

Minutes

STATE CANVASSING BOARD

November 26, 2008, 9:30 a.m.

**State Office Building, Room 200
100 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, Minnesota**

1. Call to Order and Adoption of Agenda

Secretary of State Mark Ritchie called the meeting to order at 9:27 a.m. Members of the canvassing board present included Secretary Ritchie, Minnesota Supreme Court Chief Justice Eric Magnuson, Minnesota Supreme Court Associate Justice G. Barry Anderson, Second Judicial District Court Chief Judge Kathleen Gearin, and Second Judicial District Assistant Chief Judge Edward J. Cleary. Also present were Deputy Attorney General Christie Eller, Solicitor General Alan Gilbert, and Assistant Attorney General Kenneth Raschke from the Office of the Attorney General, Deputy Secretary of State Jim Gelbmann, Director of Elections Gary Poser, and other staff from the Office of the Secretary of State.

Secretary Ritchie thanked those present for attending and for their ongoing interest in the recount process. He called the board to order pursuant to Article VII, Section 8 of the Constitution of the State of Minnesota which states:

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

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

2. Approval of Minutes of November 18, 2008 State Canvassing Board Minutes

Chief Justice Magnuson moved to approve the minutes of the November 18, 2008 meeting of the State Canvassing Board, with two minor typographical corrections.¹ Judge Cleary seconded the motion. The motion was passed without opposition.

3. Presentation of Recount Report for Completed Legislative Recounts

Mr. Gary Poser, Director of Elections for the Office of the Secretary of State, presented a recount summary report and canvassing report to the State Canvassing Board. Mr. Poser gave a summary of the races for which the mandatory recounts are complete.²

¹ See attachment A for a corrected version of the minutes for the November 18 meeting.

² See attachment B for the document presented to the board by Mr. Poser.

Judge Gearin moved to accept the report. Chief Justice Magnuson seconded the motion. Secretary Ritchie thanked Mr. Poser for his work on the recounts. There being no further discussion, the motion passed unanimously.

4. Report on the Number of Challenged Ballots to Date and Presentation of a Proposal for Pre-Review of Ballot Challenges

Secretary Ritchie stated that he wants to ensure that the challenged ballots reviewed by the board are not ones that have been challenged frivolously, so as not to waste the time of the State Canvassing Board. Attorneys from both campaigns have stated publicly that they could meet to discuss the reduction of challenged ballots and Secretary Ritchie suggested this would be a great benefit to the State Canvassing Board.

Justice Anderson stated that the fewer ballots having to be reviewed by the board, the better for all concerned. Judge Gearin stated that legitimately challenged ballots are important for the board to review but that she has concerns about the number of frivolously challenged ballots.

The board then heard the testimony of Ms. Luci Botzek, Sherburne County Deputy Administrator.

Ms. Botzek reported that she has been present in Sherburne County during the recount process. Ms. Botzek stated that she had pulled 24 ballots from the ballots challenged yesterday and offered copies of them to the State Canvassing Board as examples of frivolously challenged ballots. So far, the two campaigns have challenged a total of 801 ballots, out of roughly 30,000 ballots cast in the county.

The board declined to review the copies of the ballots in question because of the possibility of having to review them later. Secretary Ritchie remarked that 800 challenged ballots seemed like a lot coming from a relatively small county. Chief Justice Magnuson stated that it is the State Canvassing Board's responsibility to consider and rule on challenged ballots, whether the challenges in questions are legitimate or not. However, he said both campaigns have the responsibility to be thoughtful in the challenges they raise. The fewer ballots challenged by the campaigns, the more carefully the board will be able to consider the merits of the challenged ballots. He urged both parties to reconsider the merits of some of their challenges. Chief Justice Magnuson stated that the board wants to decide all legitimate challenges, but does not want to spend time they do not have reviewing ballots that do not need to be looked at.

