

IN THE MATTER OF ELECTION CONTEST, DISTRICT 48  
GENERAL ELECTION OF NOVEMBER 2, 2010

DAN NEIL, CONTESTANT	§ § §	HOUSE OF REPRESENTATIVES
v.	§ §	OF THE
DONNA HOWARD, CONTESTEE	§ §	STATE OF TEXAS

**MASTER-S REPORT—CONCLUSIONS OF LAW AND FINDINGS OF FACT**

**I. SUMMARY**

1. Contestant Neil has failed to establish by clear and convincing evidence that the outcome of the contested election, as shown by the final canvass indicating Contestee Howard as the winner, was not the true outcome of the election. Accordingly, Contestant Neil's contest should be dismissed.

2. The Master finds that Contestee Howard's vote margin should be reduced from 12 votes to 4 votes.

3. Contestant has produced no evidence of any intentional voter fraud that affected the final vote tally to his detriment. Contestant's challenge to all of the votes in question is based on technical, and apparently unintentional, violations of election law.

**II. BACKGROUND**

**A. HISTORY OF THE CONTEST**

This contest arises from the November 2, 2010, general election. The initial canvass of votes for the District 48 race conducted on November 22, 2010, indicated the following result:

<u>Howard (D)</u>	<u>Neil (D)</u>	<u>Easton (L)</u>
25,026	25,010	1,518

A recount of the votes in the race was conducted on December 2, 2010, and provided this final result:

<u>Howard (D)</u>	<u>Neil (D)</u>	<u>Easton (L)</u>
25,023	25,011	1,519

Contestant, Dan Neil, brought this contest by filing his petition with the Secretary of State on December 20, 2010. Contestee, Donna Howard, filed her answer with the Secretary of State on December 27, 2010. The Speaker of the House appointed Representative Will Hartnett to serve as Master of Discovery in the contest as provided by Section 241.009<sup>1</sup> on December 28, 2010. Contestant timely filed a cost bond as required by Section 241.0061 on December 30, 2010. Following the convening of the 82nd Legislature, on January 12, 2011, the Speaker reappointed Representative Hartnett as Master and appointed a nine-member select committee to hear the election contest, with Representative Todd Hunter serving as chair of the committee.

Starting on December 29, 2010, the Master conducted a series of weekly conference calls with counsel for the parties to expedite discovery and to clarify the issues in the contest. The parties and the Master also held several in-person meetings in this regard. This effort culminated in a hearing conducted before the Master during February 1-3, 2011, and finishing on February 7, 2011. During the hearing the Master heard arguments of the parties, heard live testimony from 40 witnesses, conducted phone interviews with 2 more witnesses, received 73 exhibits from Contestant and 28 exhibits from Contestee, supervised a recount of mail ballots from three precincts in the district, and presided over the opening of three mail ballots that had previously been disallowed by the Travis County Early Voting Ballot Board. A complete transcript of all proceedings during the hearing was made and is available to the committee.

The Master has prepared this report containing conclusions of law and findings of fact as a summary for the committee of all evidence and law relevant to this case. In this report, the term “illegal vote” means a vote that under the Election Code should not have been counted in the election tally. No evidence was presented that any illegal vote was cast with knowledge of illegality or intent to violate election law.

## **B. VOTER SUMMARY AND RELIEF REQUESTED**

In this report the Master has grouped the voters at issue at the time of the hearing into six categories, which are explained more completely in Part IV. The categories are:

A. Voters who filled out a statement of residence listing an out-of-county address. This category includes 30 voters and involves challenges by both Contestant and Contestee.

B. Voters on the suspense list for whom no statement of residence has been found. This category involves 35 voters challenged by Contestant.

C. One voter whose registration was not effective on election day and is challenged by Contestant.

D. Four voters who voted by mail, but their ballots were not counted and should have been according to Contestant.

E. Two voters who were alleged by Contestant to be double voters.

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<sup>1</sup> All statutory references in the textual portion of this report are to the Texas Election Code unless otherwise indicated.

F. Overseas voters who submitted a Federal Post Card Application indicating that the applicant was a U.S. citizen living overseas indefinitely. Contestant alleges that some or all of the 222 voters in this category should have been allowed to vote a full ballot containing both federal and state races, rather than the limited federal ballot that was sent to the voters.

Contestant maintains that, after considering all voters in the above categories, the House should void the 2010 election for District 48 and order a new election. Contestee alleges that the evidence in this contest confirms her status as the winner of the 2010 election for District 48.

### III. SCOPE AND STANDARD OF REVIEW IN ELECTION CONTEST.

The Texas Election Code provides that:

- (a) The tribunal hearing an election contest shall attempt to ascertain whether the outcome of the contested election, as shown by the final canvass, is not the true outcome because:
  - (1) illegal votes were counted; or
  - (2) an election officer or other person officially involved in the administration of the election:
    - (A) prevented eligible voters from voting;
    - (B) failed to count legal votes; or
    - (C) engaged in other fraud or illegal conduct or made a mistake.<sup>2</sup>

Legislative and judicial precedents state that, to overturn an election, the contestant has the heavy burden of proving by clear and convincing evidence that voting irregularities materially affected the election result. Since 1993, Texas courts of appeals have repeatedly approved this statement of the law.<sup>3</sup> Legislative precedent also indicates that this is the appropriate standard. In two House election contests heard in the 1990s, the committees investigating the election contests adopted the clear and convincing standard of evidence.<sup>4</sup> In the 2004-2005 contest of *Heflin v. Vo*, the Master also recommended this standard for use by the House committee.<sup>5</sup>

“[C]lear and convincing evidence is defined as that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.”<sup>6</sup> This intermediate standard falls between preponderance

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<sup>2</sup> Sec. 221.003(a).

