

STATE OF MINNESOTA

IN SUPREME COURT

A-08-2206

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Norm Coleman,

Petitioner,

v.

The 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.

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**RESPONSE OF CYNTHIA  
REICHERT, MINNEAPOLIS  
ELECTIONS DIRECTOR, TO  
NORM COLEMAN'S PETITION  
FOR AN ORDER TO SHOW  
CAUSE**

**INTRODUCTION**

Cynthia Reichert (hereinafter "Ms. Reichert") is the Elections Director for the City of Minneapolis (hereinafter "City). In this capacity, she was responsible for conducting a recount of the United States Senate race for City precincts. In doing so, Ms. Reichert acted pursuant to the authority and guidance of state law and the Secretary of State's office. Ms. Reichert therefore did not commit any error, omission, or wrongful act as contemplated by Minn. Stat. § 204B.44.

## FACTS

The recount for the United States Senate race officially began on November 18, 2008, and the City began recounting on that day. See Affidavit of Cynthia Reichert (hereinafter “Reichert Affidavit”) at ¶ 3. The recount process was governed both by applicable state law and rules and by the guidance of the Secretary of State’s office. See Reichert Affidavit at ¶¶ 2, 7, 11. Ms. Reichert was authorized by the Minnesota Secretary of State and the Hennepin County Auditor to conduct the recount of Minneapolis precincts. See Reichert Affidavit ¶ 1.

During the recount process, individuals performing the recount in certain precincts noticed that there was a discrepancy between the number of ballots marked as duplicates and the number of ballots marked as originals and the issue was promptly brought to the attention of Ms. Reichert. Id. at ¶ 3. Ms. Reichert sought additional guidance from the Secretary of State’s Office because the guidance from the Secretary of State regarding duplicate ballots -- referred to by Petitioner as “Rule 9” -- did not address this particular situation. See Reichert Affidavit at ¶¶ 4-7 (citing Affidavit of Amy S. Walstein Exhibit 6 – “Secretary of State Recount Plan” (attached to Petitioner’s Petition for an Order to Show Cause)). Ms. Reichert also conferred with the representatives from the Coleman and Franken campaigns about this issue. See Reichert Affidavit ¶¶ 4, 8, 9.

The Secretary of State provided the following instruction:

It is the opinion of our Office that Rule 9 is clear about the process to be used when duplicate ballots are found during the sorting process. Those ballots are to be removed from the sorting process and placed in a separate pile. If there is an envelope of original ballots, the original ballots should then be sorted. If there are no duplicate ballots found during the sorting process, the canvass board has not authorized the envelope of original ballots to be opened and the original ballots envelope should remain sealed. If no envelope of original ballots exist, the duplicate ballots should then be sorted. While there is no requirement to compare the number of duplicate ballots to the number of original ballots, if there is an apparent significant discrepancy in the numbers, the candidates' representatives should attempt to agree on whether to sort the original or duplicate ballots. The Deputy recount official shall note on the incident log if the duplicates rather than the original ballots were counted. If the two candidate representatives can not agree, the Deputy Recount Official shall sort and count the original [sic] ballots.

See Reichert Affidavit at ¶ 7 (citing Affidavit of Amy S. Walstein Exhibit 7 – “Email from Gary Poser to Local Elections Officials Dated November 19, 2008”).

After Ms. Reichert received Mr. Poser's email, she met with the Lead Campaign Representatives for the two campaigns. Ms. Reichert and the Coleman and Franken Lead Campaign Representatives reached an agreement on the process to be followed during the recount for those cases where the number of original ballots exceeded the number of duplicates. See Reichert Affidavit at ¶ 8. The agreed process was that, in those instances, the original ballot would be placed in the pile for counting, but could be immediately challenged by either campaign. See id.; see also Affidavit of Pat Shortridge at ¶ 3. Both of the campaigns, through their lead representatives, and Ms. Reichert understood that the challenges to these ballots would be referred to the State Canvassing Board, and would not be resolved at the local recount level. See Reichert Affidavit at ¶ 9.

## ARGUMENT

### **MS. REICHERT FOLLOWED THE PROCEDURE PROMULGATED BY THE SECRETARY OF STATE**

The Secretary of State is required to adopt rules establishing uniform recount procedures. See Minn. Stat. § 204C.361. The Secretary of State has done so by promulgating Minn. Rules 8235.0200—8235.1200. Those rules, however, do not specifically address the issue of how to recount duplicate ballots. That issue was addressed in the Secretary of State Recount Plan. See Walstein Affidavit Exhibit 6.

Pursuant to Minn. Rules subp. 8235.0700, the City's recount official – Ms. Reichert – was required to present the recount procedures provided by the Secretary of State. Ms. Reichert did so when she gave the lead campaign representatives, individuals assisting in the conduct of the recount, and any other interested party a copy of the Secretary of State Recount Plan. See Walstein Affidavit Exhibit 6.

When issues arose that were not addressed in the Recount Plan, Ms. Reichert sought immediate clarification from the Secretary of State. See Reichert Affidavit at ¶¶ 4-7. The Secretary of State's office made the decision to instruct local elections officials to count the original ballots in the event that there were discrepancies between the duplicate and original counts and the candidate representatives could not come to an agreement. See id. at ¶ 7 (citing Walstein Affidavit Exhibit 7). Ms. Reichert worked out an agreed procedure with the campaign representatives for the Coleman and Franken campaigns on how to handle this issue during the recount. The procedure allowed

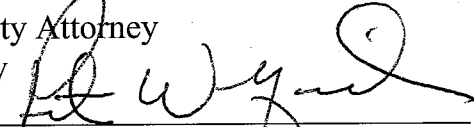
campaigns to challenge those original ballots if they wished to, believing that the decision on how to rule on those ballots was a question to be resolved at the State level, not at the local recount level. See Reichert Affidavit at ¶¶ 8-9.

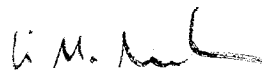
In short, Ms. Reichert, as the recount official for the City of Minneapolis, conducted the recount pursuant to the rules and guidance put forth by the Secretary of State. That guidance was followed in determining how to treat the Non-Matching Original Ballots that are of concern to Petitioner.

**CONCLUSION**

Respondent Cynthia Reichert, in her capacity as Elections Director for the City of Minneapolis, respectfully requests that this Court find that she did not commit any error, omission, or wrongful act, since she followed state law and direction of the Secretary of State.

Dated: 12/22/08

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