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DEC 27 2002

**STATE OF NEW HAMPSHIRE
BALLOT LAW COMMISSION**

**NEW HAMPSHIRE
SECRETARY OF STATE**

**Petition of Peter McDonough
(Hillsborough County Attorney Race)**

ORDER

On December 4, 2002, pursuant to RSA 665:6, II, and RSA 665:7, Peter McDonough ("the Petitioner") filed an appeal of the Secretary of State's certification of John Coughlin as the winner of the Hillsborough County Attorney's race between the Petitioner and Mr. Coughlin.

On December 21, 2002, and December 23, 2002, the Ballot Law Commission ("the Commission") held a public hearing on the appeal. Both parties were represented by counsel.

JURISDICTION

RSA 665 provides the Ballot Law Commission the jurisdiction to hear this appeal. The Commission's authority includes reviewing protested ballots, interpreting the intent of a voter with an eye toward enfranchising as many voters as possible, and, if necessary, overruling the Secretary of State's certification of a winning candidate and if necessary, declaring an election void and ordering a new election. Appeal of Donna Soucy, 139 N.H. 110, 116 (1994); Murchie v. Clifford, 76 N.H. 99, 103-104 (1911).

SUMMARY OF ISSUES

In addition to ruling on individual protested ballots from both candidates, the Commission also heard testimony and argument with respect to specific categories of ballots that the Petitioner was challenging. Although the Petitioner divided these ballots into

various categories, the majority shared the common characteristic of having been marked as a straight Republican ticket with votes for individual candidates but with no vote for county attorney.

The categories of challenged ballots were as follows: "skipped ballots," where the straight ticket Republican box was marked but there were marks for individual candidates and the race for County Attorney was not marked; "two skipped ballots" where the Republican straight party ticket box was marked, but there were marks for individual candidates, two skipped races and no vote for County Attorney; "three or more skipped ballots," with the Republican straight ticket box checked, including three or more skipped races with individual votes showing before and after the County Attorney race and no vote for County Attorney; the "one column" votes where under the first column that includes the straight ticket voting box, the voter marked the Republican straight ticket and did not vote in any of the races in that column, however, in the other two columns of races, the voter voted in each individual race and, additionally, no vote was marked for the County Attorney race; ballots with straight ticket voting, no vote for the County Attorney, no votes after the County Attorney race, but votes for the Constitutional questions; and, straight Republican ticket ballots with votes in some of the races, no vote on the Constitutional questions, no vote after the County Attorney race and no vote for the County Attorney race. The Petitioner takes the position that these voters were confused by the layout of the ballots and the instructions on the ballots. Therefore, the argument goes, the intention of the voter cannot be ascertained and a vote should not be counted for either candidate.

The Petitioner also challenged the fact that some of the statutorily required language of RSA 659:17, dealing with instructions to voters, was omitted from some of the ballots in many of the towns and cities in Hillsborough County.

RULING ON CHALLENGES

The Commission begins by noting both parties presented very clear, well-reasoned and persuasive arguments. However, for the reasons stated below, the Petitioner failed to rebut the presumptions necessary to overturn the Secretary of State's certification of John Coughlin as the winner of this race.

With respect to the "one column" ballots contested and presented as Exhibit 16, the Commission upholds the Secretary of State's finding that these votes be counted for John Coughlin. In these ballots the voters marked the Republican straight ticket box in the first column and did not vote for any individual candidates in that column. However, in both the second and third columns, the voter marked each individual race and left the County Attorney race blank. The Petitioner argued that the voter's intent was to vote straight ticket for the first column and then to vote individually in the remaining two columns. As such, their argument was that there should be no vote counted for the County Attorney race in these instances. Although the Commission acknowledges voter confusion is possible and intent may be questioned, there was not enough evidence presented to overcome the presumption that the voter, by marking the straight ticket party box, intended to vote straight party throughout the ballot despite having also voted for individual races. With over 130,000 votes cast, the fact that 61 ballots indicate a straight Republican ticket with no votes in the first

column and miscellaneous votes in the remaining columns may have no statistical significance.

