

Metzger, Lyle

OFFICE OF
APPELLATE COURTS

From: Weinblatt & Gaylord, PLC [Kris@weglaw.com]

AUG 15 2006

Sent: Tuesday, August 15, 2006 4:35 PM

To: Reedy, Bev; Metzger, Lyle

FILED

Subject: Reiter v. Kiffmeyer Case No. A06-1508

Attachments: Aaron Affidavit.doc; Supplemental Memorandum in Support of Petition.doc

August 15, 2006

HAND DELIVERED AND VIA ELECTRONIC MAIL (bev.reedy@courts.state.mn.us;
lyle.metzger@courts.state.mn.us)

Frederick K. Grittner
Clerk of Appellate Courts
Bev Reedy, Deputy Clerk of Courts
Lyle Metzger
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155-6102

Re: Louis H. Reiter v. Mary Kiffmeyer, individually and as Secretary of State of
Minnesota
Case No. A06-1508

Mr. Grittner:

Enclosed herewith for filing in connection with the above matter please find the following documents:

1. Supplemental Memorandum of Law in Support of Petition for an Order to Show Cause Pursuant to Minn. Stat. §204B.44;
2. Affidavit of Aaron Street;
3. Affidavit of Kerry Greeley (hand delivered only);
4. Affidavit of Service of Gil Gutnecht (hand delivered only); and
5. Affidavit of Service of Gregory Mikkelson (hand delivered only).

ALAN W. WEINBLATT
FOR
WEINBLATT & GAYLORD, PLC

AWW:rk
Encl.
cc: Louis H. Reiter

8/15/2006

STATE OF MINNESOTA

IN SUPREME COURT

Court File No. A06-1508

Louis H. Reiter,

Petitioner,

vs.

Mary Kiffmeyer, individually and as
Secretary of State of Minnesota

Respondent.

**AFFIDAVIT OF
AARON
STREET**

1. I am an attorney licensed to practice in the State of Minnesota and employed at the law firm of Petitioner's counsel of record.
2. I have examined the Combined Nominating Petition and Petition in Place of Filing Fee for Partisan Office ("Petition") filed on July 18, 2006 by Michael Cavlan, a Green Party candidate for the office of United States Senate.
3. Mr. Cavlan's Petition included over 2,000 signatures, all of which were purportedly signed between July 4, 2006 and July 18, 2006.
4. Staff of the Minnesota Secretary of State stated to me on two occasions that Gil Gutknecht was the only major party candidate in 2006 to file a petition in place of filing fee with the Office of the Secretary of State. These statements are confirmed by the attached press release from Gil Gutknecht.
5. Pursuant to Minnesota Statutes §204B.07, subd. 5 and §204B.11, subd. 2, I obtained copies of the attached sample petition form from the Office of the Secretary of State.
6. Pursuant to Minnesota Statute §204B.10, subd. 2, I obtained a copy of the attached petition filed by Gil Gutknecht on July 5, 2006.

Further Affiant sayeth not.

Date: August 15, 2006

Aaron C. Street

Subscribed and sworn to before me
this ____ day of August, 2006.

Notary Public

STATE OF MINNESOTA
IN SUPREME COURT

Court File No. A06-1508

Louis H. Reiter,

Petitioner,

vs.

Mary Kiffmeyer, individually and as
Secretary of State of Minnesota
Respondent.
Gil Gutnecht, Intervenor

**SUPPLEMENTAL
MEMORANDUM OF LAW IN
SUPPORT OF PETITION FOR
ORDER PURSUANT TO
MINN. STAT. §204B.44**

I INTRODUCTION

This Supplemental Memorandum of Law and the accompanying Affidavits of Aaron Street and Kerry Greeley are submitted pursuant to the Court's Order dated August 11, 2006 and are made in anticipation of potential issues that may be raised by Respondent Kiffmeyer and Intervenor Gutknecht¹.

II Timeliness of Petition

Petitioner timely filed his Petition for an Order to Show Cause. Under the judicially created laches doctrine, a petitioner may not unreasonably delay asserting a known right so as to

¹ Petitioner's counsel received today notice of request to intervene by attorneys representing Gil Gutknecht. Because Petitioner does not object to the Intervention, it is assumed that an Order allowing intervention shall be granted.

demonstrably prejudice another. Lundquist v. Leonard, 652 N.W.2d 33, 36 (Minn. 2002); Piepho v. Bruns, 652 N.W.2d 40, 43 (Minn. 2002); Fetsch v. Holm, 236 Minn. 158, 163-64, 52 N.W.2d 113, 115-16 (1952). The question in a laches analysis is whether or not specific persons will be demonstrably prejudiced by any delay. Elsen v. State Farmers Mutual Ins. Co., 219 Minn. 315, 321, 17 N.W.2d 652, 656 (1945).

