SECOND DIVISION
February 19, 2023

No. 1-23-0264

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SHAWN A. WALKER Candidate-Appellant, v. MARISEL A. HERNANDEZ, Chair, WILLIAM J. KRESSE, Commissioner, JUNE A. BROWN, Commissioner, each in their dual-official capacities as members of the Chicago Municipal Officers Electoral Board and members of the Chicago Board of Election Commissioners, EMMA ROBINSON and CHARLES ENTER, Respondents-Appellees.	)	Appeal from the Circuit Court of Cook County 23 COEL 010 Hon. Maureen O. Hannon Chicago Municipal Officers Electoral Board No. 23-EB-ALD-006

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: Reversed and remanded. The Board erred when it refused to consider the candidate's rehabilitative affidavits after previously ordering them to be reviewed.

¶ 2 This appeal concerns the February 28, 2023 aldermanic election for Chicago's 28th Ward. Appellant Shawn A. Walker appeals the decision of the Chicago Board of Election Commissioners, appearing *ex officio* as the Chicago Municipal Officers Electoral Board (the Board) that disqualified Walker from the ballot for failing to present 473 valid signatures in his

nominating petitions, as required by state law. The trial court affirmed the Board's decision, and Walker now appeals to us. For the following reasons, we reverse and remand.

¶ 3 BACKGROUND

¶ 4 Walker sought to be placed on the ballot as a candidate for Alderman of Chicago's 28th Ward in the 2023 consolidated primary election. To be placed on the ballot for this Ward, a candidate must have at least 473 valid signatures on his nomination petition. Emma Robinson and Charles Enter (Objectors), residents of the 28th Ward, challenged Walker's petitions for failing to reach this minimum threshold by filing an objection with the Board.

¶ 5 Walker's nomination petitions contained 1,112 signatures. The Objectors raised many challenges to individual signatures on the petitions. Those objections included, as they typically do, the following objections: (1) the signature is not genuine—that is, it does not match the signature on the voter's registration card; (2) the signer is not registered to vote at the address written on the petition sheet; (3) the signer's address is not located within the relevant ward, here the 28th Ward; and (4) the signer signed the candidate's petitions more than once, a "duplicate" signature. (The Objectors raised one other significant challenge we will discuss below, but it was not suitable for a records examination.)

¶ 6 The Objectors' challenges to various signatures prompted a "records examination" pursuant to Board Rule 6. In a records examination, the Board's examiner (with witnesses, or "watchers," from each side present) reviews the signatures on the petition against electronic voter registration data to make the initial ruling on the various objections we described above: genuineness of signature, registered voter, residence within the ward, and/or duplicate signature. The Board examiner makes a ruling on each individual objection. If either "watcher" objects to

that ruling, that watcher must say so at that time to preserve a future argument on that objection—in legal parlance, to preserve that error. The Board's rules so provide.

¶ 7 Here, the record examination resulted in the disqualification of many signatures, leaving Walker's petition with 526 valid signatures—53 above the required minimum of 473.

¶ 8 After a records examination, each side is allowed to challenge the Board examiner's findings and request a hearing before the hearing officer. This motion, pursuant to Board Rule 8, is known as a "Rule 8 motion." Each side here filed a Rule 8 motion.

¶ 9 In their Rule 8 motion, the Objectors sought to disqualify an additional 68 signatures on the ground that those individuals, before signing Walker's nomination petition, had signed nominating petitions for a different candidate in the same race. They claimed that their later signatures on Walker's petition were prohibited by the "first signature" rule in the Illinois Election Code. See 10 ILCS 5/10-3 (West 2022) ("each voter may subscribe to one nomination for such office to be filled, and no more; ***"). In support, the Objectors presented affidavits from 68 voters who claimed that they signed the petition of another candidate for 28th Ward alderman "before" they signed Walker's.

¶ 10 In his Rule 8 motion, Walker sought to rehabilitate 21 signatures that the Board had initially invalidated as not being genuine (meaning the voter's signature on the petition did not match the one on their electronic registration card). By those notarized affidavits, the affiants swore that they had, in fact, personally signed Walker's petition—even if their signatures on the petition may not have closely resembled their signatures on their voter registration cards.

¶ 11 I. The First Evidentiary Hearing Before Hearing Officer

¶ 12 At the evidentiary hearing, the hearing officer rejected both sides' affidavits.

¶ 13 As for the Objectors' 68 affidavits, the hearing officer found that the affidavits lacked sufficient specificity. While each affidavit stated that the affiant signed another candidate's nomination petitions "before" signing Walker's, the hearing officer found them insufficiently conclusory—they "did not provide detail of dates, locations and persons present when the nominating signatures were made" and thus "did not allow for cross examination of those events."

