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January 4, 2009

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

RECEIVED
2009 JAN -6 AM 8:07
ADMINISTRATIVE
HEARINGS

Re: Supplemental Comments on the Office of the Secretary of State Proposed Permanent Rules, including Amendments to Rules Governing Petitions, Absentee Ballots, Certification and Testing of Voting Systems, Recounts, Election Judge Training Program, Ballot Preparation and Redistricting, *Minnesota Rules*, chapters 8205, 8210, 8220, 8230, 8235, 8240, 8250 and 8255.

Dear Judge Cervantes:

As previously indicated, the undersigned serve as general counsel to the Republican Party of Minnesota, a voluntary association registered with the Minnesota Campaign Finance and Public Disclosure Board as a political party committee ("RPM").

This correspondence constitutes supplemental comments on behalf of RPM relative to the Minnesota Secretary of State's ("SOS's") proposed rule changes relative to voter registration and absentee voting in response to the hearing held on December 18, 2009.

Duplicate/Original Ballots

The RPM supports the SOS's proposed amendment to Rule 8235.0200 (new last sentence) that would prohibit utilization of the envelope marked "Original ballots from which duplicates are to be made or were made" during an automatic or discretionary recount. Under Minn. Stat. § 204C.35, subd. 3, the purpose of a recount is to determine the "number of votes validly cast". Moreover, Minnesota Rules 8230.3850 set forth clear and explicit requirements for the creation and treatment of duplicate ballots on election day, and it is only the *duplicate* ballot that is counted by the voting machine and, hence, "cast" for purposes of a recount.

The experience of the 2008 Senate Recount shows that opening the envelope marked "Original ballots from which duplicates are to be made or were made" during an automatic or discretionary recount caused significant confusion and delay, as well as hundreds of challenges to ballots marked "original" and "duplicate" which were ignored by the Minnesota State Canvassing Board as outside the scope of its authority during the recount, and more properly within the province of an election contest under Minnesota Statutes Chapter 209.

At the December 18, 2009 hearing, attorney David Lillehaug testified that the Minnesota Supreme Court had recognized that the ballots within the envelope marked "Original ballots from which duplicates are to be made or were made" should be counted during an automatic or discretionary recount. This claim was based on a misleading quotation by Mr. Lillehaug from the Minnesota Supreme Court's Order dated December 24, 2008.

Mr. Lillehaug read only the first sentence from a paragraph on page 4 of the Order, which stated, "There can be no dispute that unmatched original damaged ballots are valid ballots and the votes marked on those ballots should be counted in the election." However, the remainder of the paragraph continues as follows:

There also can be no dispute that the same vote should not be counted twice. The dispute is whether counting the votes on the unmatched original damaged ballots in the recount will result in double-counting because those votes have already been counted based on an unmarked duplicate ballot. *We do not and cannot decide that question based on the record presented in this abbreviated proceeding¹.*

Hence, contrary to the testimony of Mr. Lillehaug, the Minnesota Supreme Court at no time has ruled as a matter of law that original ballots are to be counted in a recount. During the 2009 election contest trial (the "Contest Trial") that followed the administrative recount in 2008, although it was not established to the satisfaction of the trial court under legal burden of proof standards that double-counting occurred in the recount, the testimony of many election officials, most notably Ramsey County Elections Director Joseph Mansky, was that counting ballots within the envelope marked "Original ballots from which duplicates are to be made or were made" created the distinct possibility that double-counting might have occurred.

In fact, local election official testimony during the Contest Trial was unanimous that ballots within the envelope marked "Original ballots from which duplicates are to be made or were made" had never before been counted during *any* recount in Minnesota history. Accordingly, Mr. Lillehaug's misleading and incomplete testimony should be wholly ignored and the SOS's proposed amendment to Rule 8235.0200 should be adopted.

Uniform Recount Procedures

The SOS is statutorily mandated to "adopt rules according to the [Minnesota Administrative Procedures Act] establishing *uniform* recount procedures" for the conduct of *all* recounts conducted under Minnesota Statutes Chapter 204C. Minn. Stat. § 204C.361(a). During the 2008 Senate Recount, in addition to the SOS Recount Manual, the SOS engaged in a "negotiation" process between the Coleman and Franken campaigns which resulted in additional, supplemental recount rules ("Supplemental Rules") which were *not* contained in Minnesota Rules Chapter 8235.

