

Journal of the House

Friday, January 14, 2011

Rep. Leriche of Hardwick presiding.

At nine o'clock and thirty minutes in the forenoon the Speaker called the House to order.

Devotional Exercises

Devotional exercises were conducted by Rev. David Newlun of Morningstar Worship, Barre, VT.

Communication from Secretary of State

"Date: January 13, 2011

To: Speaker of the House Shap Smith
Clerk of the House Donald Milne

Gentlemen:

Enclosed please find the Attorney General's finding on the question of the seating of the member from the Windsor-Orange 1 District, in accordance with the requirements of 17VSA 2605.

Yours truly,
James C. Condos"

Communication from Michael McShane Assistant Attorney General

"December 28, 2010

Deborah Markowitz
Secretary of State
26 Terrace Street
Montpelier, VT 05609-1101
Re: Windsor- Orange 1 Election

Dear Secretary Markowitz:

Pursuant to 17 VSA Section 2605(b) you have requested that this Office look into the recent election in General Assembly District Windsor-Orange 1. The result of the General Election showed that Ms. Buxton received 882 votes and Mr. Ainsworth 881. A recount was conducted and the recount showed 881 votes for Ms. Buxton and 880 for Mr. Ainsworth.

By letter dated December 2, 2010 Mr. Ainsworth requested an investigation. The request alleges three grounds:

1. Voters living outside the Representative District voted in the General Election.
2. Provisional Ballots were not used by the towns as required by 17 VSA § 2555 and § 2556.
3. Ballots were lost or misplaced in the town of Tunbridge between the election night count and the recount.

By letter dated December 6, 2010, this Office requested details from Mr. Ainsworth concerning his complaint. By letter dated December 15, 2010, he provided a list of five individuals who voted but were believed to reside outside of the representative district. The letter offered no explanation or basis for the belief that the five voters listed resided outside of the representative district.. The letter also listed four voters, believed to have registered in the Town of Royalton after the deadline. (Three of the four voters who were identified as having registered late were among the five whose residence was also questioned.)

Under Section 2605(b) this Office is required to prepare for you an opinion on the law and the facts.

The first allegation is resolved by the statutory process for challenging the residence of voters.

In Vermont, eligible voters are identified by creation and maintenance of voter checklists; 17 VSA Chapter 43. There is a very specific statutory framework that is designed to regulate voter checklists. Included in that framework is a process for removal of voters from a checklist. A voter may be removed from a checklist if the voter is no longer a resident of the voting district. However, in all but the most obvious circumstances, removal may not occur without compliance with a number of provisions designed to prevent voters from being erroneously removed from checklists.'

Boards of civil authority are required to meet at regular intervals to review the most recent checklist and consider "for each person whose name appears on the checklist, whether that person is still qualified to vote"; 17 VSA Section 2150(c). If the board is unable to immediately

(Footnote 1. The town clerk may remove a voter from the checklist if that voter has been placed on the checklist in a different district or is deceased, as evidenced by a death certificate. 17 VSA Section 2150(a).)

determine that a person is still qualified to vote in the district, the board is directed to attempt to determine the voter's status; 17 VSA Section 2150(d) (1). In that effort, the statute suggests that the board consider official and unofficial public documents including "telephone directories, city directories, newspapers, death certificates, obituary (or other public notice of death), tax records, and any checklist or checklists showing persons who voted in any election within the last four years." if after making the inquiry described above, the board is unable to locate the voter or if the inquiry reveals facts indicating that the voter may no longer be eligible to vote in the district, the board shall then send written notice to the voter at the last known address, asking the voter to verify his or her current eligibility to vote in the district; 17 VSA Section 2150(d) (3). There are a number statutory of requirements concerning the written notice, including that the voter be informed that if the form is not returned, a written affirmation of the voter's address will be required before the voter is permitted to vote again.

If the voter responds to the notice by confirming that he or she no longer lives in the district, the board shall then remove the voter from the checklist; 17 VSA Section 2150(d) (4). If the voter fails to response to the notice, the board may remove the voter's name from the checklist. However, the board may not do so until the day after the second general election following the date the notice was sent.

The above described statutes provide an orderly process to assure that persons on the checklist are qualified to vote in a particular municipality or district. It is a process that is intended to occur before Election Day. Checklists are presumed to be conclusive, and only under limited circumstance may the eligibility of a person on a checklist be challenged on Election Day; 17 VSA Section 2149. Residence is not among the issues that may be used to challenge a voter on Election Day. That is further evidence that it is an issue that should be raised before the election.

The second allegation was expressed in Mr. Ainsworth's first letter as a failure to use provisional ballots. The second letter clarified that the concern is that four voters were added to the checklist after the deadline to register had passed.² The assumption apparently is that if a voter was not on the checklist by the registration deadline, the only means for that voter to participate in the election would be by provisional ballot. That assumption is not accurate.

In cases in which an applicant has failed to provide any of the information required by the application form, the town clerk shall notify

the applicant that the form was incomplete and the applicant may provide the information "on or before the date of the election"; 17 VSA § 2144b (a).

