

ELECTION COMMISSIONERS OF THE CITY OF NEWTON

Recount of Ward Councilor – Ward 6 for the November 7, 2023 Election
in the City of Newton

Newton Free Library in the Druker Auditorium
330 Homer Street, Newton MA 02459
December 2, 2023 9:00 a.m.

Present: Jan Huffman, Nancy M. Levine, Marjorie Ann Butler, John P. McDermott (collectively, the “Commission”); also present Assistant City Clerk Carol Moore and Election Supervisor John Doyle; City Elections Staff and Recount Workers; Deputy City Solicitor Jonah Temple and Special Counsel Devan Braun of KP Law; Candidates and their attorneys (Dennis Newman, Esq. and Gerry McDonough, Esq.) and observers; and Police Officer.

Absent: None.

Opening and Procedures: At approximately 8:35 a.m., the parties go to the vault to remove the ballots and transport them to the recount area, including an attorney for each candidate, the Commission, the City Clerk and Elections Supervisor, City Counsel, and the Police Officer. No objections to the materials in the vault are made by either candidate. The Police Officer transports the ballots and other election materials for Ward 6 to the recount area.

At approximately 9:15 a.m., the Commission calls the meeting to order.

At approximately 9:16 a.m., the recount workers are sworn in.

Blocking Commences: Special Counsel explains the procedures for confirming the blocking of ballots. The seals on the ballot boxes are cut in the presence of the commissioners, candidates, and their counsel, and the ballots are distributed to the various tables of recount workers for counting into blocks of 10 and then into blocks of 50.

6-1: Seal # 0785725 and 0785891

6-1: Seal # 0785721 and 0785782

6-3: Seal # 0785740 and 0785853

6-4: Seal # 0785735 and 0785761

Candidates and their attorneys observe the process for blocking of ballots with the tally sheets for each block. Once the blocking is finalized, Special Counsel explains the procedure for the recounting. She explains that observers would be permitted to stand at each table but should give personal space to the recount workers and should not talk to the recount workers. Instead, they could raise their hands and object if there was an issue and the attorneys would come over to assist. The readers and recorders were to go slowly, with a pause between reading and

recording as this would be the opportunity for the observers to “protest” or “object.” If an objection was made, everyone would stop counting, the attorneys would come over and decide whether to challenge the ballot before the Commission and a protested ballot slip would be given to be filled out in place of the ballot. The legal standard being applied was whether the reader could ascertain with reasonable certainty the will of the voter (not what the machine would have done), and the vote would be recorded as such, unless there was an objection. The process for further protesting ballots before the Commission was also explained. Special Counsel affords an opportunity for questions from the recount workers, the candidates and their attorneys, observers, and the general public.

At this time, the checked-in observers are permitted to enter the recount area and take their positions next to the recount workers. Observers with disabilities were given the option to sit instead of stand.

Counting of Ballots: Thereafter, the recounting of the ballots begins.

Objection #1: Precinct 1, Block 8: Called as blank at the table; protested by counsel for Bixby.

Counsel for Bixby: The bubble is filled in with a little x through it. If you look at the rest of the ballot, there is a consistent pattern on it where the other ballots had x’s and then were circled in. It was clearly a vote for Bixby.

Counsel for Gordon: Argues that the voter intended to obliterate the prior marking to vote for Bixby and it should have been a blank.

Commission deliberates by stating that the voter put x’s on all the ballots next to candidates, and then went back to fill in the bubbles, so it should have been a vote for Bixby. Motion to record it as a vote for Bixby is approved by 4-0. The ballot was further protested by counsel for Gordon.

Objection #2: Precinct 3, Block 9: Called as vote for Bixby at the table; protested by counsel for Gordon.

Counsel for Gordon: The voter here intended to obliterate the vote that was cast for Bixby. If you look at every vote, it is different on the rest of the ballot, where just the circles were filled in. Here, there is a scribble next to Bixby, suggesting they had initially filled it in and then changed their mind and wanted to obliterate it.

Counsel for Bixby: We are looking at the intent of the voter and they come in all shapes and sizes and ages. This voter filled out the ballot for every race except one, and was very thoughtful about casting their vote, and should not be disenfranchised because the Bixby circle was filled out differently or more “exuberantly” than the others.

