

Andrea Gyger

From: Harvie Branscomb [REDACTED]
Sent: Friday, July 27, 2012 10:54 AM
To: Andrea Gyger; Scott Gessler
Cc: Dana Williams; Harvie Branscomb; Suzanne Staiert
Subject: addendum to my comments for SOS Elections rulemaking July 23, 2012

Categories: Rules

Addendum to Harvie Branscomb's previously provided written comments, subsequent to the July 23 public hearing and in partly in response to the Secretary's specific query:

Secretary Gessler suggested that the canvass board has an accounting role rather than an auditing or investigatory role. He asked me to reply with statutory citations that support my statement that the canvass board does have an investigative role and is involved in the audit of elections. Here is my answer, with citations, as well as some additional comments based on statutory citations that I wish to add based on experience gained at the public hearing and the recount in HD39 that took place this week.

[C.R.S. 1-7-514](#) is the law on "Random Audit." Here is a portion of that section:

(2) (a) Upon completion of the audit required by subsection (1) of this section, if there is any discrepancy between the manual tallies, as specified in accordance with the requirements of subparagraph (II) or (III) of paragraph (a) of subsection (1) of this section, as applicable, of the voting device selected for the audit, and the corresponding tallies recorded by such devices, and the discrepancy is not able to be accounted for by voter error, the county clerk and recorder, *in consultation with the canvass board* of the county established pursuant to section 1-10-101, *shall investigate* the discrepancy and shall take such remedial action as necessary in accordance with its powers under this title.

(b) Upon receiving any written complaint from a registered elector from within the county containing credible evidence concerning a problem with a voting device, *the canvass board* along with the county clerk and recorder *shall investigate* the complaint and take such remedial action as necessary in accordance with its powers under this title.

(c) *The canvass board* and the county clerk and recorder *shall promptly report* to the secretary of state a description of the audit process undertaken, including any initial, interim, and final results of any completed audit or *investigation conducted* pursuant to paragraph (a) or (b) of this subsection (2).

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With respect to the new rulemaking attempt to limit canvass board access to ballots in an election, please note this statutory citation from law that is recently adopted:

[C.R.S. 1-7-1003 Conduct of elections using ranked voting methods - instant runoff voting - choice voting or proportional voting - reports](#)

(6) In an election using a ranked voting method, the election judges shall not count votes at the polling place but *shall deliver all ballots cast in the election to the canvass board*, which shall count the votes in accordance with this section and the rules adopted by the secretary of state pursuant to section 1-7-1004 (1).

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As part of a dialog regarding my objection to the phrase "must certify" in the proposed rules (in several locations in the rules) the Secretary also quoted statute as follows: "the canvass board shall... certify" from section 1-10-101.5. As he also noted the section also goes on to say "when unable to certify." The remainder of that sentence also includes text to the effect that the canvass board shall also "transmit the non-certified abstract of votes" clearly showing that "shall certify" is not the only possibility envisioned by the legislature, thus an interpretation that motivated proposed rules that the canvass board "must certify" is defective and must take account of the remainder of the relevant statutory text.

[C.R.S. 1-10-101.5](#) Duties of the canvass board

(1) ***The canvass board shall:***

- (a) Reconcile the ballots cast in an election to confirm that the number of ballots counted in that election does not exceed the number of ballots cast in that election;
- (b) Reconcile the ballots cast in each precinct in the county to confirm that the number of ballots cast does not exceed the number of registered electors in the precinct; and
- (c) ***Certify the abstract of votes*** cast in any election and transmit the certification to the secretary of state. A majority of canvass board members' signatures shall be sufficient to certify the abstract of votes cast in any election. When unable to certify the abstract of votes by the majority of the board for any reason, the canvass board ***shall transmit the noncertified abstract of votes*** to the secretary of state along with a written report detailing the reason for noncertification.

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Statutes for canvass boards in non partisan elections also make it clear that the role is more than about accounting:

[C.R.S. 1-10-205](#). Corrections

If the canvass board finds a clerical error or omission in the returns, the board shall consult with the election judges from whom the returns were received to resolve the discrepancies. The ***election judges shall submit to the canvass board*** any documentation for verification of the additions and corrections, and the ***canvass board shall make any additions and corrections required by the facts*** of the case. The canvass board may adjourn from day to day for the purpose of obtaining the corrections and additions.

