

**Report Prepared Pursuant to RSA 659:77 Regarding the November 8, 2016 Election Held in the
Town of Derry, NH**

To the Voters of Derry, the NH Secretary of State and the NH Attorney General:

I, Eugene M. Van Loan III, was appointed monitor for the above election in accordance with RSA 659:77. I was assisted by Mr. Eric Forcier and Mr. Adrian LaRochelle from the Secretary of State's Office.

Prior to election day, I, Mr. Forcier and Mr. LaRochelle met with the senior election officials of the Town – the Moderator, the Town Clerk, the Chair of the Board of Supervisors, the Chair of the Town Council, a number of Assistant Moderators – and the Chief of Police. We went over the role of the monitors, explaining that our job was to observe and write a report on election law compliance and conformity of practices with those recommended in the Election Procedure Manual. I also explained that, as the monitor, I would be available to provide training and guidance to the Moderator and Clerk. We then proceeded to discuss several procedural issues which various persons anticipated might be presented at the election such as running out of ballots, extending polling hours, the new statute on wearing election paraphernalia inside the polls, and the handling of machine-counted ballots that filled the ballot boxes and needed to be removed from the box before the polls closed. The discussion was lively and collaborative.

Derry has 3 polling places, the Central Polling Place at the Calvary Bible Church and 2 additional polling places, one at the Hood Middle School and the other at the West Running Brook School. On election day, I spent most of my time at the Central Polling place, but I did visit each of the additional polling places during the day. Mr. Forcier manned the West Running Brook School and Mr. LaRochelle was situated at the Hood Middle School.

I did not personally observe, nor have reported to me by Mr. Forcier or Mr. LaRochelle, any violations of New Hampshire's election laws. In particular, the three issues that had arisen at the last Derry election, the State Primary in September, and which precipitated my appointment as a monitor of the November 8 election, were favorably dealt with by the Derry election officials and did not re-occur, to wit:

1. The failure to designate one of Derry's 3 polling places as the Central Polling Place;
2. The transportation of ballots between the additional polling places and the Central Polling Place and between the Central Polling Place and the Town Clerk's office in violation of the oversight/security procedures prescribed by the Election Procedure Manual;
3. The conduct of an unauthorized recount of machine-counted cast ballots.

The fact that I did not observe any election law violations is not to say that I did not receive any complaints. On several occasions, I was approached by Derry citizens, designated observers from the two major political parties and even election officials with questions about the propriety of certain practices or recommendations about how things might be done differently. Although some of the issues raised were well-taken, I did not conclude that they constituted election law violations. (An example of this would be the suggestion from an observer at the Calvary Bible Church that the signs dividing the check-in stations by voters' last names, according to alphabetic groups, could be arranged differently so as to even out the lines of waiting voters.)

Notwithstanding my views, it is worth mentioning two issues upon which I expressed my opinions where the laws are less than clear and which may generate complaints in Derry or elsewhere in future elections.

1. The first concerns the new law prohibiting the wearing of any “pin, sticker, circular, or article of clothing” at a polling place which is intended to influence the action of a voter within the building where the election is being held. RSA 659:43, I. In consultation with Derry election officials and Secretary of State personnel, I concluded that the critical determinant of whether voters entering the building should be confronted and told to remove or cover up their campaign logos, etc. (such as on hats, t-shirts, lapels and elsewhere) was whether such were being used to “influence the action of a voter”. Accordingly, if a voter wearing such an item entered the polling place and simply went about the business of voting – as opposed to flaunting his/her campaign items by pointing to them, waving them around, etc. – there was no violation of the statute and election officials were not required to take any action. (In so interpreting the statute, I took into consideration the likely adverse consequences of an election official ordering a person to remove or cover an article of his/her clothing. Indeed, it was reported to me that, early in the morning, when a voter standing in line at the Hood polling place challenged another voter who was wearing an item of campaign paraphernalia, it resulted in an unpleasant confrontation between the two voters. Although the situation was resolved favorably, one could easily see how it might have escalated.)
2. The second involved a question of whether a person who was conducting a write-in campaign for himself for a State office was entitled to hand out flyers advocating his candidacy to voters who were outside the polling place, but approaching it. This, again, concerns the proper interpretation of RSA 659:43. To begin with, I concluded that RSA 659:43, I, referred to above, did not apply because its prohibitions with respect to the distribution or wearing of campaign paraphernalia (including the distribution of handbills or circulars) applied only to such activities “at a polling place”, which I interpreted as meaning within the building. As for such activities outside the polling place, RSA 659:43, II provides that they may not be conducted “within a corridor 10 feet wide and extending a distance from the entrance door of the building as determined by the moderator where the election is being held”. In the case in point, the Moderator and her assistants had prescribed that the corridor in question would be a cement walkway leading up to the main doorways to the polling places. An issue arose at the Calvary Bible School because the candidate in question was standing on the cement walkway and handing out his flyers to voters walking up to the building. (All other candidates and campaign supporters were standing or sitting on the sides of the walkway holding signs and talking to voters; none were handing out literature.) When a complaint was registered, I went outside with an Assistant Moderator to review the situation. I discussed the electioneering statute with the candidate and confirmed with the Assistant Moderator that the cement walkway was the designated corridor where no electioneering was permissible. The candidate accepted this and agreed to stay out of the sidewalk.

