



STATE OF MINNESOTA

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The Honorable Mark Ritchie
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100 Rev. Dr. Martin Luther King Jr. Blvd.
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The Honorable Eric Magnuson
Chief Justice
Minnesota Supreme Court
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The Honorable G. Barry Anderson
Associate Justice
Minnesota Supreme Court
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The Honorable Kathleen Gearin
Chief Judge
Ramsey County District Court
15 West Kellogg Blvd.
St. Paul, MN 55102

The Honorable Edward Cleary
Assistant Chief Judge
Ramsey County District Court
15 West Kellogg Blvd.
St. Paul, MN 55102

Dear Secretary Ritchie, Chief Justice Magnuson, Justice Anderson, Chief Judge Gearin, and Assistant Chief Judge Cleary:

At the November 26, 2008 meeting, the State Canvassing Board discussed a proposal that local election personnel review all rejected absentee ballots in conjunction with the corresponding precinct rosters and sort them into separate piles based upon the reasons for their rejection.

Thereafter, on December 1, 2008 Secretary Ritchie's office requested all county and city election officials to place all rejected absentee ballot envelopes into one of five piles based on the following reasons for their rejection:

1. The voter's name and address on the return envelope are not the same as the information provided on the absentee ballot application (i.e., ballots rejected pursuant to clause (1) of Minn. Stat. § 203B.12, subd. 2).
2. The voter's signature on the return envelope is not the genuine signature of the individual who made the application for the ballot and a signature is required under applicable Minnesota law, or the certificate has not been



completed as prescribed in the directions for casting an absentee ballot (i.e., ballots rejected pursuant to clause (2) of section 203B.12, subd. 2).

3. The voter was not registered and eligible to vote in the precinct or has not included a properly completed voter registration application (i.e., ballots rejected pursuant to clause (3) of section 203B.12, subd. 2).
4. The voter had already voted at the election, either in person or by absentee ballot (i.e., ballots rejected pursuant to clause (4) of section 203B.12, subd. 2).
5. The election judge cannot determine any statutory basis for rejecting the absentee ballot, based on the available records, including the voter roster (i.e., the so-called "Fifth Pile").

Minnesota Statutes Section 203B.12, subdivision 2 (2008) provides four statutory bases upon which absentee ballots may be rejected.¹ The statute further provides that "[i]f all or a majority of the election judges examining return envelopes find that an absent voter has failed to meet one of the requirements prescribed in clauses (1) to (4), they shall mark the return envelope 'Rejected,' initial or sign it below the word 'Rejected,' and return it to the county auditor." *Id.* Section 203B.12, subd. 2, states that "[t]here is no other reason for rejecting an absentee ballot."

At the November 26th meeting, the State Canvassing Board unanimously denied a request to include absentee ballots rejected for one of the four reasons set forth in clauses (1)-(4) of section 203B.12, subd. 2 in connection with the recount. The Board then requested an opinion as to whether and by what means absentee ballots contained in the so-called Fifth Pile (i.e., absentee ballots that were not rejected for one of the four statutory reasons) may be tabulated in order that voters who complied in all respects with the statutes are not unfairly disenfranchised.

There is no doubt that voters who have complied with all legal requirements, but whose ballots were improperly rejected, should have their votes counted. Minnesota courts have long expressed the importance of the right of the citizen to vote and to have his or her vote counted. *See Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 729 (Minn. 2003) ("Our review must be informed by the recognition that '[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.'"); *In re Application of Andersen v. Donovan*, 119 N.W.2d 1, 8 (Minn. 1962) (election laws intended "to safeguard the right of the people to express their preference in a free election"); *Contest of Sch. Dist. Election Held on May 17, 1988 v. Gross*, 431 N.W.2d 911, 915 (Minn. Ct. App. 1988) (stating that

¹ The procedures and forms for ballots submitted under the Uniform Overseas Citizens Absentee Voting Act ("UOCAVA") are slightly different, *see, e.g.* Minn. Stat. §§ 203B.16-203B.27 (2008), but the four statutory bases for rejection of UOCAVA ballots set forth in Minn. Stat. § 203B.24, subd. 4 (2008) are similar to those set forth in section 203B.12.

“purpose and intent behind absentee voting legislation is the preservation of the enfranchisement of qualified voters”); *Dougherty v. Holm*, 44 N.W.2d 83, 85 (Minn. 1950) (“Election laws should be liberally construed so as to secure to the people their right freely to express their choice.”).

The legislature has enacted a number of statutory procedures to remedy errors made by election judges or other officials in the election process so that voters are not unfairly disenfranchised.

