carolyn Weston moved to remove Ms. McGowan from the ballot. Following discussion, Board Members Chris Smith and Carolyn Weston voted in favor of the motion. Chairwoman Lynn Zucker and Board Member Larry Heiser voted against the motion. Pursuant to R.C. 3501.11(X),¹ the Board submitted the tie vote to the Secretary of State for a decision.

On July 26, 2019 the Board asked our office for guidance regarding an independent candidate who voted in the partisan primary election. Our office instructed the Board that it should defer to the prosecutor’s judgement on how to proceed. Further, our office provided a brief summary of relevant case law, including Advisory 2007-05 in which former Secretary of State Brunner stated, “If an independent candidate votes in a party primary election after filing as an independent, the candidate is not actually unaffiliated, and the candidate’s claim of independence was either not made in good faith or is no longer current.” The Advisory’s bright-line rule is consistent with case law.²

If a board of elections considers a protest, it must conduct a hearing. When a board conducts a hearing, it acts in a quasi-judicial capacity as the judge and jury. Therefore, any statements by the protestor, candidate, or any other witness must be made under oath. In addition, a board is encouraged to employ a court reporter to transcribe the proceedings. This ensures a clear record of

¹ R.C. 3501.11(X) provides that “[i]n all cases of a tie vote or a disagreement in the board, if no decision can be arrived at, the director or chairperson shall submit the matter in controversy... to the secretary of state, who shall summarily decide the question, and the secretary of state's decision shall be final.”

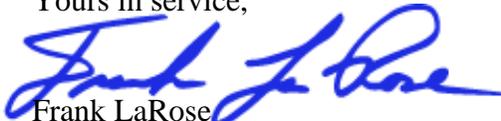
² *Morrison v. Colley*, 467 F.3d 503 (6th Cir. 2006); *State ex rel. Wilkerson v. Trumbull County Bd. of Elections*, 2007-Ohio-4762, and *State ex rel. Lorenzi v. Mahoning County Bd. of Elections*, 2007 Ohio App. LEXIS 5166.

the proceedings for review, both in case of a tie vote or challenge in court.³ In this matter, testimony was not made under oath, and our office did not receive a transcript of the proceedings.

The protestor, Michael Thomas, filed his protest on August 15, 2019. The deadline for filing a protest against an independent candidate was July 30.⁴ Therefore the protest was untimely and too late to be effective.⁵ The Board had authority to remove the candidate from the ballot by its own initiative, so long as the Board acted no later than 60 days before the November 5, 2019 General Election.⁶ Nonetheless, the motion was based on the protest and, even if the Board had acted by its own initiative, a quasi-judicial hearing should have occurred to ensure due process and comply with directives issued by this office.

Based on the facts and the insufficient record presented to me, I conclude that the Board disregarded the prosecutor's advice and considered an untimely protest without a formal hearing. It is therefore improper for me to render a decision on the Board's motion.

Yours in service,



Frank LaRose
Ohio Secretary of State

cc: Lynn Zucker, Chair, Marion County Board of Elections
Larry Heiser, Member, Marion County Board of Elections
Carolyn Weston, Member, Marion County Board of Elections
Chris Smith, Member, Marion County Board of Elections

³ R.C. 3501.39(A)(1) and (2); Election Official Manual Ch. 2, pp. 29-30; and *State ex rel. Harbarger v. Cuyahoga County Bd. of Elections*, 75 Ohio St. 3d 44 (1996).

⁴ R.C. 3513.262.

⁵ *Pierce v. Brushart*, 153 Ohio St. 378 (1950).

⁶ R.C. 3501.39(A)(4) and (B); *State ex rel. Lorenzi*, 2007 Ohio App. LEXIS 5166.