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June 26, 2006

RECEIVED

JUN 27 2006

NEW HAMPSHIRE
SECRETARY OF STATE

William Gardner
Secretary of State of New Hampshire
State House, Room 204
Concord, NH 03301

Re: Senate District 6

Dear Mr. Secretary:

Enclosed are on original and six copies of a petition asking for the Ballot Law Commission to order Rep. Cilley placed on the September primary ballot as the New Hampshire Democratic Party's designee in Senate District 6.

The original and five copies are for the Ballot Law Commission, as required by the administrative rules; the sixth copy is for your records.

Please note that I have requested a hearing on this matter. As always, thank you for your courtesy.

Very truly yours,


Kathleen N. Sullivan

NEW HAMPSHIRE BALLOT LAW COMMISSION

PETITION OF THE NEW HAMPSHIRE DEMOCRATIC STATE COMMITTEE

**RE: RULING OF THE NEW HAMPSHIRE SECRETARY OF STATE
REGARDING DESIGNATION OF CANDIDATE IN SENATE DISTRICT 6**

NOW COMES the New Hampshire Democratic State Committee (the "Democratic Party"), the duly authorized State Committee of the New Hampshire Democratic Party, with an address of 2½ Beacon Street, Concord, New Hampshire, and respectfully requests this Commission to order William Gardner, the Secretary of the State of New Hampshire, to accept the name of Jacalyn Cilley as the Democratic Party's designee for the Office of State Senate in District 6, and, in support thereof, respectfully states as follows:

A. JURISDICTION

This Commission has jurisdiction over this matter pursuant to N.H. RSA 665:7, which provides that the Ballot Law Commission "shall hear and determine disputes arising over whether nomination papers or declarations of candidacy filed with the Secretary of State conform with the law." This Petition pertains to the decision of the Secretary of State to refuse to permit the designation of Representative Jacalyn Cilley as its nominee for the District 6 State Senate seat. The Secretary of State's refusal to accept this designation violates the provisions of RSA 655:32.

B. STANDING

The Petitioner, the Democratic Party, has standing in this matter because the Secretary of State has rejected the designation made by the Democratic Party, which was duly made pursuant to RSA 655:32.

C. PETITIONER'S REPRESENTATIVE

The Petitioner's representative is Kathleen N. Sullivan, 95 Market Street, Manchester, New Hampshire 03101 (603-669-4140), the Chairperson of the Democratic Party.

D. ACTION REQUESTED BY PETITIONER

The Petitioner asks this Commission to reverse the decision of the Secretary of State, and to order the Secretary of State to place Rep. Cilley's name on the primary ballot for State Senate in District 6 for the September, 2006 primary election.

E. STATEMENT OF FACTS

On June 16, 2006, the statutory filing period for the primary election to be held in September, 2006, passed with no candidate filing a Declaration of Candidacy to seek the Democratic Party's nomination for the Office of State Senate in District 6. RSA 655:32 provides both political parties with the opportunity to designate a candidate to fill vacancies for offices for which no Declarations of Candidacy have been filed. The designation must take place on or before the Wednesday following the expiration of the candidate filing period.

As provided in the statute, the Democratic Party notified the Secretary of State of its designation of Rep. Cilley to fill the District 6 vacancy. All appropriate forms were filed. The Secretary of State did not reject the designation of Rep. Cilley by the Democratic Party.

The following day (after the statutory deadline for the Democratic Party to designate candidates to fill vacancies had passed), the Secretary of State rejected the designation, even though it had been accepted on the previous day. The apparent basis for the decision by the Secretary of State was that Rep. Cilley had previously filed as a candidate for State Representative. Prior to Thursday, June 22, 2006, the Secretary of State had not adopted any rule or regulation, nor had the Secretary of State issued any opinion, advising the political parties that he would reject the designation of someone who had filed previously for an incompatible office. The lack of any prior notice, combined with the expiration of the period for filling vacancies, has deprived the Democratic Party of the opportunity to fill the vacancy on the ballot.

F. ARGUMENT

In rejecting the Democratic Party's designation of Rep. Cilley, the Secretary of State has usurped the authority of the New Hampshire Legislature by imposing a requirement that does not appear in the statute. RSA 655:32 provides both political parties with the opportunity to fill vacancies on primary ballots. The statute does not prohibit the parties from designating a candidate who previously filed for an incompatible office. Without such a prohibition, the Secretary of State does not have the statutory authority to reject the Democratic Party's designation of Rep. Cilley. His actions intrude on the jurisdiction of the Legislature.

