

**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

JOHN M. FORMELLA
ATTORNEY GENERAL



JANE E. YOUNG
DEPUTY ATTORNEY GENERAL

November 1, 2021

William Klein, Town Moderator
Sally Kellar, Town Clerk
Bedford Town Offices
24 North Amherst Road,
Bedford, NH 03110

Re: Response to October 28, 2021 Letter to Voters

Dear Moderator Klein and Clerk Kellar:

Our Office learned of your October 28 letter concerning uncounted absentee ballots through a media post on Saturday, October 30. We are concerned, in particular, by three statements in your letter: 1) that the Attorney General's Office instructed you not to tell anyone, including the Bedford Town Council, about the 190 uncounted absentee ballots; 2) that you made numerous attempts to obtain resolution from our Office; and 3) that our October 21 closure letter was essentially the first explanation from us as to the necessary remediation plan. These statements are inaccurate.

Our Office never instructed you not to tell anyone of the incident involving the 190 uncounted absentee ballots. We would not have issued such an instruction as it is at odds with our standard instruction to individuals involved in elections investigations. Instead, we informed you that our Office would not be making any public statements regarding Bedford and the two other towns with uncounted absentee ballots until we had investigated the matters and knew what had occurred. Additionally, while this investigation took longer than we would have preferred, every time Moderator Klein called our Office to discuss the status, he spoke with an attorney or investigator to receive a status update. And, a personal contact was made with Moderator Klein in mid-May by our Chief Investigator apologizing for the delay in the investigation, due in large part to the strain on Election Unit's resources. Finally, since early June, our Office has been in contact with Bedford election officials regarding possible remediation plans and investigative interviews. During those conversations, Bedford election officials raised concerns that they did not want to notify voters of the fact that their ballots were not counted. Our Office directed that such a notification was a requirement of any remediation plan.

A copy of our October 21, 2021 letter to Bedford election officials is attached. By way of a summary of our letter, on November 16, 2020, the Attorney General's Office was informed by the Secretary of State's Office that Bedford election officials reported that Bedford had located 190 absentee ballots that were not counted during the 2020 General Election. The Secretary of State's staff told Bedford election officials that they were going to inform the Attorney General's Office and asked Bedford election officials to secure the ballots and wait until they heard from the Attorney General's Office. Immediately, the Secretary of State's staff did an analysis of all races involving Bedford and determined that even if the 190 absentee ballots had been counted, they would not have changed the results in any race. Further, by the time that the Attorney General's Office was notified of this issue on November 16, under New Hampshire law the 190 absentee ballots could not have been cast and counted in the election totals.

On November 18, 2020, the Attorney General's staff spoke with Moderator Klein, on a preliminary basis, to determine what Bedford officials believed occurred. Moderator Klein explained that, while Bedford election officials did not know how it had happened, they believed that the 190 absentee ballot envelopes were set aside during the absentee ballot pre-processing and were boxed with the empty absentee ballot envelopes. The Bedford election officials had been alphabetizing absentee ballots to more easily process them through the checklist. During this process, they had been using tops of cardboard boxes to manage the ballots. The box tops held approximately 190 envelopes. The election officials believed that a box top of ballots was incorrectly put into a box for completed pre-processed absentee ballots. However, they could not confirm this, and they had so many new election workers during the 2020 General Election that they did not have any idea which election worker could have done this. The Attorney General's staff told Moderator Klein that the Attorney General's Office was opening an investigation into the matter and that the Office would not be making any public statements while it was investigating. However, the Attorney General's staff did not instruct Moderator Klein that he could not tell anyone about the issue. The Attorney General's staff also asked Moderator Klein to provide a list of individuals with their contact information who were involved in the processing of the absentee ballots. He provided that information on November 19, 2020.

