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RECOUNT OF VOTES — SECTION 4785-162 ET SEQ., G. C. — PETITIONER ENTITLED TO REFUND OF DEPOSIT MADE FOR EACH PRECINCT WHERE ERROR ESTABLISHED SUFFICIENT TO CHANGE RESULTS BY AT LEAST TWO PER CENT OF TOTAL VOTE CAST FOR OFFICE — TRUE WHETHER OR NOT CHANGE IN RELATIVE POSITION OF CANDIDATES FOR OFFICE EFFECTED.

SYLLABUS:

In a recount of votes conducted pursuant to the provisions of section 4785-162, et seq., General Code, the petitioner for such recount is entitled to a refund of the deposit made for each precinct in which he succeeds in establishing error sufficient to change the results by at least two per cent of the total vote cast for the office in question, regardless of whether or not a change in the relative position of the candidates for such office was effected.

Columbus, Ohio, July 22, 1944

Hon. Edward J. Hummel, Secretary of State

Columbus, Ohio

Dear Sir:

This will acknowledge receipt of your letter, wherein you state that the members of the Board of Elections of Summit County are unable to agree on the amount to be refunded to a candidate in the recent primary election who requested a recount of the votes cast in certain precincts in said county, that said members are evenly divided on the question and have therefore submitted the matter to you for your decision in accordance with the provisions of section 4785-13, General Code. My opinion relative thereto is requested by you.

Your letter sets forth the following facts: L.G.W., a Democratic candidate for the office of representative to Congress from the fourteenth district, applied for a recount of the votes cast for such office in forty precincts in Summit County. After the votes cast in eighteen of such forty precincts had been recounted, said L.G.W. requested that his

application for a recount of the remaining precincts be withdrawn. This request was granted by the board. Thereafter, when the board came on to consider the charge to be made for the recount of said eighteen precincts, a motion was made that a charge of five dollars per precinct for the eighteen precincts recounted, be made. The vote on said motion resulted in a two to two tie. Those members voting in support thereof contended that the results had not been changed within the meaning of the statute, and those opposing said motion were of the opinion that there was a two per cent. change in the results in some of the precincts recounted. Accompanying your letter is a tabulation of the votes cast for the office in question in each of the eighteen precincts, in both the official count and the recount.

The provisions of section 4785-13, General Code, to which you refer in your letter, read as follows:

“In all cases of a tie vote or a disagreement in the board, if no decision can be arrived at, the clerk shall submit the matter in controversy to the secretary of state, who shall summarily decide the question and his decision shall be final.”

In all cases of a recount of votes, the amount to be refunded to the petitioner is determined by statute. It is therefore difficult to perceive how the above provision has any application. The provisions of law governing the refund of a deposit for the recount of votes cast in any precinct are set out in section 4785-162 of the General Code, and read as follows:

“* * * If the petitioner or petitioners succeed in establishing error sufficient to change the results in any precinct by at least two per cent (2%) of the total vote cast for such office in such precinct, or by two per cent (2%) of the total vote cast for and against such issue in such precinct, then the deposit for such precinct shall be refunded.”

It will be noted that the above language expressly provides “then the deposit for such precinct shall be refunded”. In light of this mandatory provision, it is scarcely understandable how a board of elections by a vote can decide whether or not an applicant for a recount is entitled to a refund of his deposit or a portion thereof. If doubt exists in the minds of any of the board members as to the meaning of the statute, the matter should be submitted to the legal adviser of the board of elections.

The fact that the construction placed upon the language by two members of the board differed from that placed thereon by the other two members, certainly would not authorize the Secretary of State, under the presumed authority of section 4785-13, General Code, to determine how such language should be construed and then proceed to make a decision on the question which, according to the terms of said section, would be final.

In fixing the amount to be refunded from a deposit which was made in connection with an application for a recount of votes cast in certain precincts, the board of elections is clothed with no discretion. If the petitioner establishes error sufficient to change the results in any precinct by two per cent. or more of the total vote cast for the office involved, then he is entitled to a refund of the entire deposit for such precinct, regardless of any vote that may be taken by the board of elections or any decision made with respect thereto by the Secretary of State, and if the board of elections under such circumstances should refuse to make such refund; the petitioner could, in a proper action instituted therefor, recover the same.

Therefore, since the foregoing provisions of section 4785-13, General Code, have no application herein and a decision, if made by you under the presumed authority thereof, would have no legal force and effect, my opinion should not be regarded by you as authority for you to make a final decision on the question.

It will be noted that the terms of section 4785-162, above quoted, read:

“If the petitioner or petitioners succeed in establishing error sufficient to change the results in any precinct * * *.”

