

State Notes

TOPICS OF LEGISLATIVE INTEREST

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The Board of State Canvassers Revisited By Suzanne Lowe, Bill Analysis Coordinator

An article in the September/October 2002 issue of *State Notes: Topics of Legislative Interest* described the Board of State Canvassers and provided an overview of its role in certifying petitions for statewide ballot proposals. Although the Board is rarely on most people's "radar screens", it again has been in the news due to a petition filed by the Michigan Civil Rights Initiative (MCRI) Committee. Since the Board did not certify the petition at its July 15, 2005, meeting, the MCRI has taken the matter to the Michigan Court of Appeals. This article discusses recent developments concerning the Board, including Court of Appeals decisions and legislative proposals.

To recap the previous *State Notes* article: The Board of State Canvassers is an entity mandated by the Article 2, Section 7 of the State Constitution, and established by the Michigan Election Law. The board consists of four members, including two from each major political party, appointed by the Governor with the advice and consent of the Senate. At least three members must be in agreement for the Board to take action.

Pursuant to constitutional and statutory provisions, the Board is responsible for determining the "validity and sufficiency of the signatures" on a petition to amend the Constitution. The Election Law also requires the Board to "ascertain if the petitions have been signed by the requisite number of qualified and registered electors" and "to make an official declaration of the sufficiency or insufficiency of a petition". It is these responsibilities, and the extent of the Board's role in fulfilling them, that have been the focus of considerable debate and litigation over the years.

Court of Appeals Decisions

Before the latest controversy involving the MCRI petition, the Board was in the spotlight preceding the November general elections in 2002 and 2004. The 2002 disputes involved proposed constitutional amendments that dealt with 1) the distribution of tobacco settlement revenue, and 2) the sentencing or treatment of drug offenders. After the Board deadlocked on the tobacco settlement petition and found that the drug sentencing petition was insufficient, the interested parties filed actions in the Court of Appeals. The Court agreed with the Board on the drug sentencing petition but ordered the Board to certify the tobacco settlement petition for the ballot. Both cases involved the extent to which a petition must identify existing constitutional provisions that a proposal would amend or abrogate, as required by the Election Law, and the responsibility of the Board to determine whether a petition meets this requirement. In keeping with Michigan Supreme Court and Court of Appeals precedent, the Court held in the tobacco settlement case that "...the Board of Canvassers' authority does not extend to conducting a complex legal analysis of constitutional issues" (*Citizens for a Healthy Michigan v Board of State Canvassers*, No. 243505). Regarding the drug sentencing petition, the Court found that no legal analysis was required to conclude that the petition was defective (*Michigan Campaign for New Drug Policies v Board of State Canvassers*, No. 243506).



In 2004, the Court of Appeals again addressed two petitions that the Board did not certify. The first, which was ultimately placed on the ballot and approved by the voters, proposed a constitutional amendment stating, "To secure and preserve marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." After the Board had previously approved the form of the petition, it split evenly on whether to certify the proposal at two meetings in August 2004. According to the Court, at the first meeting two members declined to certify the proposal on the basis that it was unlawful and unconstitutional. At the second meeting, two Board members voted against ballot language proposed by the Bureau of Elections, expressing concern that the description did not reflect the fact that the proposal could be interpreted to prohibit the recognition of existing or future domestic partnerships between a man and a woman or between a same-sex couple, or to prohibit health insurers from providing a plan allowing benefits to unmarried couples, either opposite sex or same-sex.

The Court concluded that the Board erred in considering the merits of the marriage proposal (*Citizens for Protection of Marriage v Board of State Canvassers, et al.*, 263 Mich App 487). The Court stated, "The Board comes within the definition of an 'agency' in the Administrative Procedures Act...An agency has no inherent power. Any authority it may have is vested by the Legislature, in statutes, or by the Constitution...The Board's authority and duties with regard to proposed constitutional amendments are limited to determining whether the form of the petition substantially complies with the statutory requirements and whether there are sufficient petition signatures to warrant certification of the proposal."

While the other disputed petition in 2004 did not propose a constitutional amendment, it also raised the issue of the Board's authority to determine the sufficiency of petitions. This case involved a petition seeking to nominate Ralph Nader as an independent candidate for the office of the President of the United States (*Deleeuw, et al. v Board of State Canvassers, et al.*, 263 Mich App 497). After the Secretary of State determined that there was a sufficient number of valid signatures, the petition was challenged because most of the signatures had been obtained by members and officials of the Republican party. At its August 2004 hearing on the challenge, the Board of State Canvassers was unable to reach a decision.

The Court of Appeals, in its opinion, repeated the language quoted above about the Board's status as an "agency". The Court pointed out that, under the Election Law, the Board's "sole duty" with regard to qualifying petitions is to determine the validity of the signatures on them, including those of the people who circulate the petition, whether they are the signatures of registered voters, and whether there are sufficient valid signatures to certify the petition. "There is nothing in the statute that would permit the board to look behind the signatures to determine the motives of the individual signatories or the motives or desires of the candidate." The Court held that the Board had breached its clear legal duty to certify the petition.

