

STATE OF NEW HAMPSHIRE  
BALLOT LAW COMMISSION

Appeal of Recount by Stephen D. DeStefano  
State Senate District No. 16

**DECISION**

On November 19, 1998, pursuant to RSA 665:6 II, candidate Stephen DeStefano filed a timely appeal of the Secretary of State's findings in a recount of the Senate District 16 race between candidate DeStefano and Patricia Krueger.

On November 23, 1998, the Ballot Law Commission ("the Commission") heard the appeal. Both parties were represented by counsel.

Mr. DeStefano presented four (4) types of challenges to the Secretary of State's findings. We will consider each of the challenges made by Mr. DeStefano in the order that they were presented at the Hearing.

1. **Spoiled Ballot**

Mr. DeStefano argued that RSA 659:22 was not strictly complied with when this ballot was marked "spoiled". The statute allows the Moderator to give a voter who spoils a ballot a replacement ballot after marking the ballot "cancelled" and signing his name. Because the statute was not complied with, Mr. DeStefano argued it was possible this voter's vote was not counted. The Commission is not persuaded by this argument.

RSA 659:22 permits a voter up to 3 ballots if a ballot is spoiled. While the statute does require that the moderator write "cancelled" over his signature when a ballot is spoiled, which was not done in this case, the Commission assumes that the word "spoiled" was

written on the ballot by an election official when a voter requested a replacement ballot, therefore, the intent of the law was complied with. Mr. DeStefano presented no evidence that this particular voter did not cast another ballot. Noteworthy is the fact that the moderator was not called as a witness. Mr. DeStefano has not met his burden and the ruling stands.

## 2. Absentee Ballots

Mr. DeStefano challenged the Secretary of State's ruling upholding the Ward Moderator's decision that 7 absentee ballots from Ward 12 in Manchester should not be cast or counted because the affidavit on the inner envelope was not signed by these voters. Of the 7 ballots, two were not even in the inner envelope. These two can quickly be dismissed as appropriately being not counted. The remaining 5 ballots, although requiring closer review, also were appropriately not counted. RSA 657:1 permits a registered voter to cast an absentee ballot if one of three conditions is met: 1) the voter is absent from the voting district on the day of the election; 2) the voter cannot appear in public on the day of the election because of religious commitments; or 3) the voter is unable to vote in person because of a physical disability. RSA 657:17 requires the voter to sign an affidavit to establish that the voter is entitled to vote absentee. With the contested ballots, the affidavits on the inner envelope of the ballots were unsigned. Mr. DeStefano argues that these ballots should be counted because the unsigned affidavit is an "immaterial defect" and as such, RSA 659:54 permits the ballot to be counted.

The Commission disagrees that the failure of a voter to certify under oath the reason they will be absent on election day, as well as certifying that the ballot in that particular

envelope is theirs, is an immaterial defect. To the contrary, the signed affidavit is a critical step in ensuring the integrity of the absentee ballot process. If the affidavit was immaterial, there would be no need to include an affidavit on the envelope.

Mr. DeStefano's presentation to the Commission of the affidavits of the five voters whose absentee ballots were not counted is not persuasive. Even assuming for the sake of discussion that voters could cure defects in the affidavits submitted to the city clerk, these affidavits, Exhibit B, 1-5, do not contain the critical information required by law to perfect the absentee ballot. The same defect exists in these affidavits as exist in the actual absentee ballots. The voter has not certified that he or she meets one of the criteria to vote absentee. The critical information needed to count the absentee ballots is the certification by the voter that he/she will be absent from the voting district, has a religious commitment that prevents him or her from voting, or is disabled. This information is not contained in these 5 affidavits. Therefore, the Secretary of States ruling of not counting these ballots is upheld.

### 3. Confused Ballots

Mr. DeStefano challenged 4 ballots (Exhibit C, 1-4) in which the Secretary of State ruled that the votes were properly applied to Ms. Krueger.

With respect to Exhibit C-1, Mr. DeStefano argued that under Murchie v. Clifford, 76 NH 99, 102 (1911) this vote should not be counted. The Commission agrees. The placing of the incomplete X and the colored in circle in this particular ballot is confusing, making it unclear as to who the voter wished to vote for. This confusion was increased with the fact

that the middle section of the incomplete X falls below the Krueger line and into the DeStefano line. The Commission overrules the Secretary of States finding as to this ballot.

