

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 February 1, 2007 in Room 241-N 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

Conferees appearing before the committee:

Eric Carter, Attorney for Mr. John Kriegshauser
Victor Miller, Attorney for Mr. Gent Rardin

Chairman O'Neal announced that each attorney would have thirty minutes to present the facts in their case. Eric Carter, attorney for Mr. John Kriegshauser, addressed the committee first. Mr. Kriegshauser case focused on which candidate received the most "lawful" votes. Mr. Carter believes that illegal ballots were cast by citizens who did not reside in the 16th District. (Attachment 1)

He also commented that there were substantial violations of the elections laws by the Elections Commissioner, Mr. Newby, with regard to the handling of ballots. Such as, the Board of Canvassers never received copies of identification for first-time voters who cast provisional ballots. Their job is to determine whether a voter's identification is valid and whether the provisional ballot was properly cast. Instead, Mr. Newby, by himself, determined if the I.D. was valid and whether or not the ballot should count. The counted provisional ballots were then commingled with the other counted ballots and could no longer be separated from the group total.

The following ballots are those which are being challenged by Mr. Kriegshauser as being illegally casted ballots:

- Mr. Juan Mojica registered to vote while living at 9103 Webb, in Overland Park. However, he had moved, into another district, and had not re-registered to vote. He was given a provisional ballot and his vote counted. Mr. Mojica testified that he had not lived at the Webb address for about eight months and believed that he had voted for Mr. Rardin. Therefore, this was an unlawfully cast ballot and therefore it should not count.
- Heather Henderson shows on her Kansas Voter Registration Application that she resides at 10306 Long, Overland Park. However, the Kansas Voter Registration Application listed her mailing address as 6538 W 91st, Overland Park, outside the 16th District. She was given a provisional ballot which was counted. She claims to have voted for Mr. Rardin. Because there is confusion as to where she actually resided on Election Day her ballot should not be counted.
- Alicia Frieswyk submitted a Kansas Voter Registration Application on Election Day with the address listed at 10238 Barton St, Overland Park. She is a registered Democrat and was given a provisional ballot which counted. However, at the landlord of that address claimed that Ms. Frieswyk had not lived there for many months. Therefore, Ms. Frieswyk cast an unlawful ballot and it should not count. It's more likely than not she cast a ballot for Mr. Rardin since she was a registered Democrat.

Victor Miller, attorney for Gene Rardin, addressed the committee. Mr. Miller commented that the provisional ballot process is in place to head off problems before they pollute the ballot box. He was impressed with the Mr. Newby and the way he handled the provisional ballots and also Judge Tatum who studied the election laws before crafting the opinion he forwarded to the House. (Attachment 2)

Mr. Miller brought up the ballot of Mrs. Marceline Blickhan. The Johnson County Election Office did not open or count Mrs. Blickhan's ballot because they determined that the signature on the advance ballot form did not match the voter registration signature on file. During court, testimony was given that Mrs. Blickhan's husband and she signed each other's ballot envelopes by mistake and that she cast her ballot for Mr. Kriegshauser. Mr. Miller suggested that if the committee determines it would like to count Mrs. Blickhan's vote that it actually open her ballot and make sure who she voted for. He provided the committee with an

CONTINUATION SHEET

MINUTES OF THE Select Committee on Contested Elections at 7:30 A.M. on February 1, 2007 in Room 241-N of the Capitol.

Authorization To Open Ballot and Waiver of Secret Ballot, signed by Mrs. Blickhan. (Attachment 3)

Chairman O'Neal asked if there was any other information that the attorneys believed would be helpful to the committee that they had not received. It was suggested that they might want to receive that portion of the sealed transcript regarding Ms. Sara Olivares who signed her voter registration card with an address that she stated was current and had been living at for a period of two years. During court, her portion of the transcript was sealed by the Court, it related to the question of whether the address listed was the place she lived at on Election Day or if she was residing someplace else. The committee agreed to request the sealed transcript and stated that it would not be made available for publication.

