John D. Rauh

v.

Jeffrey R. Howard, in his Capacity as Attorney General of New Hampshire
and
Robert C. (Bob) Smith

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SEP 26 1996
NEW HAMPSHIRE
SECRETARY OF STATE

96-9

ORDER

Background

On August 6, 1996, John Rauh filed a Petition in which he requested that the Ballot Law Commission ("the Commission") rule that the Attorney General improperly denied his complaint filed pursuant to RSA 664:18 and declare that Robert Smith had exceeded New Hampshire's voluntary campaign expenditures act. The Petitioner withdrew his additional requests of (1) an order directing the Attorney General to issue a cease and desist order; (2) in the alternative, that the Commission issue a cease and desist order; and (3) an order that "excess expenditures" be allocated to the general election.

By Order dated August 19, 1996, the Commission analyzed the legal issue of when the clock starts ticking for purposes of calculating campaign spending. The Commission rejected the Attorney General's statutory interpretation that a person becomes a candidate for state purposes on "the date on which the candidacy is publicly and unequivocally declared." Instead, the Commission found that, "[w]hether a person is publicly declared as a candidate and a person for whom votes are sought in an election is a question of fact

that must be determined on a case by case basis. We do not believe that the issue can be resolved by using an arbitrary date such as whether the potential candidate has filed a form with the government, state or federal." Thus, the Commission remanded the matter to the Attorney General for further consideration in light of the Commission's legal interpretation.

On August 29, 1996, the Petitioner filed a Motion to Compel and Request for Expedited Consideration in which he claimed that the Attorney General was disregarding the Commission's Order. A hearing was held on September 5, 1996. By Order dated September 5, 1996, the Commission denied the Motion to Compel based upon the representation of the Attorney General's office that the Attorney General was reviewing the Petition with respect to the date on which Robert Smith became "a person publicly declared as such and for whom votes are sought in an election," RSA 664:2, II, and was making that determination in accordance with the ruling of the Commission. However, in the Order the Commission stated that, "[i]f the Attorney general has not made that determination by September 9, 1996, . . . the petitioner may submit evidence and request the Ballot Law Commission to determine the appropriate date."

The Attorney General did not make a determination by September 9, 1996. The Attorney General also did not request an extension of the September 9, 1996 deadline. The Petitioner then requested a hearing which was scheduled for September 19, 1996.

By letter dated September 18, 1996, the Attorney General informed the Commission that a representative from his office would not be appearing at the hearing. In this letter, the Attorney General stated that, in his opinion, the Commission lacks jurisdiction to review a decision by the Attorney General whether to initiate an enforcement action, to issue cease and desist orders or extraordinary writs, or to levy fines or seek criminal sanctions. This letter did not address the Commission's jurisdiction to review the legal issue of when the clock starts to tick.

By letter dated September 19, 1996, Commissioner Richardson responded to the Attorney General's letter by stating that, pursuant to RSA 665:7, the Commission has jurisdiction to hear disputes involving alleged violations of New Hampshire election laws and to hear and determine petitions for review of cease and desist orders issued by the Attorney General. Commissioner Richardson also stated that the Attorney General was free to assert jurisdictional arguments at the upcoming hearing but that if a representative of the Attorney General's office did not appear at the hearing, the Commission would consider the Attorney General to be in default.

A hearing was held on September 19, 1996. Neither Robert Smith nor the Attorney General attended this hearing. At the hearing, evidence was presented on the issue of when Robert Smith became a "candidate." The evidence of Robert Smith's public declaration of candidacy included his "Statement of Candidacy" which was filed

on May 2, 1995 with the Secretary of the [U.S.] Senate and with the Office of the Secretary of the State of New Hampshire. FEC Form 2, Petition Exh. A. This document provides, "I hereby authorize the following named committee,... to receive and expend funds on behalf of my candidacy." Id. Evidence was also presented that Robert Smith received $735,161.12 in campaign contributions during the 1995 calendar year. FEC Form 3, Petition Exh. B. In addition, evidence was submitted which reflected that Senator Smith received over $400,000.00 of additional contributions by June 30, 1996. Id. Finally, evidence was presented that Robert Smith publicly announced and advertized his candidacy on the radio and television during May of 1996. See Letter dated August 14, 1996 from Daniel Sklar to Lawrence Edelman and attached spreadsheet.

