

STATE OF MINNESOTA
IN SUPREME COURT
A08-2206

Norm Coleman,

Petitioner,

vs.

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

Respondents.

**RESPONSE OF MICHELLE
DESJARDIN, HENNEPIN COUNTY
ELECTIONS MANAGER, AND
THE HENNEPIN COUNTY
CANVASSING BOARD**

TO: CLERK OF THE APPELLATE COURTS; JAMES K. LANGDON, FREDERIC
W. KNAAK, and TONY TRIMBLE, ATTORNEYS FOR NORM COLEMAN;
DAVID L. LILLEHAUG and WILLIAM Z. PENTELOVITCH, ATTORNEYS
FOR AL FRANKEN; STATE OF MINNESOTA CANVASSING BOARD;
LISA NEEDHAM, ATTORNEY FOR CYNTHIA REICHERT, MINNEAPOLIS
ELECTIONS DIRECTOR; and LORI SWANSON, MINNESOTA ATTORNEY
GENERAL

INTRODUCTION

Respondents Michelle DesJardin, Hennepin County's Election Manager ("Ms. DesJardin") and the Hennepin County Canvassing Board ("HCCB") submit this response to Petitioner Norm Coleman's petition pursuant to Minn. Stat. § 204B.44 and the Court's December 18, 2008 Order. Ms. Desjardin and the HCCB (together "Hennepin County Respondents") take no position on whether non-matched original ballots should or should not be counted in the statewide hand recount being conducted by the State Canvassing Board. However, the Hennepin

County Respondents assert that the Court should dismiss them from this action and not grant the relief requested in the petition regarding county canvassing boards.

The Petition is predicated on a factual misunderstanding of the Hennepin County Respondents' role in the recount for the United States Senate race and the role of county canvassing boards. The error alleged in the Petition relates to actions which took place only during the recount and, contrary to the factual allegations in the Petition, the HCCB did not certify any recount results or provide any summary statements in the recount to the State Canvassing Board. Moreover, county canvassing boards have no role in correcting errors alleged to have been made in a statewide recount. Accordingly, the Petition with respect to the Hennepin County Respondents should be dismissed.

FACTUAL BACKGROUND

The Petition is based on a belief that the State Canvassing Board has improperly counted certain ballots during the recount of the election for United States Senator. In order to comprehend Petitioner's claims, it is necessary to understand certain election procedures and the ballots at issue.

Because most precincts in Minnesota use electronic machines to count ballots ("precinct counters"), ballots that cannot be processed by a precinct counter because they are damaged or for other reasons must have the voter's choices

copied onto a duplicate ballot that can be processed by a precinct counter.¹ Pursuant to Minn. Stat. § 206.86, subd. 5, the copying of voter choices from original ballots to duplicate ballots is done by two election judges. The duplicate ballot and the original ballot are to be marked with the same serial number and the duplicate ballot is to be identified as a “Duplicate”. *See* Minn. Stat. 206.86, subd. 5 and Minn. R. 8230.3850. Original ballots for which a duplicate ballot was created will hereafter be referred to as “Original Ballots.” The Original Ballots are then placed in an envelope and the corresponding duplicate ballots are then tabulated by the precinct counter. *See* Minn. R. 8230.3850. The results of all tabulated votes are then communicated to the county and are the foundation for county canvasses.

Six days after the general election, on November 10, 2008, the Hennepin County Canvassing Board (“HCCB”) met and certified election results within Hennepin County, including the results for the United States Senate race. *DesJardin Aff.* ¶ 2. The results certified were based on the results that each precinct reported on election night directly from precinct counters, with the exception of precincts from four cities which reported slightly different results because some properly cast ballots had not been run through a precinct counter on election night. *Id.* ¶ 3. These results did not include counting any Original Ballots. Results were certified and communicated to the Office of the Minnesota Secretary of State (“OSS”) as required by statute. *Id.*

¹ In addition to damaged ballots, many ballots received pursuant to the Uniform Overseas Citizens Absentee Voting Act (“UOCAVA”) have to be duplicated because the original cannot be read by the precinct counters. *DesJardin Aff.* ¶ 7.

On November 18, 2008, the State Canvassing Board met and because the top two finishers in the United States Senate race were within .5% directed the OSS to oversee a recount in the United States Senate contest. *Id.* ¶ 3. The recount was conducted by Deputy Recount Officials, who performed their duties pursuant to an agreement with the OSS. *Id.*, Ex. 1. In Hennepin County there were approximately 19 different local officials that conducted recounts as Deputy Recount Officials. DesJardin Aff. ¶ 3.

