STATE CANVASSING BOARD

Minutes

December 16, 2008—December 19, 2008
State Office Building, Room 10
100 Rev. Dr. Martin Luther King Jr. Blvd
Saint Paul, MN 55155

December 16, 2008

Call to Order and Adoption of Agenda

Secretary of State Mark Ritchie called the meeting to order at 12:03 p.m. Members present included Minnesota Supreme Court Chief Justice Eric Magnuson, Minnesota Supreme Court Justice G. Barry Anderson, Second Judicial District Court Chief Judge Kathleen Gearin, and Second Judicial District Court Assistant Chief Judge Edward J. Cleary. Deputy Secretary of State Jim Gelbmann, Director of Elections Gary Poser, Executive Assistant Kate Mohn, Business and Legal Analyst Bert Black, and other staff from the Office of the Secretary of State were also present, along with representatives of the parties and members of the public.

Judge Cleary made a motion to adopt the agenda for the meeting. Justice Anderson seconded the motion. The motion passed without opposition.

Approval of Minutes from the December 12, 2008 State Canvassing Board Meeting

Secretary Ritchie asked for a motion approving the minutes from the December 12, 2008 meeting of the State Canvassing Board. Chief Justice Magnuson noted that he had advised the Office of the Secretary of State of several changes needed and that those revisions have been made. Chief Justice Magnuson moved to accept the minutes. Judge Gearin seconded the motion. The motion passed without opposition.

Secretary Ritchie began by outlining the process for the meeting. Representatives of each campaign will be allowed five minutes to address the board. Following these presentations the board will consider challenged ballots.

Mr. Poser will present the ballots. Secretary Ritchie stated that with each ballot he will move to reject the challenge, reaffirm the determination of the local election official, and allocate the ballot accordingly. He will then ask for a second and the board will discuss. The motion itself is meant to be procedural and should not be taken as an indication of which way Secretary Ritchie will vote on any particular ballot. Following the motion, there will be a discussion of the ballot and then a vote. Once the board votes, the ruling will be recorded in the minutes and part of the official record. Today's meeting will go from noon to 5 p.m. with a break at 2 p.m.

Secretary Ritchie asked if any members of the board had additional comments. Justice Anderson remarked that he is agreeable to the meeting going until 5:30 if needed.

Presentations by Representatives of the Franken and Coleman Campaigns

Mr. Tony Trimble from the Coleman campaign addressed the board. He stated that one of the basic elements of the canvassing process is the ability of the campaigns to comment on the nature of a challenge and why a challenge should be upheld or denied. He stated that the campaigns have a vested interest in ensuring that the determination of the board results in an appropriate allocation of the votes. As such, Mr. Trimble respectfully requested that both campaigns be allowed to interject when necessary.

Additionally, Mr. Trimble brought to the board's attention to the issue of ballots that are marked as duplicates and originals. He stated that there are precincts where the number of duplicate ballots and the number of original ballots do not match. The Coleman campaign is concerned about possible double voting, believing that this has happened at least 137 times. It is possible that duplicates that were not labeled as such have been mixed back in with the ballots being counted by hand for the recount.

Mr. Marc Elias addressed the board on behalf of the Franken campaign. He began by reiterating the the Franken campaign's guiding principle that every lawfully cast ballot ought to be counted. Minnesota law provides a very strong presumption in favor of determining voter intent and the board should make every effort to determine intent when possible. The Franken campaign has divided its challenges into two categories: 441 ballots where voter intent is questioned, and an additional 339 ballots in the incident category. Incidents could include duplicate issues, unaccounted ballots, and situations where election officials did not now allow the campaigns to make challenges. These types of issues will likely be addressed during an election contest, should there be one.

Mr. Elias took exception to the Coleman campaign's requested relief on the issue of duplicate ballots. Both campaigns agreed to guidelines issued by the Secretary of State's office regarding the issue. There were times when both campaigns were unhappy with the rules, but those were the rules laid out at the beginning of the process and neither party objected at the time. There are a number of possible explanations for the numbers of duplicate and original ballots not always matching. Since the Franken campaign believes that these sort of questions should be decided in another forum, it has set aside the 339 challenges in the incident category.

Justice Anderson asked Mr. Elias if ballots that are being challenged on the basis of incidents reports are separate from the ones being reviewed today, meaning that the board does not have to make a decision regarding the issue of original and duplicate ballots today.

Mr. Elias replied that this was correct.

Update on Withdrawn Challenges

Secretary Ritchie recognized Mr. Gary Poser, the Elections Director for the Office of the Secretary of State.

Mr. Poser began by stating that this morning the Office of the Secretary of State began pulling the ballots to be reviewed by the canvassing board. Given the lateness of the challenge withdrawals, the decision was made to begin with the challenges remaining from the Franken campaign. Those ballots have been pulled to start with, and more ballots are being pulled across the hall in Room 5.

The board will be working off the Exhibit A list as provided by the Franken campaign. Mr. Poser stated that members of the board will be able to review either copies of the ballots or the originals.

Secretary Ritchie remarked that it would be helpful to have all originals available for review if needed, and asked if this procedure was acceptable to the board.

Chief Justice Magnuson asked Mr. Poser if the ballots being reviewed will be displayed on the monitors for the public's benefit. Mr. Poser replied that the ballots will indeed be displayed.

