

STATE CANVASSING BOARD - MINUTES

December 8, 2010

9:00 a.m.

State Office Building, Room 10
100 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, Minnesota

1. Call to Order

Secretary of State Mark Ritchie reconvened the meeting of the State Canvassing Board at 9:00 a.m.

Members of the Canvassing Board present included Secretary of State Mark Ritchie, Minnesota Supreme Court Associate Justice Paul H. Anderson, Minnesota Supreme Court Associate Justice David R. Stras, Second Judicial District Court Judge Gregg E. Johnson, and Fourth Judicial Court Judge Denise D. Reilly. Also present were Deputy Attorney General Christie Eller, Solicitor General Alan Gilbert, Director of Elections Gary Poser, Bert Black and other staff from the Office of the Secretary of State, along with members of the media and public.

2. Motion to adjourn

Secretary Ritchie informed the members of the State Canvassing Board that there was a request to adjourn from the Emmer campaign until 11:00 A.M. Judge Reilly moved that the Board recess until 11:00 A.M.

Justice Anderson asked why the Board was adjourning and if 11:00 A.M. was the appropriate time for the Board to reconvene. Secretary Ritchie called on Mr. Eric Magnuson, legal representative for Candidate Emmer. Mr. Magnuson said that as it has been reported in the media that Candidate Emmer will have a press conference in Delano at 10:30 A.M; reconvening the meeting at 11:00 A.M. will expeditiously move the State Canvassing Board's business along.

Justice Stras seconded the motion by Judge Reilly. The motion passed unanimously.

The Board recessed at 9:02 A.M.

3. Board Reconvenes

Secretary Ritchie reconvened the State Canvassing Board at 11:00 A.M. Secretary Ritchie stated that the Board had two issues before it: withdrawal of challenged ballots and a letter sent to

the Board by Mr. Magnuson on December 8, 2010 waiving the recount on behalf of Candidate Emmer.¹

Secretary Ritchie asked if the legal representatives of both candidates would speak to the issue of withdrawing challenged ballots. Mr. Magnuson said that Candidate Emmer has directed his legal team to waive any further legal proceedings and waive the recount. Mr. Magnuson stated that he had talked with the Dayton campaign, Solicitor General Gilbert, Director Poser and submitted in writing Candidate Emmer's decision to waive the recount. He said that there should be no problem resolving this election immediately. Mr. Magnuson stated he believed it does not make sense to discuss withdrawing challenged ballots when Candidate Emmer has waived the recount. Secretary Ritchie asked Mr. Magnuson if he was going to withdraw the challenges. Mr. Magnuson said that he did not see withdrawing the challenges as relevant but if withdrawing the challenges would conclude the recount he would do so.

Justice Anderson thanked Mr. Magnuson for clarifying his use of the word "waiver." Mr. Magnuson responded that Candidate Emmer needed to test the validity of the results and now that a waiver has been given, it is time to certify the election results based on the original returns. He stated that if a waiver is what it takes to move forward that is what they will do.

Secretary Ritchie called on Mr. Marc Elias, legal representative for Candidate Dayton, to speak on withdrawal of the challenges. Mr. Elias said that based on Mr. Magnuson's letter, Candidate Dayton's legal team is prepared to move forward to assist the Board in bringing certification of the election. He stated that Candidate Dayton would withdraw his challenges that remained.

Secretary Ritchie said that the Board could direct Director Poser to withdraw the challenges and prepare a final report for the Board; he said that this would give the Board the most accurate number and the greatest protection against further legal action from others. The other option the Board has is to certify the original election results "which we know have been supplanted by a great deal of information from our local people."

