MINUTES
Election Contest Committee

Wednesday, January 16, 2019

MEMBERS PRESENT

Representative Steven Holt, Chair
Representative Jon Jacobsen
Representative Brian Meyer

Representative Matt W. Windschitl
Representative Mary Lynn Wolfe

CONTENTS

I.   Procedural Business

Call to order. Chairperson Steven Holt called the January 16, 2019, meeting of the Election Contest Committee to order at 4:00 p.m. in Room 103 of the State Capitol.

Committee business. Upon motion by Chairperson Holt, the committee approved the minutes from the January 14, 2019, meeting of the committee.

Future proceedings. Chairperson Holt noted that no further meetings will be held for the remainder of the week and future meetings are yet to be determined. Chairperson Holt requested the attorneys for the contestant and the incumbent provide a list of prospective witnesses to the chairperson by 2:00 p.m., Thursday, January 17, 2019.

Adjournment. The meeting was adjourned at 6:26 p.m.

II.   Opening Arguments

Shayla McCormally — attorney for contestant Kayla Koether: The issue in the election contest for House District 55 concerns 29 absentee ballots from Winneshiek County that were not opened and counted by the Winneshiek County Auditor or the Secretary of State. With nearly 14,000 votes cast in the election, the difference between the contestant and the incumbent is only nine votes. A United States Postal Service (USPS) barcode contained on the envelopes of the 29 absentee ballots in question shows that the ballots were mailed before Election Day and should therefore be opened and counted. Three counties comprise House District 55: Clayton, Fayette, and Winneshiek and all counties received absentee ballots after Election Day. No issue arose regarding Clayton County but Fayette County did count all ballots received after Election Day regardless of whether a postmark or intelligent mail barcode was examined to determine if the ballot was mailed on time. Winneshiek County, however, did not count all ballots received after Election Day, raising potential equal protection concerns. Voting is a fundamental right and the government should not knowingly and intentionally disenfranchise voters who complied with the rules for voting by absentee ballot.

Iowa Code section 53.17 provides that absentee ballots received after Election Day but before the Monday following the election be counted if the return envelope is "clearly postmarked by an officially authorized postal service or bear an intelligent mail barcode traceable to a date of entry into the federal mail system not later than the day before the election …" The ability to examine an intelligent mail barcode was added to the Iowa Code section with the clear intent of allowing for more votes to be counted. However, the phrase "intelligent mail barcode" is neither capitalized nor contains a particular trademark in the Iowa Code. Administrative rules adopted by the Secretary of State are specific to an intelligent mail barcode tracing system that was established by the USPS. However, the fact that the administrative rules are limited to the tracing system type of barcode should not limit what type of intelligent mail barcode is authorized by the Iowa Code, especially as it relates to a fundamental right like voting. In fact, the particular tracing system described in rules has now been renamed by the USPS. If a technical term is to be used in the Iowa Code, then the term needs to be defined. If not, then the meaning of a phrase or term in the Iowa Code should be determined by its plain meaning. In this case, the 29 absentee ballots contained an intelligent mail barcode, as the barcode was capable of determining when the envelopes were mailed.

Iowa Code section 57.5, relating to election contests and a recanvass of the vote, requires that all ballots be opened and errors corrected. Due process requires that evidence be received by the tribunal hearing the contest, that all ballots, including the disputed absentee ballots, be delivered to the tribunal, and that

a recanvass of all the ballots occur. Voters, who thought they had exercised their right to vote by mailing an absentee ballot on time, should have their votes counted.

Matt McDermott — attorney for incumbent Michael Bergan: The dispositive issue in this contest is an interpretation of election law, specifically what does "intelligent mail barcode traceable to a date of entry into the federal mail system" mean. The USPS utilizes two types of barcodes on mail. One type of barcode is sprayed or otherwise placed on mail by USPS and is not unique to that particular piece of mail, making it difficult to determine when the mail was placed in the federal mail system. The other type of barcode, referred to as "Intelligent Mail barcode Tracing," is affixed by the mailer (in this case, the county auditor), is unique to that particular piece of mail, and allows the mailer access to certain tracking information provided by the USPS relative to that item of mail, including when it was placed in the federal mail system. The Intelligent Mail barcode Tracing system is one that requires a subscription with the USPS by the mailer.