¶ 14 The hearing officer then turned to the 21 rehabilitation affidavits proffered by Walker. The hearing officer rejected Walker's first two rehabilitation affidavits *not* because they failed to state that the affiants truly signed Walker's petition—they clearly said so—but because, in the hearing officer's view, Walker's Rule 8 motion did not sufficiently identify the Board examiner's ruling from which Walker was appealing. And because the rest of the rehabilitation affidavits (numbered 3 through 21) suffered from the same flaw, the hearing officer did not consider them, either, and saw no reason to even admit them into evidence.

¶ 15 With the hearing officer rejecting each sides' affidavits and thus each of their attempts to add or subtract from the final tally, the final signature count obviously remained the same—Walker had 53 valid signatures above the minimum. The hearing officer thus recommended that the Objectors' petition be overruled, and Walker's name be placed on the ballot for 28th Ward alderman.

¶ 16 II. The First Rule 20 Hearing Before Board

¶ 17 When a party is dissatisfied with the hearing officer's final recommendation, that party may appeal that recommendation to the Board, pursuant to Rule 20, in what is known as a "Rule 20 motion." The Objectors made clear that they intended to file a Rule 20 motion. And Walker wanted to make sure that all 21 of his rehabilitation affidavits, not just the first two, were

considered as part of the record in the event that the Objectors prevailed in their Rule 20 motion and the Board remanded the matter to the hearing officer. So the hearing officer entered an order, agreed to by the parties, stating that:

> "(1) Candidate is given leave to submit his voter affidavits #3-21 as an offer of proof without being admitted into evidence, (2) Should the Electoral Board remand this matter then candidate's affidavits will be reviewed by the hearing examiner, as would be done at a Rule 8 hearing, and would be timely submitted at that point."

¶ 18 With that small bit of housekeeping aside, the Objectors filed their Rule 20 motion. They argued that their 68 affidavits were sufficient to establish that each of these signatories first signed a different candidate's nominating petitions before signing Walker's, thus invalidating them under the "first signature" rule embodied in section 10-3 of the Election Code. See *id.* ("each voter may subscribe to one nomination for such office to be filled, and no more").

¶ 19 On January 13, the Board held the Rule 20 hearing. Counsel for both the Objectors and Walker were present. Counsel for the Objectors argued that the Objectors' 68 affidavits were sufficient in content and form to be admitted into evidence and to invalidate those 68 signatures. Walker's counsel argued that the hearing officer properly rejected them, and that Walker's own 21 rehabilitative affidavits should add further to his number of valid signatures, which already was 53 above the required minimum.

¶ 20 Counsel for the Objectors replied that the hearing officer had properly ruled in the recommendation that Walker's "Rule 8 [motion] was insufficient to provide notice to the objectors as to the preservation of the objections on those issues ***."

¶ 21 Counsel for the Board noted that this particular case was "already going beyond our deadlines to get things wrapped up." On the substance, he opined that the Objector's 68

affidavits were the "kinds of affidavits that are somewhat standard for Electoral Board, expedited Electoral Board procedures like this" and were "customary for proceedings such as this." It was counsel's recommendation that the matter be remanded so that the hearing officer could consider the content of the Objector's 68 petitions.

¶ 22 But counsel did not stop there. He noted, as well, that the hearing officer had likewise refused to consider affidavits submitted by Walker. In counsel's view, the content of Walker's affidavits should be considered as well: "[I]t would be my recommendation actually to remand to the hearing officer with directions that *all the previously submitted affidavits be considered*; *and by that I mean the candidate also brought affidavits to the Rule 8 hearing that were not considered* ***." (Emphasis added.)

¶ 23 Counsel for the Objectors again told the Board, for the second time, that Walker's 21 rehabilitation affidavits had been rejected not on their substance but because, in the hearing officer's view, Walker's Rule 8 motion was insufficient to preserve the errors.

¶ 24 Nevertheless, the Board agreed with counsel and adopted the Chair's motion to

> "remand the case for further hearing with the following directions: One, *all affidavits previously submitted or otherwise preserved for further presentation in the event [of] a remand shall be considered*; secondly, the affidavits submitted by the objector relative to the issue of signers signing other petitions for the same office prior to the signing of this candidate's petition shall be deemed sufficient in the form presented and shall be subject to relevant rebuttal affidavits; three, rebuttal affidavits relevant to the affidavits already in the case file may be submitted; and four, the hearing officer shall promptly schedule said further hearing with the parties and shall set a deadline for the exchange of rebuttal affidavits prior to the hearing." (Emphasis added.)

