

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

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NOTICE OF DECISION

File Copy

Case Name: **John M Sellers v Town of Bristol**
Case Number: **215-2017-CV-00062**

Enclosed please find a copy of the court's order of August 21, 2017 relative to:

Final Order

August 21, 2017

Maureen F. O'Neil
Clerk of Court

(595)

C: John M Sellers; David P Carlson, Clerk; Jennifer Baldwin Forrest Hartman, ESQ; Shawn M. Tanguay, ESQ

The State of New Hampshire

ROCKINGHAM COUNTY

SUPERIOR COURT

John Sellers

v.

Town of Bristol

215-2017-CV-00062

Final Order

Plaintiff John Sellers seeks to invalidate the results of the March 14, 2017 election held by the Town of Bristol ("the Town") and to compel the Town to hold a new election. The case was transferred to the undersigned pursuant to the Election Docket Court Procedures. The Court held telephonic hearings on April 3 and May 2, and a final evidentiary hearing on June 22, 2017. For the reasons that follow, the Court DENIES Sellers' requests for relief and enters judgment in favor of the Town.

Facts

The Court makes the following findings of fact based on the evidence presented at the June 22 hearing as well as the uncontested facts contained in the affidavits submitted by Town officials.¹ This evidence includes the ballots cast in the March 14, 2017 election, the applications and affidavit envelopes for the absentee ballots, and a copy of the checklist, all of which were submitted to the Court under seal.

On March 14, 2017, the Town held an election for several offices, including positions on the board of selectmen (two open seats) and the budget committee (four open seats). The ballot also contained the following petitioned warrant article: "Shall

¹ Where necessary, the Court also relies upon representations made during the two telephonic hearings.

we adopt the provisions of RSA 40:13 (known as SB 2) to allow official ballot voting on all issues before the Town of Bristol on the second Tuesday of March?" The ballot noted that "[p]assage requires a 3/5 majority vote of those voting." The warrant article failed to achieve approval by a three-fifths majority; it received 214 "yes" votes and 185 "no" votes.

With respect to the budget committee, five candidates were listed on the ballot. Because there were four open seats, the ballot should have instructed the voter to "vote for no more than 4" candidates in the budget committee race. Due to a typographical error, however, all ballots instructed the voter to "vote for not more than 3" candidates in this category. The three highest vote-getters were sworn into office; at the time the instant action was filed, the fourth open seat remained vacant.

With respect to the two open seats on the board of selectmen, four candidates were listed on the ballot: Rick Alpers, Frederick Eichman III, Donald Milbrand, and John Sellers. Voters were instructed to "vote for not more than 2" candidates for the selectmen's race. The results of that contest were as follows:

Alpers – 238 votes

Milbrand – 224 votes

Sellers – 208 votes

Eichman – 143 votes.

Sellers timely requested a recount, which confirmed the results. Consequently, Alpers and Milbrand were declared the winners of the two open seats on the board of selectmen and were sworn into office thereafter. See *generally* RSA 669:34 (governing recounts, appeals therefrom, and oaths of office). Sellers timely filed suit in Grafton County Superior Court pursuant to RSA 669:35. The case was transferred to the undersigned pursuant to the Election Docket Court Procedures on or about March 29,

Most of Sellers' arguments relate to absentee ballots which he argues should not have been counted. Of the 446 ballots cast in the March 14th election, 75 were absentee ballots. In his complaint, Sellers alleges that a certain number of absentee ballots did not have applications and/or affidavits and, therefore, those ballots should not have been counted. At the April 3rd telephonic hearing, the Town disputed the accuracy of Sellers' numbers and offered to conduct a further review of the absentee voter applications and affidavits in Sellers' presence.

This review took place on April 10. Town officials followed the same process for each absentee voter. First, Assistant Town Moderator Shawn Lagueux read aloud the name written on the absentee voter application or affidavit. Marilyn Bucklin, one of the supervisors of the checklist, then checked whether that name appeared on the Town's voting checklist as a registered voter. All 75 absentee voters were confirmed to be registered voters. Next, for each of the 75 absentee voters, Lagueux announced whether the voter had (1) submitted a signed application, and (2) submitted a properly executed affidavit. Patricia Woolsey, an assistant to the town clerk, recorded the results on a chart that was later submitted to the Court. For voters with both a signed application and a properly executed affidavit, Lagueux compared the signatures to see if they matched. Woolsey also recorded that information in the chart.