House File 2273, enacted in 2016, which provided for the use of an intelligent mail barcode, contained further provisions concerning the Secretary of State and the use of an intelligent mail barcode. Section 15 of the legislation required the Secretary of State to report on the use of intelligent mail barcodes by county auditors during the 2016 general election. The report required, among other items, information on the number of county auditors utilizing intelligent mail barcodes. Section 16 of the legislation authorized the Secretary of State to adopt emergency rules to implement the provisions of the legislation. Following the 2016 general election, the Secretary of State issued the required report, indicating that six counties utilized the USPS Intelligent Mail barcode Tracing system. Winneshiek County was not one of the counties that utilized the system. The Secretary of State also adopted emergency rules governing the use of intelligent mail barcodes. The rules, which specifically referenced Intelligent Mail barcode Tracing, provided that the use of the system by county auditors was not mandatory, required notice to the Secretary of State prior to usage, and provided that the use, or nonuse, of the system could not be stopped or started once an election had commenced. The rules also provided that votes counted using Intelligent Mail barcode Tracing must be noted and verified to the Secretary of State. By defining intelligent mail barcode as provided by the administrative rules, the resultant system provides readily available and verifiable information for county auditors on when a ballot was mailed. Using other barcodes, in which the date mailed cannot be determined by county auditors, does not provide readily available and verifiable information on when the mail entered the federal mail system. The Legislature determines what the law means and statutory construction supports the conclusion that intelligent mail barcode is a technical term with a very specific meaning. In this case, the meaning of the term is specific to the Intelligent Mail barcode Tracing system as described by the USPS. The Secretary of State was authorized by the Legislature to adopt rules and the rules adopted as to the meaning of intelligent mail barcode should be provided deference. Comments by legislators during debate on the legislation support the conclusion that intelligent mail barcode refers to the Intelligent Mail barcode Tracing system. It would be unfair to voters to interpret the term more broadly for voters in Winneshiek County than in other counties that did not use the tracing system. Iowa law imposes several requirements on voters who vote by absentee ballot, to include signing the ballot, sealing the envelope, and ensuring that the ballot arrives timely. In this election contest, as no intelligent mail barcode was utilized by Winneshiek County, the ballots were lawfully rejected.

III. Rebuttal Arguments

Shayla McCormally: The Iowa Code does not refer to a tracing system and the Secretary of State and administrative rules limiting the use of intelligent mail barcodes should not be controlling. In this instance, the absentee ballots in question had barcodes and the auditor was eventually able to determine that

the ballots were mailed in time. The meaning of intelligent mail barcode in the Iowa Code should not be determined based on outdated USPS nomenclature and administrative rules. The term intelligent mail barcode should not be interpreted in a way that disenfranchises voters.

Matt McDermott: The fact that the name of the USPS tracing system is migrating to a different named program does not change the fact that a tracing system is still used and available. The only way the auditor was able to determine the date the absentee ballots were mailed was by a court order requiring an examination of the ballots by the postal service. The fact that the date could be determined does not alter the fact that USPS is not required to provide information on barcodes that were used on the disputed absentee ballots. Iowa law does not require that only the Iowa Code can define technical terms, administrative rules can also define these technical terms. The counting of ballots must be done in a way that is consistent and verifiable. Using a barcode other than the Intelligent Mail barcode Tracing system is neither consistent nor verifiable.

IV. Committee Member Questions and Comments

Chairperson Holt: In response to a question, Ms. McCormally indicated that it is unknown as to how the postal service determined the date the ballots were mailed or which particular barcode on the envelope was used. Chairperson Holt commented that floor debate in the House of Representatives noted that the use of the intelligent mail barcode as defined by the USPS was specific to that particular envelope and that due to the cost, county auditors were not required to use the USPS Intelligent Mail barcode Tracing system. Chairperson Holt noted that the bill drafting style guide used by the Legislative Services Agency provides that the term "intelligent mail barcode" could not be capitalized.