The committee meeting adjourned at 8:45 a.m. The next meeting was scheduled for February 2, 1007.

IN THE KANSAS HOUSE OF REPRESENTATIVES

JOHN DENNIS KRIEGSHAUSER,)
)
 Contestant,)
 vs.)
)
 GENE RARDIN,)
)
 Contestee.)
)
)

**TESTIMONY OF ERIC CARTER
ON BEHALF OF CONTESTANT KRIEGSHAUSER**

It is understood by all participants in this Election Contest that these proceedings do not occur in a political vacuum. Politics, however, matter not in an issue as important as determining which candidate for political office received the most *lawful* votes. The foundation of our representative form of government is that only those voters who actually reside within a House District should be able to chose the Representative who will represent the constituents in the Legislature. Where, as is the case here, it can be demonstrated that illegal votes were cast on behalf of Contestee Rardin by individuals not residing in the District, those votes should be deducted from Contestee Rardin’s tally.

While there have been the predictable remarks that the ballots have been “counted and recounted”, the reality is that merely recounting the same three or four illegal ballots does not cleanse them of their illegality.

Additionally, where there have been substantial violations of elections laws by the elections office, it is incumbent upon the Committee to fashion an appropriate remedy.

Each issue, including a discussion of individual ballots, is addressed in detail below.

**Provisional Ballots Cast Under the
“ID-Required” Ballots Category**

1. K.S.A. § 25-3002(b)(8) provides that no ballot cast by a first-time voter shall be counted if the voter fails to provide valid identification.
2. K.S.A. § 25-2908(e) provides that, during the first meeting of the Board of Canvassers conducted November 13, 2006, Election Commissioner Newby was required to present copies of identification received from first-time voters casting provisional ballots and the corresponding provisional ballots.
3. Mr. Newby admits that he did not provide the Board with the copies of identification received from first-time voters and, in fact, no such copies were even in the room at the meeting.
4. Rather, the two hundred forty-six (246) provisional ballots categorized as “ID required--voter supplied acceptable ID prior to the canvass date” were presented to the Board as a category rather than individually along with identification attached to the ballot, as required by statute.
5. K.S.A. § 25-2908(e) provides further that the Board of Canvassers, after having been presented with copies of the identification received from these first-time provisional voters, is then required to determine whether a voter’s identification is valid and whether each provisional ballot was properly cast.
6. At the hearing on this matter, Johnson County Commissioner John Toplikar testified that the Board made no such determination. Accordingly, K.S.A. § 25-2908(e) was violated.
7. Presentment to the Board by Elections Commissioner Newby and the Board’s affirmative determination that the voter’s identification is valid and the provisional ballot was properly cast is a condition precedent to the ballot being lawfully counted. This condition precedent was not met and the 246 “ID required” provisional ballots should not have been included in the final tally in the race for House District 16.

8. The 246 “ID required” ballots were commingled with a total of 3,830 provisional ballots counted on a countywide basis and can no longer be separated as a group to remedy this error.

9. Of the 246 “ID-required” provisional ballots counted countywide, 14 were included in the final tally in the race for House District 16.

10. Of those 14 “ID-required” provisional ballots counted in House District 16, eight were registered Democrat, four were registered Republican, and two were not affiliated with any party.

11. While Contestant received approximately 50.2% of all ballots that are known to have been cast and counted legally, Contestee received approximately 62% of the provisional ballots that are known to have been illegally counted.

12. The Board did not allow public comments or objections to be raised during its meeting on November 13th, citing elections office policy approved by the Kansas Secretary of State.

13. The Board recessed its November 13th meeting for a period of several hours during which approved provisional ballots were to be counted in anticipation of rendering final election results.

14. Upon recess, counsel for Contestant brought the errors and violations of statute contained in this Notice to the attention of both Election Commissioner Newby and the acting chair of the Board of Canvassers, John Toplikar, shortly after the November 13th meeting went into recess.

