COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

CIVIL ACTION No. 19-CI-147

CARL "TRUMP" NETT **PETITIONER**

vs.

ALISON LUNDERGAN GRIMES, in her official capacity as Kentucky Secretary of State **RESPONDENT**

ORDER

Upon Motion of Petitioner herein, and the Court being otherwise sufficiently advised, the Court hereby **DECLINES** to issue injunctive relief in this matter. However, the Court hereby **ISSUES** the following **ORDER** regarding Petitioner's *Verified Petition for Declaratory and Injunctive Relief*[1].

On November 7, 2018, Petitioner filed his handwritten Notification and Declaration of candidacy for the Republican nomination for Secretary of State. At that time, Petitioner indicated that the ballot should include his nickname "Trump!", and he submitted an affidavit claiming that "Trump!" was his bona fide nickname. Petitioner testified that members of the Jefferson County Republican Party gave him his nickname at the 2015 Kentucky State Fair when he provided materials related to then-candidate Trump's campaign for presidency for the Kentucky GOP booth. Since that time, members of the larger Kentucky Republican Party network have begun to call him by the "Trump!" nickname. When he filed his paperwork with the Office of the Secretary of

[1] The parties agreed at the hearing of February 15, 2019, that the Court would decide the case by February 18, 2019, in order to allow the partner to appeal prior to the printing of the ballots.

State, Mary Sue Helm, Director of Elections, informed Petitioner that the inclusion of an exclamation point in his nickname did not meet state formatting requirements. He then, by hand, struck the exclamation point from his nickname, and it appeared as "Trump." Ms. Helm accepted the Notice and Declaration at that time. Respondent, the Secretary of State, did not object to his nickname at that time because by Kentucky law, KRS 118.215(1)(a), she had until February 11, 2019, the second Monday following the candidate filing deadline, to certify candidates' names to county clerks to appear on the 2019 primary election ballot.

Michael G. Adams, another candidate for the Republican nomination of Secretary of State, submitted an objection to the certification of Petitioner's nickname on January 11, 2019. Adams' objection stated that Respondent should use her discretion, pursuant to KRS 118.129(2) to not allow Petitioner's nickname because it was not a bona fide nickname and he merely sought political advantage through its use. Adams threatened legal action if the Secretary certified the name. To investigate the allegations, the Office of the Secretary of State reviewed public domain materials related to Petitioner's campaign for office, including his campaign website, social media accounts, or campaign signage; all referred to him without the use of the nickname "Trump" or "Trump!". On February 8, 2019, Respondent issued a public statement regarding the certifications of candidate names that would be upcoming on February 11, 2019. The statement entailed:

> One of my most solemn duties as Secretary of State is to protect the sanctity of the Commonwealth's election ballots, and to safeguard Kentucky's election instruments from being manipulated for political gamesmanship. After receiving a written complaint from a candidate for Secretary of State, I reviewed the materials filed with my office by another candidate, who sought to have his name appear on the primary election ballot accompanied by the purported nickname "Trump!"

> Pursuant to the statutory authority granted to the Secretary of State by KRS 118.129(2), the Secretary of State's Office determined that the candidate in question offered this so-called nickname in an improper attempt to gain an advantage on the ballot. Accordingly, the name of the candidate in question, Carl Nett, as reflected by the signature on his candidate filing papers, will be certified to appear on the ballot."

Respondent amended the ballots to reflect Petitioner's name as "Carl Nett." On February 11, 2019, Respondent certified the names that would appear on the 2019 primary election ballot. Petitioner filed this action on February 13, 2019.

ANALYSIS

In this case, Petitioner argues that his constitutional rights, specifically: his right to freedom from absolute and arbitrary power over an individual, found in Section 2 of the Kentucky Constitution; the right freedom for all men to be free from special privileges under the law, which Section 3 of the Kentucky Constitution protects; and the right to equal treatment, pursuant to Section 6. Petitioner contends that the Secretary of State violated his rights because she initially approved his name and nickname to appear on the ballot as he requested and then altered its appearance on the ballot on the eve of a weekend before the ballot certification occurred without notifying him. The doctrine of equitable estoppel, he argues, should apply because he detrimentally relied on the affirmation of his use of "Trump" as a bona fide nickname. Now preventing him to use the name adversely impacts his rights to use a name commonly attributed to him.

