

STATE OF MINNESOTA

IN SUPREME COURT

Court File No. A08-2169

OFFICE OF
APPELLATE COURTS

DEC 16 2008

FILED

Cullen Sheehan, Norm Coleman, et al.,

Petitioners,

v.

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

Respondents.

**STATE RESPONDENTS'
MEMORANDUM
IN RESPONSE TO
AMENDED PETITION
FOR AN ORDER TO SHOW CAUSE
PURSUANT TO
MINN. STAT. § 204B.44**

INTRODUCTION

Respondents Mark Ritchie, in his official capacity as Secretary of State of the State of Minnesota, and the Minnesota State Canvassing Board (hereinafter collectively “the State Respondents”) submit the following Memorandum in Response to Petitioners’ Amended Petition For An Order To Show Cause Pursuant to Minn. Stat. §204B.44 (hereinafter “Amended Petition”).

FACTS

On November 4, 2008 a general election was held for the United States Senate seat in Minnesota.

The State Canvassing Board.

The State Canvassing Board is established under Article VII, Section 8 of the Minnesota Constitution, which provides:

The returns of every election for officeholders elected statewide shall be made to the secretary of state who shall call to his assistance two or more of the judges of the supreme court and two disinterested judges of the district courts. They shall constitute a board of canvassers to canvass the returns and declare the result within three days after the canvass.

A similar provision establishing the State Canvassing Board is found in Minn. Stat. § 204C.31, subd. 2 (2008).

Minnesota law provides that the State Canvassing Board shall meet at the Secretary of State's Office on the second Tuesday following the state general election the Board meets to canvass the certified copies of the county canvassing board reports received from the county auditors pursuant to Minn. Stat. § 204C.33, subd. 1 and prepare a report that, among other things, lists the number of votes received by each of the candidates, specifying the counties in which they were cast. Minn. Stat. § 204C.33, subd. 3 (2008).

Section 204C.35, subd. 1(b) (2008) provides for an automatic manual recount in statewide general elections when the difference between the votes of a candidate who would otherwise be declared elected to a statewide federal office and the votes of any other candidate for that office is less than one-half of one percent of the total number of votes counted for that office.

On November 18, 2008 the members of the State Canvassing Board met to certify the results of the various elections held on November 4, 2008. Because the difference in

votes between U.S. Senate candidates Norm Coleman and Al Franken was less than one-half of one percent, a manual automatic recount was ordered. *See* Minn. Stat. § 204C.35, subd. 1(b).

Rejected Absentee Ballots.

Thereafter, candidate Al Franken requested the State Canvassing Board to require that rejected absentee ballots be included as part of the recount. At a November 26, 2008 meeting, the State Canvassing Board passed a unanimous resolution rejecting candidate Franken’s request that absentee ballots rejected for one of four reasons set forth in the Minnesota statutes be included as part of the recount.

Chapter 203B of the Minnesota Statutes sets forth laws applicable to voting by absentee ballot in Minnesota. Minn. Stat. § 203B.12, subd. 2 (2008) provides that two or more election judges shall examine each absentee ballot return envelope and mark it accepted or rejected in the manner provided in that subdivision. The election judges shall mark the return envelope “accepted” if they or a majority of them are satisfied that:

(1) the voter’s name and address on the return envelope are the same as the information provided on the absentee ballot application;

(2) the voter’s signature on the return envelope is the genuine signature of the individual who made the application for ballots and the certificate has been completed as prescribed in the directions for casting an absentee ballot, except that if a person other than the voter applied for the absentee ballot under applicable Minnesota Rules, the signature is not required to match;

(3) the voter is registered and eligible to vote in the precinct or has included a properly completed voter registration application in the return envelope; and

(4) the voter has not already voted at that election, either in person or by absentee ballot.

Section 203B.12, subd. 2 further provides that “[t]here is no other reason for rejecting an absentee ballot” and that “[i]n particular, failure to place the ballot within the security envelope before placing it in the outer white envelope is not a reason to reject an absentee ballot.”

The procedures and forms for absentee ballots submitted by members of the armed forces under the Uniform Overseas Citizens Absentee Voting Act (“UOCAVA”) are slightly different, *see, e.g.* Minn. Stat. §§ 203B.16-203B.27 (2008), but the four statutory bases for rejection of UOCAVA ballots set forth in Minn. Stat. § 203B.24, subd. 1 (2008) are similar to those set forth in section 203B.12. Section 203B.24, subd. 1 states that an absentee ballot cast pursuant to sections 203B.16 to 203B.27 may only be rejected for the lack of one of the four statutory requirements set forth in that statute.