Mr. Magnuson asked what authority the canvassing board had to proceed with the recount after the candidate has waived the right to a recount. He said he was not aware of any authority. Justice Stras asked for an opinion from the Attorney General's office in how to move forward given the multiple possibilities. Solicitor General Gilbert stated that Candidate Emmer has waived his right to a recount pursuant to Minnesota Statute 204C.35 and that recounts have been waived on previous situations after they have been started. Solicitor General Gilbert said that he is not aware of a prior waiver situation in which the recount by the local officials had already been completed, the Board had been asked to review challenges which have apparently been withdrawn and the Board needed to make a decision on what the final

¹ See Attachment A for the letter Mr. Magnuson sent to the Board.

numbers were. Solicitor General Gilbert said that the canvassing board certifies results based on Minnesota Statute 204C.33 subdivision 3 which reads:

“The State Canvassing Board shall meet at the secretary of state’s office on the third Tuesday following the state general election to canvass the certified copies of the county canvassing board reports received from the county auditors and shall prepare a report and provide for the information to be in the report. All members of the state canvassing board shall sign the report and certify its correctness.”

Solicitor General Gilbert said that in the past canvassing boards have taken the position that they are certifying that the State Canvassing Board report accurately reflects a compilation of the canvassing reports of the local officials, not that the information in the canvassing board report is accurate and correct, since they do not have information from personal knowledge. Solicitor General Gilbert said that in this light, what Mr. Magnuson has said is correct: since the recount has been waived by Candidate Emmer, the appropriate thing to do would be to certify the results that were set forth in the initial canvassing report, which the Board has already certified.

Justice Anderson said that all the ballots were counted in the recount, the table officials made the calls on the challenged ballots and that he believes that the recount is the most accurate evidence the Board has. Justice Anderson also said he did not know if the Board has any authority to certify the totals from the recount. He reiterated that the Board wants to get the process right.

Judge Reilly stated that she believes the Board can certify today the elections based on the recount that has been done. Secretary Ritchie clarified that by certifying the recount results the challenges would be allocated as they were called by the table officials and then the Board would certify that number. Judge Reilly agreed.

Justice Stras said that after looking at the statute he would side with Solicitor General Gilbert’s opinion, that the Board has already certified the election and if the recount is being waived there is nothing left for the Board to certify. Judge Johnson stated that he agrees with Justice Stras. Justice Anderson asked to hear from Mr. Magnuson. Mr. Magnuson responded that the Board has heard from the Solicitor General Gilbert and other than the Board’s desire to do something else there is no legal authority for it to certify the election results based on the recount.

Judge Reilly reiterated that whatever needs to be done, can be done today.

Justice Stras asked if the election certificate would have to be signed since the Board already signed the initial certificate. Secretary Ritchie said the original certificate excluded the certification of the four races that were recounted. Secretary Ritchie stated that he did not want to sign a certificate with incorrect numbers that could set up a legal contest but would

rather the Board allocate the challenges and sign a certificate including the numbers from the recount.

Judge Reilly asked how much time Director Poser would need to calculate the results. Director Poser said that he could allocate the vote totals as they were determined by the local table official. He said there was an estimated 530 precincts where the allocations would need to be made and then a final report could be generated. Director Poser told the Board that his staff would need several hours to prepare the report and verify that it was accurate.

Justice Stras said that he shares Justice Anderson's opinion that the Board needs to get the process right. Justice Stras stated that he agrees with Secretary Ritchie that a certificate needs to be signed but is unsure if the certificate the Board will sign should have the original vote totals or the recount vote totals. He said he believes that it is the original vote totals. Mr. Gilbert said that was the view of the attorney general's office. Secretary Ritchie said that the waiving of the recount is too late now that it is completed so now the Board has to certify the results of the recount.

Justice Anderson said that Solicitor General Gilbert and the attorney general's office have given the Board the best advice they can and shares Secretary Ritchie's discomfort in signing a certificate with results that could be more accurate. Mr. Gilbert said he shares the Board's concerns as there has been a lot of work done by the local election officials. However, the view of the Board has been that they are canvassing the results of the local election officials, not certifying that those results are absolutely correct. Since there is a waiver of the recount it is the attorney general's opinion that the Board should certify the original canvassing results of the local election officials.

