

RECEIVED

JUL 18 1996

NEW HAMPSHIRE
SECRETARY OF STATE

1:00 p.m.

STATE OF NEW HAMPSHIRE

BALLOT LAW COMMISSION

John Rauh

v.

Bob Smith

No. 96-2

Charles G. Douglas, III

v.

Richard Swett

No. 96-4

PREAMBLE

For the last three weeks the Ballot Law Commission has had under consideration three challenges to the placement of candidates names on the primary ballot. In all three cases arguments have been made that the issues before us involve technical compliance with unduly burdensome ballot access rules. That is not the case. We have found that the ballot access rules are not unduly burdensome and that the violations of the election laws that have been proven in all three cases are substantive not just technical. In each of these cases we have found that campaign workers have engaged in gross negligence, misconduct and deceptive behavior. Although there has been no evidence that the candidates personally knew of or

condoned the actions of their staff, they should have known of the conduct and are ultimately responsible for it.

RSA 655:20 requires that anyone running for U.S. Senate must file 2,000 primary petitions signed by members of his party pursuant to RSA 655:22. This requirement is waived if the candidate voluntarily accepts the campaign spending limits of RSA 664:5-b. RSA 655:21 requires that each signatory certify under oath that the signatory is a registered member of the candidate's political party in the signatory's place of domicile. RSA 655:19 requires the candidate to file the requisite number of petitions with the Secretary of State unless the candidate agrees to limit campaign expenditures in accordance with RSA 664:5-a. For candidates who do agree to limit campaign expenditures, RSA 655:19-b provides for the waiver of the requirement of petitions.

It is the oath on the primary petition that gives the petition prima facie validity and is relied on by the Secretary of State when he accepts primary petitions. RSA 655:24, 26. It is because of this oath that it is not necessary for state officials to check the qualifications of each and every petition signer. The oath does not need to be overly formalistic but does require some indication by the

signor to the notary or justice that he or she is swearing to the truth of the contents of the petition.

In sum, our role in all three cases has not been to enforce technicalities, but to ensure that political campaigns are bound by the rule of law and that the integrity of the election process is respected and preserved. Only when the integrity of the process is preserved can we be sure that the will of the voters is carried out. This is the primary role of the Ballot Law Commission.

The Commission has considered the evidence in each of these cases separately and the Petitions have not been consolidated. However, because of the overlapping legal issues and the need for a prompt decision, the Commission is issuing a joint decision.

ORDERS

John Rauh v. Bob Smith

No. 96-2

This is a petition seeking an order that Respondent has failed to submit the necessary primary petitions required by RSA 655:20 and therefore his name should not be printed on the ballot. The Petitioner claims that a number of primary petitions submitted by Respondent were defective because they were signed by people who were not registered Republicans, were duplicate petitions signed by the same person twice, failed to show the residence of the signatory or were improperly acknowledged by a justice of the peace or notary public.

On June 10, 1996, Respondent filed a declaration of candidacy, a check in the amount of \$5,000, and 2,386 primary petitions with the Secretary of State. On July 5, 1996, N.H. Citizen Action filed a petition questioning whether the Respondent had filed a sufficient number of valid primary petitions. On July 11, 1996 John Rauh filed this petition and Citizen Action subsequently moved to change its status to that of an intervenor.

The Respondent filed a Response to the Petition.

Essentially the Respondent argued that any deficiencies on the primary petitions were not substantive, that the respondent was entitled to rely on the acceptance of the primary petitions by the Secretary of State and that the intentions of the signers of the petitions should be carried out in spite of technical deficiencies in the execution of the petitions. The Commission held a two-day evidentiary hearing. Based on the evidence presented, the Commission makes the following factual findings:

1. The Commission finds the following substantive deficiencies in the Respondent's primary petitions:

Duplicate petitions (signed by 83 people) (Rauh Exhibit 6)	166
Triplicate petitions (signed by 4 people) (Rauh Exhibit 7)	12
No notarial signature (Rauh Exhibit 12)	6
Missing entire address (conceded by Respondent)	13
Not registered Republicans (conceded by Respondent)	166
Notarial seal or justice stamp do not match signatures (Rauh Exhibit 3)	6
Christina Worcester admission in 12-15 instances she did not witness signing	12-15
Hilary Wehner's stamp used by jurat signed by unknown third party	6
Missing city/town of residence	9

2. Edward Shaughnessy is the Political Director of the Smith Campaign. He became a justice of the peace in order to take acknowledgments on Smith petitions. He appeared before the Commission with counsel and invoked testimonial privilege pursuant to RSA 665:12. Mr. Shaughnessy testified that he did not administer an oath to any signator. He claimed that he identified himself to the signator as a justice of the peace. Mr. Shaughnessy initially testified that he did not request identification from the signators because he knew most of them but admitted on cross-examination that he did not know the identity of a substantial percentage of the signators.

