

Tuesday, August 2, 2011 – 9:30 A.M.

Open Session

G.A.B. Board Room  
 212 East Washington Avenue, Third Floor  
 Madison, Wisconsin

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<b>A. Call to Order</b>	
<b>B. Director’s Report of Appropriate Meeting Notice</b>	
<b>C. Approval of Minutes of Previous Meeting</b>	
<b>1. June 27, 2011 Teleconference Meeting</b>	<b>3</b>
<b>D. Public Comment (Limit of 5 minutes per individual appearance)</b>	
<i>Break</i>	
<b>E. Background Material on Electronic Voting Equipment and Ballot Security Issues</b>	<b>8</b>
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<b>I. Administrative Rules Status Report</b>	
<b>1. Status Report on Pending Administrative Rules</b>	<b>61</b>
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**J. Director's Report**

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**K. Closed Session**

- |                                |   |
|--------------------------------|---|
| 5.05 (6a) and<br>19.85 (1) (h) | The Board's deliberations on requests for advice under the ethics code, lobbying law, and campaign finance law shall be in closed session.                  |
| 19.85 (1) (g)                  | The Board may confer with legal counsel concerning litigation strategy.   |
| 19.851                         | The Board's deliberations concerning investigations of any violation of the ethics code, lobbying law, and campaign finance law shall be in closed session. |
| 19.85 (1) (c)                  | The Board may consider performance evaluation data of a public employee over which it exercises responsibility.   |

The Government Accountability Board has scheduled its next meeting for Monday, September 12, 2011 at the Government Accountability Board offices, 212 East Washington Avenue, Third Floor in Madison, Wisconsin, beginning at 9:30 am.

# State of Wisconsin\Government Accountability Board

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JUDGE THOMAS H. BARLAND  
Chair

KEVIN J. KENNEDY  
Director and General Counsel

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## Wisconsin Government Accountability Board

212 East Washington Avenue  
Madison, Wisconsin  
June 27, 2011  
1 p.m.

### Open Session Minutes

<u>Summary of Significant Actions Taken</u>	<u>Page</u>
A. Approved Minutes of Previous Meetings	1
B. Approved Ballot Access for Robert Lussow	2
C. Approved Ballot Access for Kim Simac	2
D. Approved Ballot Access for David VanderLeest	3
E. Denied Ballot Access for John Nygren	4

Present: Judge Gerald Nichol (in person), Judge Thomas H. Barland, Judge Michael Brennan, Judge Thomas Cane, Judge David Deininger, and Judge Timothy Vocke (by teleconference)

Staff present: Kevin Kennedy, Nathaniel E. Robinson, Jonathan Becker, Michael Haas, Shane Falk, Ross Hein, and Reid Magney

#### **A. Call to Order**

Vice Chairperson Nichol called the teleconference meeting to order at 1 p.m. He welcomed Judge Timothy Vocke to the Board.

#### **B. Director's Report of Appropriate Meeting Notice**

Director and General Counsel Kevin Kennedy informed the Board that proper notice was given for the meeting.

#### **C. Approval of Minutes of Previous Meetings**

- 1. May 17, 2011 Meeting – Open Session**
- 2. May 23, 2011 Meeting – Open Session**

3. **May 31, 2011 Meeting – Open Session**
4. **June 8, 2011 Meeting – Open Session**

**MOTION:** Approve the Open Session minutes of the meetings of May 17, 2011, May 23, 2011, May 31, 2011, and June 8, 2011. Moved by Judge Barland, seconded by Judge Cane. Motion carried 5-0. Judge Vocke abstained because he was not a member of the Board at the time of the meetings.

## **D. Ballot Access Issues**

Director Kennedy told the Board that ballot access issues would be taken in the following order: Robert Lussow, Kim Simac, David VanderLeest and John Nygren. At the request of Director Kennedy, the Board gave its unanimous consent to allow an appearance by Attorney Jennifer Lohr, who is admitted to the bar in New York State, has passed the bar in Wisconsin, and will be sworn in the following week. Attorney Jeremy Levinson is unable to attend the meeting.

### **1. Robert Lussow**

Director Kennedy prepared a written report for the Board, and made an oral presentation.

**MOTION:** Find that nomination papers submitted by Robert Lussow contain 585 valid signatures as reflected by the staff analysis set out in its memorandum and challenge worksheet, which are adopted by the Board and incorporated by reference in this motion. Moved by Judge Deininger, seconded by Judge Cane. Motion carried unanimously.

**MOTION:** Find that the Declaration of Candidacy submitted by Robert Lussow substantially complies with the statutory requirement to list his municipality of residence for voting purposes when he listed a street address with a number, post office and ZIP code that is located in the Town of Bradley, Lincoln County, and State Senate District 12. Moved by Judge Cane, seconded by Judge Barland. Motion carried unanimously.

**MOTION:** Direct staff to certify Robert Lussow for placement on the ballot for the July 19, 2011 recall primary election in State Senate District 12. Moved by Judge Brennan, seconded by Judge Cane. Motion carried unanimously.

### **2. Kim Simac**

Attorney Michael Screnock appeared on behalf of Kim Simac. He told the Board that not enough of Ms. Simac's petition signatures were challenged to remove her from the ballot. He said Ms. Simac had filed an amended Declaration of Candidacy.

Discussion.

**MOTION:** Find the nomination papers submitted by Kim Simac contain at least 601 and as many as 702 valid signatures as reflected by the staff analysis set out in its memorandum and challenge worksheet, which are adopted by the Board and incorporated by reference in this motion. Moved by Judge Cane, seconded by Judge Deininger. Motion carried unanimously.

**MOTION:** Find the Declaration of Candidacy submitted by Kim Simac substantially complies with the statutory requirement to list her municipality of residence for voting purposes when she listed a street address with a number, post office and zip code that is located in the Town of Lincoln, Vilas County and the 12th State Senate District. Moved by Judge Cane, seconded by Judge Deininger. Motion carried unanimously.

**MOTION:** Direct the staff to certify Kim Simac for placement on the ballot for the July 19, 2011 recall primary election for State Senate District 12. Moved by Judge Brennan, seconded by Judge Cane. Motion carried unanimously.

### 3. David VanderLeest

Director Kennedy informed the Board that there was no appearance by the challenger. Mr. VanderLeest appeared on his own behalf, and called the challenge to his candidacy an abuse of process. Judge Cane inquired about Mr. VanderLeest's address. He indicated he moved into a four-plex apartment building he owns within the 30<sup>th</sup> State Senate District on May 21, and moved from one apartment to another, which has a different street number.

Discussion.

Staff Counsel Michael Haas reviewed the staff memo concerning Mr. VanderLeest's nomination papers. Staff initially started out validating 462 signatures and struck 37 signatures, leaving 425. After reviewing Mr. VanderLeest's response, staff reinstated four signatures, for a total of 429.

Discussion.

**MOTION:** Deny the general challenge of Linda Patzke to the entirety of David VanderLeest's nomination papers based upon the address contained in his Declaration of Candidacy form, and the challenge to all nomination papers he circulated based upon the address he listed in the circulator's certificate. Moved by Judge Cane, seconded by Judge Barland. Motion carried unanimously.

**MOTION:** Find nomination papers submitted by David VanderLeest contain 429 valid signatures as reflected by the staff analysis set out in this memorandum and accompanying challenge worksheet, which are adopted by the Board and incorporated by reference in this motion. Moved by Judge Cane, seconded by Judge Deininger. Motion carried unanimously.

**MOTION:** Direct staff to certify David VanderLeest for placement of the ballot for the July 19, 2011 recall primary election in State Senate District 30. Moved by Judge Cane, seconded by Judge Brennan. Motion carried unanimously.

#### 4. John Nygren

Jacob Hadju appeared in person on behalf of the Democratic Party of Wisconsin. He said Representative Nygren failed to submit 400 valid signatures. The Party is challenging 39 of the 424 signatures submitted.

Discussion.

Attorney Jennifer Lohr appeared on behalf of challenger Sara Scott, who has challenged 54 signatures. She said Ms. Scott agrees with the staff analysis.

Attorney Screnock appeared on behalf of Representative Nygren. He said that after staff initially determined there were 424 signatures, there was no need to supply any correcting affidavits.

Discussion.

Attorney Screnock asked the Board to consider reinstating several signatures. During the meeting, Board staff attempted to find the possible matches between the signatures with electors in the Statewide Voter Registration System and other online databases, but was unsuccessful.

Director Kennedy said the staff's recommendation is to certify 398 signatures.

**MOTION:** Affirm 26 signature challenges, verify that Candidate Nygren's nomination papers contain 398 valid signatures as reflected by the staff analysis set out in this Memorandum and accompanying challenge worksheet which are adopted by the Board and incorporated by reference in this motion. Moved by Judge Cane, seconded by Judge Deininger.

Roll call vote:	Brennan:	Aye	Cane:	Aye
	Deininger:	Aye	Nichol:	Aye
	Vocke:	Aye	Barland:	Aye

Motion carried unanimously.

**MOTION:** Deny Candidate Nygren ballot access in the July 19 recall primary in State Senate District 30. Moved by Judge Brennan, seconded by Judge Cane.

Roll call vote:	Brennan:	Aye	Cane:	Aye
	Deininger:	Aye	Nichol:	Aye
	Vocke:	Aye	Barland:	Aye

## **E. Director’s Report**

Director Kennedy reported there was no need for a closed session. He thanked Ross Hein, Diane Lowe, Reid Magney and Steve Pickett for their work on the nomination paper challenges Friday, as well as Michael Haas and Shane Falk who gave up their weekends to work on the challenges analyses.

Judge Nichol expressed the Board’s appreciation for the staff’s work and dedication.

Director Kennedy briefed the Board on a report due to the Legislature’s Joint Committee on Finance regarding implementation of the voter photo ID law, which is due July 1, as well as staff’s plans to meet with county and municipal clerks at upcoming conferences. He also updated the Board on the status of the budget, noting that overall the Governor’s vetoes and the budget were helpful for the Board, given the fiscal challenges. It raises the threshold for economic interest disclosure and eliminates any public funding for campaigns. The Governor vetoed limitations on access to Statements of Economic Interests, and the budget enhanced the Contract Sunshine program.

## **F. Adjourn**

**MOTION:** To adjourn. Moved by Judge Brennan, seconded by Judge Barland.  
Motion carried unanimously.

#####

The next regular meeting of the Government Accountability Board is scheduled for Tuesday, August 2, 2011, at the G.A.B. offices located at 212 East Washington Avenue, Third Floor, in Madison, Wisconsin beginning at 9:30 a.m.