Justice Anderson then asked if the campaigns should be allowed to offer comments on each ballot. He stated that he is concerned about the amount of time this would take but also does not want to prohibit either campaign from commenting if there is something critically important about a ballot.

Secretary Ritchie suggested that the board be able to ask for clarification from the campaigns and that the campaigns be allowed to briefly answer. The board agreed to this procedure.

Commencement of Review of Challenged Ballots

Please see the attached spreadsheets[1] for a summary of the challenged ballots reviewed by the State Canvassing Board and the determination made on each ballot.

The board decided for the purposes of the motions made on the ballots that a seconding of each motion was not necessary. It was also clarified by the board that when a challenge is rejected, the determination of the recount official is reaffirmed and the ballot allocated appropriately.

The board continued to review ballots until 5:00 p.m.

Discussion of Remaining Challenges

Secretary Ritchie gave the campaigns the opportunity to address the board regarding any concerns or issues they may have.

Mr. Elias stated that during the course of the day he had received a spreadsheet from the Coleman campaign of previously withdrawn challenges that the Coleman campaign wishes to reinstate. He asked if the Franken campaign would be allowed to reinstate withdrawn challenges as well, and if this would be an ongoing process.

Secretary Ritchie stated that while the board did not yet know how it was going to address this issue, the review of ballots so far had indicated that there are still many frivolous challenges being submitted to the board and that both campaigns would need to reduce the number of frivolous challenges.

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[1] The spreadsheets include all challenged ballots ruled on by the board through December 23, 2008. One spreadsheet is the combined listing of all challenges put forth by the Franken Campaign, the other all challenges from the Coleman Campaign. Both campaigns' lists contained errors in the notation of ballots, which have been corrected. The lists provided by each campaign also included challenges lodged by the other side—in other words, the Franken campaign listed ballots that were challenged during the recount by the Coleman campaign and vice versa.

Chief Justice Magnuson asked if there was a deadline by which challenges must be submitted to the State Canvassing Board. He stated that he thinks some of the challenges that the board has reviewed had great merit, but others did not. However, he does not want to tell the candidates what to do but instead encourages the campaigns to proceed in an orderly manner.

Secretary Ritchie suggested that this topic could be addressed publicly at the start of the next day's meeting.

Judge Gearin agreed to a discussion of the topic tomorrow morning, but remarked that some of the challenges submitted to the board today were frivolous and that disappoints her. She stated that she does not think the campaigns have reviewed the challenges they are submitting as seriously as they should have.

Justice Anderson remarked that while he shares concerns about the numbers of challenges from the campaigns, the canvassing process is one that everyone is trying to work through and he hopes that the board will pick up some speed as it continues to move forward through the challenges.

Chief Justice Magnuson reiterated that the goal of the canvassing board is to discern the intent of the voters and give careful consideration to the matters that require it. Doing so requires the help of the parties, but if there is no deadline for submitting reinstated challenges, he will trust the campaigns to use their discretion in determining ballots that need to come before the board.

Mr. Bert Black then directed the board's attention to Minnesota Rules 8235.0800 and 8325.1100, both of which deal with challenges but do not address the matters of withdrawals or reinstatements.

Mr. Trimble stated that the Coleman campaign has reinstated challenges because the rulings of the board have clarified what is and is not a proper challenge. The campaign is considering further withdrawals of challenges.

Judge Cleary stated that the board wants meritorious challenges and that a number of challenges today were not. He stated that he hopes if the campaigns are adding challenges back in they are also subtracting them.

Secretary Ritchie stated that on Thursday there will be a judicial meeting and the board will recess while that meeting is occurring.

Justice Anderson suggested that for tomorrow the board would break for lunch from one p.m. to two p.m. to allow parties to view the arguments before the Supreme Court.

Secretary Ritchie agreed to this schedule.

The meeting recessed at 5:12 p.m.

<u>December 17, 2008</u>

The meeting was called to order at 9:03 a.m. by Secretary Ritchie.

Secretary Ritchie began by commenting on the issue of ballots being challenged on the basis of special circumstances. They are currently not included in the challenged being reviewed by the board today. He suggested that the topic be addressed tomorrow. He also asked if any board members had questions for the campaigns regarding ballots challenged because of special circumstances.

Justice Anderson stated that his questions to the campaigns are regarding where the issue of double counting should be addressed. He posed several questions to the Coleman campaign—what relief are the campaigns seeking from the board and why is it not appropriate to have this issue decided through an election contest—and suggested that the campaign have responses prepared for tomorrow's discussion. For the Franken campaign, he asked why in light of the requirements of *Minnesota Statutes* 206.86, Subd. 5 shouldn't the state canvassing board's count be limited to ballots where there is a duplicate and an original.

Chief Justice Magnuson stated that he has been consistent in saying that the board decides challenges based on the information available on the face of the ballot. He has heard the suggestion that because the board allowed Ms. Cynthia Reichert to present information regarding the missing ballots in Minneapolis Ward 3, Precinct 1 the board is holding evidentiary hearings. He stated that this is not correct; the State Canvassing Board cannot hear testimony or hold evidentiary hearings and Ms. Reichert was not under oath when she presented information to the board. Precedent for such action was not set by the board hearing Ms. Reichert's report.

Judge Cleary agreed with Chief Justice Magnuson. Judge Gearin stated that she also agreed with the Chief Justice and that she does not subscribe to the argument that Ms. Reichert was providing testimony when she appeared before the board.