The numbers produced by this review process are as follows. Of the 75 absentee voters, 16 did not submit a signed application for an absentee ballot. Another 5 ballots were returned without an executed affidavit envelope. There is no overlap between the 16 no-application voters and the 5 no-affidavit voters. With respect to the 54 voters who submitted *both* a signed application and an executed affidavit, Lagueux determined that the signatures on one set of documents (*i.e.*, pertaining to one of these 54 voters) were not similar enough to be classified as a match.

At the June 22 hearing, Sellers confirmed that he was challenging these 22 absentee ballots based on the aforementioned "irregularities."² Sellers points out that he only lost to Milbrand by 16 votes. Because the absentee ballots are separated from the applications and affidavits after the affidavit envelope is opened on election day, the Court cannot discern whether those 22 absentee votes affected the outcome of the selectmen's race. According to Sellers, the Court must order a new election if it agrees with him that 16 or more of the absentee votes should not have been counted.

Sellers also alleges that certain residents engaged in "early voting" by requesting and returning their absentee ballot on March 13, the day before the election. The Town's official checklist shows the date on which each absentee voter requested an absentee ballot, the date on which that ballot was "mailed" (*i.e.*, provided) to the voter, and the date the ballot was returned to the Town (if applicable). Of the 75 registered voters who cast absentee ballots in the March 14th election, there were 19 voters who requested, received, and returned their absentee ballot on March 13.

The Court has reviewed the applications and affidavits submitted with respect to these 19 voters. Eighteen of the 19 voters submitted both signed applications and executed affidavits. The nineteenth voter submitted a signed application but did not execute the affidavit envelope. Therefore, this individual is already represented as one of the 5 no-affidavit voters discussed above. For clarity and convenience, the Court counts this absentee voter in the no-affidavit category instead of the "early voter" category, which leaves 18 absentee ballots challenged solely on the grounds of "early voting." The Court discusses the additional testimony adduced relevant to the "early voting" claim in the course of its analysis below.

² The Court refers to these 22 ballots collectively as the "incomplete" absentee ballots.

To summarize, Sellers challenges 40 of the 75 votes cast by absentee ballot on the following grounds:

- 16 for lack of signed application;
- 5 for lack of executed affidavit;
- 1 for lack of matching signatures; and
- 18 for “early voting.”

After filing the instant action, Sellers (with the Court’s permission) raised an additional argument about the absentee voter applications and affidavits. See Hearing Audio, May 2, 2017, at 9:21:25–9:23:00. Sellers asserts that neither the Town’s absentee ballot application nor its affidavit envelope conform to statutory requirements. The Court heard testimony and argument on all of Sellers’ challenges at the June 22 hearing.

Analysis

Pursuant to RSA 669:35, “[a]ny person aggrieved by a ruling of the board of recount with respect to any ballot” may appeal the board’s decision to this Court. Because Sellers lost the selectmen’s race, he is an “aggrieved” person under RSA 669:35. With respect to the budget committee ballot error, Sellers is currently a member of that committee and was not up for reelection in March 2017. Sellers explained at the April 3rd hearing that he is raising the ballot error issue in his capacity “as a voter.” Because the Town does not challenge Sellers’ standing to raise this issue, the Court addresses the merits of his argument.

Besides the budget committee issue, Sellers’ arguments relate to the 75 ballots cast by absentee voters and their potential effect on the outcome of the election for the two open seats on the board of selectmen. Sellers also appears to suggest that if the Court orders a new election for the two selectmen positions, it should also order a new

election on the petitioned warrant article, reasoning that the article might have received approval by a three-fifths majority if not for the questioned absentee ballots. As explained in *infra* note 3, this is not the case. Therefore, the Court assumes, without deciding, that Sellers has standing to request relief relative to the warrant article.

I. Budget Committee Vacancy

The Town concedes that the ballot erroneously instructed voters to vote for “not more than 3” candidates when there were four vacancies on the budget committee. The Town asserts, however, that RSA 669:61 specifies the remedy for this error. The Town further argues that *Town of Derry v. Adams*, 121 N.H. 473 (1981), is directly on point. The Court agrees with the Town.