Solicitor General Gilbert reiterated that Secretary Ritchie is saying that the waiver is improper as the recount has concluded. Secretary Ritchie stated that the waiver was proper, but since it was submitted just after the recount had been completed, the waiver has no effect. Solicitor General Gilbert responded that the statute does not state a deadline by which a waiver must be submitted. Judge Johnson asked if counsel agreed with Solicitor General Gilbert's opinion of the statute. Mr. Elias said that the people of Minnesota would be best served by having this process conclude and not take any additional time. Mr. Elias stated that he had no reason to doubt Mr. Gilbert's legal analysis. Mr. Magnuson said that Candidate Emmer has instructed his legal team to bring this matter to a conclusion as quickly as possible. Mr. Magnuson thought the waiver would do that. He reiterated that the Board should certify the results of the original canvass.

Judge Johnson made a motion based on the advice given from counsel and the representations of Mr. Magnuson and Mr. Elias that the canvassing board should conclude this process as quickly as possible. Judge Reilly seconded the motion. Justice Anderson stated that this was an automatic recount. He asked whether there was an obligation to the citizens of Minnesota to complete the recount because the statute says that it is automatic. Solicitor General Gilbert

cited Minnesota Statute 204C.35 that states in unambiguous language, “a losing candidate may waive a recount required pursuant to this section by filing a written notice of waiver with the canvassing board.” Solicitor General Gilbert said that does not suggest that the losing candidate can only waive a non-mandatory recount but indicates that a mandatory recount is included within the scope of recounts referenced. Solicitor General Gilbert suggested that the Board certify the results but also provide for an asterisk or some notation as to what the difference was in the recount. This would recognize the local election official’s efforts and that the recount has taken place in large part if not completely. Mr. Magnuson asked what the authority would be for proceeding in that manner and why the Board would do anything but follow that statute.

Justice Anderson said he did not see how an asterisk could be included on the election certificate but rather suggested that the minutes reflect the information about the recount and the hard work done by the election officials. Justice Stras said that the Board should certify the original numbers but acknowledge the hard work by the election officials as well as counsel for the two parties. Secretary Ritchie said the only thing mandatory about recounts in Minnesota is that taxpayers pay for it if the margin is less than ½ of 1%. There is no such thing as a mandatory recount in Minnesota. Any election can be recounted if the contestant who wants it is willing to pay for it. The word mandatory has been misused often in this conversation.

The motion passed unanimously.

Director Poser indicated that staff had started to prepare the appropriate documents and that we should proceed to the other work of the Board and that the documentation should be available shortly.

4. Certification of State Representative Races

Director Poser directed the board to the 2010 State General Legislative Recount Final Recount Summary Report² that summarizes the results of the recounts for State Representative Districts 15B, 25B and 27A. Director Poser noted that there were four challenges in 15B, which have since been withdrawn. The final results for district 15B were Banaian, 5,480 and Lewis, 5,467. In districts 25B and 27A there were no challenges. The final results for 25B, in which there were no challenges, were Woodard, 8,903 and Bly, 8,866. The final results for district 27A, in which there were no challenges, were Murray, 7,511 and Brown, 7,454. Mr. Poser presented the board the Statement of Votes Cast³ which includes the final recount results with the write-in numbers.

² See Attachment B for the report presented to the Board.

³ See Attachment C for the report presented to the Board.

Justice Stras made a motion to accept this report; Judge Reilly seconded the motion. The motion passed unanimously. The canvassing board members signed the certificate certifying the races for State Representative in Districts 15B, 25B and 27A.⁴

Secretary Ritchie thanked Director Poser and his staff for their hard work. Director Poser said that it was a challenging year especially with the primary date moved up. He thanked the staff at the Office of the Secretary of State and the local election officials for all they have done to implement the legislative changes.

5. Approval of Minutes from November 23, 2010 and December 3, 2010 State Canvassing Board meetings

Justice Stras moved to accept the minutes from the State Canvassing Board meeting on November 23, 2010. Judge Reilly seconded the motion. The motion passed unanimously.