<sup>3</sup> See *Speights v. Willis*, 88 S.W.3d 817 (Tex. App.—Beaumont 2002, no pet.); *Price v. Lewis*, 45 S.W.3d 215, 218 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *Olsen v. Cooper*, 24 S.W.3d 608 (Tex. App.—Houston [1st Dist.] 2000, no pet.); *Tiller v. Martinez*, 974 S.W.2d 769 (Tex. App.—San Antonio 1998); *Alvarez v. Espinoza*, 844 S.W.2d 238, 242 (Tex. App.—San Antonio 1992, writ dismissed w.o.j.); *Guerra v. Garza*, 865 S.W.2d 573 (Tex. App.—Corpus Christi 1993, writ dismissed w.o.j).

<sup>4</sup> See Junell, Seidlits, and Shuffler, Consideration of Illegal Votes in Legislative Election Contests, 28 Tex.Tech L.Rev. 1095, 1144 and 1152 (1997)

<sup>5</sup> *Heflin v. Vo*, Report of the Master, February 7, 2005.

<sup>6</sup> *State v. Addington*, 588 S.W.2d 569 (Tex. 1979); *Gore v. Scotland Golf*, 136 S.W.3d 26, 33 (Tex. App.—San Antonio 2003, pet. denied).

of the evidence of ordinary civil proceedings and the reasonable doubt standard utilized in criminal proceedings.<sup>7</sup>

In the past three election contests before the House, either the committee hearing the contest or the Master has required the contestant to prove, by clear and convincing evidence, that the margin of victory is completely offset by some combination of illegal votes cast or excluded legal votes, and that the contestant must tie each illegal vote to a particular candidate by direct or circumstantial evidence. This places a high standard on the contestant in an election contest.

Contestant appears to argue (as have most contestants in past recent election contests before the House), that Section 221.009(b) should be construed to require that the election be voided if the number of unaccounted for or unassigned illegal votes exceeds the margin of victory. In both *Fogo v. Talton* and *Erickson v. Wohlgemuth*, however, the select committee assigned to hear the contest rejected efforts to apply this lower standard.<sup>8</sup> Similarly, the Master in *Heflin v. Vo* also rejected a request to apply the lower standard.

The lower standard has also been rejected by Texas appellate courts. In *Slusher v. Streater*, the 1st Court of Appeals (citing opinions from the Corpus Christi and 14th Court of Appeals) held that “the contestant must prove that illegal votes were cast in the election being contested and that a different and correct result would be reached by not counting the illegal votes.”<sup>9</sup> The Dallas Court of Appeals also adopted this standard in *Reese v. Duncan*.<sup>10</sup> Another court found that the contestant is required to “clearly establish for which candidate the alleged fraudulent or illegal votes were cast.”<sup>11</sup>

The Master finds that the “clear and convincing” standard of proof used by the House in past election contests should be applied in the present case, and that each illegal vote must be tied to the race and to a specific candidate in order to alter the vote totals.

#### **IV. Categories of voters involved in the contest**

##### **A. Voters who filled out a statement of residence listing an out-of county-address**

This category is by far the largest source of changes in the final election tally. The parties challenged 30 voters who signed statements of residence indicating that they resided outside of Travis County on Election Day. Section 63.0011(a) requires election workers to ask each voter whether the voter’s registered address is current and, if not, whether the voter has moved within the county. If the address is not current, but the voter still resides in the county, the voter is accepted for voting after signing a statement of residence providing the voter’s new address.<sup>12</sup> If, however, the voter has moved out of the county, the voter is only allowed to vote a

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<sup>7</sup> See *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979).

<sup>8</sup> See Junell, Seidlits, and Shuffler, Consideration of Illegal Votes in Legislative Election Contests, 28 Tex.Tech L.Rev. 1095,1143-4 and 1152-7 (1997).

<sup>9</sup> 896 S.W.2d 239, 241 (Tex. App.—Houston [1st Dist.] 1995, no writ).

<sup>10</sup> 80 S.W.3d 650, 665 (Tex. App.—Dallas 2002, pet. denied).

<sup>11</sup> *Goodman v. Wise*, 620 S.W.2d 857, 859 (Tex.Civ. App.—Corpus Christi 1981, writ ref’d n.r.e.).

<sup>12</sup> Secs. 63.0011(c) and 11.004.

provisional ballot. Voters who sign a statement of residence listing an address outside the county are presumptively ineligible to vote in the election. Inevitably, addresses in cities that overlap county lines cause confusion with hurried election workers and result in a small number of out-of-county voters being allowed to cast votes even though ineligible because of their cross-county moves.