Secretary Ritchie asked the board if any motion needed to be made regarding the number of challenged ballots or to compel the campaigns to meet with the Office of the Secretary of State in order to reduce the number of challenged ballots.

Justice Anderson stated that he believed no motion was required, but asked the campaigns to be consistent in their challenges and suggested that the legal counsel for both candidates do whatever they can to reduce the number of challenged ballots.

Chief Justice Magnuson and Judge Gearin both stated that they would be disappointed if the campaigns did not meet with Director of Elections Gary Poser to reduce the number of challenged ballots prior to the meeting of the State Canvassing Board on December 16.

Secretary Ritchie thanked Ms. Botzek for her time.

5. Signing of Certification of Completed Recounts in Districts Where Recount Reports are Adopted

The members of the State Canvassing Board proceeded to sign the certification of the legislative recount races.

6. Alternate Presidential Electors

Secretary Ritchie asked that a motion be made that the State Canvassing Board Certification of November 18, 2008 for Presidential Electors be amended to include Alternate Presidential Electors. Justice Anderson made the motion. Judge Cleary seconded. The motion passed without opposition.

7. Consideration of Improperly Rejected Absentee Ballots

Secretary Ritchie began by suggesting a general discussion among the canvassing board members. He stated that in this election, roughly 288,000 Minnesotans voted by absentee ballot, and estimated that over 12,000 of those absentee ballots were rejected.

Secretary Ritchie noted concerns that today's meeting is not legal because of the November 17, 2008 Minnesota Attorney General's opinion regarding the counting of rejected absentee ballots.³ Secretary Ritchie clarified that the Attorney General opinion in question pertains to the recount process and does not comment on actions of the State Canvassing Board.

Justice Anderson stated that the best way to move forward in the discussion would be to make a motion. As such, Justice Anderson made a motion for the Minnesota State Canvassing Board to reject the request that rejected absentee ballots be included in the recount of the 2008 U.S. Senate election and any applicable canvassing reports. Chief Justice Magnuson seconded.

Justice Anderson stated that he has reviewed all materials submitted by both campaigns and that the motion he just made is a purely procedural motion and is not intended to suggest any outcome of legal issues that may arise in the future relating to rejected absentee ballots. He believes that irregularities, if any, can be addressed through the election contest⁴ process, and the motion put forth does not indicate a position on any challenges that may arise through the contest process.

Furthermore, Justice Anderson stated that the statute regarding the duties of the State Canvassing Board does not directly grant authority for the board to accept and include rejected absentee ballots. Additionally, the relief being requested from the board by the Franken campaign is extraordinary and there are no cited instances of this board performing similar actions in the past. A review of the citations provided in the briefs submitted by the campaigns reveals that cases which have dealt with absentee ballots have dealt with those ballots through the election contest process, not the

³ See attachment C for a copy of the opinion.

⁴ Throughout the meeting, the words "contest" and "challenge" were often used interchangeably to refer to the process in which an election is decided through the courts. For the sake of clarity, in these minutes "contest" will be used to refer to the judicial process and "challenge" will be used when referring to the process of disputing the voter intent of cast ballots.

administrative recount process.⁵ Finally, Justice Anderson noted that in *Minnesota Statutes* 204C.31 and 204C.35 Subd. 3 the legislature did not use broadly inclusive language, but rather limited the jurisdiction and authority of the State Canvassing Board.⁶ Therefore, Justice Anderson stated that the board should reject the request made by the Franken campaign to include rejected absentee ballots in the recount.

Judge Cleary thanked the lawyers from both campaigns and stated that he agreed with Justice Anderson for the most part, but had several differences. He stated that approximately nine percent of the ballots cast in the election were absentee ballots, and of those ballots about five percent were rejected. He stated that he respectfully disagrees with portions of the November 17 opinion provided by the Minnesota Attorney General regarding whether a rejected absentee ballot is a cast ballot, specifically case law cited from Washington state and California. Since these cases are based upon the election law of their respective states, they are of little help in Minnesota. Judge Cleary remarked that there was no case law in Minnesota to cite as precedent.

