

HAMILTON COUNTY ELECTION COMMISSION
MINUTES OF MEETING
March 13, 2013

Call to Order:

Upon notice duly given, Chairman Walden called to order a regularly scheduled meeting of the Hamilton County Election Commission at 8:15am on March 13, 2013 at the office of the Hamilton County Election Commission, 700 River Terminal Road, Chattanooga, Tennessee

Moment of Silence

Pledge of Allegiance: Commissioner Walden

Present at Meeting:

Commissioners Walden, Summers, Anderson, Braly, Crangle and Attorney Clem were present at the meeting, and staff of the Election Commission as well as members of the media and public.

Approval of Minutes:

Commissioner Braly: made a motion to approve the minutes.

Secretary Summers: seconded.

Legal Matters:

Attorney Clem stated that John Konvalinka filed a suit over the de-annexation, but that he believed that after they received the results that he would withdraw the suit. The votes were 25 to remain annexed and 24 to be de-annexed

New Business:

District 9

Chairman Walden stated that they would do the certification at the end of the meeting. He further stated that the commissioners had received the briefs from Mr. Murphy and Mr. Hakeem's Camp, We have read them and understand them but would like to give each candidate or their council a chance to address the commission within reason.

Stuart James stated that he had witnesses to speak.

Chairman Walden stated that he didn't think this was the place nor did we have the authority to do that. He then asked if Secretary Summers and or Attorney Clem would advise on this issue.

Secretary Summers stated that he thought they needed to make a decision on what is presently before them and if they want to open it up for witnesses that court is the place to do so.

Attorney Clem stated that he agreed with Secretary Summers.

Stuart James stated that he wanted to open with what Secretary Summers stated at the last meeting that there are constitutional issues involved here. In my statement to you guys on behalf of Mr. Murphy that I mention the first amendment. This commission has had a long standing policy of doing one thing and that is to let the voters decide. The first thing I want to talk about is write in voting. This ballot has a write in line and it has an oval to circle in. It takes an effort to circle in that oval. It is a conscious choice on behalf of the voter and it is irrelevant if there is a write in candidate that is qualified to run for office. It is my right as a voter, your right as a voter to circle in that oval, fill in the blank with another name, or leave it blank. When the ballots go through the accu-vote the votes are recorded as cast ballots You have to have a majority vote to win. In 2002 when the voters voted on the city charter section 5.3 in regards to the provisions in a runoff election not one word was changed. The seven votes that we are discussing today are not votes for the candidates they are votes for the office. I'd like to talk

Hamilton County Election Commission-Minutes of Meeting March 13, 2013 Page 2

about Mr. North's letter, everything he says about Mr. Hakeem falls apart for one issue and one issue only. He cites 2-7-133b and I'd like to read it to you. "If the voter marks more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the voter's choice for any such office to be filled or on a question, the voter's ballot shall not be counted for such office and shall be marked "Uncounted" beside the office and be signed by the judges. It shall be counted so far as it is properly marked or so far as it is possible to determine the voter's choice. There are two things I will make on point. I don't think the code provision applies and we are talking about ballots cast not ballots counted, and three, the voter gets to choose who they want to vote for whether it is for none of the above, the candidate or if it is a write in candidate. Here is why this choice is important and why this section doesn't apply. Because there was no ballot that was not cast in this election. There is not one issue where you have someone and their intent is not known.

Commissioner Anderson asked was he (Mr. James) saying that the Brown case or the City Charter was specifically defines votes cast are write in votes?

Stuart James stated that it does not specifically define those two terms. I am going to pass this out to everyone. **SEE ATTACHED**

He further stated that what has been custom and practice is you have always listed the write in votes.

Chairman Walden stated that we have always listed the write in votes but we have never counted the write in votes unless there was a legitimate qualified write in candidate. Until after last meeting we had not looked at the seven ballots. They were cast but were not counted to see who or what they voted for.

Stuart James stated that he differed with the chairman on that analysis. They have always been accounted for and they have always been recorded. If you do not count these votes then there are seven people's votes that made no difference particularly if they are protest votes. It comes down to what you have said in the past. No harm no foul let the voters decide and then it is over. Unless we have a repeat of this which I doubt we would have.

Chairman Walden asked how would you prevent a repeat of this? We had two candidates initially. We have another election and it comes down to the same thing, some unknown voter votes for some unknown candidate or marks a ballot for no candidate. There are only two candidates qualified to run for this office. There was not a write in candidate.

Stuart James stated that you are doing exactly what Mr. North wants you to do, and don't get caught up in term qualified candidate. Section 5.3 states that doesn't speak in terms of qualified candidates.

Chairman Walden stated that by state law there were only two candidates both non partisan and there was not a third party that was a write in candidate.