### **1. Illegal voters whose vote was clear**

The parties presented live testimony of 23 voter witnesses who stated that they lived out of county at the time of the election and stated who they voted for in the race. Of these, 15 were sure that they had voted straight ticket Democrat or for Ms. Howard, and 8 were sure that they had voted straight ticket Republican or for Mr. Neil. This caused a net subtraction of 7 votes for Ms. Howard.

### **2. Illegal voters whose vote was unclear**

Five additional voter witnesses indicated that they resided out of county at the time of the election but were unsure about whether they had voted in the race or who they had voted for. These voters are identified by Contestant's exhibit numbers 16, 19, and 21 and Contestee's exhibit numbers 3 and 11. Because these voters cannot be tied to the race or a particular candidate, their votes are not considered in this election contest.

### **3. Voters who still resided in Travis County**

Two additional voter witnesses testified that they still resided in Travis County when they voted, even though they had signed statements of residence indicating that they no longer lived in Travis County. The voter identified in Contestant's exhibit 23, a musician, testified that she did not have a fixed place of residence in Travis County, but stayed with various friends in Travis County and traveled frequently. She stated that she listed out-of-county relatives' address on the statement of residence merely for a mailing address, that she considered Travis County her longtime residence, and that she was living with friends in Travis County when she voted. The second witness, the voter identified in Contestant's exhibit 5, testified that she had bought a house outside of the county for which she filed a homestead exemption and at which she had clothes, food, and a dog, but that at the time of the election she was still living with her daughter in Travis County, still had clothes at her daughter's house, and considered her daughter's house her primary residence. Other evidence indicates that the witness had changed her driver's license address to the out-of-county homestead in July 2010. The voter nevertheless insisted that she still considered herself a resident at her daughter's house where she was registered to vote at the time of the election, and that she had filled out the statement of residence to inform the election authorities that she was moving permanently to the new out-of-county address after the election. The Master finds that the evidence does not clearly and convincingly demonstrate that the voter had terminated her domicile in Travis County.<sup>13</sup>

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<sup>13</sup> The law allows a person to register to vote at a residence other than the homestead designated for tax purposes. See, e.g., *Kiehne v. Jones*, 247 S.W.3d 259, 266-7 (Tex. App.—El Paso 2007, pet. denied).

The Master finds that the two voters had sufficient intention to reside in House District 48 and sufficient contacts with Travis County to be eligible voters in this race. Signed statements of residence are not conclusive of a voter's residence when evidence is presented to show a voter's domicile at a different residence.<sup>14</sup>

## **B. Voters on the suspense list for whom no statement of residence has been found**

### **Background:**

The voter registrar places a voter on the suspense list on receipt of information indicating that the voter does not reside at the address where the voter is registered. The most common cause for a voter to be placed on the suspense list is the return of the voter's registration renewal card by the postal service as undeliverable. Voters can also be placed on the suspense list because of their failure to respond to an inquiry from the voter registrar about the voter's address, or their report of their residence in response to a jury summons.<sup>15</sup> The notation "S" on the list of registered voters indicates that the voter has been placed on the suspense list.<sup>16</sup> A voter on the suspense list may be accepted for voting at a voting precinct if the voter satisfies the residence requirements under Section 63.0011 and submits a statement of residence in accordance with that section.<sup>17</sup> The statement of residence is an affirmation of the voter's current address. If the voter no longer resides in the county in which the voting precinct is located, the voter may not be accepted for voting.<sup>18</sup>

### **Contestant's Contention:**

Contestant identified 35 voters on the suspense list who were allowed to vote in the November 2010 general election, and for whom no statement of residence can be found. Contestant maintains that these votes are conclusively illegal, because the requirement of a signed statement of residence in Sections 15.112 and 63.0011(c) is mandatory.

### **Guidelines Regarding the Construction of Election Code Statutes and an Official's Acceptance of Voter:**

**Guideline 1.** "In construing statutes regulating the manner of holding an election, the general rule is that the language of such statutes is merely directory and a departure from its provisions will not invalidate an election ordinarily unless such departure or such irregularity has affected or changed the result of the election. [citation omitted] The general election laws, even though mandatory in form, are to be construed as directory in the absence of fraud or in the absence of some statutory provision voiding the ballot or election for failure to comply with the specific statute."<sup>19</sup>

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<sup>14</sup> *McDuffee v. Miller*, 327 S.W.3d 808, 821 (Tex. App.—Beaumont 2010, no pet.).

<sup>15</sup> See Sec. 15.081(a).

<sup>16</sup> Sec. 15.111(a).

<sup>17</sup> Sec. 15.112.

<sup>18</sup> Sec. 63.0011(b).

<sup>19</sup> *Zavaletta v. Parker*, 611 S.W.2d 466, 467 (Tex. Civ. App.—Corpus Christi 1980, no writ).

