

Minutes

(Revised August 19, 2015)

Talbot County Board of Elections
215 Bay Street
Easton, MD 21601
July 8 and 16, 2105

Present:

Board

| | |
|------------------------------|-----|
| Joseph H. Secrist, President | (R) |
| Susan MacKinnon | (D) |
| Walter W. Black | (D) |
| Richard B. Bulman | (R) |
| John F. Hall | (R) |

Staff

Patricia L. Mitchell, Election Director
Philip Cronan, Board Attorney

Guests

Mary-beth Goll
Eugene Goll
Desvin Gabbidon, Regional Manager, Field Support Division, State Board of Elections

A meeting of the Talbot County Board of Elections was held on July 8, 2015 and July 16, 2015, at the Board office indicated above. Mr. Secrist called the meeting of July 8, 2015 to order at 9:30 a.m., at which point Mr. Black was absent. He noted that a quorum was present.

Approval of Minutes of June 1, 2015

Mr. Secrist asked if the Board had any corrections or additions to the minutes of the meeting of June 1, 2015 which had been forwarded to the Board Members by email in advance of the meeting. Mr. Bulman stated that it had been his intention that the election of Mr. Hall as recorder would be effective until the bylaws were adopted. Mr. Hall suggested that the election of recorder be repeated as part of old business. Mrs. Mitchell suggested to Mr. Hall that the minutes should be signed by him as recorder. Mr. Hall referred her to the model of minutes provided by the State Board of Elections, which indicated that the signature of the president, and the date of his signature, should

be included, instead. Mr. Black joined the meeting at this point. Upon motion duly made and seconded, the minutes were approved as drafted.

Addition/Changes to the Agenda

The following changes to the agenda were approved by the board: under Old Business, (a) Mr. Cronan's email concerning Motion No. 1 of the June 1, 2015 meeting, and (b) canvas minutes and report for the 2014 primary election; under New Business, (a) the status of the staff's response to the request of the Republican Central Committee for minutes for twelve months prior to the date of the request; (b) the State Board audits of the 2014 primary election and the 2014 general election; (c) documents needed for the evaluation of the mid-cycle performance of the election director; and (d) the State Board audits of the 2014 primary election and the 2014 general election.

Reports

Mrs. Mitchell provided her report in writing, a copy of which is attached hereto as Exhibit A. Mr. Bulman asked that, in the future, more detail be provided for each item contained in the report. Mr. Hall expressed his agreement with Mr. Bulman.

Mr. Secrist inquired regarding the training of the third employee. Mrs. Mitchell stated that it was going well.

Mr. Secrist asked which staff member was responsible for preparing and mailing voter notification cards. Mrs. Mitchell stated that the duty was shared by both staff members.

Mr. Secrist asked Mrs. Mitchell to obtain the twice-monthly email bulletin circulated by the State Election Board and to send a copy of all Board Members who wished to receive it. Mr. Secrist and Mr. Hall each stated that he wished to receive it.

Mr. Secrist referred to the item on the election director's report which referred to the warehouse space survey and asked that he be provided a copy. Mrs. Mitchell said she would provide Mr. Secrist a copy, but explained that the survey was, at present, merely a form which lacked any details.

Mr. Secrist asked Mrs. Mitchell to add several items to the Board's web page, including the correct date for the 2016 primary election; the districts in which there would be elections for school board; and deadlines for registration or change in registration. Mrs. MacKinnon questioned whether the County employee who would assist the Board staff in adding to the web page would be available to meet the Board's

request for filings to be made within certain deadlines. Mrs. Mitchell stated that she felt most requests could be met in a timely manner.

Mr. Bulman asked Mrs. Mitchell for details concerning categories of expenses and distribution of voting machines.

Mr. Secrist asked Mrs. Mitchell to print out the State Board's materials concerning mock elections and directions for the New Voting System Replacement project, as presented at the biennial meeting of the Maryland Association of Election Officials on June 11, 2015. Mrs. Mitchell did so prior to the Board's recess on July 8.

