

STATE OF VERMONT
HOUSE OF REPRESENTATIVES

In Re: Petition Of Susan Hatch Davis,
Candidate For Orange-1 House District

RECEIVED

DEC 22 2016

Secretary of State
Elections Office

Petition Of Candidate Susan Hatch Davis Challenging The Election In Orange-1 House District And Requesting The House Of Representatives To Judge The Election And Qualification Of Its Own Members

NOW COMES Petitioner Susan Hatch Davis, by and through counsel, and hereby challenges the election in Orange-1 House District and moves that the House of Representatives of the General Assembly exercise its constitutional authority to judge the election and qualifications of its own members.

The request is filed pursuant to Chapter II, Section 14 of the Vermont Constitution and 17 V. S. A. Section 2605 and seeks to challenge the election and recount in which Petitioner, Robert Frenier, Rodney Graham and Adam Deslauriers sought two seats in the Orange-1 House District during the November 8, 2016 election.

In addition to the stipulation by the parties that the recount procedures were violated, it is Petitioner's position that the Orange Superior Court misinterpreted or misapplied the applicable statute, 17 V. S. A. 2602j(c), regarding violations of recount procedures and the consequences thereof in two respects:

- (a) when it denied Petitioner the statutory right to present evidence relating to the conduct of the recount; and
- (b) when it required Petitioner to prove that the procedural recount violations did affect the outcome of the recount, when the statute only requires Petitioner to demonstrate

that the “violation” of recount procedures “may have affected the outcome of the recount.”

For the reasons set forth below, Petitioner is:

1. contesting the election because identical absentee ballots, and perhaps other ballots, in different towns in the Orange-1 House District were counted in some towns and not others;
2. requesting a recount by the House of Representatives because:
 - a. it was acknowledged that several “recount procedures” were violated during the recount concluded on November 28;
 - b. inconsistent decisions on similar ballots were made during the recount;
 - c. candidates were consulted on how to treat ballots, in violation of the ground rules set by the county clerk;
 - d. one candidate convinced a counter to reverse her position and request that a ballot be sent to the Court to determine voter intent after she already had agreed with the other counters to spoil the ballot;
 - e. the Court denied Petitioner the right to present evidence regarding recount procedure violations; and
 - f. the Court misapplied the standard of proof set by statute, substituting “shall for “may” as to the level of proof required to obtain a second recount.

Background

In support of this motion, Petitioner makes the following factual allegations:

1. Petitioner is a duly qualified candidate for one of the two seats in the Vermont House of Representatives for the Orange-1 District.

2. An election was held on November 8, in which Candidates Rodney Graham, Robert Frenier, Adam DesLauriers and Petitioner competed. The two candidates with the highest vote total will represent the Orange-1 District in the House of Representatives during the 2017 session of the General Assembly. Rodney Graham received the greatest number of votes, so the contest for the second seat is between Mr. Frenier and Ms. Davis.
3. Petitioner filed a timely petition and request for recount of the ballots cast. Petitioner was entitled to a recount because the vote difference between Mr. Frenier and Petitioner was only eight votes out of 8,818 cast, less 2,081 which were blank.
4. A recount was completed on November 28, and the vote difference was reduced to six votes.
5. Petitioner objected to some of the procedures followed during the recount because they were done in violation of applicable statutes and in one instance, resulted in one of the counters during the recount process being influenced by a candidate to reverse her position on how a particular ballot should be treated, i. e., count it, spoil it, or send it to the Court, even though candidates were directed to not to speak with the counters.
6. After the recount was complete, Petitioner, pro se, pursuant to 17 V. S. A. Section 2602j(c), timely requested via letter dated November 29, a second recount, and in that letter she set forth the reasons why a second recount should be ordered.
7. Petitioner also contested the election regarding the inconsistent treatment of certain absentee ballots by different towns in the district. Absentee ballots with unsealed

inside envelopes but otherwise valid were counted in some towns but not others in the Orange-1 House District.

8. On December 14, Petitioner supplemented her November 29 letter by filing a pleading captioned, "Petitioner's Supplemental Memorandum In Support Of Evidentiary Hearing And Request For Complete Recount Or New Election." In that pleading, Petitioner raised eight additional grounds in support of a second recount. The recount conducted under the auspicious of county clerk failed to follow Vermont law or deviated from the interpretation of the law by the administrative agency that oversees Vermont elections, the Vermont secretary of state's office, in the following respects:

