

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 5, 2007 in Room 241-N of the Capitol.

All members were present.

Committee staff present:

Jerry Ann Donaldson, Kansas Legislative Research
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

Mrs. Janet Jones reported back to the committee that she had received the sealed portions of the transcript but that Mr. Newby denied the request to provide the sealed ballot to the Committee. The Chairman requested, and the committee agreed, to issue a subpoena *duces tecum*, requiring Mr. Newby to hand deliver the ballot to the committee, along with being prepared to inform the committee of the Johnson County written policy as to addressing the board of canvassers.

Staff provided an overview of several issues that arose in the contested election: (Attachment 1)

1. What consequences result from the failure of election officials to follow statutory election procedures;
2. What are acceptable forms of voter identification; and
3. When may a voter's rights to vote be challenged.

The contestant suggested in his written argument that because the Election Commissioner and the Board of Canvassers did not comply with K.S.A. 205-2908(e) the election should be invalidated. However, Kansas case law holds that a court's authority to invalidate an election is granted only in certain statutorily prescribed circumstances. The four grounds for declaring an election void is:

1. When an elected individual is ineligible to hold office.
2. When a citizen has been deprived of the right to vote which would have changed the outcome of the election.
3. Illegal votes are received or rejected.
4. If election officials are bribed by an individual.

Staff stated that a first time voter is supposed to show some type of identification. The acceptable forms of voter identification include:

- Drivers License
- Identification Cards
- Utility Bills
- Bank statements
- Paycheck, government check or other type of government document

The statute allows for a challenge of a voter's right to vote. It can only be done at the time the vote is cast. However, courts are split on this issue.

The committee turned its attention to Mrs. Blickhan's ballot. It was the understanding of the committee that Mr. & Mrs. Blickhan received absentee ballots. Each voted on their correct ballot assigned to them but Mr. Blickhan put his ballot in Mrs. Blickhan's envelope and visa versa. The Board of Canvassers did not notice Mr. Blickhan's ballot was in the wrong signed envelope and counted it. However, it did catch Mrs. Blickhan and did not count her ballot. During the court hearing, Judge Tatum talked with Mrs. Blickhan and asked her who she thought she voted for and then counted her vote, without actually opening her ballot.

The committee meeting was adjourned at 12:45. The next meeting was scheduled for February 6, 2007.

MARY ANN TORRENCE, ATTORNEY
REVISOR OF STATUTES

JAMES A. WILSON III, ATTORNEY
FIRST ASSISTANT REVISOR

GORDON L. SELF, ATTORNEY
FIRST ASSISTANT REVISOR



OFFICE OF REVISOR OF STATUTES
KANSAS LEGISLATURE

MEMORANDUM

Legal Consultation—
Legislative Committees and Legislators
Legislative Bill Drafting
Legislative Committee Staff
Secretary—
Legislative Coordinating Council
Kansas Commission on
Interstate Cooperation
Kansas Statutes Annotated
Editing and Publication
Legislative Information System

TO: Select Committee on Contested Elections
FROM: Jason Long, Assistant Revisor
RE: Election Contest Issues
DATE: February 5, 2007

I. Introduction

As a result of the election contest for State Representative of District 16 several issues have arisen as to proper election procedures and the consequences of failure to follow such procedures. These issues have been succinctly narrowed to three primary issues: (1) what consequences result from the failure of election officials to follow statutory election procedures; (2) what are acceptable forms of voter identification; and (3) when may a voter's right to vote be challenged. Each of these issues is addressed separately below.

II. Issue 1 - Failure to follow election procedure

In the election contest the argument was made that failure on the part of the Election Commissioner and the Board of Canvassers (Board) to strictly comply with K.S.A. 25-2908(e) should result in the invalidation of the election. Kansas case law holds that a court's authority to invalidate an election is granted only in certain statutorily prescribed circumstances, and that public policy strongly discourages such action when the will of the electorate is upheld despite the procedural irregularities.

"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. Since the legislature has determined when the courts may order a new election, the courts are limited to those remedies." *Lambeth v. Levens*, 237 Kan. 614, 621 (1985). K.S.A. 25-1448 provides that

when a contestant prevails on the grounds set forth in K.S.A. 25-1436(a), (b), (c), or (e), then the court has the authority to invalidate the election and order that a new election take place. Outside of this provision the courts have no authority to invalidate an election.

The four grounds for declaring an election void are: (1) When the elected individual is ineligible to hold office; (2) when voters have been deprived of the right to vote and such deprivation could change the result of the election; (3) if illegal votes are received or legal votes are rejected; and (4) if election officials are bribed by the elected individual. K.S.A. 25-1448 and 25-1436.

Furthermore, it is well settled in Kansas case law that public policy strongly encourages courts to uphold elections and to refrain from declaring an election void. "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* 237 Kan. at 617.

In *Cure v. Bd. of Hodgeman County Comm'rs*, 263 Kan. 779 (1998), the Kansas Supreme Court addressed a case similar to the present one. In that case the contestant argued that certain election procedure irregularities regarding advance balloting should invalidate the entire election. Contestant's argument was based on the fact that the statutory provisions governing election procedures use the term "shall" such that these were mandatory provisions, and failure to follow such provisions should invalidate the election. The court disagreed holding that a more practical approach should be taken with respect to compliance with statutory election procedures. The court opined that under the contestant's rationale no election would stand judicial scrutiny since statutory provisions regarding election procedures use "shall" for almost every aspect of election procedure. The better view is that use of the term "shall" indicates that the legislature expects protocol to be followed, however, failure to "dot all the i's" is an unwitting omission and should not constitute illegal conduct or invalidate an election. *Cure*, 263 Kan. at 783-84. The court further held that the contestant's position "ignores the absence of statutory authority for the court to invalidate the results of an election as a means of enforcing procedural rules." *Id.* at 799.

