

TO: The Voters of Windham
David Scanlan, New Hampshire Secretary of State
John Formella, New Hampshire Attorney General

FROM: Erin Hennessey, Deputy Secretary of State & Election Monitor
Jennifer Coté, Assistant Secretary of State & Assistant to the Election Monitor

DATE: February 22, 2024

RE: Report Prepared Pursuant to RSA 659:77 Regarding the January 23, 2024
Presidential Primary Election in Windham, New Hampshire.

In response to a complaint filed by voters from the Town of Windham regarding the State Primary Election held on September 13, 2022, the Attorney General's Office issued a letter to the Town of Windham and the complainants addressing alleged election official misconduct. In its letter, the Attorney General's office stated:

... [T]his Office's investigation identified numerous mistakes and issues with how Windham officials conducted the election, including: (1) having to be reminded by the Secretary of State's election monitor to use all test ballots when testing the [AccuVote Ballot Counting Machines]; (2) not using provided boxes for securing ballots; (3) using a spreadsheet to assist with reconciliation, despite the spreadsheet including errors that interfered with reconciliation; (4) stopping the reconciliation process at 3:30 a.m. despite not having completed reconciliation of the total number of ballots cast with the total number of voters who checked into vote; (5) conducting two unofficial recounts that were not conducted in public; (6) not fully complying with RSA 659:73, IV and V regarding timely completing and signing the moderator's certificate and worksheet, and the names on checklist form. These mistakes did not ultimately affect the outcome of any election.

As a result of its findings, the Attorney General's Office ordered Windham town election officials to attend one of the Secretary of State's Presidential Primary Training sessions, and additionally recommended that the Secretary of State appoint an election monitor to monitor the January 23, 2024 Windham Presidential Primary Election.

Secretary of State David Scanlan appointed the authors of this report – Erin Hennessey, Deputy Secretary of State, as Election Monitor, and Attorney Jennifer Coté, Assistant Secretary of State, as Assistant to the Election Monitor – to the Town of Windham for the Presidential Primary Election, scheduled to take place on Tuesday, January 23, 2024 at its polling place located at Windham High School (64 London Bridge Road, Windham, New Hampshire). This appointment was made pursuant to RSA 659:77, III, which provides that, “[u]pon a finding by the attorney general that the late submission, miscount, or other significant deficiency was due to lack of training, lack of established procedures, negligence, or misconduct, the secretary of state in consultation with the attorney general shall appoint an election monitor who shall be an individual trained in the conduct of elections and who shall attend portions of the ballot casting and all of the ballot counting to monitor the next election conducted in that town or ward.”

As the Election Monitor and Assistant to the Election Monitor, we were provided “full access to the polling place, including authority to directly observe the registration of voters on election day, the checking in of voters by inspectors of elections, assistance to voters with

disabilities, the use of the accessible voting system, the receipt of ballots, the processing of absentee ballots, and the counting of ballots, and may handle marked ballots for the purposes of instruction during the counting and tabulating process.” RSA 659:77, IV. This report is published pursuant to RSA 659:77, V, which requires the “issu[ance] of a public written report within 30 days following the election to the voters of the town or ward, the secretary of state, and the attorney general, which shall be posted on the secretary of state’s website, documenting the extent to which the town or ward complies with state law and utilizes the best practices set forth in the election procedures manual and the on-line training available on the secretary of state’s website in conducting the monitored election.”

AccuVote Test – January 12, 2024.

Windham town officials properly noticed the testing of the AccuVote electronic ballot counting devices, indicating that all four AccuVote electronic ballot counting devices which would be used for the Presidential Primary would be tested by the Moderator, Assistant Moderators, Town Clerk, and other election officials at the Town Hall on January 12, 2024, beginning at 9 A.M. Attorney Jennifer Coté, as Assistant to the Election Monitor, attended all portions of the AccuVote tests.

Testing was conducted pursuant to RSA § 656:42 and protocols dictated by the election procedure manual. Windham election officials used a test deck they prepared with 50 official ballots from each political party to test each primary and backup memory card – eight memory cards total – across four devices. The test deck followed the provisions of RSA § 656:42, VIII (e), which requires the town clerk to “mark the test ballots in such a way as to demonstrate a vote for each candidate on at least one test ballot, as well as votes for less than and more than the number of candidates that may be voted for an office, write-ins... and ballots on which there are no votes.” Each ballot was then run through the device in four different orientations.