Ms. DesJardin was a Deputy Recount Official for twelve cities in western Hennepin County. *Id.* The recount was done by examining and counting each ballot by hand. The results from these recounts were delivered directly to the OSS on a form called a County Field Recount Report. *Id.* ¶ 5, Ex. 2.

According to the recount rules adopted by the OSS, duplicate ballots identified during the sorting of ballots for a precinct, were to be set aside and the envelope containing Original Ballots was to be opened. Original Ballots corresponding to these duplicate ballots were to replace the duplicate ballots and be sorted and counted. Petition ¶ 29.

Ms. DesJardin conducted her recount on November 20, 2008, at the city of Independence. *Id.* ¶ 4. Only one envelope containing several Original Ballots was opened during this recount. *Id.* All Original Ballots were matched with duplicate ballots. The Original Ballots were counted in the recount for that precinct and the duplicates were not. *Id.* The hand-counted precinct total from the recount matched the election night results for that precinct. There were no challenges based on original and/or duplicate ballots during this recount. *Id.*

After completing the recount, in accordance with the OSS rules, Ms. Desjardin communicated the results of the precincts recounted to the OSS on the form provided by the OSS and forwarded ballots challenged (on other grounds, including voter intent) by the candidates. *Id.* ¶ 5, Ex. 2. The HCCB had no role in this recount process; it did not provide any direction or certify any recount results for any precinct in Hennepin County. *Id.* ¶ 5.

Petitioner asserts that during the recount, some precincts opened envelopes containing Original Ballots and counted Original Ballots when there were no matching duplicate ballots found. These ballots are identified by Petitioner as “Non-Matching Original Ballots.” Petition ¶¶ 9-10. Petitioner alleges that counting these Non-Matching Original Ballots during the recount was improper because it was possible there were duplicate ballots created on election night that simply were not properly marked as a duplicate (“Unmarked Duplicates”).²

Petitioner alleges that by counting Non-Matched Original Ballots during the recount, certain ballots were double counted because there is a possibility that Unmarked Duplicates (corresponding to the Non-Matched Original Ballots) had also been counted. Petition ¶ 15. The Petition alleges that this occurred in numerous precincts within Hennepin County and in the State.

The Petition goes on to say that as part of the recount “challenged Non-Matching Original Ballots were included in the county canvassing board’s summary statements as ‘challenged ballots.’” Petition ¶ 17. As discussed below,

² It is also possible that no duplicate ballot was created for these Original Ballots or that duplicate ballots were created but misplaced.

this statement is factually erroneous because county canvassing boards, including the HCCB, did not have any role in the recount. DesJardin Aff. ¶ 6.

ARGUMENT

The Petition seeks the following relief:

(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 Board officials;

(2) Order each campaign to list every precinct in which it believes Duplicate Ballots made on election night to correct damaged ballots have not been correctly reconciled with Original Ballots;

(3) Order the local canvassing board 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. The counties shall then amend their returns by the December 31, 2008 deadline so that accurate results are included in the Board's final certification results; and

(4) In the counties with precincts where all Original Ballots cannot be reconciled with Duplicate Ballots, order those county canvassing board to amend their returns to the Board and in so doing, count and certify only Original Ballots for which there are corresponding marked duplicates.

Petition at 16-17.

The relief requested in numbers three and four are directed at county canvassing boards, including the HCCB. Request number three seeks an order from the Court to have county canvassing boards: (1) meet; (2) correct errors to their canvasses relating to the alleged double-counting of votes either pursuant to Minn. Stat. § 204C.39 or through the process outlined in the Court's December 18, 2008 Order, and (3) amend their canvass reports and submit these amended reports to the State Canvassing Board. The fourth request seeks an order compelling canvassing boards to amend their returns to count and certify only Original Ballots

for which there are corresponding marked duplicates (*i.e.*, not counting Non-Matched Original Ballots).

The basic error of the petition is that it conflates an initial canvass, based on precinct counter vote totals only, with the recount, based on hand tabulation. The relief requested in the Petition regarding county canvassing boards should not be granted for three reasons. First, the counting of Non-Matched Original Ballots (which Petitioner claims was erroneous) occurred, if at all, only during the recount and was due to decisions made by Recount Officials. County canvassing boards, including the HCCB, had no role in these decisions. Second, the only result the HCCB certified did not include any alleged double counted ballots because it did not include any Original Ballots. Third, there is no authority for county canvassing boards to correct alleged errors made only during a statewide recount.