In follow-up remarks, Chairperson Holt asked the attorney for the contestant what information she was denied relative to the absentee ballots in question. Ms. McCormally responded that she was not provided any information on which ballots were determined to have been mailed prior to Election Day and the basis for why four ballots were unable to be determined to have been mailed on time. Chairperson Holt noted that the Administrative Rules Review Committee is bipartisan and ensures that legislative intent is followed when considering rules. In many instances, the committee refers rules back to the applicable administrative agency.

Representative Brian Meyer: An equal protection issue seems to be implicated in this election contest as one county, Fayette, counted ballots while Winneshiek did not. Justifying this different treatment in counting ballots should be subject to strict scrutiny. The intent of the Iowa Code would appear to make sure ballots arrive on time and that if they do, those ballots should be counted. In response, Mr. McDermott noted that regardless of what may have happened in Fayette County, the law is clear as to which ballots should be counted and Winneshiek County properly followed the law. In addition, Mr. McDermott commented that the manner of counting ballots is subject to a balance of interests, and providing an accurate, verifiable, and sound election process as it relates to counting ballots are valid interests sufficient to justify the interpretation of Iowa Code that intelligent mail barcode refers to the tracing system provided by the USPS. Representative Meyer commented that the Iowa Code does not use proprietary language or trademarks and that in this case, a determination of what each word, "intelligent," "mail," and "barcode," means should be examined by ascertaining the plain meaning of each word. In response, Mr. McDermott noted that the phrase refers to a technical term that relies upon each word in that phrase. Representative Meyer and Mr. McDermott agreed that while comments during legislative debate can be examined for purposes of statutory construction, such comments are not dispositive. Representative Meyer concluded his remarks by stating that the committee needs to hear from witnesses prior to making a decision.

In follow-up remarks to the committee, Representative Meyer noted that trademarked and proprietary names and terms cannot be used in the Iowa Code. The plain meaning of the terms in question needs to be determined and in this case, the key term is "intelligent." Due process requires that witnesses be called and a determination of the chain of custody of the ballots examined by the post office needs to be made. Representative Meyer also commented that a violation of constitutional rights, such as the right to vote, can certainly be appealed through the court system.

Representative Jon Jacobsen: Representative Jacobsen asked the attorneys what the controlling legal standard is in the election contest. Ms. McCormally responded by noting that the election contest process is provided in Iowa Code chapters 57, 59, and 62, which suggests that witnesses and subpoenas are part of the process. In addition, a determination of this election contest must be based on the right to vote, which is derived from the Iowa Code and the United States and Iowa Constitutions, and in particular the Fourteenth Amendment to the United States Constitution. Mr. McDermott stated that Article III, section 7, of the Iowa Constitution provides that it is up to the Legislature to determine the qualifications of its members and that decision is not subject to appeal to the courts. Because Iowa law is clear as to what an intelligent mail barcode means, no additional constitutional analysis is necessary. Representative Jacobsen then asked the attorneys to comment on the deference that should be provided to the administrative agency that adopted rules regarding the use of an intelligent mail barcode. Mr. McDermott stated that the legislation that added the ability to use an intelligent mail barcode provided rulemaking authority to the Secretary of State and deference should be provided to the rules adopted by the Secretary of State given the expertise of the agency relating to voting. In response, Ms. McCormally noted that deference should not be provided. While the Secretary of State had the authority to enact rules providing guidance on the Intelligent Mail barcode Tracing system, the Iowa Code is not so limited and the Secretary of State cannot change what the law says through administrative rules. In response to a question about floor debate on the legislation, Ms. McCormally noted that while one can examine floor debate, it is important to note that legislative intent should not be derived from the comments of only a few members, but from the Legislature as a whole and that floor debate discussing the Intelligent Mail barcode Tracing system should not be interpreted to exclude any other barcodes. Mr. McDermott noted that the discussion of the Intelligent Mail barcode Tracing system during floor debate was evidence that the Legislature wanted to adopt a system that could ensure a reliable method of providing information to county auditors as to when an absentee ballot was mailed. Representative Jacobsen concluded by noting the differing manner in how the three counties that comprise House District 55 counted absentee ballots.