¶ 25 In anticipation of the remanded hearing, the hearing officer issued the following order, once again agreed to by the parties:

> "This matter being remanded for hearing to January 18, 2023, at 2:30 p.m. and the parties being in agreement with the entry of this agreed order, IT IS ORDERED:
>
> 1. The parties shall exchange, and deliver copies to the below assigned hearing officer, no later than January 17, 2023, at 5:00 p.m., the following:
>
> a. Copies of all rebuttal affidavits.
>
> b. A list of all witnesses to be presented together with a brief description of the testimony to be offered."

¶ 26 III. The Second Hearing Before Hearing Officer

¶ 27 On January 18, the matter then returned to the hearing officer. The parties were prepared for an evidentiary hearing. Walker, in fact, had four new affidavits to present—affidavits to rebut four of the Objectors' 68 "first signature" affidavits (though he filed them at 5:48 pm on the due date, which was 48 minutes after the deadline.)

¶ 28 There was no doubt at that point, as counsel for the Board told the hearing officer via email, that "time [was] of the essence." Counsel for the Board included the content of the remand order in that email to the hearing officer, who in turn forwarded it to the parties.

¶ 29 One might expect, given the rather unequivocal marching orders from the Board, that the first order of business for the hearing officer would be to consider the content of the Objectors' 68 "first signature" affidavits and of the candidate's 21 rehabilitation affidavits. But no such evidentiary hearing occurred.

¶ 30 Instead, the hearing officer was persuaded by Walker that the "first signature" rule in section 10-3 of the Election Code was merely a directory, not a mandatory, provision. In other

words, even if it were true that 68 signatories to Walker's petition had first signed the petition of a different 28th Ward aldermanic candidate, that fact was of no legal consequence—it would not invalidate any of those 68 signatures.

¶ 31 In light of that determination, the hearing officer saw no further need to consider the content of those 68 affidavits. And because the candidate was still 53 signatures above the required minimum, and the Objectors had no remaining basis to reduce that number, the hearing officer likewise saw no need to consider the 21 rehabilitation affidavits offered by the candidate.

¶ 32 So without considering any of the affidavits submitted by either party, as instructed by the Board, the hearing officer again recommended that Walker's name appear on the ballot for the upcoming election.

¶ 33 IV. The Second Rule 20 Hearing Before Board

¶ 34 The Objectors again challenged this recommendation to the Board in another Rule 20 motion, arguing that the hearing officer misinterpreted the law, as the "first signature" rule was in fact mandatory, not directory as the hearing officer ruled. In response, Walker argued the other side of the law and also reminded the Board that, in addition to already being 53 signatures above the minimum threshold, he also had 21 rehabilitation affidavits that had not yet been considered.

¶ 35 The Board held its second Rule 20 hearing on January 20.

¶ 36 As for the interpretation of the "first signature" provision in section 10-3 of the Election Code (*id.*), the Board reached two conclusions. First, Walker's legal argument about the directory nature of section 10-3 was raised too late and should not have been heard. But more importantly, on the substance, the hearing officer was wrong. In the Board's view, and what it described as its decades-long position on this subject, section 10-3 clearly mandated that, if a

voter signed one candidate's nominating petition for a particular candidate in a particular election cycle, that voter could not also sign another, competing candidate's nominating petitions. And if she did so, that later signature is invalid. See *id.*

¶ 37 The Board also chastised the hearing officer, noting that it was "improper for the Hearing Officer to again decline to consider the affidavits previously presented by the Objectors and the Candidate." That, after all, had been the very reason for the Board's remand in the first place.

¶ 38 Time, at that point, was truly of the essence. The Board and its counsel, at the *initial* Rule 20 hearing before the remand, had already expressed concern about the upcoming aldermanic election on February 28, 2023. And now, here the Board was, in the third week of January, about five weeks out from the election, now finding for the second time that the hearing officer had made critical errors, leaving the matter (still) unresolved. As the Board Chair noted to Walker's counsel: "[Y]ou have to realize our position here. We are trying to move these cases as quickly and as completely as possible, and *** we are opening up early voting a week, in less than a week. *** [W]e can't wait, you know, to remand the case yet a third time ***."

¶ 39 That is to say, rather than do what it likely would have done if time permitted—remand the matter again to the hearing officer, this time to *actually* hold an evidentiary hearing on the Objectors' 68 "first signature" affidavits and Walker's 21 rehabilitation affidavits—the Board simply concluded the case on its own.