**Guideline 2.** “Mandatory provisions are generally limited to provisions requiring elections to be held by ballot and to those setting out voter qualifications as well as the time and place of elections. To set aside an election for violation of directory provisions, the contestant must show that the irregularities prevented voters from exercising freely and fairly their right to vote or from having their votes properly counted; in the absence of such proof, such irregularities are treated as informalities that do not void the election.”<sup>20</sup>

**Guideline 3.** “When an election official permits a person to vote, a presumption arises that such action was proper and that such person is a legal voter.”<sup>21</sup>

**Masters response:**

The Texas Election Code is a complex set of laws governing the holding of an election in this state. While all people involved in an election should aspire to perfectly meet the requirements of an election in the Code, the combination of multiple polling places, part-time election workers, and numerous procedural requirements leads to human errors. Although many sections of the Code place burdens on election workers and voters with words such as “must” and “shall,” well-established law requires the tribunal in an election contest to examine the statute imposing the requirement that was not fulfilled and determine whether the Legislature intended the requirement to be “mandatory” (so that a vote, or even in extreme cases, the election, is invalidated), or “directory” (so that the vote will be counted or the election upheld despite the error).<sup>22</sup> The Texas Supreme Court offered guidance for determining whether a statute is mandatory or directory in *Schepps v. Presbyterian Hospital of Dallas*:<sup>23</sup>

This Court stated the general guidelines for determining whether a statutory provision is mandatory or directory in *Chisholm v. Bewley Mills*, 155 Tex. 400, 287 S.W.2d 943 (1956):

There is no absolute test by which it may be determined whether a statutory provision is mandatory or directory. The fundamental rule is to ascertain and give effect to the legislative intent. Although the word “shall” is generally construed to be mandatory, it may be and frequently is held to be merely directory. In determining whether the Legislature intended the particular provision to be mandatory or merely directory, consideration should be given to the entire act, its nature and object, and the consequences that would follow from each construction. Provisions which are not of the essence of the thing to be done, but which are included for the purpose of promoting the proper, orderly and prompt conduct of business, are not generally regarded as mandatory. If the statute directs, authorizes or commands an act to be done within a certain time, the absence of words restraining the doing thereof afterwards or stating the consequences of

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<sup>20</sup> *Des Champ v. Featherston*, 886 S.W.2d 536, 543 (Tex. App.—Austin 1994, no writ).

<sup>21</sup> *Brandon v. Quisenberry*, 361 S.W.2d 616, 617 (Tex. Civ. App.—Amarillo 1962, no writ).

<sup>22</sup> The use of the word “must” does not automatically render a statute mandatory. *Helena Chemical Co., v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001); *In re A.G.C.*, 279 S.W.3d 441, 448 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

<sup>23</sup> 652 S.W.2d 934, 936 (Tex. 1983).

failure to act within the time specified, may be considered as a circumstance tending to support a directory construction.

The general rule of interpretation is that election laws are to be considered directory in the absence of fraud or a mandatory provision that requires the voiding of a ballot for failure to comply with the provisions.<sup>24</sup> Duties imposed on a voter by statute are generally mandatory, while those placed on election officials are generally directory.<sup>25</sup>

Contestant has not alleged or proven any instance of fraud regarding the absence of statements of residence for the suspense voters. The relevant language of Section 15.112 provides that a voter whose name appears on a precinct list of registered voters with an indication that the voter's registration has been placed in suspense "may vote in the election precinct in which the list is used if the voter satisfies the residence requirements prescribed by Section 63.0011 and submits a statement of residence in accordance with that section." No provision of the Code has been identified that would require a ballot to be voided for failure to comply with Section 15.112. Such provisions can be found, for example, in Section 86.006(h), which provides that a marked mail-in ballot "returned in violation of [Section 86.006] may not be counted" and in Section 87.041(b), which states that "a ballot may be accepted only if" certain requirements of that subsection are met.

The purpose of Section 15.112 is to have the voter confirm the voter's address after the voter's address on the registration list has been put into question and the voter placed on the suspense list. While the requirement to fill out the statement of residence at first glance appears to be placed on the voter, only an election worker will know that the voter's registration is in suspense and that the voter is required to fill out a statement of residence. Without evidence that the voter was asked to fill out the statement, and refused to do so, the conclusion must be that the absence of signed statements of residence for these voters is due to election worker error—either a failure to ask the voter to sign a statement of residence or a failure to preserve the signed statement of residence. As indicated in *Alvarez v. Espinoza*,<sup>26</sup> such error should not invalidate these votes:

The sixty-eight voters filled out voter registration forms and submitted them to the proper authorities in good faith, assuming that they would thereby be properly registered to vote. The authorities accepted the forms and included the sixty-eight in the lists of registered voters. While we do not condone the registrar's apparent failure to review the applications for completeness in the voter's presence, there is no suggestion that any of the applications were in fact incomplete. The courts should not disfranchise the sixty-eight voters because an official failed to follow the strict letter of the code. We consider this an instance in which a sanction for the sins of the registration official should not [be] visited upon the voter.

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<sup>24</sup> See *Reese v. Duncan*, 80 S.W.3d 650, 658 (Tex. App.—Dallas 2002, pet. denied); *Honts v. Shaw*, 975 S.W.2d 816, 821-822 (Tex. App.—Austin 1998, no pet.); *Kelley v. Scott*, 733 S.W.2d 312, 313-314 (Tex. App.—El Paso 1987, writ dismissed).

<sup>25</sup> *Prado v. Johnson*, 625 S.W.2d, 368, 369 (Tex. Civ. App.—San Antonio 1981, writ dismissed).

<sup>26</sup> 844 S.W.2d 238, 243 (Tex. App.—San Antonio 1992, writ dismissed w.o.j.).

