

**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

KELLY A. AYOTTE
ATTORNEY GENERAL



ORVILLE B. "BUD" FITCH II
DEPUTY ATTORNEY GENERAL

April 9, 2008

M. Kristin Spath, Esq.
Ballot Law Commission
Department of Justice
33 Capitol Street
Concord, NH 03301

RE: *Petition of Appeal to the Ballot Law Commission*

Dear Attorney Spath:

Enclosed please find a Motion to Dismiss Appeal of Albert Howard in the above-captioned matter.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Kennedy".

James W Kennedy
Assistant Attorney General
Civil Bureau
603-271-3650

JWK/sd
Enclosure

cc: Honorable William M. Gardner, Secretary of State ✓
Albert Howard
261373

**Motion to Dismiss Appeal
of Albert Howard**

NOW COMES Honorable William M. Gardner, New Hampshire Secretary of State (“Secretary of State”), by and through the office of the New Hampshire Attorney General and moves the Ballot Law Commission (“BLC”) to dismiss Republican Presidential Primary candidate Albert Howard’s (“Appellant”) appeal of the results of the New Hampshire Presidential Primary recount completed February 11, 2008. The Appellant requests that the BLC disclaim any opinion on the accuracy of New Hampshire’s 2008 Presidential Primary Election and the Republican recount “because checks and balances to maintain the integrity of the ballots and the total counts were either not followed, or not in place.” See Howard Appeal at 1. The Secretary of State maintains that the Appellant has failed to raise any issue in the Petition which triggers the BLC’s jurisdiction. Therefore, the BLC must dismiss the Petition in its entirety, and, in support thereof states as follows:

I. The BLC does not have Jurisdiction to hear Appellant’s Appeal of the Recount under RSA 665:8.

Appellant has not raised an issue under the BLC’s jurisdiction with respect to whether the Appellant should have won New Hampshire’s 2008 Republican Party Presidential Primary. RSA 665:8 sets forth the jurisdiction of and procedure for the BLC to review an appeal of the Secretary of State’s recount of a Presidential Primary. The statute provides that the BLC shall “consider and review all the rulings of the secretary of

state on ballots protested during the recount.” RSA 665:8, I. The statute further provides that “[i]f, after review, it shall appear that the appellant was nominated, the commission shall change the declaration of the secretary of state and issue a certificate of nomination to the appellant.” Id.

Of the 241,039 Republican Presidential Primary ballots casts, Appellant received a total of forty-four (44) votes from New Hampshire voters in New Hampshire’s Republican Presidential Primary. See Statewide summary at the conclusion of the Republican Presidential Primary recount, attached as Secretary of State Ex. 1. Following the Republican Presidential Primary recount conducted by the Secretary of State, it was determined that Appellant actually received a total of forty-three (43) votes from New Hampshire voters in New Hampshire’s Republican Presidential Primary, a net reduction of one vote. See id.

During the Republican Presidential Primary recount process, a total of 15 ballots were contested. See David Scanlan Affidavit, attached as Secretary of State Ex. 2. None of the contested ballots were votes that could even remotely be made in favor of Appellant. See id. In fact, while Appellant cites the “Subject of Petition” as an examination of contested ballots, he has not raised any issues related to the 15 contested ballots in this appeal for the BLC to review. See Appellant’s Appeal. Regardless, even if the BLC were to consider the 15 contested ballots from the Republican Presidential Primary recount as votes for Appellant, he still would not be declared the winner of this primary of this Primary.¹ Thus, because Appellant does not raise an issue in his appeal

¹ Republican candidate John McCain won the New Hampshire Republican Presidential Primary with a total of 88,713 votes. See Statewide summary at the conclusion of the Republican Presidential Primary recount, attached as Secretary of State Ex. 1

that would even remotely entitle him to the only remedy that the BLC has the authority to provide under RSA 665:8, his appeal must be dismissed.

II. To the Extent that the BLC considers Appellant's request for relief as something other than an appeal of the Republican Presidential Primary recount, the BLC does not have Jurisdiction to Hear and Determine the issues raised.

