

INDIANA STATE RECOUNT COMMISSION

MINUTES OF THE JULY 6, 2004 MEETING

MEMBERS PRESENT: Todd Rokita, Chair of the Indiana State Recount Commission (“the Commission”); John Griffin, Member

MEMBERS ABSENT: Gordon Durnil, Member.

STAFF ATTENDING: Heather Willis, Recount Director; J. Bradley King, Majority Counsel; Kristi Robertson, Minority Counsel; Phil McGovern, State Board of Accounts; and Lt. Colonel Michael Medler, Indiana State Police

OTHERS ATTENDING: Steve Fawcett, Secretary of State's Office Legal Intern; Michelle Gough, Secretary of State's Office Legal Intern; Adam Duncan, Secretary of State's Office Legal Intern.

1. CALL TO ORDER:

The Chair called the July 6, 2004 meeting of the Indiana State Recount Commission to order at 3:00 p.m. in the Secretary of State’s office, 201 State House, 200 West Washington Street, Indianapolis, Indiana.

2. DOCUMENTATION OF MEETING NOTICE

The Chair reviewed the agenda and recognized the recount director, Heather Willis, who pointed to the meeting notice in the members’ packets that had been sent Thursday, July 1. The chair then recognized Mr. King who acknowledged that documentation of the meeting notice met all legal requirements.

The chair noted that two of the three members were present and that Gordon Durnil was unable to attend the meeting. The chair asked Ms. Willis, who had spoken with Mr. Durnil, if he agreed that even though Mr. Durnil would not be present that day, that the other two members made a quorum. Ms. Willis affirmed this and then relayed the message from Mr. Durnil that he had reviewed everything and was ready to sign off on all of the documents.

3. APPROVAL OF MINUTES OF JUNE 10, 2004 MEETING

The Chair presented the minutes for the June 10-11, 2004 meeting. The recount director noted that a few scrivener’s errors had been corrected on the final copy and that there was one place on page 50 where the vote had not been recorded in the previous draft of the minutes and Mr. King had since inserted it. Mr. Griffin moved to accept the minutes as corrected and was seconded by Mr. Rokita. There being no discussion and with two members voting “aye” (Mr. Rokita and Mr. Griffin), and no member voting “nay,” the motion was adopted.

4. CERTIFICATION OF VOTE TOTALS FOR REPUBLICAN PARTY NOMINATION IN INDIANA

Mr. King said that in the packets was a document titled Certification of Recount Results for the Republican Party Nomination for Indiana Senate District 36. The document notes that there was a recount completed, and state law requires that a document be signed setting forth the results of the recount. The first page summarizes the results, and behind the first page is the State Board of Accounts tally sheet that has been revised to reflect the determinations made during the June 10th and 11th meeting. Mr. King noted one additional scrivener’s error on page one that read “rally” instead of “tally.” There being no discussion, Mr. Rokita moved to approve the certification as

amended and was seconded by Mr. Griffin. With two members voting “aye” (Mr. Rokita and Mr. Griffin) and no member voting “nay,” the motion was adopted.

5. ORDER 2004-08 DETERMINATION OF RECOUNT EXPENSES

Mr. King said that in the packets members should find the text of order 2004-08. He reminded the commission that a cash bond of \$1260 was submitted by the petitioner at the time of filing the Petition for Recount. That amount was based on the number of precincts that were included in the recount, which was 126, and that the margin was less than 1% of the total votes cast in that race. Although that margin was reduced from 65 to 38 votes, that reduction was less than 50% of the original margin of the certified votes. That is important because under the Indiana recount statute if the margin is reduced in a recount by 50% or more, then the petitioner is entitled to a partial refund of the deposit that is submitted. Therefore, the order indicated that because of the mathematics in this case, the commission now finds that there should be neither a full nor partial refund of the cash deposit and orders that the expense of the recount conducted by the commission be paid from the cash deposit that has previously been deposited in the state recount fund. The order also indicates that should the expenses not be satisfied by the deposit, pursuant to state law those expenses should be paid from the state recount fund. There being no discussion, Mr. Rokita moved to adopt Order 2004-08 and was seconded by Mr. Griffin. With two members voting “aye” (Mr. Rokita and Mr. Griffin) and no member voting “nay,” the motion was adopted.

6. REPORT OF RECOUNT DIRECTOR

Ms. Willis provided information about the expenses of the recount. The recount commission’s per diems, staff travel expense, and other expenses totaled \$840.84. State Board of Accounts personnel costs were \$36,051.47. The Indiana State Police personnel and costs totaled \$18,890.41. The total expenses were \$55,782.72.