A definition of the word “result” appears in Webster’s New International Dictionary as follows: “something obtained, achieved, brought about, etc., by calculation, investigation, or the like”. By the application of such definition, it is clear that the “results” in a given precinct are the total votes cast for each of the candidates in such precinct. Therefore, if one or more of such totals is changed by a recount by at least two

per cent. of the total votes cast for the office in such precinct, the petitioner would be entitled to a refund of his deposit therefor.

In order to effect a change in the "results in any precinct", it is not necessary that the position of the person receiving the greatest number of votes in the official count be changed, nor is it necessary to bring about a change in the relative positions of the various candidates. If this had been intended by the General Assembly, appropriate language expressive of such intent might easily have been employed by that body.

In connection herewith, it is significant to note the language contained in the last sentence of section 4785-162. Said sentence reads:

"If sufficient error is established to change the result of the election, regardless of the error found in any precinct, then the deposit made for all precincts shall be refunded."

It will be observed that in said sentence a change in the "result of the election" is the basis for a refund of the entire deposit made. In order for a petitioner to receive a refund of his entire deposit (except where a two per cent. change is found in every precinct recounted), it is necessary for him to establish sufficient error to change the position of the candidate receiving the highest number of votes in the official count. This would be a change in the "result of the election". Since the General Assembly has not provided that such change is necessary in order to entitle a petitioner to a refund of the deposit made for a precinct, it would appear that in the instant case the petitioner is entitled to receive a refund of the deposit made for each precinct in which he succeeds in establishing error sufficient to change the results by at least two per cent. of the total vote cast for the office for which he was a candidate, regardless of whether or not a change in the relative positions of the candidates for such office was effected.

In the case submitted, the tabulation of votes in the official count and also the recount, a copy of which follows, discloses that the results in eleven of the eighteen precincts recounted were changed by at least two per cent. of the total vote cast for the office of representative to Congress in such eleven precincts.

		RECOUNT				OFFICIAL COUNT									
		Total				Total									
Ward	Pct.	WBH	AL	JHM	LGW	WBH	AL	JHM	LGW	WBH	AL	JHM	LGW		
1	CC	26	3	6	18	53	27	3	6	19	55	-1	same	same	-1
5	O	9	4	18	13	44	12	4	18	16	50	-3	same	same	-3
5	P	9	6	46	14	75	10	6	46	16	78	-1	same	same	-2
5	Q	14	4	62	21	101	14	4	64	19	101	same	same	-2	-2
5	T	18	5	44	7	74	18	5	44	7	74	same	same	same	same
9	A	16	3	19	10	48	15	3	20	11	49	+1	same	-1	-1
9	B	15	2	5	8	30	16	2	6	8	32	-1	same	-1	same
9	C	13	1	5	16	35	12	1	5	17	35	+1	same	same	-1
9	D	20	3	5	11	39	20	3	3	11	39	same	same	same	same
9	E	20	1	9	9	39	20	1	9	9	39	same	same	same	same
9	F	18	2	6	17	43	18	2	6	17	43	same	same	same	same
9	G	27	4	9	16	56	27	4	9	16	56	same	same	same	same
9	H	13	1	16	16	46	13	1	17	16	47	same	same	-1	same
9	I	22	5	11	21	59	22	6	12	21	61	same	-1	-1	same
9	J	23	6	8	18	35	23	6	8	18	55	same	same	same	same
9	K	5	1	5	7	18	5	1	5	7	18	same	same	same	same
9	L	15	2	3	11	31	16	2	4	11	33	-1	same	-1	same
9	M	14	0	9	24	47	14	0	9	23	46	same	same	same	+1

Taking the precincts in the order set out above, it will be noted that in Ward 1, Precinct CC two votes out of fifty-three were changed in the recount. Two fifty-thirds is, of course, more than two per cent. In Ward 5, Precinct O six votes in forty-four were changed, which reduced to percentage would be in excess of twelve per cent. In Ward 5, Precinct P three votes in seventy-five were changed, in Ward 5, Precinct Q four in one hundred and one were changed, in Ward 9, Precinct A three in forty-eight were changed, in Ward 9, Precinct B two in thirty were changed, in Ward 9, Precinct C two in thirty-five were changed, in Ward 9, Precinct H one in forty six was changed, in Ward 9, Precinct I two in fifty-nine were changed, in Ward 9, Precinct L two in thirty-one were changed, and in Ward 9, Precinct M one in forty-seven was changed.

All of the above changes are in excess of two per cent of the total votes cast for the office and consequently the petitioner is entitled to a refund of the entire deposit made by him for such precincts.

Respectfully,

THOMAS J. HERBERT

Attorney General