

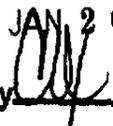
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FILED  
Court Administrator

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

JAN 20 2009  
By  Deputy

SECOND JUDICIAL DISTRICT

In the Matter of the Contest of General Election held on November 4, 2008 for the purpose of electing a United States Senator from the State of Minnesota,

File No. 62-CV-09-56

**MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENA**

Cullen Sheehan and Norm Coleman,

Contestants,

v.

Al Franken,

Contestee.

The undersigned submits this Memorandum in Support of the Motion to Quash the Subpoena to Gary Poser dated January 15, 2009.

**FACTS AND BACKGROUND**

As the Court is well aware, the outcome of the November 4, 2008 election for the Office of United States Senator as determined by the Minnesota State Canvassing Board (hereinafter "the Board") on November 18, 2008 was extremely close, which triggered an automatic recount of all ballots cast pursuant to Minn. Stat. § 204C.35 (2008). At its November 18, 2008 meeting the Board also adopted a recount plan which, *inter alia* designated Gary Poser as the State Recount Official. See copy attached.

During the course of that recount several issues arose, including the propriety of counting absentee ballots that had allegedly been wrongfully rejected, and thus not counted in the original

canvas, as well as the counting of “original” damaged ballots where no identified duplicate could be located.

Those issues were brought before the Minnesota Supreme Court pursuant to Minn. Stat. § 204B.44 (2008), and were resolved by the Court in decisions rendered on December 18 and 24, 2008 and January 5, 2009. Those decisions addressed the issues raised in the context of an administrative recount conducted pursuant to Minn. Stat. § 203C.35 (2008), but expressly withheld judgment upon their ultimate resolution as might more properly be considered in an election contest. *See, Coleman v. Ritchie*, Minn. S. Ct. No. A08-216, Order filed December 18, 2008 at p4, Order filed January 5, 2009 at pp 3-4; *Coleman v. Minnesota State Canvassing Board*, Minn. S. Ct. No. A08-2206, order filed December 24, 2008, at pp 4-5.

Acting in accordance with those Supreme Court decisions, and conforming procedures developed with substantial input from all parties, the recount was completed, and the Board issued its Certificate and Report on January 5, 2009. *See* Notice of Contest, Exhibit A.

On January 6, 2009 the Contestants filed the instant election contest pursuant to Minn. Stat. § 209.021 (2008) upon several grounds. Neither the State Canvassing Board, the Secretary of State, nor Mr. Poser is a party to the proceeding and are not listed as appropriate parties in Minn. Stat. Ch. 209.<sup>1</sup>

On Friday, January 16, 2009, a copy of the attached Subpoena directed to Gary Poser was delivered to the Office of the Attorney General. Mr. Poser was apparently out of his office on Friday and to the best of counsel’s knowledge has not been served as required by Minn. R. Civ. P. 45.02.

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<sup>1</sup> Pursuant to Minn. Stat. § 209.021, subd. 3, the Secretary of State is a “contestee” only when the challenge relates to a proposed constitutional amendment or other question voted upon in more than one county.

## ARGUMENT

The subpoena should be quashed because it has not been properly served, it fails to allow reasonable time for compliance and subjects a public official to an undue and unnecessary burden.

In general, parties to a pending case may obtain discovery of any unprivileged information that is relevant to issues in the case, or calculated to lead to the discovery of relevant evidence, from parties and non-parties alike by several means, including depositions. Minn. R. Civ. P. 26.01, 26.02 and 26.45. However, in appropriate circumstances the court also has wide discretion to deny or limit discovery to protect a party or other person from unnecessary annoyance, embarrassment, undue burden or expense. *See* Minn. R. Civ. P. 26.03; 45.03; *Erickson v. MacArthur*, 414 N.W.2d 406 (Minn. 1987); *WDSI v. County of Steele*, 672 N.W.2d 617 (Minn. Ct. App. 2003).

