THE STATE OF NEW HAMPSHIRE

NEW HAMPSHIRE BALLOT COMMISSION

In Re: City of Manchester, Ward 8
Primary Held on September 13, 1994 and
Election Held on November 8, 1994

NOTICE OF DECISION

Procedural History

Following the primary election held on September 13, 1994, the Ballot Law Commission (Commission) received a letter from J. Steve Vaillancourt dated September 13, 1994 which requested that the Commission reprimand the moderator of Ward 8 in Manchester, Philip W. Croasdale, for conduct that Mr. Vaillancourt considered rude. The Commission reviewed the letter and determined that there were no substantive election law violations alleged. Accordingly, Mr. Vaillancourt was notified on October 3, 1994 that the Commission was taking no action with respect to his letter.

Following the election held on November 8, 1994, the Commission received a second letter from Mr. Vaillancourt dated November 9, 1994 in which he raised seven allegations of illegal conduct relating to the November 8 election and requested that the Commission "undertake an investigation to determine whether a recount is necessary, or if in fact, the election results should be invalidated". A copy of Mr. Vaillancourt's letter was sent to Mr. Croasdale for response. Mr. Croasdale responded by letter dated December 5, 1994 and the Commission held a public hearing on January 18, 1995.

Decision

For the reasons set forth below, the Commission declines to invalidate the election results of the Ward 8 election held on November 8, 1994. We will consider each of the allegations made by the petitioner in the order that they were presented in the petition.

1. Campaign signs were left unattended by the door at the polling place which the moderator failed to remove. The petitioner alleges that campaign signs were left unattended by the door at the polling place. The moderator acknowledges that on one occasion he removed signs that were unattended at the entrance of the polling place, but denies that he observed any unattended signs at any subsequent time. The petitioner takes the position that the moderator was remiss for failing to observe the unattended signs (although he acknowledges that he did not bring them to the attention of the moderator) and that the moderator should have investigated to determine who was responsible for leaving the unattended signs.

The distribution of campaign materials at the polling place is governed by the provisions of RSA 659:43. The statute prohibits the distribution or posting of campaign material within the building where the election is being held and prohibits electioneering activities within a corridor ten feet wide and extending a distance from the entrance door of the building as determined by the moderator where the election is being held. The statute is silent with respect to "unattended" signs and it is the statute, not the prior practices in Ward 8, that determine compliance with election laws. The Commission finds that there was no violation of RSA 659:43 with respect to the unattended signs.

From the evidence presented to the Commission, it is not clear whether the moderator established a corridor ten feet wide extending some distance from the entrance door of the building within which to prohibit electioneering activities. Since this issue was not raised before the Commission, the Commission makes no finding with respect to any violations of that portion of the statute. The Commission does call to the attention of the moderator his authority to establish appropriate conditions to preclude electioneering that interferes with the free access of voters to the polling place.

2. Campaign literature was allowed to be left on a desk in a hallway outside of the entrance to the polling area. The evidence establishes that literature was left on a desk in a hallway outside of the entrance to the polling area, but within the building in an area where voters waited in line to enter the polling area. The literature was in the presence of voters for approximately one-half hour and at least 100 people could have picked the literature up and read it prior to voting. The moderator testified that when the literature was brought to his attention, he immediately removed it from the polling place and destroyed it.

RSA 659:43 clearly and unequivocally prohibits the distribution of campaign literature within the building where an election is being held. However, the Commission finds the testimony of the moderator credible that he took prompt and decisive action to remove the offending material as soon as it was brought to his attention. Although we could speculate whether the moderator could have or should have discovered the literature sooner, there was no substantive evidence to support such an allegation.

Although the Commission finds that a violation of RSA 659:43 was committed by someone, the N.H. Supreme Court has made it clear that "to set aside an election, the party challenging the results must prove either 'fraud which leaves the intent of the voters in doubt or irregularities in the conduct of the election of such a nature as to effect the result'". Appeal of Donna Soucy, ____ NH ____, decided November 2, 1994. While the petitioner points to the fact that 100 or more voters may have read and been influenced by the literature, and that only 15 votes separated the third and fourth place finishers in a three seat race prior to the counting of absentee ballots (the margin was 31 votes if absentee ballots are included), the Commission finds that the voters are not so easily influenced that the outcome of the election would have been different if the literature had not been present in the voting place. Accordingly, the Commission

declines to invalidate the election on the grounds that campaign literature was distributed illegally within the building.

3. The moderator failed to announce the time when the absentee ballots would be cast. Although this issue was raised in the petition, there was no evidence presented to the Commission. The moderator, in his written response to the petition, claims that he did announce the time when he would cast the absentee ballots when he opened the polls. Given the absence of evidence on this issue at the hearing, the Commission rules that the petitioner has failed to meet his burden of proof.

4. The moderator attempted to prevent the public from observing the counting of ballots. The evidence establishes that when the polls were closed at 7:00 p.m., the moderator began to close the doors to the room where the absentee ballots were to be counted which would have prevented the public from observing the count. Several individuals present objected to having the doors closed and prevailed upon the moderator to leave them open. Essentially, the moderator acknowledged these events and explained that he had been unfamiliar with the requirement that the counting be open to the public.

