

MINUTES OF THE SELECT COMMITTEE ON CONTESTED ELECTIONS

The meeting was called to order by Chairman Mike O'Neal at 7:30 A.M. on January 31, 2007 in Room 313-S of the Capitol.

All members were present.

Committee staff present:

Jerry Ann Donaldson, Kansas Legislative Research Department
Martha Dorsey, Kansas Legislative Research Department
Mary Torrence, Revisor of Statutes
Gordon Self, Assistant Revisor of Statutes
Cindy O'Neal, Committee Assistant

Gordon Self provided the committee with a brief overview of the procedure of elections which are contested.

There are three levels of rules:

- Constitutional – under the Kansas Constitution, Article 2, Section 8, allows each house to be the judge of elections, returns, and qualifications of its own members.
- Statutory Procedures – provides the procedure to follow in a contested election.
- The appointment of a Select Committee to determine, after review of the facts, who the recommended winner should be and report to the full house.

He informed the committee that it had to file its final report with the House on February 9th and the House would have to take action on it by February 16, 2007.

Janet Jones, Chief Clerk of the House, brought the court file with her to the meeting and provided the following to the committee:

- A copy of the District Court Order in *Kriegshauser v. Rardin*. (Attachment 1)
- An inventory of the District Court Case exhibits, motions, and subpoenas. (Attachment 2).

She pointed out that none of the ballots in question were provided by the court or Mr. Newby. The Chairman directed Mrs. Jones to request those ballots be preserved and that she be made the custodian of them and also to make copies of the transcript for the committee and counsel.

Chairman O'Neal turned to committee's attention determining the rules in which the committee should follow.

1. The select committee shall consider the files, records and evidence transmitted from the court and shall hear the contestant and contestee and their respective counsel. All members shall have access to such files, records and evidence at such reasonable times as determined by the committee. The select committee shall have powers of compulsory process and laws applicable thereto shall apply, except that all hearings shall be open. The select committee shall consider each ballot issue that was raised by either contestant or contestee and shall make an individual determination and recommendation thereon.
2. The files, records and evidence transmitted from the district court shall remain in the custody of the Chief Clerk of the House of Representatives. Any member of the select committee may have access to such files, records and evidence by requesting an appointment between 8 a.m. and 5 p.m. on any legislative day and fixing a time for review by the member. After the select committee has reported to the full house of representative, any member of the House of Representatives may have access to such files, records and evidence by requesting an appointment between 8 a.m. and 5 p.m. on any legislative day fixing a time for review by the member. Such files, record and evidence may be reviewed subject to such reasonable limitations as may be necessary to protect the official records of the court.
3. The select committee shall report to the full house of representatives not later than 10 days after the committee's appointment. The report shall be so designated that a separate recommendation shall be made upon each ballot issue in dispute by either the contestant or contestee. Any ballot issue upon which no recommendation is adopted by a majority of the members of the select committee shall be

CONTINUATION SHEET

MINUTES OF THE Select Committee on Contested Elections at 7:30 A.M. on January 31, 2007 in Room 313-S of the Capitol.

identified and reported separately together with the recorded vote of each member of the committee and the order of the court regarding the same.

4. No member of the select committee shall communicate with the contestant or contestee or the attorney for either party upon any matter under consideration by the committee except during the public hearing conducted by the committee.
5. Sealed ballots transmitted by the district court and remaining unopened by the court shall remain unopened until otherwise determined by the select committee.

Representative Hayzlett made the motion to adopt the proposed rules. Representative Vickrey seconded the motion. The motion carried.

The committee meeting adjourned at 8:30 a.m. The next meeting was scheduled for February 1, 2007 at 7:30 a.m.

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS

JOHN DENNIS KRIEGSHAUSER,)	
Contestant,)	
)	
vs.)	Case 06cv09461
)	
GENE RARDIN,)	
Contestee,)	
)	
)	Division 5
BRIAN NEWBY,)	
Intervenor.)	
)	

ORDER

NOW on this 23rd day of January 2007, Contestant's notice of election contest pursuant to K.S.A. 25-1434 *et seq.* comes before the Court for ruling. The Court having reviewed and considered the evidence presented, the exhibits admitted, and hearing oral arguments makes the following findings of fact:

1. This Court has jurisdiction over the matter and venue is proper pursuant to K.S.A. 25-1437.
2. Contestant Kriegshauser was the Republican candidate for State Representative of District 16 during the November 7, 2006, General Election. Under the original, official election results, Contestant Kriegshauser lost the election to Contestee Rardin by a four-vote margin, specifically, 4,132 to 4,128 votes. (Tr., Dec. 20, 2006 at 57-8, 209-19.)
3. Contestant requested a recount pursuant to K.S.A. 25-3107 and a Special Election Board was assembled. (Tr., Dec. 20, 2006 at 103-04.)
4. The recount occurred on November 15 and 16, 2006. (Tr., Dec. 20, 2006 at 57-8.)
5. Following the recount, Contestant filed timely notice of election contest with this Court as required by K.S.A. 25-1439. The Court held a full day evidentiary hearing on December 20, 2006, and continued the hearing on the afternoon of December 21, 2006, where the following facts were presented through testimony and exhibits.

The vote-counting process

6. Prior to the Board of Canvassers meeting on November 13, 2006, members of the Johnson County Election Board reviewed the ballots from the General Election to determine whether they were validly cast and should be counted.

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Attachment # 1

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7. The Election Board was comprised of individuals named by Brian Newby, the Johnson County Election Commissioner (“Election Commissioner”). Based on the conclusions of the Election Board, the Election Commissioner recommended to the Johnson County Board of Canvassers (“the Board”) which ballots should be counted. (Tr., Dec. 20, 2006 at 57-8, 82, 95-6, 101-2, 105-08, 118-19.)