Respondent Kiffmeyer will not be prejudiced if the Petition to Show Cause is granted. She has ample time to print corrected ballots for the September 12, 2006 primary election. In Studer v. Kiffmeyer, 712 N.W.2d 552 (Minn. 2006), the record showed that several county auditor respondents submitted affidavits stating that only eight days were needed to prepare new ballots for a special election. Additionally, this court has previously ruled that an affirmative order can still be made no later than two weeks before the primary election. Moe v. Alsop, 288 Minn. 323, 331, 180 N.W.2d 255, 260 (1970). This court has ample time and opportunity to hear and determine any contested issues of law², have appropriate briefs submitted and give “adequate judicial consideration” to Petitioner’s case. Moe, 288 Minn at 331, 180 N.W.2d at 260. Respondent Kiffmeyer can secure corrected ballots in ample time. See e.g. Erlandson v. Kiffmeyer, 659 N.W.2d 724 (2004).

In Moe v. Alsop, 288 Minn. 323, 180 N.W.2d 255 (1970), the petitioner sought to keep Gladys Swanson off the ballot for Legislative District 64A for failure to meet Minnesota’s constitutional residency requirement, 288 Minn at 325, 180 N.W. at 257. This Court ordered respondents to show cause by August 24, 1970 Id. The primary election was to be held on September 15, 1970 Id. This court made the order to show cause absolute, holding: “An application for an order preventing the placement of a candidate’s name upon an election ballot for any office must be timely made and clearly established.” 288 Minn. at 330-31, 180 N.W.2d at 260. Citing what was then Minnesota Statutes § 203.34, this court held: “An affirmative order of this court must ordinarily be made not later than 2 weeks before the primary election so that the auditor may discharge his duty....” Id.

² Petition does not believe that a Special Referee need be appointed because there are no disputed issues of fact.

Gil Gutknecht will not be prejudiced. He is a veteran campaigner who knows the law pertaining to filing for public office. Gutknecht had ample opportunity to review the law regarding Nominating Petitions in Lieu of Filing Fee. He apparently thought about avoiding paying a filing fee when he began securing signatures for his Nominating Petition in Lieu of Filing Fee. That was prior to February 7, 2006, nearly five months before the filing period for the September 12, 2006 primary election even opened. See Affidavit of Avinash Viswanathan.

Gutknecht filed his Nominating Petition on July 5, 2006. He then had an additional thirteen days to discover his mistake before the filing period closed on July 18, 2006. During that period, Gutknecht was fully able to discover the deficiencies in his Nominating Petition in Lieu of filing fee. This was not the first time He has filed a Nominating Petition in Lieu of Filing Fee. He has done so since the first time that he was a candidate for election to the United States House of Representatives. See Affidavit of Aaron Street. Gutknecht knew the law and intentionally took the chance that his Nominating Petition in Lieu of Filing Fee might be infirm. Having taken that chance, he should not now be allowed to raise an argument that no one has challenged the legality of his gimmickry until now. As Justice Holmes once observed: “It may be assumed that he intended not to break the law but only to get as near to the line as he could, which he had a right to do, but if the conduct described crossed the line, the fact that he desired to keep within it will not help him.” Horning v. District of Columbia, 254 U.S. 135, 137. 41 S.Ct. 53,65 L.Ed. 185 (1920).

When Candidate Gutnecht chose to have his Nominating Petition in Lieu of Filing Fee signed prior to the opening of the statutory filing period he did so apparently based upon his own interpretation of the bounds of the law. He should not now be able to ask this Court to alter the course of that boundary to comport with the risk that he took in drawing his own line. Cf. In the Matter of the Election of Ryan, 303 N.W.2d 462, 467 (1981)

In Lundquist v. Leonard, 652 N.W.2d 33 (Minn. 2002), this court, pursuant to a Petition to Show Cause, examined whether Margaret Tilley, a candidate in Legislative District 38A, fulfilled the Minnesota’s constitutional residency requirement. Tilley made a motion to dismiss on the grounds of untimeliness. Id. at 36. This court applied the rule of Fetsch v. Holm, 236 Minn. 158, 163, 52 N.W.2d 113, 115 (1952) that “in the election context we ask whether the petitioner has

so unreasonably delayed asserting a known right as to prejudice others.” Lundquist, 652 N.W.2d at 36. This court denied Tilley’s motion because it was unclear when the petitioner learned that there was a question regarding Tilley’s residency. Id. This court held that, in the absence of any facts proving petitioner’s knowledge, the court could not conclude the “petitioner failed to assert a *known* right within a reasonable period.” Id. (emphasis provided).