Exhibit C-2 was challenged because the voter did not make a complete line from the beginning to the end of the arrow on the straight ticket Republican line.

On this ballot, the intent of the voter to vote a straight Republican ticket is clear and the Commission upholds the Secretary of State's ruling.

Mr. DeStefano argued that Exhibit C-3 should not be counted as a Krueger vote because it appears the original vote for Krueger was crossed out. The Commission agrees that at best, it is confusing and the clear intent of the voter can not be determined. Therefore, the Commission overrules the Secretary of States findings as to this ballot.

Exhibit C-4 was challenged by Mr. DeStefano because all of the votes on this ballot were marked by filling in the circle, except for the vote for Ms. Krueger which was marked by an X. The intent of the voter to cast a vote for Ms. Krueger is clear. Accordingly, the Commission upholds the Secretary of State's ruling.

#### 4. Skipped Ballots

Mr. DeStefano challenged 10 ballots (Exhibit D, 1-10)<sup>1</sup>, in which the Republican straight ticket is marked off, but then the voter proceeded to vote individually in some of the races. In some cases, the votes cross party lines and in some cases they do not. In all 10 of these ballots there is no individual vote for Krueger or for DeStefano. The Secretary of State

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<sup>1</sup> His initial challenge on this issue was to 14 ballots . At the hearing he waived any challenges to Exhibits 11-14.

ruled that where no individual candidates are voted for and the straight ticket box was marked, that vote goes to the straight ticket candidate, in this case, Ms. Krueger.

The Commission upholds the Secretary of State's ruling on this matter. To be clear, 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, and the straight ticket has been marked, the straight ticket trumps.

Straight tickets voting continued to be a source of confusion to the voters. The unheeded warning that this Commission issued to the Legislature in the State Election held on November 8, 1994 bears repeating:

" The testimony heard by the Commission revealed that there is considerable confusion and misunderstanding among candidates and local election officials regarding the proper counting of straight ticket ballots. Several witnesses suggested that the layout of the ballots and the instructions to voters be modified to avoid this confusion. The Commission shares these concerns and has voted to ask the Secretary of State to recommend to the legislature changes in the law to clarify and simplify voting procedures as he deems necessary. These could include the use of a different ballot for straight ticket voters, better instructions to the voter or the elimination of straight ticket voting altogether. "

Ballot Law Commission  
decision filed December 27, 1994.

Mr. DeStefano's final challenge presented to the Commission is for one ballot cast in the town of Bow in favor of Ms. Krueger. Mr. DeStefano maintains that the vote should not

have counted. After reviewing the Bow ballot, it is the Commission's opinion that the vote was properly counted for Krueger and upholds the Secretary of States ruling.

The Commission notes that although Mr. DeStefano presented no other argument or evidence on any other ballots at the hearing, the Commission did review the remaining ballots which had been initially protested by Mr. DeStefano at the re-count. We uphold all of the Secretary of State's findings on these ballots as well.

Ms. Krueger's Challenges

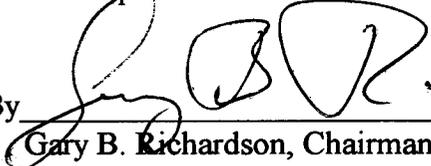
Ms. Krueger challenged ballots from Wards 1,2, and 4 in Manchester, and from Hooksett, Chester, Bow and Candia. Some were challenges to Mr. DeStefano votes and some were challenges to the Secretary of States ruling that they were no votes

After carefully reviewing these ballots, the Commission upholds the Secretary of States findings on the validity of these ballots.<sup>2</sup>

To summarize, the Commission overrules the Secretary of State's findings on two ballots, Exhibits C-1 and C-3 and orders that two votes be subtracted from Ms. Krueger's total. All other findings of the Secretary of State are upheld.

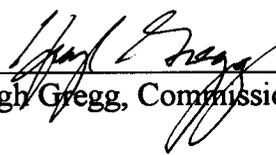
Accordingly, Ms. Krueger is certified as the winner of State Senate District No. 16.

New Hampshire Ballot Law Commission

By   
Gary B. Richardson, Chairman

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<sup>2</sup> The Commission has not provided a separate ruling on Ms. Krueger's request for findings of fact. All of these issues have been addressed in the body of this Decision.

By   
Hugh Gregg, Commissioner

By \_\_\_\_\_  
Richard Delay, Sr., Alternate Commissioner