## Conclusion:

This is a case of first impression—no court has addressed whether the statutory requirement of signed statements of residence is mandatory or directory. Wise counsel applicable here was offered in *State ex rel. Butchofsky v. Crawford*.<sup>27</sup>

But these rules are only means. The end is the freedom and purity of the election. To hold these rules all mandatory and essential to a valid election is to subordinate substance to form, the end to the means. If we keep in view these general principles, and bear in mind that irregularities are generally to be disregarded, unless the statute expressly declares that they shall be fatal to the election, or unless they are such in themselves as to change or render doubtful the result, we shall find no great difficulty in determining each case, as it arises under the various statutes . . . .

The Master concludes that this situation was almost certainly caused by election worker error, and therefore the voters should not be disenfranchised by that error and that the Legislature, under the facts of this particular case, intends a determination based on substance rather than form, and allows an inquiry into the legal residences of the 35 voters.

The Master finds that the absence of signed statements of residence for 35 voters in this case does not conclusively establish that these votes were illegal.<sup>28</sup> The fact that these 35 people were on the suspense list does, however, put into question the legal residence of these voters at the time of the election. A showing of the absence of a statement of residence for a voter on the suspense list, by itself, is not sufficient to meet the clear and convincing evidentiary burden in an election contest. Nor is a showing that a voter moved to another address in the county that is not located in District 48. Under Section 11.004, a voter who changes residence to another address in the county may vote a full ballot in the voters' precinct of former residence until the voter's registration becomes effective at the new address if the voter complies with Section 63.0011 and executes a statement of residence. As was discussed above in relation to requiring a statement of residence from these voters because they were on the suspense list, the absence of a statement of residence required to vote under Section 11.004 is most certainly election worker error, and these voters should be able to avail themselves of their right to vote in their old precinct. Since Contestant has not provided any evidence that any of the voters in this category moved out of county, the Master finds that all voters in this category were legal voters. Indeed, four witness voters testified that they had not moved at all from the address at which they were registered, and documentary evidence indicates that many of the voters who did not testify had not changed their residences either. This evidence highlights the risk of concluding that these voters were illegal voters solely because they were placed on the suspense list and no signed statements of residence can be found for them.

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<sup>27</sup> 269 S.W.2d 536, 539 (Tex. Civ. App.—El Paso 1954, no writ).

<sup>28</sup> This conclusion of law is consistent with the finding in the Master's February 7, 2005, report in the Heflin/Vo election contest on (see discussion of voters in Category 12.0 of the report).

### **C. One voter whose registration was not effective on election day**

The parties agreed that one voter whose registration was not in effect at the time of the election was an illegal voter in the District 48 race. Under Sections 11.001 and 11.002, a voter's registration must be effective on election day. Thus the voter identified in Contestant's exhibit 2 was illegal and should not have been allowed to vote. The voter testified that he cast a straight ticket Republican ballot. This finding subtracts one vote from Mr. Neil's total.

### **D. Voters who voted by mail but their ballots were not counted**

Contestant challenged the rejection by the Travis County Early Voting Ballot Board of four mail ballots.

#### **1. Agreed legal votes**

The parties agreed that two of the ballots should have been accepted and counted. The ballots of the voter identified in Contestant's exhibit 1 and the voter identified in Contestant's exhibit 3 were opened in front of the Master and the parties, and resulted in one additional vote each for Neil and Howard.

#### **2. Application for mail ballot not signed by voter**

The ballot of the voter identified in Contestant's exhibit 2 was not accepted by the Early Voting Ballot Board because she failed to sign the application for the mail ballot. Unfortunately, contrary to Section 86.001(c), the early voting clerk failed to reject the application and send a notice to the voter that the application was incomplete. Such notice would have allowed the voter to correct her error by signing the ballot application. Instead, the voter was sent a ballot. Only when the ballot was returned and reviewed by the Early Voting Ballot Board was the ballot rejected for lack of a signature on the application, apparently pursuant to Section 87.041(b). The handwriting on the ballot application and the voter's signature on the ballot carrier envelope are consistent with the voter's handwriting. The failure of the early voting clerk to notice the absence of the signature on the application and provide the voter notice of the defect denied the voter the statutorily required opportunity to timely correct the error. In accord with the Master's finding in Part IV. B above that election worker error should not disenfranchise a voter, the Master found that the ballot should have been accepted and counted. Accordingly, the ballot of the voter was opened in front of the Master and the parties, and resulted in one additional vote for Neil.

#### **3. Ballot emailed to FPCA voter and returned by mail in Travis County**

The ballot of the voter identified in Contestant's exhibit 4 was not accepted by the Early Voting Ballot Board because he mailed his ballot inside Travis County. The early voting clerk likely relied on a regulation issued by the Texas Secretary of State stating that "the applicant must be voting from outside of the United States."<sup>29</sup> The federal Military and Overseas Voter Empowerment ("MOVE") Act of 2009 established the option for military and overseas voters to

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<sup>29</sup> 1 TAC Sec. 81.39(b)(3).

receive email ballots by submitting a Federal Post Card Application (“FPCA”) to the election clerk of the county in which they are registered to vote or last resided. The Texas Secretary of State issued that regulation to implement the MOVE Act during the interim between legislative sessions. SB100 and HB111 have now been filed in the 82nd Legislature to statutorily implement the MOVE Act in Texas.