This, however, did not completely resolve the situation. Some people, including several Derry election officials, were of the opinion that even if a person was outside the corridor,

he/she was not entitled to hand out campaign literature to voters. It was my conclusion that the very fact that the statutes provided for a corridor outside the polling place where certain electioneering practices were not permitted meant that beyond that corridor, electioneering was permitted. For example, no one contended that electioneering was not permitted out in the parking lot, on the streets leading up to the parking lot, etc., etc. In other words, I concluded that the physical dividing line between where electioneering outside the polling place was permissible and where it was not permissible was governed by the 10-foot-wide corridor authorized by RSA 659:43, II.

The question then arose as to whether, notwithstanding a candidate's right to distribute campaign material outside the polls so long as he/she was not within the corridor, voters were entitled to bring the literature in question into the polling place with them. This brings us back to RSA 659:43, I, which governs electioneering inside a polling place. To begin with, RSA 659:43, I proscribes only the distribution, posting or wearing of campaign literature, not the possession thereof. Secondly, as noted above, even the prohibited activities are only prohibited if they are intended to influence a voter. Since this clearly proscribes conduct designed to influence a voter other than the one possessing the campaign materials, I concluded that the statute did not address the situation in question. Finally, it occurred to me that if voters were prohibited from entering the polls with any kind of campaign literature in their possession – even assuming that election officials could distinguish between campaign literature and non-campaign literature – that would have to extend to the “cheat sheets” that voters often bring with them to the polls from various organizations which recommend how they should vote in various races or on various issues; I concluded that this was not a reasonable interpretation of the statute.

Nevertheless, the Derry election officials expressed a legitimate concern about voters bringing campaign literature into the polls: the possibility that the carriers of such material would, intentionally or inadvertently, leave such materials in a voting booth and that it could influence a subsequent user of that booth. In order to deal with that possibility, I recommended the following remedial measures – which were implemented, at least at the Calvary Bible Church and the Hood School:

- a. To put a waste barrel inside the foyer of the polling place with a sign on it that read “Please deposit all campaign literature here”;
- b. To periodically sweep the polling booths to clean out all non-authorized literature.

Suffice it to say that this whole area of electioneering near/in polling places on Election Day involves a delicate balance between protecting the opportunities for candidates, campaign workers and voters to exercise their rights of free speech, the need to provide for safe access to the polls, and the need to prevent intimidation and harassment of voters. To the extent that the resolution of how that balance should be struck in the situations described above is not in accord with what the Secretary of State would recommend as a best practice, I believe that the Election Procedure Manual be amended accordingly. In any case, the actions that were taken with respect to these issues by the Derry officials at the November 8, 2016 were based upon my recommendations and I take full responsibility for them.

