

# State of Wisconsin \ Government Accountability Board

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JUDGE THOMAS H. BARLAND  
Chairperson

KEVIN J. KENNEDY  
Director and General Counsel

## MEMORANDUM

**DATE:** August 23, 2011  
**TO:** Members, Government Accountability Board  
**FROM:** Jonathan Becker and Ross Hein  
**SUBJECT:** Kathy Nickolaus and August 9, 2011 election night returns

Questions were raised by Democrats on the night of the August 9, 2011 Senate recall elections about a perceived delay in posting election results in Waukesha County. Director and General Counsel Kevin J. Kennedy asked us to inquire into the matter. Jonathan and Ross met with Waukesha County Clerk Kathy Nickolaus and Village of Menomonee Falls Clerk Janice Moyer to find out what occurred that night.

The only portions of Waukesha County that took part in the recall election was the Village of Butler and the Village of Menomonee Falls. Ms. Nickolaus stated that the Village of Butler faxed her its unofficial election results at 8:34 p.m. Ms. Nickolaus stated that she posted the results on her web site by 8:45 and distributed a copy of the fax to two election observers from We Are Wisconsin (Will and Debby) at the same time. We Are Wisconsin is associated with the recall efforts of Republican Senators.

The Village of Menomonee Falls did not fax any unofficial election results until after 10:30 p.m. The fax did not include results from one polling location – a fire station. Ms. Nickolaus states that Janice Moyer had informed her earlier in the day that results would be late because poll workers at the fire station would not be able to count the approximately 280 absentee ballots until after the polls closed. This was due to a high turnout and distractions caused by exit poll takers at the fire station. Ms. Nickolaus states that she called Ms. Moyer at 9:30 for an update and was told results would not be available for another hour. Ms. Nickolaus states that she apprised the observers of the delay and kept them updated throughout the evening until they left at 9:45 p.m.

According to Ms. Nickolaus, she still had not received anything from Menomonee Falls by 10:30 and so called Ms. Moyer and asked her to send whatever results were available. Ms. Nickolaus received a fax at 10:39 p.m. with results from all polling places in Menomonee Falls but for the fire station. Ms. Nickolaus states she posted these results to her county clerk web site at 10:47 p.m. Ms. Nickolaus states she received complete unofficial results from Menomonee Falls shortly after 11:30 and posted those results at 11:41 p.m. Ms. Nickolaus also states that she uploaded results as she received them to the Government Accountability Board's statewide system. Ms. Nickolaus states that she also provided regular updates to three observers from Wisconsin Election Protection, associated with the Democratic Party, who arrived at 11:00 p.m. She states that when the vote totals were final she called the state Republican Party and one of the observers (Debby) from We Are Wisconsin to inform them of those totals.

Ms. Nickolaus's statements are corroborated by copies of the faxes she received from Menomonee Falls, which are attached, and by Janice Moyer, Village of Menomonee Falls Clerk.

Ms. Moyer stated that she was at the Lilly Road fire station four times on election day. Ms. Moyer confirmed that the fire station had a large number of voters. According to Ms. Moyer, that large turnout, together with the need to manage the exit pollers and observers, meant that poll workers would not be able to count absentee ballots until after the polls closed. Otherwise, counting absentee ballots while individuals were in line to vote would cause delays for those waiting to vote.

Ms. Moyer stated that she spoke to Ms. Nickolaus several times during the day and alerted her that the results from the fire station would be late. Ms. Moyer said that, sometime after 10:00 p.m., Ms. Nickolaus asked that Ms. Moyer send the results she had at that time. Ms. Moyer cautioned that posting incomplete results could be questioned by people, but sent a fax at 10:39 p.m. with all results but the fire station's. Ms. Moyer stated she sent a second fax, with complete unofficial results at 11:41 p.m.

We found no evidence of any untoward activities. Based on the evidence, we believe Ms. Nickolaus (and Ms. Moyer) acted prudently and correctly.