

THE STATE OF NEW HAMPSHIRE
NEW HAMPSHIRE BALLOT COMMISSION

In Re: Town of Newmarket
Town Council Election Held on May 11, 1993

NOTICE OF DECISION

Procedural Background

This is a Petition filed by John "Jack" Fitzgibbon, a candidate for Town Council, requesting that the Ballot Law Commission declare the Town Council election for the Town of Newmarket held on May 11, 1993 to be void and seeking a new election.

Facts

Based on the testimony presented by Mr. Fitzgibbon, Paul Dietterle, Ron Lemieux, Town Moderator, and Judy M. Harvey, Town Clerk, and Jennie Griswold, the following facts appear to be largely undisputed. As a result of an error made by the printer, the ballot for the Town Council election erroneously informed the voters to vote for any two candidates. In fact, three positions were open and the ballot should have informed the voter to vote for any three candidates. After 84 ballots had been cast, the error was discovered and Town officials attempted to rectify the situation. The method selected was to segregate the 84 ballots cast and to attempt to contact the 84 voters who had voted to inform them of the error and their right to return to the polls to cast a totally new ballot. The uncast ballots were modified to correct the error. Election officials were able to contact 82 of the 84 voters. Of the 82 contacted, 19 chose not to return to the polls to vote a second time. The 84 ballots that were sequestered

were not counted for any race. Complicating matters further, there were 13 absentee ballots cast which apparently contained the erroneous instruction. In spite of the error, the absentee ballots were counted toward the Town Council race, apparently on the theory that it would be impossible for persons casting absentee ballots to come to the polls and vote a second time.

There was evidence presented that indicated that an "agreement" to accept the final vote tally and not contest the election may have been reached between the candidates after the error was discovered. Although Mr. Fitzgibbon acknowledged that he initially concurred with this understanding, he subsequently changed his mind after he had been contacted by a number of voters who felt that the election was illegal. Although it is undisputed that some understanding was apparently reached between the candidates, it is not clear that all of the candidates fully understood the ramifications of the agreement, particularly with respect to the absentee ballots, and it is not at all clear that any such agreement, even if it was reached with full knowledge of the facts, would be binding on the Ballot Law Commission which is charged with the responsibility of preserving the integrity of the election process.

The results of a recount held by the Town after counting the ballots in the method described above, was as follows:

Paul Dietterle	376
"Jack" Fitzgibbon	368

Jennie Griswold	391
David Halloran	433

Decision

Pursuant to the provisions of RSA 665:7, the Ballot Law Commission is charged with the responsibility to hear and determine all disputes involving alleged violations of New Hampshire election laws of a non-criminal nature. There is no evidence in this case of any criminal wrongdoing. The error in preparation of the ballots appears to have been made unintentionally by the printer and was simply not noticed by election officials until it was brought to their attention after the polls were open. As soon as election officials were informed of the error, the election officials contacted the Secretary of State's office for instructions and acted diligently and in good faith to attempt to rectify the mistake. Although with the benefit of hindsight, there were other ways that the situation might have been handled, there was probably nothing that could have been done to completely rectify the situation, particularly with respect to the absentee ballots.

With respect to the issue of the understanding that was allegedly reached between the candidates, it is unnecessary for the Ballot Law Commission to determine whether such an agreement was in fact made and whether, if such an agreement was made, it was entered into freely by the candidates with full knowledge of the facts. The election process is governed by New Hampshire law, RSA 652-671. As stated above, the Ballot Law Commission is charged

with the duty to determine all disputes involving alleged violations of New Hampshire election laws. The Ballot Law Commission finds and rules that any such agreement between the candidates would not be binding on the Ballot Law Commission if it determines that a violation of New Hampshire election laws has occurred. Accordingly, the Ballot Law Commission finds it unnecessary to determine whether an agreement was reached between the candidates and declines to do so.

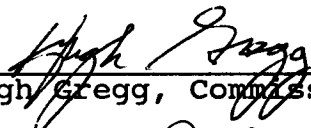
From the evidence presented, it is clear that 13 absentee ballots were cast by voters who were not informed that they had a right to vote for three vacancies for the Town Council. It is also clear that of the 84 voters who cast ballots prior to the discovery of the printing error on the ballot, two voters could not be contacted and 19 voters who were contacted were either unwilling or unable to return to the polls to vote. The failure of ballot to inform these voters of their right to vote for three candidates for Town Council was a violation of New Hampshire election laws.

Based on the results of the recount, it would appear that David Halloran had a sufficient number of votes to be elected regardless of how the voters who were not properly informed might have cast their votes. For this reason, the Ballot Law Commission declares that Mr. Halloran was properly elected to one of the positions on the Town Council and may be sworn into office and assume his duties immediately. With respect to the remaining candidates, it would appear that the results of the election could have been affected by the failure to properly inform the voters.

Accordingly, the Ballot Law Commission orders that a run-off election be held for the remaining two vacancies on the Town Council between Paul Dietterle, "Jack" Fitzgibbon and Jennie Griswold not later than the second Tuesday of November, that the Supervisors of the Checklist meet on the Saturday 10 days prior to the election to allow new voters to register and that the polls shall be open the same hours as the previous election.

New Hampshire Ballot Law
Commission

By 
Gary B. Richardson, Chairman


Hugh Gregg, Commissioner


Richard Delay, Commissioner