Stuart James stated that was not true, there were 3 choices.

Chairman Walden stated that under his choice (Mr. James there are endless choices.)

Secretary Summers stated that just for clarification, we have used the term ballots cast throughout this, Then he asked was there anything dealing with write in ballots or used as the term write in ballots cast?

Stuart James stated that there was not.

Attorney Clem stated that he has not found anything either.

Peter Murphy stated that the reality is there are some definitions. I understand that under state law there is a way you count ballots and under state law there is a way a ballot can become invalid. That doesn't apply to any of the seven ballots we are talking about here today. They are cast ballots and while you may not count them under state law, The city of Chattanooga due to past abuses was sued in Brown vs. Board of Commissioners and we are a voting rights act covered jurisdiction, and when Judge Edgar put down a federal court order it did change the rules as it applies to the city charter as compared to the rest of the

state. It is a heightened standard that protects the voters; the majority in these districts most of all. He then stated that no it hasn't happened before and that the California court said that after the first ballot you can ban the write in votes. So the odds of this happening a second time (we got struck by lightning) are very very small. If we fail to follow the court order we are setting up these districts.

Chairman Walden stated that this is the same thing that has happened this time?. We have seven write ins and two are for unknowns, two are for candidates in other districts (Freeman and McGary) and then we have JJ, Melanie Collins and Michael Dewayne Davenport. The votes for Freeman and McGary could just be that they didn't know who their councilman was.. Isn't Mr. James' argument that this election was manipulated by people who cast votes for people who were not running.

Peter Murphy stated that they are protest votes cast as is their right.

Chairman Walden stated that we are assuming that is what their motivation was, it couldn't be that they just thought they were voting for their candidate he just wasn't a legitimate or qualified candidate in this district. The votes for Freeman and McGary weren't protest votes they were just votes for the wrong candidate and in the wrong district.

Peter Murphy stated that you have to count all the ballots cast, in the federal court order paragraph 28 the language from charter 5.3 is paragraph 28 of the federal court order. The court knew they could do it another way because in paragraph 30 they point out that you only need a frugality for the school board. This provision seeks to prevent a particular type of mischief.

Commissioner Crangle stated that he did not know if they were protest votes or not but he did know they were wasted votes because they did not vote for anyone on the ballot in that district. This mischief you talk about, people could really cause mischief if they wanted to do that by casting votes out of the ordinary way by voting for an unqualified candidate.

Commissioner Braly asked had we always counted the write in votes?

Chairman Walden stated that no, we have always recorded the votes, we have never counted the write in votes. We count every ballot that is ran through the machine, there is no way with the machine we have that we cannot count the ballot that has been cast, but we have never counted who got what votes unless they were a legitimate write in candidate. We count the ballot that went through the machine but not who they voted for.

Attorney North stated that he wanted to make sure you knew what they were talking about in regards to the seven write in ballots. These are the seven write in ballots **SEE ATTACHED** You do not have to focus on the seven write in ballots but focus on the two that do not have a name attached, because if you discount those then Mr. Yusuf Hakeem wins the election. When Mr. James talks about letting the voters decide, the voters decided on March 5th Yusuf Hakeem won the election on March 5th by six votes. The voters have already spoken. It was and always will be a two candidate race. I specifically pointed out the two blank ballots that voted for the mayor and the amendment. Mr. James talked to you about ballots cast and uncast ballots. Let me read to you not my definition but Mr. James definition of an uncast ballot, That is on page four of his letter first full paragraph in the middle of the paragraph. An uncast ballot is when a voter votes on a ballot for some offices or questions but leaves others with no choice selection, this is sometimes called an under vote, and unless I am missing something or he left out a word this is exactly what happened on the two ballots. They voted for mayor and the ordinance but did not write in a write in candidate for district 9. That is exactly what we are talking about with an uncast ballot. Mr. James wants to distinguish somehow in a contrived distinction between uncast or cast votes and votes for the office. There is a case and Mr. James minimizes it but it specifically dealt with that exact point. This is a case from Missouri and let me read you what the courts said, the courts language not my language says only those voted ballots which express a preference for a declared candidate

Hamilton County Election Commission-Minutes of Meeting March 13, 2013 Page 4

can be included in the total "votes cast for an office" thus the 64 write in void ballots cannot be considered in the total number of votes cast because they failed to indicate preference for a valid candidate. That is exactly what we are talking about here. Mr. James would somehow tell you that if you don't allow this runoff or if you reject these seven write ins or at least the two undesignated ballots that the wrath of God is going to come down from district court and we will all be arrested. I can tell you that as we submitted the order to you from federal district court that they gave up jurisdiction 20 years ago. Federal court never opined what was and was not a write in ballot or how that was to be dealt with. The city charter does not deal with it so you must look to state law. State law says if you cannot discern who the voter is voting for you must not count that, you must ignore it, it is a legal nullity. Again we had two declared announced candidates and no properly qualified write in candidate; this was and always will be a two candidate race. There were 2054 votes cast of which Mr. Hakeem received 1030 and that is 50.1% of the total votes.