MCRI Petition

On January 6, 2005, the MCRI Committee filed with the Secretary of State a petition to put the following language on the November 2006 general election ballot:



A proposal to amend the constitution to prohibit the University of Michigan and other state universities, the state, and all other state entities from discriminating or granting preferential treatment based on race, sex, color, ethnicity, or national origin.

On April 18, 2005, a group known as “By Any Means Necessary” (BAMN) (or the Coalition to Defend Affirmative Action, Integration, Immigrant Rights and Fight for Equality by Any Means Necessary) filed a challenge to the petition, based on alleged misrepresentation of the petition by the circulators. According to opponents of the petition, a majority of the people who signed the petition forms were told by circulators that it was in *support* of affirmative action (“Deceptive Tactics Alleged in Attempt to Ban Affirmative Action”, by T.C. Allen, *Michigan Chronicle*, April 27-May 5, 2005).

On July 15, 2005, the Chief Deputy Attorney General gave the Board of State Canvassers a copy of a letter (of the same date) to State Representative Leon Drolet, in which the Deputy Attorney General responded to several questions the Representative had asked regarding the process of challenging signatures on petitions submitted to the Board. In particular, according to the letter, the majority of the questions “relate to whether the Board may consider claims of ‘fraudulent inducement’ or ‘fraudulent misrepresentation’ in determining the validity and sufficiency of petition signatures”. Based on an analysis of the Constitution and the Election Law, and the Court of Appeals opinions in *Citizens for Protection of Marriage* and *Deleeuw*, as well as other pertinent decisions of the Court of Appeals and Supreme Court, the Deputy Attorney General concluded that the Board may not consider such claims “...because neither the Michigan Constitution nor Michigan laws expressly or implicitly grant the Board the authority to do so”. In response to another question, the Deputy Attorney General also concluded that a signer of a petition to amend the Constitution may not have his or her signature removed once the petition has been filed with the Secretary of State.

According to the Bureau of Elections, in the Department of State, the number of signatures required to put the MCRI petition on the ballot is 317,757. The total filing contained 508,159 signatures. Based on the results of random sampling, the Bureau determined that an estimated 455,373 valid signatures appear on the petition. The Elections Director recommended that the Board of State Canvassers certify the petition as sufficient.

The Board held a hearing on the petition on July 19, 2005. After approximately six hours of testimony and discussion, the Board voted on several motions, none of which was approved. The motions included the following:

- 1) A motion that the Board of State Canvassers, with the assistance of the Secretary of State, investigate challenges to the petition and conduct hearings.
- 2) A motion that the Board reject the petition as insufficient and constitutionally infirm.
- 3) A motion that the Board certify the petition.
- 4) A motion that the Board reject the petition because of a conflict between the summary and the actual text of the petition.



The Board members split two to two on the first, second, and fourth motions. The motion to certify the petition received two “no” votes, one “yes” vote, and one abstention.

On August 2, 2005, the MCRI Committee filed a brief with the Court of Appeals, “asking it to require the Board to fulfill its legal duty to Michigan voters and certify the petitions”, according to an MCRI news release.

Legislative Proposals

Article 2, Section 7 of the State Constitution provides, “A board of state canvassers...shall be established by law”, and governs its membership. The Constitution does not, however, specify the Board’s functions or duties, which are set forth in the Michigan Election Law. (Constitutional provisions concerning the certification of ballot proposal petitions assign responsibilities to “the state officer authorized by law” or “the person authorized by law”. The Election Law states that those terms refer to the Board of State Canvassers.) Thus, although the Board is constitutionally mandated, its authority is prescribed by statute and can be changed by legislation.

Earlier this year, the Michigan House of Representative and the Senate passed House Bill 4275, which proposed an amendment to the Michigan Election Law that would require the Board of State Canvassers to declare a ballot question petition sufficient unless it determined that the petition was not in proper form or that the number of valid signatures was less than the required minimum number. The bill also stated that, in determining the sufficiency of the petition form, the Board could not consider the substance of the proposal affixed to the petition. According to proponents of the legislation, enacting this language could help prevent future litigation like that seen before the last two general elections.

Governor Granholm vetoed House Bill 4275 on July 21, 2005. In her veto message, the Governor referred to the unwillingness of the Board to approve the MCRI petition “...given the serious nature of the alleged fraud and misrepresentation”. The Governor expressed concern that “...House Bill 4275 could be interpreted to interfere with the ability of the Board of State Canvassers to canvass petitions, make official declarations on the sufficiency or insufficiency of petitions, hold hearings upon any complaints filed, or conduct investigations of petitions”.

On July 29, 2005, Senator Alan Cropsey announced in a news release that “...legislation is being drafted to address an out-of-control Board of State Canvassers that has repeatedly violated the law and disenfranchised voters by overstepping its authority and making politically charged decisions”. According to the news release, the legislation would transfer duties of the canvassers to the Bureau of Elections.