- a. failed to count, contrary to the direction of the administrative state agency that oversees elections, all valid voted ballots that were cast in the November 8, 2016, which includes but is not limited to at least four absentee ballots in the Town of Orange and others from the Town of Williamstown, which were received in a sealed outside envelope, but which had unsealed inside envelopes; and in the Town of Orange, the number of voters did not match the number of ballots cast;
- b. failed to comply with 17 VSA Section § 2602f (a)(1) when a representative of the vote tabulator machine business manually forced ballots in the tabulator used for the recount, which were folded and banded together with rubber bands, or had been stapled together, substantially increasing the likelihood that the vote count was inaccurate, in apparent violation of 17 VSA 2601f(a)(1); thus, a uniform standard was not used by the recount teams during their 17 VSA 2602f(b) review, if one at all occurred;
- c. failed to individually review each ballot before ballots were sent through the tabulator, to determine if they had any stray marks or if there were creases or other defects with the ballot that might cause the ballot to be unreadable or to cause the tabulator to record a vote for a candidate where a crease in the paper was located when one was not intended by the voter;
- d. failed to follow the applicable statute which requires that if a ballot is rejected by the tabulator, a new ballot must be created (transfer ballot) and then sent through the tabulator for tabulation;

- e. failed to ensure that all candidates and their representatives and supporters (“observers”) not speak with counters serving on counting teams about the recount during the recount process;
 - f. failed to use an appropriate “tabulator memory card” when counting the votes in the Town of Orange;
 - g. a tabulator used in the November 8 election in Williamstown was used to count ballots during the recount, in violation of 17 V. S. A. Section 2493(c), which prohibits use of a vote tabulator used in the election; and
 - h. 17 V. S. A. § 2602d (Examination of checklists) was not followed in that there was no agreement on the number of voters and the number of votes cast in the Town of Orange (apparently entrance recorded 546, exit recorded 554, tabulator counted 542, and eight ballots were hand counted bringing the total to 550 voted ballots, secretary of state notified that there were 549 voted ballots; one ballot unaccounted for), and in the final analysis, there was no agreement as required by the statute.
9. On December 15, Petitioner supplemented her pleadings by filing a third pleading captioned, “Petitioner’s Explicit Identification Of All Issues Raised By Petitioner,” to contest the election. That document was filed because the secretary of state’s office stated, incorrectly, that it must be filed to contest the election, i. e., that absentee ballots were treated differently by election officials in each of the six towns in the Orange-1 House District.
10. On December 19, the Court ruled that it was without jurisdiction to hear a contested election petition for the House of Representatives, which is left to the House of Representatives.
11. On December 19, the Court denied Petitioner her statutory right to present evidence, as set forth in 17 V. S. A. Section 2602j(c):
- “Candidates and their attorneys shall be given the opportunity to present evidence relating to the conduct of the recount.”

The basis of the Court' ruling was that although there were stipulated violations of recount procedures, there was no evidence that the violations "may have affected the outcome of the recount." 17 V. S. A. Section 2602j(c). Petitioner disagrees with that decision because the Court's ruling in effect interpreted the statute to require Petitioner to prove "shall" have affected the outcome.

12. On December 19, the final court judgment was issued.
13. 17 V. S. A. Section 2605(a)(2) requires that a challenge to the recount be filed within 10 days of the Court's final judgment.
14. Although 17 V. S. A. Section 2603 does not apply to contested elections for the general assembly, Section 2605(a)(3) requires that if there is a contest of an election, it shall be filed within 10 days of the Court's final judgment. Petitioner includes her challenge of the election within this petition in the interest of economy and efficiency and so that all issues are included in the same document.

Documents In Support Of Petitioner's Request To The General Assembly

Petitioner requests that the House of Representatives consider the following:

1. Petitioner's letter of November 29, 2016;
2. Petitioner's Supplemental Memorandum In Support Of Evidentiary Hearing And Request For Complete Recount Or New Election;
3. the Windsor Superior Court decision in Ainsworth v. Buxton, Windsor Civil, Dkt. No. 526-11-16 Wrcv;
4. the "Elections Bulletin" send by the Secretary of State's office to all election clerks regarding among other things "absentee ballot procedures," marked as Plaintiff's Exhibit 1;

5. the November 28, 2016 letter of Counter Stephen W. Webster of Randolph, marked as Plaintiff's Exhibit 2; and
6. the Vermont Supreme Court decision of Kennedy v. Chittenden, 142 Vt. 397 (1983).

**The Standard Set By The Orange Superior Court Does Not Comport
With The Law And Is Impossible For Petitioner To Meet
On The Record Available To Her**

The recount procedures are in place to ensure an accurate recount takes place. The Orange Superior Court (Teachout, J.) in Chelsea, by its ruling on December 19, effectively set an impossible standard that cannot be met by Petitioner or anyone else similarly situated.

The Court's standard would deny Petitioner – and would deny any candidate similarly situated in the future -- a new recount when recount procedures were admittedly violated.

Under the Court's ruling, for a petitioner to prevail, a petitioner will necessarily require an opportunity to conduct discovery -- examine every ballot to determine whether valid, spoiled or defective – and take depositions so evidence can be presented that the recount violations did change the outcome.

The parties stipulated that recount procedures set by law were violated. Petitioner could not, however, predict the outcome without conducting discovery. This would include looking at each ballot cast and questioning all pertinent witnesses to the recount.

Properly recounting the votes in this election “may affect the outcome of the recount,” 17 V. S. A. Section 2602j(c), as was demonstrated just one county away.