Judge Cleary said that he agrees with Justice Anderson that the board is being asked by the Franken campaign to extrapolate the duties of a judge presiding over an election contest⁷ who would be making findings of fact and reaching conclusions of law. He agreed that this is not an appropriate function for the State Canvassing Board to undertake, and agrees that there is no specific authority that grants the board the ability to do what the Franken campaign is asking.

However, Judge Cleary believes that rejected absentee ballots should be reviewed and if there are grounds for rejection—under the four reasons stipulated in statute⁸—the ballots should be retained for the purpose of the election contest. He suggested as a friendly amendment that rejected absentee ballots should be sorted into five piles, one pile for each of the four allowable reasons to reject a ballot, plus a fifth pile of ballots that have been improperly rejected. If ballots have been rejected without basis, election judges should review the ballots, open them, and challenges by the campaigns should only be allowed on the basis of voter intent. The Office of the Secretary of State could be the responsible agency for the sorting. He believed that an election contest will almost certainly follow and the sorting process will help in preparation for an anticipated contest. He also mentioned the proposal submitted by Hennepin County Attorney Mike Freeman regarding the logistics of carrying out the sorting process.⁹

Justice Anderson stated that he did not want the sorting provision as a friendly amendment on his motion, believing that the issues warrant separate discussion.

Judge Cleary then made a motion to amend Justice Anderson's motion to include the stipulation that uncounted absentee ballots mistakenly rejected should be identified, opened, and counted, subject

⁵ See attachment D for materials submitted to the State Canvassing Board by the Franken and Coleman campaigns.

⁶ See attachments E and F for copies of the statutes cited.

⁷ Judge Cleary used the term "election judge" when referring to a jurist presiding over legal proceedings contesting an election. "Election judge" can also refer to a poll worker or someone involved in the recount process. To make a clear distinction between the two, this document will use the terms "judge presiding over an election contest" and "poll worker" instead of the more vague "election judge." Also, there are several instances when members of the board used to the term "election judge" to refer to a local election official, such as a county auditor. The term "election official" has been substituted in these cases to avoid confusion.

⁸ See attachments G and H for a copy of the applicable statutes.

⁹ See attachment I for a copy of the letter and proposal submitted by Mr. Freeman.

only to challenges from the parties based on voter intent, in which case challenged ballots would come before the State Canvassing Board.

Judge Gearin then stated that she was concerned about any absentee ballots that may have been rejected without reason and would prefer to have the issue addressed in a separate motion.

Secretary Ritchie suggested that Judge Cleary withdraw his motion for the moment in order to keep the scope of the discussion broader, and indicated that the motion could be reintroduced later in the discussion as an amendment to Justice Anderson's motion.

Judge Cleary agreed to this and withdrew his motion.

Judge Gearin returned to the topic of the motion proposed by Justice Anderson. She stated that reasonable minds can disagree and that there has been public criticism of both sides. After reviewing the briefs submitted by both campaigns, she found both sides' arguments reasonable. She stated that this is why in the previous meeting the board had requested more time to consider the request that rejected absentee ballots be included in the recount.

Judge Gearin stated that she believes respect for the voters is paramount. More people voted by absentee ballot in this election than ever before. The brief from the Franken campaign stated that is not right that improperly rejected ballots not be counted. She agrees with that point and believes it would be absurd to argue against it. However, her concern being discussed today is one of jurisdiction—whether it is within the scope of the State Canvassing Board's authority to examine the reasons that absentee ballots were rejected, especially since a significant percentage were rejected. She noted the difference between the authority granted to judges when on the bench and the authority granted to judges when they are serving as a member of the State Canvassing Board.

