

John D. Rauh

v.

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

96-9

ORDER

This is a petition requesting the Ballot Law Commission to rule that the Attorney General of New Hampshire improperly denied his complaint filed pursuant to RSA 664:18 and declare that Robert C. Smith (hereinafter Respondent) has exceeded New Hampshire's voluntary campaign expenditures act. RSA 664:5-6.¹ The Respondent filed an affidavit agreeing to be bound by the campaign spending limit on July 19, 1996. By letter dated July 22, 1996 the Petitioner requested the Attorney General to investigate an alleged violation of the campaign spending act by the Respondent and to issue a cease and desist order pursuant to RSA 664:18. By letter dated August 2, 1996 the Attorney General refused to issue the cease and desist order, but invited the Petitioner to submit further information. The Petitioner declined the invitation and filed the within Petition.

¹ The Petition seeks additional relief, including an order directing the Attorney General to issue a cease and desist order; or, in the alternative, that the Commission issue a cease and desist order; and an order that "excess expenditures" be allocated to the general election. These requests were withdrawn at the hearing.

The issue presently being raised by the Petitioner is at what point in time does the clock start ticking for purposes of calculating campaign spending.

On August 9, 1996, the parties were notified by fax transmission that responsive pleadings and motions were to be filed not later than August 14, 1996 and that "(a) hearing on the motions and merits if necessary shall be held on August 15, 1996." The Attorney General filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction. The Respondent filed a written response to the Petition, but did not attend the hearing. It was represented to the Commission that the Respondent waived his right to attend and present oral argument.

I. Jurisdiction.

The jurisdiction of the Ballot Law Commission to hear this matter is set forth in RSA 665:7 as follows:

665:7 Additional Jurisdiction. In addition to the jurisdiction of issues conveyed to the ballot law commission by other sections of this chapter, the commission shall hear and determine all disputes involving alleged violations of New Hampshire election laws of a non-criminal nature for which no specific statutory appeal procedure has already been provided. The commission shall also hear and determine petitions for review of cease and desist orders issued by the attorney general under RSA 664:18, II, if such petitions are filed within 3 days of the order.

The Attorney General has filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction. Essentially the Motion presents us with the argument that the Petitioner lacks standing under RSA 665:7 and RSA 664:18 to bring this Petition. As previously noted, the Petitioner has withdrawn his request for a cease and desist order and

accordingly the Attorney General's arguments relating to mandamus will not be addressed.

The Attorney General's position with respect to RSA 665:7 is that the Petitioner has not suffered an "injury in fact" because the Attorney General has not made a final determination with respect to his complaint. State ex rel. Thompson v. State Board of Parole, 115 N.H. 414, 419 (1975). In fact, so the argument goes, the Attorney General has invited the Petitioner to submit additional information for his consideration as part of the Attorney General's ongoing review of campaign expenditure reports filed by political candidates. However, this argument ignores the fact that the Petitioner has submitted evidence to the Attorney General that, if accepted as determinative, indicates that the Respondent may have spent substantially in excess of the spending limits contained in RSA 664:5-b. This argument also ignores the fact that the letter from the Attorney General dated August 2, 1996 does reflect a final decision with respect to the interpretation of when a person becomes a candidate for public office. ("...it continues to be our view that the applicable date is the date on which the candidacy is publicly and unequivocally declared."). Letter to John Rauh dated August 2, 1996, page 3. It is this interpretation of the law that is the focus of the Petitioner's complaint to us and is the injury of which he complains.

The Attorney General's position with respect to RSA 664:18 is that the Attorney General has broad discretion to exercise his legal judgment in the handling of complaints

and the Petitioner lacks standing to question the exercise of that discretion. We agree that the Attorney General has broad discretion, but we do not believe that the exercise of that discretion is not subject to review. RSA 664:18 allows "(a)ny candidate or voter" to file a complaint with the Attorney General alleging a violation of RSA 664, and Section II "empowers", but does not compel, the Attorney General to issue cease and desist orders and prosecute violations in his discretion. However, RSA 665:7 gives the Ballot Law Commission jurisdiction to "hear and determine all disputes involving alleged violations of New Hampshire election laws of a non-criminal nature for which no specific statutory appeal procedure has already been provided" and "petitions for review of cease and desist orders issued by the attorney general under RSA 664:18, II...". We find that this is both a "dispute" as contemplated by the first sentence of Section 7 and a petition to review a cease and desist order as stated in the second sentence. John Rauh's letter to the Attorney General dated July 22, 1996 expressly requested the issuance of a cease and desist order. The response from the Attorney General expressly declined to issue a cease and desist order. We see no logical distinction between reviewing an order that issues a cease and desist order and reviewing an order that refuses to issue a cease and desist order. In our opinion the legislative grant of authority to this Commission to review cease and desist orders embraces the authority to review their denial.

For the reasons stated above, the Motion to Dismiss for Lack of Subject Matter Jurisdiction is denied.

II. The Merits.

The Petitioner submitted to the Attorney General evidence in the form of Federal Election Commission documents which demonstrate that on May 2, 1995 the Respondent filed a Statement of Candidacy (FEC form 2) with the Secretary of the U.S. Senate which the Petitioner argues is a public declaration of candidacy. On May 26, 1995 the Respondent filed the Statement of Candidacy with the New Hampshire Secretary of State. The Petitioner also submitted evidence to the Attorney General in the form of other Federal Election Campaign documents (FEC form 3) that the Respondent made campaign expenditures in the amount of \$195,014.10 in 1995 and \$439,035.06 in 1996. These documents, if determinative, would demonstrate that the Respondent has exceeded the campaign expenditure limits of RSA 664:5-b.

The Petitioner takes the position that any person who has filed a Statement of Candidacy with the Federal Election Commission meets the statutory definition of a "candidate" in New Hampshire, namely "any person publicly declared as such and for whom votes are sought in an election". RSA 664:2, II. As previously noted, the Attorney General has interpreted the statute to mean that a person becomes a candidate for state purposes on "the date on which the candidacy is publicly and unequivocally declared". (Letter, dated August 2, 1996, page 3). We do not accept either interpretation. Whether 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. To rule otherwise would be to create a trap for the candidate required by federal law to file one form whereas perhaps another candidate, not required to file a governmental form, would have the advantage of exceeding the campaign spending limit before making a public declaration of his candidacy on an arbitrarily determined date.

Given our ruling today, it is clear that neither the Attorney General or the parties considered the question of when the Respondent became a candidate in the manner that we feel is appropriate. While the Petitioner argues the evidence submitted conclusively establishes that the Respondent was a "candidate" in May of 1995 and the sheer volume and amount of campaign expenditures would tend to support that conclusion, we are not prepared to make that decision on the record before us.

We believe that it is appropriate to remand this matter to the Attorney General so that he may perform whatever investigation and make such decision on the complaint as he deems appropriate in light of this ruling. We note that the Attorney General has invited the Petitioner to submit additional information for his consideration and the Respondent may submit whatever evidence he deems appropriate. Accordingly, it is the unanimous decision of the Commission to order that the above matter be remanded to the Attorney General for further consideration in light of this ruling.

