

STATE OF NEW HAMPSHIRE  
SUPERIOR COURT

Rockingham, ss.

Dawn Merryman

v.

Town of Raymond, NH

218-2023-CV-00466

FINAL ORDER

This matter is a statutory appeal from a municipal election recount. See RSA 669:35.

The court held a hearing on the merits on May 2, 2023. The hearing was scheduled as a preliminary injunction hearing. However, pursuant to Superior Court Rule 48(b)(2) the court consolidated the preliminary hearing with the final hearing on the merits.

Given the question presented, the parties would have been ill-served by prolonging the proceeding. Had there been a need, the court would have allowed time for discovery, depositions and a more fulsome trial. However, for the reasons set forth below, the evidence at the hearing proved beyond cavil that the (a) the two candidates with the most votes were properly certified as the winners of the two open seats at issue, (b) plaintiff did not win either of the open seats, (c) there are no grounds for a

second recount and (d) there are no grounds for any other species of equitable relief.

Factual Findings

A. Background

Plaintiff Dawn Merryman was a candidate in the 2023 election for the Town of Raymond Select Board. There were a total of four candidates for two open positions on the Select Board. Voters were instructed to vote for no more than two candidates. The totals for each candidate were as follows:

<u>Candidate</u>	<u>Machine Count</u>	<u>Hand Recount</u>
Bridges	660	661
Plante	574	573
Merryman	549	550
Long	456	457

As the chart makes clear, there was very little variance between the machine count and the hand recount. Candidate Plante lost one vote as a result of the recount. The other three candidates each gained one vote in the recount. Thus, the recount corroborated the machine count and vice versa. (The slight difference between the two counts is to be expected because sometimes voters make stray or confusing marks on their ballots.)

The votes were first counted by machine immediately following the election. Merryman came in third place (meaning that she lost). She had twenty-five fewer votes than the second

place finisher, Plante, who was deemed to have won one of the two open seats.

Merryman timely requested a recount pursuant to RSA 669:30. Recounts in municipal elections are conducted by a municipal Board of Recount rather than the Secretary of State. RSA 669:32. The Board of Recount consists of the Town Clerk, the Town Moderator and the members of the Select Board (less any of those individuals who is a candidate for the office being recounted). Id. The Board of Recount may employ assistants. Id.

The recount in this case took place in a middle school gymnasium. The Board of Recount established a perimeter within the gym. Inside that perimeter were four counting tables, referred to as Tables 1, 2, 3 and 4. There was also a table for ballots that were yet to be recounted and a table for ballots that had been recounted. Thus every ballot was to be initially placed on the "yet to be recounted" table, then moved to one of the counting tables, then moved to the "already recounted" table.

The recount was open to the public. Members of the public observed from gymnasium bleachers. The recount was videotaped by at least one member of the public. A seven minute portion of his video was admitted as evidence (although the arrows and commentary he added to the video were not admitted as evidence).

Ballots were moved from the "yet to be recounted" table to one of the counting tables in stacks of 50 ballots. Each member of the counting team would then inspect each of the fifty ballots in the stack. One member of the team would then make hash marks (i.e. short straight lines) on graph paper, with each hash mark representing a vote for a particular candidate. When all 50 ballots were processed in this manner, the counting team would place a red mark on the graph paper next to the last hash mark. Then the recounted ballots would be taken by the Assistant Moderator to the "already recounted" table.

A ballot that contained votes for two Select Board candidates would result in two hash marks, one for each candidate. A ballot that contained a vote for only one Select Board candidate would result also result in two hash marks, one for the candidate and one described as an "undervote." A ballot with no discernable votes for a Select Board candidate would result in two "undervote" hashmarks. A ballot that contained votes for more than two Select Board members would result in two hash marks described as "overvotes."

Thus, the total number of (a) hash marks representing votes for candidates, (b) hash marks representing "undervotes," and (c) hash marks representing "overvotes" should have always equaled 100 for every stack of 50 ballots.

Following the recount, plaintiff Merryman remained in third place. However, she narrowed the difference between her and the second place finisher to 23 votes. The outcome of the Select Board election was not changed.

B. The Issue Of The "Already Recounted" Ballots That Were Moved Back To Table 1

A video taken by a member of the public showed the Assistant Moderator moving a stack of ballots from the "already recounted" table back to Table 1 where they were seemingly counted again. Merryman opines that this occurred due to the following **alleged** chain of events: (A) The officials at Table 1 allegedly counted a stack of 50 ballots--which will be referred to as "Stack A"-- from the "yet to be recounted" table and made hash marks on the recount worksheet, (B) Stack A was then brought to the "already recounted" table and placed at the top of a stack of ballots, (C) The Table 1 officials then realized they made some sort of counting error and asked to have the Stack A returned so they could check their work, (D) In the meantime another stack of ballots had been placed on the "already recounted" table on top of Stack A, but this escaped the notice of the Assistant Moderator, (E) The Assistant Moderator brought this other stack of already counted ballots to Table 1, (F) The officials at Table 1 then used the already counted ballots in place of Stack A. Thus, according to

Merryman, the ballots in Stack A were never accounted for in the recount and the ballots in the other stack were counted twice.