June 27, 2011 Government Accountability Board meeting minutes prepared by:

\_\_\_\_\_  
Reid Magney, Public Information Officer

July 21, 2011

June 27, 2011 Government Accountability Board meeting minutes certified by:

\_\_\_\_\_  
Judge Gerald Nichol, Acting Board Secretary

August 2, 2011

# State of Wisconsin \ Government Accountability Board

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JUDGE THOMAS H. BARLAND  
Chairperson

KEVIN J. KENNEDY  
Director and General Counsel

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## MEMORANDUM

**DATE:** For the August 2, 2011 Meeting

**TO:** Members, Wisconsin Government Accountability Board

**FROM:** Kevin J. Kennedy  
Director and General Counsel  
Wisconsin Government Accountability Board

Prepared and Presented by:  
Michael Haas, Staff Counsel

**SUBJECT:** Requests of Wisconsin Citizens for Election Protection

### Introduction

Since the Board's last regular meeting on May 17, 2011, Board staff has had a number of contacts with members of an organization called Wisconsin Citizens for Election Protection (WCEP), and specifically with Attorney James Mueller who represents the organization. WCEP members have expressed concern regarding observations they made during the recount of the Supreme Court Justice election. They also have described what they perceive to be serious ballot security issues as well as the unreliability of electronic voting equipment to accurately tabulate ballots due to the possibility of the machines malfunctioning or being tampered with by either election officials or third parties breaching the security of the equipment. The organization advocates hand counting ballots as the only reliable method of determining accurate results and ensuring ballot security.

On May 24, 2011, approximately 10-15 individuals demonstrated outside the Board's office and then in the office lobby, seeking answers to their concerns and a commitment that the Board would support greater use of hand counting of ballots by municipalities. Attorney Mueller has delivered several letters addressed to Board staff as well as to Board members, and made specific requests of municipal clerks involved in the recall elections to essentially permit observers to conduct a hand count on Election Night. Attorney Mueller met with Board staff on July 5, 2011, to discuss the questions he had raised and the guidance Board staff would be providing to clerks regarding his requests. He plans to make a presentation to the Board during the Public Comments period of the meeting.

In addition, Board staff has also received communications from other organizations which support hand counting of ballots, and which believe that electronic voting equipment is susceptible to undetected tampering. For example, an organization called Election Defense

Alliance attempted to conduct exit polls during the July recall elections as a method of checking the accuracy of the machine-tabulated results. Another organization, Center for Hand-Counted Paper Ballots, along with a UW-Madison professor, published an opinion column advocating hand counting of ballots in an online campus newsletter. These communications often cite a documentary film entitled "Hacking Democracy," which purports to demonstrate that unauthorized parties can tamper with voting equipment and data, assuming that they have access to the equipment's memory device. These stated concerns have been part of a broader national debate regarding the security of voting equipment, particularly since 2004, which have not been given great credibility by election administrators or the mainstream media. Board staff, however, can provide the Board with additional correspondence and a more thorough analysis of these issues if the Board so desires at a future meeting.

Attorney Mueller intends to make a presentation to the Board during the Public Comments portion of the agenda regarding the concerns of WCEP. Attached to this memorandum is additional background and documentation to assist the Board in considering Attorney Mueller's presentation and requests. Including Item E on the open session agenda will permit the Board, if it wishes, to discuss these issues and take any actions it deems appropriate during the meeting.

### Correspondence

Attached to this memorandum are the following documents:

1. Correspondence from Attorney Mueller to Board members dated May 31, 2011, which makes specific requests for Board action.
2. Email correspondence from Attorney Mueller to Board members dated June 1, 2011 regarding observations made during the Supreme Court recount related to optical scanning equipment.
3. Email correspondence from Attorney Mueller to Director and General Counsel Kevin J. Kennedy dated June 20, 2011, summarizing issues and questions he had previously raised with Board staff.
4. Correspondence from Attorney Mueller to Kevin J. Kennedy stating that the Board is failing to adequately protect the integrity of Wisconsin elections, and describing actions that WCEP intends to take.
5. Correspondence from Attorney Mueller to municipal clerks involved in recall elections, dated July 1, 2011. The letter and accompanying news release asks clerks to seek waivers from the Board of the statutory requirement to use electronic tabulating equipment, and, alternatively, that clerks permit WCEP observers to visually inspect each ballot on Election Night as a means of verifying the unofficial machine-counted results.
6. Memorandum from Elections Division Administrator Nathaniel E. Robinson to municipal clerks dated July 7, 2011, providing guidance regarding the requests made by Attorney Mueller on behalf of WCEP.
7. Correspondence from Staff Counsel to Attorney Mueller dated July 21, 2011, which memorializes the issues discussed at the meeting of July 5, 2011.

### Summary

While Board staff is considering all feedback related to observations from the Supreme Court recount, and intends to take a systematic approach to incorporating such input in future training and guidance, Board staff has not been presented with persuasive evidence that electronic voting equipment in Wisconsin has been or is at risk of being tampered with, either by election officials or by other parties. Board staff believes it is important for the Board to be informed regarding the debate and discussions which have been developing on this topic. No action is required of the Board at this time.

**James J. Mueller, Attorney at Law**

4064 Timber Lane

Cross Plains, WI 53528

608.831.1610 Office 888.495.1178 Fax 608.333.4589 Cell

[jimmueller@charter.net](mailto:jimmueller@charter.net)



May 31, 2011

Hand Delivered

Board Members

Wisconsin Governmental Accountability Board  
212 East Washington Avenue, 3rd Floor  
Post Office Box 7984 Madison, WI 53707-7984

Re: The Following Requests:

- 1) Have the Board schedule Additional Meetings prior to July 12'
- 2) Permit me to make a presentation to the Board,
- 3) Guidance to Election Officials regarding the Administration of the Recall Elections
- 4) Amend the Website Vote Authenticity page to acknowledge the potential for incorrect totals from optical scan devices.

Dear Board Members,

Wisconsin, with its Progressive traditions, is the acknowledged "Ground Zero" for a corporate financed agenda that attacks many of those traditions. The Recall elections, first scheduled for July 12, could be the turning point for whether or not those Progressive traditions will survive here and nationally.

Since the Recall Elections will be so important, huge amounts of money will be spent and all of the stops will be pulled out. It is therefore crucial that the Government Accountability Board hold Special Meeting to hear from those of us who have participated in the recent recount and who have concerns about the way our elections are administered.

On the reverse side of this letter I have listed some suggestions as to guidance that could be provided to elections officials. An additional 2 pages show that you have failed to account for the possibility of malfunction or misfeasance producing incorrect totals from the optical scanning devices. I look forward to your positive response to these requests.

Sincerely,

James J. Mueller  
Attorney at Law  
Wisconsin State Bar Member No. 1017455

## Suggestions for Guidance from the GAB to Election Officials for the Recall Elections

- 1) Allow post election tests of the machine totals (hand count and compare results) before the ballots are sealed into the bags,
- 2) Inform all Clerks how to properly seal the ballot bags,
- 3) Establish the procedure that the first thing to do after the polls are closed is to secure all unused ballots, count them and run a 1/4 inch or larger drill bit through them several times in the area for initials.

DRILL GABby, DRILL.

- 4) Have all of the drilled unused ballots secured in a sealed bag and kept under the control of the County or Municipal Clerk who does not keep the voted Ballots,
- 5) Have copies of all ballot invoices sent to the GAB. Have the invoices include the number of ballots supplied or weight and weight per ballot,
- 6) Require that all telephone cords for the voting machine modems are disconnected until after the totals have been run,
- 7) Inform Clerks that the pre-voting public test that is done only verifies that the machine was properly working at that time for those few votes and that on Election Day undetectable malicious codes can kick in and flip votes.
- 8) Allow individuals making Public Records requests to inspect the ballots by viewing (not touching) each one before the ballots are sealed into the ballot bags. The display of the ballots should be sufficient so that the inspector can video the ballot and/or count the votes.

**James J. Mueller, Attorney at Law**

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**Note: In the Wisconsin GAB document below, the GAB doesn't even hint at the possibility of malfunction or misfeasance occurring in the use of optical scanning devices. Not allowing for malfunction or misfeasance in an optical scanning device appears to be evidence of malfunction or misfeasance in the GAB.**

*The Portions in Arial italics are recommendation by James J. Mueller on how to amend the following document in order to make it conform to current GAB practice.*

<http://gab.wi.gov/elections-voting/recount/ballot-authenticity>

## **Authenticity of Ballots and Responsibility for Conducting Recounts**

Questions about the authenticity of ballots have arisen during the recount process due to holes in some ballot bags, gaps in their closure or issues with security tags. A hole in a ballot bag or a missing security tag is not enough evidence alone to discard the ballots inside. The ability to put a hand into a ballot bag is not by itself evidence of fraud.

Wisconsin's system of counting ballots on Election Night, canvassing votes in the following days, and recounting those votes is designed to ensure an accurate, honest and transparent tabulation and reporting of the people's will at the ballot box, as well as to detect actual fraud.

### **Election Day Procedures**

When most Wisconsin citizens vote on Election Day, they place their marked ballots into an optical scanning device, which records the votes and drops the marked ballots into a locked container.

Before ballots are cast, the optical scan voting device is secured with a tamper evident numbered seal. The seal number is recorded on the Inspectors' Statement by the poll workers. Voting occurs in a public location that anyone other than a candidate may observe while the polls are open. Any member of the public, including a candidate, may be present at the polling place after the polls close.

After the polls close, election workers print out a tape which lists the tabulated vote totals. *The totals from the device are presumed to be correct despite the fact that malfunction and malfeasance can occur. Poll workers are not allowed to hand count the ballots previously tabulated in an optical scanning device because that would be considered a recount and recounts can only be requested under certain conditions by a candidate.* The poll workers remove the voted ballots and place them into a secured container or bag. The bag is secured using a tamper evident numbered seal. Ballot containers have all potential openings secured in such a manner that no ballot may be removed, nor any ballot added, without visible interference or damage to that ballot container. The seal number is recorded on the Inspectors' Statement and Ballot Container Certificate by the poll workers. Election officials are required to maintain a chain of custody record that documents the movement and location of election ballots from the time of delivery of the ballots to the municipal clerk or board of election commissioners until the destruction of the ballots is authorized under § 7.23 Wis. Stats.

Even if the container or bag is somehow opened later, or if the chain of custody is broken, election officials have the original print-out tape from the machine, as well as the electronic memory device from the machine. This enables election officials to determine the election night vote count *unless a malfunction or misfeasance occurred in the optical scanning device on election day. In that case, it is impossible to determine what the actual vote was and the incorrect total will continue to be used.*

## **Recount Procedures**

The recount is conducted by the County Boards of Canvassers using procedures specified by state law and the Government Accountability Board. During a recount, the people in charge of recounting the ballots are not the people who handled and counted the ballots on Election Night. If the ballots had been tampered with between the election and the recount, there would be a break in the chain of custody and an unexplained difference in the results *unless the break in the chain of custody occurred in order to make the votes on the ballots equal the tabulated totals produced by malfunctioning or maliciously coded optical scanning device.* Typically in a recount, there are minor differences due to ballot marking errors by voters or issues encountered with the optical scanners. In this election, 90 percent of the ballots were cast on paper and counted by optical scanners, 5 percent were cast on paper and counted by hand, and 5 percent were cast and tabulated on touch-screen equipment. In this recount, of the 90 percent that were originally counted by voting equipment on Election Night, more than half are being recounted by hand, which results in some ballots being counted that the voting equipment may not have attributed a vote due to ballot irregularity, such as the voter circling the candidate name instead of filling in the oval or arrow.