The crux of the Petitioner's challenged ballots deal with those voters who marked the straight ticket party ballot box and then, in some fashion, voted for a number of individual races and then skipped the County Attorney race completely. (Exhibits 13—18.)

Although the Commission found the Petitioner's arguments plausible, the Commission, though not pleased to do so, must, as it has done so in its DeStefano decision of 1998 and in In Re State Election Held on November 8, 1994 rulings, once again rule that whenever a straight ticket vote is cast, that straight ticket will only be overridden by an actual additional vote for an individual candidate. If a race is blank, but a straight ticket box has been marked, the straight ticket will trump.

When attempting to determine a voter's intent in the circumstances where the voter has marked the straight ticket party ballot and then voted for individual candidates but yet left other races blank, the Commission begins with the presumption that the voter has read the instructions on the ballot and intended to vote straight ticket by marking that portion of the ballot. Although evidence was presented that the instructions on the ballot are confusing and difficult to understand, the Commission cannot presume that a particular voter did not understand the instructions. This is particularly true of the language nearest the oval to vote a straight ticket which states:

**“STRAIGHT TICKET
REPUBLICAN
For all candidates of this party fill in the oval”**

To overturn this presumption, the Commission would have to find that the voter did not mean to vote a straight party ticket. If a straight ticket means anything, it means that the voter is voting for all of the candidates of that party. When the voter then proceeds to vote for individual candidates of the same party, one can speculate as to whether the voter understood what a straight ticket meant. But, since the law permits a voter to vote a straight ticket for one party and vote for individual candidates of the other party, we cannot assume that by voting for individual candidates of the same party the voter was necessarily disavowing his or her intention to vote a straight ticket. In other words, in races where a voter did not make individual marks, we cannot assume that the voter intended to skip and not vote in that race.

In the case presented to the Commission, this presumption was not rebutted by the Petitioner. And accordingly, the Commission upholds the Secretary of State's certification of John Coughlin as the winner of the Hillsborough County Attorney race.

The Commission need not rule on the Petitioner's argument as to the affect of the missing language in the voter instruction section of the ballot, contrary to RSA 659:17, II. The Commission finds that section of the instructions with the omitted language refers to multi-candidate races, not a two party race such as is the case before us. As such, the challenge is irrelevant and the question of compliance need not be addressed.

With respect to the Petitioner's individually challenged ballots, of the 18 submitted by Petitioner, the Commission overrules the Secretary of State's finding on 6 of the ballots and upholds the rest. Ballots marked as G-14, P-55 and J-51 are ordered to be counted for the Petitioner, and ballots marked H-26, K-43 and P-73 are ordered to be "no votes." With

respect to the 15 challenged ballots by John Coughlin, two of the Secretary of State's findings are overruled. Ballots marked as C-3 and C-6 are ordered to be "no votes" and not counted for the Petitioner. A full accounting of these ballots is attached to this Order as Addendum B.

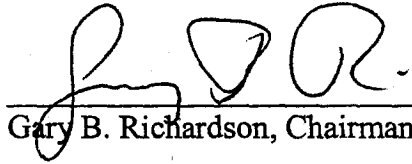
CONCLUSION

The Commission is extremely troubled that this issue is once again before it. In its Orders in 1994 and 1998, the Commission made it extremely clear that the straight ticket voting continued to be a source of great confusion to the voters of New Hampshire. The Commission specifically requested that the New Hampshire Legislature address and solve this problem. Unfortunately, once again, the citizens of New Hampshire and the candidates for the Hillsborough County Attorney race are faced with an election result that is being questioned because this issue has not been resolved. We believe that it is the responsibility of the Legislature to ensure that the instructions on the ballot are clear to the voters so that the voter knows how his or her ballot will be counted. It is the responsibility of the Ballot Law Commission to determine the intention of the voter, but we cannot do so if the voters are confused about what the marks on their ballot mean.

