

State of Wisconsin\Government Accountability Board

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JUDGE MICHAEL BRENNAN
Chair

KEVIN J. KENNEDY
Director and General Counsel

Wisconsin Government Accountability Board

Risser Justice Center, Room 150, 120 Martin Luther King Jr. Blvd.
Madison, Wisconsin
November 9, 2009
9:30 a.m.

Open Session Minutes

<u>Summary of Significant Actions Taken</u>	<u>Page</u>
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B. Approved changes to ensure absentee ballot security in Chapter GAB 5.	5
C. Received a report from staff on improvements to the Campaign Finance Information System	6

Present: Judge Michael Brennan, Judge William Eich, Judge Gerald Nichol, Judge Thomas Cane and Judge Thomas Barland. Judge Gordon Myse joined the meeting at 11:50 a.m.

Staff present: Kevin Kennedy, Jonathan Becker, Nathaniel E. Robinson, Shane Falk, Michael Haas, David Buerger, Ross Hein, Sharrie Hauge, Tommy Winkler, and Reid Magney

A. Call to Order

Chairperson Brennan called the meeting to order at 9:36 a.m.

B. Director's Report of Appropriate Meeting Notice

G.A.B. Director Kevin Kennedy informed the Board that proper notice was given for the meeting.

C. Approval of Minutes of Previous Meetings

MOTION: Approve the minutes of the October 5, 2009 meeting of the Government Accountability Board. Moved by Judge Nichol, seconded by Judge Eich. Judge Barland suggested adding one item to the Summary of Significant Actions Taken: "Received a report from staff on improvements to the Campaign Finance Information System." Motion as amended carried unanimously.

D. Public Comment

1. **Mary Ann Hanson** of Brookfield appeared on her own behalf to comment on the HAVA Check process. She thanked Board staff for an extensive response to her questions, as well as the opportunity to meet with the Chair of the U.S. Election Assistance Commission during her recent visit. She expressed concern about the number of people who did not respond to postcards and letters mailed by the Board and said there should be consequences for voters who do not respond to HAVA Check letters.
2. **Ginny Graham** of Waukesha appeared on her own behalf to comment on GAB Chapter 5, Ballot and Electronic Voting System Security, as well as the selection of poll workers. She supported the Board's proposed changes to Chapter 5 and asked how the Board plans to measure results. She also said many clerks do not appear to be selecting poll workers from lists supplied by the political parties, as required by Statutes.
3. **Annette Kuglitsch** of Waukesha appeared on her own behalf to support proposed changes to GAB Chapter 5, Ballot and Electronic Voting System Security. She called the changes very clear, logical and well thought-out. She urged the Board to provide clerks with a template for developing plans to comply with the new rules.
4. **Barbara Smith** of Madison appeared on her own behalf to comment on possible changes to the Statewide Voter Registration System, and express concern that any work should be done by state employees and not by private contractors.
5. **Paul Malischke** of Madison appeared representing Fair Elections Wisconsin to oppose approval of the ES&S voting system because of problems with overvotes. He said that based on a report prepared by the Florida Secretary of State, the DS200 scanner produces significantly more overvotes than do Eagle vote scanners.
6. **Jody Hanna** of Madison appeared representing Disability Rights Wisconsin to express concerns about the accessibility of the DS200 scanner because it does not provide for people with visual impairments and the height is too tall for people who use wheelchairs.
7. **Maribeth Witzel-Behl** of Madison appeared on behalf of the City of Madison Clerk's Office and the Wisconsin Municipal Clerks Association to comment on GAB Chapter 5, Ballot and Electronic Voting System Security. She thanked the Board for acknowledging that not all clerks have the same resources to comply with regulations, and expressed hope that the Board would address what happens in emergency situations if a clerk is not able to comply.
8. **Diane Hermann-Brown** of Sun Prairie appeared on behalf of the City of Sun Prairie and the Wisconsin Municipal Clerks Association. She said a number of clerks were in attendance to learn about the certification of Election Systems & Software's

election equipment. She also thanked Board staff for considering clerks' comments on the Early Voting study, and said changes will have an impact on clerks. She suggested the Board staff work with clerks on developing templates to comply with GAB Chapter 5, Ballot and Electronic Voting System Security.