She commented that she does not think the board has the authority to review rejected absentee ballots. She stated that she was not particularly happy about that, but the question at hand is not whether improperly rejected ballots should be counted, but rather who should review the actions of poll workers or absentee ballots boards in the rejection of these ballots.

Judge Gearin also stated that she remains concerned that there could be some absentee ballots that were neither rejected nor counted (because they were improperly rejected) and she thinks that there should be a review by local election officials to determine if there are such ballots. She concluded by stating that she supports Justice Anderson's motion.

Secretary Ritchie stated that it appeared that the board was agreeing that it does not have the authority to review rejected absentee ballots. He asked for the board's opinion regarding how the ballots in question should be handled. He also stated that he was curious as to whether the Attorney General's opinion addresses this issue.

Justice Anderson stated that there seem to be two issues being discussed. One is the discussion of how to sort and organize rejected absentee ballots. He stated that he initially finds no problems with sorting rejected absentee ballots into appropriate categories for future use. His concern is about the opening of those ballots. He stated he would support Judge Cleary's suggestion to sort the ballots in advance. He said that he believes the ballots have been rejected, but he does not want the board to

be in the business of saying whether the rejected ballots have been properly rejected and whether they should be counted.

Secretary Ritchie stated that he is hearing a high rate of concern about the issue. He stated that he was worried that the sorting being proposed could potentially be a large amount of work for the county election officials, considering that there may be as many as 12,000 to 13,000 rejected absentee ballots statewide. He suggested that the ballots be sorted into the five separate piles, but that the board not take any additional responsibility for the ballots in question or advocate opening the ballots.

Judge Gearin suggested that each county should review its rejected absentee ballots to ensure that there are not ballots that have been mistakenly rejected.

Secretary Ritchie replied that it is recount procedure that all ballots not rejected must be counted. He stated that there have been several instances when approved or accepted ballots were mistakenly rejected in the past.

Judge Gearin replied that it is because of instances like Secretary Ritchie just cited that all improperly rejected absentee ballots should be opened and counted.

Chief Justice Magnuson stated that the discussion has been a good one. He wanted to return to the discussion of the motion originally made by Justice Anderson. Chief Justice Magnuson stated that he does not hear anyone on the board arguing with the idea that the right of every citizen to have their vote counted is important and vital. The decision being made today is only about what the canvassing board has the authority to do.

The role of the State Canvassing Board is administrative, not adjudicative, and this is consistent with the view of the state for the last one hundred and fifty years. He noted the Attorney General's opinion which states that the function of the State Canvassing Board is to count ballots that have been cast and that rejected absentee ballots by definition are not cast ballots. To support this argument, he then cited *O'Ferrall v. Colby*, 2 Minn. 180¹⁰, and quoted the following from page 184 of the opinion:

If the judges of election have failed to perform their duty, or have decided erroneously in any essential particular, the constitution and laws have provided an ample remedy, either by contest before the legislature, each branch of which is the judge of the election and eligibility of its members; or by application in the courts, where all matters can be fully investigated, and the parties have compulsory process for witnesses.

Chief Justice Magnuson then went on to cite *Taylor v. Taylor*, 10 Minn. 107¹¹, quoting the following:

It was not competent for them [the State Canvassing Board] to undertake to decide whether the errors or irregularities complained of invalidated the election in the towns named. That was a question for judicial, not ministerial officers—a question that could only be decided by a court that could call in witnesses, hear evidence, and decide questions of law and fact.

¹⁰ See attachment J for a copy of the cited case.

¹¹ See attachment K for a copy of the cited case.

Irrespective of the above statutory provision, it is quite clear that this question could not be properly decided by the canvassing board.

Chief Justice Magnuson stated that he wants to make sure that every vote is counted, and the board will not stand in the way of making determinations of whether a vote is legally cast, but the board itself does not have the authority to make such determinations. He concluded by stating that he is confident that the ballots in question are secured and will be kept safe until the right body is able to address them. He stated that he strongly supported Justice Anderson's motion.

