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ADMITTED IN NH & DC

BLC 2000-4

September 22, 2000

William M. Gardner
Secretary of State
State House, Room 204
107 North Main Street
Concord, NH 03301-4989

Re: Republican Primary
NH House of Representatives
Grafton District 4

Dear Mr. Gardner:

Pursuant to RSA 665:4I, by means of this letter, which you note is being filed with you within three days of your RSA 659:89 certification of the results of the September 12, 2000 Republican primary, I am objecting in writing to that certification with respect to the Grafton District 4 House race.

The basis of my objection is your refusal to cause a recount to be made of the ballots cast in the Grafton District 4 Republican primary, for which recount I made application pursuant to RSA 660:7. Having not learned until late in the afternoon of Wednesday, September 13th that I had lost by three votes a contest that I had been thought to have won, I composed a short letter of appeal, a copy of which is attached, which I communicated to your office, along with a copy of a check payable to your order in the amount of \$10.00 for the fee prescribed by RSA 660:2I(e), a copy of which is also attached, by facsimile transmission early the next morning, Thursday, September 14th. Immediately thereafter, I deposited that letter and check in the U.S. mail at the post office in Littleton.

The reason you stated to me by telephone on Tuesday, September 19th for refusing to cause the recount I had applied for to be made was that the original letter and check failed to reach your office by the close of business on the RSA 660:7 statutory deadline of the Friday following the primary; that is, Friday, September 15th. You expressed to me the position that, notwithstanding your undoubted receipt of the facsimile transmission of my application, together with a copy of the check I was

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SEP 25 2000

NEW HAMPSHIRE
SECRETARY OF STATE

*Khl called 9/27/00
left message on machine*

sending, two full business days before the statutory deadline, the statute makes receipt by that date of the originals of both the letter and the check essential to the establishment of your jurisdiction to conduct the recount applied for.

I believe that I made proper application, that I complied with the relevant statutes, and that your refusal to cause a recount to be made in response to my application was illegal.

Submission of the Application

RSA 660:7 reads in full as follows:

"660:7 Application. Any person for whom a vote was cast for any nomination of any party at a state or presidential primary may apply for a recount. The application shall be made in writing to the secretary of state and shall be submitted not later than the Friday after the primary for a recount of all ballots cast for such nomination. Each candidate requesting a recount shall pay the secretary of state fees as provided in RSA 660:2."

The clear purpose of RSA 660:7 is to provide you with timely notice of desired ballot recounts so that you, in turn, can schedule and conduct such recounts in a timely manner in order to minimize the delay between the date of issuance of your RSA 659:86-89 certifications and the date of the general election. It is not the purpose of RSA 660:7 to lay obscure procedural traps for the ordinary citizens who largely comprise candidates for State office so that you can justify denying to them the opportunity of being assured that the reported results of primary balloting were accurate. Accordingly, the statute imposes no formality of application whatsoever other than that it be in writing and that it be brought before you in a timely manner.

You, however, have read into RSA 660:7 formalities of jurisdictional magnitude that the statute does not contain.

With respect to the application, you have done this by erroneously assuming the verb "submitted" used in the statute to be synonymous with the verbs "filed" or "delivered," as though a statute plainly designed to enable ordinary people to fulfill the substantive purpose of notification concerns itself with the precise manner by which the required written application gets into your office and comes to your attention. The verb "submitted" differs from the verbs "filed" or "delivered" in that it relates to the communication of information rather than the movement of physical objects, and this distinction is recognized in court proceedings, in which papers are "filed" but cases are "submitted." In the context of a statute whose purpose is notification within a very short time over possibly very great distances, it is all the more obvious that the verb "submitted" means "committed to another (as for a decision or judgment)," as found in Webster's New Collegiate Dictionary, a definition that addresses the ideas expressed

in the writing, and not the form the writing takes or the manner by which it is committed to that other.

In drafting RSA 660:7, the legislature could have used the verb "filed," just as it has in the statute (RSA 665:41) pursuant to which I am writing this letter, but it did not. It is a familiar principle of statutory construction that words are to be given their ordinary meanings and that the choice of different words in otherwise similar and related statutes has been made for a reason.

