

STATE OF MINNESOTA
IN SUPREME COURT
A08-2169

OFFICE OF
APPELLATE COURTS

DEC 16 2008

FILED

Norm Coleman, et al.,
Petitioners,

vs.

**RESPONSE OF THE HENNEPIN
COUNTY CANVASSING BOARD**

Mark Ritchie, Minnesota Secretary of
State, The Minnesota State Canvassing
Board, Isanti County Canvassing Board, et
al.,
Respondents.

TO: CLERK OF THE APPELLATE COURTS; JAMES K. LANGDON, FREDERIC W. KNAAK, and TONY TRIMBLE, ATTORNEYS FOR NORM COLEMAN; DAVID L. LILLEHAUG and WILLIAM Z. PENTELOVITCH, ATTORNEYS FOR AL FRANKEN; MARK RITCHIE, MINNESOTA SECRETARY OF STATE; STATE OF MINNESOTA CANVASSING BOARD; ISANTI COUNTY CANVASSING BOARD; SCOTT COUNTY ELECTIONS BOARD; and LORI SWANSON, MINNESOTA ATTORNEY GENERAL

In a filing with this Court on December 15, 2008, Petitioners seek a temporary restraining order directed to the Hennepin County Canvassing Board (hereafter HCCB). In accordance with this Court's Order of December 15, 2008, the HCCB submits this response. Although the HCCB takes no position on the Petition or on the restraining order Petitioner seeks, the HCCB files this response hoping to assist the Court by (a) explaining to the Court how the HCCB intends to proceed under Minnesota Statutes section 204C.39 (the obvious errors statute) absent contrary direction from this Court; and (b) setting out the timeline under which the HCCB intends to proceed absent further direction from this Court.

1. BACKGROUND—ELECTION ADMINISTRATION IN HENNEPIN COUNTY.

The Hennepin County Canvassing Board, like other County Canvassing Boards throughout Minnesota, is charged with performing tasks largely set out in chapter 204C of Minnesota Statutes. Election administration in Hennepin County may, however, be somewhat unique for two reasons. First, the Hennepin County canvas encompasses the largest number of votes of any other county canvassing board in Minnesota. There were 665,496 ballots cast in Hennepin County. 85,740 of those were cast via absentee ballot. Second, pursuant to statutes and rules not directly relevant to this proceeding, Hennepin County has delegated its authority to conduct elections in the County to each of the 45 municipalities in the County plus an additional entity with authority over the Fort Snelling Precinct. Election officials in each of the municipalities employ election judges and actually run the elections. The absentee ballot materials at issue in this proceeding have been (as per usual practice) retained by the municipalities. With the exception of a very small number of overseas ballots retained by Hennepin County, review of rejected absentee ballots is a task that falls upon the municipalities.

Due to the size of the electorate in Hennepin County and the relatively decentralized nature of elections administration in Hennepin County, it is a more complex task for the HCCB to timely respond to any order or guidance this Court may issue.

**2. HCCB Proceedings Under Minnesota Statutes Section 204C.39
(The Obvious Errors Statute).**

On Friday December 12, 2008, the Minnesota State Canvassing Board met and, among other things, recommended to county canvassing boards that they utilize authority outlined in a Minnesota Attorney General's opinion the Board received, to sort rejected absentee ballots into five piles. The first four piles were to correlate to the four statutory bases for rejecting an absentee ballot detailed in Minn. Stat. §203B.12 subd. 2. The fifth pile was to contain rejected absentee ballots for which none of the four statutory reasons for rejection applied. The opinion the Board received cited Minnesota Statutes section 204C.39 as providing county canvassing boards with authority to consider the so-called "fifth pile" ballots as obvious errors.

On Monday, December 15, 2008, the HCCB met and adopted the attached resolution. The resolution requests the municipalities to undertake the sorting process and to forward to the HCCB information relating to absentee ballots the municipalities believe were rejected in error. The resolution seeks the information by the close of business on Wednesday, December 17. The resolution also indicates the HCCB plans to meet at 4:00 p.m. on Thursday, December 18, 2008, for the purpose of determining, per Minnesota Statutes section 204C.39, whether an obvious error has been made. Finally, the resolution indicates the HCCB's intent to notify the Coleman and Franken campaigns of any decision of the HCCB

that an obvious error has occurred.¹ Absent contrary direction from this Court, the HCCB will proceed according to the resolution.