Judge Cleary responded to Chief Justice Magnuson, stating that he believes the ministerial capacity of the canvassing board has been expanded by statute since the cases cited by Chief Justice Magnuson. He reiterated again that many of the nine percent of voters casting absentee ballots are doing so out of necessity and it is important that their right to vote be taken as seriously as anyone else's. He stated that he was frustrated that the certification of the senate race will be signed prior to an election contest, at which point it will be subject to review.

Secretary Ritchie offered a friendly amendment to simplify the language of the motion to read, "The State Canvassing Board will reject the request to include rejected absentee ballots in the recount." Justice Anderson agreed to the re-wording of the motion.

Judge Cleary asked that it be clarified that in regard to the sorting of rejected absentee ballots that the fifth pile—any absentee ballots that have been mistakenly or improperly rejected, which he referred to as uncounted ballots—be distinguished from the motion on the table so that the motion does not remove that group of ballots from the purview of the board. The board agreed with this clarification.

There being no further discussion, the motion passed without opposition.

Secretary Ritchie then returned to a discussion of the fifth pile. He estimated that perhaps somewhere between 500 and 1000 improperly rejected absentee ballots exist. He asked if it was up to each citizen to take the issue to court, and if county attorneys should participate in the sorting process. He asked the board for a discussion of what should be done with any improperly rejected absentee ballots.

Chief Justice Magnuson asked how the Office of the Secretary of State instructs local election officials and canvassers to proceed. He asked if the Office of the Secretary of State has the authority to ask for the sorting process to begin without a motion from the canvassing board.

Secretary Ritchie replied that it is an issue both of authority and human relations, and that the proposal submitted by the county attorneys was useful in addressing the amount of people needed to perform a sorting of the rejected absentee ballots. Secretary Ritchie stated that he believed county officials should be asked to sort rejected absentee ballots into five piles. He stated that he understands that this is asking a lot of local officials but that it may be the only way to identify absentee ballots that were wrongly rejected.

Chief Justice Magnuson mentioned that the issue addressed in *Andersen v. Rolvaag*, 119 N.W. 2d 1,¹² was whether the State Canvassing Board could accept amended returns from a county canvassing board. Chief Justice Magnuson asked if recount officials are directed by the Office of the Secretary of State to also determine if there are improperly rejected ballots, would it still be possible for the county canvassing board to submit amended returns.

Secretary Ritchie suggested this might be a matter where the advice of counsel would be helpful.

Justice Anderson stated that he was not troubled by requiring counties to sort rejected absentee ballots. The work will be needed in the event of an election contest. However, the matter of opening the ballots and counting the votes falls under the jurisdictional issue discussed earlier. He stated he would be reluctant to move in that direction without advice from the Attorney General's office.

Judge Cleary stated that if the procedure outlined in statute is followed, there are four grounds for rejecting absentee ballots. Any ballot that does not meet the requirement for rejection is not a rejected ballot, but rather an uncounted ballot. He stated that the statute is very specific on this matter.¹³

Secretary Ritchie suggested that the Office of the Secretary of State be instructed by the State Canvassing Board to work with local election officials and county attorneys to sort rejected absentee ballots into their proper categories and identify improperly rejected ballots in order to help inform the State Canvassing Board's next steps.

Judge Gearin stated that she was comfortable in moving in that direction. She stated again that if absentee ballots are rejected for one of the four reasons allowed under statutes then those ballots should not be opened because they are subject to an election contest. If there is no reason for rejection, then the absentee ballot should be counted. The question is how to determine whether the ballots were improperly rejected.

Chief Justice Magnuson stated that at some point in the process the vote totals need to be certified and the counting done. The question he has is if the State Canvassing Board is currently at a point where additional ballots can still be counted.

Secretary Ritchie replied that until the board signs the certification papers, vote totals may be amended.