However, according to the testimony of one of the individuals who was sitting at Table 1, a different chain of events occurred. The court credits the testimony of this witness based on (a) the fact that the testimony is consistent with the video, (b) the inherent plausibility of the testimony, (c) the witness' demeanor on the stand, and (d) the fact that the testimony is corroborated by the Table 1 worksheet.

The witness explained--and the court finds--that the following occurred: (A) Stack A was counted at Table 1 and the officials made hash marks on the worksheet, (B) Stack A was then taken to the "already recounted" table, (C) Thereafter, the officials at Table 1 realized that they had made 102 hash marks rather than 100, (D) Thus, either they had 51 ballots or they made an extra two hash marks, (E) The officials asked to have Stack A returned so they could check their work, (F) By this time, another stack of "already recounted" ballots had been placed on top of Stack A, (G) The Assistant Moderator mistakenly brought this other Stack to Table 1; (H) Table 1 began counting the other stack, only this time instead of making hash marks, **the officials placed diagonal lines across the already existing hash marks, thereby creating "Xs."**, (I) This process left all of the hash marks from Stack A in place; (J) At some point,

after approximately 60-odd cross marks were made, the officials realized that the stack they were recounting was not Stack A, so they stopped, (K) Accordingly, the official at Table 1 ignored all of the cross marks, and (L) The hash marks--all of which were written during the Table's counting of the real Stack A were included in the Table's final count.

Thus, either the officials at Table 1 recorded two extra votes from Stack A (as undervotes as they suspected or otherwise) or Stack A held 51 ballots. No amount of litigation or discovery is likely to shed any additional light on what occurred.

However, the chain of events posited by Merryman did not occur. Stack A was not replaced by another stack. No stack was double counted.

The two vote discrepancy did not affect the outcome of the election.

### C. The Issue Of The Total Number Of Ballots

Following the machine count the Moderator certified that a total of 1359 ballots had been cast. Accordingly, the recount worksheets from all four counting tables should have contained a total of 2,718 hash marks (representing 2241 candidate votes plus undervotes and overvotes, as explained above).

The parties did not introduce all four recount worksheets. Instead, the parties introduced (a) the worksheet from Table 1 and (b) the Moderator's worksheet with the totals from all four tables. Thus, the court cannot simply count the hash marks.

The Moderator's worksheet lists 2241 candidate votes (which jibes with the number of votes for each candidate in the chart above), plus 458 undevotes, plus 123 overvotes. This works out to 2,822 hash marks or 1,411 ballots (which is 52 ballots more than the amount certified following the machine count).

However, the Moderator explained, and the court accepts, that one of the counting tables included undervotes in its count of overvotes as well (thereby overstating its hash marks by the number of undervotes). The Moderator believes there were only 8 overvotes. That would result in 2241 candidate votes, 458 undervotes and 8 overvotes, for a total of 2,707 hash marks. This would work out to 1,353.5 ballots. These numbers are obviously incorrect because there cannot be half a ballot. However, the Moderator's number is within easy striking distance of the number of ballots certified after the machine count.

The court believes that the error is almost certainly in the calculation of the number of overvotes. However, without all four worksheets this is impossible to verify. In any event, even if the recount was off by five or six ballots, this would not affect the outcome of the election.



C. Absentee Ballots

Plaintiff Merryman opines that the absentee ballots were never counted. Merryman proffered that she could produce witnesses from each of the four counting tables who would testify that they did not see ballots that had been folded or filled out with different inks or pencil. However, the Moderator stated that all of the absentee ballots were placed on one counting table.

The court accepts the Moderator's first-hand account. Further, if no absentee ballots were counted, there would have been 200 fewer hash marks and, presumably, significantly fewer candidate votes. Thus, the number of hash marks and the number of candidate votes corroborate the Moderator's in-court statement that the absentee ballots were counted.

LEGAL ANALYSIS

This action is governed by RSA 669:35. That statute provides, in pertinent part, as follows:

Any person aggrieved by a ruling of the board of recount with respect to any ballot may, within 5 days thereafter, appeal to the superior court for the county in which such town is located[.]

The statute does not provide a standard of review. However, the court proceeds upon the supposition that a plaintiff who seeks to vacate a decision of the municipal Board of Recount has the burden to prove that the Board committed

error(s) that could have affected the outcome of the election. It is not enough for a plaintiff to prove that the recount was imperfect; the plaintiff must also prove that if the recount were done according to law the result could be different.

The hand recount in this case was not perfect. Perfection is rare in human affairs. The recount was done according to law and the minor discrepancies discussed above could have not possibly altered the outcome of the election. The recount corroborated the machine vote and vice versa.

JUDGMENT FOR THE TOWN OF RAYMOND.

May 5, 2023



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Andrew R. Schulman,  
Presiding Justice

Clerk's Notice of Decision  
Document Sent to Parties  
on 05/05/2023