

STATE OF NEW HAMPSHIRE

BALLOT LAW COMMISSION

Randolph "Rip" Holden
(and others)

v.

Secretary of State

Secretary of State's
Memorandum of Law

RSA 655:14-b, Use of Nicknames on Ballots

Petitioner, Randolph "Rip" Holden, and other candidates for nomination at the September Primary have filed declarations of candidacy that listed a name to be printed on the ballot that includes a nickname, or have subsequently requested the Secretary of State to include a nickname when printing his or her name on the Primary ballot. The Secretary of State has notified each that pursuant to RSA 655:14-b the nickname they designated will not be printed on the ballot. The Petitioners appeal this decision to the Ballot Law Commission pursuant to RSA 665:9.

RSA 655:14-b prohibits the use of any nickname that is not customarily associated with the person's given name. The plain meaning of the statute and the legislative history suggest that the Legislature's intent was that in order for a nickname to be printed on the ballot the nickname must be commonly understood as a substitute for the voter's given name. It is not an issue of whether the voter himself or herself is known by that name, but whether a voter seeing the nickname would understand it to be a substitute for the given or proper name.

The Legislative history, addressed in detail below, further suggests that the intent of the Legislature was to ensure equal treatment to all candidates by establishing a clear rule that requires only a very limited exercise of discretion by the Secretary of State. While not clearly stated in the statute, the legislative history also suggests that it intended that the Ballot Law Commission have broader discretion.

The Secretary of State opposes allowing the use of deceptive nicknames or nicknames that are in effect campaign slogans. New Hampshire has a strong tradition and laws that prohibit attempts to influence voters once they enter the polling place. As the court cases from other states, discussed below, suggest, if the rule does not limit the use of nicknames candidates are likely to attempt to use the ballot as a communication tool, using creative nicknames as a final attempt to influence voters. The Secretary of State does not contend that any of the Petitioners requested nick names are deceptive, nor does he contend that any are in effect campaign slogans.

While it is the Secretary of State's position that the Ballot Law Commission may have broader discretion to approve names on a case by case basis, the Commission is urged to ensure any standards it adopts prevents the use of a deceptive nickname or campaign slogan disguised as a nickname.

STATUTE

655:14-b, Form of Candidate's Name on Ballot.

I. Every candidate for state or federal office who intends to have his name printed upon the ballot of any party for a primary shall designate in his declaration of candidacy, or on his primary petitions and assents to candidacy, the

form in which his name shall be printed on the ballot. The candidate may designate his given, first, and middle name, the initials of his given, first, and middle name, a nickname, or any combination thereof as the form in which his name shall be printed on the ballot, but he shall not designate a deceptive name. If the candidate designates a nickname in place of or in combination with his given name or the initials thereof, the nickname shall be set off with quotation marks and shall be placed immediately before his surname. If the candidate designates a nickname, the nickname shall be customarily related to the candidate's given name. A candidate shall include his surname in his designation of the form in which his name shall be printed on the ballot.

RSA 665:9, Name on Ballot Disputes.

The ballot law commission shall hear and determine all disputes arising over the form of his or her name which a candidate designates to be printed on the state primary and state general election ballot, as provided in RSA 655:14-b. The decision of the ballot law commission shall be final as to questions of both law and fact, and no court shall have jurisdiction to review the decision.

ANALYSIS

A court examining this issue would start with the plain meaning of the words of the statute. "[W]e consider the words and phrases used by the legislature within the context of the statute as a whole to effectuate the statute's underlying purpose. . . . When a particular term is undefined we assign [to it] its plain and ordinary meaning." *State v. Nelson*, No. 2003-162, slip op. at 2 (N.H. February , 2004) (internal quotations omitted) (citing *State v. Beckert*, 144 N.H. 315, 316 (1999); *State v. Boulais*, 150 N.H. at __ (2003)). The phrase, "the nickname shall be customarily

related to the candidate's given name," is properly understood to require that the alternative name be one that is associated with a particular given name. "Nickname" is defined as "1. a descriptive name added to or replacing the actual name of a person, place, or thing. 2. a familiar or shortened form of a proper name." American Heritage Dictionary, at 1187 (4th Ed 2000).

Both the language of the statute and the definition of the term "nickname" support the conclusion that it is the given or proper name, not the person who has that name, that is to be considered when analyzing whether the use of a nickname is permissible. Stated otherwise, the proper analysis of whether a nickname is permissible involves examining whether that nickname is a familiar or shortened form of a proper name, not whether the individual candidate is known by that nickname in his or her community. The analysis should be done without consideration of the individual candidate or how they are known in the community.

