

VOLUME NO. 44

OPINION NO. 6

ELECTIONS - Amending official canvass of election returns after certification of results;

ELECTIONS - Procedure for conducting recount;

PUBLIC OFFICERS - Powers of boards of canvassers;

MONTANA CODE ANNOTATED - Title 13, chapter 15; sections 13-16-201, 13-16-418, 13-16-419.

HELD: The State Board of Canvassers has no authority to amend the official state canvass except when amended election results are

certified by a county recount board after compliance with the procedures set forth in Title 13, chapter 16, MCA.

February 22, 1991

The Honorable Mike Cooney
Secretary of State
State Capitol
Helena MT 59620

Dear Mr. Cooney:

You have requested an Attorney General's Opinion on the following question:

Can the State Board of Canvassers accept an amended certified county canvass after the Board has certified the official state canvass?

Your request arises out of certain events that occurred following the general election held on November 6, 1990. After receiving election returns from the counties, and in accordance with sections 13-15-501 and 13-15-502, MCA, the State Board of Canvassers convened to determine the vote for those offices and ballot issues subject to its review. On November 26, 1990, acting in your capacity as secretary of the State Board of Canvassers, you certified the report of the official canvass, which was approved by the members of the board.

Thereafter, the office of the Secretary of State received amended election returns for Lewis and Clark County following a recount. In her letter of transmittal, the Lewis and Clark County Clerk and Recorder indicated that the county board of canvassers had been unable to reconcile the number of ballots that should have been counted with the number of ballots actually tabulated on election night. After consultation with the county attorney and with the county board of canvassers, the clerk and recorder further investigated the problem and determined that the tabulator had in fact failed to count one ballot in each of six precincts. A recount was then held on November 28, 1990.

Subsequently, another "correction" was brought to the Secretary of State's attention by Missoula County, upon the Missoula County Clerk and Recorder's discovery of a typographical error in one vote total. The error in Missoula County was not discovered or transmitted to the Secretary of State until mid-December 1990.

The issue presented by your request is whether the State Board of Canvassers may amend the report of the official canvass to include the corrected figures supplied by the counties after the canvass had been certified.

The canvass of votes and certification of results for all elections are governed by Title 13, chapter 15, MCA. Pursuant to section 13-15-401, MCA, the governing body of the county must convene ex officio as a board of county canvassers within three days after each election to canvass the election returns. The board then proceeds by "opening the returns, auditing the tally books or other records of votes cast, determining the vote for each individual and for and against each ballot issue from each precinct, compiling totals, and declaring or certifying the results." § 13-15-403(1), MCA. The board is authorized to petition for a recount of the votes "immediately" if, during the canvass, it finds an error in a precinct or precincts affecting the accuracy of vote totals. § 13-15-403(4), MCA.

Upon completion of the canvass, the county board must declare the election of those individuals having the highest number of votes cast for each county and precinct office, proclaim the adoption or rejection of a county ballot issue, and certify the results of the canvass of political subdivision offices and ballot issues to the governing body of each political subdivision participating in the election. § 13-15-405, MCA. The canvass for state and congressional offices is transmitted to the state board of canvassers, which must convene within 20 days after the election or sooner if all returns are received. § 13-15-502, MCA. Upon completion of its canvass, the state board declares elected the individual having the highest number of votes cast for each office, proclaims the adoption or rejection of ballot issues, and files a report of the canvass. §§ 13-15-506, 13-15-507, MCA.

The county governing body, or three members thereof if the body is larger, also meets as the county recount board when a recount is required. § 13-16-101, MCA. Section 13-16-201, MCA, prescribes those conditions under which a recount must be made, generally limited to circumstances in which the margin of votes for a particular office or ballot issue does not exceed one-quarter of one percent of the total votes cast. The only other circumstance prescribed for a required recount is if the board of county canvassers finds an error during its canvass of election returns and "immediately ... file[s] a petition with the election administrator." § 13-16-201(7), MCA. All petitions for recount other than those filed "immediately" by the board of county canvassers under section 13-16-201(7), MCA, must be filed within five days after the official canvass. § 13-16-201, MCA.

The election administrator must notify the members of the county recount board "[i]mmediately upon receiving a petition for a recount or a notice from the secretary of state that a petition has been filed with him," and the board must convene no later than five days after receiving such notice. § 13-16-204, MCA. "Immediately after the recount," the results must be certified by the county recount board and, if congressional, legislative, or other multi-county office or issue is involved, a copy of the certificate must be transmitted "immediately" to the secretary of state. § 13-16-418, MCA. The secretary of

state then must reconvene the board of state canvassers, which must recanvass the official returns and make a new and corrected abstract of the votes cast. § 13-16-419, MCA.

Being creatures of statute, the county and state boards of canvassers have only those powers and duties authorized by the statutes creating them. State ex rel. Wilson v. County Court of Barbour County, 145 W. Va. 435, 114 S.E.2d 904, 909 (1960); 29 C.J.S. Elections § 237(1), at 654 (1965). A board of canvassers, though vested with some discretionary powers, is a ministerial body. State ex rel. Ainsworth v. District Court of Fourth Judicial District in and for Sanders County, 107 Mont. 370, 86 P. 5, 8 (1938). Its members are "merely ministerial officers, and it is their duty to canvass the returns as they find them, and to declare the result of such canvass." State ex rel. Riley v. District Court of Ninth Judicial District in and for Glacier County, 103 Mont. 515, 63 P.2d 147, 149 (1936).