G.A.B. staff has created an internal review process to check each ward's recount totals against the original canvass totals to look for variances of plus or minus 10 votes. Any ward in which 10 more or 10 fewer votes are reported is flagged by staff for follow-up with the county clerk for an explanation of the reason. So far, we have found no significant, unexplained variances of vote totals. Staff will continue to review Waukesha County's results as they come in each day until the recount is complete.

## **Certification of the Election**

Under state law, the G.A.B. is required to rely on the certifications of the county Boards of Canvassers in making its certification of the final results. If either of the campaigns has unresolved issues with how individual county Boards of Canvassers handled the recounting of certain ballots, their exclusive remedy under state law is through an appeal to the circuit court.

In its certification of election results, the Board Chairperson certifies that the attached tabular statement, as compiled from the certified returns made to the Government Accountability Board by the several counties of the State, contains a correct abstract of the total number of votes given for the election. It also determines and certifies the names of candidates who have received the greatest number of votes, and are duly elected. A certificate of election may not be issued by the Board's Director until the deadline for any appeal has passed.

**Haas, Michael R - GAB**

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**From:** Jim Mueller [JimMueller@charter.net]  
**Sent:** Wednesday, June 01, 2011 6:41 PM  
**To:** GAB HelpDesk  
**Cc:** Kennedy, Kevin - GAB; Falk, Shane - GAB; Haas, Michael R - GAB; Robinson, Nathaniel E - GAB  
**Subject:** Undervoted Absentee Ballots

Dear GAB Baord Members,

My experience during the recount was that a lot of the changes in the total vote counts for the 2 candidates had to do with voted absentee ballots that the optical scanning machines oginally read as being undervotes. Most of the ones that I saw involved ballots that were clearly marked for a candidate but were done so with a single pencil line. It is interesting but it appeared that subsequent votes lower on the ballot were more pronounced (maybe the old pencil had to be warmed up). Since the recount did not involve those other races it is impossible to determine how many votes were being ignored on any one ballot.

Since the optical scanning machines did not produce the corrcet totals this means that the optical scanning devices are not perfect. In order to embrace the advantages of technology you have made the decision to accept a certain degree of error in order to save time and money. You could significantly increase the accuracy of the optical scanning device results by directing the poll workers to view all absentee ballots for such light marking and remake the lightly marked ballots as they do for the spoiled ballots that are rejected by the machine.

Is it possible to get a separate scanning device that could be used to show when a mark is too light to be detected by the optical scanning device?

Jim Mueller



**Haas, Michael R - GAB**

**From:** Jim Mueller [JimMueller@charter.net]  
**Sent:** Monday, June 20, 2011 8:47 PM  
**To:** Kennedy, Kevin - GAB  
**Cc:** Falk, Shane - GAB; Haas, Michael R - GAB; Robinson, Nathaniel E - GAB  
**Subject:** Questions about Ballot Security

Kevin,

During the Supreme Court Recount, I and several of the people who have formed WI Citizens for Election Protection became concerned about ballot security.

It is evident by the existence of large numbers and large percentages of improperly sealed bags that there is improper training regarding and/or inadequate enforcement of laws and rules dealing with ballot security.

The lack of proper security and the poor condition of many of the bags has led many people to the conclusion that election fraud could occur or worse did occur and can not be easily detected with the procedures that are in place.

WI Citizens for Election Protection want these issues addressed before the Recall elections occur. We need answers to the following questions in order to proceed with Formal Complaints against the people who have not done their duty and as a result have caused widespread lack of confidence in the integrity of our procedures for vote counting, canvassing and recounting.

**On June 1, 2011, I emailed the following message:**

*Nathaniel, Mike and Shane,*

*During the recount we learned that the damage to some of the ballot bags was being blamed on County Municipal workers who were picking up the ballot bags and other election materials from the individual Cities, Villages and Towns.*

*Wisconsin Statute 7.51 (5)(b) state that, "...The municipal clerk shall deliver the ballots, statements, tally sheets, lists, and envelopes for his or her municipality relating to any county, technical college district, state, or national election to the county clerk no later than 4 p.m. on the day following each such election or, in municipalities where absentee ballots are canvassed under s. 7.52, by 4 p.m. on the 2nd day following each such election, and no later than 4 p.m. on the day after receiving any corrected returns under s. 6.221 (6) (b). The person delivering the returns shall be paid out of the municipal treasury.*

***Does the GAB interpret Wisconsin Statute 7.51 (5)(b) to mean that the Municipal Clerk shall actually make the delivery of the election materials to the County Clerk?***

***Or are other individuals permitted to do this?***

***And if so, who may and how is the chain of custody and condition of the ballot bag recorded?***

***Is the delivery to the County Clerk's office or is it okay to deliver the ballot bags directly to the County's storage space?***

*Your prompt responses to these questions will be greatly appreciated.*

**Later on June 1, 2011 I emailed the following message:**

*Nathaniel, Mike and Shane,*

*During the recount I saw encounter some communities that had their ballots in bags and the bags secured in containers (Oshkosh used 90 gallon recycling containers commonly used for municipal curb side recycling programs. Most communities had their ballots in bags (some sealed properly and others not) but did not have separate ballot containers.*

*Wisconsin Statute 7.51(3)(a) state, "...secure them together so that they cannot be untied or tampered with without breaking the seal. The secured ballots together with any ballots marked "Defective" shall then be secured by the inspectors in the ballot container in such a manner that the container cannot be opened without breaking the seals or locks, or destroying the container.*

***Is it the GAB position that communities should comply with the statute and have the secured ballots further secured in containers?***

**Still later on June 1, 2011, I emailed the following message:**

*Nathaniel, Mike and Shane,*

*During the recount I observed numerous improperly sealed ballot bags that had been in the custody of the of the County Clerk for a period of 3 to 5 weeks before the bags were processed under the recount procedure.*

***Does the County Clerk have a legal duty to secure the ballots that are delivered to them ....?***

**I have not received a response to those questions.**

**Now, I have an additional questions.**

We are aware of Clerks having in their custody unsecured unvoted ballots from recent elections.

**Whose responsibility is it to have bound and sealed these unvoted ballots?**

**The Chief Election Inspector at each polling place on election night?**

**The Municipal Clerk when they are delivered to him/her?**

**The County Clerk when they are delivered to him/her?**

Please expedite the answers to these questions.

Sincerely,

Jim Mueller

*James J. Mueller, Attorney at Law*

4064 Timber Lane  
Cross Plains, WI 53528  
Phone 608.333.4589 Email JimMueller@charter.net  
Fax 1.888.495.1178



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June 23, 2011

Kevin Kennedy  
Director and General Counsel  
Government Accountability Board

via email

Democracy isn't the voting - it's the counting - Tom Stoppard

Kevin,

WI Citizens for Election Protection, the group I am representing is very concerned about the ease with which Election Fraud could be perpetrated in Wisconsin. At the June 9, 2011 Assembly Election and Campaign Reform Committee Meeting, Rep. Pridemore acknowledged that all of the programmable voting systems in use in Wisconsin are hackable. In the May 2011, Special Congressional Election, the Republican Candidate had the court impound all of the voting systems because of fear that fraud was being committed by the malicious programming of the optical scanning machines.

We feel the State and/or the G.A.B. is failing to adequately protect the integrity of our elections. This is evidenced by the fact that the G.A.B.'s "Statement of Commitment to Election Integrity" <http://gab.wi.gov/node/5> deals only with voter fraud not Election Fraud and by your statement in the June 15<sup>th</sup> letter that, "There are specific procedures for the handling of ballots on Election Night... Those procedures to not include conducting a hand count of ballots...."

With the recall elections being as important as they are, it is mandatory that the results be beyond suspicion. The only way to protect against that electronic Election Fraud is to actually count the ballots

Therefore, WI Citizens for Election Protection is encouraging local election officials to hand count the ballots and citizens to count the votes through public records requests.

**Paper Ballots under Wis. Stat. 5.40(5m)**

Our understanding is that municipalities with Population under 7,500 may choose to use paper ballots even if they have used electronic voting systems in the past. Municipalities with population of 7,500 or more may petition for permission to use paper ballots. In both cases they still have to provide HAVA compliance voting systems.

**Post-Election Testing**

Wisconsin requires pre-election tests that are useless against election fraud but does not require a post election test which would always disclose such fraud. Our research did not

discover any statutory language prohibiting a post-election test. We will encourage local election officials to seek out ways to complete post-election tests (counting the votes and comparing them to the tabulated results).

### **Public Records Access**

In your letter of June 15<sup>th</sup> you wrote, "It possible that ballots could be made available in response to a public records request after the canvassing process if a member of the public wishes to review ballots and attempt to confirm whether the machine count corresponds to that review."

We feel that the least intrusive and most meaningful time for Election Observers to be able to see the ballots and count the votes is at the polling place at the point where the Election Inspectors are sorting through all of the ballots to find any additional write-ins and to count them to reconcile with the totals from the poll list totals and the machines. We will be encouraging interested parties to make Public Records requests to "inspect" (look but not touch) the ballots at that time.

Our experience during the recounts was that an observer using a hand held counter/clicker can count the votes as the Election Inspector moves the ballot from one pile to another during their inspection of the ballots. We expect that local Election Officials will welcome the chance to have others confirm the validity of the counting process and will therefore cooperate with such a public records request. We are prepared to argue that the public's need to know that the votes have been correctly counted outweighs the small amount of effort needed to allow such an inspection.

### **Your Mission is Our Mission**

The G.A.B. Mission statement, "*The G.A.B. and its staff are committed to ensuring that Wisconsin elections are administered through open, fair and impartial procedures that guarantee that the vote of each individual counts, and that the will of the electorate prevails. ...The Board and its staff are dedicated to enforcing the election, ...laws vigorously to reduce the opportunity for corruption and maintain public confidence in representative government.*"

WI Citizens for Election Protection shares these goals and is seeking to achieve them through maximizing an open process of hand and visual counting of votes.

Sincerely,

Jim Mueller



**James J. Mueller, Attorney at Law**

4064 Timber Lane

Cross Plains, WI 53528

608.831.1610 Office 888.495.1178 Fax 608.333.4589 Cell

[JimMueller@charter.net](mailto:JimMueller@charter.net)

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July 1, 2011

Dear Municipal Clerk,

The upcoming recall elections could be the most important and closely scrutinized state elections of our lifetime. The people of Wisconsin are energized and engaged like never before. I am a founding member of Wisconsin Citizens for Election Protection. WCEP's goal is to restore transparency, accuracy, faith and integrity in the electoral process.