Commissioner Crangle stated that if you look at the City of Chattanooga's website you will find a statement on there that talks about the 50% +1, where did that come from?

Attorney North stated that he didn't know because the charter consistently talks about a majority and anything in excess of 50% is a majority.

Chairman Walden asked if we are to take the position of counting every ballot cast including write ins, what is to stop us from getting a ballot and voting for four write ins on that one ballot and continuing to vote?

Secretary Summers asked doesn't it say vote for one on the ballot?

Chairman Walden stated that it doesn't say vote for one write in.

Peter Murphy stated that you cannot vote for multiple selections for one office under state law, and under state law that becomes a void ballot, the machine will not accept it and it is in fact a void ballot.

Chairman Walden stated that was his second question are we under the federal court order, because as he read it, it was over as soon as the judge signed his final order saying that the new city way of doing districts and the charter was the way to go. If that is the case we didn't get approval from the federal court when you were re drawing the districts.

Secretary Summers stated that if there is a federal order down that is a permanent standing, It may not be on the docket but it is a binding precedent.

Commissioner Braly stated that the rules of the state coordinators office rule #13-60-2-12-09 states that the precinct officials shall examine the ballots not read or write in votes and manually count the votes that should be lawfully counted and added to the votes counted by the automatic vote counting equipment. She then stated that that is what they go by they count the write in votes they have to do that lawfully.

Secretary Summers asked did they do it and did we accept those votes? That is the question. Basically we approved this ballot and that is what the voters in the city of Chattanooga and district 9 and other places have relied upon. There is a TN Supreme court case that did deal with the write in votes, Hale vs. Pate it stated that "the intention of the voter is paramount and it should be honored if it can be reasonably ascertained". **SEE ATTACHED**

He further stated that the instructions say to vote you must darken the oval to the left of your choice(s) completely!

Chairman Walden stated that the instructions to the voter also states that to cast a write in vote, you must blacken the oval completely, AND WRITE THE NAME of your candidate on the line provided. The second thing is there was not a write in candidate.

Attorney Clem stated that this commission needs to make a decision today and we need to certify the election today. I don't believe these people can go to court until it is certified either way. You need to make a decision and whichever decision you make I can defend it.

Hamilton County Election Commission-Minutes of Meeting March 13, 2013 Page 5

Secretary Summers asked if the way he understood it is if none of them are counted Mr. Hakeem wins correct?

Attorney Clem stated that yes that was correct.

Secretary Summers then asked if the five are counted but not the two with no name are not then Mr. Hakeem wins correct?

Attorney Clem stated yes that is correct.

Secretary Summers then asked if all seven are counted then there is a run-off election correct?

Attorney Clem stated yes that is correct.

Quinston Coleman stated that he urged the commission to keep in mind that there are two good people in contention here. We as citizens depend on that the process of the system works. I thank you for your service.

Chairman Walden stated that he would entertain a motion and that he would not be voting unless there was a tie.

Attorney Clem stated that the motion needs to be to certify the election with the write in votes or to certify the election without the write in votes, but one of those needs to be the motion.

Secretary Summers made a motion to accept the seven write in votes.

The motion failed due to lack of a second.

Commissioner Anderson made a motion to reject the seven write in votes

The motion failed due to a lack of a second.

Commissioner Crangle made a motion under the city charter and T.C.A. 2-7-133 that all votes cast for a candidate will be counted; and the two write-in votes which did not reflect a write-in candidate shall not be determined votes cast for a candidate for that office. These two votes will not be counted as votes cast for a candidate for that office. These two votes will not be counted. Accordingly, no run-off election for District 9 will be authorized. And, a certificate of election will be issued to Yusuf Hakeem.

Commissioner Anderson seconded.

Motion passed 3 to 1. (**Braly, Crangle** and **Anderson** voting for. **Summers** voting against. **Chairman Walden** not voting).

Commissioner Braly made a motion to accept the certification

Commissioner Anderson seconded.

Motion passed unanimously with exception to district. 9 by Secretary Summers.

Administrator Morgan stated that the hours for the run off election were to be 8-7

Adjournment

Commissioner Braly made a motion to adjourn

Commissioner Crangle seconded.

Next meeting will be Tuesday April 9, 2013 @ 6:30 pm

APPROVED:

Jerry Summers

Secretary

Michael S. Walden

Chairman

James Anderson

Commissioner

Ruth Braly

Commissioner

Tommy Crangle

Commissioner