

STATE OF NEW HAMPSHIRE
BALLOT LAW COMMISSION

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NEW HAMPSHIRE
SECRETARY OF STATE

New Hampshire Democratic Party

v.

Fergus Cullen
(State Senate Seat, District 6)

DECISION

On or about September 16, 2002, pursuant to RSA 655:41, the New Hampshire Democratic Party through its Chairperson, Kathleen Sullivan, filed a Petition with the Ballot Law Commission ("the Commission") challenging the residency qualifications of Fergus Cullen to be elected to the New Hampshire State Senate, District 6. The residency challenge was made pursuant to New Hampshire RSA 655:7 and RSA 655:2, and Part II, Article 29 of the New Hampshire Constitution which stipulates that "no person shall be capable of being elected a senator...who shall not have been an inhabitant of this state for seven years immediately preceding his election." RSA 21:6 defines "inhabitant" as follows:

21:6 Resident; Inhabitant.

A resident or inhabitant or both of this state and of any city, town or other political subdivision of this state shall be a person who is domiciled or has a place of abode or both in this state and in any city, town or other political subdivision of this state, and who has, through all of his actions, demonstrated a current intent to designate that place of abode as his principal place of physical presence for the indefinite future to the exclusion of all others.

The issue before the Commission is whether Mr. Cullen has for the last seven years

"demonstrated a current intent to designate [New Hampshire] as his principal place of physical presence for the indefinite future to the exclusion of all others."

The Commission has jurisdiction over this matter pursuant to RSA 665:4, I and III, and on September 25, 2002, a public hearing was held.

The first issue for decision is whether the recent amendment to RSA 655:2 applies to this case. The parties acknowledge that Mr. Cullen registered to vote in Connecticut in 1994 and 1997. RSA 655:2 states that "to hold any elective office in the state, a person must have a domicile in the state." In a close case, this Commission ruled in 2000 that the fact that a candidate had registered to vote in California did not necessarily preclude him from being elected as a New Hampshire state senator. In that earlier case, the Commission was convinced that the candidate was only temporarily out of state and intended to maintain his New Hampshire domicile, although he was temporarily absent from New Hampshire. In its decision, the Commission noted that under California law, a person was not required to become a domiciliary to register to vote in that state, and, further, that under New Hampshire law, "residency shall not be interrupted or lost by a temporary absence from it, if there is an intent to return to such residence or residency as the principal place of physical presence." RSA 21:6-a. See Petition of N.H. Republican State Committee (State Senate Seat, District 14), decided 9/29/00.

In apparent response to this decision, the Legislature amended RSA 655:2, to add the following sentence: "Registration to vote or voting in another state during the relevant time period shall create a presumption that a person does not have a domicile in this state." Therefore, if RSA 655:2 as amended applies to the facts of this case, there is a rebuttable presumption that Mr. Cullen is not eligible to serve as a state senator until he has resided in the state for seven years after he last registered to vote in Connecticut.

The Respondent argues that the amendment to RSA 655:2 should not apply to him and that it would be unfair to judge his conduct based on a statute that did not take effect until after the conduct occurred. He claims to do so would be to apply it retrospectively and would be an ex-post-facto application. The Commission disagrees. In Woart v. Winnick, 3 N.H. 473 (1826) the court defined retrospective law as follows: "Every statute, which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already passed . . ." Woart v. Winnick, 3 NH 473, 479 (1826) (quoting Society v. Wheeler 22 F. CAS. 756, 767(C.C.D.N.H.1814)(no. 13,156). The New Hampshire Constitution has required since its adoption in 1784 that a candidate for state senate be domiciled in New Hampshire for seven years to serve in that office. RSA 655:2 was already in place and the amendment to the statute did not change or alter the law but only made its' definition more explicit. The recent amendment to the statute does not impose a new burden or obligation on a candidate. The amendment simply creates a statutory presumption. The Respondent's argument that application of the amendment violates the State Constitution Part I, Article 23 as a retrospective law is not persuasive. A statute is not retrospective "if it is remedial only and not highly injurious, oppressive or unjust." Wallace v. Stearns, 96 N.H. 367, 369 (1950). The amendment is remedial in nature and affects only procedural rights. The statute neither created any new obligations nor established any new duties. Eldridge v. Eldridge, 136 N.H. 611 (1993).

The respondent's ex-post-facto argument also fails. In Petition of Hamel, 137 N.H. 488, 494 (1993), the court ruled that a law or its application is ex-post-facto if it "makes an action done before the passing of the law, which was innocent when done, criminal, and punishes such action; or . . . aggravates a crime, and makes it greater, than it was when committed; or . . .

changes the punishment, and inflicts greater punishment, when the law annexed to the crime when committed . . .” Petition of Hamel at 494, citing State v. Reynolds, 138 N.H. 519, 521 (1994). Clearly, under the Hamel definition, the amendment enacted by the legislature to RSA 655:2 is not penal and therefore not ex-post-facto.

The Constitution placed Mr. Cullen on notice of New Hampshire’s seven-year residency requirement in 1994 and 1997 when he registered to vote in Connecticut. Mr. Cullen knew or should have known then that registering to vote in another state would jeopardize his New Hampshire domicile. Mr. Cullen placed his New Hampshire domicile at risk notwithstanding the statutory presumption. Based upon Mr. Cullen’s reasons for registering to vote in Connecticut, it is unlikely that he would have made a different choice than to register in Connecticut had he known that a statutory presumption might be added by the legislature. Finally, to adopt Mr. Cullen’s argument would mean that the effective date of the amendment would not occur until seven years after its adoption. That cannot be the result. Accordingly, the Commission finds that the statutory presumption found in RSA 655:2 applies to the facts of this case.

During the hearing, the Commission heard compelling arguments and testimony from both parties.