Question of expansion of list of challenges

Secretary Ritchie then turned to the issue of reinstated challenges. He reemphasized that the board is seeing too many frivolous challenges and that a significant reduction is needed.

Chief Justice Magnuson commended the staff of the Office of the Secretary of State for their work organizing materials for the review of the board. He made it clear to the campaigns that any challenges that are reinstated after being previously withdrawn will be addressed last by the board, and reiterated that the board wants to only have to consider legitimate challenges and must trust the judgment of the campaigns in this respect.

Justice Anderson thanked the campaigns for their cooperation yesterday and the willingness of the legal teams to limit their comments. He stated that he hopes that the remaining three days of reviewing challenged ballots will be as productive as the first.

Judge Cleary commented that the scrutiny on reinstated challenges is going to be extremely high and if the reinstated challenges are frivolous the board will be angry.

Review of Challenged Ballots

The board then continued its review of challenged ballots. See attached spreadsheets for further information on the rulings made by the board.

Discussion of Duplicate Ballots

Judge Cleary began by thanking the Franken campaign for the withdrawals offered throughout the course of the day. Chief Justice Magnuson agreed, as did Secretary Ritchie.

Each campaign was then granted five minutes to address the issue of duplicate ballots. Chief Justice Magnuson stated he wants each campaign to answer the following questions in the course of their presentation: What is the issue? What do you want the State Canvassing Board to do? Why can the board to it? What happens if the board does not do what is being asked?

Mr. Trimble addressed the board on behalf of the Coleman campaign. The issue is avoiding the double counting of votes, which can be resolved by the board upholding challenges based on the issue of duplicates. The challenges are made to the original ballots in the precincts specified and the campaign believes that duplicate counting happened approximately 150 times.

Duplicate ballots are made when an original is not able to be fed into the optical scan machine. Both the original ballot and the duplicate ballot are supposed to be clearly marked as such by the election judge, but this is not always the case. Duplicates may not be marked and therefore are not able to be retrieved, but reviewing the tapes from the optical scan machines may yield a vote count that does not include ballots that are counted twice.

The board has the authority to address the issue because the ballots in question have been challenged, and it is the board's prerogative to decide if challenged ballots should be counted.

Chief Justice Magnuson asked Mr. Trimble if the board can make determinations about possible duplicate votes based on the face of the ballot.

Mr. Trimble replied that it is possible to do so because if original and duplicate ballots do not match up then there is an excess number of votes.

Chief Justice Magnuson worked to clarify Mr. Trimble's position, saying that if the board was presented with an original and a corresponding duplicate ballot they would know that a vote should be counted. If, however, the board is presented with just a duplicate or just an original, the Coleman campaign believes that there is no way for the board to tell if a vote has been double counted based on the information available on the face of the ballot.

Mr. Trimble replied that the board can look at the ballots marked original and the ballots marked duplicate and there will be a difference in number. For example, if the board is able to match original number one with duplicate number one, the count is fine. But if there are nine ballots labeled originals and only six ballots labeled duplicates, that means that the remaining three duplicate ballots were not labeled correctly and are mixed in with the rest of the ballots, leading to double counting.

Chief Justice Magnuson asked Mr. Trimble how the board would determine what votes were on the ballots since they cannot be presented to the board if they are mixed in with the rest of the results from a precinct.

Mr. Trimble replied that the ballots to be reviewed by the board would be the original ballots.

Chief Justice Magnuson asked if all originals will be labeled as such.

Mr. Matt Haapoja from the Coleman campaign remarked that the incident logs completed by election officials will state when the number of duplicates and originals did not match.

Justice Anderson asked if the board would be able to make a facial determination that a duplicate ballot does not have a corresponding original ballot (and vice versa) and therefore any ballots where there is not a match with a duplicate and original should not be counted.

Mr. Haapoja stated that this is correct, and on the challenged ballot it will state that the reason for the challenge is that no duplicate was able to be found.

Chief Justice Magnuson stated that it is beyond the purview of the board to look at extraneous information such as incident logs or reports of what happened. He asked the Coleman campaign if it is possible for the board to resolve these challenges without looking at incident logs and making determinations of fact.

Mr. Trimble replied that the board can make the particular decision that duplicates were to be marked and numbered and where there are more original than duplicate ballots there is a facial situation with respect to that group of ballots. He claimed that all of the originals challenged on the basis of not having duplicates are by definition excess votes.

Mr. Haapoja added that he is not suggesting that the board look for extraneous evidence, but in the same way that the board determined there were missing ballots in Minneapolis, the board can determine that there are votes that are being counted more than once.

Chief Justice Magnuson responded that the board never decided that ballots were missing in Minneapolis but merely accepted the returns offered by the city. Any judgments about the validity of the report presented would have to be made in court.

Mr. Haapoja replied that he understands, but that incident logs prepared by local election officials regarding duplicate ballots are in the same category as the report Ms. Reichert presented to the board. So far, there are 150 incident reports related to the issue of duplicate ballots. Under the rules outlined by the Office of the Secretary of State, campaigns were allowed to fill out incident reports with the understanding that they would come before the board. Mr. Haapoja stated that if the reports are not allowed to be reviewed by the board then he does not understand why they were completed in the first place.

Secretary Ritchie stated that the rules were set by the recount because both campaigns insisted that originals be counted instead of duplicates.