As the municipal clerk, you work hard to conduct the elections in such a way as to ensure that each ballot is counted as the voter intended. I fully understand the enormity of this charge. Every election from 1999 to 2005 as Clerk/Administrator of the Town of Middleton, I also dutifully carried out the prescribed election procedures with the confidence that election fraud could not happen in Wisconsin. *I was wrong.*

My confidence was deeply shaken when;

- 1) I participated as an observer in the Supreme Court Election Recount and witnessed a diverse array of "anomalies" and flawed election procedures,
- 2) the optical scanners and the DRE voting machines were impounded in the Special Congressional Election in New York because of suspected election fraud, and
- 3) I heard Wisconsin's Republican Representative Pridemore describe how the electronic voting machines in use in Wisconsin can easily be programmed to flip votes without detection by the Clerk or other election officials. The transcript of Representative Pridemore's statement to the Assembly Election and Campaign Reform Committee is attached.

These experiences, along with my lifelong interest in the election process, compelled me to help to implement change to preserve the integrity of Wisconsin's elections. I joined with others who share my goals, to create WCEP.

After extensive research, we have concluded that the most accurate method of counting the vote is a public hand count of the ballots on Election night. The upcoming recall elections will provide the perfect opportunity to hand count votes, since there will be only one race on the ballot. A municipality with a population under 7,500 is at liberty to hand count ballots. Municipalities with a population over 7,500 need permission from the Government Accountability Board to hand count ballots. For your

information, I have attached the City of Merrill's request and their approval from GAB for hand counting the ballots in the recall election.

If you choose not to hand count the votes, our organization may issue a public record request, asking you to provide us the opportunity to visually inspect each ballot as Election Officials sort through the ballots on Election night to find write-in votes. This non-touching inspection will assure the public that the votes have been counted, and will eliminate the need for recounts or further public record requests.

We want to ensure that the care and hard work you put in to elections is bolstered by demonstrating transparency and accuracy in each step of the process, including counting each and every vote as the voter intended.

I would appreciate a response by email, indicating if you intend to publicly hand count the votes in the upcoming recall elections. If you would like additional information, or if I can help you in any way, feel free to contact me at [Clerks.Count@gmail.com](mailto:Clerks.Count@gmail.com) or call me at (608) 333-4589.

Thank you,

Jim Mueller, Founding Member  
Wisconsin Citizens for Election Protection

PRESS RELEASE  
July 5, 2011  
FOR IMMEDIATE RELEASE

## Non Partisan Group Urges Hand Count of Ballots in WI Recall Elections

The Wisconsin Citizens for Election Protection group is urging municipal clerks to hand count the ballots in the upcoming recall elections of six Republican and three Democratic Senators in Wisconsin. The non-partisan group says this is the only possible guarantee of accuracy and transparency in the electoral process.

"Wisconsin's voting machines can be programmed to miscount the votes, and the clerks won't even know," says Jim Mueller, legal counsel for Wisconsin Citizens for Election Protection (WCEP).

Mueller, a former Municipal Clerk and Election Official, himself, explains "the State Supreme Court recount revealed many flaws in the electoral process. Even the mandatory machine testing and the securing of the ballot bags won't shine the light on possible election fraud. A public hand count of the votes on election night is the only way we can be sure that each ballot is counted as the voter intended. The voting public must have confidence that each vote matters."

At the June 9 meeting of the Assembly Election and Campaign Finance Committee, Republican Representative Don Pridemore stated that some machines can be programmed to count inaccurately, and explained "two candidates in order to maintain a zero count can be programmed by adding votes to one candidate and subtracting votes. In other words, starting out at a positive and negative number even before the first ballot goes in the machine. And then you can zero out the count and then it will look like zero and looks like everything's correct; but embedded in the programming are numbers that would offset each other's total as the ballots come in."

Wisconsin Statutes allow municipalities to hand count ballots, though municipalities with more than 7,500 residents need permission from the WI Government Accountability Board. A municipality can save money by hand counting, because it eliminates the cost of programming of optical scan machines and it can use lower-cost paper for the ballots. Most towns hand count their ballots and the City of Merrill has also requested and received the go-ahead to perform a hand count. WCEP's goal is to see the rest of Wisconsin's municipalities follow their lead. WCEP has emailed each municipal clerk in the recall districts, requesting that they hand count the ballots on election night. WCEP will file public record requests to view ballots on election night in municipalities that do not hand count.

Mueller says, "The most important elections in Wisconsin's history require the most accurate method of determining the winners. Hand counting the ballots on election night prevents

hacked machines, unsealed ballot bags or misplaced ballots from changing the outcome of elections.”

To speak with Jim Mueller you can call him at 608-333-4589 or e-mail him at [jimmueller@charter.net](mailto:jimmueller@charter.net)

For more information on WCEP and their work to create election transparency and accuracy, visit them on the web at <http://electionprotectionwisconsin.com/7-2/>

Contact

Jim Mueller

Phone 608-333-4589

[jimmueller@charter.net](mailto:jimmueller@charter.net)

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**In the Matter of**                    )  
   )  
**The Petition of the**                )  
**City of Merrill**                        )

**Petition 11-03**

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By a motion passed on June 17, 2011 by the City of Merrill Common Council, the City of Merrill has requested the Government Accountability Board grant permission, pursuant to §5.40(5m), Wis. Stats., to use paper ballots, in addition to the accessible voting equipment, at the recall primary and recall election in the 12<sup>th</sup> Senate District, to be held on July 19, 2011 and August 16, 2011, respectively. The City of Merrill typically uses optical scan electronic voting equipment in addition to the accessible voting equipment.

The office of State Senator, District 12 is the only item on the primary and election ballots in the City of Merrill. The reason for the petition is to provide a cost-effective special election. Use of paper ballots, in addition to the accessible voting equipment, will allow the City of Merrill to save the cost of programming the optical scan voting equipment and the cost of printing optical scan ballots. The use of accessible voting equipment and paper ballots, rather than optical scan equipment, will not create a hardship for the voters of the City of Merrill.

Wisconsin law permits municipalities required to use electronic voting equipment to petition the government Accountability Board for permission to use paper ballots, rather than utilize an optical scan system, for a specific election. §5.40(5m), Wis. Stats. The Government Accountability Board has delegated the authority to act on petitions for the use of paper ballots to its Director and General Counsel pursuant to the provisions of §5.05(1)(e), Wis. Stats.

On behalf of the Government Accountability Board, I grant the request of the City of Merrill to use the accessible voting equipment and paper ballots for the July 19, 2011 recall primary and the August 16, 2011 recall election.

**Dated, June 21, 2011**

**By the Government Accountability Board**

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**Kevin J. Kennedy**  
**Director and General Counsel**

# State of Wisconsin\Government Accountability Board

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JUDGE THOMAS H. BARLAND  
Chair

KEVIN J. KENNEDY  
Director and General Counsel

## MEMORANDUM

**DATE:** July 7, 2011

**TO:** All Municipal Clerks

**FROM:** Nathaniel E. Robinson, Elections Division Administrator  
Government Accountability Board

**SUBJECT:** Guidance regarding Wisconsin Citizens for Election Protection request

Municipal clerks in the senate districts conducting recall elections this summer have received a request from Attorney James Mueller on behalf of an organization called Wisconsin Citizens for Election Protection (WCEP), dated July 1, 2011. Several clerks have requested guidance from the Government Accountability Board in responding to the request. This memorandum provides the Board's guidance and recommendations specifically for clerks currently conducting recall elections, but also for all municipalities which may receive similar inquiries in the future.

WCEP makes two requests of clerks, which apparently are intended to illustrate whether machine counting of ballots is unreliable or inaccurate. As you know, the recent statewide recount, in which many of the ballots originally counted by machine were recounted by hand, gave us a direct demonstration of the overall accuracy of the voting equipment.

The first request of WCEP is to encourage municipal clerks in municipalities over 7,500 to request a waiver from the G.A.B. from the statutory requirement to use electronic voting equipment. That decision, of course, is up to each municipality and the G.A.B. will respond to any such requests. Section 5.40(5m), Wis. Stats. requires the governing body of the municipality seeking such a waiver to petition the G.A.B. for permission to use paper ballots and voting booths for a specific election.

Attorney Mueller's correspondence also indicates that, in municipalities which use voting equipment, WCEP observers may submit a public records request, asking that the observers be allowed to visually inspect each ballot on Election Night as inspectors sort through them to identify write-in votes. While you and your election inspectors may wish to accommodate such a request, we do not believe that any provision of Wisconsin's election laws or Public Records Law requires that you do so on Election Night.

Observers are certainly entitled do watch the process of canvassing ballots after the polls close, but they are not permitted to interfere with or disrupt the process. Wis. Stats. §7.41. In the Board's opinion, election inspectors should focus on their specific statutory duties to canvass and secure ballots, and to forward results to the municipal clerk. If the request to view or photograph individual ballots will disrupt the canvassing process, distract inspectors from their duties, or delay completion of the process, we would discourage inspectors from granting the request of WCEP to inspect individual ballots on Election Night.

In addition, if a public records request is made to inspect ballots, such requests should be directed to the clerk as custodian of those records, not to election inspectors. Also, clerks should keep in mind that ballots must be secured until the time allowed for filing a recount petition, or appealing a recount, has expired, pursuant to §7.23(2), Wis. Stats. Absent a recount request or a pending public records request, ballots involving a federal office may be destroyed after 22 months, and ballots without a federal office may be destroyed 14 days after a primary and 21 days after other elections. §7.23, Wis. Stats.

We suggest that you consult with your municipal attorney to use the balancing test for any public records request. However, because the election process is not completed until all recount deadlines have expired, it is the Board's opinion that public access to ballots should be denied prior to the expiration of any applicable recount deadline in order to preserve the integrity of the election.

We hope that this information is helpful and we are available to consult further with you or your municipal attorney regarding this guidance. If you have questions or comments, please feel free to contact our Help Desk at 608-261-2028.

# State of Wisconsin\Government Accountability Board

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JUDGE THOMAS H. BARLAND  
Chair

KEVIN J. KENNEDY  
Director and General Counsel

July 25, 2011

Delivered by email to [jimmueller@charter.net](mailto:jimmueller@charter.net)

Attorney James J. Mueller  
4064 Timber Lane  
Cross Plains, WI 53528

Dear Attorney Mueller:

This correspondence memorializes our meeting of July 5, 2011, in which we discussed questions and concerns you raised related to the security of ballots and electronic voting equipment, on behalf of Wisconsin Citizens for Election Protection (WCEP). The Government Accountability Board was also represented in that meeting by Elections Division Administrator Nathaniel E. Robinson, Elections Supervisor Ross Hein, and Lead Elections Specialist Diane Lowe.