The testimony and exhibits presented by the Petitioner and the Respondent established the following facts regarding Mr. Cullen’s activities and residency: Mr. Cullen was born and raised in New Hampshire and graduated from Gilford High School. Between 1990 and 1994 he resided in the State of Connecticut while enrolled in Yale College.¹ During his senior year

¹ Mr. Cullen was briefly absent from the State of Connecticut when he interned for New Hampshire Senator Bob Smith in Washington, DC, from January—May 1992.

at Yale College, Mr. Cullen began working for a gubernatorial campaign in Connecticut. After the candidate he supported won, Mr. Cullen worked for the Governor from 1994 until approximately the middle of 1995. He registered to vote in Connecticut for the first time, in 1994. Mr. Cullen later returned to New Hampshire and between 1995 and 1996 worked on the presidential primary and then the governor's race.

In 1995, Mr. Cullen registered to vote in Gilford, New Hampshire. In 1997, Mr. Cullen returned to Connecticut where he resumed working for the Governor of Connecticut. He again registered to vote in Connecticut.² In 1997 and 1998, Mr. Cullen worked as the Deputy Campaign Manager for the Governor's re-election bid in Connecticut. During these years, Mr. Cullen was a member of track clubs in both Hartford, Connecticut and in New Hampshire. He ran in road races in both states, as well as the State of Vermont. At various times in notices and newspaper articles about the races, Mr. Cullen's residence is stated variously as being in Connecticut and in New Hampshire. Throughout his absence from New Hampshire, Mr. Cullen maintained his personal bank account at the Laconia Savings Bank in New Hampshire. From 1998 to 2000, Mr. Cullen operated a political consulting business in Connecticut. He also maintained a business bank account in Connecticut during that period. During his residency in Connecticut, Mr. Cullen obtained a Connecticut driver's license and registered his car in Connecticut. He paid Connecticut income tax and also paid what was referred to during the hearing as a "car tax."

In 2000, Mr. Cullen returned to New Hampshire and registered to vote here. Between 2001 and 2002, he lived in Massachusetts and attended the John F. Kennedy School of

² Mr. Cullen testified that, although he registered to vote in Connecticut again in 1997, he did not indicate a previous voting address on his registration card, although that question is asked on the card.

Government, earning an MPA in June, 2002. He did not obtain a Massachusetts driver's license or register his car in Massachusetts. In March 2002, Mr. Cullen moved to Rochester, New Hampshire, where he currently resides.

Although the Commission finds Mr. Cullen's intentions honorable and sincere, he did not successfully rebut the RSA 655:2 presumption that he was domiciled in Connecticut. The Commission finds most compelling the evidence that when Mr. Cullen was asked why he registered to vote in the State of Connecticut, he testified that he felt that his job was of paramount importance. His having registered to vote twice in the State of Connecticut, coupled with his business activities, business banking, his payment of taxes, the registration of his vehicle and the obtaining of a Connecticut driver's license, together with social and athletic activities in the State of Connecticut, lead us to the conclusion that he was domiciled in the State of Connecticut and not domiciled in the State of New Hampshire.

The Commission notes that the facts presented in this case with respect to the voter registration issue are different than those presented in the Foy matter addressed by this Commission's September 29, 2000 decision. The major difference is that in Foy, Mr. Foy registered to vote in the State of California in 1996 where the voter registration card required only that the registrant assert by affidavit that "the resident's residence shown on the Affidavit is my true and correct residence address." Unlike the State of New Hampshire voter registration card, there was no requirement that Mr. Foy declare the State of California as his domicile in order to vote there.³ The voter registration requirements in the State of Connecticut differ from both those of California and of New Hampshire. In order to register to vote in Connecticut, Conn. Sec. 9-172, an individual must be a "bona fide resident of the town and

³ The State of California has since changed their cards to require an affirmation of domicile.

political subdivision holding the election . . .” Although bona fide residence does not appear to be defined in the Connecticut statute, the requirement of a “bona fide residence” is clearly more stringent than the requirements imposed upon Mr. Foy by California law.

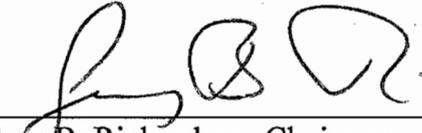
Although Mr. Cullen’s heart may have stayed in New Hampshire, his voluntary actions point to his having been a domiciliary of the State of Connecticut. By his actions, Mr. Cullen interrupted his domicile in the State of New Hampshire and created a residence and domicile in the State of Connecticut. Of particular note is that when asked what he was thinking at the time when he registered to vote in Connecticut, knowing of his desire to run for office later on in New Hampshire, Mr. Cullen stated that the considerations of his job and working outweighed his thoughts of his future in New Hampshire.

As such, the Commission hereby orders the Secretary of State to refrain from placing Mr. Cullen’s name on the November, 2002, Ballot as the Republican Candidate for State Senate, District 6.

In closing, the Commission must again note and complement the parties for their compelling and well-argued positions. The decision in this case was very close and extremely difficult and should in no way be interpreted as a lasting obstacle to Mr. Cullen’s pursuit of public service. See Stark v. Sununu, 383 F.Supp. 1287 (D.N.H. 1974).

NEW HAMPSHIRE BALLOT LAW COMMISSION

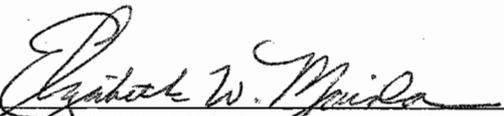
Date: 10/2/02

By: 
Gary B. Richardson, Chairman

Date: 10/1/02

By: 
Emily Gray Rice, Commissioner

Date: 10/1/02

By: 
Elizabeth W. Maiola, Alternate Commissioner