In *Adams*, the ballot contained an error with respect to the number of vacancies on the planning board. The voters were instructed to vote for two when there were actually three open seats on the planning board as the result of a newly passed law. See *Adams*, 121 N.H. at 476–77. The New Hampshire Supreme Court held that RSA 669:61 applied to this situation:

The legislature also foresaw and provided for an oversight on the part of officials in the elective process. RSA 669:61 (Supp. 1979) provides that “whenever a town neglects . . . to fill an elective town office,” that vacancy shall be filled as authorized by law. RSA 669:70 (Supp. 1979) further provides that vacancies on a town planning board shall be filled in accordance with RSA 36:7 (Supp. 1979), which in turn provides that a vacancy for an elected member shall be filled by the selectmen until the next election. We therefore hold that a vacancy on the board existed and that the selectmen properly appointed [the individual in question to the planning board].

Id. at 479–80.

Here, a similar error on the ballot resulted in an open seat on the Town’s budget committee. Consistent with *Adams*, this open seat constitutes a vacancy on the budget committee within the meaning of RSA 669:61—that is, a vacancy caused because the

Town “neglect[ed] . . . to fill an elective town office.” RSA 669:61, I. RSA 669:61 provides that “said vacancy shall be filled by the action of that body or person authorized by law to appoint or elect such officer for a term ending upon the election and qualification of his successor, unless otherwise provided.” *Id.* RSA 669:71, in turn, provides that “[v]acancies on the municipal budget committee shall be filled in accordance with RSA 32:15, VII.” RSA 32:15, VII states in relevant part: “In municipalities where members-at-large are elected, vacancies shall be filled *by appointment by the budget committee.*” (Emphasis added.)

To summarize, the remedy authorized by law is not a new election for the fourth open seat on the budget committee. Instead, the budget committee “shall” appoint an individual to fill the vacancy caused by the ballot error. RSA 32:15, VII; see *Adams*, 121 N.H. at 479–80. At the June 22 hearing, the Town’s counsel represented to the Court that the budget committee has filled the fourth seat (*i.e.*, the vacancy) by appointing the candidate who received the fourth-highest number of votes in the March 14th election. Sellers did not contest the accuracy of this representation. Accordingly, based on the information provided to the Court, the Town has followed the procedures authorized by statute in filling the vacancy on the budget committee. Therefore, no further relief from this Court is warranted.

II. Issues Concerning Votes Cast by Absentee Ballot

The Court now turns to Sellers’ remaining arguments, all of which concern the 75 votes cast by absentee ballot. Sellers has a series of burdens to overcome in order to show that the results of an election should be overturned and a new election held. “The books are filled to overflowing with statements of the rule, in substance, that, wherever possible from a standpoint of legal justice to validate an election, it is the duty of the court to do so.” *Menlo Park City Sch. Dist. v. Tormey*, 32 Cal. Rptr. 82, 87–88 (Ct. App.

1963) (quotation omitted). Generally, “the law in New Hampshire provides that in the absence of fraud, irregularities will not render an election invalid unless they affect the result of the election.” *Appeal of Soucy*, 139 N.H. 110, 119 (1994); accord *Appeal of McDonough*, 149 N.H. 105, 114 (2003).

A. Format of Absentee Ballot Applications and Affidavits

Sellers first argues that the Town’s absentee ballot application and its affidavit envelope do not conform to the requirements imposed by the election statutes. On this basis, Sellers seeks to invalidate all 75 absentee ballots cast in the March 14, 2017 election. Sellers appears to argue that, if all 75 absentee ballots are invalidated, a new election must be held for the two selectmen positions because the margin of victory between Alpers (in first place) and Sellers (in third place) was only 30 votes. However, absent fraud (which Sellers is not alleging), any problems with the 75 absentee ballot applications and/or affidavits will not render the March 14th election invalid *unless* Sellers can “prove” that these “irregularities . . . affect[ed] the result” of the selectmen’s race. *Soucy*, 139 N.H. at 117 (quotation omitted). Put differently, Sellers must demonstrate that, if the 75 absentee ballots are excluded for the reasons he identifies, the outcome of the selectmen’s race would be different. See *id.* at 117–19.

