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ATTORNEY GENERAL OPINION NO. 2012-31

Ryan Kriegshauser
Office of Legal Counsel and Policy
Office of the Secretary of State
Memorial Hall
120 S.W. 10th Avenue
Topeka, KS 66612-1594

Re: Elections—County Boards of Canvassers—Enumeration of Elections to be Canvassed by County Boards; Procedure for Canvass by County Boards

Synopsis: County boards of canvassers are charged by statute to conduct the intermediate canvass in national and state primary elections and such canvass requires examining and counting the returns of votes cast to determine authenticity and to finalize the preliminary abstract of election returns. Such canvass does not include the express or implied authority to order a “re-vote.” Cited herein: K.S.A. 2011 Supp. 25-3002; K.S.A 25-3101; K.S.A. 2011 Supp. 25-3107.

* * *

Dear Mr. Kriegshauser:

On behalf of Kansas Secretary of State Kris Kobach, you request our opinion regarding whether county boards of canvassers have the authority to order what you refer to as a “re-vote.” You state that a “re-vote” was conducted in Shawnee County on August 28, 2012 for the Republican primary of the 52nd District of the Kansas House of Representatives. You further state the “re-vote” was ordered by the Shawnee County Board of Canvassers because ballots were cast in the wrong precinct due to poll-worker error and such affected voters could not be identified.¹

Your question requires an analysis of the powers and duties of the county boards of canvassers. County boards of canvassers are creatures of statute and only have those powers

¹ It is important to note that your question is not whether the provisional ballot cast in the wrong precinct because of poll-worker error could be counted. K.S.A. 2011 Supp. 25-3002(b)(3) requires canvassers to count votes for those offices or issues which are identical in both precincts. The canvassers shall not count the votes for those offices or issues which differ from the offices or issues appearing on the ballot used in the precinct in which the voter resides.

expressly conferred by the Kansas Legislature or necessarily implied. As a creature of statute, any reasonable doubt as to the existence of power should be resolved against its existence.²

The powers of the county boards of canvassers are found in K.S.A. 25-3101 *et seq.* The board of county commissioners in each county shall serve as the county board of canvassers for elections occurring within the county.³ County boards of canvassers conduct the final canvass in local elections and the intermediate canvass in national and state elections.⁴ The procedure for canvass is found in K.S.A. 2011 Supp. 25-3107(a). It provides:

At the time of commencement of any canvass by the county board of canvassers the county election officer shall present to the county board of canvassers the preliminary abstracts of election returns, together with the ballots and records returned by the election boards. The county board of canvassers shall inspect and check the records presented by the county election officer and shall hear any questions which the county election officer believes appropriate for determination of the board. *The county board of canvassers shall do what is necessary to obtain an accurate and just canvass of the election and shall finalize the preliminary abstract of election returns by making any needed changes, and certifying its authenticity and accuracy.* The certification of the county board of canvassers shall be attested by the county election officer. Neither the county board of canvassers nor the county election officer shall open or unseal sacks or envelopes of ballots, except as is required by K.S.A. 25-409, 25-1136 and 25-1337, and amendments thereto, or other specific provision of law or as is authorized to carry out a recount under subsection (b).⁵

There is no explicit language in the statutes that we have found that provides the county board of canvassers with the authority to order a “re-vote.” The language the Shawnee County Board of Canvassers purportedly relied on is in the italicized language above. The authorization in the statute to “do what is necessary” is limited to obtaining an accurate and just *canvass* of the election. Although not defined by Kansas statute, canvass is defined in Black’s Law Dictionary to mean to examine in detail, scrutinize, or to formally count ballots and report the returns.⁶ The definition of canvass from Black’s Law Dictionary is consistent with the process the county boards of canvassers must follow pursuant to K.S.A. 2011 Supp. 25-3107(a). Put simply, the duty to canvass requires the county board of canvassers to determine that the returns are genuine and to count the votes as they find them.⁷

Furthermore, the duty of county boards of canvassers has been found to be ministerial only and its sole function is to meet, canvass the vote, and declare the results.⁸ A ministerial act is one which a public officer or agent is required to perform upon a given state of facts, in a prescribed

²*Hobart v. U.S.D. No. 309*, 230 Kan. 375, 383 (1981)(citing *State ex rel. McAnarney v. Rural High School District No. 7*, 171 Kan. 437, Syl. ¶ 1 (1951)).

³ K.S.A. 25-3101.

⁴ *Id.*

⁵ K.S.A. 2011 Supp. 25-3107(a) (emphasis added).

⁶ Black’s Law Dictionary (9th ed. 2009).

⁷ Although not an issue in your request, we point out that canvass also may include a recount of the ballots pursuant to K.S.A. 2011 Supp. 25-3107(b).

⁸ *Wycoff v. Board of County Com’rs*, 191 Kan. 658, 663 (1963). See also, *Coleman v. Ritchie*, 762 N.W.2d 218 (Minn. 2009).

manner, in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed.⁹

In *Lewis v. Marshall County Commissioners*,¹⁰ the Kansas Supreme Court held,

It is a common error for a canvassing board to overestimate its powers. Whenever it is suggested that illegal votes have been received, or that there were other fraudulent conduct and practices at the election, it is apt to imagine that it is its duty to inquire into these alleged frauds, and decide upon the legality of the votes. But this is a mistake. Its duty is almost wholly ministerial. It is to take the returns as made to them from the different voting precincts, add them up, and declare the result. Questions of illegal voting and fraudulent practices are to be passed upon by another tribunal.¹¹

Your question does not allege fraud or illegal practice, but instead alleges poll-worker error. We see no reason to treat this irregularity differently than fraud or illegal practice because the county boards of canvassers' responsibility is to canvass the ballot and not to determine all contests or objections. We conclude that a county board of canvassers has no express or implied authority to order a "re-vote." To conclude otherwise would be to transform such canvassing board into a tribunal, not only to canvass such returns, but also to determine all contests and objections arising from the canvass.¹²

In summary, county boards of canvassers are charged by statute to conduct the intermediate canvass in national and state primary elections and such canvass requires examining and counting the returns of votes cast to determine authenticity and to finalize the preliminary abstract of election returns. Such canvass does not include the authority to order a "re-vote" but to count the votes as they found them.

Sincerely,

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⁹ *State ex rel. Stephan v. O'Keefe*, 235 Kan. 1022, 1025 (1984).

¹⁰ 16 Kan. 102 (1876).

¹¹ *Id* at 108.

¹² See generally, *Brown v. Rush County Com'rs*, 38 Kan. 436, 438 (1888).