

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Maxine Mosley and Donna Soucy

v.

David Scanlan, New Hampshire Secretary of State

Docket No.: 217-2022-CV-01067

ORDER ON REQUEST FOR PRELIMINARY INJUNCTION

The plaintiffs, Maxine Mosley and Donna Soucy, filed suit against the defendant, New Hampshire Secretary of State, David Scanlan, requesting preliminary and permanent injunctive relief to enjoin the defendant from conducting a review of the race for State Representative Hillsborough District 16 noticed for November 21, 2022, at 4:00 pm. Larry Gagne filed a motion to intervene, which the Court granted. The Court held a hearing on the plaintiff's request for preliminary relief on November 21, 2022 at 1:00 pm. Prior to the hearing, the defendant delayed any further review until the morning of November 22, 2022 to allow this complaint to be considered. For the following reasons, the Court DENIES the plaintiffs' request for preliminary relief and ORDERS the defendant to conduct a review of all votes cast in the race for State Representative Hillsborough District 16 pursuant to the Rules of Procedure for Recounts (Court index #1, Ex. C.).

Factual Background

On November 8, 2022, the State of New Hampshire conducted a general election. (Court index #1 ¶ 25.) The ballot in Hillsborough District 16 listed four candidates for State Representative. (*Id.* ¶ 26.) Each voter could select two out of the four candidates. The two candidates receiving the most votes would be elected to the New Hampshire House of

Representatives. (Id.) Only voters in Manchester, New Hampshire, Ward 6 voted for the State Representative race in Hillsborough District 16. (Id.)

On Election Day, the Return of Votes Form completed by election officials in Manchester Ward 6 reflected 4,001 ballots taken and cast. (Id. ¶ 27-28.) The votes by candidate for State Representative were: (1) William Infantine (R): 1,895 votes; (2) Larry Gagne (R): 1,820 votes; (3) Maxine Mosley (D): 1,797 votes; and (4) Holly Hillhouse (D): 1,644 votes. (Id. ¶ 29.)

Plaintiff Mosley filed an application for a recount pursuant to RSA 660:1. (Id. ¶ 30.) On November 14, 2022, the defendant’s office conducted the recount. (Id. ¶ 31.) The defendant released Rules of Procedure for Recount which provided, in part, “[i]f there is a challenge of any ballot, it must be made immediately and the Secretary of State will rule on such challenge. If that decision is protested, the Secretary of State will attach on the protested ballot a statement of fact.” (Id. ¶ 33, Ex. C.) The Rules further provided that “at the completion of a recount [the Secretary of State] will announce the official winner based on the recount figures.” (Id.) Eight ballots were protested and preserved for appeal in the recount for Hillsborough District 16 State Representative.¹ (Id. ¶ 34.)

The votes by candidate after the recount were: (1) William Infantine (R): 1,877 votes (reduction of 18)²; (2) Maxine Mosley (D): 1,799 votes (increase of 2); (3) Larry Gagne (R): 1,798 votes (reduction of 22); and (4) Holly Hillhouse (D): 1,643 votes (reduction of 1). (Id. ¶ 35, Ex. D.) The defendant “declared the results and announced Plaintiff Mosley as the ‘official winner based on the recount figures.’” (Id. ¶ 36.) The declaration was made in the presence of

¹ At the hearing, the parties represented that seven, not eight, ballots were protested during the recount and preserved for appeal at the Ballot Law Commission.

² As compared to Election Night results.

Ms. Mosley, the recount observers, and counsel. (Id.) The defendant then published the recount vote tally. (Id. ¶ 37, Ex. D.)

The race for Hillsborough District 16 was selected for audit pursuant to RSA 660:17-a. (Id. ¶ 42.) The audit reflected that 3,996 ballots were cast in Manchester Ward 6, compared to the 4,001 originally calculated. (Id. ¶ 43-44.)

Immediately following the announcement of the recount vote tally, the defendant's recount officials continued working on the recount by conducting vote reconciliation. (Court index # 8 at 2.) The reconciliation process entails "comparing the total number of ballots cast, the sum of votes cast plus undervotes and overvotes, and the number of voters checked in as having voted on Election Day." (Id.) The total number of ballots cast should be equivalent to the other factors. (Id. at 3.) The reconciliation paperwork showed the number of ballots counted was 23.5 ballots lower than the number counted of the same ballots cast for the statutorily prescribed audit count of the Governor's race and 28.5 ballots lower than Election Day records. (Id.) The defendant determined that it was likely that one stack of uncounted ballots was inadvertently included in a stack of counted ballots, resulting in approximately 25 votes uncounted. (Id.)