The Democratic Party agrees that the Offices of State Representative and State Senator are incompatible; however, only the Legislature, and not the Secretary of State, has the jurisdiction to devise a remedy. The Legislature established a statutory scheme in RSA 655:10 to address the issue. If any person files for incompatible offices, the Secretary of State "shall advise the person of the provisions thereof and said person shall then advise the Secretary of State" which of said offices he or she wishes to retain in order to seek said nomination [emphasis added]. Similarly, if a candidate is nominated for two incompatible offices, the Secretary of State "shall advise" the person, and the person shall advise the Secretary, which nomination the candidate wishes to retain. The statute is mandatory, not permissive; the Secretary of State has no discretion in this matter. The Secretary of State must advise the candidate that the offices are incompatible at filing, or after the nominations are made, and then give the candidate the election as to which office the candidate will seek. The Secretary of State does not himself have the option to pick the office.

Had the Legislature intended to prohibit the parties from designating a person who had previously filed for incompatible office, it would have said so in RSA 655:10. In fact, in one section, Subsection III, the statute prohibits the parties from designating a person who has been nominated

for an incompatible office to fill a vacancy. Subsection III states, "A party shall not designate a person to fill a vacancy if the person has been nominated for any incompatible office." [Emphasis added.] The Legislature could have included the language, "When there is a vacancy on the primary ballot, a party shall not designate a candidate who has filed previously for an incompatible office." It did not do so. Instead, it limited the prohibition to vacancies that remain after the primary election, and left out vacancies that exist after the filing period but before the primary election.

The very fact that the Legislature created three specific prohibitions in RSA 655: 10 (against either filing for incompatible office, receiving a nomination to incompatible offices, and filling a vacancy after nomination with a candidate who has been nominated for an incompatible office), creates a compelling presumption that the legislature did not intend to prohibit the parties from designating previously filed candidates to fill vacancies on the primary ballot. "Unless there is evidence to the contrary, statutory itemization indicates that the legislature intended the list to be exclusive." State v. Simone, 151 N.H. 328, 330 (2004). The three prohibitions in RSA 655: 10 are such an itemization.

Moreover, interpreting RSA 655: 10 in the manner that the Secretary of State's interpretation requires, would force this Commission to add language to RSA 655: 10 that is not there. "We can neither ignore the plain language of the legislature nor add words which the lawmakers did not see fit to include." Appeal of Brady, 145 N.H. 308, 311 (2000), citing Brewster Academy v. Town of Wolfeboro, 142 N.H. (1997). Adoption of the Secretary of State's position, requires this Commission to violate fundamental rules of statutory construction.

Rep. Cilley has not been nominated for any incompatible office. Nomination as a state representative will not take place until the September primary. Since no nomination has taken place, the party has the right to designate Rep. Cilley. If Rep. Cilley were to be nominated for both State

Representative and State Senate, at the September primary, then she would have to chose between the two “incompatible offices,” as provided in Subsection II of RSA 655:10. Alternatively, if the Secretary of State considers the Party designation to be a filing under Subsection I, then he must notify Rep. Cilley that the offices are incompatible, and she must make her election. What he cannot do is refuse to accept the Democratic Party’s designation, because he has no such statutory authority.

The Secretary of State may attempt to argue that the mere filing of a Declaration of Candidacy for a primary election constitutes a “nomination.” That argument flies in the face of our election laws. RSA 655:10, I addresses, “Declaration of Candidacy or Primary Petitions for *Nominations at the Primary* for Incompatible Offices.” [Emphasis added.] A series of sections of RSA 655, starting with RSA 655:11 through RSA 655:31 come under the heading “Nominations by Primary.” RSA 655:31 discusses straw candidates, stating that no person shall be, “a candidate for *nomination at any primary* unless his candidacy is bona fide and is filed for the actual purpose of personally seeking the *nomination.*” [emphasis added] The definition of “state primary election” in RSA 652:5 is, “*a/n election to nominate* a candidate for federal, state, or county office or to chose a delegate to a state party convention.” [Emphasis added.] The entire Election Law title takes the position that “nomination” means to be chosen at a primary election, not filing as a candidate. To take any other position is to disregard the plain language and meaning of the use of the term “nomination” throughout our statutes.

