

THE STATE OF NEW HAMPSHIRE

Belknap Superior Court

64 Court Street
Laconia, NH 03246
603 524-3570

NOTICE OF DECISION

DOUG LAMBERT
42 FARMER DR
GILFORD NH 03249

07-E-0140 Doug Lambert, et al v. Belknap County Convention

Enclosed please find a copy of the Court's Order dated 7/17/2007
relative to:

Order on Merits

07/17/2007

Dana Zucker
Clerk of Court

Court Copy (jkh)

cc: THOMAS A TARDIF
JAMES CARROLL ESQUIRE

THE STATE OF NEW HAMPSHIRE

BELKNAP COUNTY

SUPERIOR COURT

Doug Lambert and Thomas A. Tardif

v.

Belknap County Convention

Docket No.: 07-E-0140

FINDINGS, RULINGS AND ORDERS

The petitioners, Doug Lambert and Thomas A. Tardif, bring this action against the respondent, Belknap County Convention, alleging violation of New Hampshire's Right-to-Know law, RSA 91-A, and requesting temporary injunctive relief, declaratory judgment, and costs. The court held a hearing on the merits on July 6, 2007, after the parties agreed to consolidation of the preliminary hearing with the merits. After review of the parties' arguments and the applicable law, the court finds and rules as follows.

The following facts are undisputed. The Belknap County Convention ("Convention") consists of the state representatives to the General Court from the representative districts in Belknap County. RSA 24:1. The Convention has various responsibilities in connection with the operation of county government, including filling vacancies in elected county offices which occur mid term. See RSA 661:9, and generally RSA Chapter 24.

On May 29, 2007, the Convention met to discuss the vacancy created in the Office of Belknap County Sheriff, occasioned by the resignation of Sheriff Dan Collis.

The Convention voted to go into a nonpublic session pursuant to RSA 91-A:2 to discuss the process for filling the vacancy.

On June 11, 2007, the Convention met again, conducted interviews of candidates for the position in a nonpublic session, and determined two finalists for the position of Sheriff. The names of the two finalists were publicly announced, but the Convention did not disclose the full list of applicants. The court does not perceive that the claims here relate to either of the Convention meetings of May 29th or June 11th.

On June 25, 2007, the Convention met again in open session. The Convention, with a quorum of representatives present, interviewed both of the final candidates in public, and then, after some discussion, elected to vote by secret ballot for the selection of the Sheriff. A majority of the Convention voted for Craig Wiggin ("Wiggin") to fill the Sheriff vacancy. Wiggin began his official duties as Sheriff on July 9, 2007.

The petitioners request the court issue a declaratory judgment that the Convention's selection process was illegal and must be re-done. The petitioners also seek an injunction to prevent Wiggin from performing the duties of Sheriff. On a preliminary basis the court declined to intervene.

The petitioners argue that the Convention's secret paper ballot is in violation of the Right-to-Know law. The petitioners assert that while the Convention may go into nonpublic session to discuss a personnel matter and conduct interviews, the Convention may not conduct a secret ballot vote in an open, public meeting of the Convention.

The petitioners further assert that contrary to the contention of the Convention, the statutory process calls for the appointment of a Sheriff, and therefore it is not an "election" under state law. Consequently, the Convention's decision does not fall under

the exception under RSA 91-A:2, II for "elections". The petitioners argue that the state laws governing elections do not apply to votes of the county delegation.

The Convention argues in response to the petitioner's claims that the Sheriff was not appointed and instead the Convention voted by majority in essentially an election. The Convention asserts that the definition of "elections" in RSA 91-A is unclear, and therefore the court should look to the legislative history of the statute. The Convention asserts that RSA 661:9 previously referred to the process as an "appointment" and later was amended, inserting the phrase "fill the vacancy." Therefore, the respondent asserts that the electoral process the Convention followed falls within the exception in RSA 91-A:2, II, for "elections".

The Right-to-Know law provides: "Except for town meetings, school district meetings and elections, no vote while in open session may be taken by secret ballot." RSA 91-A:2, II (2001 & Supp. 2006). Therefore, the court must first determine if the process used by the Convention to fill vacancies in county elected offices is an election. RSA 661:9, I provides: "If a vacancy occurs in the office of county sheriff, county attorney, register of deeds, or county treasurer, the members of the county convention shall fill the vacancy for the unexpired term by majority vote." (Supp. 2006).