The lack of any statutory sanctions for procedural irregularities stands in contrast to those statutory provisions that provide strict penalties for unlawful acts. This contrast further supports the proposition that minor procedural irregularities which do not rise to the level of illegal acts should not provide the means by which a court can invalidate an election.

In summary, courts may only invalidate elections upon the occurrence of specific statutorily proscribed conditions. Minor procedural irregularities which are not the result of any unlawful intent, but rather are unwitting omissions should not be allowed to invalidate an entire election unless it is demonstrated that such irregularities have frustrated the will of the electorate or misled them.

III. Issue 2 - Acceptable forms of voter identification

During the election contest the issue of what constitutes acceptable forms of voter identification arose. Particularly, questions were raised about whether a voter's utility bill or vehicle title and registration are acceptable forms of voter identification for purposes of determining the voter's current residence. While there is little case law in Kansas on this specific issue, the statutory provisions governing voter identification are adequately clear.

K.S.A. 25-2908(d) provides that first-time voters must provide one of the following forms of valid identification: current Kansas driver's license, nondriver's identification card, *utility bill*, bank statement, paycheck, government check or *other government document* unless such voter has previously submitted such identification in the county where registered. A voter's utility bill is, therefore, clearly an acceptable form of identification. Furthermore, a voter's vehicle title and registration, both of which are government issued documents containing the individual's name and address, likely fall under the catch-all term, "other government document." K.S.A. 25-2908(d) requires that the identification contain the voter's current name and address. From this it can be inferred that the purpose of this statute is to provide the election officials with verification of the voter's current name and address. A vehicle title and registration provides such information.

K.S.A. 25-2908(e) also requires that voters submitting a provisional ballot provide a form of valid identification as defined in subsection (d). Likewise, K.S.A. 25-1122(b), which requires voter identification for advance ballots, uses a definition of valid identification that is nearly identical to that found in K.S.A. 25-2908(d).

There is virtually no case law on this particular issue, however, the statutory provisions discussed above are clear in providing a list of acceptable forms of voter identification. Furthermore, a court would most likely also look to the intent of the statute which is to require a voter to provide some official written documentation verifying such voter's current name and address. A utility bill and a vehicle title and registration accomplish this purpose.

IV. Issue 3 - Challenge of voter's right to vote

The contestant in the election contest sought to challenge the right of certain voters to vote for the house seat in District 16 based on the allegation that such individuals were not residents of the district on the date of the election. Such challenges were only brought, however, after the ballots of those individuals had been opened, counted and commingled with the other ballots from the election. The issue raised is whether a challenge is required to be brought at the time the ballot is cast by the voter, or may be lodged at a later time; specifically, after the ballot has been opened and counted. Kansas statutes do not address challenges to a voter's right to vote subsequent to the ballot being opened and counted. The statutes only provide for challenges at the time the ballot is cast. Case law generally holds that a challenge may only be made at the time the ballot is cast.

K.S.A. 25-414 prescribes when it is the duty of an election judge to challenge a voter's right to vote. K.S.A. 25-409 then provides the procedures for challenging a vote. At the time the ballot is cast the ballot is to be sealed in an envelope and the judge is to write "provisional" on the outside of the envelope along with the reason for the challenge. The judge must then transmit the sealed ballot along with the voter's application for registration and affirmation to the Board. The Board then determines whether to accept or reject the ballot. The Board is required to open those ballots it deems valid and count them in the election.

K.S.A. 25-1136 provides that advance ballots may be challenged in the same manner as other ballots are challenged. Again, the judges are required to write "provisional" on the back of the sealed envelope containing the challenged ballot and state the reason for the challenge. This statute also contains the express provision that if a challenge is sustained, in other words, if the ballot is rejected, then the envelope is not to be opened.

The case law is not exactly consistent regarding this issue. *Lambeth* holds that "[t]he qualifications of the voter cannot be challenged later, because once the ballot is opened and commingled with the others, there is no way of identifying which one is the challenged voter's ballot." 237 Kan. at 618. This opinion follows the statutory law in that a challenged ballot should be kept segregated from the other ballots and not counted until the Board makes a determination as to the validity of the ballot. Based on the reasoning in *Lambeth* it would be practically impossible to challenge a ballot after it has been cast because of the commingling of the ballots after that point in time.

However, the court in *Cure* suggests that the statutory provisions relating to challenging ballots should be construed in the same manner as all other election procedure statutes; that is, "departures from statutory procedure for challenging advance votes should not automatically invalidate the challenge." *Cure*, 263 Kan. at 797. Failure to strictly follow the challenge procedure set forth in statute should not act as a bar to a later challenge of a ballot.

In *Cure* four absentee votes were allegedly challenged. The record only produced four empty envelopes that appeared to be sealed at one time and then opened. The court avoided delving into this issue in great detail by finding that there were only four possible votes and the election was decided by a 22-vote margin. However, the court's opinion does suggest that if a ballot is somehow kept separate from nonchallenged ballots such that the Board is able to determine the validity of the ballot, then failure to precisely follow the statutory provisions should not bar a later challenge to the ballot.

In summary, Kansas statutes do not contemplate the challenging of a voter's right to vote at any time after the casting of the ballot. *Lambeth* concisely points out the reasoning behind this: That it would be nearly impossible to distinguish the challenged ballot from the others once they have been counted and commingled. However, despite this strong reason to bar any challenge to a ballot after it has been cast, there is case law suggesting that such a challenge could be allowed in certain circumstances.