Mr. Cronan's report regarding Motion No. 1 of the June 1, 2015 meeting as well as his retainer agreement, were both separate items in Old Business and were deferred until that portion of the agenda was reached.

Old Business

Upon motion duly made and seconded, Mr. Hall was appointed recording secretary of the meeting by unanimous approval. Prior to the vote, Mr. Black questioned whether such a position as recorder was authorized. Mr. Secrist pointed out that the Board previously adopted the practice of appointing a recorder.

Use of Easton Fire House for early voting

It was the consensus of the Board that Mr. Secrist should draft a letter, based on Mrs. Mitchell's form letter requesting use of the facility for early voting, and ask to meet with Mr. Lynch to determine if the complaints which have been circulating could be addressed, and what action needed to be taken. Mr. Black suggested that, if one complaint was the failure of candidates to remove signs, then the Board should take the responsibility of seeing that the signs be removed. Imposing a limitation on the number of signs at the early voting location was also discussed. No action was taken out of concern of unduly interfering with electioneering efforts by candidates, and the matter was deferred.

Board Attorney's retainer agreement

Mr. Cronan had circulated his retainer agreement by email prior to the meeting. The Board's discussion mainly concerned whether Mr. Cronan should be required to attend all meetings. Mr. Cronan stated that he had reviewed the practices in other counties and found that those practices varied widely. Mr. Secrist, Mr. Bulman and Mr. Hall were of the opinion that legal issues arose in very few meetings, and were often not time-sensitive. For that reason, Mr. Cronan could respond to inquiries from the Board

by the date of the next meeting. Mrs. MacKinnon and Mr. Black pointed out that the prior Board had unanimously determined that it was important to have counsel at each meeting. Mrs. MacKinnon had a further concern. When Mr. Hall expressed a view regarding a legal matter, if Board counsel were not present, then there would be no one to whom the other board members might immediately turn for a possible contrary view.

All were in agreement that, if Mr. Cronan were to block out time to attend a meeting in the event that the Board determined that his presence were required, then it would be unfair not to pay him if he were not asked to attend. However, if he did not block out his time, then the Board would be at risk that he would not be able to attend on short notice.

A further concern was the language of proposed bylaw Section 5.5, which stated that the Board attorney would attend if asked to do so by the Board president. Mrs. MacKinnon questioned whether such a provision, without attendance by counsel at Board meetings, might deprive Board members of access to the Board Attorney. It was agreed that Section 5.5 be amended to add that counsel would also attend when requested by a majority of the Board.

Mr. Black performed an estimate of the amount that would be saved by not having Mr. Cronan attend each meeting. Mr. Bulman asked if Mr. Cronan had an estimate of what the likely annual cost would be. It was apparent that, when Mr. Cronan's fee for the mandatory biennial meeting was added to required attendance at monthly meetings, the cost would exceed the budget. Upon motion duly made and seconded, by a vote of three to two, the Board decided that Mr. Cronan's attendance at every Board meeting should not be required. Mr. Cronan agreed to change his retainer agreement to state that his presence at monthly meetings would be required only when he was asked to be present by the Board president, or when his presence was requested by a majority of the Board. The revisions would be made available after the meeting.

Motion No. 1 adopted at the June 1 meeting

Mr. Secrist asked Mr. Cronan to comment on his email in which he had stated that it was his opinion that the State Board had adopted a recommendation that each local election board office be staffed by an election director and two other staff members. Mr. Cronan reiterated his earlier opinion, given by email, that the State Board had adopted such a recommendation in October 2000 and had reaffirmed its position in 2001, such that Motion No. 1 was void.

Mr. Hall responded that, while he agreed that the State Board had adopted such a recommendation, it had not done so in a manner that made the recommendation a binding regulation. He pointed out that the recommendation had not been adopted in

the manner required under the Code of Maryland Regulations (commonly referred as "COMAR") for the adoption of a regulation and that it had never been published in COMAR.

He further pointed out that, if such a recommendation were a binding regulation, then it would be arbitrary and capricious in the absence of any proof of what the actual staffing needs were.