3. Timeline.

The Minnesota State Canvassing Board has set December 19, 2008 as the date when it will meet to certify a result in the United States Senate race. The HCCB has adopted a set of deadlines designed to allow it to notify the campaigns of any findings of error in advance of the December 19, 2008, State Canvassing Board meeting.

A number of municipalities in Hennepin County have already completed the sorting process. Others had not started as of the evening of December 15, 2008.² The HCCB is requesting municipalities to forward information relating to absentee ballots the municipalities believe were rejected in error by the close of business on Wednesday, December 17. The HCCB will review information submitted by municipalities on the evening of December 18, 2008, and will notify the campaigns of any findings of error as soon as possible. Given the State Canvassing Board's December 19 deadline, the time available to the campaigns and to the district court (if an action under 204C.39 is filed) to act upon such notification will be limited.

Paragraph 3 of this Court's Order of December 15, 2008 requests the Secretary of State to inform the Court "of the final date by which an original

¹ Pursuant to Minnesota Statutes section 204C.39 subdivision 1, either campaign may bring an action in district court seeking to have the county canvas amended to correct any error the HCCB might identify.

² The attached resolution was delivered to each of the municipalities on the morning of December 16, 2008.

certificate of election must be delivered to the secretary of the United States Senate for the person elected on November 4 to take office.” As matters currently stand, however, the State Canvassing Board’s December 19 date is one the HCCB must work to meet.

If the Court is going to order relief on the Petition, the HCCB asks that it consider the practical implications of that relief on the HCCB and other county canvassing boards. The HCCB is attempting to ensure that it has sufficient time to determine if there were any obvious errors with respect to improperly rejected absentee ballots and have time for the process outlined in Minn. Stat. 204C.39 to be completed and an amended return filed with the State Canvassing Board prior to the State Canvassing Board’s certification of results.

DATED: December 16, 2008

Respectfully submitted,

MICHAEL O. FREEMAN
Hennepin County Attorney

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ATTORNEYS FOR HENNEPIN
COUNTY CANVASSING BOARD

DEC 16 2008

FILED

HENNEPIN COUNTY CANVASSING BOARD

Resolution A

WHEREAS, on November 18, 2008, the Minnesota State Canvassing Board met and determined that the results of the election for United States Senate was within .5% between the top two candidates and ordered a automatic statewide recount.

WHEREAS, on November 26, 2008, the Minnesota State Canvassing Board met and discussed a proposal that local election officials review all rejected absentee ballots and determine the number that were not rejected for any of the four reasons outlined in Minn. Stat. § 203B.12, subd. 2.

WHEREAS, on December 1, 2008, the Minnesota Secretary of State's Office requested all county and city election officials sort rejected absentee ballots into five piles, corresponding with the four reasons outlined in Minn. Stat. § 203B.12, subd. 2, and a fifth pile that contained absentee ballots for which there was no statutory basis for rejecting the absentee ballot, based on available records, including the voter roster (the "Fifth Pile").

WHEREAS, as of December 12, 2008, the Minnesota Secretary of State has indicated that municipalities within Hennepin County have reported more than 250 absentee ballots in the Fifth Pile.

WHEREAS, on December 12, 2008, the Minnesota Attorney General provided an opinion to the Minnesota State Canvassing Board which included the following:

- "There is no doubt that voters who have complied with all legal requirements, but whose ballots were improperly rejected, should have their votes counted."
- "[I]t is our opinion . . . that a reviewing court would likely uphold a determination by the State Canvassing Board to accept amended reports from county canvassing boards that include absentee ballots of voters who complied with all legal requirements but whose votes were improperly rejected by election officials due to administrative error."