During the winter and spring of 2021, the Attorney General's Election Unit was occupied with post-election issues, including following up on immediate allegations raised about election irregularities, including in Windham, which consumed a substantial amount of the Election Unit's resources. However, each time Moderator Klein contacted our Office regarding the Bedford matter, he spoke with either an attorney or an investigator who explained the status of the investigation. Additional discussions occurred with Moderator Klein in May during the Windham Audit. On June 4, Moderator Klein called the Attorney General's staff to talk about "an after action plan" to prevent this from happening again. Moderator Klein submitted his report with a proposed "after action plan," dated June 18, 2021.

The Attorney General's staff interviewed Bedford election officials in July 2021, and had follow-up conversations with Bedford election officials, during August and September, about the

need to provide notification to the 190 voters that their absentee ballots had not been counted during the 2020 General Election. Bedford election officials raised concerns with this notification and asked not to notify voters. When these discussions continued into August of 2021, the Attorney General's Office became concerned about the potential for voter confusion in the upcoming Special Election in Bedford on September 8, 2021. To avoid confusion, the Attorney's General's Office indicated it would send its investigation closure letter after the Special Election. However, the Attorney General's Office clearly directed that the voters must still be notified, and Bedford election officials were aware that such a directive would be issued in a closure letter after the Special Election. On October 21, 2021, the Attorney General issued its investigation closure letter which included the directive to notify voters. The letter was issued at that point in time as the Bedford Special Election, with its recount, was final and there would be little risk of confusion regarding which absentee ballots were not counted.

At no time did the Attorney General's Office direct the Bedford Election officials not to explain the situation with the 190 absentee ballots to the Town Council or any other person. Additionally, the Attorney General's Office managed this review, along with that of two other towns that did not count some absentee ballots, as resources allowed. Finally, as explained above, the timing of the closure letter was known by Bedford election officials in advance, was purposeful in order to avoid confusion with the September Special Election in Bedford, and was the culmination of multiple contacts with Bedford election officials during the summer of 2021.

Sincerely,



Anne M. Edwards
General Counsel

Enclosure
cc: William Gardner, Secretary of State

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JOHN M. FORMELLA
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JANE E. YOUNG
DEPUTY ATTORNEY GENERAL

October 21, 2021

Sally Kellar, Town Clerk
Town of Bedford
24 North Amherst Road
Bedford, NH 03110

William Klein, Town Moderator
Town of Bedford
24 North Amherst Road
Bedford, NH 03110

Re: Town of Bedford, Absentee Ballots (3241882)

Dear Clerk Kellar and Moderator Klein:

On November 16, 2020, this Office was notified by the Secretary of State's Office that you called to report that Bedford election officials discovered 190 uncast absentee ballots. In reviewing this matter, this Office concludes that these 190 absentee ballots would not have impacted the outcome of any of the races on the ballot in Bedford during the 2020 general election.

This year presented unprecedented challenges for election officials. We understand that you and your colleagues were under immense pressure to carry out Bedford's elections in a manner that closely resembled the election experience before the public health crisis, while also balancing compliance with protective public health measures. We are grateful to your service and commitment to the Bedford voters.

However, this situation must still be addressed, and is an opportunity to refine Bedford's processes to ensure that this does not occur again. In reviewing this matter, we spoke with Moderator Klein, Clerk Kellar, Deputy Town Clerk Gloria MacVane, and Assistant Town Moderator Brian Shaughnessy. We are also in receipt of and have reviewed your remediation plan dated July 15, 2021. The Secretary of State is copied on this letter, and a copy of this remediation plan will be forwarded to his attention.

In speaking with Bedford election officials, we understand the situation as follows: Following the November 2020 general election, Deputy Clerk MacVane was reconciling the number of ballots distributed with the number of ballots cast. During this process, she discovered that there was a difference of approximately 190 fewer ballots cast than the number distributed.

The amount of absentee ballots recorded received was 7,917. The total number of absentee ballots recorded cast was 7,727.