¹For reference, the entire 6-page Minnesota Supreme Court Order dated December 24, 2008 and incompletely cited by Mr. Lillehaug during his testimony is attached as *Exhibit A*.

The RPM believes that, with a few exceptions (most notably the rule regarding duplicate and original ballots), these Supplemental Rules followed administrative recount procedures used in past legislative and local election administrative recounts, with the single exception of lack of requirement of reconciliation of the number of persons casting ballots on election day with the number of ballots to be recounted.

As such, the RPM believes that rules similar thereto should be promulgated and memorialized in writing within the Minnesota Rules to establish uniform recount procedures that will govern all administrative recounts henceforth. Memorialization in the Minnesota Rules would reduce uncertainty in future recounts and set the procedural ground rules well in advance, which will avoid the understandable but frustrating suspicion that accompanies adoption of rules on the eve of a recount, particularly in highly-publicized partisan races.

The RPM believes that such rules should include a reconciliation process to be followed by recount officials in each precinct during a recount to attempt to minimize, to the fullest extent possible, disputes over so-called "missing" and "extra" ballots. Such a rule is clearly within the SOS's legal authority; under Minn. Stat. § 204C.35, subd. 3, the purpose of a recount is to determine the "number of votes validly cast". Moreover, a reconciliation process is clearly contemplated by Minnesota Rules 8235.0700 which require the custodian of ballots to make the precinct summary statements available to the recount officials; for what other purpose would these election materials be available to the recount official if not to reconcile the number of ballots counted on election night with the number of ballots counted during the recount (a process required to be undertaken on election night by election judges)?

Following the December 18, 2009 hearing, Matthew W. Haapoja discussed the foregoing with SOS Counsel Bert Black (as well as Beth Fraser). Mr. Black suggested that the RPM's proposed rules be submitted in writing for further consideration; hence, the same are attached hereto as Exhibit B. (A copy of this correspondence and all attachments has also been provided directly to Mr. Black.)

Interpretive Guidance for Accepting and Rejecting Absentee Ballots

Although Minnesota law sets forth statutory grounds for rejecting absentee ballots, the Contest Trial clearly established that different jurisdictions applied these standards differently. These concerns were recognized by the Minnesota Supreme Court, which stated in its (unanimous) Order dated June 30, 2009 at page 19, footnote 15 (emphasis added):

Although we affirm the trial court's conclusion that any differences in the application of the statutory standard by the trial court and by election officials on election day and during the manual recount are not of constitutional magnitude, we do not suggest that such differences are inconsequential and need not be addressed....To the extent that this case has brought to light inconsistencies in the administration of absentee voting standards, we are confident that the appropriate officials in the other branches of government understand that efforts should be made to reduce these inconsistencies.

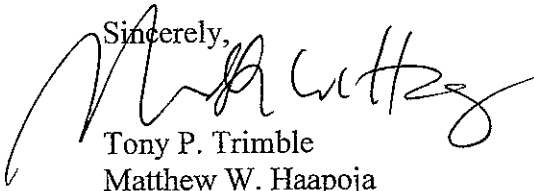
During the rejected absentee ballot review process that occurred in December 2008 during the Senate Recount, Deputy Secretary of State Jim Gelbmann drafted and issued emails to local election officials which contained interpretive guidance to the various statutory criteria for accepting and rejecting absentee ballots. The RPM believes that, in addition to more comprehensive SOS training on this matter (as discussed in prior correspondence), the SOS should memorialize within the Minnesota Rules specific and objective interpretive guidance as to what constitutes a legal absentee ballot under the statutory criteria. Such changes will complement the SOS's efforts in revising the absentee ballot instructions and envelope to attempt to reduce voter confusion; such revisions, of course, do nothing to reduce election judge confusion as to what constitutes an acceptable absentee ballot.