First, Minn. Stat. ch. 204C contains provisions for the correction by county election officials of errors as part of the canvassing process.² Under Minn. Stat. § 204C.38 (2008), if the candidates for an office agree in writing that local election judges or the county canvassing board made an obvious error in the counting and recording of votes, the county canvassing board may be reconvened to correct that error. We note that attorneys for candidates Al Franken³ and Norm Coleman⁴ have publicly stated that they support the counting of any absentee ballots that were erroneously disqualified. Accordingly, we recommend that the Secretary and/or the State Canvassing Board determine whether the candidates will agree in writing that an error occurred to the extent absentee ballots in the so-called “Fifth Pile” (i.e., ones for which the election judge cannot determine any statutory basis for rejection under § 203B.12, subd. 2) were rejected. If the candidates are willing to so stipulate in writing, then the applicable county canvassing board may submit an amended report to the State Canvassing Board reflecting any additional votes received by each candidate when the improperly rejected absentee ballots are counted. The State Canvassing Board can then include the amended certificate(s) in finalizing the election results.

² Any processes utilized should preserve the ballot secrecy that is central to the election system. See Minn. Const. art. VII, § 5 (“All elections shall be by ballot...”); *Elwell v. Comstock*, 109 N.W. 698, 699 (Minn. 1906) (stating that the Constitutional language is intended to secure the privilege of voting secrecy).

³ The request of Mr. Franken that was the subject of the November 26th meeting of the State Canvassing Board was to approve the tabulation of rejected absentee ballots in the ongoing process. For example, the Memorandum of the Al Franken Committee submitted November 17, 2008 states at page 5: “[T]he Franken Campaign and Al Franken respectfully request that this Board consider and take into account improperly rejected absentee ballots....”

⁴ The *Pioneer Press* has reported: “[Coleman counsel Fritz] Knaak said that the Coleman campaign was pleased with the [State Canvassing Board] ruling and supports the idea of counting votes from ballots that have no legal basis for being rejected. For example, Knaak said he supports the decision by Itasca County Auditor-Treasurer Jeff Walker to reopen his county’s recount to reconsider three ballots, including one rejected absentee ballot whose official reason for rejection begins, ‘We messed up.’ In essence, Knaak said, the Fifth Piles already are being created.” St. Paul Pioneer Press, “*Franken Loses A Round Over Absentee Ballots*,” Nov. 27, 2008. Similarly, Minnesota Public Radio reported on November 26, 2008: “Knaak said he won’t take issue with the counting of any absentee ballots that were wrongly disqualified or overlooked....”

Second, if the candidates are not in agreement, Minn. Stat. § 204C.39 (2008) provides an alternative manner for the correction of obvious errors at the county level. Subdivision 1 of that statute provides:

A county canvassing board may determine by majority vote that the election judges have made an obvious error in counting or recording the votes for an office. The county canvassing board shall then promptly notify all candidates for that office of the determination, including a description of the error. A candidate who receives notification pursuant to this subdivision or any candidate who believes that the election judges in a precinct have made an obvious error in the counting or recording of the votes for an office may apply without unreasonable delay to the district court of the county containing the precinct in which the alleged error was made for an order determining whether or not an obvious error has been made. The applicant shall describe the alleged error in the application and may submit additional evidence as directed by the court. The applicant shall notify the county canvassing board and all candidates for the affected office in the manner directed by the court. If the court finds that the election judges made an obvious error it shall issue an order specifying the error and directing the county canvassing board to inspect the ballots and returns of the precinct in order to correct the error and to proceed further in accordance with this section or otherwise as the court may direct.

Other than noting that there should be no unreasonable delay, neither section 204C.38 nor 204C.39 specifies any time period within which such corrections must be made. In *Andersen*, the Minnesota Supreme Court allowed county canvassing boards under a prior version of section 204C.39 to amend and resubmit their certified reports to the Secretary of State after the initial reports were submitted but before the results of the election were finalized. The court described the purpose of the prior version of section 204C.39 as “to permit correction at the county level of errors committed by the precinct judges in order to avoid the necessity of an election contest where possible.” *Andersen*, 119 N.W.2d at 5 (footnote omitted). *Andersen* supports a flexible reading of sections 204C.38 and 204C.39 to allow local canvassing officials to amend their election returns pursuant to those statutes before the election results are finalized in order to correct errors in the vote for the 2008 election for the United States Senate.