There is one other issue that arguably falls within the category of best practices that I feel is not sufficiently dealt with in the Election Procedure Manual. Although not explicit, the Manual seems to contemplate that cast ballots should not be removed from the ballot boxes until the polls are closed and the counting has begun. The problem in a jurisdiction such as Derry which uses optical scanning machines to count votes is that boxes that are supplied by the manufacturers of the voting machine systems have a limited capacity to accept ballots. This raises the question of what is to be done when those boxes are filled and they will not accept further ballots. Derry has 6 machines and 6 boxes, 2 for each of the 3 polling places. The practice of the Derry election officials when a box has accepted about 1000 ballots is to take the machine/box temporarily off-line, open the rear of the box, remove the machine-counted ballots from the left-hand compartment and place them into a box and then return the machine/box to service. Prior to the actual election, I consulted with Secretary of State personnel about how to secure these cast ballots. The guidance that was given was to put them into the cardboard boxes that were customarily used at the end of an election for transmission to the Town Clerk for post-election storage, to tape those boxes up and to affix the seals provided by the State indicating that they contained cast ballots. Upon being sealed, these boxes would then not be re-opened unless a recount was requested from the Secretary of State.

From a practical point of view, this procedure worked well. The problem, however, is perception; when voters or observers witness this procedure, they may misunderstand exactly what is occurring. I do not know the precise remedy for this misperception, but I can pose several alternatives to be considered:

1. Jurisdictions, such as Derry, which use optical scanning machines could be directed that when a machine-operated box becomes filled, they must take the machine/box out of service and substitute a traditional ballot box be used for the next ballots to be received. Accordingly, none of the boxes used at the election would be opened and ballots removed until the polls are closed and the counting has begun. (On the other hand, this, of course, would mean that those additional ballots would have to be hand-counted, which would substantially diminish the value of using machines to count ballots.)
2. Jurisdictions, such as Derry, which use optical scanning machines could be directed to purchase multiple boxes for each voting machine so that when a box becomes filled, the box is taken out of service and the machine associated with that box placed on top of another box. Accordingly, none of the boxes used at the election would be opened and ballots removed until the polls are closed and the counting has begun.
3. The procedure used by Derry could be expressly approved.

Finally, I do have several recommendations to Derry with respect to its election procedures which do not involve election law violations or deviations from best practices specified in the Election Procedure Manual, but which, in my opinion, would improve the functioning of their elections:

1. On several occasions, I felt that the election officials were a bit short-handed. When the action is heavy, and even when it is not but some problematical situation occurs, election officials can be overwhelmed and that is when mistakes can occur, voters can become agitated and controversies can erupt. There is no way to know how many people will turn out to vote at any given election, but it is better to have too many poll workers than too few.

2. The central polling place should be equipped with a photocopy machine which is available to make additional copies of necessary forms such as forms for challenging absentee ballots, write-in tally sheets, and even additional ballots in the event that they run out of official ballots. (Note-Derry did run out of official ballots at the November 8 election, but the Town Clerk was proactive and had several hundred additional ballots run off at the Town Office well in advance so that we were prepared to – and did – deal with the situation in an orderly manner.)
3. Although it may be gratuitous on my part to involve myself in an issue which does not concern compliance with the election laws and which may have unwelcome fiscal implications for Derry (and other machine-counting jurisdictions), I do believe that Derry should consider investing in dedicated machines/boxes for the processing of absentee ballots (which, in Derry's case, would mean the purchase of 3 more machines/boxes). Since NH law prescribes that absentee ballots may not be processed/counted until election day, that means that the physical ballots must be put through the machines sometime on election day. If those ballots are then inserted into the regular machines/boxes – as is the present practice - this causes several problems:
 - a. Voters trying to put their ballots into the machine are now held up by the election officials who pre-empt access to the ballot box and a queue begins to form;
 - b. Absentee ballots are folded. The machines don't like folded ballots and, as a result, when an absentee is inserted into the machine, it frequently gets rejected. Among other things, this requires the election official to try to smooth out the folds and then re-insert the ballot. Accordingly, the queue described above gets longer.
 - c. Even to the extent that a machine has accepted absentee ballots, it is often not happy about doing so. The fact that the ballots have folds in them results in the box filling up more rapidly than one would otherwise expect. Again, this creates problems/delays in the processing of the ballots from in-person voters.

The bottom line here is that if Derry were to have dedicated machines/boxes to deal with absentee ballots, it is likely the entire process of in-person voting would go much smoother.

In conclusion, I am pleased to report that my findings are that the Derry Moderator, Derry Town Clerk and the other Derry election officials – in addition to being diligent and cooperative - conducted the November 8, 2016 in accordance with New Hampshire's election laws and consistent with best practices as specified in the Election Procedure Manual.

November 16, 2016

respectfully submitted,



Eugene M. Van Loan III, Monitor

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