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The canvass board is also responsible to determining the outcome of a tie vote in a county contest by lot-another function that goes beyond an accounting role:

[C.R.S. 1-11-101](#) Tie votes at partisan elections

- (4) If at any primary election involving a county office, after all recounts have been completed, two or more candidates of the same political party tie for the highest number of votes for the same office, the canvass board shall determine by lot the person who shall be elected. The canvass board shall provide the candidates affected by the tie vote reasonable notice of the time when the election will be determined.

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Here in the following statutory citation we see the canvass board "***finds*** that the method of making or certifying...does not conform to the requirements of law" or "***finds*** a clerical error." These laws also bolster the interpretation that the canvass board performs a role more associated with auditing and investigation, instead of simply accounting. Note that the canvass board and the SOS are placed in parallel roles by paragraphs one and two here. If the canvass board is limited to an accounting role, is that also then true for the SOS?

[C.R.S. 1-10-104](#) Imperfect returns - corrections

(1) If, in the course of their duties, ***the canvass board or the secretary of state finds that the method of making or certifying returns*** from any precinct, county, or district does not conform to the requirements of law, the returns shall nevertheless be canvassed if they are sufficiently explicit in showing how many votes were cast for each candidate, ballot question, or ballot issue.

(2) If the ***canvass board or the secretary of state finds a clerical error or omission*** in the returns, the county clerk and recorder, after consultation with the election judges, shall make any correction required by the facts of the case. The election judges shall sign and submit to the canvass board any documentation required for any explanation or verification of the additions or corrections. The canvass board may adjourn from day to day for the purpose of obtaining the additions or corrections.

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Here is the specific authority for SOS rulemaking about canvass boards, and the goal of this authority is to establish equitable uniformity in appointment and operation, not to limit the canvass boards to an accounting function or to transfer their function or control over their function to county clerks and recorders. The word "equitable" probably justifies a rule to require equal representation of major parties on the canvass board.

[C.R.S. 1-10-104.5](#) Rules

The secretary of state shall promulgate rules in accordance with article 4 of title 24, C.R.S., for the purpose of establishing equitable uniformity in the appointment and operation of canvass boards.

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There are several sections of law regarding recounts that refer to canvass boards. Here is one of them. Note that the canvass board hires the workers (if any) that help it to make the recount. It is the canvass board, not the designated election official that "makes" or "conducts" the recount. The proposed rules make no reference to this key role of the canvass board.

[C.R.S. 1-10.5-107](#) **Canvass** board to conduct recount

(1) Any county clerk and recorder or governing body required to conduct a recount shall arrange to have the recount made by the **canvass** board who officiated in certifying the official abstract of votes cast. If any member of the **canvass** board cannot participate in the recount, another person shall be appointed in the manner provided by law for appointment of the members of the original board.

(2) Any **canvass** board making a recount under the provisions of this section may ***employ assistants and clerks*** as necessary for the conduct of the recount.

(3) The **canvass** board ***may require the production of any documentary evidence*** regarding any vote cast or counted and may correct the abstract of votes cast in accordance with its findings based on the evidence presented.

(4) At the conclusion of the recount, the **canvass** board shall make the returns of all partisan, nonpartisan, ballot issue, and ballot question elections to the designated election official and provide a copy to the persons or groups requesting the recount or notified of the recount pursuant to [sections 1-10.5-105](#) and [1-10.5-106](#). The **canvass** board shall meet and issue an amended abstract of votes cast for the office, ballot issue, or ballot question that is the subject of the recount and deliver it to the designated election official.

(5) The designated election official shall notify the governing body of the results of the recount.

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The recent experience with the Douglas County Canvass Board suggests that the SOS could provide better compliance with [C.R.S. 1-10-104.5](#) by adding some guidance to canvass boards in the form of additional rules for canvass boards concerning recounts.

To provide better uniformity in the conduct of recounts, it would be best to set a clear requirement that a satisfactory number and sufficiently publicly verifiable as random selection of ballots be made by the canvass board prior to testing the equipment for a recount.

The Douglas County canvass has revealed that recounts are being conducted with less than a statutory minimum number of ballots containing the contest tested prior to the choice to use a machine for recount in place of a hand count. To provide meaningful confidence that the machine might actually count the contest sufficiently accurately to substitute for a hand count, it would be reasonable to require at least 5% of the ballots voted in the contest be tested (the number that satisfies the post election audit), rather than an absolute and arbitrary maximum of 50. The test can be used as the first step of the actual recount, whether or not it is done by hand or machine, thus the time taken for the test need not be wasted.

