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January 29, 2019

Andrea Kohler, Town Clerk
Paul Scafidi, Moderator
Town of Exeter
10 Front Street
Exeter, NH 03833

Re: **Cease and Desist Order**
Exeter Town Election on March 13, 2018

Dear Ms. Kohler & Mr. Scafidi:

On March 14, 2018, our office received two complaints in connection with the Exeter Town Election that occurred on March 13, 2018. The complaints allege that the results announced on election night contained discrepancies between the number of ballots cast and the number of voters marked on the checklist. Additionally, we received notice that the Town failed to follow proper protocols with respect to issuing absentee ballots prior to the election. Our office's Chief Investigator Richard Tracy conducted an investigation.

Election Night Results

On election night, the Town reported that a total of 2,795 ballots were cast. However, the marked checklist indicated that only 2,685 voters checked in to the checklist. At first glance, it would appear to voters that there were 110 more ballots cast than voters who received ballots. On or about March 26, 2018, the Town Clerk published a notice stating that the originally reported number of ballots cast was incorrect and revised the number to 2,695 ballots cast.

Our investigation did not reveal any evidence of criminal misconduct, such as "ballot box stuffing." However, we have concluded that this discrepancy was the result of errors made by the Town of Exeter following the election. The mistakes, however, were avoidable and should have been discovered on election night, prior to announcing the results.

Ms. Kohler stated during her interview with Chief Investigator Tracy, that the announcement that 2,795 ballots had been cast was based upon a calculation that was conducted by an assistant clerk. This number was calculated by using the ballot machine tape and then adding the number of ballots that were counted by hand. It appears that an error was made when

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performing this initial calculation. On election night, this figure was not crosschecked with either the marked checklist or by conducting an inventory of cast and uncast ballots.

During the March 13, 2018, Town Election, the town ballot consisted of two double-sided pages providing for the election of officers and voting on warrant articles. The results tabulated by the ballot counting device indicated that 5,099 individual ballot pages were counted by the machine. Four (4) of these ballot pages were school ballots that were placed into the wrong machine. Nine (9) ballot pages were rejected by the machine and were hand counted.

On the day before the election, the Town ran out of absentee ballots requiring the Clerk to issue copies of blank absentee ballots, pursuant to RSA 659:24. The ballot counting devices typically cannot read copies of absentee ballots, and therefore these ballots are tabulated by hand. The Town indicated that there were one-hundred and twenty-nine (129) individual voters (258 ballot pages) who cast absentee ballots that were hand counted.

To determine the number of individual voters who cast a ballot, the total number of ballot pages must be divided by two (2), which is the number of individual ballot pages that each voter cast in the town election. The election-night calculation that the Town should have performed follows:

5,099	(ballot pages tabulated by the counting device)
- 4	(school ballot pages placed in the counting device)
+ 9	(ballot pages rejected by the counting device and hand counted)
+ 258	(hand counted ballot pages from 129 absentee voters)

5,362 total ballot pages divided by 2, equals 2,681 individual voters.

Therefore, according to the ballot counting device tape, 2,681 individual voters cast ballots during the March 13, 2018, town election. The originally reported number of 2,795 and the subsequently posted number of 2,695 voters were both incorrect because the above calculation was performed incorrectly. Note that the 2,681 votes counted are four (4) *less* than the total number of voters marked off the checklist, which was 2,685.

Although calculation errors do sometimes occur, especially after a long election day, a discrepancy of this magnitude should have been detected on election night, prior to the announcement of the results. The Town should have reconciled the reported number of ballots cast with the number of voters marked off the checklist.

It is the responsibility of the moderator to oversee the counting of votes. RSA 659:60. The selectmen and town clerk are required to assist the moderator in performing this task. RSA 669:58. "After the counting, the moderator shall make a public declaration of the number of ballots cast, with the name of every person voted for and the number of votes for each; and the town clerk shall make a fair record thereof in the books of the town." RSA 669:58; See also RSA 659:70. Inherent in this responsibility is the duty to ensure the accuracy of the tallies prior to the public announcement.

Both the State's Election Procedure Manual and RSA 659:73 set forth useful procedures that election officials should follow in order to reconcile the number of ballots cast during an election with the number of voters marked off the checklist. Although election officials are not required to report their results pursuant to RSA 659:73 for town elections, the Moderator's Worksheet located on page 255 of the 2018-2019 Election Procedure Manual is a useful tool to assist moderators in helping to identify and resolve discrepancies on election night.

As the worksheet explains, in addition to reviewing the tape on the ballot counting device, you may also reconcile the number of voters marked on the checklist with an inventory of the Town's uncast and spoiled ballots. Subtracting these figures from the total number of ballots prepared by the Town should equal the total number of ballots cast and the number of voters marked off the checklist.

For future elections, it is imperative that the Town first reconciles the number of ballots cast with the number of voters on the marked checklist prior to announcing the results.

Absentee Ballots

In the course of our investigation, our office became aware that the town clerk issued copies of the absentee ballots after having run out of official ballots. Ms. Kohler stated that on March 12, 2018, the day before the town election, she ran out of official absentee ballots due to an unexpectedly high volume of requests. She admitted that she failed to endorse each absentee ballot copied before issuing them to approximately one-hundred and twenty-nine (129) voters.

The town clerk is responsible for preparing and issuing absentee ballot materials "in such quantities as [she] may deem necessary." RSA 669:27. New Hampshire law provides that "[i]f the supply of ballots shall become exhausted before the closing of the polls, it shall be the duty of the town or city clerk to cause unofficial ballots to be prepared as provided in RSA 658:35." RSA 659:24. The town clerk shall "cause unofficial ballots to be prepared, as far as possible, in form of the official ballots" (RSA 658:35) and the ballots must contain her "official endorsement" (RSA 659:24). In such circumstances, town election officials are directed to adhere to the following procedure:

Photocopies should be made of an unused official ballot. Each photocopy ballot should be authenticated by the clerk or designee by signing his or her name or initials prior to being issued to the voter, to distinguish any such unofficial ballots from fraudulently created ballots. RSA 659:24. Keep an accurate record of the number of unofficial ballots created and the number put into use as election day ballots.

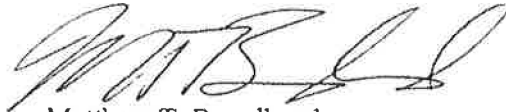
N.H. Election Procedure Manual, § X, p. 104 (2016-2017). This requirement permits election officials to distinguish between authentically issued ballots from fraudulently copied ballots.

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Based on the foregoing, we have concluded that Ms. Kohler's actions failed to adhere to the State's guidance as outlined in the NH Election Procedure Manual and that she failed to adhere to RSA 659:24 and RSA 658:35.

In light of our conclusion that the Town failed to correctly report the number of ballots cast pursuant to RSA 669:58 and failed to adhere to RSA 659:24 & RSA 658:35 by failing to endorse copied absentee ballots, it is hereby ordered to cease and desist any and all activities which violate these provisions in the future. Please be advised that continued failure to comply with our State's election laws may result in this office appointing an election monitor pursuant to RSA 659:77 or taking further enforcement action.

Sincerely,



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cc: William M. Gardner, Secretary of State
Kate Petrillo
Brian T. Grisct

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