As noted above, each absentee ballot cannot be traced back to the individual voter who cast the ballot. However, the absentee ballots are expressly marked as such; the words “ABSENTEE OFFICIAL BALLOT” appear at the top of each absentee ballot. Accord RSA 669:27, I (requiring town clerk to prepare “[o]fficial absentee voting ballots, with the words ‘absentee ballot’ printed on them”). Therefore, the Court can—and did—tally the results of all of the votes cast by absentee ballot in the selectmen’s race. The Court then subtracted the absentee vote total for each candidate from his respective overall vote tally listed on *supra* page 2 to ascertain the number of in-person votes cast

for each candidate.

Based on the Court's review of the ballots, the results of the selectmen's race would not change if all 75 absentee ballots were excluded. Looking only at the 371 ballots cast in-person on election day, Alpers received the most votes, followed by Milbrand, followed by Sellers in third, and Eichman in fourth. Therefore, Alpers and Milbrand would still be the winners of the two open seats on the board of selectmen. In fact, Milbrand's margin of victory over Sellers *increases* if the votes cast by absentee ballot are not considered. Indeed, Sellers is the candidate in the selectmen's race who benefitted the most from the absentee votes cast in the election.³

Because excluding all 75 absentee ballots would not affect the results of the selectmen's race, the Court need not address the merits of Sellers' arguments concerning the Town's application form and affidavit envelope. That is, the Court need not decide whether they are sufficiently "similar" to the application and affidavit requirements for state elections set forth in RSA chapter 657. RSA 669:27.

Nonetheless, the Court notes that, in general, "[t]he aggrieved party cannot await the outcome of the election and then assail preceding deficiencies which he might have complained of to the proper authorities before the election." *Pearson v. Taylor*, 32 So. 2d 826, 827 (Fla. 1947). Town Clerk Raymah Simpson testified that the Town has been using this absentee ballot application for six or seven years. The appropriate time to bring any deficiencies in the application to the Town's attention is before the election, and far enough in advance for the Town to amend its application, if that is warranted.

The Court infers that Sellers did not notice the alleged deficiencies in the Town's application form and affidavit envelope until after he filed this lawsuit, as he did not raise

³ The Court also tabulated the absentee votes cast with respect to the petitioned warrant article. If those votes are excluded from the totals listed on *supra* page 2, the number of "yes" votes barely exceeds the number of "no" votes. Thus, approval still falls short of the three-fifths majority required for passage.

these arguments in his initial complaint. While Sellers may assert that he could not raise these deficiencies ahead of time if he did not know about them, the Court is making a more general point about the need to raise these types of issues ahead of the election when there is still time to correct them. This point also reflects “the well-settled rule that before an election, the provisions of election laws are mandatory, and after the election, the provisions are directory.” *Swanberg v. Tart*, 778 S.W.2d 931, 933 (Ark. 1989); see also *Weisgerber v. Nez Perce Cty.*, 197 P. 562, 563 (Idaho 1921). The reasoning behind this rule is “that after the election has been held and the will of the voters has been fairly expressed the courts will seek to sustain it by a liberal construction of the applicable statutes and treat them as directory.” *Stanley v. Sw. Cmty. Coll. Merged Area*, 184 N.W.2d 29, 40 (Iowa 1971) (quotation omitted).

B. “Early Voting”

Sellers next argues that the absentee ballots requested and returned on the day before the election constituted “early voting” in contravention of New Hampshire’s election laws. Specifically, he claims that some voters cast absentee ballots on March 13 because they were concerned about the impending blizzard on election day, and that this is not permissible in New Hampshire. The Court rejects Sellers’ challenge for the reasons explained below.

RSA chapter 669 governs town elections, and several provisions of this chapter touch upon absentee voting. See, e.g., RSA 669:29 (“The procedure for absentee voting in town elections shall be the same as in state elections as provided in RSA 657:2, 657:6, 657:7, 657:8, 657:12, and 657:14 through 657:24.”). RSA 669:26 provides:

Every town which has adopted an official ballot system for town elections as provided in RSA 669:12 or 669:13 shall provide for absentee voting. Any eligible voter who is *absent from such a town on the day of a town election, or who cannot appear in public on election day because of his or her observance of a religious commitment, or who, by reason of physical disability, is unable to vote in person* may vote at a town election in accordance with the provisions of this section and RSA 669:27–669:29. A person who is *unable to appear at any time during polling hours at his or her polling place because of an employment obligation* shall be considered absent for purposes of this section and RSA 669:27–669:29. For the purposes of this section, the term “employment” shall include the care of children and infirm adults, with or without compensation.