The Windsor Superior Court (Gerety, J.) in Woodstock, in an election recount there, held an evidentiary hearing, ordered a new recount, and the result changed. More importantly, the candidates had confidence in that recount process and thus were satisfied in the outcome. See David Ainsworth v. Sarah Buxton, Windsor Civil, Dkt. No. 526-11-16 Wrcv.

Ainsworth v. Buxton; Procedural Background

On election night, the reported vote was 1003-1000 in favor of Ms. Buxton. The first recount resulted in a vote count of 1000-1000 tie. Notably, a number of Royalton ballots were read differently by the tabulator the second time through. The second recount yielded an outcome of 1003 – 1005, and Mr. Ainsworth was declared the winner. The second recount resulted in eight additional votes counted for the candidates.

In that contest, the significant difference was the process of making sure all ballots were machine readable before sending them through the tabulator and the creation of transfer ballots for those where the counters questioned readability.

While the statute is not a paragon of clarity, the requirement of making transfer ballots is explicit. The careful review prior to using the tabulator is implicit. One has to arrive at that process by recognizing that the counters need to do SOMETHING in order to feed only readable ballots through the machine. The Windsor Superior Court recognized this requirement. In the second recount, in which recount procedures were strictly followed, eight additional votes were counted. What started as a tie vote between the two candidates after the first recount resulted in a two vote majority for Mr. Ainsworth, and confidence in the outcome by the parties.

The Number Of Spoiled/Defective Ballots May Change The Outcome Of This Election

The different manner in which the same types of ballots were treated by the six towns in the House district is significant and may impact the outcome of this election. For example, absentee ballots with unsealed inside envelopes were counted in Williamstown and Washington, but not in most of not all of the other towns in the district. No one will know until the sealed ballot bags are opened and inspected.

Argument

Petitioner has no confidence in the result of the recount. The Court effectively required her to prove that recount violations did affect the outcome. The Court required Petitioner to prove that “violations” of recount procedures “shall have affected the outcome of the recount.” That is not the law and it is an impossible standard to meet. That law does not impose such a high standard. This is not a civil case where there has been discovery, such as access to the evidence and depositions of potential witnesses. The ballots are sealed in bags. The ballots not counted election night were never shown to the counters and not counted during the recount. Petitioner has evidence that similar absentee ballots rejected by one town were counted in other towns.

Based on reported vote results, a majority of Williamstown voters favored Candidates Graham and Frenier. All absentee ballots in Williamstown, including ballots with unsealed inside envelopes, were deemed valid and counted. In towns that favored Candidate Davis, like Corinth and Vershire, similar absentee ballots were ruled as spoiled or defective and not counted election night, or during the recount.

The ballots counted during the recount were not available to Petitioner in advance of the hearing to allow each ballot to be checked to ensure it was a tabulator readable ballot. She has never seen the spoiled or defective ballots never counted.

Nonetheless, Petitioner was prepared to present evidence on December 19 from counters who participated in the recount that recount laws were violated, inconsistent decisions on the same question were made, and that there had been no determination that ballots fed into the tabulators were tabulator readable. Petitioner has evidence that the machine rejected ballots and that no “transfer ballots” were prepared.

Petitioner was prepared to present evidence through witnesses that one candidate improperly influenced a decision of one of the counters. Petitioner's witnesses included Counters Paul Poirier, Jean MacDonald, Josh Wronski, County Clerk Lisa Eastman, Will Senning from the Secretary of State's office, and Petitioner.

Those admitted violations of recount procedures, and the disparate treatment of absentee ballots with unsealed inside envelopes by different towns in the Orange-1 District, are all indications that the outcome of the election may be different if proper procedures were followed and all similar absentee ballots are counted.

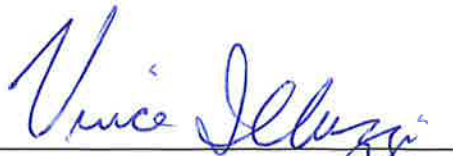
Conclusion

Petitioner's only recourse at this juncture is the House of Representatives. Petitioner requests that the House order a new recount and order that all ballots deemed spoiled or defective be examined to determine whether they should be counted.

With specific regard to absentee ballots received in unsealed inside envelopes, they all should be counted. In the towns in which they were counted, like Williamstown and Washington, they were subsequently comingled with other voted ballots. This is the only reasonable course of action without otherwise disenfranchising those voters who took the time to vote.

Petitioner cannot predict the future, but she can and does request that the House recount the ballots and that all votes cast be counted by the same standard across all six towns in the district.

DATED: December 23, 2016



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cc: Tom Koch, Esq., attorney for Robert Frenier

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Representative Susan Hatch Davis

75 Notchend Road, West Topsham, VT 05086

November 29, 2016

Honorable Timothy Tomasi
Orange County Superior Court, Civil Division
5 Court Street
Chelsea, VT 05038

cc: Lisa Eastman, Orange County Clerk

Honorable Judge Tomasi,

I am writing to ask for an evidentiary hearing and further recount in my race for State Representative from Orange-1. The recount currently underway has created a number of issues that do not provide confidence in the outcome. The voters of the district and the candidates deserve certainty which the process has not yet delivered.