The voter testified that an early voting clerk in the Travis County Clerk’s office specifically authorized him to mail the ballot inside Travis County before he took his flight to Germany and before early voting in person opened. No testimony was elicited from the clerk to contradict the voter’s testimony. The voter testified that he voted for Mr. Neil, and was surprised to learn that his ballot had not been counted.

Although the Master believes that this ballot should be counted as an additional vote for Mr. Neil, the Master has not ordered the ballot of the voter to be opened because this is a very close decision, the committee may well disagree with the Master about this vote, and, based on the margin determined by the Master, this additional vote will not change the outcome of the election. The law presumes that the Early Voting Ballot Board acted correctly, and that presumption may only be rebutted by clear and convincing evidence of error.<sup>30</sup>

The Master has consistently found that error by election officials should not disenfranchise voters. In this situation, there is hearsay evidence of erroneous advice from an early voting clerk. However, the committee may choose to disregard this evidence. Contestant did not call the clerk to the stand to testify about his alleged advice to the voter. Furthermore, the purpose of the FPCA is to assist overseas voters, and the voter (who was neither overseas when he faxed his FPCA to the Travis County Clerk early voting clerk nor when he printed and mailed his emailed ballot) was not yet overseas and should have been on notice that he was using a process uniquely designed for overseas voters. Finally, despite email communication to and from the clerk, the voter did not confirm in writing the alleged advice from the clerk, which conflicted with a regulation of the Texas Secretary of State.

In addition, the voter could have accessed the federal Voting Assistance Guide,<sup>31</sup> which would have put him on notice that:

It is recommended that voted ballots be mailed from your location outside the U.S. rather than be given to another individual to be placed in the U.S. postal system. If the ballot is postmarked from any location inside the U.S. your local election official may not count your ballot.

On the other hand, both the instructions and the carrier envelope emailed by the clerk to the voter contained wording indicating that the ballot could be mailed within the United States.

The Master thinks it is good policy to require ballots emailed in response to an FPCA to be mailed from outside the United States. If not, it would be very easy for voters to abuse the

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<sup>30</sup> Reese v. Duncan, 80 S.W.3d 650, 661-2 (Tex. App.-Dallas 2002, pet. denied).

<sup>31</sup> <http://www.fvap.gov/faq.html#gq3>

special FPCA process by submitting an FPCA using the address of an overseas hotel,<sup>32</sup> receiving an email ballot in Texas, and returning the completed ballot, without ever actually leaving the country.

The Master finds that the ballot of the voter should be accepted and counted as an additional vote for Mr. Neil.

#### **E. Alleged double voters**

Contestant alleged that two voters voted twice in the election. On examination of documentary evidence and one live witness it was determined that in both instances there were two different people with the same or similar names, and that no double voting had occurred.

#### **F. Overseas voters who are U.S. citizens residing outside the U.S. indefinitely**

This category involves 222 overseas voters who received a limited federal ballot instead of a full state and federal ballot. Each of these voters received a restricted ballot with each state race stamped or crossed through to indicate that the voter was not eligible to vote in state races (including the House District 48 race).

#### **Background:**

Federal law prescribes a “Federal Post Card Application” (“FPCA”) to allow uniformed services and overseas voters to register for and vote in any general, special, primary, and runoff election involving a federal office.<sup>33</sup> The FPCA constitutes both an absentee voter registration application and a request for an absentee ballot for federal races. Most states, like Texas, allow uniformed services and overseas voters domiciled in Texas to use the FPCA to register for, and vote in, state races as well. To receive a full state and federal ballot, an applicant must “comply with applicable requirements,” submit the FPCA more than 20 days before the election, and provide in the FPCA information sufficient for voter registration under the Election Code.<sup>34</sup>

Voters must check one of three boxes in Section 1 of the FPCA:

- Box 1(a) stating that the applicant is “a member of the uniformed services or merchant marine on active duty, or an eligible spouse or dependent.”
- Box 1(b) stating that the applicant is “a U.S. citizen residing outside the U.S. **temporarily.**”
- Box 1(c) stating that the applicant is “a U.S. citizen residing outside the U.S. **indefinitely.**”

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<sup>32</sup> The voter listed a hotel at the Frankfurt airport.

<sup>33</sup> 42 U.S.C. Secs. 1973ff, 1973ff-1(a)(4).

<sup>34</sup> Sec. 101.004(e).

Part 3 of the FPCA requires the applicant to provide a “voting residence address” and instructs that military voters should “use legal residence,” while overseas citizens should “use last legal residence in U.S.”

**Contestant’s contentions:**

Contestant challenges the Travis County Elections Clerk’s determination that individuals who checked Box 1(c) on the FPCA are only entitled to a limited federal ballot and not to a full ballot that includes both state and federal offices. Because this determination complied with an instruction consistently given by the Elections Division of the Secretary of State of Texas during the last four years, Contestant essentially challenges an established statewide protocol for handling FPCAs.