On November 17, 2022, the defendant issued a Notice regarding the Hillsborough County State Representative District 16 election. (Court index #1 ¶ 50, Ex. A.) The Notice announced that "[b]allot counting will be continued in the Hillsborough County State Representative District 16 recount." (Id., Ex. A.) The Notice stated two reasons for the continuation of the recount: (1) "[t]he routine recount reconciliation process . . . indicated that, . . . reconciliation numbers and recount reconciliation numbers were not equivalent" and (2) the audit in the race for Governor "disclosed that the total number of ballots cast and counted for the office of Governor in this

district is greater than the total accounted for so far in for the Hillsborough County State Representative District 16 race.” (Id.) The Notice announced that the continuation of the recount would commence on Monday November 21, 2022, at 4:00 pm. (Id.)

On November 17, 2022, Mr. Gagne filed a written appeal to the Ballot Law Commission pursuant to RSA 665:8. (Court index #2 ¶ 1.)³

Legal Standard

“The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy.” New Hampshire Dep’t of Env’t Servs. v. Mottolo, 155 N.H. 57, 63 (2007). “A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits.” Id. The Court will not grant a preliminary injunction unless the party requesting the injunction shows: (1) that they “would likely succeed on the merits”; (2) that they have “no adequate remedy at law”; and (3) that “there is an immediate danger of irreparable harm to the party” if the injunctive relief is not granted. Id. “It is within the trial court’s sound discretion to grant an injunction after consideration of the facts and established principles of equity.” Id.

Analysis

The plaintiffs argue that the Secretary of State maintains no statutory authority to sua sponte order a second recount of election results, precluding the noticed continuation of ballot counting. The defendant contends that the count scheduled for November 21, 2022, at 4:00 pm is not a second recount but a continuation of the original recount spurred by inequivalent

³ Mr. Gagne’s appeal concerns only the eight (or seven) ballots protested during the recount. Mr. Gagne’s appeal does not impact the jurisdiction of this Court to determine whether further review of the recount is necessary or in violation of the defendant’s authority. Mr. Gagne’s appeal and this proceeding run parallel to each other.

reconciliation results. Therefore, the defendant argues that the bar on second recounts does not apply, and he is solely carrying out his responsibility to count every vote.

Generally, only one recount is permitted and only in certain circumstances. RSA 660:3 provides that “[i]f more than one candidate for the same office in the same district applies for a recount under this chapter, and a recount is completed, such applications shall not result in a second recount.” Further, RSA 660:5 provides that “[i]n no event shall a discrepancy result in a second recount for the same candidate[.]” The only permissible circumstance where a second recount is authorized is pursuant to RSA 660:17-b. RSA 660:17-b allows for a “full recount of any race where there is a discrepancy of greater than one percent from the election results reported to the secretary of state.” The parties dispute whether this provision applies only to top ballot races such as President, United States Senate, United States House of Representatives, and governor or to any race on the ballot. The Court need not make such a determination as the defendant does not seek authorization to conduct a second recount pursuant to RSA 660:17-b, IV.

During a recount of an election, the Secretary of State shall count each of the ballots cast. RSA 660:5. The defendant believes that not all ballots cast during the election were counted during the recount. The defendant presumes that when his office conducted the recount, a stack of 25 ballots was inadvertently placed on a stack of 100 ballots and the entire stack of ballots was calculated to only include 100 ballots. This assumption is based on the procedure of a recount. The ballots where a voter cast both of their permitted votes for State Representative for the same party were gathered in groups of 25 ballots in piles of 4, equaling 100 ballots per pile. The defendant presumes that a counter accidentally placed an uncounted group of 25 Republican ballots on a pile already consisting of 100 ballots, equaling 125, but only counting for 100. This

discrepancy aligns with the reduction of 18 and 22 votes for Mr. Infantine and Mr. Gagne, respectively, and the difference between the total amount of ballots counted during the recount compared to the audit of the Governor's election. Due to these discrepancies, the defendant cannot satisfactorily certify the results of the State Representative District 16 election.

The defendant's plan is to:

- Complete an inventory of all ballots cast in Manchester Ward 6 (to confirm a number equivalent to that counted in the governor's race audit count); and
- Then tally the ballots cast for the two candidates whose vote totals dropped significantly.