Attached to the Affidavit of Gary Poser, Director of Elections for the Office of the Minnesota Secretary of State, are samples of absentee ballot envelopes that illustrate the format and location of the envelope material that would be reviewed to determine whether an absentee ballot had been rejected improperly, as well as other materials that would be utilized to make this determination, such as the absentee ballot application.

On December 1, 2008 the Office of the Secretary of State requested all county and city election officials to place all rejected absentee ballot envelopes into one of five piles based on the following reasons for their rejection:

1. The voter's name and address on the return envelope are not the same as the information provided on the absentee ballot application (i.e., ballots rejected pursuant to clause (1) of Minn. Stat. § 203B.12, subd.).
2. The voter's signature on the return envelope is not the genuine signature of the individual who made the application for the ballot and a signature is required under applicable Minnesota law, or the certificate has not been completed as prescribed in the directions for casting an absentee ballot (i.e., ballots rejected pursuant to clause (2) of section 203B.12, subd. 2).
3. The voter was not registered and eligible to vote in the precinct or as not included a properly completed voter registration application (i.e., ballots rejected pursuant to clause (3) of section 203B.12, subd. 2).
4. The voter has already voted at the election, either in person or by absentee ballot (i.e., ballots rejected pursuant to clause (4) of section 203B.12, subd. 2).
5. The election judge cannot determine any statutory basis for rejecting the absentee ballot, based on the available records, including the voter roster (i.e., the so-called "Fifth Pile").

At its meeting on December 12, 2008, the State Canvassing Board determined that it lacked authority to order county election officials to reconvene and sort any rejected absentee ballots. The State Canvassing Board did, however, determine that county canvassing boards could reconvene, sort any rejected absentee ballots, and identify those that had been improperly rejected due to obvious errors. To that end, the State Canvassing Board unanimously passed the following resolution:

The State Canvassing Board recommends that county canvassing boards that have not already done so reconvene and separate allegedly wrongfully rejected absentee ballots into five categories, the first four categories being

the reasons for reasons for rejection set forth in Minnesota Statutes 203B.12 and 203B.24, the fifth category being those that are not included in any of the four categories for rejection.

A draft of the minutes of the December 12, 2008 State Canvassing Board meeting is attached to the Affidavit of Catherine Mohn, Executive Assistant to the Secretary of State. The discussion of the issue that resulted in the unanimous passage of the above resolution is contained at pages 7-13 of the draft minutes. The members of the canvassing board expressed the expectation that the county canvassing boards would proceed to correct obvious errors identified in the sorting process. *Id.*

The petition in this matter was filed under Minn. Stat. 204B.44, entitled “Errors and Omissions; Remedy.” The statute provides that any individual may file a petition for the correction of “any wrongful act, omission, or error of any election judge, municipal clerk, county auditor, canvassing board or any of its members, the Secretary of State, or any other individual charged with any duty concerning an election.” The statute further provides that the court may “...order the officer, board or individual charged with the error, omission or wrongful act to correct the error or wrongful act...”

The Petitioners seek the following relief from the following parties:

1. *That the Court order county election officials to take no additional action relating to rejected absentee ballots until further order of the court.* The State Respondents do not represent county election officials and do not have authority to act on their behalf.

2. *That the Court direct counties, county canvassing boards, the Secretary of State, and the State Canvassing Board that no rejected absentee ballots be counted in the*

administrative recount. The State Respondents do not themselves “count” rejected absentee ballots as part of either the administrative recount or the canvassing process. Rather they rely upon and tabulate the results set forth in the canvassing reports and/or amended canvassing reports submitted by county officials. The State Respondents do not represent county election officials and do not have authority to act on their behalf.

3. *That the Court order all rejected absentee ballot envelopes, and the corresponding ballots therein, be preserved and kept segregated.* The State Respondents do not have custody of any rejected absentee ballot envelopes or ballots contained therein. These documents are under the custody and control of county election officials. The State Respondents do not represent county election officials and do not have authority to act on their behalf.

4. *In the alternative, to the extent the Court directs any county canvassing board to open and count any previously-rejected absentee ballots, that representatives of each campaign be permitted to participate in the counting process and that evidence be preserved for an election contest.* The State Respondents do not have custody or control over the rejected absentee ballots, and any opening and counting process will be conducted at the local level. The State Respondents do not represent county election officials and do not have authority to act on their behalf.

ARGUMENT

As noted above, the statutes are clear in setting forth the reasons that an absentee ballot may be rejected. *See* Minn. Stat. §§ 203B.12, subd. 2 and 203B.24, subd. 4 (UOCAVA ballots). Indeed, section 203B.12, subd. 2 states that “[t]here is no other

reason for rejecting an absentee ballot.” A similar provision applicable to UOCAVA ballots is found in section 203B.24, subd. 1. Election officials at the local level make the determination as to whether an absentee ballot is accepted or rejected under these statutes.