The Appellant alleges eight violations in support of his request that the BLC disclaim any opinion on the accuracy of New Hampshire's 2008 Presidential Primary Election and the Republican recount. These alleged violations are:

1. Machine failures were handled improperly -- and possibly altered the outcome of the election.
2. Machine failures render equipment non-compliant with HAVA regulations.
3. The location of the memory cards post-election were reported "unknown."
4. The boxes of ballots were not picked up for the recounts by State Police.
5. Ballots were not stored and transported in boxes provided by the Secretary of State's office.
6. Many ballot boxes were not properly sealed, and what were referred to as "seals would not safeguard the ballots from tampering.
7. The uncounted ballots were not always kept overnight in the security of the "ballot vault."
8. Ballots were not always delivered in an open and public manner.

The BLC does not have jurisdiction to consider these alleged violations.

In assessing whether the BLC has jurisdiction to hear the issues raised by Appellant, it is necessary to construe the BLC's jurisdiction under RSA chapter 665. The New Hampshire Supreme Court instructs that the "starting point in any statutory interpretation case is the language of the statute itself," Crowley v. Frazier, 147 N.H. 387,

389 (2001), and to examine “the plain and ordinary meaning of the words used.” Petition of Bailey, 146 N.H. 197, 198 (2001). Further, a reviewing court must “not merely look at isolated words or phrases, but instead . . . consider the statute as a whole.” DeVere v. Attorney General, 146 N.H. 762, 765 (2001). Moreover, “legislative intent is to be found not in what the legislature might have said, but rather in the meaning of what it did say.” State v. Cobb, 143 N.H. 638, 644 (1999) (internal quotation and citations omitted).

RSA chapter 665 sets forth the specific and exclusive jurisdictional boundaries in which the BLC may hear and determine disputes. Pursuant to this statute, the BLC has the jurisdictional authority to hear and determine: (1) disputes arising over whether nomination papers or declarations of candidacy forms filed with the secretary of state conform with the law see RSA 665:6; RSA 665:7; (2) appeals from recounts from the primary and general election, see RSA 665:8; and (3) “all disputes arising over the *form* of his or her name which a candidate *designates* to be printed on the state primary and state general election ballot, as provided in RSA 655:14-b,” RSA 665:9 (emphasis added). The BLC also has jurisdiction to “hear and resolve complaints of federal voting law violations, pursuant to the Help America Vote Act of 2002, Public Law 107-252, as provided in RSA 666:14.” RSA 665:9.

In reviewing the plain language of RSA chapter 665 and upon review of the statute as a whole, no section of that statute expressly or implicitly provides that the BLC has the jurisdictional authority to hear and determine the eight issues raised by Appellant. Absent a specific statutory provision granting the BLC with the jurisdiction to rule on the specific issue raised by the Appellant, the BLC must dismiss the appeal.

Additionally, the legislative history of RSA chapter 665 demonstrates that the BLC does not have jurisdiction to hear the instant matter. In 2003, the legislature amended RSA chapter 665 and removed the section entitled, "Additional Jurisdiction."

This section previously codified under RSA 665:7, provided in part:

[i]n addition to the jurisdiction of issues conveyed to the ballot law commission by other sections of this chapter, the commission shall hear and determine all disputes involving alleged violations of New Hampshire election laws of a non-criminal nature for which no specific statutory appeal procedure has been provided.

Because the legislature removed this section of RSA chapter 665 which provided general additional jurisdiction, it follows that the BLC's jurisdiction is limited to those specific areas expressly provided for in the statute.

Accordingly, the Appellant's requests that the BLC disclaim any opinion on the accuracy of New Hampshire's 2008 Presidential Primary Election and the Republican recount on the basis of the eight alleged violations is outside the scope of the BLC's jurisdictional authority, and therefore, the BLC must dismiss the appeal.

Accordingly, the BLC must dismiss the appeal and/or petition for lack of jurisdiction.

III. Conclusion

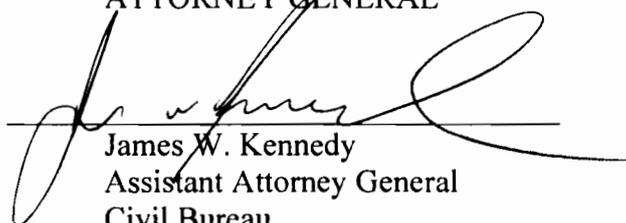
WHEREFORE, New Hampshire Secretary of State respectfully requests that this Honorable Commission:

- A. Dismiss the Petition on the basis that it does not have jurisdiction to hear and determine this matter;
- B. Grant such other and further relief as justice may require.