In summary, we discussed the following points which you had raised in correspondence to the Board:

1. Your May 31, 2011 and June 1, 2011 correspondence to Board members made several specific requests. We advised that the Board would not schedule a special meeting to consider your requests prior to the July recall elections or its regularly scheduled meeting of August 2, 2011. You are free to make a presentation to the Board during the Public Comments period of that meeting, and such remarks are limited to five minutes per person. We do not intend to list your request as a separate agenda item, but Board staff will provide the Board with your correspondence and background materials prior to the meeting. We also advised that Board staff would consider your feedback based upon observations made during the Supreme Court Justice recount as part of a broader review of lessons learned and future training of local election officials. Finally, we do not believe there is sufficient reason to incorporate your suggested language in the Board's statement regarding the authenticity of ballots.
2. We also responded to questions you raised in your email to Director and General Counsel Kevin J. Kennedy dated June 20, 2011. We advised that we interpret §7.51(5)(b), Wis. Stats., to permit municipal employees other than the municipal clerk to make the actual delivery of ballots and election materials to the county clerk. The language in that statutory provision stating that the person delivering the returns shall be paid out of the municipal treasury appears to support this interpretation. The individual making the delivery should be noted on the chain of custody documentation. We also clarified that the county clerk may determine whether ballots should be delivered to the county clerk's office or to another location pending the official canvass and any potential recount. The county clerk should certainly be aware of when and where the ballots are being delivered.

You also asked whether the language in §7.51(3)(a), Wis. Stats., regarding securing ballots requires that ballots be secured together with a seal and then secured a second time in a

container. We advised that we interpret that language to require that ballots be secured in a container with a tamper evident seal, but not separately bound together and sealed. The language in that provision may be a bit antiquated and refer to the practice of gathering together ballots and sealing them with wax.

We further advised that, if a county clerk receives ballots which are not secured, the clerk should either require the municipality to secure the container, or the county clerk may do so, and should document that action. Finally, we advised that unvoted ballots are not required to be bound and sealed, and they are not secured with voted ballots.

3. In response to your letter to Mr. Kennedy dated June 23, 2011 and your subsequent correspondence to municipal clerks dated July 1, 2011, we advised that it is up to each governing body in a municipality over 7500 in population to determine whether it wished to seek a waiver from the Board of the requirement to tabulate ballots with electronic equipment. The Board evaluates each such request on its own merits. We did not receive any such requests other than the one made by the City of Merrill which you cited.

Regarding your alternative request that municipalities permit observers to visually inspect each ballot on Election Night, we advised that each chief inspector or municipality was free to grant or deny this request. We clarified, however, that the Board would not require clerks to accommodate this request, and that we would discourage clerks from following such a procedure if it would disrupt the specific steps that election inspectors are required to complete after the polls closed. We also stated that we would advise clerks not to permit access to the ballots after they are secured in response to a public records request until all recount deadlines have expired. With this correspondence I am providing a copy of the July 7, 2011 memorandum we distributed to clerks addressing these items, which you indicated you have already obtained.

I hope that this summary accurately reflects your recollection of our conversation. We appreciate the time you took to discuss your concerns and the interest of WCEP members in ensuring the integrity of Wisconsin elections. Please feel free to contact me if you have any questions regarding this correspondence.

**Government Accountability Board**



Michael Haas  
Staff Counsel

# State of Wisconsin \ Government Accountability Board

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JUDGE THOMAS H. BARLAND  
Chairperson

KEVIN J. KENNEDY  
Director and General Counsel

## MEMORANDUM

**DATE:** For the August 2, 2011 Meeting

**TO:** Members, Wisconsin Government Accountability Board

**FROM:** Kevin J. Kennedy  
Director and General Counsel  
Government Accountability Board

Prepared by:

Shane W. Falk, Staff Counsel

**SUBJECT:** Central Count Absentee Guidance

### **Introduction and Recommendations:**

Sections 7.52 and 7.53(2m), Wis. Stats., were created by 2005 Wisconsin Act 451, which permits the governing body of a municipality to provide for the canvassing of all absentee ballots on Election Day by a municipal board of absentee ballot canvassers. This process is commonly referred to as "central count absentee." Following the enactment of §§7.52 and 7.53(2m), Wis. Stats., the governing bodies of several municipalities adopted ordinances permitting the central count of absentee ballots. Currently, there are 15 municipalities with central count of absentee ballots, including larger municipalities such as Milwaukee, Kenosha, Brookfield, and Wausau.

Recently, a married couple who voted in Milwaukee were charged and tried for alleged double-voting because they both submitted an absentee ballot and both then voted in-person at the polls. See exhibit A (Milwaukee Journal Sentinel article dated May 25, 2011.) The couple was found "not guilty" by a jury. In reviewing this situation, staff became concerned that the central count absentee guidance issued by the State Elections Board on February 21, 2007 and reissued by the G.A.B. on January 17, 2008 needed further review and clarification. See exhibit B (G.A.B. guidance dated January 17, 2008).

The G.A.B. and its predecessor, the S.E.B., have long had a policy permitting an elector to appear in person on Election Day to vote, even if that same elector had already submitted an absentee ballot, so long as the absentee ballot had not already been "cast" - processed and tabulated. If the absentee ballot had not yet been cast, the elector is permitted to vote in-person and the election officials are to reject the elector's absentee ballot. If the absentee ballot had already been cast and a voting number assigned to the elector, the election officials are to prohibit the elector from voting in-person. Application of this policy to central count absentee municipalities has been inconsistent.

**Recommendation:**

1. Staff recommends that the Board approve the draft revised guideline for central count absentee that follows this Memorandum as Exhibit C and incorporate more specific information on central count absentee processes in the Election Day Manual and G.A.B. training.
2. Staff recommends that the Board solicit further comment from the current 15 central count absentee municipalities with respect to the draft revised central count absentee guidance and return to the Board at a later meeting to report findings for consideration by the Board before formal adoption of the revised guidance, as well as revision of the Election Day Manual and G.A.B. training.

**Background:**

The background, requirements to establish a central count absentee process, Election Day procedures, voter lists, and procedures for processing central count absentee ballots are set forth in the G.A.B. guidance dated January 17, 2008 and which follows this Memorandum as Exhibit B. Clerks have pointed out to staff that the Election Day Manual does not specifically address central count absentee in great detail and there is no reference to central count absentee in the section of the manual relating to the “absentee” watermark on the poll list. Clerks have also identified that some procedural inconsistencies in the central count absentee process have emerged since the State Election Board’s first guidance in 2007 and that the G.A.B. training on the central count absentee process has been minimal thus far. Some clerks apparently were not even aware of the 2007 and 2008 guidance issued by the S.E.B. and G.A.B.

The issue raised by the prosecution of the couple in Milwaukee for allegedly double-voting is addressed in the “miscellaneous issues” section of the January 17, 2008 guidance and specifically the following two paragraphs:

“A list of absentee ballots issued must be provided to each polling place, so that the inspectors do not permit a voter who has been issued an absentee ballot to vote at the polling place. If the voter insists that the absentee ballot was not returned to the municipal clerk, the voter may cast a challenged ballot at the polling place.

If it is determined that an elector voted both by absentee ballot and in person, the absentee ballot is void.”

The first paragraph quoted above identifies a procedure that appears to differ from the absentee ballot process in municipalities that do not have central count absentee with respect to addressing an in-person elector on Election Day who has also submitted an absentee ballot. It does appear to place the burden on the elector to avoid potentially casting two ballots for the same election, whereas that burden has traditionally been born by the election officials. It also seems to conflict with provisions of §7.53(1) and (2)(d), Wis. Stats., which require the board of canvassers to reconcile the poll list of the electors who vote by absentee ballot with the

corresponding poll list of the electors who vote in-person to ensure that no elector is allowed to cast more than one ballot, said statutes clearly stating that if an elector who votes in-person has submitted an absentee ballot, the absentee ballot is void.

The second quoted paragraph above is consistent with the Board's longstanding policy to permit an elector to vote in-person on Election Day, rejecting any absentee ballot; however, it does only implicitly require the election officials or clerk to reject the absentee ballots for any electors having voted in-person. Obviously, the purpose was to prevent a situation where two ballots were counted for the same elector at the same election. The second quoted paragraph above was likely a quote from §§7.53(1) and (2)(d), Wis. Stats., but did not include the prefatory provision requiring the board of canvassers to reconcile the poll list of the electors who vote by absentee ballot with the corresponding poll list of the electors who vote in-person to ensure that no elector is allowed to cast more than one ballot.

In practice, some municipalities with central count absentee have adopted a policy whereby an election official at the poll calls the central count absentee location when confronted with an elector on Election Day that wishes to vote in-person, but has the "absentee" watermark adjacent to the elector's name on the poll list. If the election officials at the central count absentee location confirm that they have not processed the elector's absentee ballot, the absentee ballot is rejected and the elector is permitted to vote in-person at the poll; however, if the election officials at the central count absentee location have already processed the absentee ballot, the elector is not permitted to vote in-person. This process avoids having to challenge ballots at the polls and placing the burden on the elector to assure that his or her absentee ballot has not been cast. This process also preserves the elector's ability to vote in-person on Election Day if he or she so chooses, even if the elector has already submitted an absentee ballot (so long as that absentee ballot has not been cast.) Under these practices, electors voting in municipalities with central count absentee are treated the same as electors in municipalities without central count absentee, where those absentee ballots are processed at the individual polling locations on Election Day.

Some municipalities with central count absentee are too large and have 10,000 or more absentee voters (elector having requested an absentee ballot) for any given election, making it practically impossible to have election officials at the polls contacting election officials at the central count absentee location. In the larger municipalities, such as Milwaukee, on average 75% of the issued absentee ballots are returned. On average in Milwaukee for any given election, 10,000 absentee requests are processed, which then leaves roughly 2,500 unreturned absentee ballots per election. A high percentage of those electors not returning their absentee ballot end up voting in-person at the polls on Election Day. A municipality like Milwaukee has asserted that it is not practical to require Chief Inspectors, staffing 190 polling locations in Milwaukee, to call the central count site to even inquire on these 2,500 unreturned absentee ballots, let alone also having to contact the central count regarding additional in-person electors that have already returned an absentee ballot.

These larger municipalities have adopted central count absentee policies whereby in-person electors at the poll are denied the ability to vote in-person on Election Day, if there is an absentee watermark adjacent to their names on the poll lists. In the instances where an election official misses the notation and permits the elector to vote in-person, clerks have referred any

elector having cast an absentee ballot and having voted in-person at the polls to their district attorney for prosecution for double-voting. It appears that this is what occurred with the couple in Milwaukee that were charged, tried, and found not guilty by a jury. This process seems to place the burden on the elector to know whether his or her absentee ballot is accepted and processed by the central count location. This approach appears to treat those electors subject to this central count absentee process different than electors from other municipalities without central count absentee and even some municipalities that do have central count absentee.

It appears likely that no municipality with central count absentee requires the board of canvassers to reconcile the poll list of electors who vote by absentee ballot with the corresponding poll list of the electors who vote in-person to ensure that no elector is allowed to cast more than one ballot.

### **Analysis:**

No person may vote more than once in the same election. §12.13(1)(e), Wis. Stats. Whoever intentionally violates §12.13(1)(e), Wis. Stats., is guilty of a Class I felony. §12.60(1)(a), Wis. Stats. An elector may obtain an absentee ballot pursuant to §§6.86 and 6.865, Wis. Stats., in lieu of voting in-person at the polls on Election Day. Statutorily prescribed procedures set forth the absentee ballot canvassing process, in part to insure that no person votes more than once in the same election.

