STATE OF MINNESOTA
Office of the Minnesota Secretary of State
Mark Ritchie

January 14, 2010

Judge Manuel J. Cervantes
Office of Administrative Hearings
600 North Robert Street
PO Box 64620
St. Paul, MN 55164-0620

Dear Judge Cervantes:

The Office of the Secretary of State appreciates the opportunity to respond to the supplemental comments submitted by Tony Trimble on behalf of the Republican Party of Minnesota in a letter dated January 4, 2010.

Mr. Trimble's comments and suggestions were quite thoughtful. Although we may not fully embrace his supporting arguments, this office appreciates Mr. Trimble's support for this office's proposal related to the original ballot envelope.

Mr. Trimble suggests two additions to the rules. First, he suggests that administrative procedures similar to those used in the U.S. Senate recount be codified in chapter 8235 of the rules. He proposes the addition of a reconciliation process to these recount procedures. Second, he suggests adding rules to provide interpretive guidance to election judges in accepting and rejecting absentee ballots.

This office appreciates the time and energy Mr. Trimble put into modifying the U.S. Senate Recount Procedures to draft his proposal in Exhibit B of his letter. Many of these procedures are already incorporated in the current and proposed rules. He has identified several items that this office believes would be valuable additions to the proposed rule, which are set forth in Exhibit 1. However, this office believes that many of the provisions he includes in his Proposed Recount Procedures are too specific to the unique circumstances surrounding the U.S. Senate recount to be codified for use in all future recounts. The vast majority of recounts occur in a local race or question. As such, the State Canvassing Board does not play a role and there would be no need for candidate representatives to provide credentials. The number of table officials required and the decisions of whether or not to use labels on the challenged ballots, or to make copies of the challenged ballots for example, should remain within the local recount official's discretion.

Mr. Trimble suggests that a reconciliation process be incorporated into the recount procedure. While well intentioned, please note that the process he proposes is nearly identical to a procedure that election judges already conduct in every precinct on Election Night. Adding this reconciliation process to the Proposed Recount Procedures is problematic for several reasons. First, it requires use of the precinct roster or voter certificates to determine the number of individuals who voted, violating *Minnesota Statutes*, section 204C.35, subd. 3 which states that, "Only the ballots cast in the

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election and the summary statements certified by the election judges may be considered in the recount process."

Second, Mr. Trimble suggests that any discrepancies be noted on an incident log to be forwarded to the State Canvassing Board. However, the State Canvassing Board does not have the legal authority necessary to even consider the incident log, nor can it conduct an investigation to determine what happened. Only the courts have this authority. If a ballot discrepancy ultimately becomes the deciding factor in an election, a candidate always has the option of raising the issue in an election contest, where the situation can be investigated thoroughly and findings of fact can be made.

Finally, Mr. Trimble asserts that there is no other purpose for making the summary statements available during a recount than conducting this reconciliation. This office would argue that the summary statements are available so that the candidates and the general public will know how the results of the hand recount differ, if at all, from the results originally certified. Without the summary statements available (and/or the inclusion of the certified totals on the recount summary statements as was done in the U.S. Senate recount), candidates (and the public) would not know whether they gained or lost votes as a result of the recount: a subject in which this office is sure that they are very interested. The summary statements also make candidates aware of any precincts in which any discrepancies may exist, allowing them to raise this issue in a contest, if they deem appropriate.

Mr. Trimble also suggests adding rules to provide interpretive guidance to election judges in accepting and rejecting absentee ballots, and proposes language in Exhibit C of his letter. This office considered his proposal and agrees that interpretive guidance along these lines could be helpful to election judges. This office has reviewed his suggestions and modified them to conform to both the style and format of Minnesota Rules and standard procedures. Please find the office's proposed interpretive guidance in Exhibit 2.

Finally, with respect to the modifications proposed by this office in this letter, our response dated January 8, 2010, and at the hearing on December 18, 2009, this office believes that these modifications do not make the proposed rules substantially different. In the vast majority of cases, the modifications are typographical, formatting, or clarifying. In the remaining cases, they are within the scope as announced in the notice of hearing dated November 16, 2009, which includes absentee balloting, recounts, certification and testing of new voting systems and procedures for optical scan voting systems. The modifications are the logical outgrowth of the notice of hearing and comments submitted throughout the process. In addition, the proposed modifications are within the fair warning provided by the notice of hearing of what the final rule might be.