15. Despite the requests of Contestant and Chairman Toplikar, Election Commissioner Newby was not able to timely segregate the “ID required ballots” from the rest of the provisional ballots, despite having them bundled in categories during the meeting.

16. During the several hour-long recess of the November 13th meeting, such ballots were commingled with a total of 3,830 provisional ballots counted on a countywide basis and can no longer be separated as a group from the total.

**Provisional Ballots Cast Under the
“Name or Address Change, Voter Completed Registration Application” Category**

17. The Board, at the November 13th meeting, approved to be counted 1,740 provisional ballots categorized as “name or address change, voter completed registration application.” Said ballots were to be counted with the other provisional ballots during the Board’s recess.

18. Upon reconvening the November 13th meeting, Election Commissioner Newby announced that twenty (20) additional ballots had been “found” during the recess. Said ballots, according to Newby, should have been added to the 1,740 ballots categorized as “name or address change, voter completed registration application,” for a total of 1,760 ballots so categorized.

19. At the hearing in this matter, Mr. Newby explained that no additional provisional ballots were “found”, but rather that the provisional ballots were grouped in stacks of 20 provisional ballots each and that an election worker had miscounted the 88 stacks of ballots, erroneously stating that there were only 87 such stacks.

20. Within this category of provisional ballots categorized as “name or address change, voter completed registration application” were those cast by Juan Mojica, Heather Henderson, Alicia Frieswyk, and “S.O.”¹

Provisional Ballot Cast by Juan Mojica

21. Mr. Juan Mojica submitted a Kansas Voter Registration Application on Election Day, November 7, 2006, claiming to reside within House District 16 at 9103 Wedd, Overland Park,

¹ Because the portion of the transcript pertaining to the testimony of “S.O.” was sealed by the Court, Contestant has submitted no argument or proposed findings regarding “S.O.” or the circumstances of “S.O.’s” residency or voting as doing so in this publicly available filing would be inconsistent with the Court’s desire to keep that portion of the transcript sealed. Contestant, however, does not waive its position that “S.O.” was not a lawful resident of House District 16 when “S.O.” voted in the November 2006 Election.

KS. He was provided a provisional ballot that was subsequently accepted by the Board of Canvassers and included in the results of this Election.

22. Mr. Mojica, however, did not reside there and, in fact, had not for over eight months.

23. At the hearing in this matter, Contestant called to the stand Mr. Sage Smith, the owner of the property, who testified the Mr. Mojica did not live there on November 7th and had not for several months.

24. Prior to the hearing, Mr. Mojica signed an affidavit acknowledging that, during the eight months prior to and including Election Day, his address was 9535 Monrovia in Lenexa, KS, well outside House District 16.

25. Mr. Mojica's affidavit also indicated he had voted for the Contestee, Gene Rardin.

26. At the hearing in this matter, Mr. Jacob Swisher testified that he had met with Mr. Mojica and was told by Mr. Mojica that he did not live in the district at 9103 Wedd on Election Day but instead had lived at the Monrovia address outside the district for the eight month period leading up to and including Election Day.

27. Mr. Swisher also testified that Mr. Mojica told him he had voted for Democrat candidates for U.S. Congress, Governor, and Attorney General and that he had voted for Democrat Gene Rardin.

28. Mr. Mojica appeared at the hearing and, with regard to his residence on Election Day, offered testimony consistent with his prior affidavit and the testimony of Mr. Swisher and Mr. Smith – that he had lived outside House District 16 at the address on Monrovia and, contrary to his Election Day Voter Registration Application, had not resided within District 16 at the address on Wedd for at least eight months.

29. The ballot cast by Mr. Mojica was, therefore, not a lawfully cast ballot.

30. Mr. Mojica's testimony at the hearing regarding the candidate in the House District 16 race for whom he had voted, however, was somewhat equivocal. In light of the testimony of Mr. Swisher, the affidavit of Mr. Mojica acknowledging that he did not live in the district when he voted and that he voted for Contestee Rardin, the fact that the testimony of Mr. Swisher was consistent with that of Mr. Mojica and Mr. Smith regarding Mr. Mojica's residency outside House District 16 and his attempts to reach Mr. Mojica, and the fact that 62% of all provisional voters voted for Contestee Rardin, it is more likely than not that Mr. Mojica cast a ballot in favor of Contestee Rardin.