WHEREAS, on December 12, 2008, the Minnesota State Canvassing Board met and discussed evidence regarding improperly rejected absentee ballots and the Minnesota Attorney General's opinion and unanimously requested that County Canvassing Boards meet to determine whether errors were made in the rejection of some absentee ballots and if so to open and count these erroneously rejected absentee ballots and report amended returns including the results for the United States Senate from these ballots.

WHEREAS, in Hennepin County local municipalities conduct elections and these municipalities have possession of all rejected absentee ballots.

WHEREAS, a petition was filed on December 13, 2008 in the Minnesota Supreme Court on behalf of the Coleman campaign, which names the Minnesota Secretary of State, the Minnesota State Canvassing Board, and Itasca County Canvassing Board (as representative of all county canvassing boards) requesting an order preventing county canvassing boards from opening and counting erroneously rejected absentee ballots.

WHEREAS, the petition and communications from the Coleman campaign asserts that the process recommended by the Minnesota State Canvassing Board will result in eighty-seven different counties applying different standards and will result in the loss of evidence likely to be of extreme importance in an election contest.

WHEREAS, the Coleman campaign filed a motion on December 15, 2008, for an emergency temporary restraining order or temporary injunction seeking to enjoin the Hennepin County Canvassing Board from opening envelopes, counting ballots, and preparing and submitting amended election returns.

THEREFORE,

BE IT RESOLVED, that the Hennepin County Canvassing Board requests all municipalities within Hennepin County review all rejected absentee ballots and sort them into five piles pursuant to the December 1, 2008 request from the Minnesota Secretary of State.

BE IT FURTHER RESOLVED, that Hennepin County Canvassing Board requests municipalities provide the Hennepin County Auditor with written information on all improperly rejected absentee ballots placed in the Fifth Pile, including the basis for the determination that the rejection was improper, on or before close of business on Wednesday, December 17, 2008.

BE IT FURTHER RESOLVED, that the Hennepin County Canvassing Board requests municipalities who do not have any ballots in the Fifth Pile send a letter to the Hennepin County Auditor prior to close of business on Wednesday, December 17, 2008, indicating that there are no improperly rejected ballots.

BE IT FURTHER RESOLVED, that the Hennepin County Canvassing Board directs the Hennepin County Attorneys Office to file a response to the temporary injunction indicating the Board's intent to comply with any order from the Supreme Court and further providing the Court with information related to the time the Board will need to complete its obvious error review.

BE IT FURTHER RESOLVED, that the Hennepin County Canvassing Board will review this information at a meeting on Thursday, December 18 at 4:00 p.m., and determine whether election judges made obvious errors and proceed under Minn. Stat. § 204C.39 by notifying the candidates of this decision.

Dated: December 15, 2008.

December 16, 2008

Fredrick K. Kittner
Supreme Administrator
Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155-1500

Dear Mr. Gittner:

Attached find an electronic version of the response of the Hennepin County
Canvassing Board. The response is being e-mailed to the following (list)

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An original and eight copies will be filed with the Court by mail. Service by mail will follow.

Parties wishing to deliver documents to the Hennepin County Canvassing Board by electronic means should forward them to the following e-mail addresses:

Pat.Diamond@co.hennepin.mn.us

Dan.Rogan@co.hennepin.mn.us

Sincerely,

/s/ Patrick C. Diamond
PATRICK C. DIAMOND
DEPUTY COUNTY ATTORNEY

STATE OF MINNESOTA)
) SS.
COUNTY OF HENNEPIN)

AFFIDAVIT OF SERVICE

Teresa Christensen, being first duly sworn on oath, deposes and says:

That on the 16th day of December, 2008, she served the annexed Response of the Hennepin County Canvassing Board on each of the following by mailing to each of them one (1) copy thereof, enclosed in an envelope, postage prepaid, and by depositing the same in the United States Mail in Minneapolis, MN, directed to them at their last known addresses, as follows:

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(Attorneys for Hennepin County Canvassing Board)

/s/Teresa Christensen
Teresa Christensen

Subscribed and sworn to before me this
16th day of December, 2008.

Notary Public