9. **Steve Pearson**, vice president of certification for Election Systems & Software, appeared on behalf of his company to answer comments about the Unity system. He said the company believes the system is compliant with Wisconsin statutes and accessibility requirements, and said they would not be here if it had not already been certified by the U.S. Election Assistance Commission. He said the system can be coded so it rejects overvotes instead of giving the voter the choice of accepting the overvote.
10. **Mark Manganaro**, state certification manager for Election Systems & Software, appeared on behalf of his company to answer comments about the Unity system. He said that if there is an overvote, the system will give an explanation of the first race on the ballot in which there is an overvote.

An extended discussion ensued between Mr. Pearson, Mr. Manganaro, Board members and Board staff about ES&S election equipment.

Chairman Brennan called a recess at 11:07 a.m. The Board reconvened at 11:20 a.m.

E. Approval of Electronic Voting Equipment

1. **Demonstration of Elections Systems and Software Voting System Components – Election Management System, AutoMark Accessible Ballot Marker, DS-200 Polling Pace Tabulator, M650 Central Count Tabulator**

Elections Specialists Ross Hein and David Buerger conducted a demonstration of the ES&S equipment being considered for certification by the Board.

Discussion.

Chairman Brennan called a recess at 12:13 p.m. The Board reconvened at 12:52 p.m.

2. **Approval of Elections Systems and Software Voting System Components**

Elections Specialist Ross Hein presented the staff recommendation to approve the ES&S Unity 3.2.0.0 System, which includes the Unity Election Management System software, the intellect DS200 precinct optical scan ballot counter, the M650 central county optical scan ballot counter, and four versions of the AutoMark Voter Assist Terminal ballot marking device, per the certificate from the U.S. Election Assistance Commission, with the condition that ES&S not set deadlines for clerks that are contrary to state statutes.

Discussion.

MOTION: To adopt staff recommendation to approve the ES&S Unity 3.2.0.0 System. Moved by Judge Cane.

Discussion.

MOTION: withdrawn by Judge Cane.

Discussion.

MOTION: To defer this matter to the next meeting with instructions to staff to make recommendations with regard to certification, modifications to the present program, if it is felt desirable, as well as the appropriate role of the Board at some time in the future for making recommendations or comments on certified equipment. Moved by Judge Myse, seconded by Judge Eich.

Roll call vote: Brennan:	Nay	Cane:	Nay
Eich:	Aye	Barland:	Aye
Myse:	Aye	Nichol:	Nay

Motion failed, 3-3.

Chairman Brennan called a recess at 2:08 p.m. The Board reconvened at 2:20 p.m.

MOTION: To defer certification to a future meeting, and ask staff to recommend to the Board suggestions both about certification and methodology for addressing concerns regarding the precinct count optical scan and the manner in which the system processes ballots that contain overvotes or cross-party votes. Also, to request staff further analyze the proper role of the Board in making a commentary about the strengths and weaknesses of each of the certified voting systems. Moved by Judge Myse, seconded by Judge Nichol.

Discussion.

Roll call vote: Brennan:	Aye	Cane:	Nay
Eich:	Aye	Barland:	Aye
Myse:	Aye	Nichol:	Nay

Motion carried, 4-2

F. Administrative Rules

1. Status Report on Administrative Rule Defining Scope of Regulated Activity, GAB 1.28 (Issue Ad Regulation)

Staff Counsel Shane Falk updated the Board on the status of the Citizens United case heard by the United States Supreme Court, which involves the scope of regulation of political communications permitted by the Constitution. He briefly commented on Senator Russ Feingold's speech on the U.S. Senate Floor that was directed to the U.S. Supreme Court regarding the Citizens United case. He said release of the Court's opinion is more likely in December.

2. GAB Chapter 5 Ballot and Electronic Voting System Security

Staff Counsel Michael Haas and Election Specialist Ross Hein presented the staff recommendations for changes to GAB Chapter 5 with regard to improving the security of absentee ballots. The staff has not recommended changes regarding maintenance of voted ballots until their destruction or security of electronic voting systems.

Discussion.

MOTION: To approve changes to GAB Chapter 5, Ballot and Electronic Voting System Security. Moved by Judge Nichol, seconded by Judge Eich. Passed on a voice vote, with Judge Myse voting Nay.

3. Status Report on Pending Administrative Rules

Staff Counsel Shane Falk reported that because emphasis has been placed on closing up investigations, there has not been a substantial change in progress on administrative rules.