Piepho v. Bruns, 652 N.W.2d 40 (Minn. 2002), was a companion case to Lundquist, *supra*. The Piepho Petition to Show Cause was filed one day after the Lundquist petition. The Piepho petition raised similar issues of residency of candidate John Hottinger. Hottinger made a motion to quash the order to show cause on the basis that it was untimely. As in Lundquist, this court, adopted the rule set forth in Fetsch v. Holm, 236 Minn. at 163, 52 N.W.2d at 115. Again, the court held that the record did not disclose when the petitioner became aware of the issue of Hottinger’s residency. And once again, the court denied Hottinger’s motion.

Fetsch v. Holm, 236 Minn. 158, 52 N.W.2d 113 (1952) is particularly instructive. This Court addressed the issue of laches in an election context. The petitioner claimed there were deficiencies in a Presidential Primary nominating petition. Petitioner argued that a nominating petition for Dwight D. Eisenhower was fatally defective and that Eisenhower’s name should not be placed on the ballot for the Republican presidential primary. This Court held that Eisenhower’s petition was fatally flawed because it lacked the statutorily required oath and notarization. Id.

In Fetsch, the intervener claimed the petition should be denied because of laches. This court adopted the laches rule set forth in Elsen v. State Farmers Mutual Ins. Co., 219 Minn. 315, 17 N.W.2d 652:

the practical question... is whether there has been such an unreasonable delay in asserting a known right, resulting in prejudice to others, as would make it inequitable to grant the relief prayed for.

Eisenhower’s nominating petition was filed on February 1, 1952. Filings closed on February 15, 1952. Petitioner filed his objection on February 26, 1952. The intervener claimed that petition should be denied because the nominating petition was subject to public inspection after it was

filed on February 1, 1952 and that if petitioner had examined the nominating petition prior to the close of filings, intervener could have remedied the deficiencies. This Court rejected intervener's arguments, writing:

There is nothing in the record to show when [petitioner] discovered [the defects].... Furthermore, the fatal defect to which we have called attention was patent, and intervener was in as good a position to discover it as petitioner. Nothing was done by petitioner to mislead intervener.

The Court also rejected the argument that the petition should be denied because petitioner could have warned intervener prior to the close of filing and the deficiencies could have been remedied. The Court concluded:

The status of the petition became fixed on [the day filings closed]. The fatal defect could not be removed. There was nothing which petitioner thereafter could have done to place intervener and her associates in a position which was worse than that they were already in. There is nothing in the instant case to show that there has been such an unreasonable delay by petitioner of a known right as to prejudice intervener and the others and to make it inequitable to grant the relief prayed for. Id

Likewise, in the case at bar, once July 18 came and went, without Gutnecht's payment of the filing fee, his case was sealed. There was nothing more that could have been done to save the validity of his Nominating Petition in Lieu of Filing Fee.

Because Petitioner has not knowingly sat on his rights, because no one is prejudiced and because there are no factual issues requiring investigation, the Petition is timely.

III APPLICATION

A. Not Far Reaching Consequences

A ruling in the Petitioner's favor will have no far reaching consequences. Respondent Kiffmeyer has acknowledged that, "I don't know of any major party candidate for United States Congress in recent memory who has filed by petition in lieu of filing fee" ("Gutknecht: The People's Choice." Gil Gutknecht Press Release, July 5, 2006). Additionally, the Office of the Secretary of State has made assurances that Respondent Gutknecht is the only candidate to file a Nominating Petition in Lieu of Filing Fee with her office. (Affidavit of Aaron Street). Based on this information, removal of Respondent Gutknecht from the primary ballot would have no repercussions for any other known candidates.