Conversely, Respondent contends that Petitioner has failed to establish an abrogation of a concrete personal right. The legislature, in its provision of a statute allowing nicknames, conditioned the use of a nickname upon the discretion of the Secretary of State. In this case, Respondent properly used her discretion to block Petitioner from using the nickname on the ballot. Lacking the constitutional right to use

"Trump" as a nickname on a statewide election ballot, Petitioner has suffered no legal harm, according to Respondent. If a right for Petitioner to use the name exists, Respondent asserts that she did not act arbitrarily in determining not to certify his nickname. Petitioner's campaign materials lack the presence of the nickname "Trump." Kentucky case law points to deference to the decision of the Secretary of State because a "some evidence" standard is the appropriate standard to use in an administrative fact-finding endeavor that does not violate Section 2 of the Kentucky Constitution. *See Smith v. O'Dea*, 939 S.W.2d 353, 358 (Ky. App. 1997).

The Court holds that Petitioner does not have a legal right to use "Trump" as a nickname in an election; to deny him the use of the nickname on the ballot does not violate his constitutional rights.

Though the Court agrees with Respondents regarding the disposition of this matter, the Court disagrees with Respondent in her application of a "some evidence" standard. In *Smith v. O'Dea*, the case Respondent cites in her pleadings, the Kentucky Court of Appeals was first tasked with determining if the Court applied the proper standard of review to a decision a disciplinary committee within the Kentucky Department of Corrections. The Court noted, "in light of exceptional difficulties confronting prison administrators, a highly deferential standard of judicial review is constitutionally appropriate with respect to both the fact finding that underlies prison disciplinary decisions and the construction of prison regulations." *Id.* at 357. The Court continued to opine that Section 2 of the Kentucky Constitution similarly requires due process to be given at a level determined by the interests at stake through the accuracy of fact finding and legal determinations. *Id.* The Court recognized that typical Kentucky

administrative decisions require substantial evidence review, yet in cases of prison disciplinary actions, a lesser standard of review would be appropriate:

> We note on the one hand the prison administration's compelling interest in order and in authority as a means to order. In a prison, where a state of emergency and high alert is unrelieved, any defect in the administration's authority poses a risk of disruption. On the other hand, inmate declaratory judgment petitions, like the one before us, typically present uncomplicated factual situations and concern relatively minor interests (in slightly reduced sentences, for example, or marginally mitigated conditions of confinement). In light of these disparate interests and the circumstances in which they typically arise, we are persuaded that the "some evidence" standard of review provides courts with a sufficient check upon adjustment committee fact-finding. Section 2 of our Constitution is not compromised by this standard of review nor, in general, is it compromised by judicial deference to the judgments of prison disciplinary committees and administrators n accord with that recognized as appropriate under federal law in *Wolff*, *MCI v. Hill*, and *Conner*. In reaching this result, we stress that our holding in no way relieves courts of their responsibility to be vigilant in detecting and steadfast in remedying genuine prison abuses.

Id. at 358. The holding of this case is clearly limited in scope of judicial review as it applies to disciplinary actions conducted by the Department of Corrections. The Court clearly weighs the interests of both prisoners and prison administrators in holding that a "some evidence" standard would apply to review disciplinary actions.

The parallel between this case and that in *Smith* is exclusively limited to an administrative agency, in the course of conducting its administrative function, making a factual determination about a contested set of facts. This Court, having original jurisdiction in cases involving Kentucky's administrative agencies, is continually reviewing cases in which an administrative agency makes factual determinations. Except where higher judicial courts or the legislature have specifically spoken to a particular standard of review for agencies, the Court applies a "substantial evidence" standard in a KRS Chapter 13B review of administrative agency actions. To conflate the substantial

evidence standard that has long been applied to administrative agencies with a "some evidence" standard reserved for cases involving the Department of Corrections would undermine the fundamental principle that the Franklin Circuit Court reviews administrative agency actions with the substantial evidence standard contained in KRS 13B. Therefore, the Court will decline to use "some evidence" and will use the substantial evidence standard in this matter.

The General Assembly has dealt with the qualifications for a nickname to appear on the ballot. Pursuant to KRS 118.125(4), a candidate's nickname "may be acceptable as the candidate's name" and "titles, ranks, or spurious phrases shall not be accepted on filing papers and shall not be printed on the ballots as part of the candidate's name..." However, the legislature has since offered the Secretary of State discretion to find that an appropriate "title, rank, degree, job description, or spurious phrase":

> ... shall be placed on the ballot only if it is the candidate's bona fide nickname, generally used by acquaintances of the candidate in the county of residence to refer to the candidate, and if the nickname is acknowledged, by affidavit, under oath, by five (5) residents of the county in which the candidate resides, to be a bona fide nickname. The candidate shall also acknowledge, by affidavit under oath, that this is his bona fide nickname and is not being used to gain an advantage on the ballot.

Ky. Rev. Stat. § 118.129(2). The Court agrees that deference should be given to Respondent, as she is the constitutional officer tasked with exercising her discretion in determining the validity of nicknames candidates may use on a ballot.