¶ 40 First, the Board found that the Objectors' 68 "first signature" affidavits were sufficient in form and content and thus invalidated 68 signatures from Walker's nomination petitions. As we have previously noted, Walker had emerged from the records examination 53 signatures above the minimum; losing 68 more signatures obviously put him 15 signatures below the minimum threshold. (And as the Board noted, even if Walker prevailed on the four counter-affidavits he

submitted on the "first signature" issue, which it found untimely by 48 minutes, at best they would add four more signatures to his tally, still 11 short of the required minimum.)

¶ 41 But second and critical to our analysis, the Board then turned to Walker's 21 rehabilitation affidavits. To set the scene, a quick reminder: (1) the first time the parties appeared for a hearing before the hearing officer, the hearing officer refused to consider those 21 affidavits because Walker, in the hearing officer's view, had failed to adequately plead a challenge to the Board examiner's rulings in his Rule 8 motion; (2) the Board, in ordering a remand, and despite argument from Objector's counsel that Walker's 21 affidavits did not comply with Rule 8, specifically instructed the hearing officer to consider the merits of those 21 affidavits.

¶ 42 And indeed, as just noted above, in paragraph 24 of its final decision under review here, the Board chastised the hearing officer, finding it "improper for the Hearing Officer to again decline to consider the affidavits previously presented by the Objectors *and the Candidate*" after the Board had specifically ordered him to do so. (Emphasis added.)

¶ 43 And yet nearly in the same breath, two paragraphs later in that same written order, the Board resolved the matter of Walker's 21 rehabilitation affidavits thusly: "the Candidate sought to introduce rehabilitative affidavits in the Rule 8 hearing that were not properly pled in the Rule 8 motion and are therefore not to be considered."

¶ 44 So with those 21 affidavits out of the way, Walker was short of the required minimum, either by 15 votes or, if his four counter-affidavits prevailed, 11 votes. The Board thus ordered Walker's name to be removed from the ballot for the upcoming 28th Ward aldermanic election.

¶ 45 Walker appealed to the circuit court, which affirmed the Board's decision. This appeal reached us shortly thereafter, and we ordered expedited briefing. After an initial review that, in our view, favored Walker's position, and cognizant that early voting had already begun, with

election day less than two weeks away, we issued an order on February 17, 2023, ordering the Board to place Walker's name on the ballot until further order of the court, with our written decision to follow. This is that decision.

¶ 46 ANALYSIS

¶ 47 It was necessary to lay out the procedural background at some length to explain our reasoning below. Given time constraints, we will truncate our legal analysis as much as possible.

¶ 48 We start with three guiding principles. The first is a reminder that we are reviewing the decision of the Board, not that of the circuit court. *Jackson-Hicks*, 2015 IL 118929, ¶ 19.

¶ 49 The second is our standard of review. As always, we review *de novo* pure questions of law, such as whether the electoral board properly interpreted a statute. *Jackson-Hicks v. East St. Louis Board of Election Commissioners*, 2015 IL 118929, ¶ 20. We will ordinarily defer to an administrative tribunal's interpretation of its own rules. *Wiesner v. Brennan*, 2016 IL App (2d) 160115, ¶ 34. The parties agree only on this much.

¶ 50 The Board argues that its interpretation of its own rules presents a mixed question of law and fact, thus triggering the "clearly erroneous" standard of review. See *Cinkus v. Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 211 (2008). A decision is clearly erroneous when the reviewing court is left with the " 'definite and firm conviction that a mistake has been committed.' " *Id.* (quoting *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001)).

¶ 51 Walker, on the other hand, argues that the appropriate standard for determining whether a tribunal has properly followed its own internal rules is whether the agency's determination is arbitrary or unreasonable. See *Wiesner*, 2016 IL App (2d) 160115, ¶ 34; *Corbin v. Schroeder*, 2021 IL App (2d) 210090-U, ¶ 14 (unpublished decision under Supreme Court Rule 23) ("A

reviewing court must give deference to the election board's application of its rules unless its decision was arbitrary or unreasonable.").

¶ 52 We suspect that the arbitrary-or-unreasonable standard is the appropriate standard, as the "clearly erroneous" standard considers mixed questions of fact and *law*, while *Weisner* and *Corbin* concerned an electoral board's interpretation of its own internal procedural rules, much as here—which is not quite the same thing as a legal determination *per se*.

¶ 53 So we will employ the arbitrary-or-capricious standard and, given time constraints, leave it at that. But we emphasize that our conclusions would be the same under either standard.