B. Frustration of Policy Rationale

There is no logical policy rationale for allowing an open-ended signature collection period for Nominating Petitions in Lieu of Filing Fee. If candidates are allowed to collect signatures without any beginning time restriction, candidates will have an incentive to collect signatures months or years in advance of an election. Candidates may also turn in the precisely bare minimum number of signatures at each filing, while saving excess signatures for the next election, thus reducing the likelihood of over paying a filing fee. This open-ended collection interpretation would encourage all candidates to adopt Respondent Gutknecht's gimmick, thus frustrating the clear intent of the statute, which is a preference for the collection of filing fees. The state's policy preference is clearly indicated by the fact that all other major party candidates in the State of Minnesota pay the filing fee.

C. Petition Sample Form

1. Reference to 204B.07

Minnesota Statutes §204B.07, subd. 5 and §204B.11, subd. 2 each authorize the Secretary of State to make sample forms for petitions available. Pursuant to these statutes, Respondent Kiffmeyer has promulgated a sample Nominating Petition in Lieu of Filing Fee (Exhibit ?). This sample petition makes explicit reference to its authorizing authority by citing on the lower right-hand corner "M.S. 204B.11 subd 2., M.S. 204B.07, M.R. 8205.1010" (Exhibit ?).

Respondent Gutknecht used this sample form as the basis of his Nominating Petition in Lieu of Filing Fee (Exhibit ?). By referencing §204B.07 as a source for this petition, Respondent Kiffmeyer implicitly acknowledges that the statutory requirements for a Nominating Petition are applicable to a Petition in Place of Filing Fee. Respondent Kiffmeyer further acknowledges this by referencing Respondent Gutknecht’s “Nominating Petition in Lieu of Filing Fee” in her receipt of the petition (Exhibit A). It is clear by the actions of Respondent Kiffmeyer both through her Receipt for Petition and through her promulgation of the Sample Form, that she acknowledged the statutory requirements for §204B.07 were applicable to petitions filed under §204B.11, subd. 2.

2. Space for Signature Date

Respondent Kiffmeyer’s Sample Form includes a space for the date of signature for all petition signers, as required under Rule 8205.1010. (Exhibit ?) Rule 8205.1010 requires that all petition signers include the date of their signature. This Administrative Rule requirement is meant to comply with the §204B.08, subd. 1 requirement that all petition signatures are collected during the filing period. An Administrative Rule requiring that all petitions include the date of signature indicates that the date of signature plays a role in meeting the requirements of those petitions. There is no other logical purpose to require the date of signature on a Nominating Petition in Lieu of Filing Fee other than that this date plays some role in the validity of the signature for purposes of filing. Therefore, the signature date requirement further indicates that signatures for all petitions are collected within a generally-applicable petition signature collection period, namely, the filing period.

IV EQUAL PROTECTION – BUSH v. GORE

It is undisputed that minor party candidates must have their petitions signed and filed during the 14 day filing period window Minn Stat. §204B.03. If Respondents argue that Minn. Stat. §204B.11 should be read as not including §204B.08 subd 1, that argument should be rejected on Equal Protection grounds. Bush v. Gore 531 US 98 (2002) admonishes that the electorate must not be treated disparately in the interpretation of state election law. In Bush the Florida recount statutes were found unconstitutional because of the absence of specific statutory standards to

insure their equal application in determining “voter intent”. In this case there is a baseless double standard. Every minor party must secure its signatures within the filing period. No other major party candidates attempt to avoid paying a filing fee. Only Mr. Gutknecht gets special treatment.

For the reasons set forth in his initial Memorandum petitioner submit that the only reasonable interpretation of Minn Stat §204B.08 subd 1 and 204B.11 subd 2 is that the former applies to the latter. If there are two possible interpretations of this question, this Court should not choose the one that creates an Equal Protection issue. If the Order sought by Petitioner is granted only one person will be affected. If it is denied on the ground that the clear requirement of Minn. Stat. § 204B.08 subd. 11 does not apply to Mr. Gutnecht, Equal Protection of Law will have been denied. Bush v. Gore, supra. See also Affidavit of Kerry Greeley showing Respondent Kiffmeyer application of § 204B. 08 subd. 1 to a congressional candidate other than Respondent Gutnecht.