(Emphases added.)

The Town’s affidavit envelope contains language similar to that of RSA 669:26 and identical to portions of RSA 657:7, II, which applies to affidavit envelopes prepared by the secretary of state for state elections. The Town’s affidavit envelope requires the voter to “certify under the penalties for voting fraud” that one of the following is true: the voter “will be unable to appear at any time during polling hours at any polling place because [the voter] will be working on election day or will be otherwise absent on election day from [the] town and will be unable to vote in person”; the voter “will be observing a religious commitment which prevents [him or her] from voting in person”; or, “on account of physical disability,” the voter is “unable to vote in person.” Pl.’s Ex. 7.

Sellers notes that “inclement weather” is not among the conditions pertaining to eligibility to cast an absentee ballot listed in RSA 669:26, RSA 657:7, or on the Town’s affidavit envelope. He points out that “some” of the individuals who voted by absentee ballot on March 13 told Town Clerk Simpson that “they may not want to come in” to vote on the day of the election because of the impending blizzard.⁴ Hearing Audio, June 22, 2017, at 11:13:35. Sellers essentially argues that these individuals violated New Hampshire law and that, therefore, their votes should be invalidated.

⁴ This blizzard was so severe that some municipalities decided to postpone their elections. See Laws 2017, 20:6.

Simpson testified to the following relevant facts. Every year, the Town's office remains open until 5 p.m. on the day before the election "for absentee ballots." *Id.* at 11:14:08. It is not unusual for people to come in the day before the election to request absentee ballots, although more people came in this year (*i.e.*, 2017) than in years past. Everyone who came into the office on March 13, 2017, to request an absentee ballot had to fill out the application form. The exhibits submitted under seal confirm that all nineteen individuals who requested and received an absentee ballot on March 13, 2017, submitted a signed absentee ballot application. Eighteen of those individuals also executed the affidavit envelope when returning the ballot.

Simpson explained at the hearing that New Hampshire law does not allow early voting and that, "as a town clerk, [she] would not allow early voting." *Id.* at 11:11:04. When people come in to apply for an absentee ballot, Simpson "always" asks them if they are "going to be in town, out of town, [or] what." *Id.* at 11:11:19. These individuals are also told that they are signing an affidavit, which requires them to "certify under the penalties for voting fraud" that they meet one of the listed conditions for absentee voting eligibility. Pl.'s Ex. 7. Therefore, Simpson "do[es]n't usually argue" with people who choose to execute the affidavit after being apprised of the absentee voter requirements. Hearing Audio, June 22, 2017, at 11:13:48.

New Hampshire law does not allow the town clerk to refuse to accept an absentee ballot from a registered voter who has executed the affidavit envelope. On the contrary,

[u]pon receipt of an outer envelope purporting to contain an official absentee voting ballot, the clerk of the city or town *shall* . . . attach thereto the application for an absentee ballot submitted by said voter and record the information pursuant to RSA 657:15. All such envelopes shall be preserved unopened until election day.

RSA 657:18 (emphasis added); see RSA 669:29 (making RSA 657:14–24 applicable to

town elections). On election day, “the clerk *shall* deliver *all* such envelopes, the applications therefor received by him or her, and the list of absentee voter applicants compiled pursuant to RSA 657:15 to the moderator[]” RSA 657:23 (emphases added). The moderator is the town official responsible for “processing absentee ballots.” RSA 659:50; *see also* RSA 669:25 (“In towns which have adopted an official ballot system, the town election shall be conducted in the same manner as a state general election as provided in RSA [chapters] 658 and 659”).

At the June 22 hearing, Sellers clarified that he was not arguing that Simpson should have done something different with respect to the “early voting” issue. Indeed, he acknowledged that the voter is the one who signs the affidavit envelope. In effect, Sellers is attempting to challenge a certain subset of the 19 absentee ballots cast on March 13 on the grounds that these voters did not meet the conditions of eligibility for absentee voting listed in the affidavit and the statutes.