This letter and the attached exhibits, the response and exhibits dated January 8, 2010, and the submission at the hearing on December 18, 2009 constitute the final response of the office.

Thank you again for the opportunity to submit this comment and for your time and attention to this matter.

Sincerely,

BETH FRASER
Director of Governmental Affairs

Exhibit 1

Proposed additions to recount procedures found in proposed rule parts 8235.0700 and 8235.0800

8235. 0700

On 62.5, after the period, insert: "If the recount official needs to leave the room for any reason, he or she must designate a Deputy Recount Official to preside during his or her absence. A recount official must be in the room at all times."

On 62.7, after the period, insert: "There must be an area of the room from which the public may observe the recount. Cell phones and video cameras may be used in this public viewing area, as long as their use is not disruptive."

8235.0800

On 62.18, insert "Subpart 1. Recount officials may not take a break for a meal or for the day prior to the completion of the sorting, counting, review and labeling of challenges, and secure storage of the ballots for any precinct. All challenged ballots must be stored securely during breaks in the counting process." Renumber the other subparts accordingly.

On 62.22 before the period add ": one pile for each candidate that is the subject of the recount and one pile for all other ballots (those for other candidates, overvotes, undervotes, etc.)"

On 63.1 before the period insert "pursuant to "Minnesota Statutes, section 204C.22"

On 63.4 after the period, insert "Challenged ballots must be placed into separate piles, one for ballots challenged by each candidate."

Exhibit 2

8210.2450 DUTIES OF ELECTION JUDGES WHEN EXAMINING RETURN ENVELOPES UNDER 203B.12

Subpart 1. Review. Two or more election judges from different political parties must review the absentee ballots returned for the precinct under Minnesota Statutes, section 203B.12.

Subpart 2. Name, Address and Signature Review. The voter's name and address on the absentee application must match the voter's name and address on the return envelope. Use of, or lack of, full names, nicknames, abbreviations or initials on either document are not a reason for rejection.

Election judges must determine that the return envelope contains the genuine signature of the individual who made the application for the ballot by comparing the signature on the envelope to the signature on the absentee ballot application. Use of, or lack of, full names, nicknames, abbreviations or initials within either signature are not a reason for rejection. A signature is considered genuine even if a voter uses a signature mark on either or both documents, or if a voter has another individual or different individuals sign the voter's name in their presence on either or both the application and the return envelope in accordance with Minnesota Statutes, section 645.44, Subd. 14.

Subpart 3. Voter's Registration Status. (a) Election judges must determine the voter is registered under the name and at the address on the return envelope by using the statewide voter registration system, or a master list or polling place roster produced from the statewide voter registration system. A voter who is not registered, whose registration is inactive, or whose registration is challenged, must include a properly completed voter registration application within the absentee return envelope pursuant to Minnesota Statutes, section 203B.04 Sub. 4, or the ballot must be rejected. If the voter was sent non-registered absentee materials and the voter is not registered to vote and a voter registration application is not found in the return envelope, the election judges shall open the ballot envelope and, without examining or removing the ballot, remove any voter registration application from the ballot envelope. The election judges must immediately reseal the ballot envelope with the ballot enclosed, initialing across the seal and noting on the ballot envelope the purpose for which it was opened.

(b) A voter registration application returned separately from an absentee return envelope after the voter registration deadline in Minnesota Statutes, section 201.061, subd. 1, is a late registration and may not be used as a registration for the current election pursuant to Minnesota Statutes, section 201.054, subd. 1 (3).

Subpart 4. Witness Eligibility. An absentee ballot may not be rejected for lack of an eligible witness, if a witness has signed the statement required from a witness by Minnesota Rules, part 8210.0600, subparts 1a or 1b, and:

(a) has provided a Minnesota address as part of the witness's certification on the return envelope; or
(b) has provided the title indicating that they are eligible to administer oaths; or
(c) has affixed a notarial stamp.

Subpart 5. Ballot already cast. Election judges must use available polling place rosters to determine whether the voter has already voted in the precinct on election day. If the voter has already voted, the return envelope must be marked "rejected."