Evidence was also presented on the issue of Robert Smith's expenditures. From July 1, 1995 through December 31, 1995, the Bob Smith for U.S. Senate Committee made expenditures in the amount of $118,894.95. FEC Form 3, Petition Exh. B. From January 1, 1996 through August 21, 1996, the Bob Smith for U.S. Senate Committee made expenditures in the amount of $626,298.61. FEC Form 3, Rauh Exh. 4.

Findings

As a preliminary matter, the Commission finds Robert Smith and the Attorney General in default for failing to appear at the September 19, 1996 hearing.

The information necessary to determine when a person becomes publicly declared as a candidate is by its very nature public information. If the Commission believed that the Attorney General was in the process of determining the date on which Senator Smith became a candidate in light of the Commission's legal interpretation, the Commission might not be making an independent determination of the date of candidacy. However, although counsel for the Attorney General gave verbal assurances at the hearing on the Motion to Compel that the Attorney General would determine the date of candidacy in accordance with the Commission's Order, and did not appeal the Commission's August 19, 1996 Order, the failure to make a ruling and the September 18, 1996 letter to the Commission, as well as the Attorney General's failure to appear at the hearing, suggest that the Attorney General has no intention of determining the date of candidacy in light of the Commission's legal ruling. Thus, the Commission must act based on the Attorney General's apparent refusal to respect the Commission's rulings and authority.

The Commission finds that, based upon the evidence presented and the Commission's prior legal interpretation of the statute, Robert Smith became a candidate at least as early as July 1, 1995 . First, on May 2, 1995, Robert Smith filed with the New Hampshire Secretary of State a document which was captioned "Statement of Candidacy" and which gave authority for others to act "on behalf of [his] candidacy." Second, it seems unlikely that the public would have contributed over $700,000.00 in 1995 ($398,432.40 was contributed before July 1, 1995) if no public announcement of

candidacy had been made by that time. Finally, Robert Smith publicly announced his candidacy through the media well before the date that the Attorney General found Robert Smith to be a candidate.

The evidence clearly establishes that the Bob Smith for Senate Committee has made total expenditures to influence the state primary in the amount of $745,193.56 since July 1, 1995, some or all of which should be charged to the primary election spending cap. In light of Robert Smith's failure to appear at the hearing to argue that some of this amount should not be allocated to the spending cap, the Commission finds that the petitioner has proven that Robert Smith has exceeded the $500,000.00 primary election limitation. RSA 664:5-b. Accordingly, it is the unanimous decision of the Commission that the Attorney General improperly denied John Rauh's Complaint and that a violation of RSA 664:5-b has occurred.

The Commission notes that this finding is limited to the issue of when the clock started ticking for Robert Smith and whether, based upon that finding, a violation of the election limitation occurred. The Commission is not seeking to usurp the Attorney General's power to determine whether prosecution based upon such violation is appropriate in light of Robert Smith's apparent reliance on the Attorney General's legal advice about the date of candidacy.[1] Likewise, the Commission takes no position at this

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[1] In a fax dated September 17, 1996, Robert Smith stated that when he decided to be placed on the Republican primary ballot, he relied on the Attorney General's legal opinion that the clock started to tick on June 2, 1996, the date when he made his formal

time with respect to what, if any, fine would be appropriate under the circumstances or whether some or all of the fine should be waived due to Robert Smith's reliance on the Attorney General's legal opinion.

BALLOT LAW COMMISSION

Date: 9/26/96

By: _____
Gary B. Richardson, Chairman

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Hugh Gregg

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Richard Delay

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announcement of candidacy.