

**THE STATE OF NEW HAMPSHIRE
NEW HAMPSHIRE BALLOT LAW COMMISSION
(December 19, 1994)**

**Re: State election held at Wilton, New Hampshire,
on November 8, 1994**

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SECRETARY OF STATE

Upon a recount of subject election, held on November 8, 1994, a dispute arose in the contest between Daren McGettigan, Republican, and Harold Melcher, Democrat, for the seat of State Representative for Hillsborough County, District 11.

By official vote count on election night, Melcher defeated McGettigan by nine votes - 545 to 536. Following the recount Melcher won by ten votes - 546 to 536.

Twelve ballots, as ruled by the Secretary of State at the recount were protested, one by Melcher and eleven by McGettigan.

On November 28, 1994, the three members of the Ballot Law Commission (Chairman Gary Richardson, Hugh Gregg, and Emily Gray Rice) heard testimony from Melcher, from Senator David Wheeler representing McGettigan, and others.

Three of the disputed ballots, the one protested by Melcher and two of the eleven protested by McGettigan, involved straight-party voting. The Ballot Law Commission, on a vote of 2-1, overruled the Secretary of State's decision on two of the contested ballots, thus giving Melcher one additional vote and McGettigan one additional vote. The Commission upheld the ruling on the Secretary of State on the third disputed ballot.

At the November 28th hearing the Ballot Law Commission took no action on the remaining nine protested ballots, pending a further hearing and testimony from Wilton's election officials.

On December 9, 1994, the Ballot Law Commission held a second hearing to take testimony on the remaining nine protested ballots.

In the absence of Chairman Gary Richardson, due to illness, it was agreed by representatives of both Melcher and McGettigan that the hearing could proceed with only the two Commissioners (Hugh Gregg and Emily Gray Rice) present, providing Chairman Richardson later reviewed the transcript and participated in the decision. Commissioner Richardson has reviewed the hearing record.

Testimony was taken from Richard Rockwood, Wilton Moderator; Cheryl Burns, Supervisor of the Wilton Checklist; John Griffith, Attorney for Melcher; Harold Melcher himself; Senator David Wheeler, representing McGettigan; Daren McGettigan himself; Thomas Burack, Attorney for the Republican State Committee representing McGettigan;

Jane Farrell, Wilton Town Clerk; Kyra Brennan, Wilton Deputy Town Clerk; and Philip J. Smith, a private citizen from Jaffrey.

All of the nine protested ballots had been written upon, with similar penciled, numerical markings which appeared to be tally results from the counting of votes. Under the provisions of RSA 659:36, the making of such markings would ordinarily be a misdemeanor. Cheryl Burns testified that all nine ballots had been so marked by herself and two other election officials, all three counting at the same table. The other two counters were Democrat Richard Greeley and Republican Stuart Draper. Burns identified two of the nine ballots which she had marked herself. She said that at the time of the counting, she was unaware of the provisions of RSA 659:36.

Moderator Rockwood testified that he was also unaware of the prohibition against the marking of ballots, and was certain that there was no intent by anyone in the polling place to commit a fraud.

A careful examination of the protested ballots by the Commissioners determined that the intent of the voter was clear in each instance. Each ballot was a vote for Melcher. The Commissioners discerned no evidence that questionable or suspect marks had been made in the boxes on the ballot, nor was there any indication of tampering with the voter's original marking.

At the hearings Senator Wheeler raised questions about alleged irregularities in voter registration, the handling of absentee ballots, and a discrepancy of one vote in the total vote count in connection with the Wilton election, wherein 1,111 names were checked off as voting and only 1,110 ballots were counted. He requested the election be invalidated and a new one held.

DECISION

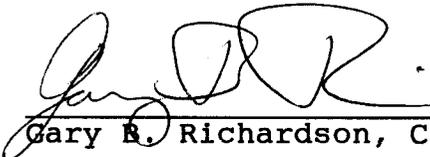
The nine protested ballots were improperly marked under RSA 659:36, but there was no evidence of fraud in the marking nor was the intent of any voter frustrated in said marking by the election officials. It did not appear that any of the election officials intended to violate the election laws.

The Commission finds the nine ballots were clearly intended by the voters to have been votes for Melcher and upholds the Secretary of State's ruling thereon. In view of this determination, it does not appear that the allegations of irregularities in registration, the handling of absentee ballots, or the total vote count are irrelevant, inasmuch as these allegations would not affect the election's result. Based upon

the recent holding by the New Hampshire Supreme Court in the Soucy matter on November 13, 1994, that "in the absence of fraud, irregularities will not render an election invalid unless they affect the result," the Commission declines to void the election and upholds the Secretary of State's determination that Mr. Melcher won the election.

The results of the Wilton election of November 8, 1994 are hereby upheld.

SO ORDERED:

By: 

Gary B. Richardson, Chairman



Hugh Gregg, Commissioner



Emily Gray Rice, Commissioner