The Court has reviewed all evidence submitted to the record by both parties through the lens of substantial evidence review. Petitioner, at the time of his filing, submitted an affidavit explaining the origins of his nickname "Trump."[2] The nickname arose in 2015 after members of the Jefferson County Republican Party began calling him

[2] See Exhibits 1, 2, 3, and 4 submitted by Petitioner.

"Trump" for his insistence that materials for then-candidate Trump be displayed at its booth at the Kentucky State Fair. Since the nickname originated, Petitioner swore in his affidavit that members of his political circles have taken to calling him "Trump," whether they mean in it a positive or negative fashion. Petitioner similarly met statutory requirements that five residents of Jefferson County, the county in which he resides, swore that "Trump" was his bona fide nickname. He submitted to the Court a copy of a fundraising letter that contains his name as "Carl 'Trump' Nett."[3] Respondent also submitted numerous examples of Petitioner's campaign related branding and advertising materials that lack any reference to the nickname "Trump."

The Court is persuaded that substantial evidence exists to support Respondent's actions, and her decision was not an arbitrary abuse of power. First, Petitioner has only used the nickname "Trump" on one of his campaign related materials, a fundraising letter that was mailed to individuals who he addressed as "Dear fellow Trump supporter." The nickname has not appeared on any branding literature that is available in the public domain. A bona fide nickname is one by which members of the community use as an active form of recognition of an individual. The Court cites Albert Benjamin "Happy" Chandler, former Governor of the Commonwealth, and Eugenia Crittenden Blackburn "Crit" Luallen, former Lieutenant Governor of the Commonwealth as examples of elected officials who ran for office using bona fide nicknames. Both candidates actively used their nicknames in campaign materials as well as in everyday life as a way to refer to themselves; and, to this day, Kentuckians still refer to both officials by their given nicknames. In this case, however, members of a political party gave petitioner the nickname "Trump" in jest only three years ago. The Court recognizes that the use of the

[3] See Exhibit 3.

nickname has spread beyond the original members of the Jefferson County Republican Party who mockingly called Petitioner "Trump" to larger Republican political circles, though those circles remain a small subsection of the population of the Commonwealth. Yet, it remains clear from the candidate's campaign materials that the community at large does not refer to him as "Trump," but rather refers to him as "Carl" or "Carl Nett," his given name.

As Petitioner noted, the Office of the Secretary of State has deviated from this standard and allowed a Jefferson County Representative, Dan Seum, to run for office using the name "Dan 'Malano' Seum". Seum owned a popular, Louisville, neighborhood restaurant, Malano's, and used the name of the restaurant name as a nickname. Based upon this precedent, the Court understands Petitioner's argument that if a restaurateur is able to use his place of business, which he does not use as a working name, as a bona fide nickname, then a nickname that is used in relatively small circles could also stand as admissible on a statewide election ballot.

The facts here, however, differ greatly from those present in the case of Representative Seum. First, Seum owned Malano's restaurants, making them more tangibly part of his public persona by which he could be recognized within his community. Petitioner's nickname, "Trump," has no connection to his public persona except an ideological compatibility he has with then-candidate and now President Trump.

Next, unlike a restaurant, Petitioner's nickname is inherently politically charged because those who gave him that nickname did so exclusively because he supported President Trump despite the established party's apparent opposition. Though ideas and beliefs make up the bedrock of an individual's identity, they do not constitute a nickname

that is not "spurious" or used for "political advantage" on an election ballot. In a political race, a candidate's political ideology is already available to voters because it is the platform on which the candidate campaigns. To add a politically charged nickname on a primary ballot would provide an inherently unfair advantage to that candidate because it is an immediate reminder of the candidate's messaging and political leanings that his opponent would not also have. President Trump's popularity amongst voters, particularly in a partisan primary, would undoubtedly garner political advantage over his fellow Republican opponent. The Court encourages Petitioner to campaign vigorously and express his ideological leanings to the public in the days leading up to the primary. However, the Court will not allow Petitioner to use a spurious, political nickname on the ballot because substantial evidence reveals that the nickname is not a bona fide part of general public persona.

WHEREFORE, the Court **HOLDS** that substantial evidence supports Respondent's denial of Petitioner's use of "Trump" as a nickname. Petitioner lacks a legal right to use the politically advantageous nickname, and the Secretary of State did not act arbitrarily in removing the alleged nickname from the ballot.

SO ORDERED, Monday, February 18, 2019. This is a final and appealable order, and no just cause for delay exists.

THOMAS D. WINGATE
Judge, Franklin Circuit Court

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order was mailed, this 18 day of February, 2019, to the following:

Hon. Jon Salomon
Tachau Meek PLC
101 South Fifth Street, Suite 3600
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Mr. Carl B. Nett
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Amy Feldman CC

Amy Feldman, Franklin County Circuit Court Clerk