3. Hilary Wehner is the Finance Director for the Smith Campaign. Ms. Wehner appeared before the Commission to testify with her counsel and invoked testimonial privilege pursuant to RSA 665:12. Ms. Wehner executed 742 of the Respondent's primary petitions as a justice of the peace. She never administered an oath to the signatory. Ms. Wehner's justice of the peace stamp appears on 5 petitions that have been signed by another individual or individuals who Ms. Wehner was unable to identify.

4. Christine Worcester was a paid staff member for the Smith campaign. Ms. Worcester appeared before the Commission

with her counsel and invoked testimonial privilege pursuant to RSA 665:12. Ms. Worcester took the acknowledgment of approximately 395 signatories as a justice of the peace. Ms. Worcester became a justice of the peace in order to take acknowledgments on primary petitions for political candidates. In no case did she administer an oath or request identification from the signatory. Ms. Worcester testified that she did not know how to administer an oath "according to the state's terms". Significantly, Ms. Worcester admitted that she acknowledged signatures of 12-15 signatories who did not appear before her. Ms. Worcester admitted that when she signed her application to become a justice of the peace she had not been a registered voter for three years as stated in her affidavit. Ms. Worcester did not meet the qualifications to be a justice of the peace. RSA 455-A. We did not find Ms. Worcester's testimony to be credible and we find that she significantly minimized the extent of her misconduct. The Commission finds that Ms. Worcester failed to properly take any acknowledgments. The Commission finds that significantly more than 12-15 signatories did not appear before her.

5. Each of the three justices from the Smith Campaign signed acknowledgments that were untrue. Because of their

misrepresentations it is impossible to quantify the precise number of invalid petitions. We find that the number of valid petitions is significantly below the 2,000 required.

6. The Respondent's campaign workers were grossly negligent in their efforts to obtain signatures on the petitions and engaged in misconduct and deceptive behavior. Despite the fact that the Smith Campaign instructed its employees to become justices of the peace to collect petitions, no instructions or procedures were put in place to prevent the type of misconduct that occurred here.

7. Although there is no evidence that the Respondent personally knew of or condoned the actions by his campaign staff, he should have known of the conduct and is ultimately responsible for it.

8. The Respondent filed his declaration of candidacy on June 10, 1996. When the Respondent filed his declaration of candidacy he may have assumed that he had submitted in excess of 2,000 valid primary petitions.

Legal Issues

I. Jurisdiction. The Ballot Law Commission finds that it has jurisdiction pursuant to both RSA 665:5 and 665:7. RSA 665:5 grants the Commission jurisdiction over filing disputes

involving declarations of candidacy. The Respondent suggested at the pretrial structuring conference that the Ballot Law Commission has no jurisdiction over this matter because FECA preempts RSA 655:20. We disagree. No evidence or arguments were presented on this issue at the hearing on the merits. RSA 655:20 is a ballot access statute. The federal and state governments have shared authority over federal elections. It has long been recognized that when Congress exercises its authority to regulate federal elections, its enactments have the effect of superseding state law only so far as the two are inconsistent and no further. See Ex Parte Siebold, 100 U.S. 383 (1882). We do not need to address whether FECA preempts any of New Hampshire's election laws. We find that it does not preempt RSA 655:20 and does not deprive the Commission of jurisdiction.

II. Time Limit to Object. The Respondent contends that he was entitled to rely on the fact that the Secretary of State did not notify him that any of his primary petitions were rejected and that the Petition was untimely. The Commission interprets RSA 655:26 to require the Secretary of State to inspect primary petitions for facial irregularities. It is not reasonable to expect the Secretary of State to verify the

substance of the thousands of petitions that are submitted to him before every election. The Commission finds that the statute does not impose any time limit to challenge primary petitions on the basis of illegality or fraud. The Commission will review the equitable and due process claims related to timeliness on a case-by-case basis. In this case the Commission finds that the Respondent has been afforded the process that he is due. We find the laches argument unpersuasive in this case. Likewise the Commission finds that the Respondent is not entitled to rely on acceptance of his petitions when his own staff was responsible for submitting defective petitions.

III. Constitutional Right to be on the Ballot. The Respondent correctly points out that he has a constitutional right to seek elective office. N.H. Const. Pt. 1, Art. 11. However, his "right" to appear on the ballot is subject to compliance with reasonable statutory regulation. Wilkes v. Jackson, 101 N.H. 420 (1958). Having represented that he met those requirements, he cannot now complain when it appears that the representation was inaccurate.

