

**STATE OF NEW HAMPSHIRE
BALLOT LAW COMMISSION**

Decision BLC 2021-1

In Re Windham Audit

REPORT AND DECISION

The 2020 Rockingham County District 7 state representative election resulted in significant variances between the machine count on election night and the recount totals. The Ballot Law Commission (the “Commission”) held a hearing on November 23, 2020 and confirmed the results of the election. See BLC 2020 -7. The Commission also recommended that an investigation be held into the variation in vote totals, which in some cases exceeded 300 votes. In 2021, the New Hampshire Legislature passed Senate Bill 43, which required an audit of the results of the District 7 election, a report by the auditors and, within 45 days of the report by the auditors, a report by the Commission “in accordance with RSA 656:41, . . . as to the performance of the ballot counting devices.” The Commission’s report is due by August 26, 2021.

The Commission met on July 28, 2021, to consider the report of the auditors, which report had been distributed to the members prior to the meeting. At the meeting, the report was admitted into the record, and Associate Attorney General Anne Edwards, who had been involved in the audit process throughout, testified as to the conduct and contents of the audit and report. The Commission met again on August 23, 2021, to finalize its report and findings.

The report and testimony concerned the careful manner in which the audit was conducted, with the helpful participation of volunteer election officials from across the state, and the fact that it involved evaluation of the functioning of the ballot counting machines in Windham, which, like all such machines in New Hampshire, are the AccuVote machines certified for use by this Commission. The audit process and report also involved a full recount of the race for state representative, and certain other races, according to the report. Most significantly, the audit hand recount of ballots confirmed the hand recount originally conducted by the Secretary of State and upheld by the Commission, with a confirmation that the total number of votes reported on election night was the same as those recounted, and that the hand count results were virtually identical in both hand recounts, being exactly the same in five of the eight candidate totals and varying by only one or two votes in the remaining three candidate totals, indicating that the final results of the election are indisputable. (Audit Report (AR) at pages 7, 47, 71 and 76-77)

The Executive Summary of the audit report stated:

“[t]his audit found the primary root cause of the discrepancy to be folds through vote targets on some absentee ballots, largely resulting from using a machine to fold absentee ballots. That folding machine, leased by the town for other purposes, did not fold ballots along the score lines between vote targets, where the ballots were designed to be folded. Instead, it often folded ballots through vote targets in the State Representative contest, which the scanners interpreted as vote attempts a substantial fraction of the time. . . . The problem may have been exacerbated by inadequate maintenance that allowed a build-up

of white powder inside the scanners, obstructing the lenses... We also found, as is generally the case in recounts, that the hand count was able to ascertain voter intent in some instances where voters marked ballots incorrectly, leading the scanners to misread valid votes as undervotes or overvotes. No malware was found on any of the tabulators. Forensic examination of a random sample of paper ballots revealed nothing anomalous about the paper, printing, or marking.”

(AR, 4.)

In short, the audit team concluded that the folding of absentee ballots so that the fold line went through the circle next to the name of a State Representative candidate, often was read as a vote for that candidate, and when four other candidates had been selected, resulted in a “overvote” which invalidated the vote for all state representatives on the ballot. When the ballots were hand counted, the “overvotes” were eliminated and the four candidates who had received votes on the previously invalidated ballots received additional votes that were not counted on election night. The total vote for candidate St. Laurent went down by about one hundred votes in the hand recounts because folds over the oval next to her name were counted as votes for her by the machines when, in fact, the ovals had not been marked by voters. (AR 47,57) This accounted for the unusual discrepancy between the machine total and the recount total. Secretary of State William Gardner testified that in his experience supervising over five hundred recounts, this situation was unique.

The testimony at the July 28th meeting and the contents of the report established that the AccuVote machines were functioning properly, and a random check of machines in other municipalities indicated no similar issue with voting. Further, neither the AccuVote machines in Windham, nor the machines used throughout the state, showed any indication of malfunctioning during the election. The audit revealed that the variation in the results of the Windham election was caused by the use of a folding machine which folded ballots on lines other than those marked on the ballot for folding. Had the ballots been folded on the proper lines, the AccuVote machines would not have misread of the ballots. To verify this conclusion, the auditors conducted a controlled experiment, described in the report at pages 59 and 61, in which they used folded and unfolded new ballots to replicate what they believed happened on election night, and fed those ballots through two voting machines actually used on election night, and verified that is what in fact had occurred.. The following portion of the report, found on page 61, appears to confirm categorically the conclusion reached by the audit:

“All ballots that had never been folded were tabulated accurately on both machines and in all orientations. All contests on folded ballots except those with folds through vote targets were tabulated accurately in all orientations. The State Representative contest was not tabulated accurately when there were folds through St. Laurent’s vote target. Accuracy depended on the orientation and on the machine. The school machine was less accurate than machine 2 in every case.” (AR 61)

The testimony and the audit report provided multiple recommendations made by the audit team for possible actions which could be taken to avoid the reoccurrence of the problem encountered in Windham. The recommendations include:

“Consider not folding ballots at all.”

