STATE OF NEW HAMPSHIRE

BALLOT LAW COMMISSION

Petition of the Democratic Party of New Hampshire Re: Alice Surago

BLC 2010-5

ORDER

BACKGROUND

Alice Surago filed as a candidate for the New Hampshire House of Representatives for the Democratic party primary from Strafford District 03. After the primary, she was duly certified as one of the Democratic candidates for that office in the November election. On September 16, 2010, she submitted to the Secretary of State an executed affidavit, duly notarized, requesting that her candidacy for the New Hampshire House of Representatives be terminated and that her name be removed from the ballot. In her affidavit, Ms. Surago stated that due to her age (78) and various physical ailments, as well as exhaustion due to her duty to care for her ailing husband, she is physically incapacitated and is unable to serve in the legislature.

N.H. RSA 655:38 states:

If a candidate to be voted for at the general election shall make oath between the date of the candidate's nomination and the day of the election that he or she does not qualify for the public office which he or she seeks because of age, domicile, or incapacitating physical disability acquired subsequent to the primary, the secretary of state may remove said person's name from the ballot. A new candidate may be substituted by the appropriate party committee by submitting the name of the new candidate to the secretary of state within 3 days of the disqualification. The name of the substitute candidate shall be placed on the ballots as provided in RSA 656:21.

The Secretary of State denied Ms. Surago's request. The Democratic Party appealed the denial. On September 18, 2010, the Ballot Law Commission (the "Commission") held a hearing

on this matter. At the hearing, Secretary of State William M. Gardner said that it is the established practice of his office to require verification of any disqualifying condition prior to removing any candidate for office from the ballot. In the case of a candidate who claims to be disqualified due to age or domicile, the Secretary said, those facts are easily verified. When a candidate wishes to be removed from the ballot due to disability, however, a certification from a medical doctor stating that the candidate is unable to serve due to physical disability or illness is required. No such requirement is contained in the statute.

FINDINGS OF FACT

The petitioner was represented by Attorney Peter Burling. Ms. Surago did not attend. The only testimony at the hearing offered in support of the petition consisted of Ms. Surago's sworn affidavit, in which she states that since declaring her candidacy, she has undergone surgery to repair a hand condition, and that since then, her husband suffered an aggravation of a long-term illness, and that she is providing for his care. She is 78 years of age, and the burden of taking care of her husband added to her own ailments has resulted in her suffering from exhaustion, severe headaches, muscle weakness, chest pains and the inability to sleep.

Therefore, she claims to be physically incapacitated and unable to serve in office. Ms. Surago's affidavit also states that she regrets having to withdraw, as she had looked forward to serving.

Based upon his understanding of the situation, Attorney Burling offered further circumstances surrounding Ms. Surago's condition and interest in withdrawing. Attorney Burling described her inability to obtain a doctor's verification, as she apparently is a patient of the Veterans Administration and was unable to arrange an appointment with a VA physician prior to the hearing. It is unclear whether Secretary of State was aware of these facts prior to the hearing.

The Secretary of State explained that his office denied Ms. Surago's request to be removed from the ballot because she failed to substantiate her oath by supplying a written opinion from a medical doctor stating that she is incapable of serving due to her physical ailments.

No party contradicted Ms. Surago's claims of incapacity, yet when asked why Ms. Surago did not submit a certification of incapacity signed by a medical doctor, Attorney Burling stated that due to extenuating circumstances not within Ms. Surago's control she currently has no access to a qualified health professional.

RULINGS OF LAW

N.H. RSA 665:7 grants the Commission jurisdiction to decide "disputes arising over whether nomination papers or declarations of candidacy filed with the secretary of state conform with the law." Further, the Ballot Law Commission "is a quasi-judicial body charged with responsibility to carry out objects and purposes of state election law." Appeal of Soucy, 139 N.H. 110, 116 (1994). This dispute relates to the question of whether Ms. Surago's withdrawal of her candidacy conforms with the law.

At issue in this appeal is the discretion of the Secretary of State to rule on the disqualification of a candidate for office. The appellant argues that all that is required for a candidate to remove his or her name from the ballot is to make an oath pursuant to RSA 655:38, supra, that he or she is no longer qualified for office due to age, domicile or disability. Yet, this argument ignores the statute's plain language. RSA 655:38 does not state that upon the oath of disqualification, the secretary of state shall remove the person's name. Rather, the statute is permissive, stating that the secretary of state may remove the candidate's name from the ballot.

The Commission concludes that this permissive language evidences the legislature's intent that the oath of the candidate is not dispositive of whether the candidate is to be removed from the ballot. The legislature intended that the secretary of state inquire more deeply prior to making that determination.

The Secretary of State argues that a candidate should need to clear a high bar before being removed from a ballot. If a candidate can remove himself or herself from the ballot after the filing deadline easily, the Secretary says, the integrity of the electoral process is in jeopardy. An easy route to disqualification of a candidate opens the door to various maneuvers designed to provide one party or another with an advantage not related to a candidate's merits.

For this reason, the Secretary argues, it is imperative that any candidate who claims to be no longer qualified for office provide objective, verifiable evidence of that disqualification.

Thus, a candidate claiming to be disqualified due to age or domicile must submit documentary evidence supporting the claim. Similarly, a candidate who seeks disqualification due to recent incapacity must support the claim by showing a verification of such incapacity by a medical doctor.

The Commission concludes that the Secretary's requirement of objective, verifiable evidence of disqualification for office is reasonable and within his discretion. Indeed, these requirements are wise and, in normal circumstances, desirable. The Secretary of State is well within his power and discretion to require these verifications as a matter of usual procedure. We commend him for requiring these proofs and for following tradition in insuring that parties do not maneuver or manipulate the process. However, the Commission further concludes that there needs to be some flexibility in the form of supporting data that is required, when there are special circumstances that do not suggest abuse. Age or domicile may be proven by various types of

documentation, *e.g.*, a birth certificate, driver's license, utility bills or registry on the town checklist. In contrast, under the Secretary's current procedure, a person who claims physical incapacity has only one option – the certification from a doctor. Thus, a candidate who is unable to access a doctor has no choice but to remain on the ballot, despite a possible incapacity. This could also harm the electoral process by disadvantaging one side in the election when that candidate is incapable of actively campaigning. If the candidate is nonetheless elected and ultimately fails to serve, a costly special election would be needed to fill the vacancy.

The Commission finds that it is within the Secretary of State's reasonable discretion to require a candidate seeking removal from the ballot due to physical incapacity to provide a certification from a medical doctor verifying the incapacitating physical disability before the candidate may be removed from the ballot, provided that there be some alternative means of verification of incapacity when a candidate does not have access to a medical doctor. The Commission further finds that in this case, the facts contained in Ms. Surago's sworn affidavit together with the supporting information provided by counsel at the hearing were adequate to allow the Commission to determine that Ms. Surago's request to be removed should be granted. This is based on the facts of this case, and is not to be read to remove the requirement of a physician's certification of disability to serve in the normal case, as required by the Secretary of State in order to produce objective and neutral substantiation.

ORDER

The petition of the New Hampshire Democratic Party to remove Alice Surago from the ballot is GRANTED.

SO ORDERED

New Hampshire Ballot Law Commission

Date: 10/9/10

Bradford Cook, Chairman

Jane Clemons Gregory Martin Sheila Roberge Martha VanOot