He also referred to 65 Att'y Gen. Op. 396 (1985) in which the Attorney-General had opined that, if a rule were intended to be of general applicability, enforceable as law, then it had to be adopted in the manner prescribed by COMAR. It was irrelevant whether a policy was a "rule" or a "recommendation"; it was not binding unless the procedures in COMAR were followed. As a result, Motion No. 1 was fully effective.

Mr. Secrist added that the Board has been staffed solely by the Election Director and one additional staff member during the 2014 election, and had not suffered any difficulties arising from an inadequate number staff members.

A discussion then followed of what action the Board should take and it was the consensus of the Board that no action should be taken until Mr. Hall's petition to the State Board was finally determined. Mr. Hall estimated that the entire process could take as much as four years.

Mr. Black moved that Mr. Secrist write to the County and to the State Board, stating that Mr. Hall's petition to the State Board was done on his own initiative and not at the direction of this Board. The motion was carried by four votes with no opposition.

By-Laws

Mr. Bulman discussed his motion, introduced at the June 1, 2015 meeting, to amend the bylaws. He began by stating that he had discovered two errors in the bylaws as presented on June 1, 2015, and presented amendments to make the needed corrections. Those amendments are attached hereto as Exhibit B.

Mrs. MacKinnon presented her own proposed changes to the bylaws, which are contained in a document attached hereto as Exhibit C.

Mr. Bulman undertook an explanation of each provision of the proposed bylaws that differed from the current bylaws.

Mrs. MacKinnon questioned the deletion of the signing requirement. Mr. Hall responded that bylaws are not a contract which requires everyone's agreement. They

become effective upon the vote of a majority of the Board. Adding a requirement that they be signed by all members merely created the possibility of confusion as to whether they would be effective if a member refused to sign. Mrs. MacKinnon asked for Mr. Cronan's thoughts, and Mr. Cronan concurred with Mr. Hall.

Mr. Hall pointed to his experience as a member of the board of directors of a 501(c)(3) not-for-profit organization where the members were expected to sign a separate document stating that they were aware of limitations of the Internal Revenue Code, thereby reinforcing that compliance with those limitations is necessary to preserve the tax-free status of the corporation. He had no objection to signing such a separate document for the limited purpose of acknowledging the limits of State law on engaging in political activity. Nevertheless, as he has previously sworn he would abide by those laws, he saw no need to set out an agreement to do so in the document acknowledging the limitations that apply.

Mrs. MacKinnon referred to proposed Section 2.2, A., 4, and asked if the provision would deny other board members access to the Board attorney. Mr. Bulman expressed his intention that it would not, as the section made the president the "primary point of contact," not the "exclusive point of contact."

Mrs. MacKinnon stated that she was concerned that hour of the proposed quarterly evening meeting might be confusing to the public, who would expect it to be held at 9:30 a.m., but did not oppose the change. Discussion regarding the hour of the evening meeting ensued, but no change from the beginning time of 7:00 p.m. was made.

Mr. Bulman noted that the door giving access to the meeting was closed, primarily to avoid disturbance of or by the county employees working in the ante room. He suggested that a sign be prepared for posting on the door, giving information that the meeting was in progress and that members of the public wishing to attend should enter.

Mr. Black questioned how Section 3.1, D., regarding cancellation of a meeting, would operate in actual practice. Mr. Bulman explained the provision was unchanged from the current bylaws.

As shown on Exhibit B., Mr. Bulman proposed to change Section 4.,1.,C, to eliminate the current language which refers to "regular" members. He proposed to change Section 4.,3.,A., b, to eliminate reference to an exhibit.

Mrs. MacKinnon stated that she would like for the last sentence in Section 4.5 to be re-worded to remove any possible misunderstanding that the sentence authorized

partisan political activity. Upon motion made, seconded and duly carried, the Board directed that the sentence in question be re-worded as follows:

“Further, Members shall attend any election-related training or educational meetings relating to conducting fair elections each feels would be beneficial to expanding his or her knowledge.”

