



Christopher B. Drescher  
*Admitted in NH*

October 4, 2021

Mark LeDoux, Vice Chair  
Town of Hollis Selectboard  
64 Dow Road  
PO Box 327  
Hollis, NH 03049-0327

**Re: Opinion relative to Moderator Authority as to Voter Ballot Hand Re-Counts**

Dear Mark,

As per your request, I have performed a legal analysis of the questions that you sent to me directly. Below are the results of said analysis.

**Synopsis**

Under the RSAs, the Town Moderator does not have the authority to order or conduct any recounts (*by hand or otherwise*) because the RSAs make clear that applications for the recounts have to be made by the aggrieved candidate and the process for the recounts fall under the jurisdiction of either the Secretary of State (*if general election*) or the Town Clerk (*if a Town election*).

**Legal Analysis**

Your first inquiry is whether there is any RSA that would prohibit the Town Moderator from conducting a hand count of the ballots to perform an audit of the Accu-Vote tabulator tape. As for your direct question, is there an RSA that directly prohibits a Town Moderator from ordering/conducting a hand count the ballots as part of a recount? Yes, but it does require 'reading between the lines.'

*NH RSA 659:60 (Duties of Moderator), states in full, "[t]he moderator, or the moderator pro tempore if the moderator is disqualified under RSA 658:24, shall oversee the counting of votes by other election officers, including the selectmen and the town clerk, and may discharge any other duties relating to the counting of votes."*

In 2018, there was an attempt to amend (*intended to become NH RSA 659:60-a*) the aforementioned statute to allow for the Moderator to have the authority to verify the AccuVote device's count. The bill was sponsored by six democrats and one republican. The legislation was HB 1582 and it was 'introduced dead.' The RSA remains un-amended.

If an election is for state general offices there is an RSA that mandates recounts are the jurisdiction of the Secretary of State (*discussed further below*).

Therefore, the Town Moderator has no authority to order or conduct any kind a recount relative of a state general election.

The Secretary of State has, in the past, condemned such a practice. The aforementioned HB 1582 was in response to the Town of Derry Moderator (Mary Till) ordering such a hand count in the 2016 Primary Election and was then subject to disciplinary action and State mandated supervision of her duties. In his letter to Till, Secretary Gardner stated that "...you [Till] conducted a hand recount of an AccuVote machine, an act which was not sanctioned or approved by the Secretary of State and it not permitted by any provision of New Hampshire law."

The letter also condemned Till because she did not have the authority to order the recount in the first instance. That recounts are performed at the "...application by candidates, and are conducted exclusively within the jurisdiction of the New Hampshire Secretary of State."

This brings me to your second direct question as to if absent an RSA specifically forbidding a Town Moderator from ordering or conducting a hand count is there an RSA that would allow either the Selectboard or the Moderator the authority to require a hand count of the AccuVote machines.

Put simply, there is no specific RSA that mentions the words "hand recount."

However, NH RSA 669:30, *et seq.* (outlining the process for recounts for Town Elections), will lead you to NH RSA 669:32 (Board of Recount) that contains, in full, the following language:

*"At the time and place so appointed and notified, the clerk shall publicly break the seal of and open the package in which the ballots of said election are kept; and, thereupon, said ballots shall be recounted by the clerk, the moderator, and the selectmen of said town who shall constitute the board of recount. When counting the ballots, the board of recount or their assistants shall visually inspect each ballot. No mechanical, optical, or electronic device shall be used for the counting of ballots. Any member of the board of recount who is one of the candidates for the office being recounted shall disqualify himself or*



*herself from the board of recount for all official duties of said board. The moderator shall appoint an assistant who shall take the same oath as, serve in the same capacity as, and have all the powers of the recount official whom he or she has replaced."*

NH RSA 669:32 reads to me as if it *requires* a hand count. I 'Shepardized' this statute and it brought up "No documents found in Citing Decisions." In other words, there is case law interpreting this statute. Again, it should be noted that this is the section of the RSAs dealing with 'Town Election[s].'

However, NH RSA 660:5 (Conduct of Recounts (*this is for state general elections*)) also contains similar language, "***[w]hen counting the ballots, the secretary of state or his or her assistants shall visually inspect each ballot. No mechanical, optical, or electronic device shall be used for the counting of ballots.***"

NH RSA 660, *et seq.*, deals with state general elections. NH RSA 660:1 through NH RSA 660:6 deal with state general election recounts.

Under NH RSA 660:1, a candidate may apply for a recount, provided the votes cast for the applying candidate are less than 20 percent of the total votes cast in the towns which comprise the office to be recounted. The application "...*shall be made in writing to the Secretary of State...*".

NH RSA 660:4, mandates that the Secretary of State conducts and oversees the process of recounting ballots and it shall take place in Concord.

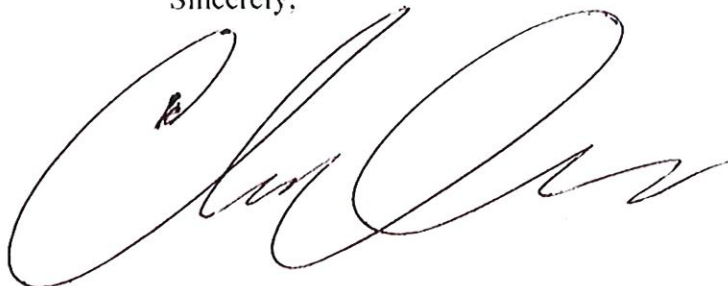
### Conclusion

In conclusion, I do not read any of this legislative history or RSAs to condemn the practice of 'hand recounting,' *per se*, but rather the RSAs make clear that recounts are the jurisdiction of the Secretary of State, provided, the office at issue is 'state general.'

Similarly, if the election at issue were a 'Town Election' then the aggrieved candidate applies for the recount to the Town Clerk. Then the ballots shall be re-counted by the Clerk, the Moderator, and the Selectboard. However, any member of the Board that may be on the ballot must recuse themselves and a Moderator appointee shall take the place of the disqualified Board member.

I hope this helps and please let me know if you need anything else.

Sincerely,

A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end.

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