Following the December 18, 2009 hearing, Matthew W. Haapoja also discussed this matter with Bert Black, who again suggested that these proposed rules be submitted in writing for further consideration. The same are attached as Exhibit C. These rules are based largely on SOS guidance issued during the recount, with an addition at Item #5 relative to witness registration, based on the Contest Trial 3-judge panel's ruling (ratified by the Minnesota Supreme Court on appeal) that witnesses with a Minnesota address should be presumed registered to vote or to have been registered to vote.

We appreciate your and the SOS's further consideration of these matters, particularly the proposed recount procedures and interpretive standards relative to acceptable absentee ballots attached as Exhibit B and Exhibit C, respectively.

Please contact either of the undersigned with any questions or comments as to this matter. Thank you.

Sincerely,



Tony P. Trimble
Matthew W. Haapoja
TPT:kp

Enclosure

cc: Mr. Tony Sutton, Chair, Republican Party of Minnesota (w/o encl.)
Mr. Bert Black, Counsel, Secretary of State of Minnesota (w/encl.)

EXHIBIT A

MINNESOTA SUPREME COURT ORDER
DATED DECEMBER 24, 2008

STATE OF MINNESOTA

OFFICE OF
APPELLATE COURTS

IN SUPREME COURT

DEC 24 2008

A08-2206

FILED

Norm Coleman,

Petitioner,

vs.

Minnesota State Canvassing Board,
Michelle DesJardin, Hennepin County
Elections Manager, Cynthia Reichert,
Minneapolis Elections Director, Hennepin
County Canvassing Board, individually and
on behalf of all County and Local Election
Officers and County Canvassing Boards,

Respondents.

Al Franken for Senate and Al Franken,

Intervenor-Respondents.

ORDER

Petitioner Norm Coleman has filed a petition under Minn. Stat. § 204B.44 (2006) concerning the election for United States Senator from Minnesota held on November 4, 2008, in which petitioner asks this court to (1) restrain the Minnesota State Canvassing Board from certifying or finalizing the results of its recount until the “duplicate/original” issue is resolved by the county canvassing officials; (2) order each campaign to list every precinct in which it believes duplicate ballots have not been correctly reconciled with the

original ballots; (3) order the local canvassing boards to ensure that vote totals are reconciled to correct any errors relating to the "duplicate/original" issue so that no double-counting of votes occurs, and to do so as part of this court's previously ordered process for finding wrongly rejected absentee ballots; (4) order the counties to amend their returns by the December 31, 2008 deadline so that accurate results are included in the Board's final certification results; and, (5) in the counties with precincts where all original ballots cannot be reconciled with duplicate ballots, order those county canvassing boards to amend their returns to the Board and in so doing, count and certify only original ballots for which there are corresponding marked duplicates. In addition, petitioners separately filed a motion for a temporary restraining order.

This action concerns ballots that are damaged or defective so that they could not be counted by the electronic voting machines on election day. Minnesota Statutes § 206.86, subd. 5 (2006), provides a process for dealing with such ballots. The statute requires the election judges to make a duplicate copy for each damaged ballot card that the machine cannot count. The duplicate must (a) be clearly labeled "duplicate," (b) indicate the precinct in which the damaged ballot was cast, and (c) bear a serial number that must also be recorded on the damaged ballot. The duplicate is then counted in lieu of the damaged ballot. The damaged ballots for which duplicates are made ("original damaged ballots") are to be placed in an envelope marked "ballots for which duplicates were or are to be made." Minn. R. 8230.3850, subp. E (2007).

In the course of the manual recount in the race for United States Senator, it was discovered that in some precincts there were some original damaged ballots for which no

duplicate ballots were identified. The instructions from the Secretary of State to local recount officials directed that in precincts where there were significant discrepancies between the numbers of original damaged ballots and duplicate ballots, the candidates' representatives should attempt to agree on whether to sort the originals or duplicates for counting, and if there was no agreement, the original damaged ballots should be sorted. Based on these instructions, in a number of precincts unmatched original damaged ballots were counted in the manual recount.