The Legislature does not define "elections" within RSA Chapter 91-A, nor does it assign a process for the Convention to "fill the vacancy" under RSA 661:9. In the Court's view, however, it is clear that selecting an individual to fill a vacant county office is not an election. The definition of "election" under RSA 652:1, means the "choosing of a public officer...by voters by a means of a direct vote under the election laws." RSA 652:1 (1996). No such vote did, or could, take place under RSA 661:9. Furthermore,

even if it were appropriate to look to legislative history, the legislative history of RSA 661:9 leads the court to conclude that an appointment to fill the vacancy in a county elected office is not an election, as that term is used in RSA 91-A. See Remington Invs., Inc. v. Howard, 150 N.H. 653, 654 (2004) (only where there is an ambiguity in the statute, does the court look to legislative intent).

RSA 661:9 governing the filling of vacancies in county elected offices, before recent amendments, provided, in part: "the superior court shall appoint a commissioner to fill the vacancy." RSA 661:9 (1996). In 1998, the statute was amended and the clause "appoint a commissioner to" preceding "fill the vacancy" was deleted. RSA 661:9 (citing HISTORY). It was not until 2003 that "the county convention" replaced "the superior court." *Id.* If the Convention's election argument is correct, the superior court likewise held elections every time the court filled a vacancy in a county office under the statute, at least after 1998. The court finds no support in the legislative history or in the superior court's past practice for the Convention's position. Accordingly, the exception in RSA 91-A:2, II, for secret ballots at "elections", does not apply to the Convention when it acts to fill the vacancy in the position of Sheriff under RSA 661:9. Therefore, the Right-to-Know law applies.

The Convention is entitled to hire public employees, including the hiring of an interim Sheriff, in a nonpublic session under the Right-to-Know law. RSA 91-A:3, II ("Only the following matters shall be considered or acted upon in nonpublic session: . . . (b) The hiring of any person as a public employee.") (2001 & Supp. 2006). If the Convention chooses to hire public employees in a nonpublic session, however, it must do so in accordance with to the provisions of the Right-to-Know law. "No body or agency

may enter nonpublic session, except pursuant to a motion properly made and seconded.” RSA 91-A:3, I(a) (2001 & Supp. 2006). Here, the Convention was in open, public session when it conducted a secret ballot vote to select Wiggin. No motion was made and seconded to go into nonpublic session which would have allowed the selection to be made in a closed session. The court, therefore, finds that the process followed by the Convention to select Wiggin as Sheriff violated the state’s Right-to-Know law.

RSA 91-A:8, II provides “The court *may* invalidate an action of a public body or agency taken at a meeting held in violation of the provisions of this chapter, if the circumstances justify such invalidation”. (2001 & Supp. 2006, emphasis added.) The clear import of this section on the remedy available for a violation of the statute is that the court *may*, but is not required to, invalidate the Convention’s action, depending on the circumstances of the case. A Right-to-Know law violation does not automatically result in the invalidation of the action taken. In this case the court finds that circumstances do not justify invalidation of the selection of Wiggin as Sheriff.

While the Convention has, without question, violated the Right-to-Know law with respect to the secret ballot decision to appoint Wiggin as Sheriff, the Convention would have been well within its rights to conduct the entire process of selecting the Sheriff in nonpublic sessions. RSA 91-A:3, II (b). The exception for hiring public employees allows those matters to “be considered *and acted upon* in nonpublic session...” (Emphasis added.) In this sense, the Convention went further than the Right-to-Know law required, conducting interviews with the two final candidates in public and voting at the public session, albeit by secret ballot. In this case there is no reason to believe that the Convention would reach a different result if the matter were to be revisited by the

Convention following a directive from this court, whether the matter were considered in public session or nonpublic session under RSA 91-A:3, II (b). Moreover, there is nothing in this record to suggest that the Convention will, in the future, fail to carry out its responsibilities under RSA 661:9, in filling vacancies in elected county offices, consistent with the Right-to-Know law, as they have been defined herein. In short, no useful purpose would be served by invalidating the selection of Wiggin as Sheriff and requiring the Convention to revisit the selection; the circumstances of this case do not justify such invalidation.

Petitioners have requested their costs. "Fees shall not be awarded unless the court finds that the body, agency or person knew or should have known that the conduct engaged in was a violation of this chapter. . . ." RSA 91-A:8, I (2001 & Supp. 2006). Even though the Convention did more than was required, in that the Convention could have conducted the entire process of selecting the Sheriff in nonpublic session, the violation of the specific command of RSA 91-A is plain and indisputable. The county delegation should have known that a secret ballot vote in a public session violated that Right-to-Know law on its face. Accordingly, costs for filing fees and service are awarded to petitioners. Inasmuch as petitioners proceeded pro se, no attorney's fees have been incurred and, therefore, they are not awarded

So Ordered.

July 17, 2007
Date

/s/ Bruce E. Mohl
Bruce E. Mohl
Presiding Justice