Chief Justice Magnuson said that his point is not whether it is good or bad to have created incident reports, but rather how the State Canvassing Board considers those, as opposed to them being considered in an election contest. He told the Coleman campaign that they are not without a remedy, but a remedy is not able to be offered by the board.

Mr. Trimble stated that they are only seeking determinations that can be made from the face of the ballot. Chief Justice Magnuson replied that it would be helpful if he was able to see an example of what the Coleman campaign wants to board to judge from.

The Franken campaign was then asked to address the board.

Mr. Elias stated that the issue being presented is whether the board will judge ballots based on their face or will the board begin looking at the underlying facts. Mr. Elias stated that there were counties in which the Franken campaign was not allowed to lodge challenges based on mismatched duplicate and original ballots. He continued, saying that Secretary Ritchie's assertion that both campaigns insisted on the counting of original ballots is correct. Neither party was completely satisfied with the rules laid out for the recount process, but the rules should be adhered to and the board should not be making determinations of fact.

Judge Gearin stated that the board cannot make determinations of fact, and that there has been no disagreement that the board cannot review extraneous matters. Judge Gearin asked the Franken campaign what they wanted the State Canvassing Board to do.

Mr. Elias replied that the board should only review the face of the challenged ballots and as such the Franken campaign is offering to withdraw all of its challenges based on incident reports.

Judge Cleary asked Mr. Elias to respond to Mr. Trimble's assertion that the issue of duplicate ballots can be made facially.

Mr. Elias replied that if the board goes down that road, precincts will need to be reopened. He noted that Mr. Trimble has demonstrated that in some places it can be shown that the number of duplicate ballots does not match the number of original ballots, but that the board cannot determine why that may be the case without bringing in witnesses and considering evidence.

Judge Cleary asked if Mr. Elias was stating that making such determinations would require fact-finding on the part of the board.

Mr. Elias replied that this was correct and that is why the Franken campaign is prepared to dismiss all challenges based on incident reports.

Chief Justice Magnuson asked Mr. Elias that if the board decides not to consider challenges based on the issue of duplicates and originals, does Mr. Elias then agree that the Coleman campaign has waived nothing in regard to its ability to pursue this issue through the courts.

Mr. Elias replied that he absolutely agreed.

Justice Anderson asked if *Minnesota Statutes* 206.86, Subd. 5 applies such that duplicate ballots should be counted if the original ballot is damaged or defective.

Mr. Elias replied that the agreement to count original ballots and not duplicate ballots was negotiated between the parties and the Office of the Secretary of State.

This statement lead Justice Anderson to ask Mr. Elias how the agreement relates to the statutory language in question.

Mr. Elias stated that he believes that the Office of the Secretary of State and the State Canvassing Board have the authority to interpret the statute and that is what has been done. He said he was unhappy with the Coleman campaign deciding three days prior to the start of the canvass that they no longer wanted to follow the agreed-upon guidelines.

Judge Gearin asked if the canvassing board was able to be presented with originals but a duplicate was unable to be located why wouldn't the canvassing board use the originals. She stated she was having trouble understanding why the board wouldn't count the original ballots.

Mr. Elias stated that he agrees. The State Canvassing Board is not an adjudicative body, but rather and administrative one. The counties conducted the recount under the rules set by the Office of the Secretary of State, and he agrees that when counties transmit a ballot to the board, the board should count it.

Justice Anderson raised Mr. Trimble's argument that the board could state that it has original ballots without duplicates or vice versa, not count those ballots, and the party unhappy with this decision could file an election contest.

Mr. Elias replied that the board could not determine why both an original and duplicate ballot are present. The Coleman campaign has presented a theory of double counting, but their theory is not proven. The only way to know if the theory is correct is to test it through hearing evidence, and the board cannot do that. Additionally, in Wright County the Franken campaign was instructed that it could not challenge ballots on the grounds of the duplicate issue. The Franken campaign was not happy about that, but those were the rules of the recount and the campaign followed them.

Mr. Trimble countered that the purpose of an administrative recount is to review and challenge the ballots cast on Election Night. The ballots cast and counted on Election Night did not include the originals of ballots that were duplicated—only duplicates were fed through the optical scan machines, and thus only the duplicates should be counted.

Secretary Ritchie asked Mr. Trimble if the Coleman campaign believed this when they insisted on counting originals prior to the start of the recount. Secretary Ritchie stated that the Office of the Secretary of State was not happy about the campaigns insisting on using originals at the time.

Mr. Trimble replied by asking if anyone could have anticipated discrepancies between duplicates and originals when the recount plans were drafted.

Secretary Ritchie stated that local election officials did and that is why they were in favor of using duplicates instead of originals, but the campaigns would not agree to this.

Mr. Trimble suggested that the law is the law and statute dictates what should be counted in a recount.

Secretary Ritchie replied that the board is conducting a canvass, not a recount, and is trying to settle a question that has been raised at a late date in the process. Both campaigns have filed many briefs

with the board, but Secretary Ritchie believes that the matter is now getting to a point that it should perhaps be addressed in a judicial setting. The priority of the board will be to rule on a thousand challenged ballots in the next couple of days.

Mr. Trimble replied that the counting of ballots not counted on Election Night would be a major departure from statutory requirements. The statutes governing the State Canvassing Board only addresses votes validly cast on Election Night. This definition only includes ballots that were run through the optical scan machines.

Judge Gearin stated that it sounded like the campaigns made an agreement to count originals and now the Coleman campaign does not want either counted because of the issue of originals and duplicates not matching up.