Provisional Ballots

8. The Election Board’s review included the provisional ballots. When a person votes provisionally, the person essentially reregisters to vote. (Tr., Dec. 20, 2006 at 24.) Provisional ballots include a voter registration card and ballot. The ballot requires two signatures and indicates generally, why it is a provisional ballot. (Tr., Dec. 20, 2006 at 24, 27.)
9. The person needing to vote provisionally applies for an advance ballot by mail and is required to provide identification. (Tr., Dec. 20, 2006 at 26.) If the person does not provide identification, the election office mails the person another provisional ballot with two separate envelopes. One envelope is for the ballot and another is for a copy of the person’s ID. (Tr., Dec. 20, 2006 at 27.)
10. If the voter does not provide valid ID the second time, the vote is not counted. (Tr., Dec. 20, 2006 at 27.)
11. Provisional categories relevant to this case are “ID required” ballots and “name and address change” ballots. (Tr., Dec. 20, 2006 at 27, 33-4, 41-6.51-2.)
12. The Election Board initially determined that a total of 3,810 provisional ballots were validly cast in Johnson County and should be counted. (Tr., Dec. 20, 2006 at 56-61, 70-74, 93, 105-08.)
13. On November 13, 2006, the Board of Canvassers met at the Johnson County Election Office to discuss the provisional ballots, to authorize a final counting of the ballots, and to certify the election results. (Tr., Dec. 20, 2006 at 57-8, 74, 82, 95-6, 101-2, 105-08.)
14. The Election Commissioner left the provisional ballots in their envelopes and organized them on a tray in bundles of twenty. (Tr., Dec. 20, 2006 at 44-5.)
15. During a work session, the Board approved a measure that they would not touch the ballots. (Tr., Dec. 20, 2006 at 44-5.)

16. During a recess, it was discovered that the number of ballot bundles had been miscounted. One bundle of 20 ballots had not been counted as part of the total number of bundles. In short, this meant that 20 more ballots should be included in the count. (Tr., Dec. 20, 2006 at 81, 92-3,105-08, 219-220.)

Name or Address Change Provisional Ballots

17. Of those provisional ballots, 1,740 were originally categorized as “name or address change” ballots. The additional 20 ballots [discussed above] were also provisional ballots categorized as name or address change. Thus, the Board ultimately approved for counting 1,760 provisional name or address change ballots. (Tr., Dec. 20, 2006 at 33-4, 92-3.)
18. County Commissioner Toplikar served as Chairman of the Board of Canvassers for this election. (Tr., Dec. 20, 2006 at 69.)
19. Commissioner Toplikar testified at the hearing before this Court, that per procedure, the board never inspected the additional 20 ballots before approving them for counting. (Tr., Dec. 20, 2006 at 45-7, 93-4.)
20. The Board followed the recommendation of the Election Commissioner that the ballots were valid and should be included in the count. (Tr., Dec. 20, 2006 at 94, 118-19.)
21. Board Chairman Toplikar indicated that the Election Commissioner explained to the Board that there was an internal system in place that verified the validity of the ballots. (Tr., Dec. 20, 2006 at 95, 101-03.)
22. The additional 20 ballots were commingled with the total ballots cast. Thus, the total number of validly cast provisional ballots was 3,830. This figure represents the total number of provisional ballots cast in all elections in Johnson County. (Tr., Dec. 20, 2006 at 92-93, 105-08.)
23. In addition to the name or address change provisional ballots, there were also 246 provisional “ID required” ballots cast in Johnson County. Of the 246 ballots, 14 pertained to the race for House of Representatives, District 16. The Board considered and accepted those 14 ballots. (Tr., Dec. 20, 2006 at 27, 41-6, 51-2.)
24. In doing so, the Board did not personally view the ID for each ballot, but accepted the Election Commissioner’s recommendation that the votes be counted. The ballots and

corresponding ID were on a tray and adjacent to the room where the Board considered the validity of the ballots. (Tr., Dec. 20, 2006 at 44-5.)

The Original Results

25. The original election results indicated that Contestee won the election by four votes. Specifically, the Board certified the election results for Representative of District 16 at 4,132 to 4,128 votes in favor of Contestee Rardin. This result was reached by totaling the votes cast using the voting machines and optically scanning the paper ballots. (Tr., Dec. 20, 2006 at 57-8, 209-11, 217.)

Possible Error in the Counting Process

26. Although not permitted to participate in the Board's evaluation of the ballots, Counsel for Contestant, Eric Carter, was present to observe the proceedings on behalf of Contestant. (Tr., Dec. 20, 2006 at 82-5, 88.)

27. During the recess, Mr. Carter notified the Board that Contestant's representatives believed there was a violation in the counting process. Specifically, that the identifications were not inspected by the Board as required by K.S.A. 25-2908(e). (Tr., Dec. 20, 2006 at 82-9.)

28. Board Chairman Toplikar contacted the Election Commissioner and notified him of Contestant's objection. (Tr., Dec. 20, 2006 at 84, 110-11.)

29. Mr. Toplikar also contacted County Counselor Don Jarrett to make him aware of Contestant's objection and to find out whether the votes had already been commingled and counted (Tr., Dec. 20, 2006 at 86-7, 111.)

30. Mr. Jarrett indicated to Board Chairman Toplikar that the votes had been counted and could not be separated. (Tr., Dec. 20, 2006 at 82-87, 176-77, 229-31.)

31. Mr. Carter attempted to address the Board after the recess. Mr. Toplikar told Mr. Carter that the County Commission had adopted a policy that prevented Mr. Carter from speaking to the Board on behalf of the contestant during the meeting. Mr. Toplikar stated that he would make a record of the discussion they had during the recess regarding Contestant's objection to the process. (Tr., Dec. 20, 2006 at 88.)

Contestant Requests a Recount

32. Under Kansas law, the contestant had the right to ask for a recount at the State's expense since the vote margin was so narrow. (Tr., Dec. 20, 2006 at 213.)

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33. By law, the recount must be conducted in the same manner in which the votes were initially counted. In this case, that meant retrieving the votes from the electronic voting machines, scanning the paper ballots and combining the totals. (Tr., Dec. 20, 2006 at 213.)
34. A Special Election Board was assembled to handle the recount. This Special Election Board was comprised of persons different from those who were a part of the original election board. However, the Special Election Board did not make any decisions regarding the provisional ballots. The Special Election Board certified the recount results. Specifically, they certified the recount results at 4,131 to 4,128 votes in favor of Contestee Rardin, and a three-vote margin. (Tr., Dec. 20, 2006 at 104-05, 210-15.)