In municipalities without central count absentee, the municipal clerk shall deliver all timely received absentee ballots to the election inspectors of the proper ward or election district where the absentee ballots are canvassed. §6.88(2), Wis. Stats. Except in municipalities with central count absentee, the inspectors shall canvass the absentee ballots at any time between the opening and closing of the polls on Election Day. §6.88(3)(a), Wis. Stats. At the polls in the same room where votes are being cast, the inspectors shall review the certification on the absentee envelope. Id. “When the inspectors find that the certification has been properly executed, the applicant is a qualified elector of the ward or election district, and the applicant has not voted in the election, they shall enter an indication on the poll list next to the applicant’s name indicating that an absentee ballot is cast by the elector.” Id. (emphasis added.) After opening the absentee envelope, removing the ballot, verify endorsement by the issuing clerk, and verifying whether proof of residence is required, “the inspectors shall then deposit the ballot into the proper ballot box and enter the absent elector’s name or voting number after his or her name on the poll list in the same manner as if the elector had been present and voted in person.” Id.

The procedures for municipalities using central count absentee are set forth in §§7.52 and 7.53(2m), Wis. Stats. In counting the absentee ballots, the board of absentee ballot canvassers shall use 2 duplicate copies of a single poll list for the entire municipality and upon accepting each absentee ballot, shall enter a poll list number on the poll list next to the name of the elector who voted the ballot. §7.52(2), Wis. Stats. The board of absentee ballot canvassers shall mark the poll list number of each elector who casts an absentee ballot on the back of the elector’s ballot before depositing the ballot into the proper ballot box and entering the absent elector’s name or poll list number after his or her name on the poll list. §7.52(3)(a), Wis. Stats.

After any canvass of the absentee ballots is completed under §7.52, Wis. Stats., the board of canvassers shall reconcile the poll list of the electors who vote by absentee ballot with the corresponding poll list of the electors who vote in-person to ensure that no elector is allowed to cast more than one ballot. §§7.53(1) and (2)(d), Wis. Stats. If an elector who votes in person has submitted an absentee ballot, the absentee ballot is void. Id. The purpose of marking the poll list number of each elector on the back of the elector's ballot before depositing it in the ballot box is to provide for easy identification and later rejection of the absentee ballot after the reconciliation of the poll list of the electors who vote by absentee ballot with the corresponding poll list of the electors who vote in-person, pursuant to §§7.53(1) and (2)(d), Wis. Stats.

The statutory procedures with regard to central count absentee are clear and unambiguous with respect to handling electors who vote in-person at the polls after having received and even having submitted an absentee ballot. A reconciliation of the central count absentee poll list with the corresponding poll list for electors having voted in-person at the polls must occur to ensure that an elector is not allowed to cast more than one ballot. The statutory remedy for a central count absentee elector having submitted an absentee ballot and also having voted in-person at the polls is also clear - the absentee ballot is void. These statutory procedures further ensure that electors from municipalities with central count absentee are allowed to vote in-person after having submitted an absentee ballot, very similar to absentee electors in municipalities where absentee ballots are canvassed at the polls on Election Day.

**Proposed Motions:**

1. **MOTION:** The Board approves the draft revised guideline for central count absentee and directs staff to incorporate more specific information on central count absentee processes in the Election Day Manual and G.A.B. training.
  
2. **MOTION:** Staff shall solicit further comment from the current 15 central count absentee municipalities with respect to the draft revised central count absentee guidance and return to the Board at a later meeting to report findings for consideration by the Board before formal adoption of the revised guidance, as well as revision of the Election Day Manual and G.A.B. training.



# Jury finds couple who voted twice not guilty of election fraud

## Intentions considered in rendering verdict

By Bruce Vielmetti of the Journal Sentinel

May 25, 2011 | (74) Comments

A Milwaukee couple wept and hugged their lawyers Wednesday after a jury found them not guilty of election fraud for voting twice in the 2008 presidential election.

But they had little to say after escaping a possible prison sentence.

"I'm drained right now," said Herbert Gunka, 61.

"I'm speechless," said Suzanne Gunka, 56, as they quickly left the Milwaukee County Safety Building.

The Gunkas admitted casting both absentee and election-day ballots, but insisted the latter was only because they honestly believed the former had not been counted, due in part to talk radio discussions that raised their fear of fraud and stolen votes. They said they never meant to have each vote count.

They were among 20 people charged by the Election Fraud Task Force, including several cases of felons voting, or improper registration of voters, but the only case of double voting. The Gunkas were charged in March 2010.

"We believe the evidence presented reflected a violation of the state election laws, but we respect the jury's verdict," said Bill Cosh, spokesman for Attorney General J.B. Van Hollen.

One juror said the panel felt the state didn't prove the Gunkas each meant for both of their votes to count, and didn't think the fact they initially lied to agents who came asking questions a year later betrayed anything more than the panic Herbert Gunka said gripped him when he realized what was happening.

Assistant Attorney General David Maas had stressed the couple's personal responsibility to ask about their prior vote before casting a second, but the juror said that cut both ways.

"You have a personal responsibility when you have a job as a poll worker," said Nicole Matenaer of West Allis.

Election officials testified that a poll worker should have noted the word "absentee" printed in gray left of the Gunkas' names in the poll book Nov. 2, 2008, and asked them if they had sent in their absentee ballots. If they had answered yes, the worker was not supposed to give them ballots.

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Matenaer also wondered why Maas did not put the poll workers on as witnesses, a question raised by the defense.

She said jurors were also disturbed by the fact the state Department of Justice agents who showed up at the Gunkas' house in September 2009 intentionally misled him about the purpose of their visit, and secretly recorded Herbert Gunka, yet expected him and his wife to be completely forthcoming with them.

"It's all about honesty," Matenaer said.

The jury had heard the agents' recording of their doorway interview with Herbert Gunka, and they asked to hear it a second time during four hours of deliberations.

### **Ambush or opportunity?**

In his closing argument, Maas stressed how the agents gave both Herbert and Suzanne, interviewed a short time later at her workplace, multiple chances to admit they had voted absentee, and gone together to their polling place a week later.

But the couple's attorneys said they were just scared by the ambush-style interviews.

Herbert Gunka's attorney, Patrick C. Brennan, reminded the jury that his client had voted 32 times since 1992, and never twice in the same election.

"He's not a criminal," Brennan said. "He's a responsible citizen.

"All the man wanted was for his one vote to count."

Patrick Cafferty, representing Suzanne Gunka, argued that the government "goes too far" when it charges people who make honest errors.

Jurors in the two-day trial got a crash course in Milwaukee voting procedures.

Before 2008, absentee ballots were counted at each polling place, and a red A was marked after a voter's name on the poll book. But starting that year, all absentee votes were counted at a central location. If a voter requested an absentee ballot, it is indicated in gray on the left margin of the poll book.

Herbert Gunka testified that, succumbing to similar concerns in 2004, he went to his polling place, saw the red A next to his name, and was reassured his vote was counted. He said he hadn't read letters sent with absentee ballots in 2008 explaining the change and, when he checked on election day and didn't see the A, concluded his first ballot had been lost or stolen.

After the verdict, Circuit Judge Richard Sankovitz told the Gunkas it must have been odd for them, as frequent voters, to see how many people in the jury pool admitted they never vote.

He also advised them to change their listening habits. "Talk radio hosts are the purveyors of misinformation," the judge said.

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**Find this article at:**

<http://www.jsonline.com/news/crime/122632359.html>

Check the box to include the list of links referenced in the article.

# State of Wisconsin \ Government Accountability Board

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KEVIN J. KENNEDY  
Legal Counsel

## MEMORANDUM

**DATE:** January 17, 2008

**TO:** Municipal and County Clerks

**FROM:** Nathaniel E. Robinson, Administrator  
Elections Division, WI Government Accountability Board

**SUBJECT:** Establishing Central Count Absentee Procedures

Special Note: The Wisconsin Legislature created the new Government Accountability Board (GAB) in January 2007, which assumed the combined responsibilities of the former State Elections Board and the State Ethics Board on Thursday, January 10, 2008. The GAB is made up of two divisions: the Elections Division and the Ethics and Accountability Division. Welcome to the new GAB!

This memorandum provides some basic information for municipalities who want to utilize a municipal board of absentee ballot canvassers for counting absentee ballots on Election Day. 2005 Wisconsin Act 451 permits the governing body of a municipality to provide for the canvassing of all absentee ballots on Election Day by a municipal board of absentee ballot canvassers. Section 7.52, Wis. Stats.

This memorandum also provides the basic requirements for establishing procedures for utilizing a municipal board of absentee ballot canvassers to count absentee ballots on Election Day. There are a number of administrative procedures that will have to be developed to ensure individuals do not vote absentee and in person and that votes cast by absentee ballot are properly reported for the canvass of election results. We expect that these procedures can be further developed after municipalities have had some initial experience with a municipal board of absentee ballot canvassers counting absentee ballots on Election Day.

### What is required?

If the governing body decides to provide for the canvassing of all absentee ballots on Election Day by a municipal board of absentee ballot canvassers, it must adopt an ordinance. Section 7.52 (1), Wis. Stats. The municipal clerk is required to notify the Elections Division in writing before the municipality adopts the ordinance and consult with the Elections Division staff concerning administration of a central location for counting absentee ballots.

The governing body must also establish a municipal board of absentee ballot canvassers. Section 7.53 (2m), Wis. Stats. The municipal board of absentee ballot canvassers is the municipal clerk and two other qualified electors of the municipality appointed by the clerk. They serve two-year terms beginning January 1<sup>st</sup> of odd-numbered years.

### Election Day Procedures

The municipal board of absentee ballot canvassers shall publicly convene between 7 a.m. and 10 p.m. on Election Day to count the absentee ballots for the municipality. The municipal clerk shall give at least 48 hours notice of the meeting of the municipal board of absentee ballot canvassers.

Any member of the public has the right to observe the proceedings of the municipal board of absentee ballot canvassers just as they do at the polling place.

Election inspectors may be appointed to assist the municipal board of absentee ballot canvassers with counting the absentee ballots for the municipality. If appointed, there must be an odd number of inspectors, and there must be at least three inspectors present at all times while absentee ballots are counted.

No later than 8 p.m. on Election Day, the municipal clerk shall post an informational statement in the clerk's office and on the Internet, at a site announced by the clerk, before the polls open at 7 a.m. The statement shall list the number of absentee ballots that have been issued and the number of absentee ballots that have been returned by the close of the polls on Election Day. The statement shall not include the name or address of absentee voters. If the municipality does not have a website where this information can be posted, the municipality is not required to make an Internet posting.

### Voter Lists

The municipal board of absentee ballot canvassers shall use two duplicate SVRS-generated copies of a single poll list for the entire municipality. The list shall be annotated with voter numbers beginning with the number 1, along with an indication the voter cast an absentee ballot. If the voter's name does not appear on the poll list, the name and voter number shall be recorded on the supplemental poll list.