IV. Cure. The Respondent points out that RSA 655:26 evidences a statutory policy to permit a candidate to cure a

filing of petitions found to be defective by the Secretary of State and argues that a candidate whose filing is found to be defective by an opposing candidate should be afforded the same protection. To the extent that the defects were found to be de minimis or technical, the argument would have some appeal. However, the defects here are substantive. To allow a candidate to cure petitions that were illegally executed is not permitted by the statute. Even if he had a chance to cure the facially defective petitions, Respondent still would not have filed a sufficient number of petitions.

Decision

The Ballot Law Commission finds that Respondent failed to file the requisite number of primary petitions required by RSA 655:22, and therefore pursuant to RSA 655:20 is not entitled to have his name printed on the ballot.

RSA 664:5-a requires a candidate who is willing to abide by campaign spending limits to file an affidavit to that effect "within 3 days after the date on which a candidate files his declaration of candidacy... ." The Respondent filed his declaration of candidacy on June 10, 1996. The Petition challenging the Respondent's primary petitions was filed with the Secretary of State on July 5, 1996 by Citizen Action and

July 11, 1996 by Petitioner. If the Respondent had known on June 11, 1996 that he did not have a sufficient number of valid petitions he could have chosen the alternate route to ballot access and voluntarily agreed to the campaign spending limit. We do not think that he should be deprived of that choice simply because the Petition was filed after the date for making that election. We have found that the filing of this Petition was not untimely despite the fact that it came after the date by which Respondent had to choose which ballot access route to take. At the same time we think that it would be unfair to deprive the candidate of that option simply because the Petition was not filed sooner. We believe that we have the equitable power to allow the Respondent a reasonable time to make that choice now. We exercised that power with respect to Candidate Zelif. If the Respondent wishes to voluntarily so elect, the affidavit required by RSA 664:5-a shall be filed with the Secretary of State no later than 9:30 AM on Friday, July 19, 1996. If this affidavit is timely filed, then the Respondent's name shall be printed on the ballot. If the affidavit is not so filed, the Respondent's name shall not be printed on the ballot.

We understand that the Commission has no authority to order any candidate to comply with the campaign spending limits. Filing the affidavit is a waiver of certain rights. We simply find that the candidate should be given a second chance to make that election in light of our findings in this case.

The Secretary of State shall not begin printing the ballots until 24 hours after this decision is issued.

This is the unanimous decision of the Commission.

Charles G. Douglas, III v. Richard Swett

No. 96-4

This is a petition seeking an order that Respondent has failed to submit the necessary primary petitions required by RSA 655:20 and therefore his name should not be printed on the ballot. The Petitioner claims that a number of primary petitions submitted by Respondent were defective because they were signed by people who were not registered Democrats, were duplicate petitions signed by the same person twice, failed to show the residence of the signatory or were improperly acknowledged by a justice of the peace or notary public.

On June 11, 1996, Respondent filed a declaration of candidacy, a check in the amount of \$5,000, and 2,095 primary petitions with the Secretary of State. On June 14, 1996 the Respondent filed an additional 49 primary petitions. On July 9, 1996, the Petitioner filed the within challenge.

The Respondent filed a Motion to Dismiss the Petition and the Petitioner filed a Motion to Amend to Substitute Petitioner. The latter was orally amended to add rather than substitute the Republican State Committee of N.H. as a party

and to that extent the Motion is granted. The Motion to Dismiss is denied for the reasons set forth below.

1. The Respondent has stipulated that 219 primary petitions are invalid because they are duplicative or because the signatory is either a Republican, an independent, or not a registered voter. The Respondent has also stipulated that Mr. Pappas, a paid campaign worker, signed some petitions as a justice of the peace when signatories were not in his presence.

2. Matthew Pappas signed approximately 900 primary petitions as a justice of the peace. Of those, 337 were dated June 10, 1996 and 24 had dates changed to June 10, 1996. The acknowledgment of 337 petitions in one day represents close to one acknowledgment every 2 minutes for 12 hours without a break. Numerous attempts by the Petitioner to subpoena Mr. Pappas to appear before the Commission and efforts by counsel for the Respondent to contact Mr. Pappas were unsuccessful in spite of the fact that Mr. Pappas remains on the Respondent's payroll. We believe that Mr. Pappas intentionally evaded service of a subpoena to avoid testifying before the Commission.