- citation from SOS Rules-

14.6.3 For testing central count/mail-in scanners the canvass board shall randomly select one percent (1%) or fifty (50) ballots, whichever is greatest. A blank prom cartridge, rom cartridge or memory card shall be utilized for the test. The ballots selected shall be processed through the central count/mail-in scanner and compared to the hand-tallied total.)

In Douglas County this week, 41 ballots were tested in a contest of 5001 votes. 5% (the number used by Colorado's post election audit) would call for 250 ballots to be tested in Douglas County's HD39 Republican recount test (machine count compared to hand count).

Likewise in Douglas County we know that the sample of ballots selected for the pre-recount test were not randomly selected, but instead a single batch of 200 ballots from the entire election (all parties, all House districts numbered about 27,000 ballots instead of 5,000) was identified because it had on it a large number of ballots from a precinct known to be in HD39. Not only is this selection not random, but the batch was obviously not even representative of other batches, because it had a preponderance of ballots from a single precinct. (Douglas County has hundreds of precincts so in a mail ballot election, a typical batch of two hundred should contain about one ballot per precinct or zero.)

Clearly then, the canvass boards need both guidance on selecting ballots for this crucial test and an understanding of the value of a hand count in a recount. Its important for each canvass board member to understand that no voting system can accurately interpret every ballot in an election... a contest on a ballot that appears to the machine as a normal vote but to a judge as a vote for a different selection is a type that cannot be detected by machine, even with undervote, overvote and damaged contest filtered for resolution as is the case in the machine recount. No mark that appears to the machine as a normal vote (including a dot- thought mark- or dust collected on a fold- detected as a vote where an undervote should be) will be resolved in a machine count- either under rules for the original count, or under rules for a machine recount. It will be seen and resolved by humans in case of a hand count.

The Douglas County recount also revealed that canvass boards are being required by rule to resolve ballots identified as requiring resolution by the Hart voting system with the same result as was obtained in the original

election tabulation, even when this is clearly replicates an incorrect record of the voter intent. This rule applies uniquely to Hart Ballot Now because that system (because of the unique number placed on each ballot) actually records the manual resolution for each ballot that was done in the original election, and so this information is available for use by a recount. Note (thinking of [C.R.S. 1-10-104.5](#)) that the rule that requires this special treatment in case of Hart Ballot Now obviously creates non-uniformity in handling recounts by the canvass board- including those for multi-county contests such as HB 39. It would appear to me that the rule in 14.7.3 (b) and (c) was not fulfilled equally by the canvass boards in Douglas and Teller counties with respect to the HD 39 recount and probably could not have been because of inconsistencies inherent in the rule. In addition, I think this rule 14.7.3 (b) and (c) produce results that are contrary to the purpose of a recount.

-citation, first three sub-paragraphs of SOS Rule 14.7.3- (note that this appears truncated on the SOS website on the HTML version- only (a) appears there. This is from the pdf version.)

14.7.3 Ballots for the recount shall be processed following the State of Colorado Procedures for the use of the Ballot Now Voting System in conjunction with the following procedures:

(a) Open Ballot Now with an unused MBB (Mobile Ballot Box) from the election and create a Ballot Now recount database.

(b) *Scan and resolve all recount ballots following original election procedures.*

(c) Use the Audit Trail Report and Original Scan Batch Reports with notes to *ensure that resolution action follows the original resolution.*

The idea that the recount must replicate the conditions of the original count and even to the extent of replicating the mistakes is abhorrent and will likely lead to much discussion of Colorado on national comedy shows if what happened in Douglas County this week recurs during the 2012 presidential race in case of a recount. Douglas County also attempted to scan the ballots in the recount on the same specific scanner as tabulated the same ballots in the original election count, when common sense suggests that the recount would attempt to use an independent tabulation mechanism (such as hand count, but at a minimum on a different scanner (Douglas County has 4 such scanning systems) as a preferable alternative to achieve more confidence in accuracy.

The recent recount also demonstrates a need for canvass boards to better understand the fact that they are a public board and subject to open meetings law. Canvass boards do need a rule to explain how many canvass board members may discuss business with each other without constituting a public meeting. Canvass boards and the public need an explanation of the extent to which it is legal for the public to interact with canvass board individual members or to observe or participate in meetings of the board. Likewise the access afforded to accredited watchers of the process as well as the canvass board needs to be explained.

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Harvie Branscomb [REDACTED] submitted July 27, 2012