For example:

- Absentee ballots were not treated the same depending on which town processed the ballot. In Orange town, four absentee ballots were deemed “defective” because the internal envelope was not sealed. However, in Williamstown at least two ballots returned in un-sealed envelopes were counted. At a minimum, the four ballots from Orange should be examined.
- External, undo influence was exerted on a recount team. After the Republican team made the determination to spoil a ballot due to identifying information on the ballot, observer Jeffrey Bartley, Executive Director of the Vermont Republican Party, loudly expressed his frustration. He was then escorted out of the room and the recount team reversed their decision about the spoiled ballot.
- The process for challenging ballots changed over the course of the recount. At some points the clerk asked the candidates if they would like to challenge a ballot. At others times the recount team decided if a ballot was to be challenged.
- There were significant concerns raised by using a tabulator:
 - It was not clear that the tabulator accurately counted all ballots. The recount teams were instructed that all ballots that went through the tabulator were accurately counted. After recount team members raised questions about marks that may not have been read by the tabular we were told that all ballots that went through the tabulator had been accurately counted. A recount member observed the tabulator count a fold in a ballot as a vote in the race for auditor but we had no way of double-checking the tabulator’s count.
 - This was especially problematic for the town of Vershire where all

ballots were folded prior to being dropped in the ballot box. The tabulator jammed several times and had to be restarted while tabulating votes from Vershire.

- The card used to program the tabulator was not set to read ballots from Orange Town, the only town in Orange-1 that votes in the Caledonian State Senate district. Voters in Orange Town are given two votes for state senate whereas voters in the remaining district towns only vote for one state senate candidate. As such, every voter in Orange Town who correctly voted for two state senate candidates had their ballot registered initially as an over-vote. These were overridden manually in a way that was difficult to verify.
- The tabulator also malfunctioned at one point causing write-in and non-write-in ballots to be mixed together.
- The court indicated that there were only three Challenge votes, but the recount challenge chart indicates that six ballots were to go before the judge.

Given these concerns I request an evidentiary hearing and hope you might ask for a complete recount done by hand.

Sincerely,

Susan Hatch Davis
State Representative
Orange-1

STATE OF VERMONT

SUPERIOR COURT
Orange Unit

CIVIL DIVISION
Docket No. 151-11-16 Oecv

IN RE: SUSAN HATCH DAVIS (Orange 1 House District)

**Petitioner's Supplemental Memorandum In Support Of Evidentiary Hearing
And Request For Complete Recount Or New Election**

NOW COMES Petitioner, by and through counsel, and hereby requests that the Court order a new recount of all voted ballots for the reasons set forth in Petitioner's letter to the Court of November 29, 2016 and as supplemented by and detailed in this memorandum.

There were deviations between the procedure for recount set forth in statute and the actual procedures and protocols used in the recount. The county clerk deferred to a representative of LHS, the manufacturer or seller of the tabulators, to make substantive decisions, which were contrary to Vermont law.

Given the closeness of this particular election, these deviations from applicable state law have the potential of impacting the final results of this election.

Although Petitioner disagrees with the findings of the first recount, here are the changes reported from the election night compared to the recount, suggesting that a change of four votes will change the outcome of the election:

	Chelsea	Corinth	Orange	Vershire	Washington	Williamstown
Susan Hatch Davis	272 / 271 -1	398 / 400 +2	199 / 198 -1	204 / 204 0	244 / 244 0	528 / 527 - 1 (1C)
Robert Frenier	378 / 375 -3	246 / 247 +1	302 / 302 0	127 / 127 0	232 / 232 0	568 / 567 -1 (1C)
Rodney Graham	273 / 272 0	165 / 163 -2	271 / 271 0	85 / 84 -1	207 / 206 -1	1017 / 1015 -2
Adam Deslauriers	162 / 158 -4	196 / 194 -2	108 / 108 0	135 / 134 -1	140 / 143 +3	266 / 269 +3
Spoiled	/2	/6	/8	/2	/0	/?
Challenge				1		2

Applicable Law

17 VSA § 2602j(c) provides that candidates may present evidence to the Court relating to the conduct of the recount. If the court finds that violations of the recount procedure occurred and that the violations in question may have affected the outcome of the recount, a new recount may be ordered.

17 VSA Section § 2602f (Recount by vote tabulator) provides in pertinent part:

(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.

