

Approved June 27, 2007

**Minutes of The New York State Board of Elections
Wednesday, May 2, 2007**

The meeting of the New York State Board of Canvassers was called to order at 1:30 p.m. at the New York State Board of Elections, 40 Steuben Street, Albany, New York. Canvassers present were Co-Chairmen Neil Kelleher and Douglas Kellner and Commissioners Evelyn Aquila and Helena Donohue. The meeting was chaired by Commissioner Kelleher. Staff present were: Peter Kosinski, Stanley Zalen Todd Valentine, Lee Daghlian, Bob Brehm, Anna Svizzero Allison Carr, Deirdre Hammer, Liz Hogan and William McCann. Guest list is attached.

The Board of Canvassers met to certify the special elections held on March 27, 2007 in the 16th, 61st and 62nd Assembly Districts. The Commissioners signed the certifications and adjourned at 1:35 P.M. The regular meeting of the Commissioners convened at 1:36 P.M.

Minutes of March 27, 2007 - approved with a 4-0 vote.

Unit Updates:

- **Legal Unit:** - Todd Valentine reported on two issues:
 1. A third HAVA lawsuit has been filed by the Cortland County Board of Elections. Cortland did not wish to join the Suffolk County Board of Elections' lawsuit.
 2. Todd Valentine reported on the updates with the Department of Justice (DOJ). We are continuing to work on these updates. The last time we reported to DOJ officially about our time line was right after the election. DOJ has officially opposed the intervention joining of their suit by the Nassau and Suffolk County Boards of Elections.
- **Election Operations:** Anna Svizzero reported on several issues:
 1. Completion of the certifications of the special elections held on March 27, 2007.
 2. Preparatory work for the special election held on May 1, 2007 in Rockland County has been completed and the election was conducted, without incident.
 3. Final preparations and assistance to the Public Information Office (PIO) for the NYSBOE Annual Conference in Syracuse, N.Y. have been completed.
 4. They continue to review of voting systems contracts with the New York City Board of Elections, Office of General Services (OGS) and the Attorney General's (AG) office. They recently met at the NYSBOE conference in Syracuse. Several issues must be resolved and these issues will be discussed during the New Business portion of the agenda.
 5. Unit staff has built acceptance test ballots, for use in the dry run testing of vendor acceptance test procedures. Ballots will be sent out for translation and audio ballot purposes. Ops is awaiting information on certified vendors who can program the Diebold OpScan ballot. NYSTEC and Election Ops will work together, to conduct dry run tests.
 6. Litigation statements from vendors are being reviewed by Allison Carr. There was discussion regarding the vender's applications for certification and the particular requirements to be included with

their applications. One requirement is that vendors certify they have no lawsuits pending and if they do to report such. Many have not responded with the appropriate information, for example Diebold. Apparently Avante sued Diebold and other vendors and no report was made. The Board requested that letters be sent to the vendors reminding them of those requirements and instructing them to report these requirements to OGS as well as NYSBOE.

Commissioner Kellner was troubled by this situation and faults the Election Operations unit in not following up on the disclosure requirements upon taking applications. He feels we should immediately finish a review of all vendors for completed applications and do a report to the Board on vendor compliance. He instructed them to do a line by line review of the regulations to ensure that everything that is needed has been provided by the vendors. He feels there's no excuse for vendors not having a completed application at this date. Lastly, Commissioner Kellner inquired about a vendor compliance list, which he felt had not been provided since last October. This report has been updated and will be provided to the Board at the next board meeting.

Anna asked if the certification bond for the vendors is truly needed. Money to cover the expenses of certification has been posted with this Board, although not all vendors have paid all the money. Most posted half the money estimated for certification costs, and that money has been held in escrow since the testing with Ciber has been put on hold. Commissioner Kellner feels this issue should be resolved now, instead of waiting until we have a new ITA on board.

Commissioner Donohue wanted to make sure that we all understood the certification bond issue and whether it is really necessary. Additionally, Commissioner Kellner stated that we must either complete the application process or discontinue it. Commissioner Aquila stated we should put this on hold until the process is completed. Peter Kosinski agreed.

7. Commissioner Kellner raised the source code issue again and stated that we need to hear from the Operations Unit of how to deal with this issue. Mr. Kosinski and Allison Carr's view is not in agreement with Commissioner Kellner's interpretation. There was a long discussion over this issue and the statutes involved, 7-202 and 7-208. Commissioner Kellner feels that the source code testing and the escrow is not needed for anything except the actual voting machine and that it is not needed for the administrative machinery that tabulates and combines all the votes.

Mr. Kosinski and Ms. Carr believe differently in that 7-208 particularly requires that not only voting systems, but voting equipment as well, should come under the edict that software be put into escrow as well as tested. Discussion continued on the voting systems and the EMS systems and the differences of opinion on the interpretation of the law. Mr. Kosinski and Ms. Carr say that they are not interpreting the statute, but simply reading it. Commissioner Kelleher feels that Anna should schedule a meeting and that all parties, especially vendors, should discuss this issue.