The chair asked for questions from the commission. Mr. King noted that under an order previously adopted by the commission, the recount director has the authority to approve claims submitted to the recount commission for these expenses. Mr. Rokita noted that many, himself included, might raise an eyebrow when they hear that a recount cost \$55,000. The chair asked State Board of Accounts and Indiana State Police to provide details as to how they reached their totals so that people will appreciate the work involved.

The chair recognized Mr. McGovern from State Board of Accounts. Mr. McGovern said that State Board of Accounts had previously submitted the names of the people who worked on the recount and that totaled around thirty to forty names, and the total number of hours worked was 744. The State Board of Accounts federal hourly rate is \$48.44 per hour. By multiplying the hours by the federal hourly rate, they reached the total number that they reported. Mr. Griffin clarified that the reported number of hours spent reflected the hours actually overseeing the counting and not hours spent in an office. Mr. McGovern affirmed.

Lt. Col. Medler explained that the Indiana State Police reached their total expenses by the number of employees multiplied by an hourly rate plus any overtime beyond the 8.5 hour workday. They had twelve employees involved. They also claimed the amount of miles driven, 5776, at the current rate of \$.34 per mile. They also had some minimal expenses, including locks, for about \$75.00.

The chair recognized Mr. Lawrence Reuben, attorney for the respondent. Mr. Reuben said that these numbers are for jobs that these agencies are required to perform as a matter of law. He did not question the value of the services, but he questioned whether they should be reimbursed for something that is part of their statutory responsibility. He said that it would be a different issue if

they incurred extra expenses like the example of the Indiana State Police having to buy locks. He was curious to know for himself and for the public how they would be charging back one agency against another.

The chair asked for comment from commission counsel. Mr. King said that Ind. Code 3-12-10-11 addresses this point by indicating that “The State Recount Commission shall reimburse any agency or office described in sections 8, 9, and 10.” (State Board of Accounts, State Police, and Secretary of State and Election Division staff, respectively). Mr. King further indicated that statute said the commission “shall reimburse any agency that incurs any expense to carry out responsibilities of the commission in accordance with the policies and procedures established by the State Budget Agency.” The chair noted that the language seemed to give very little discretion.

Mr. Reuben stated that he thought that expenses should be those expenses incurred for extra things and not ordinary payroll which is not an expense for this purpose. He does not think that reimbursement for ordinary payroll was what was contemplated by the language.

The chair asked for an opinion from counsel. Mr. King said that particular section has not been amended since 1986 when the Indiana State Recount Commission was established. He spoke from his personal experience in the November 2002 recount where he consulted with the State Budget Agency as to whether they had any guidelines for reimbursement of the agencies under those sections. He was told that the practice to reimburse the agencies for documented hours was in conformity with the guidelines referenced in statute.

The chair moved to adopt Order 2004-09. Mr. King noted that Order 2004-09 provisions regarding claims for reimbursement which may have not yet been submitted. Ind. Code 3-12-10-12 permits additional claims to be submitted no later than noon sixty days after the final determination, so there is the potential for additional claims to be submitted. Section 1 of the order designates the recount director to be the person to approve a claim submitted within the sixty-day period. Section 2 of the order repeals orders of the 2002 recounts that have become obsolete, regarding Brad Skolnik as the previous recount director and Mr. King as the person to approve claims arising from the 2002 recounts after Mr. Skolnik left employment in state government. Mr. King indicated that another provision in the order designates the recount director as the person who can approve the minutes from today’s meeting.

The chair asked for discussion. Mr. Griffin said that he has some concerns as he does not want to be endorsing a blank check. He asked whether there would be any one overseeing Ms. Willis’ approval. The chair asked whether there would be an opportunity for a person to object to the approval of requested expenses. Mr. King said that there would be an opportunity at some point to hold the claim if there was a dispute because the repayment of funds is a lengthy process. Ms. Willis indicated she would promptly inform the commission members of any additional claim for expenses. There being no discussion, the chair moved to approve Order 2004-09 and was seconded by Mr. Griffin. With two members voting “aye” (Mr. Rokita and Mr. Griffin) and no member voting “nay,” the motion was adopted.

7. REPORT OF INDIANA STATE POLICE

Lt. Col. Medler stated that Indiana State Police currently have in their possession Senate District 36 and Perry 23 election materials that have been carried to a holding facility and are in Indianapolis.

The chair asked for questions from the committee. Ms. Willis stated that she had received communication from Mr. Brooks over the weekend that indicated the petitioner had no objection to rescinding the impoundment orders. Mr. Griffin asked whether the communication was written or verbal. Ms. Willis affirmed that it was written. Mr. Redstone, attorney for the petitioner, said that he would confirm that to the petitioner had no objection to rescinding the impoundment orders.