After the test deck was run through the first AccuVote’s memory card, election officials noted that the count by the device did not match the predetermined hand-count done by election officials. Further examination of the ballots showed that one purposely blank ballot was folded in such a way that creasing caused by the fold encroached into the oval. The AccuVote device appeared to have read the creasing as a vote in two out of the four orientations tested.

In response, Windham election officials contacted AccuVote’s vendor – LHS Associates Inc. – who sent out a technician to ensure the device was functioning properly. Additionally, Attorney Coté suggested that the election officials take advantage of the Secretary of State’s “Guide to Making a Test Deck Presidential Primary 2024,” which provided that “[i]f you prefer, you may substitute 15 absentee ballots that do have the score mark guiding where to fold the ballot for 15 of the election-day ballots.” Election officials subsequently removed and replaced the 15 folded official ballots with 15 folded absentee ballots from each political party. The first memory card was retested using the replaced ballots. All AccuVote electronic ballot counting device tests were successful.

Election Day – January 23, 2024.

Moderators in New Hampshire elections are charged with overseeing polling locations. The New Hampshire Constitution specifically provides that elections “shall be... governed by a moderator, who shall, in the presence of the selectmen (whose duty it shall be to attend) in open meeting, receive the votes of all the inhabitants of such towns and wards present, and qualified to vote... and shall... in the presence of said selectmen, and of the town or city clerk,... sort and count the said votes, and make a public declaration thereof, with the name of every person voted for, and the number of votes for each person...” N.H. CONST. pt. 2, art. 32.

The moderator is the “chief election officer in charge of the polls.” Election Procedure Manual, pg. 146. It is the moderator’s responsibility to both ensure that each election officer understands their own election day duties and “secure the observance of the provisions of the [laws] relating to the conduct of voting.” N.H. RSA § 659:9. The moderator is ultimately the individual accountable for compliance with election laws and procedures, and for the delegation of other election day duties. It is the moderator’s leadership which either facilitates or frustrates the election from running smoothly and successfully.

Based on the observations we made throughout the election, it is clear that the vast majority of Windham’s election officials were eager to accept constructive criticism, make improvements to election day procedures, and carry out their duties effectively. Despite their enthusiasm, the Windham election officials lacked effective leadership from the moderator. The moderator’s lack of command throughout the day manifested in missing paperwork, poor procedure, unenforced guardrails, and delayed results.

Opening of the Polls.

Windham’s Presidential Primary Election took place on January 23, 2024 from 7 A.M. until 8 P.M. We arrived at the polling location at 6:15 A.M. and introduced ourselves to Moderator Peter Griffin, and his assistant moderators Galen Stearns and Betty Dunn. We additionally introduced and offered our assistance throughout the day to the deputy town clerk, Hannah Davis, who had assumed the duties of town clerk for election day.

We confirmed with Moderator Griffin that he, in the presence of at least one legal voter from the town of Windham, showed that the ballot compartment for each AccuVote device was empty prior to printing the zero tapes in accordance with N.H. RSA § 658:36.

Moderator Griffin announced that polls were opened to voting at 7:00 A.M. sharp. At that time, only one of four AccuVote devices were prepared to accept ballots. Voters were directed to feed their ballots into the prepared device until the remaining three devices were turned on and finished printing their zero tapes.

At the time the polls were opened to voting, there was no physical guardrail in place. Election procedure and statutes provide that “[t]he polling area must be set up to provide an orderly flow of voters.” Election Procedure Manual, pg. 80. Additionally, the “guardrail shall be so constructed and placed so that only such persons as are inside such rail can approach within 6 feet of the ballot box and of the voting booths. The arrangements shall be such that the voting

booths can be reached only by passing within the guardrail.” N.H. RSA § 648:9. Windham’s polling location had stanchions available, however, the stanchions were never retracted and were not utilized to prevent unauthorized admittance to the guardrail, as touched on in later sections of this report.