8. Next Anna reported on the progress of the RFP for the new ITA. They are a little bit late with responses to proposed questions, but will finish up with this soon.

9. Commissioner Kellner asked about a report regarding the undervote issue. He feels we need to do a study in a scholarly way to find out exactly what these issues are and how to deal with them. Commissioner Aquila doesn't feel that under votes should be considered an issue at all. She stated that if a constituent does not wish to vote for a particular office that it should be their right to do so. She also feels that if there were a switch on the voting machine for that option, that the switch should be shut off.

- **NVRA/PIO:** Lee Daghlian reported on several issues:

1. Lee Daghlian reported that the NYSBOE annual conference went very well and thanked everyone on staff that participated in it's success, including Anna Svizzero and her staff.

2. Lee Daghlian reported on the trial run of our new web casting feature for today's Board meeting and that the company here today represents the recommendation made in the memo in their packet. Mr Daghlian suggests that we assign this job to a vendor who can provide us with a turn key operation. That solution would mean that this Board and the ITU unit do not have to buy any new equipment for web streaming and that we need not hire additional people to do closed captioning. Their decision to choose this particular vendor is not required now because OGS does not currently have a standard contract to deal with this specific type of work. They are working on this now. We have received proposals from a number of web casting service providers with a range of expenses from \$300 to \$400,000, down to \$40,000 to \$50,000. Our hope is to keep this cost to under \$50,000 per year and that would be based on at least two Board meetings a month.

Lee reported that he will now begin the preparations for the State Fair to be held in August of this year and expects to reach out to the county boards as well as NYSBOE staff for assistance in manning the booth.

3. Lee reported on the county funds and the poll worker training programs that were given at our conference in Syracuse. Both programs seemed to be very effective with the county funds running a little smoother now. The RFP for Poll Worker Training is almost completed, we have yet to hear from OGS about the scores. Lee reported that he would be able to provide the Commissioners with the winning vendor at the next Board meeting for their approval.

- **Campaign Finance:** Bill McCann reported on several issues:

1. The 2007 Filer Update has been mailed out to all active filers. It includes information on current issues that filers need to be aware of, and includes the filing calendar as well as the Campaign Finance Seminar Schedule for this year. Seminars have been scheduled for around the state to commence in mid-May with the first seminar scheduled in Rochester on May 15, 2007. The Monroe County Board of Elections has asked to video tape the Seminar for use by that office. They will be providing the State Board with a copy for its own use, which could include posting on our web site, or making cd copies available to the public upon request. These various options will be explored. The seminars will run through mid June.

2. Staff is continuing its review for corporate over-contributions as well as for the last election cycle for campaigns, committees, and individuals.

3. Work continues on the Local Filer Project. The next two (2) phases were discussed at the Board's Conference in Syracuse. One phase enlists the assistance of the County BOE's to promote compliance by local filers who are now obligated to register and file with the State Board. The County Boards had previously identified filers who were so obligated, but who had not yet complied. The State Board sent letters to these local filers outlining the law and seeking compliance. There are still a substantial number of filers who have not complied. The County Boards had indicated that they would like to assist with this effort in order to prevent local filers from running a-foul of enforcement. The State Board provided the County Boards at the Syracuse Conference with the present non-compliance lists for their counties. They will be working over the next few weeks to obtain compliance. The second phase discussed concerns identifying local candidates for this Fall's elections. The State Board will be sending a post-conference memo to the County Boards outlining the information needed to get local candidates into our campaign finance database.

4. Commissioner Kellner introduced Liz Hogan who attended the meeting and is the candidate for the Enforcement Counsel position that was vacated by Michael Johnson. The Board voted to accept her appointment with a 4-0 vote.

5. Mr. McCann reported that IT and Campaign Finance staff were reviewing modifications to the system to allow filing from the new Microsoft Vista operating system. Commissioner Kellner commented that it was his understanding that there were discussions in the Legislature to require a web based filing system and inquired whether that project was ongoing. Mr. McCann said that he did not believe that there was consensus on that point. Mr. McCann thought that it was important that the Board anticipate this new operating system. Commissioner Kellner wished to state on the record, that he was opposed to spending any money to favor one vendor without a bidding process or a proper analysis. Mr. McCann assured the Commissioners that IT was studying the issue and would come back to the Board with a report and proposal.

- **ITU:** Bob Brehm reported in George Stanton's absence.

1. Compliance reviews for the counties and/or their vendors systems are ongoing. NTS's software and Schoharie County's home grown system tests have been completed. George recommends the Board approve the reviews.

2. George also asks for the Board's approval for the Co-Executive Directors to sign the final NTS contract.

3. George Stanton also requested the approval to negotiate the vendor contract for Hamer Enterprises (Vendor for Monroe County) for \$60,000.