Such measures are particularly appropriate in circumstances where the proposed discovery involves matters outside the scope of a legitimate cause of action and, in particular attempts to delve inappropriately into the mental processes of administrative decision-makers. *See, e.g., O'Connor Bros. State Bank of Renville v. Lecy*, 304 N.W.2d 894 (Minn. 1981); *Mampel v. Eastern Heights State Bank of St. Paul*, 254 N.W.2d 375 (Minn. 1977).

To the extent that it deals specifically with determinations made by recount officials on the Board in the course of the now-concluded senate recount, the information sought by the Contestants in connection with the subpoena has no apparent relevance to the separate election contest pending in this Court. The recount itself has been completed, and the results certified by the State Canvassing Board. Furthermore, questions concerning issues such as the counting of rejected absentee ballots and damaged "original" ballots in connection with the recount have

been resolved by the Minnesota Supreme Court. Those determinations are, therefore, *res judicata* and beyond question here.

As noted above, however, those decisions concerning the narrow scope of the administrative recount did not affect consideration of the same issues in the broader context of the current chapter 209 election *contest* which is a *de novo* action in which the court will consider all issues raised without regard to how they were addressed, or not addressed, at the administrative recount level. Consequently any effort by the Contestants to probe the decision-making processes of recount officials or the Canvassing Board itself are simply irrelevant to the present election contest.

Furthermore, even in circumstances where a court has jurisdiction to directly review an administration agency's decision:

[d]iscovery of the mental processes by which an administrative decision is made generally is not proper. *United States v. Morgan*, 313 U.S. 409, 61 S.Ct. 999, 85 L.Ed. 1429 (1941). This is not to say that discovery is absolutely prohibited in proceedings for judicial review of agency decisions. Discovery may be permitted by the district court upon procedural matters if the discovery is appropriately limited. Persons seeking review may make inquiry through discovery to determine whether the agency adhered to statutorily defined procedures or the rules and regulations promulgated by the agency itself which enter into the fundamental decision-making process. . . .

Because of the narrow scope of discovery presently permitted, we have concluded that the most appropriate method by which such discovery should be accomplished is through depositions of witnesses upon written questions as allowed under Rule 31, Rules of Civil Procedure.

*Mampel v. Eastern Heights State Bank of St. Paul*, 254 N.W.2d 375, 378 (Minn. 1977).

Again, in *Ellingson & Associates, Inc. v. Keefe*, 396 N.W.2d 694, 696-97 (Minn. Ct. App. 1986) Review Denied (Jan. 21, 1987). The court affirmed that:

*Mampel* and subsequent cases demonstrate an exception to the general principle of wide-ranging discovery. Inquiry of administrative executives is limited to written query. See *Application of Lecy*, 304 N.W.2d 894, 900 (Minn. 1981) (discovery regarding Commerce Commissioner limited to written interrogatories);

*People for Environmental Enlightenment and Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council*, 266 N.W.2d 858, 873 (Minn. 1978) (reaffirming *Mampel* and holding Minnesota Environmental Quality Council members could only be required to answer written interrogatories).

[P]ublic policy requires that the time and energies of public officials be conserved for the public's business to as great an extent as may be consistent with the ends of justice in particular cases. Considering the volume of litigation to which the government is a party, a failure to place reasonable limits upon private litigants' access to responsible governmental officials as source of routine pre-trial discovery would result in a severe disruption \*697 of the government's primary function.

*Community Federal Savings & Loan v. Federal Home Loan Bank*, 96 F.R.D. 619, 621 (D.D.C.1983).

The concerns expressed in *Mample* and *Ellingson* apply with even greater force in this case where neither Mr. Poser, nor the Office of Secretary of State is a party and the proceeding will be conducted *de novo*. Consequently unless the Contestants can demonstrate a particular necessity therefor, Mr. Poser should not be subjected to discovery concerning the decision-making processes of his division, the Office of Secretary of State or the State Canvassing Board.