3. Carl Makin, Michael Salce and William and Dorothy Emerson signed primary petitions which were acknowledged by Matthew Pappas on June 10, 1996. All four testified that they signed the petitions prior to June 10, 1996 and none of them had their acknowledgments taken by Matthew Pappas. On the Carl Makin and William and Dorothy Emerson petitions the original dates and counties were crossed out and replaced with June 10, 1996 and Merrimack County. Michael Salce testified that he signed his petition on June 2, 1996.

4. Based on the evidence and the reasonable inferences we draw therefrom, we find that the acknowledgments on a significant number of the Pappas petitions were not truthful and that a significant number of the signatories never appeared before Mr. Pappas.

5. The Petitioner presented credible evidence that a number of persons who signed primary petitions for the campaign were not registered Democrats or did not have their oath taken by a justice of the peace or notary public.

6. We find that the number of valid petitions is substantially less than 2,000.

7. The Respondent's campaign workers were grossly negligent in their efforts to obtain signatures on the petitions and engaged in misconduct and deceptive behavior.

8. Although there is no evidence that the Respondent personally knew of or condoned the actions by his campaign staff, he should have known of the conduct and is ultimately responsible for it.

9. The Respondent filed his declaration of candidacy on June 11, 1996. When Respondent filed his declaration of candidacy, he may have assumed that he had submitted in excess of 2,000 valid primary petitions.

Legal Issues

I. Jurisdiction. The Ballot Law Commission finds that it has jurisdiction pursuant to both RSA 665:5 and 665:7. RSA 665:5 grants the Commission jurisdiction over filing disputes involving declarations of candidacy. The Respondent has claimed that the Ballot Law Commission has no jurisdiction over this matter because FECA preempts RSA 655:20. We disagree. RSA 655:20 is a ballot access statute. The federal and state governments have shared authority over federal elections. It has long been recognized that when Congress exercises its authority to regulate federal elections, its

enactments have the effect of superseding state law only so far as the two are inconsistent and no further. See Ex Parte Siebold, 100 U.S. 383 (1882). We do not need to address whether FECA preempts any of New Hampshire's election laws. We find that it does not preempt RSA 655:20 and does not deprive the Commission of jurisdiction.

II. Time Limit to Object. The Respondent contends that he was entitled to rely on the fact that the Secretary of State did not notify him that any of his primary petitions were rejected and that the Petition was untimely. The Commission interprets RSA 655:26 to require the Secretary of State to inspect primary petitions for facial irregularities. It is not reasonable to expect the Secretary of State to verify the substance of the thousands of petitions that are submitted to him before every election. The Commission finds that the statute does not impose any time limit to challenge primary petitions on the basis of illegality or fraud. The Commission will review the equitable and due process claims related to timeliness on a case-by-case basis. In this case the Commission finds that the Respondent has been afforded the process that he is due. We find the laches argument unpersuasive in this case. Likewise the Commission finds that

the Respondent is not entitled to rely on acceptance of his petitions when his own staff was responsible for submitting defective petitions.

III. Constitutional Right to be on the Ballot. The Respondent correctly points out that he has a constitutional right to seek elective office. N.H. Const. Pt. 1, Art. 11. However, his "right" to appear on the ballot is subject to compliance with reasonable statutory regulation. Wilkes v. Jackson, 101 N.H. 420 (1958). Having represented that he met those requirements, he cannot now complain when it appears that the representation was inaccurate.

IV. Cure. The Respondent points out that RSA 655:26 evidences a statutory policy to permit a candidate to cure a filing of petitions found to be defective by the Secretary of State and argues that a candidate whose filing is found to be defective by an opposing candidate should be afforded the same protection. To the extent that the defects were found to be de minimis or technical, the argument would have some appeal. However, the defects here are substantive. To allow a candidate to cure petitions that were illegally executed is not permitted by the statute. Even if he had a chance to cure

the facially defective petitions, Respondent still would not have filed a sufficient number of petitions.

Decision

The Ballot Law Commission finds that Respondent failed to file the requisite number of primary petitions required by RSA 655:22, and therefore pursuant to RSA 655:20 is not entitled to have his name printed on the ballot.

RSA 664:5-a requires a candidate who is willing to abide by campaign spending limits to file an affidavit to that effect "within 3 days after the date on which a candidate files his declaration of candidacy... ." The Respondent filed his declaration of candidacy on June 11, 1996. The Petition challenging the Respondent's primary petitions was filed with the Secretary of State on July 9, 1996. If the Respondent had known on June 11, 1996 that he did not have a sufficient number of valid petitions he could have chosen the alternate route to ballot access and voluntarily agreed to the campaign spending limit. We do not think that he should be deprived of that choice simply because the Petition was filed after the date for making that election. We have found that the filing of this Petition was not untimely despite the fact that it came after the date by which Respondent had to choose which