Legislative History

The legislative history of House Bill 475 ("HB 475") suggests that one purpose of the adoption of the restriction on the use of nicknames was to have a uniform policy to ensure that candidates have an equal opportunity to be presented on the ballot. *See* March 22, 1989, Senate Public Affairs Committee Hearing minutes. A narrow construction of the statute that limits the discretion of the officials who determine whether a nickname conforms to the statute is consistent with this intent. If the Secretary of State has to examine the individual candidate's historical usage of a nickname and whether or not the candidate is known by that name in his or her

community, this would be an onerous burden and would inherently involve a subjective judgment. The hearing testimony establishes that the Legislature was asked to establish a clear policy that limited the extent to which the Secretary of State has to make subjective judgments. *See* March 22, 1989, Senate Public Affairs Committee Hearing minutes. If the statute is construed to require only that the local official or the Secretary of State determine whether a particular nickname is either a familiar or shortened version of the proper name or a nickname that is commonly associated with the given or proper name, independent of the history of its usage by a particular candidate, the analysis is more objective in character.

The Legislature clearly intended the statute to prevent the use of deceptive names. The Committee report on HB 475 was presented to the Senate by then State Senator Charlie Bass. When asked if a person could use the name "Tax Cap Arnold" on the ballot, Senator Bass advised that, if adopted, HB 475 would prohibit this name. "It wouldn't appear on the ballot as that name because that name is clearly deceptive and it says in the committee amendment but it shall not designate a deceptive name." Senate Journal, 9 May 1989, at 1308.

It was also the apparent intent of the Legislature that even a non-deceptive nickname that is not a nickname commonly associated with the given name must be rejected by the Secretary of State, but that such a name might be approved by the Ballot Law Commission on appeal. Senator Bass was asked how a person would be listed whose legal name is Barbara Goodlander, but who is known politically as Betty Tamposi, a nickname followed by her maiden name. He replied "you might . . . put your name in and if the Secretary of State does not approve that name because it

doesn't conform with the amendment, then you would appeal to the ballot law commission. And the ballot law commission decision would be final." *Id.* Asked if his reply meant that this person could be listed on the ballot as "Betty Tamposi," Senator Bass replied "[t]hat is entirely possible." *Id.* It, therefore, appears that it was the Legislature's intent, to the extent that subjective decisions were to be made at all, that subjective decisions should be made by the Ballot Law Commission.

Case Law – Court Decisions from Other States

This Commission previously addressed RSA 655:14-b in *Meldrim Thomson, Jr. v. Dick Swett*, September 28, 1990 (Copy Attached). In pertinent part the Commission held that the "nickname "Dick" customarily relates to the candidate's given name "Richard." *Id.* at 3.

There are no New Hampshire Supreme Court decisions addressing RSA 655:14-b or the use of nicknames on ballots. Cases from other jurisdictions emphasize the importance of an equal treatment of all candidates. Louisiana has a statute similar to New Hampshire's RSA 655:14-b, except that it does not limit the use of nicknames to those customarily associated with the candidate's given name. A Louisiana appeals court upheld the use on a ballot of the nickname "Sal" for person whose given name is Salaris and use of the name O'Neal "Elmo" Bosley by a person whose name is O'Neal Bosley. *Wilson v. Butler*, 513 So. 2d 304 (La. App. 1 Cir. 8/14/87).

Illinois, in 1996, had a statute that prohibited a candidate from using any nickname other than one "by which the candidate is commonly known . . ." 10 ILCS

5/7-10.2. Under the Illinois statute, a voter had to challenge the use of a nickname before election officials could analyze whether its use was permissible. *Golden v. Cook County Officers Electoral Board*, 1996 WL 684096 (N.D. Ill. 1996). The United States District Court upheld election board and state court's denials of the use of the nickname "Cut the Taxes" because the board, after an evidentiary hearing, found that the candidate was not commonly known as an individual by the nickname "Cut the Taxes." *Id.* It is noteworthy that because no one filed a challenge, nicknames including "Save-a-Baby," "Cop," "Non-incumbent," and "America First" appeared on ballots. *Id.* In analyzing the merits of the candidates equal protection claim the court stated:

There is no constitutional right to use the ballot as a forum for advocating a policy or communicating a message; indeed, the ballot is a vehicle only for putting candidates and laws to the electorate to vote up or down and the state does not violate free speech simply by failing to make the ballot a usable means to communicate views of public policy.

Id. at 6 (internal quotations omitted) (quoting *Georges v. Carney*, 691 F. 2d 297, 300-301 (N.D. Ill. 1982).