¶ 54 Our final guiding principle: "It goes without saying that access to a place on the ballot is a substantial right that we will not lightly deny." *Elam v. Municipal Officers Electoral Board for Village of Riverdale*, 2021 IL 127080, ¶ 13; see *Bettis v. Marsaglia*, 2014 IL 117050, ¶ 28. Indeed, " 'voting is of the most fundamental significance under our constitutional structure.' " *Ghiles v. Municipal Officers Electoral Board of City of Chicago Heights*, 2019 IL App (1st) 190117, ¶ 17 (quoting *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). Restricting access to the ballot burdens two fundamental rights—the right to associate with those of similar political beliefs and the right to vote. *Id.*; see *Illinois State Board of Elections*, 440 U.S. at 184.

¶ 55 I. Walker's 21 Rehabilitation Affidavits

¶ 56 Notwithstanding our deferential review, we cannot uphold the Board's decision to ultimately refuse to consider Walker's 21 rehabilitation affidavits.

¶ 57 As shown above, in its initial remand order, the Board had clearly indicated that Walker's 21 affidavits should be considered, notwithstanding its knowledge that the hearing officer had found Walker's Rule 8 motion to be deficiently pleaded and thus the error not properly

preserved. That point was made perfectly clear to the Board more than once at the initial Rule 20 hearing, but the Board nonetheless unequivocally ordered those affidavits to be reviewed.

¶ 58 Yet the second time the matter came before it, the Board reversed its own position and declined to consider those affidavits because they did not comply with Rule 8's pleading requirements. See *Centegra Hospital-McHenry v. Mercy Crystal Lake Hospital and Medical Center, Inc*., 2019 IL App (2d) 180731, ¶ 27 ("Sudden and unexplained changes to policies or practices have been considered arbitrary."); see also *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 506 (1988).

¶ 59 As demonstrated above, the Board was clearly cognizant of the calendar—the approaching deadline for early voting. The Board and its staff have difficult jobs and are tightly pressed for time. But if the affidavits should have been considered, they should have been considered—just as the Objectors' 68 petitions were reviewed (and conclusively ruled upon) by the Board at that same hearing. To reverse its own position simply given the tightness of time, or perhaps frustration with the hearing officer, is not something this court can abide, particularly given the "substantial right" at stake. *Bettis*, 2014 IL 117050, ¶ 28. And again, that is doubly true when the Board did adjudicate the Objectors' 68 affidavits but not Walker's 21.

¶ 60 The Board and the Objectors complain that Walker did not technically raise the issue of the 21 rehabilitation affidavits in his own Rule 20 challenge to the Board. Initially, it is not clear to us that Rule 20, on its face, would have permitted him to do so. Rule 20 permits an appeal to the Board to "[a]ny party disagreeing with the recommended findings *and* proposed decision of a hearing officer." (Emphasis added.) Walker did not disagree with the hearing officer's proposed decision—his proposed decision was that Walker's name be placed on the ballot.

¶ 61 In any event, the record is clear that the Board went to great lengths to ensure that it understood everything about the case that had been pending before the hearing officer—what evidence or documents remained, what had been admitted into evidence, and what had been proffered. There is no credible argument that the Board did not fully consider the fact that Walker's affidavits had been proffered, and that the hearing officer had disqualified them for a deficiently pleaded Rule 8 motion—yet the Board nonetheless was crystal clear that those affidavits should be considered.

¶ 62 Though we have said enough to reverse, we would add that the Board's actions strike us as particularly unfair given our skepticism that the Board even properly applied Rule 8 to the facts of this case. To explain, we must briefly explain Walker's Rule 8 motion and Rule 8 itself.

¶ 63 Recall that the objections lodged against Walker's petitions—at least the ones suitable for a records examination—were categorized into four objections: (1) the signature is not genuine (denoted on the objection sheet by the letter "S"); (2) the signer is not registered at the address listed (denoted by "R"); (3) the address is not an address within the relevant ward, here the 28th Ward ("W"); and the signer signed the petition more than once—a duplicate signature ("D").

¶ 64 Those objections are then considered and ruled upon by the Board examiner at the records examination, petition sheet by petition sheet, line by line, in the presence of "watchers" representing each party. And under Rule 8, a party who might wish to challenge a particular ruling by the Board examiner must object at the time of the ruling to the Board examiner (and obviously in the presence of the opposing party's "watcher"). If the "watcher" does not raise a contemporaneous objection to the Board examiner, that party forever waives the right to challenge that ruling. That objection is the first step in the two-step process for preserving errors for review by the hearing officer. At that point in time, the Board examiner knows a potential

appeal of her ruling might be forthcoming, and the opposing party—via their "watcher"—knows that as well.

¶ 65 The second step in preserving an error for the hearing officer is the Rule 8 motion itself, which must be filed by close of business, the day after the records examination is completed. In a typical Rule 8 motion, much like the ones both Walker and the Objectors filed here, the party lays out, in chart format, each sheet and line number for the signatures where the Board examiner ruled contrary to their interests and which they wish to challenge. And the party also lists the ruling(s) that the Board examiner made contrary to their position, in code (again, "S," "R," "W," or "D").