Difference in Results

35. During the recount process, the ballots were recounted several times using different methods, including reviewing the electronic votes, rescanning paper ballots, and conducting hand-counts. (Tr., Dec. 20, 2006 at 210-11, 16-17.)
36. Specifically, a recount of paper ballots was conducted twice using scanners. Specifically, two scanners were used and all ballots were scanned with each scanner. Each scan produced a one-vote difference that affected Contestee Rardin. Originally, Contestee Rardin received 4,132 votes. After each scanned recount, Contestee Rardin received one vote less, or 4,131 votes. The number of votes for Contestant Kriegshauser remained the same after each scan, 4,128. (Tr., Dec. 20, 2006 at 210-15.)
37. In an effort to reconcile the difference produced by the scan recount, the election staff went back through the paper ballots several times. (Tr., Dec. 20, 2006 at 213.)
38. The Election Commissioner testified that for their own auditing purposes, the supervising judge hand-counted a number of paper ballots. That hand-count yielded a four-vote margin. To ensure accuracy and thoroughness, election officials conducted a second hand-count. This time a group of people participated in the hand recount and a larger number of ballots were counted. Each hand-count resulted in the same number of votes as the original count, i.e., a 4-vote margin. (Tr., Dec. 20, 2006 at 210-18, 224.)
39. The Election Commissioner explained that Contestant's original recount request was for a recount in the same manner as the original count. That original count resulted in a four-vote margin. However, the scanned recount produced a one-vote difference. On

November 17, 2006, the Election Commissioner submitted the recount results to the Special Election Board. He decided to submit the three-vote margin in favor of Candidate Rardin or 4,131 votes to 4,128 votes. He stated that his reason for so doing was because this was a close and contentious race. Thus, in his opinion, the best practice was to error on the “safe” side and submit the three-vote margin. (Tr., Dec. 20, 2006 at 215-16.)

40. The Election Commissioner testified as to why the results could have ranged from a two to four-vote margin. He explained that the first ballot counting is the best. It provides the most reliable results because the more the ballots are handled, the more likely they are to smudge and not scan correctly. In addition, the scanners used in Johnson County are older and not as sophisticated as newer machines. While they are still acceptable for use, a ballot not clearly marked may be compromised. Finally, the slightest difference in the size of the ballot can affect the results. So, if a ballot was not cut to *exact* specifications, it may not coincide with the calibration of the scanner. (Tr., Dec. 20, 2006 at 214-16, 221-24.)
41. The Election Commissioner testified that he believes that hand-counting was the most accurate and reliable way to count votes during the recount process. (Tr., Dec. 20, 2006 at 222-24.)
42. The Election Commissioner also stated that any assertion that the lower figure of 4,131 votes for Contestee Rardin, which was produced by the scanners, is accurate is not supported by the evidence. The 4,132 vote total produced by the original count is the most accurate result. (Tr., Dec. 20, 2006 at 219, 222.)

ID Required Provisional Ballots

43. Contestant’s Counsel questioned Mr. Toplikar about the voter application of Carin House. Ms. House submitted as ID, her title and vehicle registration receipt. (See Plaintiff’s Exhibit 8.) (Tr., Dec. 20, 2006 at 77-8, 166-72.)
44. Contestant’s Counsel also questioned Mr. Toplikar about the voter application of Chaoyong Jiang. For purposes of ID, Mr. Jiang submitted a utility bill. (See Plaintiff’s Exhibit 9, 10.) (Tr., Dec. 20, 2006 at 80.)

Jacob Swisher

45. At the evidentiary hearing on December 20, 2006, Jacob Swisher, a witness for Contestant, testified that he contacted several voters at the request of Contestant's Counsel, Eric Carter. Mr. Swisher questioned voters about their votes and asked them to sign a form declaring for whom they voted. If they agreed to sign an affidavit, Mr. Swisher notarized it. (See Plaintiff's Exhibit 38, 39, 40.) (Tr., Dec. 20, 2006 at 121-28, 137, 200-07.)
46. The Court questioned Mr. Swisher about the methods he used to contact voters and gain information about their vote and to obtain their signature on the affidavit. (Tr., Dec. 20, 2006 at 144-45, 167 200-07.)
47. Counsel for both sides also questioned Mr. Swisher. He testified that he did not decide whom to contact. He was given a list and asked to contact the person. (Tr., Dec. 20, 2006 at 121, 137, 189-96, 200.)
48. Mr. Swisher explained that when he contacted voters he told them there were concerns about the election results for the House of Representatives race in District 16. He testified that he did not explain the affidavit to them. He told them how to complete it, but he did not explain that they were signing a document with legal consequences. (Tr., Dec. 20, 2006 at 140, 188, 200-07.)
49. Contestant did not call any voters to testify, but offered their affidavits as evidence of their vote and/or address at the time of the election. (See Plaintiff's Exhibit 38, 39, 40.) (Tr., Dec. 20, 21, 2006 at 124-37, 143-44, 149-50, 274-75.)
50. The next day, December 21, 2006, Contestee was able to secure the appearances of two of the witnesses that Contestant had contacted and asked to sign an affidavit to evidence their vote. (Tr., Dec. 20, 21, 2006 at 124-37, 143-44, 149-50, 274-75.)
51. Specifically, during the evidentiary hearing on December 21, 2006, Contestee called as witnesses, two of the voters Mr. Swisher contacted, Sara Olivares and Juan Mojica. (Tr., Dec. 20, 21, 2006 at 124-37, 243, 260, 274-75.)

Sara Olivares

52. Ms. Olivares appeared voluntarily and testified that the address provided on her voter registration card is current, and for the last two years, has been her address. (Tr., Dec. 21, 2006 at 245, 248.)

53. Ms. Olivares also stated that Mr. Swisher called her at work and did not really identify himself or what he wanted. He just asked her questions about her address and where she lived. She told him that her address is the same as it has always been for two years and that she lived at that address. (Tr., Dec. 21, 2006 at 246, 248.)
54. Ms. Olivares also testified that when she completed her voter registration card and cast her ballot in the November 7, 2006 election, she lived at the address she provided and within the district. (Tr., Dec. 21, 2006 at 255-58.)