"When a board of canvassers has fully performed its duty, proclaimed the result of the count according to law, and adjourned sine die, it is functus officio; the persons who compose it have no power voluntarily to reassemble and recanvass the returns." Henderson v. Young, 179 Ga. 540, 176 S.E. 388, 391 (1934) (citations omitted). Accord People ex rel. Holdom v. Sweitzer, 280 Ill. 436, 117 N.E. 625, 633 (1917); State ex rel. Wilson, 114 S.E.2d at 911; State ex rel. Robinson v. Hutcheson, 180 Tenn. 46, 171 S.W.2d 282 (1943); Hall v. Stuart, 198 Va. 315, 94 S.E.2d 284, 289 (1956); 29 C.J.S. Elections § 239, at 668-69 (1965). Once having examined all the returns filed, reached a conclusion thereon, and made a report, the canvassing board has fulfilled its duties, whether or not its conclusion is accurate, and it cannot voluntarily recanvass the same returns and announce a different conclusion. Hutcheson, 171 S.W.2d at 285.

This rule of law is based on a solid foundation. As stated in Henderson:

"[The members of the Canvassing] Board can act but once. And having once met and fully completed their duty, their powers are exhausted, and they cannot again meet and recanvass the votes or reverse their prior decision and announce a different result." And this rule seems to be the logical result of our elective system. If canvassing boards can meet and change the results which they have once declared, they can also meet and change the results any number of times. Serious and injurious results might follow if such powers were held to exist in canvassing boards.

Id., 176 S.E. at 391-92 (citation omitted). This concern also was expressed by the court in Hutcheson, noting that a contrary holding would "open wide the door and provide the opportunity for the perpetration of every

conceivable fraud." 171 S.W.2d at 284. Thus, it has been held that after a board of county canvassers has forwarded an abstract of votes for certain offices to the secretary of state to be canvassed by the state canvassing board, a change made thereafter by the county board in such abstract is a nullity. Sweitzer, 117 N.E. at 633. See also Henderson, 176 S.E. at 391; 29 C.J.S. Elections § 239, at 669 (1965).

Where state law provides no procedure for a recount, a board of canvassers may not, voluntarily or by writ of mandamus, conduct a recount of the ballots cast. Hutcheson, 171 S.W.2d at 284; 29 C.J.S. Elections § 289, at 760-62 (1965). Where the right to a recount is established by statute, it may be exercised only upon compliance with the conditions prescribed. Coe v. State Election Board, 203 Okla. 356, 221 P.2d 774, 776 (1950); Cowling v. City of Foreman, 238 Ark. 677, 384 S.W.2d 251, 254 (1964). "It is well settled that recounts are wholly a matter of statute, and that they are of no validity unless the foundation required by statute is laid." Berardi v. Registrars of Voters of Milford, 318 Mass. 748, 64 N.E.2d 100, 102 (1945).

Courts have held that the right of a candidate to demand a recount must be exercised between the completion of the canvass and the declaration of the official result. Beacom v. Board of Canvassers of Cabell County, 122 W. Va. 463, 10 S.E.2d 793, 795 (1940); State ex rel. Wilson v. County Court of Barbour County, *supra*, 114 S.E.2d at 911. Montana law, as noted, prescribes in most instances a specific time within which to petition for recount. That five-day period commences to run from the conclusion of the canvass. § 13-16-201, MCA. See also State ex rel. Riley v. District Court of Second Judicial District in and for Silver Bow County, 103 Mont. 576, 64 P.2d 115, 120 (1937) (time begins to run from conclusion of the canvass by the county board of canvassers).

Where the recount is sought by the county board of canvassers itself, however, petition to the election administrator must be made "immediately." §§ 13-15-403(4), 13-16-201(7), MCA. Though the statutes do not place a specific limit on when the recount must be completed, the recount board is required to meet within five days after the petition is filed and, where the statutes refer to a recount, the word "immediately" is used often. §§ 13-15-403(1), 13-16-201(7), 13-16-204(1), 13-16-418(4) and (5), MCA.

In the instant case, with respect to Lewis and Clark County, while it appears that the recount was done at the instance of the county board of canvassers, there is no indication that the board discovered an error during the canvass and immediately petitioned the election administrator for a recount, or in fact that it ever submitted such a petition, as is required by section 13-16-201(7), MCA. Further, there is no evidence that the recount board convened within five days after the petition was received by the election administrator, as required by section 13-16-204, MCA. Absent a court order as provided in

section 13-16-301, MCA, or a petition from one of the persons listed in section 13-16-201(1) to (5) or 13-16-211, MCA, the only circumstance under which a recount may be conducted is upon petition of the board of county canvassers *immediately* upon discovery of the error *during* the canvass. §§ 13-15-403(4), 13-16-201(7), MCA. None of these procedures appears to have been followed in Lewis and Clark County.

With respect to Missoula County, there was no recount at all, but simply the belated correction of a keystroke error by the clerk and recorder after the canvass had been certified.

The state board of canvassers is authorized by law to reconvene and recanvass the official returns under only one circumstance -- that prescribed in section 13-16-419, MCA, when certificates have been filed by county recount boards. Absent compliance with the statutes governing recounts, a recount is of no validity, and the board is without authority to certify a new abstract of the votes cast. Likewise, there is no statutory provision for the correction of a canvass due to mathematical or typographical errors after the canvass has been certified, and there is thus no authority by which the board may accept the revisions submitted by Missoula County.

THEREFORE, IT IS MY OPINION:

The State Board of Canvassers has no authority to amend the official state canvass except when amended election results are certified by a county recount board after compliance with the procedures set forth in Title 13, chapter 16, MCA.

Sincerely,

MARC RACICOT
Attorney General