



STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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The Honorable Mark Ritchie
Secretary of State
180 State Office Building
100 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155-1299

Re: Canvass of Rejected Absentee Ballots

Dear Secretary Ritchie:

You request legal advice as to whether Minnesota law allows returned absentee ballots that were rejected by election judges pursuant to Minn. Stat. § 203B.12, subd. 2 (2008) to be reviewed in connection with the upcoming state-wide recount of the votes cast in the November 4 election for the U.S. Senate.

ABSENTEE BALLOT PROCESS

A person voting by absentee ballot, after marking the ballot in the presence of another registered voter, seals the ballot in a ballot envelope provided with the absentee voting materials. The ballot envelope is then placed into a return envelope, upon which is printed a "certificate of eligibility," to be signed and sworn to by the voter. The return envelope also contains a statement by the voter's witness that the unmarked ballot was displayed to the witness, the voter marked the ballot in the presence of the witness and, if not previously registered, the voter provided proof of residence required by Minn. Stat. § 201.061, subd. 3 (2008). See Minn. Stat. §§ 203B.07, 203B.08 (2008). The return envelope is then sealed and mailed or delivered by an agent to the county auditor or municipal clerk. Minn. Stat. § 203B.08 (2008).¹

On election day the unopened return envelopes are delivered to the election judges. Minn. Stat. §§ 203B.08, subd. 3, 203B.12, subd. 1 (2008). Two or more judges examine each return envelope. A return envelope is "Accepted" if a majority of the judges are satisfied that:

- (1) the voter's name and address on the return envelope are the same as the information provided on the absentee ballot application;

¹ Voters may also complete absentee ballots in person during the 30 days preceding the election at the office of the county auditor or other place designated by the auditor. Minn. Stat. § 203B.081 (2008).



- (2) the voter's signature on the return envelope is the genuine signature of the individual who made the application for ballots and the certificate has been completed as prescribed in the directions for casting an absentee ballot, except that if a person other than the voter applied for the absentee ballot under applicable Minnesota Rules, the signature is not required to match;
- (3) the voter is registered and eligible to vote in the precinct or has included a properly completed voter registration application in the return envelope; and
- (4) the voter has not already voted at that election, either in person or by absentee ballot.

Minn. Stat. § 203B.12, subd. 2 (2008). The ballot envelopes are removed from the "Accepted" return envelopes and placed unopened in a separate absentee ballot container. *Id.*, subd. 4. After the last election-day mail delivery, each "Accepted" ballot envelope is opened, and the ballot contained therein is initialed by the judges and deposited in the ballot box.

If a majority of the election judges examining a return envelope find that the voter has failed to meet one or more of the above requirements, the return is "Rejected." The "Rejected" return envelopes are returned unopened to the county auditor.²

The procedures applicable to absentee ballots submitted by military personnel and persons residing outside the United States differ in certain respects from that described above. *See* Minn. Stat. §§ 203B.13-203B.27 (2008).³ However, the ultimate treatment of the "Accepted" and "Rejected" ballot return envelopes is similar.

APPLICABLE LAW

The purpose and scope of an administrative recount pursuant to Minn. Stat. § 204C.35, subd. 3 (2008) is as follows:

Scope of recount. A recount conducted as provided in this section is limited in scope to the determination of the number of votes validly cast for the office to be recounted. **Only the ballots cast in the election** and the summary statements certified by the election judges **may be considered in the recount process.**

² The "Accepted" return envelopes from which ballots have been removed are also retained and returned to the county auditor.

³ For example, pursuant to Minn. Stat. § 203B.23, subd. 2 (2008), an absentee ballot board examines all returned ballot envelopes immediately during the thirty days before the election, and a return envelope that is rejected at least five days before the election is treated as a "spoiled" ballot and the voter may submit a replacement in lieu thereof.

Id., subd. 3 (Emphasis added). Likewise, the rules of the Secretary of State relating to recounts are directed to the recounting of “ballots cast” (Minn. R. 8235.0200) and “voted ballots” (Minn. R. 8235.0300, 8235.0700).

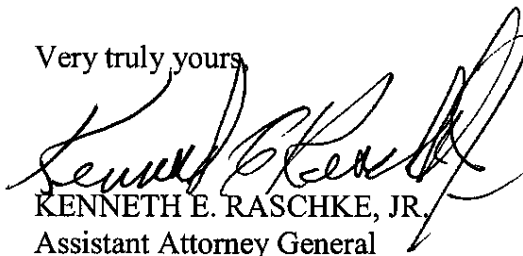
Courts that have reviewed this issue have opined that rejected absentee or provisional ballots are not cast in an election. *McDonald v. Secretary of State*, 153 Wash.2d 201, 204, 103 P3d 722, 723 (2004) (review of rejected absentee ballots not within the scope of statutory recount); *Nguyen v. Nguyen*, 158 Cal. App.4th 1636, 1665, N.27 (Cal. App. 2008) (registrar not permitted by statute to count rejected provisional ballots during recount). The Hand Count Instructions in the 2008 Recount Guide prepared by your office similarly state:

This is an **administrative** recount held pursuant to M.S. 204C.35 and M.R. 8235. It is **not** to determine who was eligible to vote. It is **not** to determine if campaign laws were violated. It is **not** to determine if absentee ballots were properly accepted. It is **not** - except for recounting the ballots - to determine if judges did things right. It is simply to physically recount the ballots **for this race!**

(Emphasis in original.) Further, your office has not advised us of any previous recount in Minnesota that has included reconsideration of rejected absentee ballot return envelopes.

This is not to suggest that there is no remedy for the wrongful rejection of absentee ballots. Minn. Stat. ch. 209 (2008) sets forth the process for an eligible voter or candidate to commence a judicial election contest to challenge, among other things, “an irregularity in the conduct of an election.”

Very truly yours,



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