Juan Mojica

55. Juan Mojica testified that Mr. Swisher first contacted him by telephone regarding an election dispute. The two met a couple days later at Olathe Ford while Mr. Mojica was waiting for his truck to be serviced. (Tr., Dec. 21, 2006 at 260-63.)
56. Mr. Mojica stated that Mr. Swisher told him there was a discrepancy as to where he lived and voted. Mr. Mojica asked Mr. Swisher why he wanted him to sign the affidavit as to his address and how he voted. According to Mr. Mojica's testimony, Mr. Swisher said, "well, you just go ahead and sign it [the affidavit] and say that you voted for one of these persons." (Tr., Dec. 21, 2006 at 263.)
57. Mr. Mojica explained he told Mr. Swisher at that time that he could not remember for whom he voted. Mr. Swisher then said to Mr. Mojica "don't you remember voting for this person and so and so". Mr. Mojica told him that really he did not remember. He said he told Mr. Swisher "I do not remember ever getting to a State Representative" I was mainly there to vote for Sebelius, Moore, and Morrison. Mr. Swisher said, "well, you can just sign this." Mr. Mojica testified he told Mr. Swisher "I will sign it because it says there to the best of my ability. I will sign it but I cannot tell you who I voted for". Mr. Swisher told him, "well, just pick one". Mr. Mojica said he did not know who to pick — "how can I pick somebody if I don't know?". Mr. Mojica selected Contestant Kriegshauser and Mr. Swisher left. (Tr., Dec. 21, 2006 at 243, 260-64.)
58. Mr. Mojica also testified that Mr. Swisher came back to Olathe Ford and said, "hey, by the way how long have you lived at your present address?". Mr. Mojica answered and that was the last of their conversations. (Tr., Dec. 21, 2006 at 264.)

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59. Mr. Mojica also testified that the following day Mr. Roy, counsel for Contestee, served him with a subpoena to appear in court at 2:00 p.m. on December 21, 2006. (Tr., Dec. 21, 2006 at 270-72.)
60. Mr. Mojica indicated that he did not really know the candidates for House District 16. He does not remember casting a vote in the 16th District House of Representatives race. His main concern that day was to vote for candidates Sebelius, Moore, and Morrison. (Tr., Dec. 21, 2006 at 265.)
61. Mr. Mojica further explained that he voted at the church polling location because it was in-between his old address and his current address and close to his house — within five blocks. (Tr., Dec. 21, 2006 at 268-70.)
62. Mr. Mojica testified about his conversation with Contestee’s counsel, Mr. Miller. Specifically, he stated that he told Mr. Miller he signed an affidavit but only because the guy told him to sign it. Mr. Mojica testified that Mr. Swisher said that if he signed it he would not have to go to court “and most people are getting called to court.” Mr. Mojica further explained that he told Mr. Miller that when signing it he told Mr. Swisher that he could not tell him for whom he voted and Mr. Swisher told him to just pick a name. (Tr., Dec. 21, 2006 at 271-73.)

Heather Henderson and Alicia Frieswyk

63. Arguments were presented regarding the correct address for Heather Henderson and Alicia Frieswyk. Neither individual testified at the hearing. (Tr., Dec. 20, 2006 at 63-8.)
64. Ms. Henderson provided two addresses on her voter registration, one in District 16, and another outside the district. (Tr., Dec. 20, 2006 at 163.)
65. Ms. Henderson signed an affidavit indicating she voted for Contestee Rardin. (See Plaintiff’s Exhibit 39.) There is no clear evidence that Ms. Henderson lived outside the 16th district when she voted. (Tr., Dec. 20, 2006 at 153-55.)
66. A friend of Alicia Frieswyk, Mr. Miller, testified that Ms. Frieswyk was a friend and had lived with him and his wife. However, she did not live at their residence on 10238 Barton Street at the time of the election, November 7, 2006. (Tr., Dec. 20, 2006 at 63-8.)
67. It is unknown who Ms. Frieswyk voted for in the District 16 race and she did not sign an affidavit indicating how she voted. (Tr., Dec. 20, 2006 at 63-8.)

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Marceline Blickhan

68. The Election Commissioner testified that there was only one ballot cast in District 16 where the signature on the ballot envelope did not match the voter signature on file. Thus, that ballot was not opened nor counted. The ballot belonged to Marceline Blickhan. (See Plaintiff's Exhibit 34.) (Tr., Dec. 20, 2006 at 46-7, 179.)
69. Mr. Swisher explained that for health reasons Mrs. Blickhan voted by advance ballot. She and her husband inadvertently signed each other's ballot. (Tr., Dec. 20, 2006 at 180-81.)
70. The election office recognized the error and contacted them. Mr. Blickhan went to the election office and signed his ballot, but for health reasons, Mrs. Blickhan was not able to correct the signature on her ballot. (Tr., Dec. 20, 2006 at 180-81.)
71. Mr. Swisher testified that he contacted Mrs. Blickhan. He asserted that Mrs. Blickhan wanted to clarify for whom she voted. Accordingly, she completed and signed an affidavit, which he notarized. (See Plaintiff's Exhibit 40.) (Tr., Dec. 20, 2006 at 181.)
72. Mr. Swisher stated that Mrs. Blickhan indicated to him in person and on the affidavit where she lived at the time of the election and for whom she voted. She provided an address in the 16th District and signed an affidavit stating she voted for Contestant Kriegshauser. (See Plaintiff's Exhibit 40.) (Tr., Dec. 20, 2006 at 181.)

CONTESTANT'S ARGUMENTS

Contestant Kriegshauser alleges that several errors justify the present election contest.

- A. Contestant challenges the election results on the basis that the board did not follow the procedures set forth in K.S.A. 25-2908(e).
- B. Contestant specifically challenges the votes of Juan Mojica, Heather Henderson, Alicia Frieswyk, and Sara Olivares. He alleges that they voted in the House District 16 race when they did not live in the district at the time they voted.
- C. Finally, Contestant challenges the Election Commissioner's refusal to allow the vote of Marceline Blickhan.

