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House Government Operations

Friday January 20, 2017

In re: Petition of Susan Hatch Davis – Orange -1 House District

Thank you Madame Chair and committee members.

Over the past 15 years I have participated in at least a half dozen recounts and have represented candidates in those recounts on several occasions.

Close elections test us in many ways. They can test the courage and resolve of candidates to be sure but I am here to talk about what I have learned about the test that they put to our election system.

I've represented Sarah Buxton in both of the recounts that she and David AIsworth have had. In the first of those the margin of Sarah's victory was 1 vote on election night and that margin was confirmed by recount. In their most recent showdown (there really is nothing else to call election results that are this close) Sarah had a margin of victory of 3 votes on election night. A first recount ended in a tie. After a day of hearing before Judge Gerety the parties agreed to a second recount and that resulted in a 2 vote margin of victory for David Ainsworth. Not only did the election result change, I think it is fair to say that everyone who was involved was surprised to learn that our procedures for recounting elections are rather weak.

Accuracy – What level of accuracy do we need in our vote counting procedures? I have come to understand that our election night results are reliable so long as there is a significant margin between the tally for the candidates in question. The issue that I want to focus the committee's attention on is the level of accuracy needed in a recount. Take the Buxton-Ainsworth election. There were 2066 ballots counted and the original margin of victory was 3 votes. In order to name a winner with confidence we need a system that has an error rate of less than 1 in 1,000; that is 99.9% accurate.

Tabulators – As you know, I was a member of this body, perhaps even of this committee, when we mandated the use of tabulators in recounts. My recall is that we all accepted that tabulators were more accurate than hand counting. This most recent Buxton-Ainsworth recount has demonstrated that tabulators are only as good as the information fed into them and that voters do not always mark their ballots in a manner that can be accurately read by the tabulator. After spending 3 days down in Woodstock; 2 recounting and one in court; and dozens of hours trying to understand why we were getting varying results, I have come to the conclusion that tabulators are accurate and dependable BUT only when they are supported by a robust process. Used with a weak process I don't think they can be said to be any more accurate than hand counting. While it is the topic of a future discussion that I hope to have with this committee I should say that our current statutory process for recounting votes is not adequately clear and precise.

A TALE of 2 towns and 3 vote counts:

Count 1 – election night

Tunbridge (hand count)	David Ainsworth	325		
	Sarah Buxton	378		
Royalton (Tabulator count)	David Ainsworth	675		
	Sarah Buxton	625		Margin Buxton +3

Recount #1

Tunbridge (Tabulator count)	David Ainsworth	324	-1 from election	
	Sarah Buxton	377	-1 from election	
Royalton (Tabulator count)	David Ainsworth	676	+1 from election	
	Sarah Buxton	623	-2 from election	Margin TIE

Recount #2

Tunbridge (tabulator count)	David Ainsworth	325	+1 from 1st recount	
	Sarah Buxton	378	+1 from 1st recount	
Royalton	David Ainsworth	679/80	+6 from 1st recount	
	Sarah Buxton	625	+2 from first recount	Margin DA + 2

Lessons learned:

1) Standard recount practice (which is at odds with statute) yields variable results. Notice the variability in the Royalton tally from election night to the first recount. The same tabulator was used with the same ballots in both cases. The only reasonable conclusion to come to is that the technology being used did not read the ballots we fed it consistently.

2) When transfer ballots are created a significant number of additional votes were counted for the two candidates combined. If you compare recount 1 to recount 2 you see that 10 more ballots were counted to the candidates in recount 2. The ONLY real difference between these two recounts was that a careful

process of making transfer ballots was used. I want to emphasize that point by saying that our standard recount procedure would have disenfranchised 10 voters. And, you can see that the proper recounting of ballots resulted in a change in the result.