It also came to our attention that official ballots had been improperly counted and inventoried prior to election day. N.H. RSA § 658:31 provides that “[a]t or prior to the opening of the polls in each town or ward, the seal of the packages shall be publicly broken by the town or ward clerk; and the ballots shall be given to the ballot clerks and the ballots shall be examined and counted by the election officers in the presence of the clerk, the moderator, and at least one other legal voter. If the ballots are counted prior to the opening of the polls, the clerk shall post, in an appropriate place and prior to election day, notice of the time and place of the counting.” Additionally, N.H. RSA § 658:32 provides that “...[w]hen the ballots are counted, the moderator shall certify [on the moderator’s certificate] the total number of ballots received.”

We were informed by election officials that the official ballots had been counted and inventoried by one individual over several days. The ballot inventory time and place were not noticed to voters, nor was it witnessed by the clerk, the moderator, or at least one other legal voter. We were also informed that the moderator had failed to complete the Moderator’s Certificate certifying the total number of ballots received prior to election day. RSA §658:32 requires that “[w]hen the ballots are counted, the moderator shall certify [on the moderator’s certificate] the total number of ballots received.” Instead, at our suggestion, Moderator Griffin filled out the Moderator’s Certificate on the day of the election.

Maintaining Control of the Polling Location.

Throughout the day of the election, we observed a number of deviations from election law and procedures related to the operations of the polling place. In one instance, we were made aware that there were several high school students under the age of 17 permitted behind the guardrail to assist with the election. Although we applaud both the Windham election officials and the Windham students for volunteering at the polls, no election officials confirmed the age of the volunteers acting as assistant election officials. Several students under the age of 17 therefore helped voters cast their ballots. N.H. RSA § 658:7-A provides that “[a]n assistant election official appointed as provided in RSA 658:7 shall be at least 17 years of age as of the date on which such official initiates performance of the duties of office.” It is the Windham election officials’ responsibility, led by the Moderator, to ensure that all election day volunteers admitted to the guardrail are at least 17 years old. To the extent students under the age of 17 would like to volunteer, there are roles outside the guardrail they may fill.

The flow of traffic throughout the polling place was not properly maintained by election officials, and the lack of physical barriers or other guidance caused confusion amongst voters. The line for voters returning to undeclared status frequently intertwined with the line of voters waiting to check-in and receive their ballot. Additionally, on several occasions we witnessed and alerted Moderator Griffin to individuals accessing the voting area who did not enter for voting purposes. This included individuals approaching the AccuVote device to record the number of

ballots cast at that moment in time. Their unauthorized presence in the voting area was facilitated by the lack of a physical guardrail. Windham election officials are reminded that “[n]o person other than the election officers, the voters admitted or those admitted to aid a voter pursuant to RSA 659:20 shall be permitted within the guardrail except by the authority of the election officers and, then, only for the purpose of keeping order and enforcing the law.” N.H. RSA § 659:21.

Moderator Griffin was also frequently informed that individuals electioneering outside the polling location left unattended signs. Though this is a frequent challenge faced by election officials across New Hampshire, “[t]he moderator is responsible for acting to deter illegal electioneering at the polling place.” Election Procedure Manual, pg. 284. The moderator, or other election official by delegation, should check in on individuals electioneering outside the no-electioneering zone to ensure compliance with New Hampshire law.

We noted that on at least three occasions, a voter arrived to check-in and receive their ballot to find that their name had been marked as voted on the checklist earlier in the day. After observing a number of ballot clerks check-in voters, it was clear that at least some ballot clerk teams were not following mandated procedure. Ballot clerks are required to “1. Ask the Voter to announce his or her name, domicile address, AND the name of the party in which he or she is registered. Ask an undeclared Voter desired to vote in a party primary to announce the name of the party in whose primary he or she wishes to vote. 2. Search the checklist, find the Voter’s name and address, and read aloud the Voter’s name, domicile, mailing address (if any), and party affiliation as they appear on the checklist. Always read loud enough so challengers present can hear the information.” Election Procedure Manual, pg. 409. The purpose of repeating a voter’s information back to them is, at least in part, to ensure that the correct voter is marked off the checklist. Ballot clerks failing to repeat this information back to the voter may have allowed the improper voter to be marked off the checklist. We also noted that several ballot clerks did not properly utilize a ruler or straight edge to identify and mark off voters on the checklist. RSA § 659:13, I(b) provides that “...[t]he ballot clerk shall also mark the checklist using a ruler or other straight edge to ensure accuracy of the mark in order to show that the voter obtained his or her ballot.” Failure to properly use a ruler or straight edge to identify and mark off voters pursuant to RSA § 659:13 increases the chance that a ballot clerk makes a mistake.