4. George reported that the compliance reviews of all non-ES&S counties should be completed by the end of May with the exception of Delaware County.

The Board voted 4-0 on items 1, 2, and 3 as a group.

- **Old Business :** Memo's are attached about the final adoption of changes made to three regulations, 6209.9, 6214 and 6217. **The changes were approved by the Commissioners with a 4-0 vote.**

Commissioner Aquila asked if we have the option to use the lever machines for this year's elections without involving legislation. Todd Valentine responded that we have three options:

A. We do nothing and after we get sued, deal with it.

B. Change the statute and after we get sued, deal with it.

C. Or lastly, the Board could recommend legislation or the Board could extend the existing legislation to a specific event or date. Todd suggested that because we have to work with DOJ, that our third option would be better to tie this event, in other words the use of lever machines and the end of that use to an event, not a specific date. We must be consistent with what we do in Federal court and Commissioner Kellner also feels that we should propose an amendment to that statute and that Mr. Valentine will draft and circulate that amendment. There was no vote on this issue but the consensus was that all agreed an amendment should be drafted.

Commissioner Kelleher stated that we should leave lever machines in and use them for perpetuity and to then develop a plan B machine for the disabled community to use and leave it at that.

- **New Business** : Regulation 6210.19 with regard to the minimum number of voting machines required per polling place. There is a memo attached. The numbers in the regulations were derived from the AIR study with additional extrapolations to arrive at a meaningful number. The memo suggests that there should be one optical scan machine for every 3,500 to 4,000 active voters at the polling place. **With a vote of 4-0, the Commissioners all agreed to approve the figure of 4,000 voters per machine and to accept the rest of the memo as written.**

Next, a change is needed in the statute with regard to the Plan B machines so that these machines can be utilized in the 2007 elections by the county boards. Previously we had discussed this issue and agreed that this was a possibility but that the county boards could not purchase any new machines but to use the machines they had already purchased with HAVA money. The agreement was to extend the use of the plan B machines permanently until such time that the Board wishes to change that. **All agreed with a 4-0 vote.**

Discussion followed as to whether county boards can use HAVA funds for additional supplies for these Plan B machines, re the ballot set up, the sip and puff straws, etc. Commissioner Kellner pointed out that HAVA does not authorize use of federal funds for operations and maintenance. Although it was agreed that counties cannot use HAVA money for these but that the State Board will consider how it can offer assistance for ballot programming.

Voting machine contracts: there was a meeting in Syracuse at the NYSBOE annual conference with the NYC Board of Elections staff, OGS, the AG's staff along with NYSBOE staff to discuss the form of the contracts. There were basically three issues:

First, whether a certification bond is required. Commissioner Kellner asked Anna and Allison to review the regulations and report at the next meeting. The second issue was what percentage of the costs should be set for the performance bond and the scheduling of payments under the contract. OGS recommended a 5 or 10% bond. NYC had asked that the payment schedule have delays built in to assure proper operation of the equipment in an election. The Commissioners agreed to require 10% for the performance bond and not provide for a delay in payment after acceptance. Commissioner Kellner pointed out that there was no definition in the draft contract of acceptance or breach of warranty. There was a suggestion that there be a sliding scale for the notice to cure conditions depending on the impact on the election.

Commissioner Kellner noted that the meeting raised several technical issues concerning the source code and licensing provisions in the contract and recommend that NYSTEC review this situation. Commissioner Kellner proposed the formation of a working group similar to the one for the statewide database. This committee would consist of county board commissioners, NYC staff, Operations staff to review all these issues and to advise NYSBOE and OGS of how they should go. Commissioner Kellner moved that a working advisory committee be formed with the Director and Deputy Director of Election Operations plus four county commissioners and NYC staff to review and propose the terms for the contracts. **The Commissioners approved the motion with a 4-0 vote to accept.**

The source code provisions: if a vendor no longer supports a particular product they could allow county boards to get the source code and to get licensing so that they themselves can repair and review the codes. We will ask NYSTEC to review this situation. There was a recommendation made by the Board to set up an advisory committee similar to the one for the state wide database. This committee would consist of county board commissioners, NYC staff, operations staff to review all these issue and to advise NYSBOE AND OGS of how they should go. **This was moved by Commissioner Kellner with a 4-0 vote to accept.**

Commissioner Kellner moved to go into Executive Session to discuss personnel and enforcement issues. The motion was adopted 4-0. The meeting was adjourned to Executive Session at 3:40p.m.

Following the Executive Session, the Commissioners reconvened at 3:55 p.m. and voted on the following enforcement actions:

Preliminary Determinations

- CMP05-66 - Closed
- CMP05-68 - Closed
- CMP05-74 - Closed as amended
- CMP05-79 - Closed
- CMP05-89 - Tabled

Commissioner Donohue moved that the State Board go on record to oppose changing the date of this year's Primary Election from September 11, 2007 to any other date. **The motion was approved by a vote of 3-0; Commissioner Aquila did not vote on the motion.**