Mr. Trimble replied that the Coleman campaign wants the board to count duplicates because those are the ballots that were cast on Election Night and that counting originals as well will cause double counting.

Secretary Ritchie replied that Mr. Trimble's claim was a theory and it has not been determined if the theory is true.

Mr. Elias agreed with Secretary Ritchie that Mr. Trimble's claim is in fact a theory. Both campaigns intitially agreed to use originals, and he finds it extraordinary that the Coleman campaign now thinks the agreement is contrary to statute.

Secretary Ritchie asked Mr. Elias if he agreed that the issue raised by the Coleman campaign should not be investigated by the board.

Mr. Elias agreed that he does not think the State Canvassing Board is the appropriate forum for discussing issues related to incident reports.

Chief Justice Magnuson stated that as much as the board members have made it clear that they want to count all legally cast ballots, they do not want to count ballots twice. There appears to be an issue, but it is not an issue that the board is able to resolve. He stated that he still does not understand how the board can determine if ballots were counted more than once without considering extrinsic evidence.

Mr. Trimble replied that no ballot marked as an original was ever counted on the day of the election. The duplicates made by election judges are fed through the scanning machine and the original is saved for evidence if needed. Again, original ballots are never counted; they are set aside. So, if that is the case, why would the board use originals to determine the intent of the voter if the duplicate ballots are the ones cast?

Justice Anderson asked if the parties agreed that the originals should be used.

Mr. Trimble replied that the agreement to use originals was not made with the understanding that double voting may have occurred. During the recount process, it became clear to the Coleman campaign and originals and duplicates did not always match and in this case the best intentions of the campaigns in agreeing to count originals did not work out.

Justice Anderson asked Mr. Trimble to respond to Mr. Elias's argument that if the board were to consider these type of challenges that counties where these type of challenges were not allowed would need to be reopened.

Mr. Trimble replied that the Coleman campaign also had situations where they were not allowed to make challenges based on the original and duplicate issue. Nevertheless, whether or not a challenge was allowed, the campaign knows the ballots marked originals have duplicates created for them based on the procedures for election night.

Secretary Ritchie asked if Mr. Trimble was making a presumption that duplicates were made.

Mr. Trimble clarified that if a voter's original ballot cannot be fed through the machine, he or she would have no idea about a duplicate being created. But, if the original ballot was removed from the recount—which it was, since the recount only counts votes cast on election night—you have to trust that the system otherwise works. Therefore, you would know with a great deal of certainty that the duplicate was counted.

Mr. Elias countered that the campaigns agreed on rules for the recount which the Office of the Secretary of State implemented. He is concerned about some counties allowing challenges based on the issue, while others did not and that Mr. Trimble is now saying that the Coleman campaign trusts some parts of the process the campaigns agreed on, but does not trust others. The applicable statutes clearly calls for the State Canvassing Board to reconcile the intent of voters and identifying marks. That is the reason why the Franken campaign was not allowed to challenge on the basis of duplicates in Wright County, and Mr. Elias again stated that he was worried about the Coleman campaign asking for the rules to be changed so late in the game.

Mr. Trimble replied that implicit in the agreement made by the campaigns was that if you count original ballots, then you don't count the duplicates because doing so would result in an excess vote.

Judge Cleary suggested the board begin discussing the issue. He stated that he agreed with Chief Justice Magnuson that what the Coleman campaign is asking requires factual determinations. He stated that he believes an election contest is the correct forum for this debate.

Judge Gearin asked what this means as a practical matter. Should the board count duplicates? Originals? Neither?

Chief Justice Magnuson replied that the counties have counted ballots and reported returns to the State Canvassing Board. If the parties want to challenge local officials, they need to go to court. The board gets the returns, but it does not examine the procedure by which local election officials reach their count. This is the reason why the board accepted the report from Minneapolis regarding the 133 ballots in Ward 3, Precinct 1—because that is the return the city reported.

Judge Gearin asked if this means that the board should not deal with any of the challenges and instead just accept the counts as reported on election night?

Justice Anderson expressed concern that the board is going down a road where it is likely that votes could be counted twice. He understands Mr. Elias's assertion that the double counting is a theory,

but he believes it is a persuasive one. The problem is that the parties agreed to a certain process at the start of the recount. He believes that this is a very serious issues, that it is very likely that there was double counting, and that there will be an election contest regardless of what the State Canvassing Board decides. The parties may argue that they have been unfairly treated, but that is a matter for a contest. He noted that Mr. Elias did raise a good point regarding the lateness of this challenge, and concluded by noting that *Minnesota Statutes* 206.86 Subd. 5 addresses the issue, though it does not expressly require originals and duplicates to match.

Secretary Ritchie asked if the board wished to discuss the matter further this afternoon or address the issue tomorrow.

Judge Gearin responded to Justice Anderson's remarks by saying that there may have been double counting, but if there was there was very little of it. She stated that board does not believe there is a lot of double counting happening or that there is widespread sloppiness on the part of the local election officials. In fact, she believes there has been very, very little double counting.

Secretary Ritchie replied that there are mechanisms in place to prevent double counting, and there are not currently many options available to the board. The board would need to review evidence.

Justice Anderson observed that a problem for the Coleman campaign is that all the case law in this area deals with election contests, but there is some authority for the proposition that they have advanced. There could be double counting when duplicates and originals are not able to be matched.