(Emphasis supplied)

Argument

The recount conducted under the auspicious of county clerk failed to follow Vermont law or deviated from the interpretation of the law by the administrative agency that oversees Vermont elections, the Vermont secretary of state's office, in the following respects:

- 1) failed to count, contrary to the direction of the administrative state agency that oversees elections, all valid voted ballots that were cast in the November 8, 2016, which includes but is not limited to at least four absentee ballots in the Town of Orange and others from the Town of Williamstown, which were received in a sealed outside envelope, but which had unsealed inside envelopes; and in the Town of Orange, the number of voters did not match the number of ballots cast;
- 2) failed to comply with 17 VSA Section § 2602f (a)(1) when a representative of the vote tabulator machine business manually forced ballots in the tabulator used for the recount, which were folded and banded together with rubber bands, or had been stapled together, substantially increasing the likelihood that the vote count was inaccurate, in apparent violation of 17 VSA 2601f(a)(1); thus, a uniform standard was not used by the recount teams during their 17 VSA 2602f(b) review, if one at all occurred;

- 3) failed to individually review each ballot before ballots were sent through the tabulator, to determine if they had any stray marks or if there were creases or other defects with the ballot that might cause the ballot to be unreadable or to cause the tabulator to record a vote for a candidate where a crease in the paper was located when one was not intended by the voter;
- 4) failed to follow the applicable statute which requires that if a ballot is rejected by the tabulator, a new ballot must be created (transfer ballot) and then sent through the tabulator for tabulation;
- 5) failed to ensure that all candidates and their representatives and supporters (“observers”) not speak with counters serving on counting teams about the recount during the recount process;
- 6) failed to use an appropriate “tabulator memory card” when counting the votes in the Town of Orange;
- 7) a tabulator used in the November 8 election in Williamstown was used to count ballots during the recount, in violation of 17 V. S. A. Section 2493(c), which prohibits use of a vote tabulator used in the election; and
- 8) 17 V. S. A. § 2602d (Examination of checklists) was not followed in that there was no agreement on the number of voters and the number of votes cast in the Town of Orange (apparently entrance recorded 546, exit recorded 554, tabulator counted 542, and eight ballots were hand counted bringing the total to 550 voted ballots, secretary of state notified that there were 549 voted ballots; one ballot unaccounted for), and in the final analysis, there was no agreement as required by the statute.

1. Directive From The Secretary Of State’s Office. The secretary of state’s office is the administrative agency which oversees, provides ballots and advises town and county clerks regarding the conduct of elections for the General Assembly. On or about October 7, Director of Elections William Senning sent a memorandum to all town and county clerks around Vermont advising them to count all absentee ballots which were received in a sealed envelope, even though the inside envelope was unsealed, based on the secretary of state’s interpretation of Vermont election law. In this district, voted absentee ballots from different towns in the district were treated differently. In Williamstown, the hometown of Candidate Rodney Graham, it is unclear whether all such ballots were counted. In Orange, at least four such ballots were not at

all counted, and they were set aside and labeled as “defective.” It is unclear how other towns in the district counted such ballots, in light of the different instructions given to ballot counters by the respective town clerks, and the clearly erroneous instruction given by the county clerk to the counters during the Court overseen recount.

One of the counters, Sandy Haas, if called as a witness, is expected to testify that she observed other envelopes from other towns presumably containing voted ballots that were deemed “defective” or “spoiled,” and not counted at all, because the inside envelope was not sealed.

Of the towns that counted such ballots, they were included with all other voted ballots and there is no way at this time to isolate or segregate them. Since they were all lumped together with other ballots, absentee or otherwise, there is no way to determine at this time how those counted ballots impacted the outcome of the election. Thus, there was no uniformity in the recount process.

Also, in the Town of Orange, the number of voters as reflected on the entrance or exit checklist did not match the number of ballots cast.

2. Manually Forced The Tabulator Machine To Count Physically Damaged Ballots (Creased And Folded); No Transfer Ballots Were Prepared, As Required By 17 VSA Section § 2602f (a)(1). The county clerk appointed as part of her observer team a representative of LHS, the business that manufacturers or at least sells the tabulator used for the recount. There were no transfer ballots prepared. The county clerk deferred to the LHS technician, **not Vermont law**, regarding what action should have been taken when the tabulator was unable to read ballots.

Ballots were sent into the machine that were apparently damaged and the machine would reject them. The LHS business representative, who throughout the recount process defended the accuracy of the tabulators, physically forced damaged paper ballots through the tabulator for counting. He opened the tabulator, pounded on it, or forced ballots through the machine.

Regarding the Williamstown ballots, the tabulator itself had to be readjusted after about 500 ballots were run through it because at the back end of the tabulator, where the ballots exit the tabulator, the tabulator did not properly separate out ballots that contained write in votes or questioned voter intent. It happened a second time when 991 ballots had been processed. The LHS representative was required to slam the machine to get the ballot to drop into the pile of other counted ballots, but claimed that particular ballot had been counted. There was no way for recount officials to confirm that statement from LHS's representative. There were 23 ballots hand counted and no transfer ballots were prepared, in apparent violation of Vermont law.

In Chelsea, 18 ballots were counted by hand. No transfer ballots were prepared after those 18 ballots were rejected by the tabulator.