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THE LEGAL STANDARD

For this Court.

K.S.A. 25-1451 establishes the authority of this Court in these proceedings. The statute reads in relevant part:

25-1451. Final determination of contest of state representatives and senators; procedure before legislative body.

(a) When a contest of election is for the office of state senator or member of the house of representatives, the **ONLY question to be tried by the court**, notwithstanding any other provision of law, shall be the question of what number of legally cast votes each of the candidates to the contested office received. The judge trying the proceedings shall make findings of fact upon the question so tried. Further evidence upon the points specified in the notice, including but not limited to the question as to the eligibility of any person to office, shall be taken and preserved by the judge trying the contest, but the judge shall make no finding or conclusion thereon.

See generally Legislative Coordinating Council v. Stanley, 264 Kan. 690, 705, 957 P.2d 379 (1998)(stating “[w]hile the legislature delegated to the district court a discretionary decision on costs "in the interests of justice" in an election contest, it reserved unto itself the ultimate decision in such a contest”).

Advance Ballots.

K.S.A. 25-1122 outlines the requirements that must be met when a voter casts an advance ballot by mail. Provisions specifically relevant to this case are situations regarding voters needing assistance, the manner by which the county election officer maintains records, and instances where voter ID is required. The relevant subsections provide:

25-1122. Advance voting; application for ballots; time for filing application; voters needing assistance; permanent advance voting status; records maintained by county election officer; first-time voter; identification, when required

(a) Any registered voter may file with the county election officer where such person is a resident, or where such person is authorized by law to vote as a former precinct resident, an application for an advance voting ballot. The signed application shall be transmitted only to the county election officer by personal delivery, mail, facsimile or as otherwise provided by law.

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(b) If the registered voter is applying for an advance voting ballot to be transmitted in person, and such voter is a first-time voter, such voter shall provide a form of valid identification such as a current and valid Kansas driver's license, nondriver's identification card, utility bill, bank statement, paycheck, government check or other government document containing the voter's current name and address as indicated on the registration book. Such voter shall not be required to provide identification if such voter has previously provided current and valid identification in the county where registered.

(c) If the registered voter is applying for an advance voting ballot to be transmitted by mail, and such voter is a first-time voter, such voter shall provide on the application for an advance voting ballot the voter's current and valid Kansas driver's license number, nondriver's identification card number or the last four digits of the voter's social security number, or shall provide with the application a copy of the voter's current and valid Kansas driver's license, nondriver's identification card, utility bill, bank statement, paycheck, government check or other government document containing the voter's current name and address as indicated on the registration book. Such voter shall not be required to provide identification if such voter has previously provided current and valid identification in the county where registered.

(d) If a first-time voter is unable or refuses to provide current and valid identification, or if the name and address do not match the voter's name and address on the registration book, the voter may vote a provisional ballot according to K.S.A. 25-409, and amendments thereto. The voter shall provide a valid form of identification as defined in subsection (c) of this section to the county election officer in person or provide a copy by mail or electronic means before the meeting of the county board of canvassers. At the meeting of the county board of canvassers the county election officer shall present copies of identification received from provisional voters and the corresponding provisional ballots. If the county board of canvassers determines that a voter's identification is valid and the provisional ballot was properly cast, the ballot shall be counted.

Kansas Case Law and Rules and Regulations Adopted by the Kansas Secretary of State.

There is a presumption that the election is valid. When challenging the results of an election, plaintiffs must plead and prove the irregularities complained of and that the irregularities changed the result of the election. Further, “[a] negative finding that a party did not

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carry its requisite burden of proof will not be disturbed on appeal absent proof of an arbitrary disregard of undisputed evidence or some extrinsic consideration such as bias, passion, or prejudice.” Thomason v. Stout, 267 Kan. 234, 978 P.2d 918 (1999).

Ordinarily, “an election should not be declared void unless it is shown that the result is not in accordance with the will of the electorate or that such will cannot be ascertained because of uncertainties. Public policy requires courts to uphold the validity and declared results of elections which have been properly and fairly conducted or which do not clearly appear to have been illegal.” Stated another way, “an election irregularity will not invalidate an election unless it is shown to have frustrated or to have tended to prevent the free expression of the electors' intent, or to have otherwise misled them.” Lambeth v. Levens, 237 Kan. 614, 702 P.2d 320 (1985).

The courts should go to extreme lengths to preserve the validity of all elections, and be slow and reluctant to override the clear intent and purpose of the electorate. An election should not be declared a nullity if on any reasonable basis such a result can be avoided.”... ”An election cannot be declared void unless such relief is authorized by law since there is no inherent power in the courts to pass on the validity of elections. An election cannot be declared void where a statute otherwise limits and prescribes the duties of the court on the trial of a contest.” Id.

“A substantial compliance with the law regulating the conduct of elections is sufficient, and when the election has been held and the will of the electors has been manifested thereby, the election should be upheld even though there may have been attendant informalities and in some respects a failure to comply with statutory requirements; mere irregularities should not be permitted to frustrate the will of the voters, nor should the carelessness of election officials.” Lambeth, at 617.

“The statutes governing the conduct of voters or election officials and other election matters cannot control the remedy. Allegations of specific irregularities or illegalities are to be considered and determined according to the pertinent statutory provisions, but, once the determination is made, its effect is controlled by the statute or statutes that authorize what judicial relief can be granted. In this regard, the categorization of conduct or votes as illegal or not is the key. The distinction between mandatory and directory provisions is lightly applied, if at all.” [Emphasis added.] Cure v. Board of County Comm'rs, 263 Kan. 779, 952 P.2d 920

(1998)(examining a situation where advance votes were called into question on the basis that they were illegally cast and mishandled).

In addition to the statutes and case law concerning this issue, the Kansas Secretary of State has set forth administrative rules and regulations regarding the proper procedures for elections. They are instructive and provide further guidance to this Court.

DISCUSSION

With above legal standards and authority in mind, the Court addresses the issues presented in this case.