Petitioner Coleman challenged unmatched original damaged ballots counted in the recount and asked the State Canvassing Board to disallow the counting of those ballots. Petitioner argued to the Board, and here, that although no matching duplicate ballots were found for the unmatched originals, it is likely that duplicate ballots were created and counted as required by statute, but not marked as duplicates as required by statute. Petitioner argued that if an unmarked duplicate ballot was among the ballots counted in the recount and the unmatched original was also counted, there would be impermissible double-counting of that voter's ballot. Petitioner contended that this double-counting was illustrated by the fact that in some precincts the total ballots counted in the recount exceeded the number of ballots recorded by the machines on election day, often by the number of unmatched original damaged ballots counted in the recount.

The Franken campaign argued, as it does here, that it cannot be assumed that for all unmatched original damaged ballots duplicate ballots were made and counted, but not labeled. Rather, the Franken campaign suggested, there are alternate scenarios that could

account for both unmatched original damaged ballots and discrepancies in the number of ballots counted.

On December 19, 2008, the State Canvassing Board adopted a resolution rejecting all challenges “based upon duplicates or originals that are not based on voter intent or identifying marks.” It is that decision of the Board that petitioner alleges is in error and should be corrected in this proceeding.

There can be no dispute that unmatched original damaged ballots are valid ballots and the votes marked on those ballots should be counted in the election. There also can be no dispute that the same vote should not be counted twice. The dispute is whether counting the votes on the unmatched original damaged ballots in the recount will result in double-counting because those votes have already been counted based on an unmarked duplicate ballot. We do not and cannot decide that question based on the record presented in this abbreviated proceeding.

Because the resolution of petitioner’s claim that double-counting of votes will result from including unmatched original damaged ballots in the recount is better suited to an evidentiary hearing and fact-finding, the decision of the State Canvassing Board to reject challenges to unmatched original damaged ballots counted in the recount was not in error and the relief requested by petitioner is denied.

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED THAT:

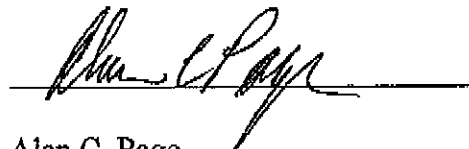
1. The petition of Norm Coleman for relief from the December 19, 2008 decision of the State Canvassing Board rejecting challenges to unmatched original

damaged ballots be, and the same is, denied. But our denial of the relief requested does not constitute a binding determination in a subsequent election contest proceeding.

2. Petitioner's motion for a temporary restraining order be, and the same is, denied as moot.

Dated: December 24, 2008

BY THE COURT:

A handwritten signature in black ink, appearing to read "Alan C. Page", is written over a horizontal line.

Alan C. Page
Associate Justice

MAGNUSON, C.J., and ANDERSON, G. Barry, J., took no part in the consideration or decision of this matter.

EXHIBIT B**PROPOSED RECOUNT PROCEDURES**

[To Supplement/Replace Minnesota Rules 8235.0700 and 8235.0800]

1. Recount locations are open to the public and the media and there will be a public viewing area in each recount location. Cell phones and video cameras may be used in the public viewing area, as long as their use is not disruptive.
2. The State Canvassing Board will appoint a Deputy Recount Official for each recount location throughout the state. The Deputy Recount Official may designate an Assistant Deputy Recount Official to preside whenever he or she needs to leave the room. The Deputy Recount Official or a designated Assistant Recount Official must be in the room at all times while ballots are being counted. The Deputy Recount Official shall appoint as many Table Officials as he or she deems appropriate. Only the Deputy Recount Official, the Assistant Deputy Recount Official, and the Table Officials may touch the ballots. The Deputy Recount Official shall determine and publicly announce the schedule for the recount, including the start and end times and all breaks within each day, and any changes in the schedule. The candidates' Lead Representatives may appeal to the Deputy Recount Official for modifications to the schedule.
3. All ballots properly cast on Election Day, and all non-rejected absentee ballots properly cast and received by an election official before 8:00 p.m. Election Day (including those cast by voters who were in line to vote by 8:00 p.m. on Election Day) will be counted. The ballots within the envelope marked "Original ballots from which duplicates are to be made or were made") are not within the scope of the recount and this envelope must not be opened during the recount.
4. All candidate representatives must present written credentials to the Deputy Recount Official and each candidate must designate one representative as his Lead Representative at each counting location.
5. The Deputy Recount Official (or Assistant Deputy Recount Official) shall produce the ballot container (boxes) one (1) precinct at a time. This shall be done in the presence of all campaign representatives who shall examine the box to see if the seals are broken and note any that are found broken. The Deputy Recount Official (or Assistant Deputy Recount Official) shall first determine the number of ballots to be counted as follows: The Deputy Recount Official (or Assistant Deputy Recount Official) shall remove any election register from the container. The Table Officials shall then count the names in the election register to determine the number who apparently voted, where such registers are found or available. If there is no election register, the voters' certificates or, if the same are not available, the duplicate registration files of persons who voted shall be counted. The total number of persons signing the election register and the total number of absentee ballots accepted by local election officials shall be entered by a Table Official on the summary sheet as the total number of ballots to be counted. The Table Officials shall then (without sorting any ballots)