Chief Justice Magnuson then stated in that case the counties can be asked again to count their rejected absentee ballots. The problem is that the State Canvassing Board does not have the authority to tell an election official or poll worker how to rule on any particular ballot. Ballots in the fifth pile should be taken up through the election contest process, not by the State Canvassing Board. He stated that he agrees with the proposal from the county attorneys as a mechanical way of sorting things, but stops short of being able to direct election judges as to what to do with the ballots in question.

¹² See attachment L for a copy of the cited case.

¹³ See attachment G for a copy of the applicable statutes.

Judge Cleary disagreed, stating that if an absentee ballot was not rejected because one of the four reasons, it is an uncounted ballot and should be counted now.

Justice Anderson countered that ballots which have been rejected, even if the reason for the rejection is not properly listed, will likely be dealt with under the election contest process. He stated that it would be helpful to have input from the Attorney General's office on this question, since it again deals with the issue of authority discussed earlier in the meeting.

Secretary Ritchie asked the Attorney General's office to give an opinion regarding the ability of local election officials and county attorneys to sort the rejected absentee ballots in order to determine the number of absentee ballots that may have been improperly rejected. The question of what will be done with the ballots in question is a matter that does not need to be addressed today, but any input the Attorney General's office has to offer in the matter would be helpful.

Christie Eller, Deputy Attorney General, stated that the Office of the Attorney General has not seen the proposal put forth by the county attorneys and therefore she did not want to comment on the proposed plan.

Secretary Ritchie asked Ms. Eller if the Office of the Attorney General could review the plan this week.

Ms. Eller replied that she would. She added that *Minnesota Statutes* 204C.38 addresses the issue of correction of obvious errors when candidates agree.¹⁴

Judge Cleary countered that he does not believe that 204C.38 is applicable to the current situation. He asked Ms. Eller if, in the situation where the candidates do not agree on anything, whether election officials can review whether rejected absentee ballots fall under one of the four categories. In that case the ballots could be challenged on the basis of intent only.

Ms. Eller replied that the Attorney General's office would like some time to review the issue further before offering an opinion.

Judge Cleary stated that he believed if election officials sorting rejected absentee ballots is not an issue, then the issue of what to do with ballots in the fifth pile should not be an issue, either.

Mr. Alan Gilbert, Solicitor General, stated that the question posed by Judge Cleary regarding the fifth pile gets back to the jurisdictional issues discussed earlier in the meeting.

Chief Justice Magnuson stated that a fifth pile should be created through the sorting process, but it is not within the State Canvassing Board's province to dictate what should be done with those ballots. He asked for assistance from the Attorney General's Office.

Judge Gearin reiterated that any ballots in the fifth pile are by definition uncounted and should therefore be opened and counted and it is at the discretion of election officials and their staff whether an absentee ballot should be in the fifth pile.

¹⁴ See attachment M for a copy of the referenced statute.

Mr. Gilbert stated that he understands and the Attorney General's Office will review the issue further.

Judge Cleary asked if it was possible to reintroduce the motion he had put forth earlier and then withdrawn.

Justice Anderson asked if the board should wait until receiving advice from counsel.

Secretary Ritchie suggested that the board should wait for an opinion from the Attorney General's office and then work on crafting something for consensus. He stated that he was hearing general agreement on the sorting of rejected absentee ballots, and that the board can later address the questions raised by Judge Gearin and Judge Cleary. Secretary Ritchie asked the board if they were comfortable with proceeding in this fashion.

Chief Justice Magnuson remarked that he believes it would be unwise to make a decision without input from the Attorney General and the Franken and Coleman campaigns. He suggested a need for the board to meet again.

Judge Gearin made a motion to commend the state's local election officials and the work they are doing in the recount process. Judge Cleary seconded the motion. The motion passed without opposition.

8. Recess

Secretary Ritchie then made a motion for the board to go into recess. Chief Justice Magnuson seconded the motion. The motion passed unanimously.

The meeting was adjourned at 10:27 a.m.