On the basis of its plain wording, I complied with RSA 660:7 the moment I caused my application for a recount to be communicated to you by facsimile transmission on the morning of Thursday, September 14th, facsimile being a well established, reasonable and efficacious method of communication that your office endorses by the fact of its having its facsimile telephone number prominently displayed on its letterhead and in various telephone and other directories.

Payment of the Fee

It is worthy of note that none of the three telephone messages from your office that I found on my answering machine when I arrived home on the evening of Friday, September 15th, made any mention of a problem with the form of, or method by which I "submitted" my application. Each of these calls, rather, was concerned with the supposed consequences should your office not have received my check for the RSA 660:2 fee by the close of business that day.

Once again I consult the statute, and once again I am left to wonder from where your office's assumptions originate. RSA 660:7 merely states that a candidate requesting a recount "shall pay the secretary of state fees as provided in RSA 660:2." Neither this nor any other relevant statute specifies when these fees must be paid. Nor do they specify either that they must be received by the deadline by which an application for a recount must be "submitted," or that they must accompany an application. RSA 660:4 gives no indication that receipt of payment is a prerequisite even to your beginning the process of recounting the ballots. As far as the relevant statutes are concerned, an applicant could fulfill Chapter 660's fee payment requirement merely by bringing his checkbook with him to the recount.

What you have done, apparently for the sake of convenience in the running of your office, is to read into the statute a linkage between the timing of making application for a recount and paying the RSA 660:2 fees, a linkage that the wording of the statutes do not support. In doing so, you have gone well beyond merely applying an administrative gloss to the statute. You have elevated your desire for convenience into a jurisdictional mandate: you have in effect imposed by decree a totally new law saying that unless the RSA 660:2 fee is in hand before the close of business on the Friday following the primary, you are without authority to hold a recount. This view of

the statute, so beyond any reasonable reading of Chapter 660 as to constitute an amendment to it.

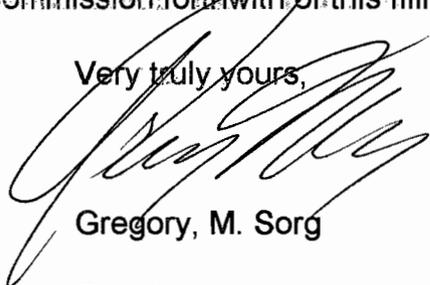
Conclusion

In our second and final telephone conversation on September 19th, you told me that you had never before experienced a problem with the ballot recount process such as you were having with me; that candidates wishing recounts have always called your office and followed the instructions given. This insight on your part neatly identifies the problem.

I did not call your office for instructions because, being a lawyer, I know there are volumes of Supreme Court decisions uniformly holding that citizens rely at their peril on what even seemingly expert government officials tell them about the laws they administer; that the only authoritative source of the requirements of a law is the law itself. My training and instincts caused me to go to the statute and not to your staff. I followed the statutes. The statutes take precedence over any assumptions or practices of your office no matter how long held or followed. I expect to be held to what the statutes actually say, and I reject the notion that I should be bound by what you would prefer them to say.

In accordance with RSA 665:4I, I expect that you will notify the Ballot Law Commission forthwith of this filing so that it can be set for hearing and decision.

Very truly yours,



Gregory, M. Sorg

Enc. (2)

Office of the Secretary of State
State House, Room 204
Concord, NH 03301

September 14, 2000

Dear Sir:

Pursuant to RSA 660:7, I am applying for a recount of the vote in the Republican primary for State House of Representatives in Hampton District 4 (Easton, Ellsworth, Lincoln, Livermore and Woodstock) in which I was a candidate.

The difference between the recorded vote cast for me (150) and for my opponent (153) was 0.99 percent. Accordingly, I am enclosing my check in the amount of \$10.00 for the fee prescribed by RSA 660:2I(e).

Very Truly Yours



Gregory M. Gary

BY FAX & US MAIL