31. Accordingly, the number of votes received by Contestee Rardin should be reduced by one vote.

Provisional Ballot Cast by Heather Henderson

32. Ms. Heather Henderson submitted a Kansas Voter Registration Application on Election Day, November 7, 2006, claiming to reside within House District 16 at 10306 Long, Overland Park, KS. She was provided a provisional ballot that was subsequently accepted by the Board of Canvassers and included in the results of this Election.

33. Her Voter Registration Application listed as her mailing address an apartment located at 6538 W. 91st St. in Overland Park, outside House District 16.

34. Prior to the hearing in this matter, Ms. Henderson signed a sworn affidavit regarding her residence and the candidate for whom she voted.

35. For her place of residence, Ms. Henderson listed "10306 Long St. (6538 W. 91st St. [apartment number omitted])."²

36. On the subsequent line, she states, "I have maintained my residence *at the above address* since Sept. 06' [sic.]" (Emphasis added.) The "above address" would be the 91st St. apartment

² The apartment number provided in the affidavit is not included to protect the privacy and security of the voter.

located outside House District 16, and her admission that she has “maintained [her] residence” there since September 2006 is conclusive.

37. Consistent with this reading of the affidavit is the testimony of Mr. Jacob Swisher. Mr. Swisher testified that he was not able to locate Ms. Henderson at the address on Long St. in House District 16 but was instead told she had moved out. He then tried to reach her at her 91st St. apartment address and was successful.

38. Mr. Swisher testified that Ms. Henderson confirmed that, on Election Day, she resided at the 91st St. address outside House District 16 and had moved there in September 2006.

39. Mr. Swisher also testified that Ms. Henderson told her she voted for the Contestee, Gene Rardin. Ms. Henderson’s sworn affidavit further confirms that she voted for the Contestee, Gene Rardin.

40. This testimony is consistent with the fact that Ms. Henderson is a 25 year-old woman who has moved out of her parents’ house and has no intention of returning and uses her parents’ mailing address as fixed mailing address for convenience rather than an actual residence.

41. The ballot cast by Ms. Henderson was, therefore, not a lawfully cast ballot.

42. In light of her own sworn testimony, it cannot be disputed that Ms. Henderson cast a ballot in favor of Contestee Rardin. Accordingly, the number of votes received by Contestee Rardin should be reduced by one vote.

Provisional Ballot Cast by Alicia Frieswyk

43. Ms. Alicia Frieswyk submitted a Kansas Voter Registration Application on Election Day, November 7, 2006, claiming to reside within House District 16 at 10238 Barton St., Overland Park, KS. She registered as a Democrat and was provided a provisional ballot that was subsequently accepted by the Board of Canvassers and included in the results of this Election.

44. At the hearing in the matter, Mr. Robert Michael testified that he is the owner of the Barton St. address claimed by Ms. Frieswyk and that, contrary to the statement contained in her Voter Registration Application, she did not reside there on Election Day and had not lived there for many months.

45. The ballot cast by Ms. Frieswyk was, therefore, not a lawfully cast ballot.

46. It is more likely than not that Ms. Frieswyk cast a ballot in favor of Contestee Rardin. In addition to her chosen party affiliation with the Democrat Party on Election Day as listed on her Voter Registration Application, 62% of all provisional voters voted for Contestee Rardin. Accordingly, the number of votes received by Contestee Rardin should be reduced by one vote.

WHEREFORE, Contestant, having shown a substantial likelihood that the certified election results are in error, prays that the House will discard the illegally-counted provisional ballots, count all lawfully-cast ballots, and determine Contestant Kriegshauser to have won the election.