### Procedures for Processing Absentee Ballots

No earlier than 7:00 a.m. on Election Day, the municipal board of absentee ballot canvassers shall open the carrier envelope or container in which the absentee ballots were delivered to the polling place so that a member of the public may observe the opening.

As each ballot is processed, the municipal board of absentee ballot canvassers shall announce the name of the absentee voter so that any member of the public present may hear the voter's name. The municipal board of absentee ballot canvassers shall carefully examine the certificate to determine it is signed and witnessed and the elector is a qualified voter in the reporting unit for which the absentee ballot is being processed.

The municipal board of absentee ballot canvassers shall compare the certificate envelope to the list of ineligible voters provided by the Department of Corrections. If the absentee voter's name appears on the list, the municipal board of absentee ballot canvassers shall challenge the absentee ballot.

The municipal board of absentee ballot canvassers shall carefully open the certificate envelope, remove the ballot from the certificate envelope and verify that the ballot has been initialed by the municipal clerk or a deputy clerk. NOTE: If the ballot does not contain the initials of either the municipal clerk or a deputy clerk, the omission is noted on the Inspectors' Statement (Form EB-104), and the ballot is processed. An absentee ballot is not rejected solely because the initials of the clerk or deputy clerk are missing.

The municipal board of absentee ballot canvassers shall mark the voter number on the back of the ballot and on the poll list along with the indication the voter cast an absentee ballot.

If the poll list indicates the voter was required to provide proof of residence as a first-time voter, the municipal board of absentee ballot canvassers shall record the type of document provided on the poll list. If no proof of residence was provided, the municipal board of absentee ballot canvassers shall treat the absentee ballot as a provisional ballot.

The municipal board of absentee ballot canvassers may not count the absentee ballot and shall mark the ballot as "Rejected" if:

- The certification is insufficient (not signed or witnessed);
- The voter is not a qualified elector of the reporting unit;
- The absentee certificate envelope was open or had been opened and resealed;
- The absentee certificate envelope contains more than one ballot of any one kind;
- The certificate of an absentee elector who received an absentee ballot by Fax or e-mail is missing;
- Proof is submitted that the elector has died.

The reason for rejection shall be recorded on the certificate envelope and on the Inspectors' Statement (Form EB-104) by the municipal board of absentee ballot canvassers. The rejected absentee ballots shall be placed in the brown envelope for rejected absentee ballots (Form EB-102).

After recording the voter number for a properly cast absentee ballot, the municipal board of absentee ballot canvassers shall deposit the absentee ballot in the ballot box or vote tabulating device. The used certificate envelopes shall be placed in the white envelope for used certificate envelopes (Form EB-103).

#### Follow the Same General Procedures as Used at the Polling Place

The municipal board of absentee ballot canvassers shall follow the same general procedures, and use the same forms as are used at the polling place when processing, counting and securing absentee ballots. Duplicate original tally sheets and a single Inspectors' Statement (Form EB-104) must be maintained for each reporting unit. Rejected absentee ballots and used certificate envelopes are not required to be maintained by reporting unit. Rejected absentee ballots may be placed in a single Rejected Absentee Ballot envelope or container. Used certificate envelopes may be placed in a single Used Certificate envelope or container.

#### Challenging Absentee Ballots

An absentee ballot may be challenged in the same manner as it would be challenged at the polling place. Any qualified elector may challenge an absentee ballot. The municipal board of absentee ballot canvassers shall challenge an absentee ballot cast by an elector whose name appears on the ineligible voter list. The municipal board of absentee ballot canvassers shall follow the challenge procedures set out in the Election Day Manual and ElBd Chapter 9, Wis. Admin. Code using the EB 104-C to document the challenge.

#### Completing and Delivering Forms

The municipal board of absentee ballot canvassers shall carefully record the votes for each reporting unit on duplicate original tally sheets, which are signed by the board of absentee ballot canvassers and anyone who assisted in the counting. Municipalities utilizing an optical scan voting system shall use two machine printouts as tally sheets. However, write-in votes must be recorded on duplicate original tally sheets (Form EB-105). The ballots and materials shall be delivered to the municipal clerk following processing and counting of the absentee ballots, and after completing, recording and securing the required forms.

#### Miscellaneous Issues

Automatic tabulating devices must be properly set up, programmed and tested before Election Day to count absentee ballots by reporting unit for the entire municipality.

A list of absentee ballots issued must be provided to each polling place, so that the inspectors do not permit a voter who has been issued an absentee ballot to vote at the polling place. If the voter insists that the absentee ballot was not returned to the municipal clerk, the voter may cast a challenged ballot at the polling place.

If it is determined that an elector voted both by absentee ballot and in person, the absentee ballot is void.

Detailed training, including checklists and instructions shall be provided to the municipal board of absentee ballot canvassers by the municipal clerk.

#### Questions and Comments

If clerks have questions on the utilization of a municipal board of absentee ballot canvassers to count absentee ballots contact the Elections Division staff. We also encourage you to identify issues and detail procedures so that the central count absentee ballot process can be improved and shared with all clerks.



## **Guideline—Central Count Absentee**

Special Note: This guideline provides some basic information for municipalities who want to utilize a municipal board of absentee ballot canvassers for counting absentee ballots on Election Day. Section 7.52, Wis. Stats., permits the governing body of a municipality to provide for the canvassing of all absentee ballots on Election Day by a municipal board of absentee ballot canvassers.

This guideline also provides the basic requirements for establishing procedures for utilizing a municipal board of absentee ballot canvassers to count absentee ballots on Election Day. There are a number of administrative procedures that will have to be developed to ensure individuals do not vote absentee and in person for the same election. In addition, these administrative procedures will ensure that votes cast by absentee ballot are properly reported for the canvass of election results.

### What is required?

If the governing body decides to provide for the canvassing of all absentee ballots on Election Day by a municipal board of absentee ballot canvassers, it must adopt an ordinance. Section 7.52 (1), Wis. Stats. The municipal clerk is required to notify the Elections Division in writing before the municipality adopts the ordinance and consult with the Elections Division staff concerning administration of a central location for counting absentee ballots.

The governing body must also establish a municipal board of absentee ballot canvassers. Section 7.53 (2m), Wis. Stats. The municipal board of absentee ballot canvassers is the municipal clerk and two other qualified electors of the municipality appointed by the clerk. They serve two-year terms beginning January 1<sup>st</sup> of odd-numbered years.

### Election Day Procedures

The municipal board of absentee ballot canvassers shall publicly convene between 7 a.m. and 10 p.m. on Election Day to count the absentee ballots for the municipality. The municipal clerk shall give at least 48 hours notice of the meeting of the municipal board of absentee ballot canvassers.

Any member of the public has the right to observe the proceedings of the municipal board of absentee ballot canvassers just as they do at the polling place.

Election inspectors may be appointed to assist the municipal board of absentee ballot canvassers with counting the absentee ballots for the municipality. If appointed, there must be an odd number of inspectors, and there must be at least three inspectors present at all times while absentee ballots are counted.

No later than 8 p.m. on Election Day, the municipal clerk shall post an informational statement in the clerk's office and on the Internet, at a site announced by the clerk, before the polls open at 7 a.m. The statement shall list the number of absentee ballots that have been issued and the number of absentee ballots that have been returned by the close of the polls on Election Day. The statement shall not include the name or address of absentee voters. If the municipality does not have a website where this information can be posted, the municipality is not required to make an Internet posting.

After any canvass of the absentee ballots is completed under §7.52, Wis. Stats., the board of canvassers shall reconcile the poll list of the electors who vote by absentee ballot with the corresponding poll list of the electors who vote in-person to ensure that no elector is allowed to cast more than one ballot. §§7.53(1) and (2)(d), Wis. Stats. If an elector who votes in person has submitted an absentee ballot, the absentee ballot is void. Id. The purpose of marking the poll list number of each elector on the back of the elector's ballot before depositing it in the ballot box is to provide for easy identification and later rejection of the absentee ballot after the reconciliation of the poll list of the electors who vote by absentee ballot with the corresponding poll list of the electors who vote in-person, pursuant to §§7.53(1) and (2)(d), Wis. Stats.

#### Voter Lists

The municipal board of absentee ballot canvassers shall use two duplicate SVRS-generated copies of a single poll list for the entire municipality. The list shall be annotated with voter numbers beginning with the number 1, along with an indication the voter cast an absentee ballot. If the voter's name does not appear on the poll list, the name and voter number shall be recorded on the supplemental poll list.

#### Procedures for Processing Absentee Ballots

No earlier than 7:00 a.m. on Election Day, the municipal board of absentee ballot canvassers shall open the carrier envelope or container in which the absentee ballots were delivered to the polling place so that a member of the public may observe the opening.

As each ballot is processed, the municipal board of absentee ballot canvassers shall announce the name of the absentee voter so that any member of the public present may hear the voter's name. The municipal board of absentee ballot canvassers shall carefully examine the certificate to determine it is signed and witnessed and the elector is a qualified voter in the reporting unit for which the absentee ballot is being processed.

The municipal board of absentee ballot canvassers shall compare the certificate envelope to the list of ineligible voters provided by the Department of Corrections. If the absentee voter's name appears on the list, the municipal board of absentee ballot canvassers shall challenge the absentee ballot.

The municipal board of absentee ballot canvassers shall carefully open the certificate envelope, remove the ballot from the certificate envelope and verify that the ballot has been initialed by the municipal clerk or a deputy clerk. NOTE: If the ballot does not contain the initials of either the municipal clerk or a deputy clerk, the omission is noted on the Inspectors' Statement (Form GAB-104), and the ballot is processed. An absentee ballot is not rejected solely because the initials of the clerk or deputy clerk are missing.

The municipal board of absentee ballot canvassers shall mark the voter number on the back of the ballot and on the poll list along with the indication the voter cast an absentee ballot.

If the poll list indicates the voter was required to provide proof of residence as a first-time voter, the municipal board of absentee ballot canvassers shall record the type of document provided on the poll list. If no proof of residence was provided, the municipal board of absentee ballot canvassers shall treat the absentee ballot as a provisional ballot.

The municipal board of absentee ballot canvassers may not count the absentee ballot and shall mark the ballot as "Rejected" if:

- The certification is insufficient (not signed or witnessed);
- The voter is not a qualified elector of the reporting unit;
- The absentee certificate envelope was open or had been opened and resealed;
- The absentee certificate envelope contains more than one ballot of any one kind;

- The certificate of an absentee elector who received an absentee ballot by Fax or e-mail is missing;
- Proof is submitted that the elector has died.

The reason for rejection shall be recorded on the certificate envelope and on the Inspectors' Statement (Form GAB-104) by the municipal board of absentee ballot canvassers. The rejected absentee ballots shall be placed in the brown envelope for rejected absentee ballots (Form GAB-102).