Although most of the physically damaged ballots were from the Town of Vershire, there were physically damaged ballots from all towns in the House district, including the Town of Corinth (machine failed; LHS representative pounded on the machine; no transfer ballot prepared), and the Town of Orange (machine was in override mode; ballots were rejected; hand counting occurred; no transfer ballot prepared).

Petitioner lost count of the number of times the tabulator representative was required to attempt to flatten or straighten the paper on which the ballots were printed, and sometimes force them through the tabulator. The tabulator on its own would not accept a number of paper ballots because they were damaged. They were folded and banded together.

The tabulator uses some sort of optical scan technology. The fold could create a vote for a candidate because the machine would read the crease in the paper as a mark for the candidate whose name was in the crease or fold.

The banding of the ballots with rubber bands caused the paper on which the ballots were printed to be curved. The LHS representative or the counters were required to try to straighten or flatten out the paper ballots. The tabulator business representative was required to manipulate some of the ballots before feeding them into the tabulator because there were a large number of failures.

The LHS business representative was required on numerous occasions to pull the tabulator out of the case, slam it back in, turn a key, and then hit the back of the tabulator, and say, "yup, it dropped down." This was the process he was required to follow to force the tabulator to count ballots which were folded or banded together with rubber bands, substantially increasing the likelihood that the vote count was inaccurate. That action appears to be in violation of Vermont law.

3. Failed To Follow The Applicable Statute Which Requires A Tabulator Rejected Ballot To Be Copied And Resubmitted Through the Tabulator (Transfer Ballots). Vermont law requires that if a ballot is rejected by the tabulator, a new ballot must be created by the voting official and then sent through the tabulator for tabulation. It is identified as a transfer ballot. The county clerk refused to follow that statutory directive, which impacted ballots from each town in the district. There are a number of reasons why a tabulator may reject a ballot. For example, a crease or fold in the paper ballot may cause the machine to read an over vote, meaning that the machine reads the crease or fold as a vote, causing two votes to be cast in a race where there is only one office up for election, when the voter only intended one vote to be cast.

4. Failed To Ensure That All Candidates And Their Representatives And

Supporters (“Observers”) Not Speak With Counters During The Recount About The

Recount. The county clerk directed candidates and their representatives to not speak with the counters during the counting process. The county clerk designated areas where the candidates and other observers were supposed to remain, and directed the candidates and their observers to not speak with the counters about the recount during the recount process.

During the recount that took place over two days, one of the candidates and his representative routinely spoke with counters about the recount during the decision making period. Rep. Paul Poirier, a counter, was present and heard one or more conversations. As a result of one interaction, a ballot that was initially “spoiled” (it was signed by the voter) by agreement of the four counters, was ultimately forwarded to the Court after the candidate spoke with a counter who was selected by him and that counter changed her mind. The signed ballot was a vote in favor of that candidate who spoke with the counter.

That action reduced confidence in the recount process, and thus in the outcome of the election.

5. Failed To Use An Appropriate “Tabulator Memory Card” When Counting The

Votes In The Town of Orange. Also impacting confidence in the recount process, and perhaps the outcome, was the use of a voter card from the Town of Williamstown, which is in the Orange Senate District and has one state senator. To count votes from the Town of Orange, the tabulator was placed in some override position because it is in the Caledonia Senate District, which has two state senator offices.

As a result, most of the ballots from the Town of Orange where a voter cast a vote for a state senator candidate had “over votes” in the state senator election, requiring the tabulator to be

placed in some type of “override” mode. As such, it is unclear if other ballots which contained “over votes” in the Orange 1 election should have been considered “spoiled” or “defective” and rejected.

If the machine was in the “override” mode, it may have ignored spoiled or defective ballots in this race. Thus, confidence in the outcome of the election is shaken.

6. The Tabulator Used In The November 8 Election Was Used To Count Ballots During The Recount, In Violation of Vermont Law. Vermont law does not authorize a tabulator used in the election to be used in a recount of that election. See 17 V. S. A. Section 2493(c).

A tabulator used in Williamstown in the November 8 election was used to count ballots during the recount, in violation of Vermont law, which prohibits use of the same vote tabulator in the same election. Williamstown is in the Orange 1 House district.

This action, in addition to being contrary to Vermont law, also reduces confidence in the outcome of the election.

Witnesses

Petitioner may call any or all of the following witnesses:

1. Will Senning, director of election, Secretary Of State’s Office;
2. Josh Wronski, elections director, Vermont Progressive Party, who was a counter;
3. Rep. Paul Poirier, who was a counter;
4. Rep. Sandy Haas, who was a counter;
5. Lisa Eastman, Orange County clerk; and
6. a LHS representative.