G. Legislation

1. Summary of Recent Legislative Activity

Director and General Counsel Kevin Kennedy informed the Board that the Legislature had approved a bill to provide public financing for Wisconsin Supreme Court elections. He said Board staff is going through the legislation line by line to analyze its impact. The next election for Supreme Court is scheduled for 2011. He also discussed the federal Military and Overseas Voter Empowerment Act, which was recently signed into law. He said Wisconsin is one of 11 states with September primaries, and would need a federal waiver from some of the Act's requirements.

2. Legislative Status Report

Written summary was included in Board packet. No action was taken.

H. Report on Campaign Finance Information System

Ethics & Accountability Division Administrator Jonathan Becker provided the Board with an update on improvements to the Campaign Finance Information System (CFIS). He said the cost estimate from the vendor to make changes to the system has dropped from more than \$100,000 to \$24,000, though that number is growing. Staff has decided to cut back on many of the changes to the user interface and focus on the speed of the system. Staff has found that many of the problems experienced during the last two filing cycles may not be caused by the software or its design, but potentially by the hosting system provided by the Department of Administration's Division of Enterprise Technology (DET). Staff continues to find problems with the hosting environment. The system has been improved so that an upload that once took 12 minutes now takes a minute and a half. Staff is working with DET staff to look at the design of the system.

Discussion.

Judge Barland suggested keeping Legislators and their staffs updated on progress.

I. Director's Report

Elections Division Report – election administration

Written report from Nathaniel E. Robinson was included in Board packet. Mr. Robinson gave an oral presentation, and complimented the staff, especially Ross Hein, for his work on the voting equipment certification.

Ethics and Accountability Division Report – campaign finance, state official financial disclosure, lobbying registration and reporting

Written report from Jonathan Becker was included in Board packet.

Office of General Counsel Report – general administration

Written report from Kevin J. Kennedy, Sharrie Hauge and Reid Magney was included in Board packet. Ms. Hauge said the staff is preparing for an upcoming federal compliance audit regarding HAVA funds, and that James Malone has been hired to run the Contract Sunshine program. Also, 10 limited term employees have been hired to assist with the remaining Retroactive HAVA Check letters.

Mr. Kennedy discussed the schedule of upcoming meetings and asked Board members if they would consider moving the December meeting from the 14th to the 17th, and holding it in the State Capitol. He also asked about holding a second day of meetings in March, on the 23rd and 24th. There was agreement on both changes.

Judge Nichol expressed a concern about a rule recently adopted by the Wisconsin Supreme Court regarding whether Justices should recuse themselves from cases in which one of the parties is a campaign contributor. He asked Board members whether they should take a formal position on the matter, even though it is outside of the Board's purview. Judge Barland said he is sympathetic to Judge Nichol's position, but did not

believe the Board should take a position. Judge Cane said it is not the Board's role, and Judge Eich agreed.

J. Closed Session

Adjourn to closed session to consider written requests for advisory opinions and the investigation of possible violations of Wisconsin's lobbying law, campaign finance law, and Code of Ethics for Public Officials and Employees; and confer with counsel concerning pending litigation.

MOTION: Move to closed session pursuant to §§5.05(6a), 19.85(1)(h), 19.851, 19.85(1)(g), and 19.85(1)(c), to consider written requests for advisory opinions and the investigation of possible violations of Wisconsin's lobbying law, campaign finance law, and Code of Ethics for Public Officials and Employees; and confer with counsel concerning pending litigation and consider performance evaluation data of a public employee of the Board. Moved by Judge Eich, seconded by Judge Cane.

Roll call vote: Brennan:	Aye	Cane:	Aye
	Eich:	Barland:	Aye
	Myse:	Nichol:	Aye

Motion carried.

Hearing no objection, the Chairman called a recess at 3:40 p.m. The Board reconvened in closed session beginning at 3:58 p.m.

Summary of Significant Actions Taken in Closed Session:

- A. Investigations and enforcement: 21 pending matters considered with three dismissed and four investigations authorized; 13 new matters considered with investigations authorized, and 1 new matter considered.

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The next meeting of the Government Accountability Board is scheduled for 8:30 a.m., Thursday, December 17, 2009 in the State Capitol, Rooms 400NE and 413N, Madison, Wisconsin.

November 9, 2009 Government Accountability Board meeting minutes prepared by:

Reid Magney, Public Information Officer

November 12, 2009

November 9, 2009 Government Accountability Board meeting minutes certified by:

Judge Gerald Nichol, Board Secretary

December 17, 2009