In short, read as a whole, RSA 655:10 does not prohibit a party from designating a person to fill a vacancy if a person has filed for an incompatible office previously. The party is only prohibited from designating a person to fill a vacancy if the person has been nominated for any incompatible office. The Secretary of State does not have the authority to substitute his judgment for that of the Legislature by expanding the language of RSA 655: 10 beyond its plain meaning and

intent.

The decision by the Legislature not to prohibit designation of a previously filed candidate for incompatible office makes abundant sense. What if a vacancy in an office, such as United States Senator or Congressman, occurred after the close of the filing period, but before the primary, due to death or incapacity? The Legislature certainly did not intend to prohibit the Republican Party, for example, from designating one of its prominent and popular office holders, such as a Senate President or Senate Majority Leader, from serving as the Party's designee. The purpose of the statute is to give the parties the opportunity to fill a vacancy on the primary ballot regardless of whether the designee has previously filed for another office. It is only after nomination, when the candidates have been duly nominated by their respective party members for particular offices, that the parties are prohibited from designating a candidate for an incompatible office. That dual nomination would lead to the mischief that the incompatible office statute now is designed to avoid.

The line of demarcation for party designation drawn by the Legislature is at nomination, not filing, and the Secretary of State does not have the authority to alter this statutory scheme. The Secretary of State, the Ballot Law Commission, and the parties may question whether the line drawn by the Legislature is the best place to draw the line, but that is a policy decision for the Legislature to make, not the Executive Branch. Consequently, the Secretary of State was wrong to reject the Democratic Party's designation of Rep. Cilley. It is incumbent upon this Ballot Law Commission to recognize the clear language of the statute and the clear intent of the Legislature, and not to permit the Secretary of State to substitute his judgment for that of the Legislature.

Even if one were to argue that the statute has any ambiguity (and the Democratic Party does not concede any ambiguity), the Ballot Law Commission should resolve this ambiguity in favor of the public policy of permitting the designation. To do otherwise deprives the Democratic Party and

its voters of having a candidate on the September ballot. The Legislature enacted a policy of permitting designation by parties. The Secretary of State gave no indication prior to the close of the party filing period that he would not accept the designation of someone who had previously filed for an incompatible office. In fact, he told the press that the designation was proper on the day after the period for party designation passed (see Exhibit A attached hereto). As a result of his initial interpretation, and then his subsequent change of mind after the close of the party designation period, he has frustrated the policy of the Legislature to permit the political parties to fill vacancies on the primary ballot. The Secretary of State should not be permitted to affirmatively accept a designation, announce to the public that the designation is proper, and then, when it is too late to substitute another designee, change his mind, frustrating a party's efforts to fill its primary ballot. If this Commission allows the Secretary of State to change policies and procedures after the fact, then the Commission is setting a dangerous precedent that could subject a future Secretary of State to partisan pressure to change his mind on other matters. If someone wants to challenge the decisions of the Secretary of State in these matters, they may do so by appealing to this Commission.

The Secretary of State has indicated to the Petitioner that RSA 655:30, regarding the withdrawal of candidates, should be applied to this situation. RSA 655:30 limits the ability of a candidate to withdraw after filing for office. That statute is not applicable. RSA 655:30 pertains to a situation where a candidate who has filed for office later changes his mind and asks to withdraw. Withdrawal is not permitted, except in very limited circumstances, such as moving out of a district. Rep. Cilley is not asking to withdraw, however. Her situation is one of incompatible office, not withdrawal, and, as such, it is RSA 655:10, and only RSA 655:10, which governs this situation. If the Secretary of State believed the party designation created an incompatible filing under RSA 655:10,I, he was obligated to give Rep. Cilley the option of either filing for state representative of

senate. The designation of Rep. Cilley has nothing to do with withdrawal, and RSA 655:10, not RSA 655:30, is the operative statute.

G. CONCLUSION

A political party has an opportunity to designate a candidate for the primary ballot regardless of a prior filing by the candidate for incompatible office. In such an event, the Secretary of State has no discretion. He must notify the candidate to chose one office. By rejecting the Democratic Party's filing, the Secretary of State has fashioned a remedy that is not his to fashion. The remedy for incompatible office was fashioned by the Legislature, and the Secretary of State must follow the Legislative scheme, by giving Rep. Cilley the choice of running for representative or State Senate.

For all of these reasons, and the reasons set forth above, the Democratic Party respectfully requests as follows:

1. For this Commission to schedule a hearing on this matter; and
2. For this Commission to reverse the decision of the Secretary of State.