Third, another procedure which may be available for counting improperly rejected absentee ballots is set forth in Minn. Stat. § 204B.44 (2008). See *Andersen*, 119 N.W.2d at 10. In *Erlandson v. Kiffmeyer*, 659 N.W.2d 724 (Minn. 2003), a petition was filed in the Minnesota Supreme Court following the death of Senator Paul Wellstone to require the Secretary of State to mail replacement absentee ballots to voters to whom absentee ballots had previously been sent. Section 204B.44 allows an individual to file a petition with any Justice of the Minnesota Supreme Court for the correction of an omission or error of any election judge, county auditor, canvassing board, or other election official in connection with an election for state or federal office. The petition shall describe the error or omission and the correction sought by the petitioner. *Id.* The statute further provides that “[u]pon receipt of the petition the court shall

immediately set a time for a hearing on the matter and order the officer, board or individual charged with the error, omission or wrongful act to correct the error or wrongful act or perform the duty or show good cause for not doing so” and that “[t]he court shall issue its findings and a final order for appropriate relief as soon as possible after the hearing.” *Id.*

Fourth, another mechanism for correcting errors in the election process is contained in Minn. Stat. Ch. 209, which allows an eligible voter or candidate to commence a judicial election contest to challenge, among other things, “an irregularity in the conduct of an election or canvass of votes.” *See* Minn. Stat. § 209.02, subd. 1.

A common thread in the court cases discussed in this opinion is that every lawful vote should be counted. Another common denominator is that the courts grant substantial deference to the decisions of canvassing boards, so long as they act in good faith to ascertain the will of qualified voters. To that end, Minnesota courts have sustained canvassing boards that took action to include votes in a manner not necessarily contemplated under a strict reading of the statutes. *See Andersen* and *Contest of School District Election*. We assume the courts have done so out of a legitimate and abiding concern that, in a democracy, every lawful vote should count.

The *Andersen* case involved the 1962 gubernatorial election. Based on the initial election results certified by all Minnesota county canvassing boards, Karl F. Rolvaag led by 58 votes. Ten counties thereafter amended their election results to correct errors discovered by county election officials. In one county, 31 absentee ballots that were personally delivered to the election judges were originally not counted. The county board, upon reconvening, considered these ballots and counted them. The ten county canvassing boards then certified the results of their recanvasses to the secretary of state. The recanvassed vote resulted in a 142 vote margin for Elmer L. Andersen. Candidate Andersen filed a petition with the Minnesota Supreme Court seeking to compel the State Canvassing Board to accept the amended returns as part of their tabulations. The issue for the court was whether the ten counties could, under a predecessor to the current law now contained at section 204C.39, amend their certified results based on errors in their initial reports.

The Minnesota Supreme Court initially observed:

That there is difficulty in the proper construction of these statutory provisions is evident from the fact that the state canvassing board--composed of two district judges, two members of this court, and the secretary of state, four of whom are learned in the law--has been unable to agree upon their proper application.

Andersen, 119 N.W.2d at 6. The court then noted that the action by the counties in submitting amended reports “in all probability” was not timely under the applicable statutes and further indicated that a “better” course of action would have been for a court order to have been obtained to allow the counties to submit the amended returns. The Supreme Court nevertheless ordered that the amended tallies be accepted:

It would have been better if the parties interested had proceeded under § 203.38 [predecessor statute to section 204B.44 authorizing court petition to correct errors], but, keeping in mind that the object of all elections ought to be to declare elected the candidate who receives the most legal votes, it should follow that the method of arriving at the correct result, *after it is in fact accomplished*, should not be permitted to control so as to declare the loser to have won the election. To do so would be to permit the outcome of an election to rest on admitted mistake rather than on known fact.

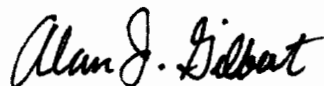
Andersen, 119 N.W.2d at 10-11 (emphasis in original).

Similarly, in *Contest of School District Election*, election judges set aside 29 absentee ballots as “questionable” in a school funding election because the voter’s certificate was not properly placed between the inner and outer envelopes, as required by the voting instructions. The school board, acting as a county canvassing board, approved a resolution that the “questionable” ballots be counted. The inclusion of the absentee ballots in the final results changed the outcome of the election, and a group of voters filed a contest challenging the validity of the disputed ballots. The Court of Appeals sustained the inclusion of the ballots by the county canvassing board, finding that “[a]n election that has resulted in a fair and free expression of the will of legal voters will not be invalidated because of a departure from the statutory regulations governing the conduct of the election.” *Contest of Sch. Dist. Election*, 431 N.W.2d at 915.

We note that the Minnesota Supreme Court in *Andersen* described the filing of a court petition as the “better” course to follow. *Andersen*, 119 N.W.2d at 10. However, it is our opinion based on *Andersen* and *Contest of School District Election* that a reviewing court would likely uphold a determination by the State Canvassing Board to accept amended reports from county canvassing boards that include absentee ballots of voters who complied with all legal requirements but whose votes were improperly rejected by election officials due to administrative errors.

We remind you that the State Canvassing Board operates under the constitution and the statutes as an official body and, accordingly, the Board should adopt a formal resolution concerning any decision it makes regarding the matters discussed in this opinion. We hope this opinion is of assistance to the Board in its deliberations on Friday.

Very truly yours,



ALAN I. GILBERT
Solicitor General