Commission deliberates by stating that the voter voted consistently by slate and on the ballot, but it does not buy the exuberance argument. The Commission voted to count it as a blank by a vote of 3-1 (Commissioner Butler would count it for Bixby). One would have recorded it as a vote for Bixby. The ballot was further protested by counsel for Bixby.

Objection #3: Precinct 3, Block 6: Called as vote for Bixby at the table; protested by counsel for Gordon.

Counsel for Gordon: This is similar to the last one, where there were x's for all the candidates, but here there was a scribble in the bubble next to Bixby.

Counsel for Bixby: If a voter does not circle the bubble and instead fills in an X, the machine will spit it out because it cannot read it. So the voter is informed that they need to fill in the circle to have it read by the machine. Here, the voter was likely given that chance and then filled out the bubble over the initial X. They did not turn the ballot over and do that for the rest but they clearly intended to vote for Bixby. Technology explains what happened here.

Commission deliberates for a long time. It could be viewed as a vote for Bixby because the X could indicate a vote for the candidate rather than an obliteration, but other commissioners think the X could be indicative of an obliteration. Where the Commission could not ascertain with reasonable certainty who the voter intended to vote for, there was a motion to record the vote as a blank by a vote of 3-1 (Commissioner Butler would count it for Bixby). One would have recorded it as a vote for Bixby. The ballot was further protested by counsel for Bixby.

Objection #4: Precinct 4, Block 10: Called as vote for Gordon the table; protested by counsel for Bixby.

Counsel for Bixby: This is similar to the previous ones that you deemed obliterations. I do not agree with that ruling, but to be consistent, this one similarly must be called as a blank because of the intent to obliterate the vote for Gordon.

Counsel for Gordon: This ballot is closer to the first, and not like the obliteration ballots.

Commission deliberates by stating that this is more like the first ballot. The voter filed it for Gordon and there was no indication of an obliteration like a scribble. The Chair notes that it does look different from the others because it is outside the oval. The Commission votes to record it as a vote for Gordon by a vote of 4-0. The ballot is further protested by counsel for Bixby.

Objection #5: Precinct 4, Block 6: Called as vote for Gordon at the table; protested by counsel for Bixby.

Counsel for Bixby: This is similar to the previous ones that you deemed obliterations. I do not agree with that ruling, but to be consistent, this one similarly must be called as a blank because of the intent to obliterate the vote for Gordon.

Counsel for Gordon: This is not an obliteration. The case law about X's suggests that this is not an obliteration but more of an exuberant voter.

Commission deliberates. The Chair states that the voter similarly went outside the ballot in two other instances. Commissioner Butler does not see it as an obliteration but that is

how she voted on the other ones as well. This one is further outside the lines but there is no indication of a scribble to make it an obliteration. The Commission moves to count it as a vote for Gordon by a vote of 4-0. The ballot is further protested by counsel for Bixby.

Objection #6: Precinct 4, Block 7: Called as vote for Bixby; protested by counsel for Gordon.

Counsel for Bixby: It is important to be consistent with past rulings and this is not an obliteration. The other votes are also not perfect and outside the lines, and we must use common sense.

Counsel for Gordon: This is an obliteration.

Commission deliberates by stating that this is clearly a vote for Bixby. There is no scribble or obliteration. The Commission moves to count it as a vote for Bixby by a vote of 4-0. The ballot is further protested by counsel for Gordon.

Objection #7: Precinct 4, Block 1: Called as vote for Gordon; protested by counsel for Bixby.

Counsel for Bixby: Voter new how to fill in circles evidently on the rest of the ballot, and here, only filled in a tiny dot or pen mark on the Gordon bubble, showing that voter did not intend to vote for Gordon.

Counsel for Gordon: Put a mark next to Gordon and intended to vote for Gordon, as there were similar markings on that side of the ballot.

Commission deliberates and notices that the one side of the ballot had consistent markings while the reverse side had consistent markings, even though the two sides were different. Chair suggests that voter filled in bubbles but forgot to turn it over and do the same on the other side, but marked who the voter intended to vote for. Commission agrees that the checked mark is next to Gordon. Commission moves to record it as a vote for Gordon by a vote of 4-0. The ballot is further protested by counsel for Bixby.

Objection #8: Precinct 4, Block 1: Called as blank; protested by counsel for Gordon.