“Clearly instruct election officials to fold absentee ballots along the score lines and to double-check the location of the folds.”

“Check the fold location when opening absentee ballots.”

“Add process controls to ensure that all accepted absentee ballots are counted.”

“Enable overvote notification of the AccuVotes.”

“Improve machine maintenance.”

“Conduct routine risk-limiting audits of all election results.” (AR, 107)

The Commission believes that the recommendations on improving machine maintenance, especially cleaning the machines prior to elections, in order to reduce the chance of machine misreading of ballots, should become part of normal procedure by election officials. (AR 62, 96-98, 107)

The Commission heard evidence that legislative changes would be required to enable overvote notification when overvotes are encountered by the machines, and that there is the capacity for overvotes to be identified by the machines if they are set to do so. It is not clear that the machines can segregate such ballots as it does those with write-in votes. Further clarification needs to be made as to the capacity of the machines to do so, as such ballots could then be hand counted, or at least the presence of an abnormal number of overvotes could be detected immediately, if they could be segregated by the machines. The Commission believes that this would be helpful, if it could be done. However, implementing such a procedure (assuming it is possible) should be weighed against the possible interference with voter secrecy if it resulted in returning ballots to voters for correction, and the efficient conducting of elections if this group of ballots had to be hand counted in addition to ballots with write-in votes.

The Commission is aware that New Hampshire is one of a minority of states which does not routinely conduct audits of elections, and is not prepared to make a recommendation as to whether this should continue or be changed. In any event, the legislature would have to make such a change.

On the other recommendations of the report, while it is not the specific charge of the Commission under the provisions of SB 43, the Commission believes that education of election officials by the Secretary of State on each of the recommendations would be appropriate, to avoid the issues which occurred in the Windham election. The recommendation to not fold absentee ballots would involve increased time for processing by the Post Office, and would involve extra cost, and does not seem warranted.

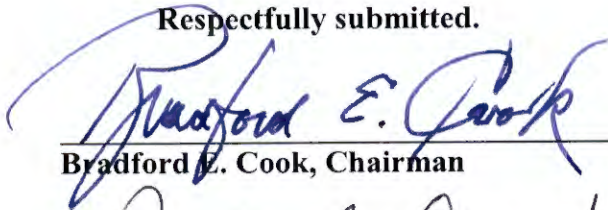
Specifically, on the issue with which the Commission is charged, it is apparent from testimony and the audit report, that the AccuVote machines in the town and statewide appear to operate properly, are capable of performing the task for which they have been certified, and there is no specific or widespread malfunctioning of the machines. The machines appear to be capable of continuing to perform properly. Indeed, the Audit Report found no machine failures or inherent defects, and made no recommendations regarding the improvement, replacement and/or reengineering of the machines despite a “forensic electronic investigation of...(the) machines” and their age.” (AR 7, 26)

The Commission noted at the hearing, that its responsibility under statute is to review the functioning of the presently-authorized machines every five years, and will be scheduling a hearing to ascertain information on that subject, independent from the audit report, within the required time period. Further, both the Secretary of State and the Commission are involved in a

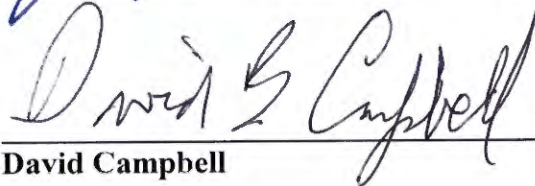
process of identifying potential replacement machines which could be approved for use in New Hampshire.

In summary, the Commission finds that the discrepancies in Windham in November, 2020 were the result of a unique set of circumstances, not the result of malfunctioning of the ballot counting devices, and are not likely to reoccur. The Commission finds that the presently authorized AccuVote machines are capable of continuing to meet the requirements for elections held in New Hampshire.

Respectfully submitted.



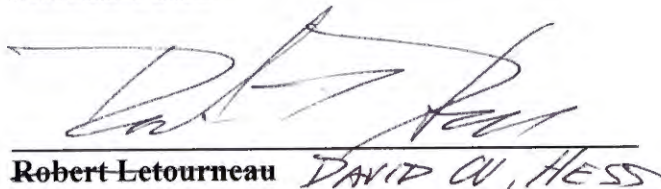
Bradford E. Cook, Chairman



David Campbell

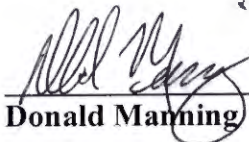


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August 23, 2021