I. THE ERRORS ALLEGED IN THE PETITION TOOK PLACE DURING THE RECOUNT FOR WHICH THE HENNEPIN COUNTY RESPONDENTS PLAYED NO ROLE.

The errors alleged in the Petition were not the result of actions by the Hennepin County Respondents. The Petition's allegations are factually erroneous regarding the recount. The HCCB and other county canvassing boards had no formal role in the recount, and there were no summary statements created in the recount, as alleged in the Petition. Petition ¶ 17. Petitioner conflates the distinct roles played by county canvassing boards, which have no role in the recount, and local election officials who acted as Deputy Recount Officials.

The Petition is predicated on challenging decisions made *during the recount* by certain Deputy Recount Officials and by the State Canvassing Board.

Petitioners do not challenge the HCCB's November canvass. The Non-Matching Original Ballots only surfaced during the recount when election officials reviewed them to determine voter intent. Neither Ms. DesJardin, who was not the Deputy Recount Official in any area identified in the Petition as allegedly double counting votes, nor the HCCB are proper respondents to Petitioner's claims based only on the recount.

It cannot be disputed that county canvassing boards had no role in the recount. DesJardin Aff. ¶ 6. However, the Petition erroneously asserts that "challenged Non-Matching Original Ballots were included in the county canvassing board's summary statements as 'challenged ballots.'" Petition ¶ 17. This is incorrect because county canvassing boards did not provide summary statements or have any role in the recount. The summary statements county canvassing boards provided to the State Canvassing Board were done prior to the recount do not serve any purpose in the recount. The recount starts the vote counting process anew, with a hand count.

As discussed above, the recount was conducted by the OSS. The Deputy Recount Officials, including Ms. DesJardin, performed their duties on behalf of the OSS. DesJardin Aff., Ex. 1. The results from these Deputy Recount Officials were communicated directly to the OSS on a form called a County Field Recount Report. *Id.* ¶ 5, Ex. 2. The HCCB did not meet to review these results or have any role in any recount activities within Hennepin County. *Id.* ¶ 6. Because the Hennepin County Respondents have not committed the error alleged in the Petition, the Petition should be dismissed with respect to them.

II. BECAUSE THE NOVEMBER CANVASS RESULTS FROM THE HCCB DO NOT INCLUDE NON-MATCHING ORIGINAL BALLOTS, THERE IS NO ERROR TO CORRECT.

In addition to alleging the Hennepin County Respondents made errors during the recount (which they did not), the Petition seeks relief from county canvassing boards, even if the complained of error was made by the State Canvassing Board. Petitioner seeks to have county canvassing boards meeting and attempting to determine if obvious errors occurred during the recount and amending their original canvass reports. This relief is misplaced because county canvassing boards have no errors to correct in their canvasses. The county canvasses were completed prior to the recount and do not include Non-Matching Original Ballots in their certified results.

The Petition asserts that by counting Non-Matched Original Ballots *during the recount*, Recount Officials double counted these ballots during the recount. This argument is premised on the idea that a duplicate was created on election night, but not identified as a duplicate, and that counting the Non-Matched Original during the recount counts that voter's ballot twice (the Original Non-Matched original and the non-identified duplicate). In other words, the complained of error took place during the recount related to counting Original Non-Matched Ballots.

These Non-Matched Original Ballots, which surfaced only in the recount, *were not counted in or part of the original canvass*. As discussed above, this issue and the alleged error in how it was resolved took place only during the recount,

and allegedly resulted in Original Non-Matched Ballots being improperly counted *in the recount*. This was not and could not have been an issue in the HCCB canvass on November 10, 2008. The Original Ballots (Matched or Non-Matched), which were removed from sealed envelopes during the recount, were simply not part of the HCCB November canvass. DesJardin Aff. ¶ 2.

Only duplicate ballots (identified and unidentified) were part of county canvasses. In other words, *no Original Ballots were included in county canvasses*. Thus, the results from the HCCB's November 10, 2008 canvass already complies with the relief Petitioner requested in its fourth request, because it did not include any Non-Matched Original ballots. Requesting county canvassing boards to reconvene is therefore illogical and cannot result in the real relief Petition seeks: a determination that the State Canvassing Board exclude Non-Matched Original Ballots from *the recount*.