Minn. Stat. § 204C.39 (2008) allows a county canvassing board, or a district court upon application of a candidate, to determine that local election judges have made an obvious error and order the correction of a county canvassing report.

Other than noting that there should be no unreasonable delay, section 204C.39 does not specify any time period within which such corrections must be made. In *Anderson v. Donovan*, 119 N.W.2d 1 (Minn. 1962), the Minnesota Supreme Court allowed county canvassing boards under a prior version of section 204C.39 to amend and resubmit their certified reports to the Secretary of State after the initial reports were submitted but before the results of the election were finalized. The court described the purpose of the prior version of section 204C.39 as “to permit correction at the county level of obvious errors committed by the precinct judges in order to avoid the necessity of an election contest where possible.” *Andersen*, 119 N.W.2d at 5 (footnote omitted).

The *Andersen* case involved the 1962 gubernatorial election. Based on the initial election results by all Minnesota county canvassing boards, Karl F. Rolvaag led by 58 votes. Ten counties thereafter amended their election results to correct errors discovered by county election officials. In one county, 31 absentee ballots that were personally delivered to the election judges were originally not counted. The county board, upon reconvening, considered these ballots and counted them. The ten county canvassing

boards then certified the results of their recanvassing efforts to the secretary of state. The recanvassed vote resulted in a 142 vote margin for Elmer L. Andersen. Candidate Andersen filed a petition with the Minnesota Supreme Court seeking to compel the State Canvassing Board to accept the amended returns as part of their tabulations. The issue before the court, was whether the ten counties could, under a predecessor to the current law now contained at section 204C.39, amend their certified results based on errors in their initial reports.

The court noted that the action by the counties in submitting amended reports “in all probability” was not timely under the applicable statutes but nevertheless ordered that the amended tallies be accepted:

It would have been better if the parties interested had proceeded under § 203.38 [predecessor statute to section 204B.44 authorizing court petition to correct errors], but, keeping in mind that the object of all elections ought to be to declare elected the candidate who receives the most legal votes, it should follow that the method of arriving at the correct result, *after it is in fact accomplished*, should not be permitted to control so as to declare the loser to have won the election. To do so would be to permit the outcome of an election to rest on admitted mistake rather than on known fact.

Andersen, 119 N.W.2d at 10-11 (emphasis added).

The December 12 resolution of the State Canvassing Board is consistent with and supported by Minnesota law. *See Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 729 (Minn. 2003) (“Our review must be informed by the recognition that ‘[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.’”); *In re Application of Andersen v. Donovan*,

119 N.W.2d 1, 8 (Minn. 1962) (election laws intended “to safeguard the right of the people to express their preference in a free election”); *Contest of Sch. Dist. Election Held on May 17, 1988 v. Gross*, 431 N.W.2d 911, 915 (Minn. Ct. App. 1988) (stating that “purpose and intent behind absentee voting legislation is the preservation of the enfranchisement of qualified voters”); *Dougherty v. Holm*, 44 N.W.2d 83, 85 (Minn. 1950) (“Election laws should be liberally construed so as to secure to the people their right freely to express their choice.”).

The State Canvassing Board is currently meeting to consider the candidates’ challenges to ballots based on the intent of the voter. At the December 12 State Canvassing Board meeting, Secretary Ritchie indicated that the goal of the State Canvassing Board was to have the recount process completed by December 19, 2008.

Under the U.S. Constitution, the term of a United States Senator is six years. U.S. Const. Amend. XVII. The term expires at noon on the 3rd day of January. U.S. Const. Amend. XX, section 1. Minn. Stat. § 204C.35, subd. 1(c) provides that “[t]he results of the recount must be certified by the canvassing board as soon as possible.” Section 204C.40, subd. 1 provides that “[i]n an election for United States senator, the governor shall prepare an original certificate of election, countersigned by the secretary of state, and deliver it to the secretary of the United States Senate.” That section further provides that “[i]f a recount is undertaken by a canvassing board pursuant to section 204C.35, no certificate of election shall be prepared or delivered until after the recount is completed.

In case of a contest, the court may invalidate and revoke the certificate as provided in chapter 209.”¹

Dated: December 16, 2008

Respectfully Submitted,

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AG: #2357457-v1

¹ Section 204C.35, subd. 1(d) provides that the “[t]ime for notice of a contest for an office which is recounted pursuant to this section shall begin to run upon certification of the results of the recount by the canvassing board.” Section 209.021, subd. 1 provides that notice of an election contest must be filed within seven days after the canvass is completed in the case of a general election.