Judge Cleary stated that someday a body could make findings as to whether there was double counting, but the board is not able to make that determination.

Judge Gearin agreed with Judge Cleary, but Justice Anderson did not. Judge Gearin stated that she would like to read the materials offered by the campaigns again and discuss the matter in the morning.

Chief Justice Magnuson remarked that the issue was a complicated one and that as a result of the conversation he is able to better understand how the board could make facial determinations. His concern is the way the issue has been handled by the parties and that however the board rules is going to be flawed. He stated he wanted to think on it further.

Secretary Ritchie suggested that the board be allowed to think about it further and discuss it again tomorrow.

Justice Magnuson asked the two campaigns to offer suggestions to help the board in making this decision. He also asked for a brief overview of the special circumstances ballots from the Franken campaign.

Mr. Elias replied that ballots in the third pile are special circumstances, the first pile being the challenges the board has reviewed and the second pile being the challenges based on incident reports that the Franken campaign has on reserve. The special circumstances ballots are instances where the counties upheld challenges based on duplicates or chain of custody. He stated that his position is that determination should be facial and therefore clear intent ought to be counted. Mr. Elias stated that there were a handful of incidents where local election officials set aside ballots as

non-votes based on these special circumstances. If the board decides that challenges based on duplicate issues are not meritorious, then the board should review these ballots for intent and identifying marks.

Mr. Trimble agreed that these issues should be addressed after the board finishes reviewing the rest of the challenges.

The board then recessed until 9 a.m. on December 18.

December 18, 2008

The board was called to order by Secretary Ritchie at 9:03 a.m.

Review of Challenged Ballots

The board then continued its review of challenged ballots. See attached spreadsheets for further information on the rulings made by the board.

Discussion of Duplicate Ballots

Chief Justice Magnuson began the discussion by noting the problem facing the board is that while everyone wants all legally cast ballots counted, nobody wants ballots counted twice. Confusion has arisen because parties and the Office of the Secretary of State agreed on procedure different from statute. The result is claims that local election officials were not consistent in counting the ballots and may have counted both originals and duplicates.

Chief Justice Magnuson stated that determining if double counting happened would require more than a facial examination of ballots, and that the matter should be subject to an election contest instead of being taken up by the board. The Chief Justice asked Mr. Trimble to provide an explanation of the exhibits related to the issue of duplicate ballots in the memorandum submitted by the Coleman campaign.

Mr. Trimble directed the board's attention to Exhibit B1, which was a document regarding ballots cast in a precinct in Eagan where the election night totals and recount totals differ. The Coleman campaign offered this as evidence of possible double counting of votes, stating that there are seven ballots marked as originals, but there are not seven ballots marked as duplicates and the campaign believes those seven duplicate ballots that were not properly labeled are now mixed in with the rest of the ballots in the precinct and have therefore been counted twice.

Secretary Ritchie asked Mr. Trimble how the Coleman campaign knows that those duplicate ballots exist and are mixed in with the rest of the ballots from the precinct. Mr. Trimble conceded that the campaign does not know with certainty that the seven duplicate ballots exist or that they are mixed in with the rest of the ballots from the precinct, however they suspect that the election judges from the precinct followed procedure as outlined in statute for the creation of duplicate ballots and therefore the Coleman campaign believe the ballots exist and are mixed in with the rest of the ballots from the precinct.

Chief Justice Magnuson asked Mr. Trimble that if the board assumes all of the theories presented by the Coleman campaign are correct, wouldn't the board have to look at evidence that is extrinsic to the ballots and returns and adjudicate facts to determine if votes were counted twice.

Mr. Trimble replied that this was correct, but the markings on ballots that label them as either originals or duplicates are on the face of the ballot and the board can make the facial determination based on those markings. In Morrison Township original ballots that should have been challenged might not have been and are likely excess votes. Mr. Trimble finished by stating that Cynthia Reichert has stated publicly that there is no doubt in her mind that in Hennepin County precincts double counting occurred.

Chief Justice Magnuson asked Mr. Trimble how the board can decide that a particular vote should be accepted or rejected based on the face of the ballot.

Mr. Trimble replied that if a ballot marked as an original does not have a corresponding duplicate, it would have been challenged and the board is facially able to judge whether that challenge should be accepted or not. Many of the challenges in question are labeled as being challenged because of not having a duplicate.

Mr. Elias then responded to Mr. Trimble. He stated that he has a witness from the precinct in question in Eagan who claims that the duplicate ballots from the precinct were mislaid and then recovered after the completion of the hand recount. Mr. Elias offered this explanation as an alternative hypothesis that would explain the discrepancy in the precinct. He believes the board would not be able to infer that double voting happened because the numbers on the tapes from election night do not match the numbers reported following the hand recount—the totals could differ for a number of reasons, and the board cannot make these determinations based on the face of the ballot.

Justice Anderson asked Mr. Elias what if the board adopted Mr. Trimble's approach where ballots labeled as originals that do not have corresponding duplicates should not be counted. Justice Anderson said the board could not quite make this determination without some investigation, and would have to determine if a duplicate was in fact made.

Mr. Elias responded that the problem with that approach is that originals were counted in the recount and duplicates were not. In many places, the duplicates remain at the counties. He cited the hesitancy of the board to order counties to do things and claimed that the board would need to reopen counties and go through a process of recounting and re-challenging the duplicate ballots. Additionally, there were three counties—Anoka, Wright, and Todd—where the Franken campaign was not allowed to lodge challenges based on this issue. He closed by quoting an email from Mr. Trimble dated November 19, 2008 which stated that duplicates should be counted if no corresponding original cannot be found and that challenges based on duplicate issues are not under the jurisdiction of the administrative recount.