Mrs. MacKinnon objected to the removal of what is Section 4.6, “Fiduciary Duty of to the Board” of the current bylaws, stating that, during her four years on the Board, she referred to it for guidance in the performance of her duties.

Mr. Hall responded that he recognized that he had sworn an oath to uphold the Constitution and laws of the State of Maryland, and, thus, those rules limiting political activity as set forth in COMAR. Nevertheless, nothing in the State Election Law, nor in COMAR, made him a fiduciary by virtue of being a member of a local election board. He was unwilling to act as a fiduciary without a clear statement of what his duties as a fiduciary were; to whom he owed a duty of fidelity, and what the limits of his potential liability were for a breach of his fiduciary duty, none of which is contained in current Section 4.6. Without knowing the limits of his possible liability, neither he, nor the Board on his behalf, would be able to purchase director’s insurance against risk of accusation of breach.

He further stated that he had observed this very board, at its April meeting, invoke Section 4.6 as means of squelching dissent. Mr. Secrist added that he had experienced Board members interpreting the word “fiduciary” in an imprecise manner to justify their individual goals rather than as a means of serving the interests of the Board.

Mr. Black suggested that the duty was owed to the Board. Mr. Hall pointed to the impermissible conflict-of-interest and impermissible possibility of collusion which would exist if each board member were a both a fiduciary of the Board, as well as a member of the Board to which the fiduciary duty is owed.

The Board next addressed Section 5.1, C., 3. Mrs. MacKinnon questioned whether an individual member should have the authority to request information without prior consent of the Board, which information might then not be made available to other members. By motion made, seconded and duly carried, the Board directed that the second sentence in the referenced section be re-worded as follows:

“The election director shall provide copies of the requested data and information and report summaries to the member making the request, and to all other members of the Board.”

Mr. Secrist directed the attention of the Board to subsections C and K of Section 5.3, referring to the Election Director's formulating annual objectives and the Board's approving annual objections, and stated that it had not been done in the past. He further pointed to the need to clarify what should be included in annual objectives. The consensus of the Board was that annual objectives would have to be determined based on the anticipated duties to be executed by the local election board during each upcoming year.

As discussed when considering the Board's attorney retainer agreement, the Board directed that the following language be added to Section 5.5, B., 1: "or by a vote of the majority of the Board."

Upon a review of Section 5.6, A., 1, and the language of the performance review document provided by the State Board, the Board directed that the reference section be re-worded as follows: "1. The Board shall perform, each year, a mid-cycle performance review and an end-cycle performance review."

The Board took a brief recess approximately noon, whereupon, Mr. and Mrs. Goll left.

The meeting reconvened shortly after noon. Mrs. MacKinnon presented her proposed changes to the bylaws. She said that she did not propose that her changes be adopted in full. Rather, she proposed that those changes in her proposal which related solely to the removal of all references to the role of substitute members be adopted. Mr. Bulman pointed out that he had done so in his proposed bylaws, and that the wording might conflict. Mrs. MacKinnon agreed that her motion to adopt such limited portions of her proposed changes include a qualifier that, in the event of a conflict between her proposals and those contained in Mr. Bulman's proposals, Mr. Bulman's proposals would prevail. Her motion was seconded by Mr. Black and approved by the Board.

Mr. Bulman revised his motion to adopt his proposed bylaws, made at the June 1 meeting, to state that he moved the adoption of his proposed bylaws, as amended by the specific actions of the Board noted above in these minutes, and as amended by Mrs. MacKinnon's motion, to the extent not inconsistent with Mr. Bulman's proposals.

The Board then recessed until Thursday, July 16, 2015 at 9:00 a.m.

The Board reconvened on Thursday, July 16, 2015, at 9:00 a.m. at the Board office. Mr. Black was absent due to illness; the other four members were present, constituting a quorum. Eugene Goll and Mary-beth Goll were present. Desvin Gabbidon joined the meeting shortly after it had been reconvened.