Contestant also makes several other contentions (page references are to Contestant’s Brief filed in this issue):

That every person who signs an FPCA is swearing that he is a resident of Texas. (pp. 5-6)

That every person who signs an FPCA is entitled to receive a full ballot. (p. 7)

That the Texas Election Code makes no distinction between persons living abroad “temporarily” as compared to “indefinitely.” (p. 7)

That “it is currently not possible to force a voter into Texas Election Code Chapter 114.” (p. 8)

**General Guidelines Regarding Establishment of Residence for Voting Purposes:**

**Guideline 1.** The Texas Constitution restricts the right to vote in state elections to Texas residents.<sup>35</sup>

**Guideline 2.** In the Election Code, “residence” means “domicile, that is, one’s home and fixed place of habitation to which one intends to return after any **temporary** absence.”<sup>36</sup>

**Guideline 3.** A U.S. citizen who is domiciled in a foreign country is not domiciled in any of the United States.<sup>37</sup>

**Guideline 4.** “There is a presumption that election officials have done their duty in conducting an election, and the contestant has a heavy burden of overcoming the presumption that the officials discharged their duty properly in receiving or rejecting a ballot.”<sup>38</sup>

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<sup>35</sup> Section 2(a), Article VI.

<sup>36</sup> Sec. 1.015(a).

<sup>37</sup> *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989).

<sup>38</sup> *Chumney v. Craig*, 805 S.W.2d 864, 865 (Tex. App.—Waco 1991, writ denied).

### **Master's Finding:**

The Travis County Clerk correctly sent federal ballots (limited to federal races) to each voter who represented that the voter was “a U.S. citizen residing outside the U.S. indefinitely.”

### **Support for the Master's Finding:**

#### **Texas Election Code :**

Section 101.001(2)(C) determines the eligibility of a person to vote in state elections. It specifies that an overseas person who is not a member of the armed forces or the spouse or dependent of a member of the armed forces is only entitled to a full ballot if “domiciled in this state but **temporarily** living outside the territorial limits of the United States.”

Section 13.002(h) provides that the submission of an FPCA does not constitute an application for registration “at the voting residence address stated on the application” if the applicant “indicates on the person’s federal postcard application that the person is residing outside the United States **indefinitely**.” This result from checking Box 1(c) on the FPCA is reiterated in Section 101.006(a)(2). Although Sections 13.002(h) and 101.006(a)(2) only became effective on September 1, 2009, and relate to registration of FPCA voters rather than what type of ballot an applicant receives, the Master considers these sections illustrative of a legislative intent to treat differently an applicant who indicates that the applicant is residing outside the United States indefinitely.

Sections 1.015(a), 13.002(h), 101.006(a)(2), and 101.001(2)(C) clearly indicate the State’s intention to treat voters who are “temporarily” absent from Texas from those who are “indefinitely” absent. Texas law recognizes that a temporary absence from one’s residence with the intention to return does not affect residence, but an indefinite absence from one’s residence terminates that residence:

a person loses his or her residence when the person leaves a permanent home and moves to another place with no present intention to return to the former abode. *Id.*; Tex. Att’y Gen. LO 92-19 (1992). On the other hand, if a person moves to a new location only temporarily, presently intending to return to the previous place of habitation, the person does not lose his or her residence.<sup>39</sup>

An FPCA falls under Chapter 114 when “the citizen’s most recent domicile in the United States was in this state and the citizen’s intent to return to this state is uncertain.”<sup>40</sup> When a voter states on the FPCA that the voter is a “U.S. citizen residing outside the U.S. indefinitely,” the voter has stated that the voter’s intent to return to Texas is uncertain and thus places the voter under Chapter 114.

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<sup>39</sup> *Tovar v. Board of Trustees of Somerset Independent School Dist.*, 994 S.W.2d 756, 762 (Tex.App.—Corpus Christi 1999, pet. denied).

<sup>40</sup> Sec. 114.002(1).

Although Contestant contends that Section 101.004(h) expresses a legislative intent to provide a full state and federal ballot to any applicant who is a registered Texas voter, that subsection relates back to Subsections 101.004(e) and (f), which in turn are dependent on Section 101.001. That section determines the general eligibility to vote a full ballot under Chapter 101, and its parameters exclude all voters who are indefinitely living outside the territorial limits of the United States. Subsection (h) provides a narrow exception to allow an applicant who would otherwise be eligible to receive a full ballot but who is entitled to only a limited ballot because the application was received after the 20th day before election day and before the 6th day before election day to receive a full ballot if the applicant is already a registered voter at the address contained on the application. Furthermore, even given Contestant's expansive reading of Subsection (h) as one of general application, only two FPCAs sent by voters who were registered at the address indicated on the FPCA arrived during the time period mandated by that subsection.

### **Federal Instructions:**

The FPCA used by the 222 voters at issue here is a form created by the United States Department of Defense ("DoD") in 2005. The Instructions attached to the cardstock FPCA state that "Marking Block 1(c) applies for a Federal ballot only (if one is printed by the state)."<sup>41</sup> This exact same instruction was given in the DoD "2008-09 Voting Assistance Guide"<sup>42</sup> and in the DoD's October 2005 newsletter announcing the revised FPCA (which was used in this election).<sup>43</sup> It is clear that the intent of the federal government is that voters who are "residing outside the U.S. indefinitely" are only entitled under federal law to receive a federal ballot.