The chair moved to adopt the Order 2004-10 rescinding the impoundment orders. He asked for discussion from the attorneys. Mr. King noted that the commission would be rescinding two separate impoundment orders. The first, Order 2004-1, was the one issued at the initial meeting of the commission which was the one that was for district 36, and the second was Order 2004-6 which Ms. Willis was for Perry 23 materials.

The chair recognized Mr. Reuben. Mr. Reuben expressed that his willingness to acquiesce was based on the petitioner's waiver of any appellate rights that he may have, or else the impounded materials should be kept until the time limit for any appellate rights expires. Mr. Reuben said that he was not sure whether the commission needed his acquiescence, but he would not grant it unless the petitioner waived all appellate rights. The chair clarified that Mr. Reuben was asking whether the commission needed agreement by the parties to rescind the impoundment order. The chair asked the opinion of commission counsel. Mr. King said that he was unaware of any statute that required agreement of the parties and that certainly none of the procedures that governed the commission require that, but a party may file a motion to object. Ms. Willis noted that at the end of the June 10th and 11th meeting, Mr. Bopp indicated that he had no objection to rescission of the impoundment. Mr. Reuben said that he had indicated via email to Ms. Willis after the June 10th and 11th meeting that the respondent would only acquiesce if the petitioner waived his appellate rights.

Mr. Redstone said that he would converse with Mr. Brooks about the matter, but that he would waive the petitioner's appellate rights. The chair asked that the petitioner put the waiver in writing. When asked by the chair, Mr. Reuben agreed that the respondent would not object to the rescission of the impoundment upon receipt of a written waiver of appellate rights by the petitioner.. The chair then moved to adopt Order 2004-10 and was seconded by Mr. Griffin. The chair noted that he would like to make this order contingent upon counsel for petitioner submitting a waiver of appellate rights in writing. Mr. King clarified that the impoundment order would stay in affect as far as the State Police are concerned until the recount director advises them of the filing. The chair affirmed that was the motion before the commission now. With two members voting "aye" (Mr. Rokita and Mr. Griffin) and no member voting "nay," the motion was adopted.

8. REPORT OF STATE BOARD OF ACCOUNTS

The chair recognized Mr. McGovern. Mr. McGovern reported that they had prepared revised tally sheets that essentially moved all the votes that were in the disputed column to the undisputed column based on the events of the June 10th and 11th meeting. The chair asked for questions from members of the commission, and there were none.

9. ORDER 2004-11-11 AMENDMENT TO GUIDELINES

The chair asked counsel about Order 2004-11 and the recount guidelines. Mr. King indicated that the State Recount Commission operates under guidelines that have been adopted and amended at various points throughout the years. The current amendment would take care of two technical

items that were noted as part of the recount process. Sections 1 through 3 of the order moves the definition of “cross-Petitioner” which, under the guidelines, includes a candidate who was opposed in the primary election by the petitioner whether or not the candidate chooses to cross-petition. That language exists in the middle of the guidelines now, and the amendment moves it up to the chapter where the definitions are set forth without change. Section 5 reflects a change that has been added in some other guidelines but not put forward in this one. The guidelines currently provide that if, at the end of the recount process, there are ballots that are disputed that have not been presented by either party, it is the duty of the recount director to bring those forward to the attention of the commission in order to resolve those disputes and arrive at a final count. What section 5 does is correct the timing of that to refer to the completion of the cross-petitioner’s case in chief and all the precincts included in the recount. The commission then recognizes the recount director to perform that function, which was the actual practice of the commission during the recently completed recount. The chair asked for questions from the commission and from the parties. With no discussion, Mr. Rokita moved to adopt the Order 2004-11 and was seconded by Mr. Griffin. With two members voting “aye” (Mr. Rokita and Mr. Griffin) and no member voting “nay,” the motion was adopted.

10. RESOLUTION 2004-12 AND CONCLUDING REMARKS

The chair conveyed thanks to Heather Willis, Deputy Secretary of State and Recount Director; Mr. McGovern and his staff from the State Board of Accounts; the Indiana State Police through Lt. Col. Medler and Superintendent Mel Carraway; Jill Jackson, Johnson County Court Clerk; Doris Anne Sadler, Marion Country Court Clerk; Robert Vane from Marion County; Cam Savage from the Secretary of State’s office; Bradley King and Kristi Robertson as legal counsel to the commission, and legal interns Michelle Gough and Steve Fawcett at Secretary of State’s office. Mr. Griffin thanked both attorneys for the commission.

11. ADJOURNMENT

There being no discussion, the chair moved to adjourn the session for the Indiana State Recount Commission and was seconded by Mr. Griffin. With two members voting “aye” (Mr. Rokita and Mr. Griffin) and no member voting “nay,” the motion was adopted and the meeting was adjourned at 3:35 p.m.

APPROVED,

Heather Willis,
Recount Director