The Commission's rulings on the Petitioner's requested Findings of Facts and Rulings of Law are incorporated into this Order as Addendum A.

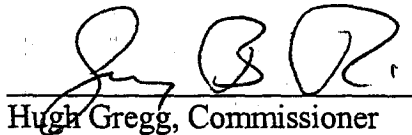
New Hampshire Ballot Law Commission

Date: 12/27/02



Gary B. Richardson, Chairman

Date: 12/27/02

for 

Hugh Gregg, Commissioner

Minority Opinion

The Ballot Law Commission is charged with determining the intent of the voter. The question before it is for whom did the voter cast his ballot. Murchie v. Clifford, 76 N.H. 99, 103. While recognizing the language of the statute and the language of the instructions that appear on the ballot, it appears based on the voting patterns exhibited on the challenged ballots that many voters did not understand those instructions. Based on the challenged ballots, I cannot presume that the voter understood the instructions on the ballot. If any presumption was supported by the challenged ballots, it would be that the voter did not understand the instructions. Based on the various voting patterns presented on the challenged ballots and the evidence presented, I also cannot presume that the voter by marking the straight ticket party box intended to vote straight party throughout the ballot despite having also voted for individual races and skipping some races. "... (T)he statute and ballot are not used entirely by those whose minds are trained to such a nicety of reasoning. They are for the use of the masses. They must be given a construction capable of being understood by ordinary men. The intent expressed by them is only such as those expressing it could entertain." Murchie, at 104.

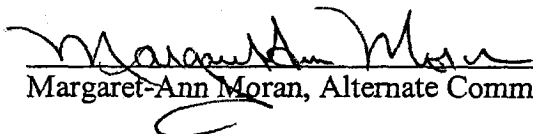
On those ballots where the voter marked a straight ticket, and then voted individually in some of the races, in some instances voting for the candidate of the party they marked a straight ticket for and then skipped other races, including County Attorney, I cannot determine the voter intent. I presume skipping over a race obviously meant something to the voter, but I cannot determine what it meant.

Where there is ambiguity, it should not be counted as a vote for a particular individual, but rather as a no vote. To do so in this instance would result in the Petitioner being declared the winner. That, however, would not be a fair or equitable result given that the voting machines were programmed to count the vote on any skipped races as a vote consistent with the straight party mark. Therefore, there will have been ballots where the straight party ticket was marked Democratic, the County Attorney race skipped and the vote determined to be for the Petitioner.

The Secretary of State followed the existing language of the statute in the instructions he gave and in the determinations he made, that is if a race is blank or skipped and the straight ticket has been marked, the straight ticket trumps. Those determinations were applied consistently as to both candidates. Those determinations are also consistent with prior decisions of this Commission. They may not, however, reflect the intent of the voters. I cannot determine what the voter intent was when the voter marked the straight party ticket and then voted individually for some races and skipped others.

In this election, the challenged ballots on which I cannot determine voter intent, would determine the outcome of the race. Unfortunately, the only way to fairly clarify with certainty voter intent, given the confusion created by the straight ticket party ballot, would be for a new election to be held for this race.

Date: December 27, 2002


Margaret-Ann Moran, Alternate Commissioner

Addendum A

STATE OF NEW HAMPSHIRE

BALLOT LAW COMMISSION

Petition of Peter McDonough
(Hillsborough County Attorney Race)

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**RULINGS ON PETITIONER'S PROPOSED FINDINGS OF FACTS
AND RULINGS OF LAW**

Findings of Facts

1. Granted.
2. Granted.
3. Granted.
4. Neither granted nor denied.
5. Neither granted nor denied.
6. Granted.
7. Granted.
8. Granted.
9. Granted.
10. Granted.
11. Granted.
12. Granted.
13. Granted.
14. Granted.
15. Granted in part. The Commission supported either clarifying the way in which the straight ticket was presented or eliminating it.