Counsel for Gordon: Table called it as a blank because it appears to be an overvote where someone voted for Gordon and for a write-in. But the words "free Palestine" was written in the write-in candidate which is clearly not a candidate but a political statement. Not a case of a write-in ballot or overvote because there is no vote for two candidates.

Counsel for Bixby: Appears to take no position.

Commission carefully deliberates and notices that where voter could vote for 2, they did. They made political statements throughout the ballot but know where to vote when they wanted to. Whatever they put in the second category would be an overvote. But it is true that free Palestine is not a candidate for office. If it was a made-up name, it would have been counted as an overvote. 2 circles filled in is an overvote and thus a blank. But Commission ultimately agrees that this is different where the second vote is not a "candidate." Commission votes to record it as a vote for Gordon by a vote of 3-1

(Commissioner Levine would record it as an overvote/blank). The ballot was not further protested so it went back to the table and was not segregated for judicial review.

The recounting of ballots concludes.

Other election materials: Other election materials are presented to the Commission.

1. Ballots Rejected as Defective: The Elections Supervisor presents the AV and EV ballots rejected as defective, explaining that the first may have been erroneously rejected because of a clerical error in inputting information into the system when the voter erroneously returned a September ballot instead of a November ballot. The ballot is opened and affixed to the envelop, with the voter's name blocked out to preserve the secrecy of the ballot, but the ballot was not from November. Therefore, the Commission voted to affirm the reasoning of the Clerk's office to reject the ballot. The Commission also voted to affirm the reasoning of the clerk's office to rejected absentee and early voting ballots for the following reasons: spoiled ballot by mail because they voted in person; missing inner envelopes; ballots received late; ballots were returned to sender; and ballot was missing a signature. In each case, the Commission signed the back of the ballots or categories of ballots and gave a statement for the rejection.

In the case of one ballot, the Commission voted to accept the ballot because the voter had signed the ballot of a family member but then went in and crossed out the name, suggesting that she had just put her ballot in the wrong envelop and her vote should be counted because she properly signed it. The Elections Supervisor checked the check-in book to confirm that this voter did not vote in-person on election day and thus that they are not having the opportunity to cast the vote twice, and that was confirmed. The Commission voted to accept this ballot for Precinct 3 and it was recorded as a vote for Gordon and added to the final tally sheet as such.

Several of the AV/EV's rejected as defective are further protested and set aside in the envelope to be segregated for judicial review.

2. Provisional Ballots: The Elections Supervisor presents the two provisionals that were not counted and explains that they were rejected because, upon further research, neither person was a registered voter in Newton. The Commission votes to affirm the reasoning of the Clerk's office and signs a statement of the reasoning. Counsel for Gordon further protests this and the two provisionals are segregated for judicial review.
3. Other materials: Counsel for the candidates are then given an opportunity to review any other materials. Counsel for Gordon requests to look at the check-in books, tapes, and original tally sheets to confirm the discrepancy of approximately 15 ballots for Precinct 4. The Elections Supervisor explains that there was an issue in Precinct 4 whereby the warden counted the hand counts and the write-ins on the same tally sheet, as opposed to two different sheets, leading to inflated numbers even though there were not that many ballots cast. The tapes confirmed that there were not that many ballots cast.

Counsel goes through the check-in book which also confirms there were not that many voters, leading to the likely explanation that the numbers were in fact due to a clerical error and that the recount numbers of actual ballots cast were correct.

The total tally sheet is updated and the Commission reads the final recount results into the record, as well as signs a statement of the results. The Board certifies the results following the recount as follows:

	6-1	6-2	6-3	6-4	Total
Martha H. Bixby	209	282	411	422	1,324
Lisa Gordon	278	339	321	371	1,309
Write-Ins	1	0	0	0	1
Blanks	18	23	29	35	105
Total	506	644	761	828	2,739

At approximately 4:32 p.m., the Commission moved to adjourn the meeting; seconded; all in favor.

The ballot boxes are sealed, along with the protested ballots, ballots rejected as defective, and other protested material by the candidates and all boxes are transported in the presence of the Police Officer back to the vault along with the remaining election materials. Counsel for each candidate waived their right to be present for the transport of materials back to the vault. New seal numbers are as follows:

6-1: Seal # 0785817 and 0785818

6-1: Seal # 0785816 and 0785815

6-3: Seal # 0785814 and 0785813

6-4: Seal # 0785820 and 0785819