We have interviewed the Royalton Town Clerk concerning the four voters identified as having been added to the list after the registration deadline. We will refer to the voters by initials. The facts are as follows for each voter:

1) S.B. The voter filed an application dated October 20, 2010. The application was incomplete because it lacked a Social Security number and Vermont Driver's License number. Efforts to contact the voter by phone were unsuccessful. The voter did appear on Election Day; he filled out and signed a Voter Affirmation Form for Addition to the Voter Registration Checklist (Voter Affirmation Form). The completed form includes all of the required information, including a specific street address in Royalton. He was added to the checklist and allowed to vote.

2) J.J. The voter and his spouse had previously been on the Royalton checklist. They had left their former residence and been removed from the checklist. The spouse was added to the checklist again as a result of information provided by the Department of Motor Vehicles that showed she had again become a resident of Royalton. J.J. appeared with his spouse on Election Day and filled out a Voter Affirmation Form. He was added to the checklist and allowed to vote.

3) L.S. The voter claimed to have filled out and signed a voter registration form prior to the final registration date during a voter registration drive that was conducted at Vermont Law School. A number of registration forms which had been collected at the Vermont Law School drive were delivered to the Town Clerk's Office prior to the registration deadline. However, L.S.'s form could not be found. On November 1, 2010 L.S. appeared at the Clerk's Office, filled out another registration form as well as a Voter Affirmation Form, and voted early.

4) S.H. voted at the polls on Election Day. She stated that she had filed a voter registration form. Her voter registration form (application to be placed on check list) could not be found, She filled out a Voter Affirmation Form and was allowed to vote.

(Footnote 2. The deadline for acceptance of applications to add names to the checklist is 5:00 PM on the Wednesday preceding the day of the election. 17 VSA§ 2144(a).)

None of the four voters mentioned above requested a provisional ballot. All filled out Voter Affirmation Forms. All took the voters oath. All listed a specific address within the Town of Royalton as their principal dwelling place and affirmed under penalty of perjury that the information provided was accurate. In each case the procedure outlined in 17 VSA §2144b was followed.

The Third allegation is that ballots were lost or misplaced in the Town of Tunbridge between election night and the recount. The basis of this allegation is the fact that on election night, a total of 651 votes were counted in Tunbridge in the Windsor/Orange District 1 race and the recount totaled 649.

We have interviewed the Tunbridge Town Clerk who presided at the vote count on election night. The ballots in Tunbridge are hand counted. On election night both the number of voters on the checklist checked as having voted and the tally showed 651. After the count was concluded the counted ballots were placed in the ballot bag and were sealed by the clerk. The clerk then transported the bag from the Town Hall at which the voting and count had taken place to the Town Office. At the Town Office the bag was placed in the vault. The following morning the ballot bag was tagged and the Official Return of Votes was sent to the Office of Secretary of State. The ballot bag was returned to the vault in the Town Office and remained there until it was transported to the Windsor County Building for the recount.

The ballot bag was transported from the Tunbridge Town office to the Windsor County building in Woodstock by two town officials, one a Democrat and one a Republican. When the ballot bag arrived to the Windsor County Building it was locked in the Probate Court vault. On the day of the recount the ballot bag was removed from the vault and was unsealed by the Deputy County Clerk in the presence of four observers. The bag and seals were intact. A hand count was done by twenty counters, in the presence of the Deputy Clerk and four observers. The total number of votes counted from Tunbridge in the Windsor/Orange District 1 race was 649. The break down was Buxton 345, Ainsworth 295, write-in candidate 1, and 8 spoiled ballots. When added to the recount total from the Town of Royalton, the complete recount total was Buxton 881 and Ainsworth 880. Consequently, the recount did not change the result of the general election.

17 VSA § 2605 and Vermont Constitution Ch. II § 14 provide little guidance concerning the criteria to be used by the House of

Representatives in judging the qualifications of its members. However, in this election the evidence shows that proper statutory procedure was followed.

Four persons were added to the checklist in Royalton on Election Day or in the week immediately preceding the election. As outlined above, proper statutory procedure was used in all four cases. The recount of the Tunbridge ballots totaled two less than the count in the General Election. There is no explanation for the difference. However, the ballots were property sealed and stored after the count on Election Day. The ballots were stored in a secure place and were transported from the Town Office to the County Office by a Democratic municipal office holder and a Republican municipal officer holder. It has been verified that the seals and bags were intact when they were open for the recount. Although the totals differed by one vote per candidate, the recount and the general election produced the same result.

Very truly yours,

/s/Michael McShane
Assistant Attorney General”

Rules Suspended; House Bills Introduced

House bills of the following titles were severally introduced. Pending first reading of the bills, on motion of **Rep. Komline of Dorset**, the rules were suspended and the bills were read the first time by number and referred or placed on the Calendar as follows:

H. 39

By Reps. Grad of Moretown, Bouchard of Colchester, Fisher of Lincoln, French of Shrewsbury, Howrigan of Fairfield, Jerman of Essex, Koch of Barre Town, Moran of Wardsboro, Partridge of Windham, Pugh of South Burlington, Ram of Burlington, Savage of Swanton, Shand of Weathersfield, Stevens of Waterbury, Sweaney of Windsor and Wizowaty of Burlington,

House bill, entitled

An act relating to advance directives for service members;

To the committee on General, Housing and Military Affairs.

H. 40

By Rep. Shand of Weathersfield,

House bill, entitled