A. Contestant's Contention that the Board did not follow the provisions of K.S.A. 25-2908(e).

Pursuant to K.S.A. 25-2908(e), the county election commissioner shall present to the Board the provisional ballots and the copies of the corresponding identification.

Section (e) specifically reads:

25-2908. Use of registration book and poll book or registration book at polling place; identification of voters; signature of voter; ballot numbered and given to voter; name of voter not in book; challenge of votes; first-time voter.

(e) If a first-time voter is unable or refuses to provide current and valid identification at the polling place, or if the name and address do not match the voter's name and address on the registration book or poll book, the voter may vote a provisional ballot according to K.S.A. 25-409, and amendments thereto. The voter shall provide a valid form of identification as defined in subsection (d) of this section to the county election officer in person or provide a copy by mail or electronic means before the meeting of the county board of canvassers. At the meeting of the county board of canvassers, the county election officer shall present copies of identification received from provisional voters and the corresponding provisional ballots. If the county board of canvassers determines that a voter's identification is valid and the provisional ballot was properly cast, the ballot shall be counted.

The election commissioner testified at the hearing that he did not present actual copies of the corresponding identification with the ballots in question. He explained that the identifications were in the building but not in the room where the Board was present and

conducting their meeting. Commissioner Toplikar's testimony confirmed this. Thus, the Court finds that K.S.A. 25-2809(e) was not strictly followed.

However, as stated, per policy and procedure, the Board would have been prevented from inspecting the actual ballots if a member had requested to do so. In addition, the ID and ballots were in the building and in close proximity to the room where the Board was meeting. Finally, the Election Commissioner testified that his office had verified the validity of the ballots.

The Kansas Supreme Court has made it clear that substantial compliance regarding the conduct and formality of an election is enough, so long as the will of the voters is preserved. Informalities or irregularities in the election procedure are acceptable — carelessness is not. Lambeth v. Levens, 237 Kan. 614, 702 P.2d 320 (1985); Cure v. Board of County Comm'rs, 263 Kan. 779, 952 P.2d 920 (1998).

The Supreme Court has declared "violations" of the statutes prescribing protocol can be, and seem to be in the present case, unwitting omissions. Thus, the better view seems to be that the verb "shall" in the statutes at issue indicates that the legislature expects the protocol to be followed and that it was not merely passing time by drafting and enacting the legislation, but that failure to dot all the i's does not constitute illegal conduct or invalidate an election." Cure, 263 Kan. at 784.

Here, the handling and counting of the ballots by the election office was not perfect. However, that is not to say that the task was carried out illegally or that any one person's conduct was illegal. In addition to the facts explained above regarding the logistics and ballot verification, the Election Commissioner testified that the ballots were recounted using three different methods, including two hand-counts. He also testified at the hearing that his office considers and follows the administrative rules set forth by the Secretary of State.

Given the large amounts of ballots the election office had to process for this county, their attention to the results of this particular race is commendable. As stated, in addition to conducting a recount per the contestant's request, the election office also conducted a hand-recount for their own auditing purposes, and to ensure the accuracy of that hand-count, they conducted another, larger hand-recount. They also scanned the paper ballots several times.

Despite these efforts, the results never changed for the Contestee. The only possible change was the number of votes for the Contestant. Specifically, his votes increased by one vote

and only when the scanners were used. The hand-recounts consistently produced the same results as the original count.

In an effort to err on the side of caution, the Election Commissioner opted to recognize the one-vote discrepancy that his office could not account for, and submitted a three-vote margin to the Board. Even with the smaller margin submitted and approved, Contestee Rardin remained the winner.

Any argument that the ballots should or should not count because the election office failed to follow K.S.A. 25-2908(e) exactly as written is without merit. In this case, election officials substantially complied with the law.

Proper Forms of Identification

The Court notes that Contestant attempted to call into question the type of ID provided with several of the ballots in question and the Board's decision to approve them. During the hearing, Contestant asserted that a utility bill and vehicle registration were not acceptable forms of ID. This assertion fails, pursuant to K.S.A. 25-1122, those particular documents are acceptable forms of ID. In addition, the statute states that if the voter has previously provided a valid ID in the county, he does not need to do so again.

B. Contestant's Contention that Juan Mojica, Heather Henderson, Alicia Frieswyk, and Sara Olivares did not provide an acceptable name and/or address with their ballot.

Kansas law provides that “[a]n illegal vote does not invalidate an election. An illegal vote may change the results of an election if it can be shown for whom the vote was cast. If it cannot be determined for whom the vote was cast, the election must stand.” [Emphasis added.] Cure v. Board of County Comm'rs, 263 Kan. 779, Syl. ¶ 4, 952 P.2d 920 (1998).

“All election law is created either by the constitution or by statute. K.S.A. 25-1135 establishes the procedure for verifying eligibility of absentee voters. K.S.A. 25-1136 provides that a challenge of the vote of any absentee voter may be made in the same manner as other votes are challenged, and that “[i]n all such cases, the judges shall endorse on the back of the envelope the word 'challenged' and the reason for sustaining the challenge.” Lambeth v. Levens, 237 Kan. 614, 702 P.2d 320 (1985).

His testimony established that he voted at the location he did because it was closest to his house and in between his old address and his new address. Mr. Mojica testified that the official at the polling location questioned him about this but let him vote.

The Court accepts Mr. Mojica's testimony that he is not sure for whom he voted or if he voted in the 16th District race at all. Thus, his choice is not clear to this Court and his vote cannot now be determined. In this situation, the results must stand. Cure v. Board of County Comm'rs, 263 Kan. 779, Syl. ¶ 4, 952 P.2d 920 (1998). The Court finds from the evidence presented, that Mr. Mojica's ballot should not change the election results of this case.

Heather Henderson

Ms. Henderson provided two addresses to the election office, one located in District 16, and another outside of the district. Based on the evidence presented to the Court as to where she lived when she voted, there is no credible evidence of illegal voting by Ms. Henderson. Thus, her vote was properly counted and should not change the election results of this case. Lambeth v. Levens, 237 Kan. 614, 619, 702 P.2d 320 (1985); Cure v. Board of County Comm'rs, 263 Kan. 779, Syl. ¶ 4, 952 P.2d 920 (1998).