In a challenge to a decision by the New York State Board of Elections to deny use of the name "Grampa Al Lewis" by candidate for Governor, "Al Lewis," the Supreme Court (equivalent to a New Hampshire Superior Court), citing, an earlier court decision stated:

The ultimate test of fairness is that the ballot furnish to each elector a reasonable opportunity to express his

choice, as where all the names are printed in the same style under the same appropriate headings. It would be neither fair nor practical to permit the insertion of such titles or degrees with candidates' names, much less the myriad appellations and items of descriptive matter that might logically follow and which election fever and ingenuity would undoubtedly generate.

Lewis v. New York State Board of Elections, 678 N.Y.S. 2d 887, 888 (N.Y. Gen. Term, 1998) (internal quotations and citations omitted) (quoting *Matter of Luchowski v. Lawley*, 205 N.Y.S. 2d 205, affd. 11 A. D. 2d 1084). "The use of a nickname on the ballot would lead to unrelenting attempts by candidates to highlight the given name by a nickname, street name, stage name, title, degrees or any other name created by the fertile imagination." *Id.* The appellate court noted that the petitioner claimed "that because he is known in the community by the name "Grandpa" due to his role in a 1960s television series, it is necessary that this nickname appear on the ballot in order to avoid confusion among the voting public as to his identity." *Lewis v. New York State Board of Elections*, 254 A.D. 2d 568, 568 (N.Y. App. Div. 1998). That court found "that the use of the term 'grandpa' is descriptive and . . . merely informs the voting public of petitioner's 'claim to fame' stemming from his character in a television series . . . the petitioner's name by itself is sufficient for voters to identify him." *Id.*

Conclusion

Courts from other jurisdictions have concluded that there is no constitutional right to have a nickname of one's choice listed with one's proper name on a ballot.

While New Hampshire could prohibit the use of nicknames completely, the New Hampshire Legislature has established a more permissive rule.

RSA 665:14-b, when executed by the Secretary of State, should be construed narrowly to limit the amount of discretion applied when assessing the permissibility of the use of a nickname. Application of a narrow construction in the administrative context of the Secretary of State administering the election laws provides equal protection to all candidates and keeps the administration of the election laws free from even the appearance of partisanship. To the extent that a non-conforming nickname is permissible provided the candidate proves its use does not violate the spirit of the law, that decision should be made by the Ballot Law Commission.

If the Ballot Law Commission chooses to exercise its discretion to allow a broader use of nicknames on a case by case basis after a hearing, the Secretary of State advocates that such use should be limited to circumstances where a candidate establishes by testimony or evidence that it is more likely than not that the nickname:

- a. is not deceptive;
- b. is not an electioneering communication or campaign slogan; and
- c. has been customarily associated with the individual and is a name the person has been known by in the person's community for at least five years.

The Secretary of State recognizes that many individuals are known in their community by a name other than person's legal or given name. These individuals have a legitimate interest in seeking the votes of those people who know the candidate only by this nickname. The integrity of New Hampshire's elections, however,

requires that the polling place and the ballot be free of electioneering and campaign slogans.

The difficult task of weighing the evidence and determining if a particular nickname is deceptive and whether it is a name traditionally associated with a particular individual belongs in the quasi-judicial setting of a Ballot Law Commission Hearing. For these reasons, should the Commission decide to permit the use of the Petitioner(s) nickname(s) the Secretary of State requests that any Order of the Ballot Law Commission also conclude that RSA 655:14-b when executed by the Secretary of State is properly narrowly construed and that the Secretary of State should permit only those nicknames that are a familiar or shortened forms of proper names or which are customarily related to the candidate's given name.

Respectfully submitted,

THE SECRETARY OF STATE

BY AND THROUGH HIS
HIS ATTORNEYS,

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July 8, 2004

Certification

July 8, 2004

I hereby certify that a copy of the foregoing has been sent on this date by United States Mail to the Petitioner(s), Randolph Holden, 36 First Avenue, Goffstown NH 03045 and by e-mail to ripholden@msn.com.

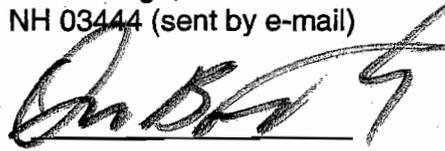
Copies also were mailed to:

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Janet Shaffer Hammond, 6 Powersbridge Road, Peterborough, NH 03458

Doris Haddock, 295 Cobb Meadow Road, Dublin, NH 03444 (sent by e-mail)

A handwritten signature in black ink, appearing to be "R. B. S.", written over a horizontal line.