Judge Gearin asked Mr. Elias to clarify that when he said that the Franken campaign used the phrase "we have an alternative hypothesis," the alternative hypothesis was that there was not duplicate counting.

Mr. Elias replied that this was correct and that he was worried that the board could not only overstep its jurisdiction in considering this issue but could also potentially disenfranchise hundreds of voters in order to prevent a handful of duplicate voting if Mr. Trimble's theory is correct.

Justice Anderson asked Mr. Trimble that if Mr. Elias is correct in saying that the duplicate ballots are kept at the county, then wouldn't the board have to consider evidence that is not currently available?

Mr. Trimble replied that Justice Anderson's statement was relatively accurate, however the Coleman campaign again asserted that the board must review the challenges presented to the board.

Secretary Ritchie suggested that the board only has the authority to review challenges on the basis of voter intent or identifying marks and asked Mr. Trimble to respond to that concern.

Mr. Trimble suggested that perhaps the board should seek an opinion from the Attorney General on the matter.

Chief Justice Magnuson asked Mr. Trimble if he agrees with the statement that there was inconsistent administration of the challenge rule across the state, that some counties did not accept challenges on the basis of duplicates.

Mr. Trimble replied that he did not.

Chief Justice Magnuson stated that his concern is related to the procedural imprecision in the way ballots were given to the board based on challenges related to the duplicate issue. If the board acts, the parties and the citizens will not be starting from an even posture to have the merits addressed. He stated that he believes the most sensible way to deal with the issue is to go back and work with the local election officials and resolve the issue there. He stated he was uncomfortable placing his imprimatur on something requires more facts than are available to the board.

Mr. Trimble countered by suggesting that accepting duplicate votes would compound the problem.

Chief Justice Magnuson replied that the board has certifications from local officials and challenges based on intent and identifying marks, but if the local election officials has done something in error, statute does not grant the board authority to address the issue.

Judge Cleary stated that he shares the Chief Justice's concerns and the late raising of this issue by the Coleman campaign. He does not see any way for the board to do what the Coleman campaign is asking without adjudicating.

Judge Gearin stated that her position is that board should reject all challenges based on the issue of duplicates and the votes should be allocated back to the original determination of the recount officials. Judge Cleary agreed.

Justice Anderson stated that he is very concerned about the potential of double voting, though he recognizes that that Mr. Elias's hypothesis may be correct regarding the discrepancy in the precinct in Eagan. He believes with near certainty that double counting has occurred. He stated that the case law cited by Mr. Trimble is compelling, but it is a case from an election contest. Justice Anderson

finished by stating that he was not aware of any authority that would enable the board to do what the Coleman campaign is asking.

Mr. Trimble suggested that board seek an opinion from the Attorney General for further guidance in the matter, due to the gravity of the situation and the near-certainty that double counting has occurred.

Judge Cleary responded that he is uncomfortable with the term "near certainty" being used by the board members and Mr. Trimble.

Justice Anderson disagreed with Judge Cleary, stating that he is willing to make the statement about his certainty regarding double counting because he is not acting as a judge in his capacity as a member of the canvassing board. He believes the problems faced by the Coleman campaign are procedural ones, rather than substantive.

Chief Justice Magnuson stated that he did not think the board was yet prepared to make a decision but will do so soon.

Secretary Ritchie requested that the campaigns work together and that if they are able to submit a joint proposal that would be very helpful.

Mr. Elias asked to briefly address the board regarding Justice Anderson's question yesterday about *Minnesota Statutes* 206.86. For the purposes of the recount, the two campaigns agreed to use the original ballots because they believe voter intent is more clearly expressed on the originals.

Secretary Ritchie thanked the Coleman campaign for their withdrawals, and both counsels for the additional information offered regarding this issue.

The board recessed at the call of the chair at 5:36.

December 19, 2008

Introductory Remarks

Secretary Ritchie called the meeting to order at 9:01 a.m. He stated that the issue of consistency regarding passport numbers on ballots would be addressed later in the day, but thanked the campaigns for their assistance in calling the matter to the board's attention. Second, he announced that the Office of the Secretary of State is working on the allocation of previously withdrawn challenges and the allocation spreadsheet will be presented to the board on Monday, December 23.

The third item is the discussion of the duplicate ballot issue. He asked if the campaigns had come to an agreement. Mr. Elias and Mr. Trimble signaled that they had not. The board then moved to discussion of the duplicate issue.

Justice Anderson stated that he has reached the conclusion that while the issue is a serious one, the State Canvassing Board does not have the authority to act on the issue as these are not determinations that can be made from the face of the ballot. One possibility could be separating and ruling collectively on the ballots challenged solely on the duplicate question.

Judge Cleary asked for a clarification on the consensus that the board is reaching.

Secretary Ritchie replied that the duplicate issue is best handled in another forum, but challenges within that group based on voter intent or identifying marks will be reviewed by the board. The rest of them will be determined as a group, and that decision will be made at the end of the day.

Review of Challenged Ballots

The board then continued its review of challenged ballots. See attached spreadsheets for further information on the rulings made by the board.