Throughout election day, we had to remind Moderator Griffin and other election officials that whenever the AccuVote device is accessed, they must announce their actions to the public. The Election Procedure Manual provides in explicit detail:

Public confidence in the legitimacy of elections benefits when those present understand the voting process and all activities at the polling place. Publicly explain what you are doing when something unusual or which may be misunderstood occurs. A public explanation will preempt protests from observers or public misunderstandings that harm confidence in the fairness of the election... For example, a ballot counting device jams, voters deposit ballots into a ballot box, and now the moderator is inserting those marked ballots into the functioning ballot counting device. Tell all present why you are feeding ballots from a box into the device. Another common example is when the base under the ballot counting device reaches capacity. Monitor the bins under the device and empty the storage bins whenever they are nearly full. You must move counted ballots into the ballot storage boxes supplied by the Secretary of State. If someone seeing marked ballots being moved into a cardboard box suspects ballot box stuffing or other fraud, that

misinformation may be instantly spread far and wide. Make a proactive public announcement. Inform all present about what you are doing and why. The announcement will reduce the risk that someone will send out a false alarm. Election Procedure Manual, pg. 163.

Taking measures to make the election process transparent is vital to public confidence in election integrity. At all times, election officials, especially the moderator, should strive to keep this procedural provision in mind to guide all compliance with election laws and procedures.

Poll Closing Procedures.

The Windham polling location closed to voting at 8:00 P.M. sharp. At that time, any voters still in the act of voting or standing in line waiting for the ballot were permitted to vote, in compliance with New Hampshire election law. Upon Attorney Coté's suggestion, Moderator Griffin directed the stanchions to be retracted, creating a physical guardrail between observers and the counting of ballots.

At this point in the poll closing procedures, Deputy Secretary Hennessey had to direct Moderator Griffin to run the AccuVote long tapes and shut down the AccuVote devices. RSA § 659:61 specifically provides that "[a]fter all absentee ballots have been processed, or processed and counted, as provided in RSA 659:49-55, and after the polls have closed, the election officials, except those disqualified in accordance with RSA 659:58, shall, under the supervision of the moderator, immediately begin counting the votes cast at the election." As part of the legal requirement to immediately begin counting votes cast at the election, the moderator must ensure that all ballot bins are emptied and the AccuVote results are printed.

The four AccuVote ballot bins were emptied once all ballots were cast and polls were closed to voting, however, this was done behind a barrier of tables, garbage cans, and Windham election volunteers. Election procedure specifically states that "the ballot counting device must be in the 'line of sight' from the designated spot outside the rail for the observer(s). We understand 'line of sight' in this context to mean the unobstructed view... The observer should be able to see enough of the ballot counting device to see the printing of the results tapes and allow observing the emptying of the different bins under the device where ballots are stored." Election Procedure Manual, pg. 175. Election officials must be governed by the tenants of transparent elections; this includes ensuring that the AccuVote device and ballots are within the line of sight of observers at all times. When viewing the poll closing procedures from outside the guardrail, it was not immediately clear to us what actions the election officials were taking.

Counting and Reconciliation.

Once polls were closed and all ballots were removed from the AccuVote devices, election officials began counting those ballots which needed to be adjudicated by hand. This was done at tables appropriately distanced from the guardrail, and within sight of all observers. Election officials additionally examined all ballots counted by the AccuVote device for potential write-ins, as directed by election procedure best practices.

Though the adjudication of hand-count and write-in ballots was done appropriately, the aggregation and reconciliation of the election results was done out of sight and without

transparent communication to the observers. At around 12:30 A.M., Assistant Moderator Stearns adhered to our suggestion of moving the aggregation and reconciliation process to a table within sight of all observers.