Finally, even if Mr. Poser were properly subject to deposition in this matter he has apparently not been properly served and even the attempted service did not allow a reasonable time for preparations and compliance.

**CONCLUSION**

For the foregoing reasons, the court should Quash the subpoena directed to Mr. Gary Poser and order that no discovery be had against Mr. Poser or any members of the Office of the Secretary of State absent a showing of specific necessity therefore.

Dated: January 19, 2009

Respectfully submitted,

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ATTORNEYS FOR GARY POSER

# SECRETARY OF STATE RECOUNT PLAN November 18, 2008

## Recount Scope

The votes cast at the November 4, 2008 State General Election for the office of United States Senate for Norm Coleman and Al Franken in all the counties of Minnesota.

The votes cast at the November 4, 2008 State General Election for the office of State Senate, District 16 for Lisa A. Fobbe and Alison Krueger in Benton, Mille Lacs, Morrison and Sherburne Counties.

The votes cast at the November 4, 2008 State General Election for the office of State Representative, District 12B for Al Doty and Mike Lemieur in Morrison and Crow Wing Counties.

The votes cast at the November 4, 2008 State General Election for the office of State Representative, District 16A for Gail Kulick Jackson and Sondra Erickson in Benton, Mille Lacs, Morrison and Sherburne Counties.

The recount is limited in scope to the determination of the number of votes validly cast for the candidates to be recounted. Only the ballots cast in the election and the summary statements certified by the election judges may be considered in the recount process.

## State Recount Official

Gary Poser, Director of Elections, Office of the Minnesota Secretary of State is hereby designated State Recount Official.

## Designated Recount Officials

The State Recount Official will designate officials to perform a recount of all ballots cast for United States Senate, Senate District 16 and House Districts 12B and 16A. See the attached schedule for the individuals designated as Recount Officials and for the number of teams of Table Officials at each recount location.

## Recount Schedule

Deputy Recount Officials are authorized to commence recounting the ballots at any time after 8 a.m., Wednesday, November 19, 2008 pursuant to the authority of the Deputy Recount Officials as described in the Recount Procedures.

The recount official may alter the schedule if a recount location becomes unavailable, or if in the opinion of the recount official the change is necessary to permit the recount to proceed promptly and efficiently. The change must not unnecessarily delay the progress of the overall recount. If a change is necessary the following applies:

- a) A change to time or location must be clearly posted in the office of the recount official and at the originally scheduled location.
- b) The recount official must immediately notify the State Recount Official of the change.

## Recount Process

The recount shall be open to the public.

The recount shall proceed according to *Minnesota Statutes* §204C.35 and *Minnesota Rules Chapter* 8235, and to the Recount Procedures attached to this Plan and adopted by the State Canvassing Board.

In jurisdictions with multiple recounts under this plan, challenged ballots shall be returned to the ballots for the precinct in which the ballots were cast in order for the ballot to be counted in any subsequent recount. After the last recount in that jurisdiction, ballots challenged in any of the multiple races shall be sealed in envelopes noting each of the races in which the ballot is challenged.

Deputy Recount Officials will print use the recount summary statement as provided by the State Recount Official. A template of the recount summary statement is attached to this Plan.

All county and local election officials are hereby directed to provide the sealed election materials, including voted ballots and precinct summary statements from the 2008 state general election to the recount official designated for that jurisdiction.

The Deputy Recount Officials shall forward in a secure manner directed by the State Recount Official, the completed recount summary statement, the incident log, and all challenged ballots to the State Recount Official, who shall secure the challenged ballots, compile the results and prepare the recount report for the State Canvassing Board.

## Meeting of the State Canvassing Board

The State Canvassing Board will meet to resolve the disposition of the challenged ballots and to canvass the results of the recounts on December 16, 2008 at Saint Paul, Minnesota at 9 AM.

**The meeting will continue until the reports of the recounts authorized in this plan are completed and may recess from time to time.**