Requested Relief

Petitioner requests that the Court **order** the county clerk to take the following action:

1. conduct a recount with specific procedures designed to follow the statutes, and set a date and time for same;
2. all ballots received by any town clerk and otherwise valid be counted, even "if the ballot is in the certificate envelope but the envelope is not sealed";
3. every ballot first shall be inspected by the counting team, before sent through the tabulator, to ensure, as is required by 17 V. S. A. § 2602f(a)(1)(Recount by vote tabulator), that the ballots are "vote tabulator-readable ballots";
4. if any ballot is damaged or contains marks the counting team believes may be tabulator unreadable, or which may cause the tabulator to count a vote for a candidate when the voter had no such intent, such as the ones which are folded, stapled or banded together, or have stray marks, a transfer ballot must be prepared;
5. if any ballot is rejected by the tabulator, a transfer ballot shall be created and then sent through the tabulator for tabulation;
6. ensure that all candidates and their representatives and supporters ("observers") not speak with counters serving on counting teams about the recount during the recount process;
7. use a "tabulator memory card" when counting votes in the Town of Orange that will not require the tabulator to be placed in "override";
8. not defer decisions which should be made by the county clerk to the LHS representative; and
9. use a vote tabulator machine not used in the Orange 1 district during the November 8 election.

DATED: December 12, 2016



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STATE OF VERMONT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 526-11-16 Wrcv

DAVID AINSWORTH
Plaintiff,

v.

SARAH BUXTON,
Defendant

Order Granting Motion for New Recount

This matter is before the court for decision on the Defendant's Motion for Evidentiary Hearing and New Recount. An evidentiary hearing was conducted on December 7, 2016. Both candidates and their respective counsel attended the hearing. The court received evidence relating to alleged improper procedures followed during the first recount and regarding the Defendant's allegation that improper procedures may have impacted the outcome of the recount.

The court observes, based on the evidence presented and our review of the governing statute, that the work of the Windsor County Clerk and the Recount Committee was very significantly hampered by two things. First, the language of the governing statute regarding the process for determining if ballots are machine readable and for the creation of "transfer ballots" for ballots determined not machine readable during a recount is ambiguous as to whether the determination should be made before, or after, the ballots are counted by the vote tabulator machine. 17 V.S.A. §2602(f). Second, under the governing legislation the Vermont Secretary of State is directed to adopt procedural rules regarding the use of the required vote tabulator machines by election officials and by recount officials. 17 V.S.A. §2493(a)(5) and (6). So far as

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the court is presently aware, the required rules have not been adopted or published by the Vermont Secretary of State.

These two deficiencies, combined with other factors including the absence of training for recount officials, resulted in a variety of irregularities in the recount process. Also, as a direct consequence of the irregularities, it is not possible for the court to determine whether the vote count reported after the first recount is accurate.

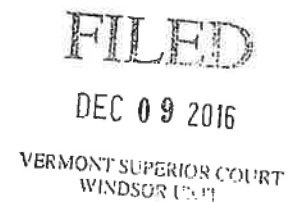
Finally, after the close of the evidence and before the announcement of the court's decision, the parties reported on the record that they stipulated and agreed that a new recount should be ordered. The terms of the agreement were stated on the record.

Accordingly, based on the court's determination that statutory procedures were not followed during the initial recount, that the failure to follow the statutory procedures may have affected the outcome of the recount, and the agreement of the parties that a new recount should be ordered, the court hereby orders that a new recount shall be conducted. The Defendant's Motion for New Recount, (MPR #3), is granted. The new recount shall be conducted in accordance with the provisions of 17 V.S.A. §2602. Also, the recount shall be conducted in accordance the following:

1. A recount of the votes cast for the Vermont House of Representatives District – Windsor-Orange I shall be conducted. The recount shall commence December 14th, 2016, at 9:00 a.m., and shall continue until the recount is complete.
2. The original summary sheets for Tunbridge and Royalton, and the two original ballots identified as “questionable” that were received in evidence during the court proceedings as Court Exhibit 1, 1A and 1B, shall be delivered by the

Windsor Court Operations Manager to the Windsor County Clerk forthwith. The court operations manager shall make a photocopy of the original documents, mark the photocopies as Substitute Court Exhibit 2,3,4 and 5 and file the substitute exhibits in the court file with the other exhibits admitted into evidence during the hearing on the Defendant's motion for recount.

3. The County Clerk shall forthwith unseal the ballot container for the Royalton ballots, insert the two original ballots from Royalton that are referenced in the preceding paragraph of this order in the container, and then reseal the container.
4. The County Clerk shall maintain the security of the ballots and election materials and shall store the same in their sealed containers in the vaults of the County Clerk until the date of the recount or until further order of this Court.
5. The Windsor County Clerk, shall request the county chairpersons of the two relevant political parties, that being, Republican and Democrat to submit a list of names of impartial voters who did not serve on the initial recount committee as nominees to serve on the New Recount Committee. The Windsor County Clerk shall then submit to this Court the list of nominees for appointment to serve on the New Recount Committee. If a list of nominees is not received by the County Clerk within two business days of the request, the clerk shall notify the appropriate candidates that they each have 24 hours to submit a list of nominees to serve on the New Recount Committee. This Court shall appoint a New Recount Committee from the list pursuant to 17 V.S.A. § 2602a(b).
6. The appointed New Recount Committee shall recount all the votes cast for the