The team of election officials struggled to come up with the final election results. Assistant Moderator Stearns, with the help of several other election officials, spent several hours using a spreadsheet on the computer to determine the final results of the election. At around the same time the aggregation and reconciliation process were moved, we stepped in to walk the officials through the process of determining final results, including calculating the ballots cast, reconciling Windham's hand-counted ballots, and assisting election officials in completing the Return of Votes required to be submitted by 8:00 A.M. This was ultimately done by hand, rather than through the use of a spreadsheet. During reconciliation, it was clear that election officials misunderstood what election data needed to be used or adjusted based on the hand-counts. Page 98-100 of the Election Procedure Manual, in part, provides the following guidance for reconciliation relevant to the types of votes cast during the Presidential Primary Election:

...[A] ballot where the voter circled the names of his or her chosen candidates and all ovals are blank[] has been treated by the ballot counting device as a blank ballot. Hand count the votes on the entire ballot, adding the votes marked by the voter to each candidate's total. The device has included the ballot in its total of counted ballots. For the ballot inventory/ballots cast report, do not add that ballot to the total ballots that were hand counted because that ballot is already included in the number of device counted ballots... For the purpose of determining the total number of votes for a particular office or question, including undervotes and overvotes, for every vote you add to a candidate or question total, you must subtract "1" from the "undervotes" total. By determining the voter's intent, you are changing the ballot from being an undervote to being a vote for the marked candidate or marked choice on a question.

When the ballot counters were adjudicating the hand-counted and write-in ballots, teams did not notate whether the ballot was undervoted with a write-in candidate, or whether there was a write-in candidate and a properly filled in oval besides the write-in candidate.

Ballots at this point of the night had been sealed into their boxes and were not available for inspection. This is in conflict with election procedure, which provides that ballots should only be sealed into boxes "immediately after the votes at a state election have been tabulated, the results have been announced, and the return prepared." Election Procedure Manual, pg. 176. Instead, the tabulation sheets used to mark the results of the hand-adjudicated ballots showed there were fewer undervoted ballots and more write-ins than reported on the AccuVote long tape, indicating that at least some ballots had a write-in candidate with no bubble filled in. Based on these tabulation sheets, election officials, with our guidance, properly adjusted the election results to reflect voter's intent.

Though there was a slight variance between the votes cast and ballots cast numbers, Moderator Griffin initially announced the results of both primaries at around 1:25 A.M. Immediately following the announcement, election officials determined that the unreconciled variance came from hand-counted ballots that were not included in the results. The tabulation sheets used to count those ballots were examined, the numbers were added to the previously announced results, and Moderator Griffin announced amended results at 1:40 A.M. The amended results reconciled with little to no variance.

We left the polling location at approximately 2:10 A.M., after the final box was sealed. At that time election officials were still attempting to reconcile the number of voters checked in.

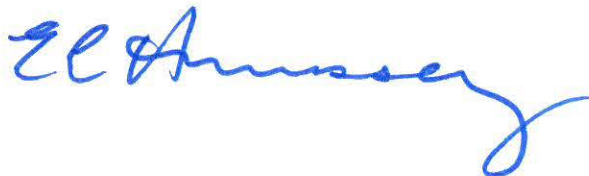
Conclusion.

The Windham Presidential Primary Election was overall successful, despite the deviations from election law and procedure. Election officials throughout the day were largely positive, responsive to constructive feedback, and open to learning opportunities. In the future, collaboration amongst election officials, coupled with strong and knowledgeable leadership, will ensure that the Town of Windham is able to fully comply with all election laws and procedures.

Windham election officials have repeatedly struggled to reconcile election results in a timely manner on election night. Election officials should review all reconciliation training, determine a course of action prior to election night, and consider whether the use of a spreadsheet on election night is the best method for tabulating election results. With regard to all other deficiencies in election law and procedure compliance, it is our recommendation that all Windham election officials, including the moderator, deputy moderator(s), assistant moderator(s), town clerk, deputy town clerk, selectmen, supervisors of the checklist, and all other election officers as defined under RSA § 652:14, attend a Windham-specific training event hosted by the Secretary of State's office.

Sincerely,

Erin Hennessey, Deputy Secretary of State
Election Monitor



Jennifer Coté, Assistant Secretary of State
Assistant to the Election Monitor