(Court index #8 at 4.) The two candidates whose vote totals dropped significantly are William Infantine and Larry Gagne. The defendant does not propose to only count the uncounted ballots, because there is no way to know which ballots may have been left uncounted. Because the defendant seeks to review votes already counted in the recount, his planned course of action would effectively be a second recount, and not solely a continuation of the initial recount. The defendant does not maintain statutory authority to reconcile the results of a recount nor authorize a continuation of a recount. RSA 660:5 and 660:6 prescribe the conduct of a recount and declaration of a winner. Neither statute authorizes a reconciliation process after a recount, continuation of a recount after a winner is declared, nor a second recount. Further, there is no history of conducting a reconciliation after a recount. A statutory analysis alone, requires the Court to find in favor of the plaintiffs. However, the Court does not agree with the plaintiffs that the defendant is barred from conducting further review of the ballots in this circumstance.

While the Court does not have adequate evidence to adopt the defendant's presumption that a stack of 25 ballots was mistakenly left out of the count, it accepts that the defendant's theory is a likely explanation. While there are numerous possible reasons the recount reflected different vote allocations than Election Night, a mistaken allocation of 25 ballots lines up closely

with the reduction in votes for Mr. Infantine and Mr. Gagne and the difference between the total amount of ballots counted during the recount compared to the total amount of ballots counted in the audit of the Governor's race. This alleged administrative error during the tallying of the recount supports the defendant's reasons for conducting another review of the ballots. Although courts generally do not become involved in political matters, see Stickney v. Town of Salem, 96 N.H. 500, 501 (1951), this matter concerns a full and fair review of election results, not the weighing of one political position over another. The Court does not presume the results of a full review, only that the defendant's determination that an administrative error occurred, potentially resulting in erroneous recount results, is credible.

Ordinarily the defendant does not maintain the authority to review a recount of an election. This matter stands apart from ordinary circumstances. When weighing the value of statutory election requirements against the accurate count of the people's will, the New Hampshire Supreme Court stated that, "[t]he question to be decided is not whether some election officer has followed the requirements of the statute. . . . The issue is: What was the legally expressed choice of the voters?" Nickerson v. Aimo, 110 N.H. 348, 351 (1970). "In resolving election difficulties of this nature, care must be taken that the matter is not decided on the basis of unwarranted technicalities. The goal must be the ascertainment of the legally expressed choice of the voters." Opinion of the Justices, 116 N.H. 756, 759 (1976); see also Opinion of the Justices, 114 N.H. 784, 786 (1974) (strict compliance with technical form of vote must yield to recognition of voter's indication of intent). "The object of election laws is to secure the rights of duly qualified voters, and not to defeat them." Opinions of the Justices, 116 N.H. at 759.

A review of the recount tabulation is required to ensure the expressed will of the Manchester Ward 6 voters is heard and the candidate with the most votes is seated as their State

Representative. While the defendant's announcement of Ms. Mosley as the winner presents complexity, the greatest weight must be attributed to the complete and lawful count of the votes cast to determine the will of the people. The defendant's alleged clerical error which may have altered the results of the recount tally compels this Court to allow additional review of the ballots to determine that the expressed choice of the voters is the final outcome. Further, there is minimal, if any, prejudice as no candidate has been sworn into office, engaged in legislative functions, and there is time to remedy any potential errors in the recount before the next legislative session. This extraordinary circumstance requires an atypical remedy. The Court permits the defendant to continue his review of the recount but such review must include all ballots cast, not just ballots cast for certain candidates. The process shall ensure full transparency and abide by the rules promulgated by the defendant in the Rules of Procedure for Recounts applied to the initial recount.

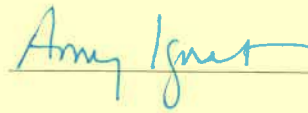
The plaintiffs fail on this first prong of the preliminary injunction test because they did not demonstrate a likelihood of success on the merits. The Court need not address whether there is an adequate remedy at law nor whether the plaintiffs face an immediate danger of irreparable harm. See Canty v. Hopkins, 146 N.H. 151, 156 (2001) (holding that the Court need not consider party's remaining arguments where one or more was dispositive of the case).

Conclusion

The Court DENIES the plaintiffs' request for preliminary relief. The defendant is ordered to conduct his noticed review of the State Representative Hillsborough District 16 election pursuant to the Rules of Procedure for Recounts utilized for the original recount in this matter. The defendant must review all ballots, not just those where voters selected Mr. Infantine and Mr. Gagne.

SO ORDERED.

November 22, 2022



Amy L. Ignatius
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 11/22/2022