Vermont House of Representatives District – Windsor-Orange I in the election held November 3, 2016, in the manner required under 17 V.S.A. §2602 (as amended 2013), which includes, but is not limited to, the following requirements:

a. The new recount shall be conducted by vote tabulator. The vote tabulator used for the new recount shall not be the same tabulator as the tabulator used during the election night vote count or the initial recount, the tabulator used for the new recount shall be certified as having been maintained and calibrated in a manner consistent with statutory requirements and any rules duly adopted by the Vermont Secretary of State concerning maintenance and calibration of vote tabulators;

✓
works
machine

b. In the implementation of the provisions of 17 V.S.A. §2602f(a)(1)-(3) all ballots from a container shall be examined by the new recount committee for the purpose of identifying ballots deemed to be not vote tabulator readable BEFORE the ballots from that container are entered into the vote tabulator.

Free voter
ballots

All ballots determined to be not vote tabulator readable shall be set aside.

Where voter intent is not disputed, the committee shall create a transfer ballot for each non-machine readable ballot in the manner described in the statute.

Where transfer ballots are created, the original ballots shall be segregated from the other ballots and shall be placed together in marked envelope and shall not be entered into the vote tabulator. In the event there is a ballot as to which the committee does not agree as to voter intent, the ballot shall be handled in the manner described in 17 V.S.A. §2602f(c). Otherwise, all

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VERMONT SUPERIOR COURT
WINDSOR UNIT

transfer ballots and all other tabulator readable ballots shall be entered into the vote tabulator.

c. At the conclusion of the new recount process the committee shall count the total number of ballots cast and compare the total with the total number of votes cast as reported by the vote tabulator.

7. Committee members shall be paid according to law. The Windsor County Clerk shall forward an expense report for each committee member to the Court Administrator's office. 17 V.S.A. Section 2602i.
8. The new recount shall take place in the Windsor Superior Court, Civil Division or such other place as shall be selected by the Windsor County Clerk. The new recount shall commence as soon as possible after 9:00 a.m. on December 14, 2016 as logistics permit. If the process has not commenced by 9:00 a.m. on December 14, 2016, the Windsor County Clerk shall file a report in the Windsor Superior Court – Civil Division explaining the reason for the delay and seeking permission for any further delay.
9. The Windsor County Clerk, or her or his duly authorized deputy, shall supervise the new recount and the tabulation of the results. The candidates for the Vermont House of Representatives District – Windsor-Orange I or their representatives and the general public, subject to reasonable restriction as may be imposed by the Windsor County Clerk as needed to ensure an orderly process, may attend but may not participate in the new recount or impede the new recount in any manner, and shall not be permitted within the work area designated for the new recount by

the Windsor County Clerk.

10. Candidates and their attorneys seeking to present evidence relating to the conduct of the new recount pursuant to 17 V.S.A. §2602j (c) shall do so by written motion filed in this action. If the Court determines that any violations of statutory recount procedures have occurred and that they may have affected the outcome of the recount, a new recount shall be ordered.
11. Upon completion of the new recount, the Windsor County Clerk shall report the results of the new recount to the Windsor Superior Court – Civil Division in the manner set forth at 17 V.S.A. §2602h(d). Following the entry of Judgment by the Court, the Windsor Court Clerk shall comply with the provisions of 17 V.S.A. §2602k.
12. The court clerk shall send a certified copy of the Judgment to the Vermont Secretary of State.

Dated at Hartford, Vermont, this 8th day of December, 2016.



Robert P. Gerety, Jr.
Superior Court Judge

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VERMONT SUPERIOR COURT
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Fwd: ELECTIONS BULLETIN - absentee ballot procedures, etc.

Jim Condos

Mon 12/5/2016 3:27 PM

To: vincentilluzzi@hotmail.com <vincentilluzzi@hotmail.com>;



Vince

Below is a copy of an email sent to town clerks during the election cycle as a reminder

Jim

From: Senning, Will
Sent: Friday, October 7, 2016 11:44 AM
To: Senning, Will <will.senning@sec.state.vt.us>
Subject: ELECTIONS BULLETIN - absentee ballot procedures, etc.
Importance: High

Hello Clerks,

I hope you all are doing well. Below are a few reminders regarding the absentee ballot process and other items that I wanted to address with all of you at this time:

1. **Requests from Military or Overseas Voters:** Like any other local voter, military and overseas voters can continue to make absentee ballot requests, and the clerk is required to continue to send (or email) the ballots, up until the day before the election. The deadline in late September was simply a deadline to send the ballots to any military or overseas voter that has requested them **by that time**, but after that you need to continue to accept and fulfill all requests.
2. **Return of Absentee ballots:** when the General Election ballots are returned, the law contains four instances when the ballots should be considered defective:
 - a. The person is not qualified to vote or has already voted;
 - b. The affidavit on the envelope is insufficient;
 - c. The certificate is not signed; or
 - d. "the voted ballot is not in the voted ballot envelope".