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STATE OF NEW HAMPSHIRE

BALLOT LAW COMMISSION

Appeal of Recount by Kenneth J. MacDonald,
Candidate in Republican Primary,
Grafton County State Representative District No. 7

DECISION

This matter is before the Commission¹ on an appeal from a recount under RSA 665:6, I. Candidate Kenneth J. MacDonald (1) complains that the Secretary of State's procedures did not ensure the accuracy of the recount, and asks that we order a second recount using different procedures; and (2) argues that the Secretary of State should have counted the total number of ballots tallied during the recount to make sure he received all of the ballots cast, and asks that it be done now.

For the reasons set forth below, we deny Mr. MacDonald's appeal.

¹ This matter was heard and decided by Ballot Law Commission Chair Gary B. Richardson and Commissioner Richard Delay, Sr. Commissioner Gregg was unable to attend the hearing and the parties agreed to proceed with only two commissioners present. N.H. Code Admin. R. Bal 105.01.

FACTS

Following the Republican primary election for State Representatives in Grafton County District No. 7 on September 8, 1998, Plymouth election officials declared the top three finishers to be Harry Hinman (by a large margin), Kenneth MacDonald, and Allen K. MacNeil in that order. The vote totals for Messrs. MacDonald and MacNeil were:

MacDonald	232
MacNeil	223

Grafton County District No. 7 is a two-seat district, so Messrs. Hinman and MacDonald were declared to be the Republican nominees.

There were no allegations on primary election day or in this appeal that any ballots in Plymouth were lost, improperly sealed, or otherwise mishandled.

Mr. MacNeil requested a recount under RSA 665:6, II.² The Secretary of State received the sealed ballots from Plymouth and, on September 16, 1998, conducted the recount. Messrs. MacNeil and MacDonald were present and observed the recount.

Mr. Jay Ward accompanied and assisted Mr. MacDonald.

The recount was actually conducted by a recount team of two individuals designated by the Secretary of State. Those two individuals sat side-by-side on one side of a table. Messrs. MacNeil, MacDonald, and Ward sat on the opposite side. The first part of the

² Although the Appeal refers to RSA 665:6, II, that section covers appeals from recounts in general elections. The proper statutory reference is RSA 665:6, I, relating to primary recounts and the Commission will consider the appeal under that section of the statute.

recount was the setting aside of the uncast ballots, i.e., those ballots that were not given to voters on election day. Then, each cast ballot was taken one-by-one, the marks on it were read aloud by one member of the recount team, it was shown to the two candidates, and then the votes were tallied on a sheet of paper by the other member of the recount team. No tally marks were recorded until both candidates had an opportunity to see the ballot. The next ballot was not picked up until the previous ballot was tallied. Each of the cast ballots was handled in the same way.³

There were no contested ballots during the recount.

At the end of the recount, but before the Secretary of State announced the results, Mr. MacDonald requested that the recount team determine the total number of ballots cast by counting the number of ballots in the recount. That request was denied as being outside the scope of the Secretary of State's recount procedures. Mr. MacDonald was told to bring the matter to this Commission if he believed there was a problem with the number of ballots counted.⁴

³ Mr. MacDonald claims that noise and possible confusion concerning the candidates' names call into question the accuracy and validity of the recount. He did not complain about the conditions during the recount itself.

⁴ At the hearing in this matter, Secretary of State William Gardner and Deputy Secretary of State Robert Ambrose stated that totaling the cast ballots is not part of a recount except when there is evidence of a problem. Secretary of State Gardner used the phrase "red flag" and gave two examples. First, if the recount tallies for each candidate are some significant percentage below the original tallies, he will inquire. Second, if the original tally sheets show votes from a particular ward or precinct, but there are no ballots from that precinct, he will inquire.

When the results were announced, Mr. Hinman was still in first place, but Mr. MacNeil had switched places with Mr. MacDonald. The totals for Messrs. MacNeil and MacDonald were:

MacNeil	228
MacDonald	225

Messrs. Hinman and MacNeil were declared by the Secretary of State to be the Republican nominees.

DISCUSSION

The Commission's jurisdiction over recount appeals is set forth in RSA 665:6, I. In hearing such an appeal, the Commission,

shall ... consider and review all the rulings of the secretary of state on ballots protested during the recount. If, after the review, it shall appear that the appellant was nominated, the commission shall change the declaration of the secretary of state and issue a certificate of nomination to the appellant.

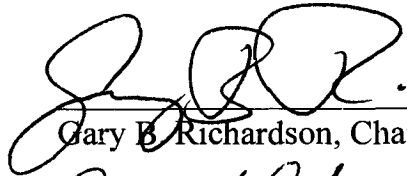
Id.

In this matter, there were no contested or protested ballots. Accordingly, we will not change the declaration by the Secretary of State.

Concerning Mr. MacDonald's second complaint, that the Secretary of State should have determined the total number of ballots he had in his possession, we decline to order that it be done now. While we have sympathy with Mr. MacDonald's disappointment over the result of the recount, we will not second guess the Secretary of State's judgment that, in the ordinary case, such a step is not part of a recount. Nor will we order it absent some allegation of irregularity in the handling or sealing of the ballots. RSA 665:7.

For the foregoing reasons, we will not disturb the Secretary of State's declaration of the result of the recount.

Date: *October 2, 1998*



Gary B. Richardson, Chair



Richard Delay, Sr.