Discussion of Passport Numbers on Ballots

Justice Anderson began by moving to reconsider Franken Challenge #24, Rochester Township, Ward 2, Olmsted County. Judge Cleary seconded the motion. The motion passed without opposition.

Justice Anderson stated that the memo submitted by the Coleman campaign suggested that the State Canvassing Board has not ruled in a consistent manner on ballots with passport numbers.

Chief Justice Magnuson suggested that before the board reviews individual ballots, they should have a discussion of the topic in general. He stated that it is his interpretation that the board is compelled by statute to reject ballots where the board decides that the voter has tried to identify a ballot. The reason why this proscription is in statute is to stop people from selling votes, but the statute doesn't say for fraudulent purposes, it says for intent of identifying oneself. Unfortunately, the people who put their passport numbers on their ballots are no different from the people who sign or notarize their ballots, and the board has been rejecting those ballots. To be consistent, the board has to reject ballots where voters intended to identify themselves.

Judge Cleary raised Judge Gearin's concern that it might not have been the voter making the identifying mark, but allowed that the board would need extrinsic evidence to make such a determination.

Judge Gearin replied that the general principal is found in *Minnesota Statutes* 204C.22, Subd. 13, which states that if a ballot is marked by distinguishing characteristics, then the entire ballot is defective. Therefore, Judge Gearin stated that if a passport number is placed on a ballot then the ballot should not be counted.

Justice Anderson wanted to return to the East Gull Lake ballot from yesterday, which had been assigned to Coleman. If, he stated, the board wants to be consistent, its needs to reconsider it from yesterday.

Secretary Ritchie and the board ruled on the Rochester ballot with the passport number on it by allocating it as a vote for no one due to identifying marks. Secretary Ritchie then moved to reconsider the East Gull Lake ballot from yesterday.

Secretary Ritchie moved that the ballot be allocated to the other pile due to an identifying mark.

Mr. Trimble reminded the board that it had allocated the ballot to Coleman yesterday because of the rule that a passport number must be written on the envelope of an overseas ballot.

Chief Justice Magnuson stated that he agreed with Mr. Trimble's characterization of how the board ruled yesterday, but now believes the board was wrong in its ruling and to be consistent ballots with identifying marks should not be challenged. He stated that it was a difficult choice for him because he believes citizens marking their ballots are earnest and trying to do the right thing, but the board needs to follow the law.

The board passed Secretary Ritchie's motion unanimously.

Secretary Ritchie then moved for the Franklin Township ballot with a passport number to be allocated to the other pile due to an identifying mark. The board passed the motion unanimously.

Review of Challenged Ballots

The board then continued its review of challenged ballots. See attached spreadsheet for further information on the rulings made by the board.

Ruling on Duplicate Ballots

Chief Justice Magnuson suggested that the board first rule on ballots that were solely challenged because of the original/duplicate issue and then the board could rule on the seven ballots that were set aside into one of the colored folders that were challenged based on intent.

Secretary Ritchie agreed, and asked for a motion to reject the ballots challenged solely on the duplicate issue and to insert them into the allocation spreadsheet to be reviewed by the board on Monday.

Chief Justice Magnuson moved to reject all of the challenges based on duplicates or originals that are not based on voter intent or identifying marks. Judge Cleary seconded the motion. There being no further discussion the motion passed without opposition[2].

Mr. Elias addressed the board, stating that as a result of the ruling the Franken campaign would now formally withdraw the 339 challenges it had set aside based on this issue.

Chief Justice Magnuson asked both parties if they had maintained lists of ballots relating to this issue if needed for any future actions.

Mr. Trimble addressed the board, stating for the record that the board should be aware that as a result of the motion made there will be double counting of votes.

Chief Justice Magnuson replied that he understands Mr. Trimble's position but there is nothing the State Canvassing Board can do.

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[2] All ballots ruled upon under this motion are highlighted in blue on the spreadsheets and noted as rejected under the Magnuson motion.

Judge Gearin stated that she still believes Mr. Trimble's position is an opinion and it would require determination of fact outside of the jurisdiction of the board to conclude if double counting occurred.

Justice Anderson stated that he was fine with the Coleman campaign making a statement in reaction to the actions taken by the board.

Mr. Haapoja then addressed the board, stating that sometimes both an original ballot and a duplicate ballot have been challenged, so the board may be double counting if this is not accounted for when the Office of the Secretary of State prepares the spreadsheet detailing the allocation of withdrawn challenges.

Secretary Ritchie replied that the Office of the Secretary of State will make sure that such allocation errors will not happen when preparing the spreadsheet.

Chief Justice Magnuson asked for further explanation of the issue.

Mr. Elias stated that this was the first time he had heard the Coleman campaign raise the issue.

Secretary Ritchie reiterated that duplicate allocations would not happen on the withdrawal spreadsheet, and that both campaigns would be allowed to review the spreadsheet and offer corrections prior to the State Canvassing Board approving the allocations.

Justice Anderson asked for a clarification, stating that his understanding was that a formal spreadsheet will be produced which both sides will review and if they find mistakes the board can correct them.

Secretary Ritchie replied that this was correct.

Justice Anderson said he appreciated the comment from the Coleman campaign and urged each campaign to bring these kinds of issues to the board's attention.

Review of Challenged Ballots

The board then continued its review of challenged ballots. See attached spreadsheet for further information on the rulings made by the board.

Upon the completion of the review of challenged ballots, the board recessed at the call of the chair.