On November 8, 2020, Deputy Clerk MacVane attributed the cause of this discrepancy to a mistake made during the processing of absentee ballots on election day. That process was explained to this Office as follows:

Because of the challenges presented by the coronavirus pandemic, the Town utilized the partial processing (or preprocessing) session authorized by the Legislature. During the preprocessing session, the absentee ballots were arranged in alphabetical order. Once alphabetized, the outer envelope was opened, and the inner affidavit envelope was inspected to ensure that it had been properly signed. The absentee ballot remained sealed in the inner envelope. Next, the entire absentee ballot mailing (outer envelope, inner envelope, and absentee ballot) was matched with the corresponding absentee ballot request form. The mailing was then placed – again, alphabetically – into large plastic bins for storage and transport to the polling place on election day.

This Office was informed that on election day, Bedford election officials utilize two “areas” during absentee ballot processing. The absentee ballot mailing contained in the plastic bins were grouped together in batches of 150-200. These batches were then placed inside a paper box lid/tray, which was transported to the “final processing location.” In this first area, election officials took the first absentee envelope at front of the lid/tray, removed and opened the inner envelope, removed the absentee ballot contained inside, and placed the absentee ballot to the side of one of the processing election officials. The empty envelope and any other contents, aside from the absentee ballot, were returned to the lid/tray at the back of the batch. This process continued until the first, now empty, set of envelopes returned to the front of the lid/tray.

The absentee ballots removed during this process were taken to be cast in the dedicated absentee ballot counting device. The empty envelopes inside the lid/tray were taken to the second area or the “completed location,” where they awaited storage inside a storage box.

Deputy Clerk MacVane informed Chief Investigator Richard Tracy that likely, in the “final processing location,” an official inadvertently took a lid/tray of envelopes to the “completed location” without the absentee ballots inside having been removed and cast. She surmised that given the number of absentee ballots contained in each batch, it was possible the missing/uncast 190 absentee ballots may be found inside one of the storage boxes holding the empty absentee ballot envelopes. On November 8, 2020, she contacted Assistant Town Moderator Shaughnessy to inform him of the discrepancy, as well as her theory. She told Investigator Tracy that together, they contacted Clerk Kellar, and arranged to inspect the storage boxes containing the empty absentee ballot envelopes in an attempt to locate the 190 uncast absentee ballots.

On November 9, 2020, Clerk Kellar, Deputy Clerk MacVane, and Assistant Moderator Shaughnessy, went inside the Town’s vault where the absentee ballot envelope storage boxes were secured. The three officials found all 190 uncast absentee ballots, with the absentee ballots still sealed inside the inner envelope.

There is insufficient evidence to identify the specific election official who inadvertently took a lid/tray of unprocessed absentee ballots before they could be cast. There is similarly no evidence that a specific person or persons intended to withhold these absentee ballots on purpose. Furthermore, after reviewing the results of the 2020 November election in Bedford, no election was won by a margin of 190 or fewer votes. Consequently, this error was not outcome determinative.

Based on the forgoing, the Bedford election officials must:

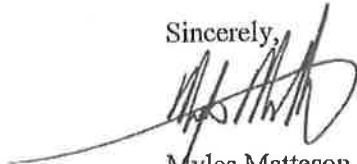
1. Contact the 190 voters whose absentee ballots were not counted and explain what happened to their ballot on election day; and
2. Provide this Office with a written remediation plan on tracking cast versus uncast absentee ballots on Election Day, and include any other measures to ensure all properly submitted absentee ballots are counted.

With respect to the second item, and as mentioned above, this Office is in receipt of the Town's remediation plan dated July 15, 2021. The plan is acceptable to this Office and will be forwarded to the Secretary of State's Office.

This matter will be closed upon confirmation from the Town of Bedford that all 190 voters whose absentee ballots were not cast, have been contacted and informed of the situation.

Please feel free to contact me if you have any questions.

Sincerely,



Myles Matteson
Deputy General Counsel
Attorney General's Office
(603) 271-3650

cc: William M. Gardner, Secretary of State