count the number of ballots from the ballot container boxes for the precinct and, if the number does not match the number to be counted, shall attempt to locate any missing ballots and resolve any excess ballots in the manner provided in Minnesota Statutes § 204C.20, subd. 2. When the number of recounted ballots agrees with the number of ballots to be counted, any ballots not counted shall be attached to a certificate made by the Table Officials, for forwarding to the canvassing board, which states why the ballots were not counted. A Table Official shall also prepare a recount incident log, for forwarding to the canvassing board, which describes the reconciliation attempts (including attempts to locate any missing ballots).

6. Each candidate shall appoint a single Lead Representative for each Recount Location. The Lead Representative may serve as a "Roving Representative" who is allowed in the counting area to answer questions from other representatives of that candidate, but are not necessarily assigned to a counting table. A second Roving Representative is allowed at the discretion of each candidate.
7. Ballots, as defined in paragraph 3, will be sorted and counted by teams of at least two Table Officials, who shall be designated by the Deputy Recount Official.
8. Each candidate may have one representative who is authorized to challenge ballots at each counting table. If the Deputy Recount Official determines that there is adequate space at each Table, each candidate may add a second representative to the table to observe the sorting and counting of the ballots, provided both candidates have a second representative to add to the Table(s). Only one representative for each candidate, who shall be designated by the candidate's Lead Representative to challenge ballots, will be allowed to challenge ballots. If the candidate representative who is authorized to challenge ballots believes a ballot presents a unique situation that has not previously presented itself, he or she may request that the ballot be set aside and discussed at the end of the sorting process when the candidate's Roving Representative is available to advise the candidate's representative. This clause shall not apply when the candidate does not have a Roving Representative at that ballot counting location.
9. One of the Table Officials will sort the ballots into three piles, based upon the principles of voter intent outlined in Minnesota Statutes, section 204C.22: one pile for each candidate that is the subject of the recount and one pile for all other ballots (those for other candidates, undervotes, overvotes, etc.). The Table Official must make it clear into which pile he or she is placing the ballot and allow both candidates' representatives to view the ballot. Candidate representatives are not allowed to touch or otherwise handle any ballot(s).
10. The candidate representative authorized to challenge ballots at a Table may challenge the decision of which of the three piles the Table Official places a ballot. He or she must state a reason for the challenge pursuant to M.S. (2008) Section 204C.22. Challenges may not be automatic or frivolous. A challenge is frivolous if it is based upon an alleged identifying mark other than a signature or an identification number written anywhere on the ballot or a name written on the ballot completely outside of the space for the name of a write-in

candidate. The Table Official will reexamine the ballot to determine into which pile it should be placed. Challenges may be withdrawn at any time.