¶ 66 In his Rule 8 motion, however, Walker employed what we might call a "scattershot" approach to his challenge to the Board examiner's rulings. That is, in his Rule 8 motion, Walker did not specify the precise ruling the Board examiner made—S, R, W, or D—in listing his challenge to the various signatures at issue. Instead, he wrote "S, R, W, and/or D" for each signature that had been invalidated that he hoped to rehabilitate. As just one example, he challenged the invalidation of a signature on sheet 29, line 3 on all four grounds—"S, R, W and/or D"—despite the fact that this particular signature was only the subject of an objection on two bases (S and R) and was sustained only one ground (S, for non-genuine signature).

¶ 67 Stepping back and being practical, it's not hard to understand what Walker's counsel was doing. These election cases move at a breakneck pace. As noted, Walker was required to submit his Rule 8 motion by close of business the next day, and he ultimately lodged (by our count) 480 line-by-line challenges. As Walker's counsel himself explained to the hearing officer, rather than run the risk of an oversight by writing down the wrong objection and waiving it, he included

them all—a belt-and-suspenders approach—to ensure that he did not miss anything. He preserved too much, if you will, to ensure that he did not (fatally) preserve too little.

¶ 68 Best practices, maybe not. But the question is whether Rule 8 put Walker on notice that such an approach was prohibited. After all, a tribunal is generally free to adopt whatever rules it deems proper, but at the very least, a rule must reasonably apprise those subject to the rule of its requirements, particularly if the penalty for noncompliance with those requirements is forfeiture or waiver. See, *e.g.*, *Granite City Division of National Steel Co. v. Illinois Pollution Control Board*, 155 Ill. 2d 149, 164 (1993).

¶ 69 Rule 8(d) provides that a Rule 8 motion "shall contain a written statement or outline sufficient to advise the other parties of the factual and/or legal issues to be addressed" at the Rule 8 evidentiary hearing. And Rule 8 makes its waiver rules abundantly clear. If the "watcher" does not object to the Board examiner's unfavorable ruling, that ruling is barred from further consideration or argument. If the unfavorable ruling is not listed in the Rule 8 motion, further consideration of that ruling is forever barred. But the rule says nothing about what happens if, out of an abundance of caution, the party does *more* than identify the specific objections the party intends to challenge. There is nothing even hinting at a penalty for preserving "too much" error.

¶ 70 The Board insists that Walker's Rule 8 motion was unfair to the Objectors, who were burdened with researching every line-by-line objection for every conceivable ruling by the Board examiner. But that ignores the reality of the situation and the very framework set up, wisely, by the Board. The Objectors, just like the candidate, have eyes and ears at the record examination—their own "watchers," as prescribed by the rules. They know which objections were sustained or overruled, and they know which ones the opposing "watcher" preserved for further review by

objecting. The only thing they do not know, at the conclusion of the records examination, is which signatures the opposing side will choose to raise in their Rule 8 motion. Usually, as appears to be the case here, both sides' "watchers" object to every unfavorable ruling just for preservation purposes, and the Rule 8 motion lists every one of those signatures for the same reason. Here, again, Walker appealed some 480 signatures for review, though he ultimately tried to rehabilitate only 21 of them via affidavits.

¶ 71 So the notion that one side could be unfairly blindsided by an admittedly scattershot Rule 8 motion like Walker's here strikes us as misplaced. All the Objectors really needed to know is which signatures were potentially in play; they already knew which rulings were relevant to each signature. As long as those rulings were identified in the Rule 8 motion and thus preserved, the Objectors knew that a potential signature, and a potential ruling on that signature, was in play at the evidentiary hearing before the Board.

¶ 72 We are skeptical that Walker's Rule 8 motion failed to "sufficient[ly] *** advise the other parties of the factual and/or legal issues to be addressed" at the Rule 8 hearing. We are just as skeptical that the Board's Rule 8 put Walker on reasonable notice that his motion would be improper. That only magnifies the error in not considering Walker's affidavits while considering and ruling conclusively upon the Objectors', thus flipping the outcome from ballot access to ballot denial for Walker.

¶ 73 In sum, we cannot uphold the Board's final decision to exclude Walker's 21 affidavits from consideration.

¶ 74 II. "First Signature" Challenges

¶ 75 We cannot end our analysis there. Walker also insists that the Board erroneously agreed with the Objectors that 68 of his signatures were invalid under the "first signature" provision in

section 10-3 of the Election Code. See 10 ILCS 5/10-3 (2022). If he is correct, then the matter is at an end; he has sufficient signatures for ballot access. But he is not correct. We uphold the Board's findings and conclusions of law on this question.