Alicia Frieswyk

Contestant contends that Ms. Frieswyk's vote should not have been counted because she did not live in the proper area to vote in the District 16 race. A friend of Alicia Frieswyk, Mr. Miller, testified that she had lived with him and his wife at their residence on 10238 Barton Street. However, at the time of the election on November 7, 2006, she did not live at that address.

Her ballot was commingled with the other ballots. There is no evidence as to how Ms. Frieswyk voted in the election. Nonetheless, Contestant urges this Court to count Ms. Frieswyk's vote in accordance with her party affiliation. Contestant asks this Court to assume that Ms. Frieswyk voted for the District 16, House of Representative Democratic candidate simply because she is a registered Democrat, and accordingly, find that Contestee Rardin's vote total should be reduced by one.

The Court finds Contestant's argument speculative at best. Moreover, the argument is contrary to Kansas law. "K.S.A. 25-1135 establishes the procedure for verifying eligibility of absentee voters. K.S.A. 25-1136 establishes that a challenge of the vote of any absentee voter may be made in the same manner as other votes are challenged, and that "[i]n all such cases, the

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judges shall endorse on the back of the envelope the word 'challenged' and the reason for sustaining the challenge.” Levens, at 618.

More importantly, the law contemplates a challenge to the persons right to vote in a particular race must be challenged *at the time* the person *attempts to vote*, not at some subsequent time and not when the vote is being counted. [Emphasis added.] No provisions are made for challenging a voter's right to vote *after* the ballot has been *cast*.” Levens, at 618; Cure v. Board of County Comm'rs, 263 Kan. 779, Syl. ¶ 4, 952 P.2d 920 (1998).

Finally, while evidence was presented that Ms. Frieswyk did not live at the address provided on her voter registration at the time of the election, no evidence was presented to suggest she did not live elsewhere within the district at the time of the election. Lambeth v. Levens, 237 Kan. 614, 619, 702 P.2d 320 (1985); Cure, at 779. For these reasons, the Court finds that Ms. Frieswyk’s vote shall not be disturbed. Tthe vote stands and does not change the election results.

Sara Olivares

Ms. Olivares testified at the hearing and Mr. Swisher contacted her by phone, at work in the days preceding the hearing. Evidence suggested she was reluctant to talk to him. Further, she reserved in her statements to him and would only say she normally voted democrat.

At the hearing, Ms. Olivares testified and established that the address she provided on her voter registration is her current address. Moreover, it was also her address at the time of the election. Thus, her ballot is valid and her vote was properly submitted to the Board and counted. The Court finds that the ballot does not change the final number of votes received by either candidate and should not affect the election results.

C. Contestant’s Contention that the Election Commissioner improperly refused to recommend the vote of Marceline Blickhan on the basis that the signature on her provisional ballot did not match her signature on file.

Marceline Blickhan’s ballot was not opened nor counted because the election office determined that the signature on the envelope did not match the voter registration signature on file. In short, this is an example of a situation where a husband and wife sign each other’s ballots by mistake.

For health reasons Mrs. Blickhan was not able to go to the election office to correct her ballot. Thus, her vote was not included in the results. Upon being contacted by Mr. Swisher, Mrs. Blickhan signed an affidavit stating that she voted for Contestant Kriegshauser.

In Levens, the fact that a voter failed to sign an affidavit as required by law, did not invalidate the absentee ballot. In any event, the Supreme Court remanded the case because it was uncertain whether the absentee voter had voted twice in violation of K.S.A. 25-2416, or if she had cast her husband's vote according to his wishes. However, the Court concluded that even if she had illegally voted twice, the illegal vote was invalid only upon proof of how it was cast.

Here, there is little evidence of that kind of problem. The cause of the error was clearly known by the Election Commissioner. Importantly, it appears that it is possible to ascertain which two ballots belong to the Blickhans. This conclusion is supported by the fact that the ballots were separated from the rest of the ballots and the husband was contacted and corrected his signature. However, since Mrs. Blickhan was unable to go to the election office to correct her signature, her vote was not counted.

The Supreme Court has made it clear that election procedures should not be so strict that they frustrate the will of the voters. In addition, when a disabled voter innocently commits a minor error in voting, she is entitled to have it counted. Failure to follow procedure does not make a vote illegal. Substantial compliance with the law regulating the conduct of elections is sufficient. Levens, *Supra*.

Furthermore, in a case involving signatures on a recall petition, the Kansas Supreme Court opined that the election official improperly struck the name of a disabled individual whose wife signed the recall petition for him. The Court reasoned that absence of proof that the disabled voter's intentions were ignored, the signature should stand. Cline v. Meis, 21 Kan. App. 2d 622, 636-37, 905 P.2d 1072 (1995).

Here, it appears that the error was properly noted and addressed by the Election Commissioner. It further appears that the error was rectified as best as possible under the circumstances and the Election Commissioner simply did not recommend Mrs. Blickhan's vote be counted.

The law is clear. A technical violation that is innocent of fraudulent intent should not unduly frustrate the will of the voter. A simple scrivener's error that the Election Commissioner

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is made aware of, and the voter and Commissioner attempt to rectify, should be counted and be included in the results. Thus, Contestant Kriegshauser's total number of votes should be increased by one vote.

CONCLUSION

The Court conducted this hearing pursuant to K.S.A. 25-1451 *et seq.* This Court will forward to the Kansas State Legislature its findings of fact, as well as the transcript of the hearing and all exhibits admitted so that they may conduct further proceedings on the matter in accordance with Kansas law.

The Court adopts the facts as reflected in this Order. The facts as they are set forth rely on the evidence presented including witness' testimony and admitted exhibits. The Court, acting as fact finder has heard and evaluated the evidence. Accordingly, the Court has given to the evidence what it considers appropriate weight and credibility.