Mr. Bulman revised his motion to adopt bylaws to refer specifically to a thirteen-page document bearing the revision date of July 10, 2015, which was a compilation of the bylaws as previously proposed and as amended by this Board at its meeting which commenced July 8, 2015. Mrs. MacKinnon stated that she was opposed to the bylaws mainly because of the deletion of the assumption by each board member of a fiduciary duty, and because of the limits put on access to the Board attorney. The motion to adopt the bylaws was carried by a vote of three in favor; one, opposed.

The Board then addressed the November invoices which were over the budget limits, specifically, \$125.00 charged to the account designated "part-time employees". Ms. Mitchell explained that one election judge had failed to sign in, and was not paid. When that judge complained about non-payment, it was determined that she was entitled to payment. As a result, payment was made late.

The costs of the primary election were not submitted to the County until after July 1. However, since the money had been allocated for the fiscal year ending June 30, 2015, the funds were still available and the payment of those expenses were not in excess of amounts budgeted.

Ms. Mitchell did not retain a copy of the invoices for forms. She promised to obtain a copy from the County.

Ms. Mitchell stated that she had no control over the amount submitted for workers' compensation insurance premiums.

The amount shown under "Travel" during the fiscal year ending June 30, 2015 was the expense of the mandatory biennial meeting and the MAEO meeting held July 10 and 11th, 2015.

The apparently mistaken entry for rental of polling places in the wrong account was made at the County Finance Office and was corrected by that office.

Ms. Mitchell stated that all materials belonging to the Board had been removed from the former office on North Harrison Street except for certain documents which the Board has to retain for 22 months, and that were secured in a vault. Ms. Mitchell stated that the County had assured her that the documents could remain at the old office until the building was sold or otherwise made use of by the County.

Under New Business, Mrs. MacKinnon made a motion that emails between Mr. Hall and Mr. Cronan, which had contemporaneously been shared with members of the Board, relating to the terms of Mr. Cronan's Legal Representation Fee Agreement, be made part of the minutes. The motion died for a lack of a second.

The Board then addressed the budget for fiscal year 2015-2016. In light of the uncertainty of whether the figures represented in the budget presented would be the final figures, no action was taken.

Ms. Mitchell observed that the County hoped to save money by having the Election Board use the County's bulk-mail permit, and that the County had turned down a request for new scanners. Nevertheless, the Board office copier could be used as a scanner.

The Board then turned to June expenses. Mr. Secrist asked for an explanation of the expense of mailing new voter notification cards. Ms. Mitchell stated that it had been the practice to do so whenever the board office was moved. Mr. Secrist pointed out that there was no authorization for such expense in the budget and thus should not have been made without prior approval by the Board.

Regarding new voting equipment, Ms. Mitchell stated that the Board staff would be trained on the equipment on July 29 in Dorchester County. As a result, the Board office would be closed that day.

Mr. Secrist asked about the warehouse survey for voting equipment storage. Mr. Gabbidon responded the State Board employees were currently preparing a proposal for all jurisdictions which would be presented to Linda Lamone, State Administrator, for review by July 24. It was expected that, by July 30, the proposals for warehousing the leased voting machines would be sent to the local election boards. He explained that the lessor of the voting machines required that there be an electrical supply and climate control, which the State was contractually obligated to provide. Additionally, space for staff to perform work on the equipment was needed.

Mr. Gabbidon addressed preparation for the mock election. The local board would receive a questionnaire from the State Board directed to where and how the local board intended to conduct a mock election. He stated that the mock election was intended to be a system-wide test which would probe for any difficulties in advance of an election.

Mr. Gabbidon and Ms. Mitchell both addressed security for the voting machines during early voting. They both stated that, like most of the other counties, there was no actual secure facility in which to store the voting machines. Clearly, at the Easton fire house, there was no way to exclude the emergency medical service responders from access to their equipment, which was stored in the same location.

Instead, the voting equipment was closed out each night after voting hours ended and re-opened the following day in a manner designed to detect whether the machines

had been tampered with. Any machine which had been breached would be taken out of service, and its tally compared to the paper ballots.