¶ 76 The Board found that, when Walker challenged the Objectors' interpretation of section 10-3 at the post-remand hearing, he did so belatedly. That is to say, under Board Rule 5, if Walker wanted to contest the legal viability of an objector's challenge, he had to do so in an initial pleading, and Walker did not do so in that initial pleading. Thus, in the Board's view, Walker was not entitled to even raise the argument at the time he did.

¶ 77 The finding of waiver was not arbitrary or unreasonable. Board Rule 5(b) required challenges to the legal sufficiency of an objector's petition to be filed by a time certain in writing, and it is undisputed that Walker did not do make that argument by that deadline or even close to it. The failure to do so under Rule 5(b) results in waiver.

¶ 78 A. Statutory Interpretation

¶ 79 But the Board properly did not stop there; waiver or not, no responsible board would invalidate signatures based on a statute without ensuring that the statute so required. Nor would this court. The Board properly considered the legal question on the merits.

¶ 80 The Board first found that its own longstanding precedent at the administrative level was to deem section 10-3's "first signature" rule to be mandatory, not directory. The Board noted that it repeatedly had made that ruling over the years, and that one of those decisions reached the appellate court, which affirmed its ruling in an unpublished order. See *Popielarcyzk v. Board of Election Commissioners of City of Chicago*, 1-11-0218, 2011 WL 10088339, at *6 (1st Dist. 2011) (unpublished order) (Epstein, J.).

¶ 81 The Board also relied on this court's decision in *Watkins v. Burke,* 122 Ill. App. 3d 499, 501 (1984), which found the provisions of a similar "first signature" rule in section 7-10 of the Election Code to be mandatory, not permissive. See *id*. at 501 (when voter has signed more than one nominating petition, "the signature appearing on the petition first signed is valid and all subsequent signatures appearing on the nominating petitions of other parties are invalid.").

¶ 82 For many of the reasons given by the Board, we agree that the "first signature" rule in section 10-3 of the Election Code is mandatory, not directory. We will attempt to keep our analysis brief for time purposes.

¶ 83 In construing a statute, our primary task is to give effect to the legislature's intent. *McNamara v. Oak Lawn Municipal Electoral Board,* 356 Ill. App. 3d 961, 964 (2005). The best indication of that intent is the plain and ordinary language of the statute. *Id.*

¶ 84 Section 10-3 of the Election Code, which covers any number of subjects, in pertinent part provides that "Each voter signing a nomination paper … may subscribe to one nomination for such office to be filled, and no more." 10 ILCS 5/10-3 (West 2022). Walker says that this is not mandatory language but merely directory or permissive language.

¶ 85 Generally, requirements in the Election Code are mandatory, not directory. *Jackson-Hicks*, 2015 IL 118929, ¶ 23. The word "may" generally indicates non-mandatory, permissive language. See *id.* ¶ 27. For example, in *McNamara*, 356 Ill. App. 3d at 964, cited here by Walker, this court construed a separate provision of Section 10-3 that provided that "Nominations of independent candidates for public office *** *may* be made by nomination papers signed in the aggregate for each candidate by qualified voters of such district." (Emphasis added.) 10 ILCS 5/10-3 (West 2002). We read that language as permissive; it described the

manner in which a nomination *could* be made but did not dictate it as a requirement. *McNamara*, 356 Ill. App. 3d at 966.

¶ 86 But no word—"may" or any other—should be considered in isolation; it must be construed in context with its surrounding language. *Jackson-Hicks*, 2015 IL 118929, ¶ 27. For example, the word "may," if followed by the word "not," would be anything *but* permissive.

¶ 87 The language at issue provides that a voter "may" sign one candidate's nominating petition in a given race "and no more." 10 ILCS 5/10-3 (West 2022). That sounds nothing like permissive language. Of course, a voter "may" choose to sign a petition—she is obviously not required to do so, thus the word "may." But the phrase "and no more" that follows is a hard restriction on the number of nominating petitions a voter "may" sign. We find no merit to Walker's attempt to find this language permissive.

¶ 88 Walker further argues that this language, even if couched as a mandate, should be deemed directory, not mandatory, because section 10-3 does not specify a penalty for noncompliance. We cannot agree. Our supreme court has held that minimum-signature requirements are deemed mandatory, even when state law does not specify a penalty for noncompliance with that required minimum. See *Jackson-Hicks*, 2015 IL 118929, ¶ 31 (minimum-signature requirement was mandatory; it was not "necessary for the legislature to explicitly state the consequence of failing to meet its fixed numerical threshold").