Respectfully Submitted,

KELLY A. AYOTTE
ATTORNEY GENERAL

April 9, 2008

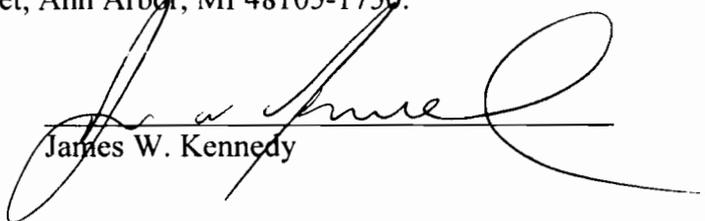


James W. Kennedy
Assistant Attorney General
Civil Bureau
33 Capitol Street
Concord, NH 03301-6397

Certificate of Service

April 9, 2008

I hereby certify that copies of the foregoing was mailed this day, postage prepaid, to Albert Howard, *pro se*, 710 Apple Street, Ann Arbor, MI 48105-1750.

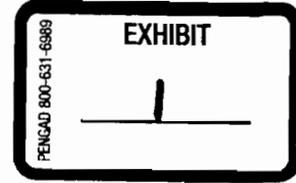


James W. Kennedy

255390

The Republican recount began on January 23, 2008 and ended on Monday, February 11, 2008

Statewide summary at the conclusion of the recount



Republican Candidates	January 8, 2008 Presidential Primary Results	Recount Results
John McCain	88,571	88,713
Mitt Romney	75,546	75,675
Mike Huckabee	26,859	26,916
Rudolph W. Giuliani	20,439	20,344
Ron Paul	18,308	18,346
Fred Thompson	2,894	2,956
Duncan Hunter	1,225	1,192
Alan Keyes	203	205
Stephen W. Marchuk	124	127
Thomas G. Tancredo	80	63
Hugh Cort	53	35
Cornelius Edward O'Connor	45	46
Albert Howard	44	43
Vern Wuensche	44	36
Vermin Supreme	41	43
John Cox	38	39
Daniel Gilbert	33	35
James Creighton Mitchell, Jr.	30	26
Jack Shepard	27	28
Mark Klein	19	16
N. Neal Fendig, Jr.	13	13

Following this summary is a breakdown by town and city in each county

How to read these results:

The first set of numbers under the candidate(s) name reflect the number of votes reported to the Secretary of State's office after the January 8, 2008 Presidential Primary Election. The number to the right (under the column marked "recount") is the number of votes the candidate(s) received after the recount of votes in that town or ward.

The democratic candidates listed at the end of each county (indicated by the d next to their name) are candidates who received WRITE-IN votes on republican ballots.

Click on the county link below to view recount results.

| [Belknap County](#) | [Carroll County](#) | [Cheshire County](#) | [Coos County](#) | [Grafton County](#) |
[Hillsborough County](#) | [Merrimack County](#) |

| [Rockingham County](#) | | [Strafford County](#) | [Sullivan County](#) | [Summary By Counties](#) |

THE STATE OF NEW HAMPSHIRE

Ballot Law Commission

Motion to Dismiss Appeal
of Albert Howard

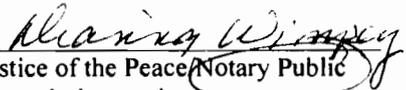
Affidavit of Deputy Secretary of State David Scanlan

1. I have served as the Deputy New Hampshire Secretary of State for 5 years.
2. As Deputy Secretary of State, I participated in conducting and overseeing the recount for New Hampshire's 2008 Republican Presidential Primary.
3. During the Republican Presidential Primary recount, a total of 15 ballots were contested.
4. None of the contested ballots in New Hampshire's Republican Presidential Primary were votes that could even remotely be construed as votes for the Republican Presidential Primary candidate Albert Howard.

Dated: 4/9/08


David Scanlan
Deputy Secretary of State

Sworn to and affirmed at Concord, New Hampshire on April 9, 2008,
before


Justice of the Peace/Notary Public
Commission expires:

