

Reprinted with the permission of the NH Bar Journal and NH Bar Association

### The Role of the Moderator as an Election Official

By Charles F. Tucker, Esquire

It is the duty of the moderator, be it a town moderator in towns, a school district moderator, a village district moderator, a ward moderator in cities, or an assistant moderator in charge of a ward in towns with election districts, to ensure that the election process is fair and is conducted in accordance with State law<sup>i</sup>. There is remarkably little law on the matter in New Hampshire. This indicates either that the moderators have had little to do, or, that moderators have, in general, conducted themselves so appropriately that the New Hampshire Supreme Court has rarely been called upon to decide any issue relative to moderators, and that the Legislature has not seen fit to “fix” situations perceived as faulty by prescribing a number of additional rules.

Most of what the moderator does is routine and administrative - the signing of the receipt for the ballots, supervising the polling place, and the signing of the final tallies, for example.

But, there have been three areas in my experience as a moderator, which required me to exercise judgment in accordance with the law. They involved:

- (1) Electioneering
  - what does a moderator do when the wife of a United States Senator (the Senator being a candidate) and her entourage of aides and the press want to be photographed in the polling place?
- (2) Assisting Voters

- what does a moderator do when an elderly stroke victim wants assistance in voting because he does not know who any of the candidates are?

(3) Counting the Votes

- what does a moderator do when there is a close contest and a ballot which could decide the issue is not clearly marked?

Before addressing these questions, a brief review of the legal functions of the moderator is in order.

The State Constitution requires that elections be:

“... free and every inhabitant of the State of 18 years of age and upwards shall have an equal right to vote in any election. .... voting registration and polling places shall be easily accessible to all persons including disabled and elderly persons who are otherwise qualified to vote in the choice of any officer or officers to be elected or upon any question submitted at such election<sup>ii</sup>.”

RSA 40:1 provides for the election of moderators for two year terms in towns at the annual election in even numbered years, and in city wards at every other regular city election. Moderators in school districts are chosen in the same fashion as moderators for towns<sup>iii</sup> as do village district moderators<sup>iv</sup> and have all the powers and duties of moderators of towns. Moderators of cooperative school districts have one year terms<sup>v</sup> unless the district votes by ballot at the meeting to elect said moderator for two or three year terms.<sup>vi</sup>

Both town and city ward moderators are authorized to appoint assistant moderators<sup>vii</sup> as well as other election officials as deemed necessary. Assistant moderators take the oath of office and perform such duties and have such powers as the moderator may delegate to them, except the power of making the declaration of vote cast shall not be delegated to them.<sup>viii</sup> RSA 658:14 provides for the appointment of assistant moderators at additional polling places. Assistant moderators must have their domicile in the voting district covered by the additional polling place.

On the local level, the city or town clerks, the selectmen, city councils or their counterparts, and the supervisors of the checklist have far more to do, and far more rules to follow, in the conduct of an election than does the moderator. It is overly simplistic, but not entirely inaccurate, to say that the moderator shows up on the morning of the election, prior to the opening of the polls, stays most of the day (except and unless he appoints a moderator pro tem for a time when he is absent from the polling place to eat lunch or to tend to his horses), and remains after the close of the voting until the results of any elections which are determined by the district which the moderator supervises have been determined and announced by the moderator.<sup>ix</sup> Since a moderator cannot, by law, serve as a selectman, town treasurer, trustee of trust funds, collector of taxes, highway agent, or supervisor of the checklist, he/she is unlikely to have any other significant official interest in the election process.

The moderator has certain responsibilities prior to the opening of the polls, which include overseeing the counting of ballots received by the town before voting begins<sup>x</sup>, the receipt of absentee ballots<sup>xi</sup>, and the pasting of pasters on the ballots, if authorized by the Secretary of State<sup>xii</sup>.

During the course of the voting, the moderator has certain other administrative tasks such as announcing the time the absentee ballots will be opened and counted, personally checking the names of absentee ballot envelopes against the names on the checklist, and checking that all of the signatures match, and then casting the ballot in the ballot box<sup>xiii</sup>. The moderator must also write "CANCELED" on any spoiled ballot<sup>xiv</sup> and not "VOID" or "SPOILED" (as this moderator had done without incident for the decade prior his drafting of this article). During the course of the voting, the moderator has the obligation to accept the ballots from the voters and place them in the ballot box, voting machine, or optical scanning machine, as the case may be.

Once the voting is over, the moderator is responsible for confirming the checklist<sup>xv</sup> and signing of seals on the boxes of cast ballots, and in towns with voting machines, for signing the tallies from the voting machines<sup>xvi</sup>. (It should be noted that the New Hampshire Secretary of State promulgates certain forms and rules which are more

detailed than those in the statutes. Said details change from time to time, and are forwarded to the municipal clerks prior to elections, and are not to be ignored.)

The moderator is also charged with determining the need for additional election officials beyond the number which the statute would require<sup>xvii</sup> and additional voting booths beyond the number which the statute requires that the selectmen provide<sup>xviii</sup>. The moderator appoints the ballot clerks who hand out the ballots<sup>xix</sup> and also determines who may assist the illiterate and the physically disabled in voting<sup>xx</sup>.

Upon the completion of these tasks, absent a request for a recount of a local ballot question or election result, the moderator is done with his election duties until the next election.

The Moderator oversees the Presidential primary every four years in February (typically the most exciting of our elections), the annual town elections, the city elections whenever they occur, usually biannually, the biannual State primary in September, and the biannual general election in November.

The author, as moderator, has found that the most interesting part of the moderator's role to be the enforcer of what may be categorized as "the rules" to encourage, if not guarantee, fair elections.

#### (1) Electioneering

Electioneering is a perennial issue. The moderator is given the ability to restrict electioneering from an area ten feet in width from the public way to the door of the polling place. The Selectmen are in charge of arranging the polling place<sup>xxi</sup>. The Moderator is in charge of generally overseeing the conduct of voting<sup>xxii</sup>.

RSA 659:43 forbids the distribution of campaign materials, posters, cards, handouts, placards, pictures or circulars, which are intended to influence the actions of the voter, within the building where the election is being held. Nor may any person who is a candidate for an office, or who is representing or working for a candidate, distribute any campaign materials or perform any electioneering activities, or any activity with respect to the safety, welfare and rights of voters "within a corridor ten feet wide and extending a distance from the entrance door of the building as determined by the moderator where the election is being held."

Given the vociferous opinions of those running for office, or campaigning for or against an issue, that they ought to have an opportunity to make themselves obvious to the potential voters on the one hand, and the potential voters who do not like being harangued at the last minute, on the other, (and disputes are frequent) the author has tried to strike a balance over the years. The balance is effected in Exeter (where this author is moderator) by keeping the campaigners behind police barricades (sawhorses and ropes) lining both sides of the entrance of the polling place. This requires periodic visits (every half hour) to ask campaigners to remove themselves from the public sidewalk and put themselves back behind the barricades where they belong. The author has observed that the more important the public office being sought, the less the candidates believe in the need to stand behind the barricades, and the more insulted they are when directed to do so. The author has been generally successful at this with the one notable exception of the wife of a then United States Senator who swept into the polling place accompanied by her entourage. When told about how honored Exeter was with her presence, but she just could not be within the polling place, she graciously smiled, shook a few more hands, and departed.

## (2) Assisting Voters

For most citizens no problems arise. The citizen arrives, declares his/her name and address, is given a ballot, is conducted to a voting booth, votes, whether by pencil on paper or voting machine, leaves the voting booth, and gives the ballot to the moderator to deposit in the ballot box (be it a conventional wooden box with a slot in the top or a optical scanning machine or other machine) and leaves.

An interesting issue arises when a person is unable to vote by him/herself either due to a physical disability such as impaired vision, or due to a mental disability.

Persons whose vision is impaired are permitted to have join them in the voting booth an election official as designated by the moderator, or a person known to the vision impaired person who resides in the same voting district<sup>xxiii</sup>.

This latitude does not apply to those who are mentally impaired or who cannot read, in which case, only the moderator and election officials designated by the moderator may assist. Such an individual may request that one inspector of elections

from each party assist the individual, presumably to assure the integrity of the assisted vote.

The author has had occasion to assist an elderly person who requested assistance in voting and asked the moderator, "Who should I vote for?". The moderator replied, "I cannot give you any advice in that regard." The voter replied, "I don't know any of these people or what they stand for, somebody has to tell me how to vote." The moderator replied, "Well, there is no one who can help you do that in the voting booth at this point." The voter replied, "But I always vote, it's my civic duty." The author suggested that she not vote on any of the questions on this occasion and turn her ballot in unmarked, with advice that next year she figure it out before she came in and perhaps mark a sample ballot which she would be allowed to bring into the voting booth as a guide.

The author also has had occasion to have voters who are known to the moderator to have had a stroke or have a severe mental illness and although their physical abilities were present, their mental abilities were greatly diminished. In one case, the spouse of the voter wanted to assist the voter in voting. When under previous law the moderator said he could not do so, the husband said, "She won't know who to vote for because she does not have any sense about those things anymore. I need to tell her how to vote." The moderator observed to the husband that he then would essentially be voting twice and that would not be a good idea. The husband reluctantly agreed and so she cast no vote.

On the other hand, in theory, there could be persons who attempt to vote who should not be allowed to do so. Although the supervisors of the checklist are in charge of this decision<sup>xxiv</sup>, the moderator is often called upon to back them up or assist them in making a decision. Under RSA 659:27, a challenged voter must sign an affidavit, the form of which is established by statute, and give it to the moderator before his/her vote is cast. Without the affidavit, the vote cannot be cast, and the moderator, if he/she casts it, is guilty of a violation<sup>xxv</sup>.

The most interesting and tricky election day this moderator has dealt with was a Presidential primary in Exeter, which was one of three New Hampshire polling places

that ABC NEWS covered. ABC NEWS began its “Good Morning America” program at 7:00 E.S.T. with my gaveling opening the primary, and concluded the evening with Cokie Roberts doing election analysis live from the stage of the Exeter Town Hall. Working with the television technical crew and news media to enable them to provide desirable footage, while at the same time not violating State law, was a challenge and required some rearranging of the Town Hall to provide vantage points for the cameras and “visually” appropriate backdrops for the newscasters.

### (3) Counting the Votes

A moderator along with other election officials (and not the moderator alone) is required to rule on disputed ballots<sup>xxvi</sup>. Such a ballot is to be counted “in accordance with a majority vote of the election officials present and counting votes; provided that, if no alternative count receives a majority vote, the ballot shall be regarded as defective for that office as provided for in RSA 659:65.” That has happened very rarely in the author’s years of moderating largely because the Town of Exeter had used purely mechanical voting machines for several decades, and although a voter could make a mistake in pushing a lever, the votes, when tallied, were not capable of reinterpretation. The Town of Exeter has now converted to the optical scanning type ballot which, again, is read by a machine and either the voter marks the ballot correctly and the machine reads it, or the voter marks the ballot incorrectly and the machine ignores the vote. Now, the only ballots which are susceptible of interpretation are those the machine will not read at all, either because of the use of faint ink or the cutting of an absentee ballot to fit into a return envelope or some other similar reason.

The Town of Exeter has for decades used the three voting systems recommended by a Blue Ribbon panel appointed after the 2000 Florida fiasco, i.e. the old-fashioned, hand-marked paper ballot, the purely mechanical level action voting machine, and the optical scanning device which reads a marked paper ballot. There have been two occasions in the Exeter Region Cooperative School District where the vote was close enough that a hand recount was taken of questions on the ballots which had been previously read by the optical scanning machine. The results were within one tenth of one percent of being the same in both cases. On the other hand, the ballots

tallied by hand in one municipality, which does not (yet) use optical scanning machines, were found to have been ten percent off when recounted.

The most usual disputed vote is when there are candidates whose names are listed below one another, plus a blank line or lines for write-ins, and the “X” is placed in the box next to a write-in line, with no name written in. One argument is that the voter intended to vote for the last candidate whose name was printed on the list. The other argument is that the voter intended to vote for no one. The vote for “no one” carries the day.

In summary, this moderator thoroughly enjoys playing this role as a part of the democratic process and recommends it to others who want to do something to help keep the process strong.

Author: Charles F. Tucker, Partner in the firm of Donahue, Tucker & Ciandella of Exeter, New Hampshire, is Moderator for the Town of Exeter and Moderator of the Exeter Region Cooperative School District.

#### ENDNOTES:

- 
- i. School district moderators and village district moderators generally have few of the responsibilities discussed below, with the exception of certifying election results, since the town and city moderators conduct most aspects of the elections.
  - ii. Constitution of the State of New Hampshire, Part First, Bill of Rights, Article Eleven, Elections and Elective Franchises
  - iii. RSA 197:19
  - iv. RSA 670:2
  - v. RSA 671:11

- 
- vi. RSA 671:11-a
  - vii. RSA 658:7
  - viii. RSA 658:7
  - ix. RSA 659:82; RSA 659:70
  - x. RSA 658:31 and RSA 658:32
  - xi. RSA 657:23
  - xii. RSA 658:34
  - xiii. RSA 659:50
  - xiv. RSA 659:22
  - xv. RSA 659:56
  - xvi. RSA 659:59 et seq
  - xvii. RSA 658:2
  - xviii. RSA 658:9 II
  - xix. RSA 658:25
  - xx. RSA 658:25
  - xxi. RSA 658:9
  - xxii. RSA 659:9
  - xxiii. RSA 659:20
  
  - xxiv. RSA 654
  - xxv. RSA 659:31
  - xxvi. RSA 659:64