RECEIVED
JUN 26 1997
NEW HAMPSHIRE
SECRETARY OF STATE

BALLOT LAW COMMISSION

In re Petition of Katz and Lynch

Procedural History

This case involves two petitions filed by Norman Katz et al and Stevia G. Lynch et al respectively, seeking to challenge the results of three ballot votes relating to the adoption of the Official Ballot Referenda optional form of government, RSA 40:12-14, in the Amherst School District, the Souhegan Cooperative School District and the Town of Amherst on March 11, 1997. The Katz petition was initially filed with the Secretary of State on or about March 25, 1997. The Lynch petition was initially filed with the Secretary of State on March 28, 1997. The Katz petition requested that the results of the vote be set aside and that a new election be held. The Lynch petition requested the Ballot Law Commission to "conduct a thorough review of the [vote] and if appropriate, hold a hearing on these matters." The petitions allege a variety of procedural and substantive errors at the election. For purposes of this decision, it is sufficient to say that these allegations include issues involving the proper counting of ballots (e.g. ballots having only one box next to the question rather than a box marked "yes" and a box marked "no" making it difficult to ascertain the intention of the voter) and issues involving the conduct of voting and the recount itself (e.g. lack of security of ballots, allowing voting after polling hours, lack of impartiality of the boards of recount etc.). By letter dated March 31, 1997, the Commission notified the petitioners that there was an issue whether the

Commission had jurisdiction to grant the relief requested and the petitioners were informed of the requirement contained in its rules that requires a complaint to the Commission to contain "a citation to any statutes, rules, orders or other authority which entitles the petitioner to have the Commission act as requested." Rules BAL 205.01(a)(5).[1] In response, the Lynch petitioners provided a list of specific statutes that the petitioners felt had been violated but did not address the jurisdictional issue of the Commission's authority to decide the issues raised. The Katz petitioners did not respond in writing to the request.

A preliminary hearing was scheduled on the petitions for April 17, 1997 and notice was provided to the petitioners and to the election officials of the involved school districts and town. Immediately prior to the hearing, counsel for the public entities filed a Motion to Dismiss Complaint or Alternatively to Quash Purported Hearing Notice and to Provide Proper Notice and Scheduling Orders. At the hearing, counsel for the public entities requested a postponement of the hearing and an opportunity to file a Memorandum in Support of the Motion to Dismiss. The request was granted and the petitioners, who were

---

[1]In a letter to the Secretary of State, Ms. Lynch makes reference to holding a recount pursuant to RSA 660:13-17. That section of the statutes relates to recounts of local questions appearing on the state ballot prepared by the Secretary of State. The adoption of the Official Ballot Referendum Form of Meeting is decided by official ballot on the warrant for an annual meeting prepared by the town or school district. RSA 40:14, III. We do not believe that the statutory procedures for a recount of a state election can be utilized for a recount of a local election without some statutory authorization from the legislature.

unrepresented by counsel, were invited to file a responsive pleading to address the jurisdictional issue. By letter dated May 3, 1997, the Lynch petitioners declined the Commission's invitation and in essence stated that the petitioners would leave it up to the Commission to rule on the Motion without the benefit of their input. The Katz petitioners filed no response.

Decision

"Jurisdiction to hear and determine election contests is dependent on and regulated by statutory provision." 26 Am.Jur.2d Elections §328. Cited in Appeal of Soucy, 139 N.H. 110 (1994). The jurisdiction of the Ballot Law Commission is set forth in RSA 665. Sections 4 and 5 of the statute recite the general duties and jurisdiction of the Commission relating to state elections. Section 7 sets forth a broader grant of jurisdiction to determine all disputes involving New Hampshire election laws provided that no other statutory procedure has been provided elsewhere in the statutes:

> "In 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 already been provided..." (emphasis added)

Therefore, the jurisdictional issue raised in this case is whether the petitioners had available to them a specific statutory appeal procedure other than to the Commission.

The contested election in this case relates to the adoption of the Official Ballot Referenda optional form of government. RSA 40:12-14. RSA 40:12-14 was adopted by

the legislature in 1995 as an alternative form of government to the traditional town and school district meeting. The legislature placed this new legislation within Chapter 7 Title III of the Revised Statutes Annotated. RSA 40 already contained a procedure for ballot recounts. Section 4-C of the statute provides for ballot recounts to be held "in accordance with the procedure for recounts of town elections under RSA 669:30-33". In turn, RSA 669:35 provides that any person aggrieved by a ruling of a board of recount under RSA 669:30 "may...appeal to the Superior Court". To the extent that the petitioners are seeking a recount, it seems clear to us that there is a specific statutory appeal procedure, that the appeal is to the Superior Court and, therefore, the Commission lacks jurisdiction to hear their appeal.

As stated above, a recount is only one part of the relief that the petitioners are seeking. The petitioners are also raising issues relating to the conduct of the voting such as allegedly inadequate security of the ballots and improper election procedures that a simple recount of the ballots cast would not address. Since RSA 40:4-c and RSA 669:30-33 expressly refer to only ballot recounts, an argument could be made that to the extent that the petitioners claim a violation of law in the conduct of the election, there is no specific appeal procedure and, therefore, the Commission has jurisdiction under RSA 665:7.

Unfortunately for the petitioners, we then run into the Supreme Court's opinion in Nickerson v. Aimo, 110 N.H. 348 (1970). The Nickerson case involved a request for a

recount in a contested race for selectman. A request for a recount was filed under RSA 59 which has been subsequently repealed and recodified in RSA 652-671. The losing candidate appealed to the Superior Court contesting the recount alleging improprieties in the conduct of the recount and the winner moved to dismiss claiming that the Superior Court lacked jurisdiction because the nature of the dispute involved the conduct of the recount not the actual counting of the ballots cast. The Supreme Court upheld the denial of the motion to dismiss and ruled that the Superior Court had jurisdiction to consider allegations of ballot tampering under the statutory grant of authority to decide appeals from a recount.

Nickerson tells us that a statutory reference to the authority of the Superior Court to review appeals from a recount embraces the authority to review allegations of violations of election laws. That being the case, there is a specific statutory procedure for appeal. We are left to conclude that the Commission lacks authority to decide allegations involving violations of election laws in municipal elections absent an express statutory grant of authority.

The petitioners have alleged violations of New Hampshire election laws and have asked the Commission to provide them with a remedy. The allegations, if proven, could constitute serious violations of the law. RSA 669:35 requires that an appeal from a recount must be filed in the Superior Court within five days of the recount. It is unfortunate, perhaps for both sides of this dispute, that a public hearing cannot be held to

resolve the issues that have been raised. However, the Ballot Law Commission cannot create jurisdiction for itself where it does not exist. The Motion to Dismiss is hereby granted.

Dated: June 23, 1997

BALLOT LAW COMMISSION

By _____