In follow-up remarks to the committee, Representative Jacobsen questioned whether the administrative rules requiring county auditors to provide notice and a report to the Secretary of State if they are to utilize the Intelligent Mail barcode Tracing system doesn't establish that this barcode is the exclusive method authorized by Iowa Code. Ms. McCormally noted that the administrative rules should not be viewed as exclusive as other barcodes can be used to determine the timing of a mailing.

Representative Matt Windschitl: Representative Windschitl asked about issues surrounding the court order requiring the delivery of the 33 absentee ballots to the post office. Ms. McCormally noted that it is currently unknown how the 33 absentee ballots in question were taken to the post office, raising an issue of chain of custody relative to these ballots. Ms. McCormally commented that the only information as to what happened to the 33 absentee ballots is an affidavit indicating that it was determined that 29 of the 33 absentee ballots were mailed on time. Representative Windschitl noted that the procedure used to attempt to determine the validity of the 33 absentee ballots clearly differed from the procedure that is used during a canvass and a recount of the ballots in any particular election. In a canvass and recount situation, witnesses from both political parties are present when ballots are counted. Representative

Windschitl noted that the Election Contest Committee is to follow the rule of law and the key question here is whether the barcodes in question are intelligent mail barcodes. In response to questions, Ms. McCormally noted that if the post office is capable of reading the barcode and determines when the absentee ballots were mailed, the barcode is an intelligent mail barcode. Ms. McCormally commented that the fact that the administrative rules provide specific guidance as to using the Intelligent Mail barcode Tracing system but provide no information on other mail barcodes does not mean that the Iowa Code provision should be limited to the tracing system. In response, Mr. McDermott noted that the legislation providing for the use of intelligent mail barcodes makes no sense if you can use any barcode, as barcodes other than an intelligent mail barcode do not provide a county auditor with useable information on when a particular absentee ballot was mailed.

Representative Mary Wolfe: Representative Wolfe questioned whether the barcodes on the disputed absentee ballots are considered an intelligent mail barcode for some purposes since the post office was able to determine when the absentee ballots were placed in the federal mail system. Representative Wolfe also questioned what was the compelling government interest in determining that the absentee ballots should not be counted even if it is determined that the ballots were mailed on time. Furthermore, Representative Wolfe wondered why an intelligent mail barcode should not mean barcodes that are not specifically addressed by administrative rules if they can still be used to determine when an item is mailed. In response to questions, Mr. McDermott noted that how the post office read the barcodes on the absentee ballots in question is unclear. Mr. McDermott also noted that a compelling government interest exists in utilizing the system described in the administrative rules as it is important to have a uniform process to examine ballots received after Election Day. Mr. McDermott concluded that the law and legislative intent is clear in limiting the term to the Intelligent Mail barcode Tracing system. In response to a question regarding Iowa Code section 57.5, Ms. McCormally noted that the Iowa Code section ensures the right to open the ballots in public and have witnesses. Mr. McDermott noted that the right to a recanvass of the ballots does not require opening of the absentee ballots in question. In conclusion, Representative Wolfe stated that while reasonable minds can disagree, intelligent mail barcode should be interpreted in a way to enlarge the right to vote.

In follow-up remarks to the committee, Representative Wolfe noted that the Election Contest Committee should be focused on the constitutional rights of 29 voters who mailed their absentee ballots on time but did not have them counted. Statutes control over administrative rules and the United States and Iowa Constitutions control over both statutes and administrative rules. If a fundamental right like the right to vote is implicated, then the law demands we interpret any ambiguity in favor of enfranchising voters.