¶ 89 The "first-signature" language is intertwined with the candidate's signature requirement. The point of minimum-signature requirements is to determine a modicum of support for a candidate. See *Anderson v. Celebrezze*, 460 U.S. 780, 788 n. 9 (1983); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). The "preliminary demonstration of a significant modicum of support furthers the state's legitimate interest of avoiding confusion, deception, and even frustration of

the democratic process at the general election." (Internal quotation marks omitted.) *Druck v. Illinois State Board of Elections*, 387 Ill. App. 3d 144, 151 (2008). The "first-signature" requirement is consistent with this purpose; one could question the level of support for a candidate if those who signed the candidate's petition also signed a rival's petition.

¶ 90 It is not our place to say whether this "first-signature" provision is wise policy or even a good idea; that is left to the legislature. But there is no question that this provision is substantive in nature, not some technicality that may be forgiven or that may be overlooked if the candidate "substantially complied" with the restriction. There is no substantial compliance with this provision; the voter either signed dual petitions or she did not. So this provision is a far cry from mandatory language on more technical matters, the noncompliance with which we have forgiven, like inadequate language on the notarial jurat on a statement of candidacy; the filing of a required statement of economic interest in the wrong county; the failure to sequentially paginate signature pages to a ballot petition; or writing the wrong date on a statement of candidacy. See, respectively, *Akin v. Smith*, 2013 IL App (1st) 130441, ¶ 3; *Atkinson v. Roddy*, 2013 IL App (2d) 130139; *Samuelson v. Cook County Officers Electoral Board*, 2012 IL App (1st) 120581; *Siegel v. Lake County Officers Electoral Board*, 385 Ill. App. 3d 452, 461 (2008).

¶ 91 The Board properly determined that the "first signature" language in section 10-3 was mandatory, and thus that "the signature appearing on the petition first signed is valid and all subsequent signatures appearing on the nominating petitions of other parties are invalid." *Watkins*, 122 Ill. App. 3d at 501.

¶ 92 B. Propriety of Objectors' Affidavits

¶ 93 Having found that the Board properly determined that the "first signature" rule was mandatory, and thus noncompliance with that provision rendered a signature on Walker's

petition invalid, we turn to the Board's finding that the 68 affidavits submitted by the Objector were proper in form and content. The hearing officer thought not because, though the affiants swore that they signed another specified candidate's petition "before" they signed Walker's, they did not specify where or when they signed that first petition.

¶ 94 We agree with the hearing officer that more detail might have been ideal, but it was not arbitrary or unreasonable for the Board to determine, on the contrary, that the affidavits were minimally sufficient to get the job done. So we uphold that finding, too. Which means that the Board did not act arbitrarily or unreasonably in determining that the 68 affidavits served to invalidate each of those 68 signatures on Walker's petition.

¶ 95 C. Candidate's Four Rebuttal Affidavits

¶ 96 And last, we consider the Board's finding that Walker's presentation of four counter-affidavits, aimed at four of the 68 affidavits presented by the Objectors, was untimely. As noted above, the hearing officer's order provided that any rebuttal affidavits be submitted by 5:00 pm on the relevant day, and Walker submitted the four rebuttal affidavit 48 minutes past the deadline. While barring them as untimely may seem harsh, under our deferential standard of review, we cannot deem the Board's conclusion to be arbitrary or unreasonable; enforcing a deadline, especially under tight time constraints, is enforcing a deadline.

¶ 97 For these reasons, we uphold the Board's striking of those 68 signatures submitted by the Objectors.

¶ 98 III. Remaining Matters

¶ 99 In sum, we hold that the Board improperly refused to consider the 21 rehabilitation affidavits proffered by Walker. The Board did not err in sustaining the Objectors' 68 affidavits,

thus reducing Walker's signature count by 68 votes and below the required threshold—but not so far below that his 21 rehabilitation affidavits could not potentially put him back over the top.

¶ 100 For these reasons, and given the expedited nature of matters at this late juncture, we remand this matter to the Board for an evidentiary hearing, to be scheduled immediately, on the validity of the 21 rehabilitation signatures proffered by Walker. This Court will retain jurisdiction over this matter. The Board will immediately issue a final decision after the results of that evidentiary hearing and submit it directly to this Court. In the meantime, the name of Shawn A. Walker will remain on the ballot for 28th Ward Alderman, per our previous Order.

¶ 101 The judgment of the circuit court is reversed. The cause is remanded to the Board, consistent with the instructions above. This court retains jurisdiction over the cause.

¶ 102 Reversed; remanded with instructions; jurisdiction retained.