Respectfully submitted on February 1, 2007,

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ATTORNEY FOR CONTESTANT

February 1, 2007

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before your committee. Just as the Chairman and Representative Sawyer, I have had the privilege of participating in both the 1991 and the 1995 Election Contests before the House—each time as counsel for one of the parties.

And while the Chairman has already noted distinctions between the previous contests and this one, so have I. Most importantly this contest lacks the significant number of issues raised in each of the previous two. I attribute this to a number of things. First, the Legislature has acted in response to problems in the process raised in the other cases and statutory changes have served to eliminate many of those problems. Secondly, the provisional ballot process, also referred to as “fail safe voting”, has served to head off problems before they pollute the ballot box. Thirdly, the Johnson County Election Commissioner, oversaw a highly efficient and professional election last November. While I have been disturbed by the procedural problems and carelessness uncovered in previous cases, I was duly impressed by the caliber of the electoral processes followed by election officials in this election. Lastly, Judge Tatum demonstrated a firm command of controlling election law when crafting the opinion forwarded to you.

Consequently, I have few issues I need to raise. However, I do believe there are a couple of gaps the Committee needs to fill.

First, the count. The Court gives an excellent summation of the testimony on this

point on pages 5 and 6 of its Order. The bottom line is that while almost all the testimony and evidence points to a total of 4,132 votes cast for the Contestee, Rep. Rardin, the Election Commissioner chose to submit a count of 4,131 because of the constraints of the recount law. Judge Tatum accepted this "official vote count" even though it flies in the face of the facts and evidence. If the Committee has any doubt that our contention is incorrect, we urge you to independently count the paper ballots yourself and add the results to the machine count electronically recorded. We have no fear that your endeavor will clearly establish the Contestee received 4,132 votes. This election should turn on the facts and the truth, not an anomaly in the law.

Secondly, we would ask that, if you are to count the vote of Marceline B. Blickhan, you do so on the basis of her actual ballot, not an affidavit. We do contend that her vote should not be counted inasmuch as she clearly did not comply with the requirements of K.S.A. 25-1124 which reads in pertinent part, "The voter shall complete the form on the ballot envelope and shall sign the same."

However, conceding that the Committee may choose to count Mrs. Blickhan's vote, the proper way of counting it is to open her provisional ballot (still sealed and preserved) and record it as cast. A lengthy discussion on this point (among others) is found in the Court transcript on pages 281 through 307. The Court did order that it be part of the record forwarded to the Legislature. (See page 286, line 10 and page 307, lines 10-12). We urge the Committee to take whatever steps necessary to secure Mrs. Blickhan's ballot and include it as part of the record.

A concern was raised by Contestant's attorney that opening Mrs. Blickhan's ballot might violate her right to a secret ballot. To address that concern, I have attached to this

testimony an "Authorization To Open Ballot and Waiver of Secret Ballot" executed by Mrs. Blickhan in the presence of a notary public yesterday. As you will note from that document, she has no objection to its opening. In addition, the Committee can, as almost every court in the election contests I have litigated has done, provide for an *in camera* proceeding to open the ballot so as to minimize the exposure of the votes on other races.


On behalf of Rep. Rardin, I thank you for your consideration of the points we have raised. I stand ready to offer any additional assistance as you complete your deliberations.

AUTHORIZATION TO OPEN BALLOT AND WAIVER OF SECRET BALLOT

I, the undersigned Marceline B. Blickhan of 11305 West 106th Street, Overland Park, Kansas, hereby authorize the Select Committee on the 16th District House of Representatives Election Contest or its appointed agents to open my provisional ballot cast in the November 7, 2006 General Election held in Johnson County, Kansas.

I understand I have the right to maintain the secrecy of my ballot and hereby waive any such right.

I make this authorization and waiver of my own free will and without coercion or duress.



Marceline B. Blickhan

State of Kansas)

County of Johnson)

SWORN AND SUBSCRIBED before me this 31st day of January, 2007.



Notary Public