New Hampshire’s election statutes set forth the procedure and grounds for challenging absentee ballots. *See* RSA 659:27, :27-a, :51.

All absentee ballots are subject to challenge after the moderator publicly announces the name of the absentee voter, except for voters provided for in RSA 7:46, but not after the ballot is removed from the envelope. No challenge to an absentee ballot may be asserted except in conformity with the requirements of RSA 659:27-a.

RSA 659:51. “No challenge may be accepted unless one of the . . . grounds [specified in RSA 659:27-a] is asserted and specific facts are offered in support of such grounds.” RSA 659:27-a, II. For purposes of this order, the Court assumes, without deciding, that an absentee ballot can be challenged on the grounds Sellers articulates here.

“[T]here are specific limitations on the powers of challengers in order to effectuate the overriding public policy in favor of enfranchisement. Such policy derives from the basic precept that the right to vote is quintessential to our democratic process.”

In re Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hosp., 750 A.2d 790, 792 (N.J. App. Div. 2000) (citation omitted). New Hampshire's election statutes make clear that challenges to absentee ballots can only occur during a particular window, *i.e.*, "after the moderator publicly announces the name of the absentee voter" but before the ballot is removed from the affidavit envelope. RSA 659:51. The reason for this is obvious: to avoid challenges motivated by how the voter voted. This time limitation also promotes "the finality of the election result." *N.L.R.B. v. A.J. Tower Co.*, 329 U.S. 324, 331 (1946). "Long experience has demonstrated the fairness and efficaciousness of the general rule that once a ballot has been cast without challenge and its identity has been lost, its validity cannot later be challenged. This rule is universally recognized as consistent with the democratic process." *Id.* at 332. "The fact that cutting off the right to challenge conceivably may result in the counting of some ineligible votes is thought to be far outweighed by the dangers attendant upon the allowance of indiscriminate challenges after the election." *Id.* at 331. Consistent with the foregoing, the Court concludes that "it is too late" for Sellers to challenge the 19 absentee ballots cast on March 13 on the grounds of "early voting." *Id.*

Furthermore, Sellers has failed to adduce sufficient facts to sustain such a challenge under New Hampshire law. The Court imports the requirements from RSA 659:27-a in examining whether Sellers has met his burden. *See* RSA 659:51 ("No challenge to an absentee ballot may be asserted except in conformity with the requirements of RSA 659:27-a."). RSA 659:27-a states that "[a] challenge may be asserted only upon personal knowledge or other basis of probable cause that the challenged voter is ineligible to vote." The only basis of knowledge here is Simpson's testimony that "some" of the individuals who came into the Town's office on March 13 to request absentee ballots mentioned to her that "they may not want to come in" to vote

on March 14 “because of the snow.” None of these individuals were identified by name at the hearing, nor was there any testimony from Simpson about the number of people who made this type of statement. Moreover, Simpson clarified that some of the absentee voters who came in on March 13 stated that they planned to go out of town because of the snow. Simply put, Sellers has failed to establish that *any* of the 19 individuals who returned their absentee ballots on March 13 did not actually meet the conditions for absentee voter eligibility on election day. Therefore, the Court rejects his challenge to these ballots.

C. “Incomplete” Absentee Ballots

Finally, the Court turns to the 22 “incomplete” absentee ballots. These are the 16 absentee ballots cast without a signed application, the 5 absentee ballots cast without an executed affidavit envelope, and the 1 absentee ballot with non-matching signatures on the application and affidavit. *See supra* pp. 3–5. Sellers argues that the Town must hold a new election if the Court invalidates 16 or more of these ballots, given Milbrand’s 16-vote margin of victory over Sellers. For the reasons explained below, the Court ultimately rejects Sellers’ challenge to the no-application absentee ballots. Because invalidating the other 6 challenged ballots would not change the outcome of the selectmen’s race, the Court need not address Sellers’ arguments concerning those ballots. *See McDonough*, 149 N.H. at 110 (declining to reach issue about validity of remaining ballots where said ballots did not affect the outcome of the election).