Mr. Bulman asked why there had been no response to the request made by the Republican Central Committee for copies of minutes for the year prior to the request in late 2014. Ms. Mitchell's response made it clear that she had not done so. She said that the chairman of that Committee, Nicholas Panuzio, said he had gotten them from Mr. Secrist. Mr. Secrist said he had given Mr. Panuzio only the June 2015 minutes.

Ms. Mitchell said that she was arranging for minutes for a limited period of time to appear on the Board's web page. She then stated that her staff took care of such matters. Mr. Hall pointed to the extreme lapse of time and asked that she make copies of minutes for a year prior to the date of the request to Mr. Grodecki, who had authored the response. Ms. Mitchell said she would do so.

The Board then reviewed the State audit of the 2014 primary and general elections. Mr. Bulman and Mr. Hall expressed displeasure at the number items designated as "repeat items" and the number of items where it was noted that this Board made no response. The audit should be a guide for mistakes to be corrected and prevented from occurring in future elections. They were also disturbed that the audit noted that Ms. Mitchell had failed to respond to telephone calls from the State office received while she was on vacation upon her return from vacation.

Ms. Mitchell also stated that telephone messages to her at work would now appear on her personal email, so that she would not fail to respond to telephone messages.

Ms. Mitchell stated that some of the problems were caused by the difficulty in finding judges of suitable proficiency. She said that the new system likely would eliminate some judges who had performed less than satisfactorily in the past, because they would not be able to satisfy the training requirements. Mr. Gabbidon agreed that finding suitable judges was a state-wide problem.

Mr. Secrist asked whether a meeting of the chief judges had produced any observations and recommendations. Ms. Mitchell stated that the meeting had been useful.

Mr. Gabbidon explained that the reference to matters to be discussed in a subsequent report likely meant that they would be included in a "comprehensive audit report" which followed the audits which had been furnished to the Board. Mr. Bulman asked Ms. Mitchell to provide, to the Board, a copy of her response to the State audit.

Mr. Secrist then distributed a document setting forth the statement regarding Mr. Hall's petition to the State Board, in response to the motion by Mr. Black made at the July 8, 2015 session. Mrs. MacKinnon suggested that discussion of the contents of the proposed letter be deferred until Mr. Black could be present and the Board agreed to do so.

Mr. Hall observed that the Board staff had prepared the sign requested on July 8 and that it was posted on the door. He thanked Ms. Mitchell.

Mrs. MacKinnon then questioned the fact that the agenda did not include her request, which she made July 8, 2015, for the addition of an item to discuss the appropriateness of the new Board's request for documents containing the Board's evaluations of the Election Director's performance for the prior two years. It was explained to her that the agenda was the same agenda which had been prepared before the start of the July 8 2015 meeting, that is, prior to her request.

In a discussion of the request, Mrs. MacKinnon stated that those evaluations were confidential, such that the new board had no right to see them. Mr. Bulman and Mr. Hall disagreed. Mr. Bulman stated that, as a member of this Board, he was entitled to all of the records of the Board. Mrs. MacKinnon moved that the Board clarify what information could be considered by the new Board, by asking for an opinion as to confidentiality of prior evaluations from Mr. Cronan, and that the performance evaluation be deferred to the next meeting. The motion was seconded by Mr. Bulman and was carried.

Mr. Hall then presented a document entitled "Director's Acknowledgment of Limitations on Political Activity" and suggested that, out of deference to the State Board, the document be signed by the local election board. Mr. Secrist, Mr. Bulman and Mr. Hall signed the document. Mrs. MacKinnon declined. The document was delivered to Ms. Mitchell for delivery to the State Board, along with a copy of the bylaws adopted at this meeting.

Mr. Hall then announced, again in deference to the State Board's guidelines, that he had made a \$100.00 contribution to Congressman Harris. Mr. Bulman stated that he had made a contribution to a political action committee and asked if that had to be disclosed. A review of the State Board's guidelines revealed that it did not.

Mr. Secrist then announced that the next meeting would be held August 19, 2015 at 7:00 p.m. at the Board office.