Justice Anderson moved to approve the December 3, 2010 State Canvassing Board meeting minutes with his minor changes. Justice Stras seconded the motion. The motion passed unanimously.

6. Recess

The Board recessed at 11:32 A.M. until noon.

7. Reconvene

Secretary Ritchie reconvened the meeting of the State Canvassing Board at 12:02 P.M.

Secretary Ritchie called on Director Poser to make the final report to the Board. Director Poser directed the Board to the State of Minnesota Canvassing Report.⁵ This report included the numbers from the November 23, 2010 meeting. The final totals were Emmer, 910,462 and Dayton, 919,232. The second report Director Poser presented to the Board was the Challenged Ballot Allocation report.⁶ In this report 508 challenged ballots would have been allocated to Candidate Dayton and 103 challenged ballots allocated to Candidate Emmer. The final totals as recounted were Dayton, 919,691 and Emmer, 910,611; a difference of 9,080 votes. Director Poser asked that this report be attached to the minutes along with the detailed 2010 Gubernatorial Recount Challenged Ballot Allocation Report.⁷

⁴ See Attachment D for the certificate signed by the Board.

⁵ See Attachment E for the report presented to the Board.

⁶ See Attachment F for the report presented to the Board.

⁷ See Attachment G for this report presented to the Board.

⁸ See Attachment H for this certificate signed by the Board.

Judge Johnson moved to accept the November 23, 2010 State of Minnesota Canvassing Report. Justice Stras seconded the motion. The motion passed unanimously.

The members signed the certificate⁸ certifying the results of the Governor/Lt. Governor race.

8. General comments

Judge Reilly said that this experience confirms what she learned as being part of the election process in 2008. She is proud of how many people come out and vote and volunteer to be part of the process. She thanked Secretary Ritchie for allowing her to be part of this.

Justice Stras stated that it has been a great honor to serve on the Board. He thanked the citizens of Minnesota for participating in the process, the volunteers across the state, and the Office of the Secretary of State staff for doing a great job in facilitating the process. Lastly he thanked counsel from both sides for helping the Board with this process.

Justice Anderson shared the following comments:

Thank you, Mr. Secretary for the opportunity to say thank you and a few words of clarification before we adjourn sine die.

Service on this Board has been a good experience; but, I anticipated that it would be once I learned the names of my fellow Board members. You are excellent colleagues. To paraphrase the late Charles Schultz, "Thanks for the opportunity to serve with you, the anticipation was only exceeded by the actual event."

Secretary Ritchie, I thank you and your excellent staff for how you have conducted these proceedings. Everything has been well organized, and I have always been kept fully informed. Mr. Poser, thank you for your work in coordinating the recount. You did your job well for the people of Minnesota. I am aware at times you may have felt that my questioning was a bit tenacious or even relentless; but please understand that asking questions is what I do for a living and that I did need to know the answers to my questions.

My biggest thank you is reserved for all the election officials who have given service above and beyond the call of duty. Some names come to mind. Rachel Smith and Joe Mansky of our two largest counties—Hennepin and Ramsey. Larry Jacobs from Renville County who braved an 11 inch snowstorm in order to deliver his county's ballots to us, and to Wayne Stein of Otter Tail County whose diligence led to finding an errant ballot that was stuck in a voting machine.

The officials who I have named are representative of all the election officials in our state who have been conscientious in their efforts to make sure that every validly cast ballot

was counted. They are the people to whom we owe the greatest debt of gratitude. Their diligent works is what makes Minnesota elections function well. They are vitally important to making our democracy work.

I wish to add a second to Justice Stras' thank you to the attorneys for their help in getting the work of this Board completed. This thank you includes Deputy Attorney General Christie Eller and Solicitor General Alan Gilbert and their staff.