RSA 659:63 requires that the counting of votes shall be conducted within the guardrail and shall be public. If the moderator had closed the doors to the polling place and conducted the count in private, it would have constituted a serious violation of the law. Fortunately, the violation did not occur. The Commission is satisfied that the moderator's attempt to exclude the public was the result of unfamiliarity with the law and not the result of malice.

The petitioner also alleges that because of the location of the ballot counters and the table that was used to count the absentee ballots, the public was unable to observe the counting of the absentee ballots. The petitioner provided the Commission with a diagram showing the layout of

the polling place, and although finding that the proceedings technically met the requirements of RSA 659:63, agrees with the petitioner that in the future, the counting of absentee ballots should be done in such a manner as to permit the public to readily observe the process of counting the ballots. The Commission is aware that the procedures utilized by the moderator complied with past practice in Ward 8 and that the layout of the polling place is not conducive to allowing access to the public. However, the moderator indicated a willingness to review and modify the procedures followed in Ward 8 to permit the public to observe the voting process in the future and the Commission strongly supports that effort.

The petitioner also complains that an eleven-year old daughter of an election official was permitted to be in the polling place after the polls were closed. There is no allegation of any substantive wrongdoing and the Commission finds that none occurred.

5. The petitioner alleges that Jackie Domaingue, a paid poll worker, engaged in electioneering activities on behalf of a candidate. The petitioner testified that he observed Ms. Domaingue outside the building during breaks from her duties as an election official encouraging voters to support a particular candidate. The moderator testified that he did not observe Ms. Domaingue outside of the polling place and that he did not feel that it was his responsibility to observe her activities outside the building. He further testified that when he observed Ms. Domaingue inside the building, she was not wearing any campaign materials and that he did not observe her engaging in any electioneering activities. He also testified that no one complained to him during the election concerning Ms. Domaingue's activities. Finally, the moderator testified that Ms. Domaingue was employed by the City Clerk's office as a voter registrar and was not acting under his direct supervision.

Ms. Domaingue did not testify. However, Victor Goulet, an employee of the City Clerk's office with the title of election specialist, who was assigned to work at Ward 8 during this election, did testify. He testified that Ms. Domaingue was an employee of the City Clerk serving as a deputy registrar to register new voters in Ward 8. Mr. Goulet testified that he did not observe Ms. Domaingue engaging in any electioneering activities in his presence.

RSA 659:44 states that "no election officer shall electioneer while in the performance of his official duties". RSA 652:14 defines an "election officer" as "any moderator, town clerk, selectman, supervisor of the checklist, or inspector of election". Accordingly, the Commission finds that Ms. Domaingue, although employed by the City Clerk as a deputy registrar, was acting as an election officer at the Ward 8 election held on November 8, 1994.

RSA 659:44 makes it a misdemeanor for an election official to engage in electioneering activities. The Commission declines to determine whether Ms. Domaingue may have violated the provisions of RSA 659:44 for two reasons: First, although the petitioner has alleged that he observed Ms. Domaingue "talking to voters, encouraging them to support Ms. Riley", the testimony is totally lacking in specific allegations that would enable the Commission to determine whether a substantive violation of the law occurred. Second, the jurisdiction of the Ballot Law Commission is limited to determining "all disputes involving alleged violations of New Hampshire election laws of a non-criminal nature . . .". RSA 665:7. Accordingly, the Commission considers the allegation of illegal electioneering activities by Ms. Domaingue solely to the extent that the conduct alleged, if true, might constitute "fraud which leaves the intent of the voters in doubt or irregularities in the conduct of the election of such a nature as to effect the result". Id. page 8.

Based on the standard enumerated in Soucy and quoted above, the Commission finds that the conduct of Ms. Domaingue, even if found to be as alleged by the petitioner, is insufficient to

constitute fraud or an irregularity of such a nature as to effect the result of this election. There was not one scintilla of evidence presented to the Commission that any voter was influenced in any way by the alleged conduct of Ms. Domaingue.

6. There were not an equal number of Democrats and Republicans serving as ballot clerks. The petitioner did not present any evidence at the hearing regarding this issue. The moderator stated in his response to the petition that he had three Democrats serving as ballot inspectors for the full day, two Republicans serving for the full day and two Republicans serving for a half day each. Given the absence of evidence on this issue at the hearing, the Commission rules that the petitioner has failed to meet his burden of proof.

7. The petitioner alleges that a person named Andy Martel told voters that the petitioner's telephone had been disconnected in an apparent attempt to discredit the petitioner's candidacy. In his response, the moderator stated that he was without knowledge concerning this allegation. The petitioner did not present any evidence at the hearing regarding the allegation and therefore the Commission rules that the petitioner has failed to meet his burden of proof.

At the hearing, the petitioner orally raised an allegation that the moderator violated the provisions of RSA 659:45 by failing to report the election violations alleged by the petitioner to the Attorney General's office for investigation. Since the Commission has not found any substantive violation of the election laws, with the possible exception of the allegations relating to Ms. Domaingue and the moderator has testified that he did not observe Ms. Domaingue engage in any electioneering, in our opinion the moderator has not violated the provisions of RSA 659:45. Furthermore, such claims are outside the jurisdiction of this Commission. Accordingly, the petition of J. Steven Vaillancourt is denied.

New Hampshire Ballot Law
Commission

By_____
Gary B. Richardson, Chairman

By_____
Hugh Gregg, Commissioner

By_____
Emily Gray Rice, Commissioner