As noted in the preceding section, the ability to challenge an absentee ballot generally evaporates once the window of time specified in RSA 659:51 has passed and the envelope has been opened. However, with respect to the signature requirements for absentee voters, RSA 659:50 appears to impose upon the moderator sole responsibility for enforcing these requirements. *See* RSA 659:50 (“[If the conditions in

paragraphs I through IV are met,] then the moderator shall publicly announce the name of the absentee voter If these conditions are not met, the moderator shall follow the procedure provided in RSA 659:53.”); *see also* RSA 659:53 (listing “affidavit improperly executed” as one of the bases for a moderator’s “find[ing] that an absentee voter is not entitled to vote”). Therefore, for purposes of this section of the analysis, the Court assumes that absentee votes can be challenged for noncompliance with the signature requirements after the envelopes have been opened and the ballots counted.

Of the 75 voters who cast an absentee ballot in the March 14, 2017 election, 16 of these voters did not submit a signed application for an absentee ballot. The exhibits submitted under seal show that 5 of these 16 absentee voters failed to submit a signed application because they requested a ballot via email. *Cf.* RSA 657:19-c (“Each town and city clerk shall establish and maintain an official e-mail address and street address, which shall be publically available to voters.”). Specifically, these individuals⁵ emailed the Town in late February to request an absentee ballot because they would not be in Bristol on the day of the election. The Town confirmed that all five individuals were registered to vote in Bristol. But instead of responding to these emails by providing a formal application with instructions to sign and submit the form, the Town apparently deemed the emails sufficient and mailed each individual an absentee ballot with an affidavit envelope. All five individuals returned the absentee ballot in an executed affidavit envelope as required.

Because the Town deemed the emailed requests acceptable, the moderator did not have a signature to compare to the signature on the affidavit envelope for these five individuals when their absentee ballots were processed on election day. *See* RSA

⁵ In two cases, the email sent by the voter requested an absentee ballot for the voter and his or her spouse. Therefore, only three individuals emailed the Town, but five ballots total were mailed.

659:50 ("The moderator shall then remove the envelope containing the ballots of each absentee voter and shall compare the signature on the affidavit with the signature on the application for the ballot."). The only reason the moderator did not have a comparison signature was because the Town failed to request that these five registered voters submit signed applications when they emailed to inquire about absentee ballots.

Under these circumstances, the Court declines to disenfranchise these five voters where the noncompliance at issue was the result of the Town's conduct. A Texas appellate court came to the same conclusion in *Lee v. Whitehead*, 182 S.W.2d 744, 746 (Tex. App. 1944):

It appears from the record, and the trial judge found, that although the absentee ballot in question was not accompanied by the required application and affidavit of the voter, yet, nevertheless, it was apparent that such omission was due to the carelessness of the County Clerk in performance of his ministerial duty in the transaction, and to no failure of duty on the part of the voter, who may not be disfranchised by such failure of a public officer.

More generally, the New Hampshire Supreme Court has observed that "[t]he object of election laws is to secure the rights of duly qualified voters, and not to defeat them." *McDonough*, 149 N.H. at 110 (quotation omitted). The Court is also cognizant of the well-accepted "democracy canon," which states that "[a]ll election statutes should be liberally interpreted in favor of the right to vote according to one's belief or free choice." *Wilson v. Kennedy*, 86 N.E.2d 722, 726 (Ohio 1949). "The courts are reluctant to defeat a fair expression of popular will in an election and will not do so unless so required by the plain mandate of the law." *Veterans' Fin. Comm. of 1943 v. Betts*, 359 P.2d 471, 473 (Cal. 1961). Because the law does not require the Court to invalidate the ballots cast by these five absentee voters, it declines to do so.

For similar reasons, the Court declines to invalidate the ballots cast by the other 11 voters who did not submit a signed application. For the reasons explained below,

the Court deduces that these 11 voters are the residents of the elderly housing units that were visited by Town officials approximately one week before the election.