At this point, I believe a few words of clarification by me are necessary. Much has been made of the exchanges that occurred between me and my former Supreme Court colleague, former Chief Justice Eric Magnuson. Some people have told me that I may have been a bit too stern, even harsh, during our exchanges. Thus, I have concluded that some clarification is necessary to explain my comments.

Late last Thursday, I learned that the number of challenged ballots might well exceed 9,000; a number that I knew would render the task of this Board to be nearly impossible. I was also informed that comments had been made that the recount process is just an extension of the political campaign and therefore partisanship was appropriate. I deemed these latter comments to be highly inappropriate.

At about the same time, I received a packet of 84 challenged ballots that had been cast in Hennepin County. I reviewed each ballot, one by one. The best way to characterize my reaction to what I saw is to concur with the comment made by my fellow board member, Judge Gregg Johnson –it was “ludicrous.”

What really struck me as I reviewed those ballots was the knowledge that behind each ballot was an individual voter. A citizen who had registered to vote, who had taken the time to go to a polling place, who had cast his or her vote; and now, someone was, for partisan reasons, trying to disenfranchise that citizen—to take that citizen's vote away. This conduct should not happen, especially not here in Minnesota. As I became more and more irritated by what I saw, I concluded that something needed to be done to stop this behavior.

At this point, everyone should know that we judges understand that the citizens of this state are our boss and that we take this relationship very seriously. Each judge on this board knows to whom he or she is accountable, to whom he or she has a fiduciary duty and an ultimate responsibility. We know that we have a duty to protect the interests of the citizens of this state.

As you may recall, at our first meeting, I attempted to send a clear message that frivolous ballot challenges were not welcome. Obviously, this message was not taken to heart. I concluded that this message needed to be restated with more force. Mr. Magnuson, by appearing before this board you became the vessel through which I

would deliver this message. This is why I said what I did to you. It was not because I had any doubts about your professional standards, in fact, it was just the opposite. I knew that you do adhere to the highest standards, but I also knew that you needed to have a solid template available to you when you conveyed our message to those who had transgressed and had not adhered to the standards that we expected. I do believe that subsequent events have shown that my confidence in you was justified.

If my comments were a bit harsh, I apologize, it was with that foregoing purpose in mind. Please be assured that it was not because I had any doubts about your professional standards. I do not. I know that they are very high. In this regard I want to make it absolutely clear that I have the highest respect for your professional standards. It is a respect that you have achieved the old-fashioned way—you have earned it.

One final point before I finish, those who know me well know that I truly love this state. It is a privilege to live here and it is a great privilege to serve the people of this state. I want to thank the citizens of Minnesota for giving me and the other members of this board the opportunity to serve you, I hope that we have served you well—we have surely tried to do so. We fully understand and appreciate the privilege of service that you have bestowed upon us. The only thing that we can do in return is to attempt to earn this privilege by what we do each and every day. I hope that you will conclude that what we have done on this canvassing board justifies the trust and confidence you have placed in us.

Judge Johnson said that it had been a pleasure to serve with his colleagues on the Board and the Secretary of State. He complimented the Office of the Secretary of State staff, local election officials and members of the attorney general's office, saying that they did a marvelous and efficient job. Judge Johnson also thanked the attorneys from both sides for their professionalism.

9. Approval of the minutes from the December 8, 2010 State Canvassing Board meeting

Secretary Ritchie called on Mr. Bert Black who informed the Board members that the next State Canvassing Board meeting is scheduled for August 21, 2012. Mr. Black suggested Board members follow the procedure established in 2008 recount, which was at the last meeting that the Board directed the minutes to be prepared and circulated to the Board members for approval in writing.

Judge Reilly moved that the minutes be prepared and sent to the Board members for their edits and written approval. Judge Johnson seconded the motion. The motion passed unanimously.

10. Adjournment

Judge Johnson moved to adjourn the meeting of the State Canvassing Board. Judge Reilly seconded the motion. The motion passed unanimously and the Board adjourned at 12:18 P.M.