The Court finds that there is no evidence that any illegal or fraudulent votes were cast and counted. There is no evidence of voter tampering. There is also no evidence that the Johnson County Election Commissioner or members of the Johnson County Election Office acted illegally. The Court finds that the Johnson County Election Commissioner and the Johnson County Election Board substantially and lawfully complied with the statutory requirements of K.S.A. 25-1434 *et seq.*

The Court finds that the three-vote margin reached as a result of the recount, and recommended by the Election Commissioner and approved by the Special Election Board, is the official vote count attributed to this race. The Board certified the three-vote margin and the Court agrees, while noting that an argument could be made for a four-vote margin.

In addition, as explained, the Court finds that Ms. Blickhan's vote was disallowed in good faith but should have been counted. She did her best under the circumstances to cast her ballot and later signed an affidavit stating she voted for Contestant Kriegshauser. Thus, the Court finds that Contestant Kriegshauser's total number of votes should be increased by one.

In sum, there was a three-vote margin in this race. As explained, the Court finds that Contestant Kriegshauser's total number of votes should be increased by one. Contestee Rardin's total number of votes remains the same.


Despite the change in the applicable margin and the number of votes for Contestant Kriegshauser, Contestee Rardin still received more votes in the November 7, 2006 General

Election. The Court finds that the correct vote count for the Kansas House of Representatives race for District 16 is 4,131 votes to 4,129 votes in favor of Contestee Rardin.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Court has made the above findings of fact and ruled upon Contestant's motion in accordance with this Order.

IT IS SO ORDERED.

1-23-07
Date Entered



THE HONORABLE STEPHEN TATUM
Johnson County District Court Chief Judge
Division 5

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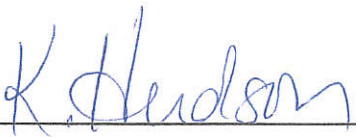
Certificate of Service

I hereby certify that on the 23 day of January 2007, a true and correct copy of the Court's order was addressed to the counsel listed below and placed in the U.S. Mail, postage prepaid, on the date of filing of this document:

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Don Jarrett
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ATTORNEY FOR INTERVENOR



Kristie Hudson
Administrative Assistant
Division 5

SCAN DATE: 2007/01/23 16:18

Inventory of District Court Case 06CV9461, John Kriegshauser vs Gene Rardin

Received 12:00 noon, Thursday, January 25, 2007

Certificate of Clerk of The District Court

Civil Appearance Docket

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Plaintiff;s Exhibits

Exhibit 1	Thomas Blue Eyes Application	1 page
	Provisional Ballot Envelope, No ID	1 page
Exhibit 2	Blue Eyes Kansas Driver's License	1 page
Exhibit 3	Jonathan DiGiacinta, Application	1 page
	Provisional Ballot Envelope, No ID	1 page
Exhibit 4	DiGiancinta Kansas Drivers License	1 page
Exhibit 5	Adam Groden Application	1 page
	Provisional Ballot Envelope, No ID	1 page
Exhibit 6	Kansas Driver's License	1 page
Exhibit 7	Carin House Application	1 page
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Exhibit 8	Title and Registration Receipt	1 page
Exhibit 9	Chaoyang Jiang Application	1 page
	Provisional Ballot Envelope, No ID	1 page
Exhibit 10	Atmos Energy bill	1 page
Exhibit 11	Nicholas Billiard Application	1 page
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Exhibit 12	Kansas Driver's License	1 page
Exhibit 13	Anthony Arrack Application	1 page
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Exhibit 14	Kansas Driver's License	1 page
Exhibit 15	Charles Rose Application	1 page
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Exhibit 16	Passport	1 page
Exhibit 17	Mildred Swearingen Application	1 page
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Exhibit 18	Kansas Driver's License	1 page
Exhibit 19	Beverly Swearingen Application	1 page
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Exhibit 20	Kansas Driver's License	1 page
Exhibit 21	Kathryn Sirridge Application	1 page
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Exhibit 22	Valley View Bank statement	1 page
Exhibit 23	Diana Salisbury Application	1 page

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Exhibit 24	Kansas Driver's License	1 page
Exhibit 25	Rachel Voss Application	1 page
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Exhibit 26	Kansas Driver's License	1 page
Exhibit 27	Thomas Ferbese Application	1 page
	Provisional Ballot Envelope, No ID	1 page
Exhibit 28	Kansas Drivers License	1 page
Exhibit 29	Name or Address Change	1 page
	Alicia Frieswyh	1 page
	In-Person Provisional Ballot, Name not in book	1 page
	Sara Olivores	1 page
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Amy Lees	1 page
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Sara Olivares	1 page
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Juan Mojica	1 page
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Heather Henderson	1 page
In-Person Provisional Ballot, Address Change	1 page

In the District Court of Johnson County, Kansas Civil Division, Case No. 06CV09461

Notice of Election Contest filing by Karl R. Hansen and Eric C. Carter, Attorneys for Contestant

	8 pages
Request and Service Instruction Form	2 pages
Motion to Intervene	2 pages
Response of Intervener, Johnson County Election Commissioner, to Notice of Election Contest	6 pages
Certificate of Mailing	1 page
Contestee's Answer	3 pages

Certificate of Mailing	1 page
Sheriff's Return of Service	1 page
Request and Service Instruction Form	1 page
Suggestions in Opposition to Applicant' Motion to Intervene	6 pages
Certification of Delivery	1 page
Request and Service Instruction Form, Subpoenas	5 page
Amended Notice of Election Contest	11 pages
Protective Order	4 pages
Subpoena for Heather Henderson, Juan Monica, Sarah Olivaris	1 page
Subpoena for Records Custodian Verison Wireless, Return of Service, etc.	5 pages
Subpoena for Robert Michaels, Return of Service, Instruction Form	5 pages
Subpoena for John Toplikar, not served	2 pages
3 blank subpoenas	
Subpoena to Juan Monica	2 pages
Subpoena to Sage Smith	2 pages
Contestant's Proposed Findings of Fact	12 pages
Contestant's Motion for Leave to File Out of Time, Proposed Findings of Fact	3 pages
Order	25 pages
Transcript of Hearing held on 20th day of December, 2006.	245 pages
Transcript of Hearing held on 21st day of December, 2006	99 pages