III. THE HCCB DOES NOT HAVE AUTHORITY TO DECLARE AN OBVIOUS ERROR IN THE RECOUNT.

Finally, to the extent that the Petition seeks to have county canvassing boards “correct” errors made by Recount Officials in this statewide recount, there is no authority to support this suggestion. “The duties of each canvassing board are limited to those duties specified in sections 204C.32 to 204C.39.” Minn. Stat. § 204.31, subd.3. There is no statute or Minnesota Rule providing for county canvassing boards to have any role in reviewing decisions made by Deputy Recount Officials and or the State Canvassing Board in a statewide recount.

The HCCB's role in the election to date is related to the canvass report created pursuant to Minn. Stat. § 204C.33. This report was certified on November 10, 2008. Petitioner asserts that Minn. Stat. §§ 204C.39 provides authority for the HCCB to correct the error alleged in the Petition. This statute does allow a county canvassing board to correct some errors to *its canvassing report*. However, it does not give county canvassing boards any authority relating to correcting errors in a statewide recount.

Minnesota Statute section 204C.39, subd. 1, allows county canvassing boards to determine that “election judges made an obvious error in counting or recording votes.” After complying with the procedures outlined in Minn. Stat. § 204C.39, the canvassing board shall “submit . . . an addendum to its regular report, which addendum shall contain the following information . . . (d) the names of the candidates for each office . . . and the total number of votes received by candidate for that office.” Minn. Stat. § 204C.39, subd. 3. This error correcting ability only authorizes county canvassing boards to file an addendum to the “regular [canvassing] report.” *Id.*

Here, the alleged errors relate to Deputy Recount Officials and/or the State Canvassing Board decisions on what ballots to count in the recount and do not relate to errors in county canvassing reports. Moreover, the alleged errors are not errors of election judges, but rather Deputy Recount Officials. Accordingly, the HCCB asserts Minn. Stat. § 204C.39 does not create authority to correct the error alleged in the Petition. Finally, the alleged error is not an arithmetic error in “counting or recording,” rather it is a question of how Non-Matched Original

Ballots are dealt with in the recount. For all of these reasons, Minn. Stat. § 204C.39 does not authorize county canvassing boards to provide the relief requested.

Importantly, there are also significant practical problems with the requested relief. Petitioner's request is really a request to change the recount rules. The relief requested is essentially seeking to have 87 different county canvassing boards recount the recount. Issuing addendums to county canvassing board totals with respect to previously counted ballots at this stage would cause enormous confusion and difficulty. The rejected absentee ballots (with which Petitioner seeks to join with this count), were never included in either the county canvass totals or in the recount totals. They may be simply added to the canvassing total and (after being subject to the recount process) to the recount total. In contrast, attempting to have county canvassing boards meet and attempt to reconcile original canvass results with the hand recount results for that precinct and determine if there was an obvious error in counting Non-Matched Original Ballots, mixes the recount results with canvassing results. This will result in confusion and uncertainty regarding vote totals that the State Canvassing Board should use.³

³ For example, to the extent Petitioner's relief requests that county canvassing boards remove non-matched *duplicates* from county canvasses, this *would* change county canvass results (which, as discussed above *only* included duplicates) and would have to somehow be reconciled with recount numbers reported for these same precincts. If that occurred, what is the State Canvassing Board to do if that ballot has not been challenged by a campaign on that basis in the recount?

CONCLUSION

For the foregoing reasons, the Hennepin County Respondents request the Court dismiss the Petition as to them. If the Court is going to provide relief to Petitioners regarding Non-Matched Original Ballots, the relief should be directed to the State Canvassing Board and should not include asking county canvassing boards or local election officials to make determinations about whether counting these ballots in the recount was an obvious error or otherwise improper. Accordingly, the Hennepin County Respondents respectfully request that the Court dismiss the Petition with respect to them and deny the relief requested regarding county canvassing boards.

DATED: December 22, 2008

Respectfully submitted,

MICHAEL O. FREEMAN
Hennepin County Attorney

/s/ Daniel P. Rogan

By: DANIEL P. ROGAN
Sr. Assistant County Attorney
Attorney License No. 0274458
PATRICK C. DIAMOND
Deputy County Attorney
Attorney License No. 0175110
C-2000 Government Center
Minneapolis, MN 55487
Telephone: (612) 348-8406
FAX: (612) 348-6028

ATTORNEYS FOR MICHELLE
DESJARDIN AND HENNEPIN
COUNTY CANVASSING BOARD