A look at the statute:

17 VSA 2602f (a)(1)

§ 2602f. Recount by vote tabulator

(a)(1) Vote tabulator-readable ballots from each container shall be fed through a vote tabulator by one team until all vote tabulator-readable ballots from the container have been entered. For ballots unable to be read by a vote tabulator, such as damaged or plain paper ballots, a second team shall collect these ballots from the pile and transfer the voter's choices on those ballots to blank ballots provided by the Secretary of State. After all of the vote tabulator-readable ballots have been fed through the vote tabulator, the first team shall feed through the vote tabulator any transfer ballots created by the second team.

I understand that Tom Koch has argued that the statute does not require ballots to be reviewed before feeding them through the tabulator. In support of this he has directed you to section 2602f (b). I would agree with Tom that (b) required the ballots to be reviewed after feeding them through the tabulator but I think it is pretty clear that (a) requires a review before feeding them through as well. I am not here to tell you that it makes sense to do this twice. I am here to tell you that it is FAR more important to review the ballots BEFORE feeding them through the tabulator than after.

(a)(1) directs that "Vote tabulator -readable ballots" be fed through the tabulator. An obvious question comes to mind I hope – how will the recounters know what is tabulator readable and what is not? Please do not be fooled by the fact that the tabulator rejects ballots from time to time. While it is fair to say that those ballots are NOT readable, what of the ballot that that is lightly marked or smudged or has "stray markings"? Understand that there is no way to know whether the machine properly tallied "read" the ballot once it has gone through the machine.

(a)(1) goes on to require that transfer ballots be made for those "unable to be read by the vote tabulator". It goes on to say "such as damaged or plain paper ballots". Please understand that this is not an exhaustive list. There are a number of "flaws" in a ballot that can cause the tabulator to be unable to read it accurately. These include smudges, creases, stray marks, and erasures.

As we were completing the first recount (at a point when the ballots had all been through the tabulator) one team said "what about this ballot" followed by "and what about this one". They agreed on the intent of the voter intent but they were uncertain about whether the tabulator technology had properly understood that intent. Their task, under 2602f (b) was to review for voter intent. They had done that but didn't know what to do with their conclusion. If they assumed erroneously that they had been counted they would have disenfranchised those two

voters. Conversely, if they erroneously assumed that they had not been counted they would end up giving those voters 2 votes each. AND, there was no way to tell how the machine had responded to the ballots in question. These were, by the way, what we have come to understand to be "stray mark ballots".

At hearing, we had a rep from the tabulator company as a witness. Her testimony was clear. She could not say with certainty how the ballots had been treated. She also testified that a review of the ballots prior to use of the tabulator was the only way to ensure accuracy.

Unless a recount takes the time to review ballots prior to using the tabulator and unless transfer ballots are created for any ballots that are smudged, creased, erased, stray marked or in other ways less than clear to optical scan technology, you will be accepting less than fully accurate election results and you will have failed to count (sometimes referred to as disenfranchising) some number of voters).

One last statute:

17 VSA 2602j (c)

(c) Candidates and their attorneys shall be given the opportunity to present evidence to the court relating to the conduct of the recount. If the court determines that any violations of recount procedures have occurred and that they may have affected the outcome of the recount, a new recount shall be ordered. After such hearings or arguments as may be indicated under the circumstances, the Superior Court, within five working days, shall issue a judgment, which shall supersede any certificate of election previously issued and shall return to the county clerk questionable ballots which had been forwarded to the court.

To paraphrase, a further recount SHALL be ordered where there where the first recount failed to follow statutory procedure and the violations may have affected the outcome.

It is my understanding that the Orange – 1 recounters did not review the ballots before using the tabulator. This is a violation of 2602f(a)(1). Given that the use of careful procedures counted 10 more votes over a base of 2066 in the Buxton – Ainsworth election it is likely that a similar proportion of votes were NOT counted on the first recount in Orange -1. If I am not mistaken, that number would be greater than the current margin of victory.

I will leave you with a couple of thoughts.

1) Close elections are important.
2) They point out weaknesses in our current system.
3) We should not be afraid of properly counting the votes.

I thank you for your time and attention and wish you a productive session.