As the Town's counsel explained at the April 3rd hearing, the Town, like many other municipalities, tries to accommodate the elderly by bringing absentee ballot materials to the three elderly housing units located in Bristol. Indeed, the New Hampshire Election Procedure Manual, which is published by the Secretary of State and the Department of State, notes in relevant part:

Residents of Nursing Homes and similar facilities, while encouraged to vote in person on election day if they are able to do so, are frequent absentee voters. Over the years several municipalities have reported incidents causing concern for whether nursing home residents were being unduly influenced when marking their absentee ballots. While not required by law, many clerks arrange an absentee registration and voting event at the nursing homes and similar facilities within their municipality. Either in person or through a designee, the clerk has the nursing home recreation/activities director plan, publicize, and organize a voting event for some day close to but prior to the election. The clerk, a deputy clerk, supervisors, or some trusted non-partisan designee of the clerk goes to the home and assists those residents who will be unable to travel to the polls on election day with registering absentee, if needed, and voting absentee. This process ensures that no one is able to unduly influence the residents as they make their voting choices. The Secretary of State and the Attorney General's staff are available to assist in training designees or otherwise organizing this type of registration/voting event.

Dep't of State, *New Hampshire Election Procedure Manual: 2016–2017*, at 103, available at <http://sos.nh.gov/Elections.aspx>.

This year, Simpson sent two supervisors of the checklist to the elderly housing units. Due to some oversight or mix-up, some of the residents of the elderly housing units were not required to fill out and sign an application before receiving their ballot. The supervisors of the checklist collected the ballots (in signed affidavit envelopes) from these residents on the same day. Simpson estimated that this occurred approximately a week to a week and a half before the election.

According to the copy of the checklist submitted to the Court under seal, the 11

voters who failed to submit a signed application (and who did not request an application via email) requested, received, and returned their absentee ballots all on the same day: March 9, a little less than a week before the election. These 11 individuals also have similar street addresses (but with different apartment numbers), according to the checklist. Except for the aforementioned 5 individuals who requested their ballot via email, no other absentee voters failed to submit a signed application. Therefore, these 11 no-application individuals must be the residents of the elderly housing units.

The failure to provide absentee ballot applications to these residents was an error by the Town, not these 11 voters. *See Lee*, 182 S.W.2d at 746 (declining to invalidate absentee ballot where lack of application and affidavit "was due to the carelessness of the County Clerk in performance of his ministerial duty in the transaction, and to no failure of duty on the part of the voter"). Therefore, for the reasons articulated on *supra* page 17, these 11 absentee voters shall not be disenfranchised by the failure of Town officials to require a signed application. *Id.*; see also *Kibbe v. Town of Milton*, 142 N.H. 288, 293 (1997) ("Recognizing that 'the object of election laws is to secure the rights of duly qualified voters, and not to defeat them,' [the Court] strive[s], in resolving election disputes, to ascertain the legally expressed choice of the voters and avoid deciding cases on unwarranted technicalities." (brackets omitted) (quoting *Opinion of the Justices*, 116 N.H. at 759)).

Furthermore, the Court notes that one of the main purposes of the absentee ballot application requirement is to allow the Town to check whether the applicant is a registered voter. The supervisors of the checklist verified that each resident was a registered voter before providing the ballot and affidavit envelope. Indeed, all of the persons who submitted absentee ballots in this election, including the 16 voters who did not complete an application, were registered voters. In other words, the failure to

require a signed application did not result in any ballots cast by unregistered voters.

Another purpose of the application requirement is to obtain a signature from the absentee voter which can be compared to the affidavit envelope containing the ballot. See RSA 659:50 (requiring the moderator to "compare the signature on the affidavit with the signature on the application for the ballot"). Here, the same Town officials who confirmed that the residents were registered voters and provided the ballots also received the executed affidavit envelopes back from the registered voters on the same day. Accordingly, the verification purpose of the signature requirement was satisfied even though a comparison signature was not obtained for these 11 absentee voters.


For all of the foregoing reasons, the Court declines to invalidate the 16 no-application absentee votes. This leaves 6 remaining absentee ballots that Sellers is challenging. Because Milbrand's margin of victory was 16 votes, these 6 ballots cannot affect the results of the selectmen's race, and the Court need not address Sellers' substantive arguments. See *McDonough*, 149 N.H. at 110.

Conclusion

For the reasons explained above, the Court declines to order the Town to hold a new election. Accordingly, the Court enters judgment against Sellers and in favor of the Town.

So Ordered.

August 21, 2017
Date



David A. Anderson
Associate Justice