Respectfully submitted,

New Hampshire Democratic State Committee

Dated: June 26, 2006

By: 
Kathleen N. Sullivan, Chairperson
95 Market Street
Manchester, NH 03101
(603)669-4140

I hereby certify that a copy of this Petition has been this day been sent, postage prepaid, to William Gardner, Secretary of the State of New Hampshire.


Kathleen N. Sullivan, Chairperson

EXHIBIT A

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Friday, June 23, 2006

Officially, Green still a Senate candidate

By COLIN MANNING
N.H. Statehouse Writer
statehouse@fosters.com

CONCORD — Sen. Dick Green may be the new executive director of the Pease Development Authority but he has already filed for re-election to the Senate — and his name is staying on the ballot whether Green wants it to or not.

The filing period for the upcoming fall elections closed last Friday and once the filing period closes, state law only allows three cases for a person's name to be withdrawn from the ballot. Those instances are the death of the candidate, an "incapacitating physical disability," or if the candidate moves out of the district.

If re-elected, Green can choose to resign his seat immediately or serve as both senator and executive director of the PDA. State law forbids members of the PDA Board of Directors from holding elected office, but it is silent on the issue when it comes to the executive director.

Trying to do both jobs is not something Green favors.

"At this point I'm going to let my name stay on the ballot because I have to. I'll have to make a decision after the primary," Green said. "I'll either run, or make a public statement asking people not to vote for me."

Green, 68, will finish his current term, which shouldn't be a conflict when he begins his duties at the PDA in early August seeing as the Legislature is out of session. If he were to be re-elected in November, Green said his top priority would be to fulfill his duties as PDA executive director.

"That is my current intent but the question is still open," Green said. "If I am re-elected, I do have the option of resigning."

If Green were to be re-elected and then resigned, a special election would have to be held which could be costly for the communities of District 6.

"I'm always concerned about the cost. I would work with my communities to keep the cost at a minimum," Green added.

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PDA board Chairman Art Nickless said he and other board members would prefer Green not serve another two-year term in the Senate.

"We're going to sit and talk with Dick about that. Right now, if the board had its druthers they would assume he would be a full-time director and not involved in the Senate," Nickless said. "And it's because of the conflicts. The Legislature enacts laws all the time that affect us and I'm sure he would have a conflict if he were doing both."

Nickless said the Green's elected office was discussed before the board offered him the job.

"We're going to work out these issues with the senator and we look forward to having him join us," he said.

Democrats and Republicans had until Wednesday to fill ballot vacancies, but seeing as Green had already filed, there was no vacancy to fill.

While it's clear Green's duties at the PDA will preclude from serving as senator if he is re-elected, the state Republican Committee is not planning on running a write-in candidate against Green in the primary.

"Basically, we're going to have Dick run. It's my understanding that Dick will run and if elected will serve," said state GOP Chairman Wayne Semprini. "At this point we've all agreed we'll take it one step at a time. Dick has to deal with what's best for the state of New Hampshire."

Semprini added that he believes the state Democratic Party's choice to fill the vacancy on that side of the ballot with state Rep. Jacalyn Cilley, D-Barrington, is a bigger issue.

Cilley had already filed to run for re-election to the House. After the filing period for candidates closed, Democrats added her name to the District 6 race on Wednesday. State law forbids a person from running for both the state Senate and House. Cilley notified the secretary of state's office she is running for the Senate, and her name will be removed from the House race on the ballot.

Secretary of State William Gardner said Thursday state law was not violated and Cilley can run for the Senate.

But Semprini believes Democrats should not be allowed to fill a vacancy with someone already running for what is known in state statutes as an "incompatible office."

"With all due respect to the secretary of state ... based on what I do know, I wouldn't be surprised if we challenge this before the Ballot Law Commission," Semprini said.

State law forbids a political party from filling a vacancy with someone running for an incompatible office after the primary. The primary is not until September, which state Democratic Chair Kathy Sullivan said will ensure Cilley is qualified to run for the Senate.

"I don't think, I know she can run for the Senate. But if Wayne Semprini wants to go off and spend more of his party's money on a Ballot Law Commission challenge, when the party only has \$3,000 in the bank, then I say go for it Wayne," Sullivan said. "We looked at this and based on our reading of the statute it's very clear — she can run as long as she wasn't nominated after the primary."



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