After recording the voter number for a properly cast absentee ballot, the municipal board of absentee ballot canvassers shall deposit the absentee ballot in the ballot box or vote tabulating device. The used certificate envelopes shall be placed in the white envelope for used certificate envelopes (Form GAB-103).

#### Follow the Same General Procedures as Used at the Polling Place

The municipal board of absentee ballot canvassers shall follow the same general procedures, and use the same forms as are used at the polling place when processing, counting and securing absentee ballots. Duplicate original tally sheets and a single Inspectors' Statement (Form GAB-104) must be maintained for each reporting unit. Rejected absentee ballots and used certificate envelopes are not required to be maintained by reporting unit. Rejected absentee ballots may be placed in a single Rejected Absentee Ballot envelope or container. Used certificate envelopes may be placed in a single Used Certificate envelope or container.

#### Challenging Absentee Ballots

An absentee ballot may be challenged in the same manner as it would be challenged at the polling place. Any qualified elector may challenge an absentee ballot. The municipal board of absentee ballot canvassers shall challenge an absentee ballot cast by an elector whose name appears on the ineligible voter list. The municipal board of absentee ballot canvassers shall follow the challenge procedures set out in the Election Day Manual and EIBd Chapter 9, Wis. Admin. Code using the GAB 104-C to document the challenge.

#### Completing and Delivering Forms

The municipal board of absentee ballot canvassers shall carefully record the votes for each reporting unit on duplicate original tally sheets, which

are signed by the board of absentee ballot canvassers and anyone who assisted in the counting. Municipalities utilizing an optical scan voting system shall use two machine printouts as tally sheets. However, write-in votes must be recorded on duplicate original tally sheets (Form GAB-105). The ballots and materials shall be delivered to the municipal clerk following processing and counting of the absentee ballots, and after completing, recording and securing the required forms.

#### Miscellaneous Issues

Automatic tabulating devices must be properly set up, programmed and tested before Election Day to count absentee ballots by reporting unit for the entire municipality.

Detailed training, including checklists and instructions shall be provided to the municipal board of absentee ballot canvassers by the municipal clerk.

#### Questions and Comments

If clerks have questions on the utilization of a municipal board of absentee ballot canvassers to count absentee ballots contact the Elections Division staff. We also encourage you to identify issues and detail procedures so that the central count absentee ballot process can be improved and shared with all clerks.

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JUDGE THOMAS H. BARLAND  
Chairperson

KEVIN J. KENNEDY  
Director and General Counsel

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## MEMORANDUM

**DATE:** For the August 2, 2011 Meeting

**TO:** Members, Wisconsin Government Accountability Board

**FROM:** Kevin J. Kennedy  
Director and General Counsel  
Wisconsin Government Accountability Board

Prepared and Presented by:  
Nathaniel E. Robinson, Elections Division Administrator  
Elections Division Staff

**SUBJECT:** Review of Recount Minutes and Procedures

Following the completion of the statewide recount of the election for Supreme Court Justice, each county submitted its recount minutes to the Board. The minutes were then posted on the Board's website for all interested parties to review. The length and detail of the minutes varied, ranging from one page submitted by Menominee County to over 300 pages from Waukesha County. Elections Specialist Aaron Frailing thoroughly reviewed each set of minutes to determine what issues arose and what errors in procedure were discovered through the recount.

Attached is a summary of the most common issues mentioned in the recount minutes. Board staff intends to use this information as points of emphasis in training of local election officials. The attached summary has also been posted on the Board's website for the public's information.

# State of Wisconsin \ Government Accountability Board

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JUDGE THOMAS H. BARLAND  
Chairperson

KEVIN J. KENNEDY  
Director and General Counsel

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**DATE:** July 20, 2011

**TO:** Wisconsin County Clerks Association  
Wisconsin Municipal Clerk Association  
City of Milwaukee Election Commission  
Milwaukee County Election Commission

**FROM:** Nathaniel E. Robinson  
Elections Division Administrator  
Wisconsin Government Accountability Board

**SUBJECT:** Review of Minutes from the Recount of the State Supreme Court Justice

As part of the recount of the State Supreme Court Justice contest from the April 5, 2011 Spring Election, counties were required to take detailed minutes of the recount proceedings and submit them to the Government Accountability Board (G.A.B.). In order to garner information from these minutes, the minutes collected from all 72 counties were reviewed and the incidents from the recount were compiled and summarized.

Below is a list of issues that occurred statewide. This list is delineated into different categories in order to make it user-friendly. These items made up the vast majority of incidents recorded in the recount minutes. While the issues identified in the Board of Canvassers' minutes need to be corrected for future elections, the G.A.B. has no evidence that any of the incidents affected the outcome of the election or demonstrated intentional wrongdoing by local election officials. To the contrary, the recount primarily confirmed the accuracy of the original canvass result and, where errors in the process or discrepancies were discovered, it was the meticulous work of recount officials which ensured that each ballot was reviewed to try to determine the voter's intent.

The G.A.B. presents this summary in the spirit of transparency, with the purpose of continuously improving election administration and maintaining public confidence in Wisconsin's electoral system.

## **Issues regarding Poll Book Reconciliation**

- When recording voter numbers in the poll book, Election Inspectors skipped or duplicated numbers.
- When issuing voter numbers in the poll book for Election Day registrants, Election Inspectors did not record participation for these voters in the supplemental poll book. Instead, the Inspectors recorded voter participation in the pre-printed section of the poll book only, or the Inspectors recorded participation in both the supplemental poll book and regular poll book.
- Elections Inspectors, when recording participation for absentee electors, failed to notate which electors voted by absentee ballot in the poll book.

### **Issues dealing with Ballots/Ballot Containers**

- Election Inspectors were inconsistent with the handling of spoiled, damaged and replacement ballots. These ballots were inconsistently marked as damaged or replaced, or were not marked at all and were often put in incorrect envelopes for delivery to the municipal clerk's office.
- Municipalities failed to accurately mark ballots with the name of the municipality or reporting unit in which the ballot was being cast.
- Election Inspectors failed to enclose all ballots with the election materials. Additionally, ballot containers were not properly secured in the office of the municipal clerk. On several occasions, the County Board of Canvassers had to request further investigation of missing ballots.
- There was difficulty in determining voter intent on many ballots due to many electors using incorrect ballot marking devices.
- Ballot containers were not properly sealed. Also, ballot containers contained holes generally from too many ballots being stored in the ballot bags. Tamper evident seal numbers documented on the Ballot Container Certificate (GAB-101) and Inspectors' Statement were incorrectly recorded.

### **Issues dealing with the Absentee process and Absentee Ballots**

- Absentee Certificate Envelopes lacked witness signatures.
- Many absentee ballots failed to include the initials of the issuing clerk or deputy clerk.
- Requests for absentee ballots were taken incorrectly, such as by telephone.
- Absentee ballots cast in the Clerk's office lacked witness signatures.
- Municipal clerks did not use the combination Absentee Certificate Envelope/Application for in-person absentee voting, and also did not require that the absentee voter complete an absentee application.

### **Issues dealing with Voting Equipment and Elections Materials**

- Municipalities incorrectly used the Pre-Lat cartridge for the entire election.
- Municipalities mixed the test ballots with the official ballots.
- Many tamper evident seals used were old and brittle; thus, causing the seals to break during transit or during handling, and these were never notated on the chain of custody statement or the GAB-104 Inspectors' Statement.
- Many Election Inspectors and clerks were unfamiliar with how to troubleshoot voting equipment issues, such as jammed ballots. Additionally, there were many instances where the voter verified paper audit trail was loaded backwards causing candidate selections to not print on the paper receipt.
- Errors that occurred with voting equipment were not properly documented and recorded on the Inspectors' Statement (GAB-104). This required further investigation on behalf of the County Board of Canvassers.
- Some County Boards of Canvassers improperly used the drawdown process.

**Issues regarding required GAB Forms (GAB-101, GAB-104, etc.)**

- Election Inspectors failed to fill out the Inspectors' Statement (GAB-104) completely on election night. This resulted in tamper evident seals for ballot containers not being recorded on the Inspectors' statement or the Ballot Container Certification. In addition, in many cases, Election Inspectors failed to sign the required forms, incidents were not clearly defined, and poll book reconciliation errors were not remedied.
- Election Inspectors failed to accurately record statistics regarding absentee ballots or total number of electors and ballots. This led to inaccurate recording of participation statistics.

**Conclusion**

Overall, the statewide Recount for the office of Supreme Court Justice was handled professionally and efficiently by local election officials. Although it was a difficult task, the recount provided the Government Accountability Board, county and municipal clerks, and the public a unique opportunity to review election-related business processes.

Lessons learned will generate new training opportunities including WisLine training teleconferences, step-by-step guides and additional topics for in-person and virtual classroom training conducted by the Government Accountability Board and our clerk partners. The Government Accountability Board will continue to offer new help guides, such as the Poll Worker Checklist, in order to assist and train local election officials. New and comprehensive training and public education initiatives will continue to demonstrate to concerned members of the public that elections in the State of Wisconsin are being carried out efficiently, effectively and with the fullest possible transparency now and in the future.

# State of Wisconsin \ Government Accountability Board

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JUDGE THOMAS BARLAND  
Chairperson

KEVIN J. KENNEDY  
Director and General Counsel

## MEMORANDUM

**DATE:** For the Meeting of August 2, 2011

**TO:** Members, Wisconsin Government Accountability Board

**FROM:** Kevin J. Kennedy  
Director and General Counsel  
Government Accountability Board

Prepared and Presented by:  
Michael Haas, Staff Counsel  
Edward Edney, SVRS Application Trainer

**SUBJECT:** Legislative Status Report

Following is a summary of legislative proposals that Board staff is monitoring:

### **1. Senate Bill 6 and Assembly Bill 7 and Assembly Bill 67: Photo ID:**

SB6 and AB7 were introduced as identical companion bills which would require electors to show a valid form of photo identification prior to receiving a ballot. SB6 was amended, but laid on the table in the Senate on June 8, 2011. AB7 was also amended through two substitute amendments, but was made a special order of business before the Assembly on May 11, 2011. The Assembly adopted both substitute amendments, and passed the bill. The Senate concurred on May 19, 2011. The bill was then approved by the Governor on May 25, 2011 as Wisconsin Act 23, which was published on June 9, 2011.

AB67 was introduced as a separate companion bill to SB6 which would require electors to show a valid form of photo identification prior to receiving a ballot. AB67 would in addition change the deadlines for late registration and in-person absentee voting, and require G.A.B. to provide an interactive electronic registration form. The bill was referred to committee, but was not taken up.

### **2. Senate Bill 17 and Assembly Bill 28: Reporting by nonresident committees:**

SB17 and AB28 are companion bills which would expand the amount of campaign finance information which is required to be reported by nonresident political committees. Currently such committees are required to report only contributions received by Wisconsin residents and expenditures made which involve Wisconsin elections. SB17 was referred to committee, but has not been scheduled for a public hearing. AB28 was also referred to committee, which held a public hearing on June 9, 2011.