11. When all ballots for the precinct have been sorted, each pile will then be counted by creating stacks of 25. If both of the candidates have a second representative who is available to join the table, they may do so at this time. Each of the Table Officials will count one candidate's pile. The Table Official who is done first will then count the pile of other ballots, and the piles of challenged ballots. Vote counts for each candidate, all other ballots, and ballots challenged by each candidate's representative will be announced and recorded. A candidate or candidate's representative may immediately request to have a pile of 25 counted a second time if there is disagreement as to the number of votes in the pile.
12. A label will be placed on white space on the back of the challenged ballot that will note the precinct, the candidate whose representative made the challenge, and the reason for the challenge pursuant to M.S. (2008) Section 204C.22. Each of the challenges will be given a sequential number based on the candidate's name and ballots challenged by that candidate's representative (numbered as CANDIDATE X-1, CANDIDATE X -2, and CANDIDATE Y-1, CANDIDATE Y-2, etc.).
13. Vote totals, the number of persons signing the register on election day, and the number of absentee ballots accepted by local election officials will be noted on the recount summary statement. Challenged ballots are recorded in the "Challenged By" for each respective candidate. Challenged ballots must then be placed in an envelope marked "Challenged Ballots".
14. At the end of each day, the Deputy Recount Official will make four copies of the recount summary statements referenced in paragraph 13, recount incident logs as defined in this paragraph, and both sides of each challenged ballot. One copy of each item will be retained by the Deputy Recount Official, one will be forwarded to the Office of the Secretary of State, and one copy will be provided to each Lead Representative for each candidate. If the Table Officials must leave the room to make the copies, they will be accompanied by each candidate's representative and the names of everyone who left the room with the ballots will be noted on an incident log. The incident log shall also be used to record any other activity that the Table Officials believe should be recorded, including, but not limited to, the names of all individuals at the Table and all reconciliation efforts as described at paragraph 5 hereinabove.
15. After copies have been made, the Deputy Recount Official shall seal the original challenged ballots in one envelope, the Deputy Recount Official's copies in another envelope and the copies for the Office of the Secretary of State in a third envelope. At least two Table Officials will sign over the seal of all 3 envelopes.
16. Challenged ballots must be stored securely during breaks in the counting process, at night if the recount for the County or City has not finished, and after the counting is complete. No lunch break shall be taken during the middle of the sorting and counting process for a single

precinct. The counting and sorting of a precinct must conclude before the Table concludes the recount procedures for that day.

EXHIBIT C**PROPOSED ADMINISTRATIVE GUIDANCE REGARDING
ACCEPTABLE ABSENTEE BALLOTS****[TO BE ADDED AT MINNESOTA RULES CHAPTER 8210]**

1. A voter's signature on the return envelope must be the genuine signature of the individual who made the application for the ballot. Ballot envelopes that have signatures that are similar, but not identical to, the signature on the application should be marked "accepted". For example, if a voter signed an application Jonathon R. Doe, but signed the ballot envelope John Doe, that ballot envelope should be marked "accepted". If the voter signed using a signature mark on both the application and the envelope, that envelope should be marked "accepted".
2. The voter must be registered and eligible to vote in the precinct or include a properly completed voter registration application. Election judges and absentee ballot board members shall use available voter rosters and/or the Statewide Voter Registration System ("SVRS") to determine whether the voter was registered on Election Day. Envelopes for voters whose records in SVRS are "inactive", as well as voters whose records are challenged because of a felony status or other reason should be marked "rejected" and the ballot must not be counted, unless the voter included a voter registration application with the absentee ballot.
3. If the voter's name does not appear on the roster or in the SVRS, without opening the secrecy envelope, the election judge or absentee ballot board member shall attempt to determine if a voter registration card or form is enclosed in the secrecy envelope. If it is determined that a voter registration card or form is likely to be included inside the secrecy envelope, the election judge or absentee ballot board member shall mark the envelope as "accepted". If, when the secrecy envelope is opened, the voter registration card or form is not enclosed in the secrecy envelope, the ballot must not be counted.
4. Before opening an absentee ballot, election judges shall use available voter rosters to determine whether the voter had already voted in the precinct on election day and, if so, should be marked "rejected" and the ballot must not be counted.
5. If a witness includes a Minnesota address, the witness is presumed to be registered or have been registered to vote in the State of Minnesota, and the ballot envelope should be marked "accepted".