16. Granted.
17. Granted.
18. Granted in part. See Petitioner's Exhibit 8 for exact text of Secretary of State's Office's testimony.
19. Granted, as to some voters.
20. Granted.
21. Granted.
22. Granted.
23. Granted.
24. Granted.
25. Neither granted nor denied.
26. Neither granted nor denied.
27. Neither granted nor denied.
28. Granted, but irrelevant to Petitioner's race.
29. Granted, but irrelevant to Petitioner's race.
30. Granted, but irrelevant to Petitioner's race.
31. Neither granted nor denied.
32. Granted but irrelevant to Petitioner's race.
33. Granted in part, as to some voters, but irrelevant to Petitioner's race.
34. Denied.
35. Denied.
36. Neither granted nor denied.

37. Granted in part. It may indicate voter preference but without additional evidence a clear determination cannot be made.

38. Denied.

39. Denied.

40. Denied.

41. Denied.

42. Denied.

43. Denied.

Rulings of Law

1. Granted.

2. Granted.

3. Granted.

4. Granted.

5. Granted.

6. Granted.

7. Granted.

8. Granted.

9. Granted.

10. Granted.

11. Granted.

12. Granted.

13. Granted.

14. Granted.
15. Granted.
16. Granted.
17. Granted.
18. Granted.
19. Granted in part. The Commission may determine voter intent when enough evidence is presented to make such a determination.
20. Granted.
21. Granted.
22. Granted.
23. Granted.
24. Granted.
25. Granted.
26. Granted.
27. Granted.
28. Granted.
29. Granted, as to the Commission.
30. Granted in part. A rebuttable presumption is created by the placement of a mark in the straight ticket box.
31. Granted in part. Under some circumstances, markings on the ballot may provide an indication as to which mark was made first.
32. Granted.
33. Denied.

34. Granted except as to (1).

35. Denied, except the Commission agrees that the Legislature has failed to adequately address the confusion associated with straight ticket voting.

36. Granted.

37. Denied.

38. Denied.

39. Denied.

40. Denied.

41. Denied.

42. Neither granted nor denied.

43. Denied.

New Hampshire Ballot Law Commission

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ADDENDUM B

Ballot Law Commission

John Coughlin's Protested Ballots

<u>Ballot Number</u>	<u>Secretary of State's Ruling</u>	<u>Ballot Law Commission's Ruling</u>
C-1	McDonough	McDonough
C-2	McDonough	McDonough
C-3	McDonough	No Vote
C-4	No Vote	No Vote
C-5	No Vote	No Vote
C-6	McDonough	No Vote
C-7	No Vote	No Vote
C-9	McDonough	McDonough
C-11	McDonough	McDonough
C-12	McDonough	McDonough
C-14	No Vote	No Vote
C-17	No Vote	No Vote
C-20	McDonough	No Vote
C-22	McDonough	McDonough
C-23	McDonough	McDonough

ADDENDUM B

Ballot Law Commission

Petitioner Peter McDonough's Protested Ballots

<u>Ballot Number</u>	<u>Secretary of State's Ruling</u>	<u>Ballot Law Commission's Ruling</u>
G-14	Coughlin	McDonough
C-39	Coughlin	Coughlin
H-26	Coughlin	No Vote
G-26	Coughlin	Coughlin
P-55	No Vote	McDonough
P-83	Coughlin	Coughlin
L-23	No Vote	No Vote
J-51	No Vote	McDonough
E-33	No Vote	No Vote
E-10	Coughlin	Coughlin
E-3	Coughlin	Coughlin
Q-23	Coughlin	Coughlin
K-43	Coughlin	No Vote
B-36	Coughlin	Coughlin
P-73	Coughlin	No Vote
N-18	Coughlin	Coughlin
F-2	No Vote	No Vote
Q-22	Added to Exhibit	