

THE STATE OF NEW HAMPSHIRE



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October 20, 2016

Mary Till
70 Old Chester Road
Derry, NH 03038

Re: State Primary Election

Dear Ms. Till:

We received two complaints regarding you in your role as Derry Town Moderator relating to your actions during the state primary election held on September 13, 2016. As a result, the Secretary of State's office conducted a review of those procedures you employed during the election and determined many actions taken are not permitted by New Hampshire law and serve to undermine confidence in the election process.

We are writing to ask you to correct these deficiencies in the upcoming general election and plan to have on site in Derry state officials pursuant RSA 659:77, III to assist and to confirm corrective actions have been implemented.

I. Failure to Identify a Central Polling Place

None of Derry's three polling places have been designated or are known as a "central polling place." RSA 658:10 provides a mechanism for towns, such as Derry, to employ more than one polling place on election day with separate voting districts for each polling place. The law requires, however, that the polling place "presided over by the moderator of the town or ward shall be known as the central polling place and all other polling places shall be known as

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additional polling places.” RSA 658:11. These additional polling places are to be overseen by an assistant moderator that you as Moderator would appoint and an assistant clerk appointed by the town clerk. RSA 658:14. Both of those individuals are to be domiciled in the voting district covered by the additional polling place. RSA 658:14. There is confusion as to whether there is a central polling place in Derry and if so, where it is located.

One of the statutory functions of the central polling place is to receive the ballots from the additional polling places for public counting inside the guardrail of the central polling place. RSA 659:62; RSA 659:63. This was not done during the state primary election. Instead it was conducted at the Derry Municipal Building which is not a polling place. This constitutes a violation of RSA 659:62 and RSA 659:63.

II. Moderator Handling of Ballots

RSA 658:24 was modified, effective July 4, 2016, so that moderators, whose names are on a ballot for elective office, cannot handle marked ballots or be involved in the counting of votes. You violated this provision of law by overseeing the counting of ballots and ordering a partial recount.

III. Delivery of Ballots

The manner in which ballots were delivered to the Municipal Building was not consistent with the requirement that the ballots from the additional polling places be delivered by two election officials appointed by the assistant moderator, one from each party. RSA 659:62. Instead a police cruiser was used to deliver some ballots to the Municipal Building. Further, other ballots were transported in the private vehicle of one Derry Councilor with a second Councilor following in a separate private vehicle. Neither method of delivery is permitted by New Hampshire law. This violated RSA 659:62 which requires that two election officials from each party deliver these materials. Pursuant to this provision, the ballots must be accompanied by those two individuals throughout the entire delivery, including when the ballots are inside a moving vehicle. Further, while the ballots being transported were sealed, there was no certification by the assistant clerk at the additional polling place as required by RSA 659:62. This process is vital to ensure the integrity of the ballots and the election.

IV. Recount

Of greater concern, you conducted a hand recount of an AccuVote machine, an act which was not sanctioned or approved by the Secretary of State and is not permitted by any provision of New Hampshire law. Moreover, the manner in which the ballots to be recounted were delivered to the Municipal Building was not consistent with state law and generated concern and at least one complaint to the Attorney General's Office and the Secretary of State's Office by candidates who were on the ballot.

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You have cited RSA 659:77 as a justification for the AccuVote recount that you ordered. However, you were specifically instructed by the Secretary of State, prior to the election, that you had no authority to do a recount. Additionally, RSA 659:77 provides that any moderator who neglects to provide an accurate count may be guilty of a violation---but it nowhere authorizes a recount as a means to assure an accurate count occurred. Instead, the provision must be read in conjunction with the rest of the section which sets forth the types of activities that might be implicated by that phrase such as providing a return of votes in an untimely fashion, or with “significant defects,” or where the vote count is significantly inaccurate following a recount performed by the Secretary of State pursuant to statutory authorization. It must also be read in conjunction with RSA 660 *et seq.*, which governs the conduct of recounts in New Hampshire elections. Recounts are performed upon application by candidates, and are conducted exclusively within the jurisdiction of the New Hampshire Secretary of State.

As previously stated, prior to the primary election, you were counseled by the Secretary of State’s office that there was no statutory authority for you to conduct a recount yet you did so anyway. The Secretary of State has learned you informed town officials that you intend to conduct a similar recount at the general election. You are required to provide the Attorney General written confirmation received in his office no later than October 28, 2016, that you will not conduct another recount of an AccuVote machine during the general election or in the future.

V. Conclusion

The serious violations described in this letter directly resulted in complaints received by the Secretary of State and the Attorney General. The complainants have indicated confusion and concern over the process that you employed in addition to doubt as to the accuracy of the election results.

Accordingly, pursuant to RSA 659:77 and the findings contained in this letter, the Secretary of State, in consultation with the Attorney General, will appoint at least one election monitor for the general election, possibly more. The election monitor will attend the ballot casting and the entire ballot counting in Derry and oversee your activities as Moderator. There will also be a monitor assigned to each of Derry’s additional polling places prior to and during the close of those polls. Pursuant to RSA 659:77, III, you may appeal this decision to the New Hampshire Ballot Law Commission.

It is imperative that, going forward, you ensure that your practices and procedures comply with New Hampshire law and that no further unauthorized recounts be performed. Election officials must comply with the law not simply to prevent fraud or misconduct, but to maintain public confidence in the electoral process. When statutes are broken or ignored, or

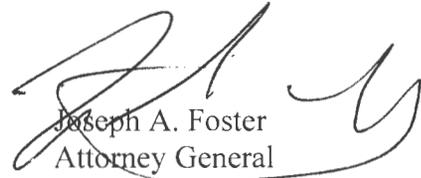
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when the directives from the Secretary of State's office are dismissed, public confidence in the election process is undermined.

Sincerely,



William M. Gardner
Secretary of State



Joseph A. Foster
Attorney General