Finally, it is strongly urged that the specific disparate treatment that would result from a ruling that the requirement of § 204B.08 subd. 1 does not apply to a major party candidate involves a particularly suspect subject, i.e. money. Poor Mr. Gutnecht is allowed to avoid the \$300 filing fee with four months old petitions while other citizens who desire to file under minor party candidate must do so only with fresh current signatures. Simply put, there is no rational basis under any standard of review, for such disparate treatment regarding a filing fee. See Earlandson v. Kiffmeyer, 659 N.W. 2d 724, 733 (Minn. 2003)

Respectfully Submitted,

August __, 2006

Alan W. Weinblatt, Atty. Reg. No. 115332
Luke M. Kuhl, Atty. Reg. No. 0337316
WEINBLATT & GAYLORD, PLC
Suite 300 Kellogg Square
111 East Kellogg Boulevard
St. Paul, Minnesota 55101
Telephone: (651) 292-8770
Fax: (651) 223-8282

ATTORNEYS FOR PETITIONER

MINNESOTA PETITION IN PLACE OF FILING FEE

We, the undersigned eligible voters, residing in the election district for the office set forth below, understand that it is intended that this petition be presented in place of the filing fee otherwise required by law by _____ at the time of filing an affidavit of candidacy for the office of _____ to be voted on at the general election to be held on November 07, 2006, as provided by *Minnesota Statutes*, section 204B.11, subdivision 2.

(name of candidate)

(office sought and district number, if any)

SIGNER'S OATH

"I swear (or affirm) that I know the contents and purpose of this petition and that I signed the petition only once and of my own free will."

ALL INFORMATION ON THIS PETITION IS SUBJECT TO PUBLIC INSPECTION

*****ALL INFORMATION MUST BE FILLED IN BY PERSON(S) SIGNING THE PETITION UNLESS DISABILITY PREVENTS THE PERSON(S) FROM DOING SO.*****

	DATE	SIGNATURE	YEAR OF BIRTH	PRINT FIRST, MIDDLE, AND LAST NAME	RESIDENCE ADDRESS (number and street or box and route number)	CITY OR TOWNSHIP	COUNTY
1.							
2.							
3.							
4.							
5.							
6.							
7.							
8.							
9.							
10.							



Gutknecht: The People's Choice

Fiscal Conservative First District Congressman Gutknecht Once Again Files by Petition In Lieu of Filing Fee

7.5.2006

First District Congressman Gil Gutknecht filed today with the Minnesota Secretary of State to seek his seventh term in the United States House of Representatives. Ever the fiscal conservative, Gutknecht continued with the tradition he started when he first ran for Congress in 1994, filing by petition in lieu of paying the \$300 filing fee. Congressman Gutknecht's submission included 1,626 citizens representing all twenty-two counties in the First District. Signers expressed their approval of Congressman Gutknecht and supported his bid for re-election through their action.

"I am delighted that we have once again collected over 1,600 signatures from people all over the 1 st District," Gutknecht said. "More importantly, we had many young people, those who will be voting in their first election, excited about my campaign and about being a part of the process."

According to the Minnesota Secretary of State no other congressional candidate has filed by petition in recent memory. "I don't know of any major party candidate for United States Congress in recent memory who has filed by petition in lieu of filing fee," stated Secretary of State Mary Kiffmeyer. "[Filing by petition] requires incredible amounts of grass roots support and organization."

► [Home](#) | [Statements](#) | [Media Center](#)

ATTACHMENT

STATE OF MINNESOTA

IN SUPREME COURT

Court File No. A06-1508

Louis H. Reiter,

Petitioner,

vs.

Mary Kiffmeyer, individually and as
Secretary of State of Minnesota

Respondent.

**AFFIDAVIT OF
AARON
STREET**

1. I am an attorney licensed to practice in the State of Minnesota and employed at the law firm of Petitioner's counsel of record.
2. I have examined the Combined Nominating Petition and Petition in Place of Filing Fee for Partisan Office ("Petition") filed on July 18, 2006 by Michael Cavlan, a Green Party candidate for the office of United States Senate.
3. Mr. Cavlan's Petition included over 2,000 signatures, all of which were purportedly signed between July 4, 2006 and July 18, 2006.
4. Staff of the Minnesota Secretary of State stated to me on two occasions that Gil Gutknecht was the only major party candidate in 2006 to file a petition in place of filing fee with the Office of the Secretary of State. These statements are confirmed by the attached press release from Gil Gutknecht.
5. Pursuant to Minnesota Statutes §204B.07, subd. 5 and §204B.11, subd. 2, I obtained copies of the attached sample petition form from the Office of the Secretary of State.
6. Pursuant to Minnesota Statute §204B.10, subd. 2, I obtained a copy of the attached petition filed by Gil Gutknecht on July 5, 2006.

Further Affiant sayeth not.

Date: August 15, 2006

Aaron C. Street

Subscribed and sworn to before me
this ____ day of August, 2006.

Notary Public