### **Secretary of State Directives:**

In 2007, 2009, and 2010, the Elections Division of the Secretary of State of Texas (the "Elections Division") provided written instructions to county elections personnel to only provide federal ballots to voters (like the 222 here) who check Box 1(c).<sup>44</sup> In August 2010, the Elections Division provided the following instruction:

If the applicant checks 'U.S. citizen residing outside the U.S. indefinitely,' the applicant is entitled to receive a federal ballot only since the voter's intent to return to the state is uncertain. Chapter 114. Checking other boxes entitles the applicant to a full ballot (if the timeliness/registration status criteria above are met).<sup>45</sup>

The Elections Division website offered the following instruction at the time of the 2010 General Election:

The applicant will also receive a federal ballot only if the voter is a U.S. Citizen residing indefinitely overseas.<sup>46</sup>

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<sup>41</sup> Contestee's Ex. 18.

<sup>42</sup> Contestee's Ex. 22.

<sup>43</sup> Contestee's Ex. 21.

<sup>44</sup> Contestee's Exs. 19 and 28.

<sup>45</sup> Contestee's Ex. 28.

<sup>46</sup> Contestee's Ex. 19.

Another instructional document provided by the Elections Division to county elections personnel states the following:

NOTE: checking box #1c – U.S. citizen residing outside the U.S. indefinitely – the applicant receives a federal ballot only.”<sup>47</sup>

The Legislature in Section 31.003 has given broad power to the Secretary of State over the administration of state elections:

The secretary of state shall obtain and maintain uniformity in the application, operation, and interpretation of this code and of the election laws outside this code. In performing this duty, the secretary shall prepare detailed and comprehensive written directives and instructions relating to and based on this code and the election laws outside this code. The secretary shall distribute these materials to the appropriate state and local authorities having duties in the administration of these laws.

“Construction of a statute by the administrative agency charged with its enforcement is entitled to serious consideration, so long as the construction is reasonable and does not contradict the plain language of the statute.”<sup>48</sup> “The contemporaneous construction of a statute by the administrative agency charged with its enforcement is entitled to great weight.”<sup>49</sup>

### **Policy of Other States:**

The Master has made a cursory review on the Internet of other states’ policies regarding this matter, and determined that the following states also provide a federal ballot only to voters who check Box 1(c): Alaska,<sup>50</sup> Colorado,<sup>51</sup> Delaware,<sup>52</sup> Illinois,<sup>53</sup> Minnesota,<sup>54</sup> New Hampshire,<sup>55</sup> South Carolina,<sup>56</sup> and Virginia.<sup>57</sup> The State of Colorado has wisely supplemented the FPCA to make clear to voters the effect of checking Box 1(c): “A U.S. Citizen Residing Outside the U.S. Indefinitely (Federal Ballot Only).”<sup>58</sup>

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<sup>47</sup> Contestee’s Ex. 27.

<sup>48</sup> *Tarrant Appraisal District v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993).

<sup>49</sup> *State v. Public Utility Comm’n. of Texas*, 883 S.W.2d 190, 196 (Tex. 1994).

<sup>50</sup> [http://www.elections.alaska.gov/vi\\_mo\\_oc\\_res\\_ind.php](http://www.elections.alaska.gov/vi_mo_oc_res_ind.php)

<sup>51</sup> [http://www.sos.state.co.us/pubs/elections/Resources/files/application\\_uocava\\_fax\\_ballot\\_07\\_08\\_10.pdf](http://www.sos.state.co.us/pubs/elections/Resources/files/application_uocava_fax_ballot_07_08_10.pdf)

<sup>52</sup> [http://electionsncc.delaware.gov/absentee\\_de/bhf/bhf2006\\_2.pdf](http://electionsncc.delaware.gov/absentee_de/bhf/bhf2006_2.pdf)

<sup>53</sup> <http://www.eac.gov/assets/1/Page/UOCAVA%20Voters%20and%20the%20Electronic%20Transmission%20of%20Voting%20Materials%20in%20Four%20States%20-%20Final.pdf>

<sup>54</sup> <http://www.sos.state.mn.us/index.aspx?page=889>

<sup>55</sup> [http://www.nhlgc.org/affiliate/nhctca/training\\_handouts/2010/AnthonyStevenPresentation.pdf](http://www.nhlgc.org/affiliate/nhctca/training_handouts/2010/AnthonyStevenPresentation.pdf)

<sup>56</sup> <http://www.eac.gov/assets/1/Page/UOCAVA%20Voters%20and%20the%20Electronic%20Transmission%20of%20Voting%20Materials%20in%20Four%20States%20-%20Final.pdf>

<sup>57</sup> [http://townhall.virginia.gov/L/GetFile.cfm?File=E:%5Ctownhall%5Cdocroot%5CGuidanceDocs%5C132%5CGD-oc\\_SBE\\_4320\\_v1.pdf](http://townhall.virginia.gov/L/GetFile.cfm?File=E:%5Ctownhall%5Cdocroot%5CGuidanceDocs%5C132%5CGD-oc_SBE_4320_v1.pdf)

<sup>58</sup> Appendix A hereto.

### **Other Comments by the Master Regarding FPCAs:**

Contestant has cited Guidelines 2, 3, and 4 from the Master's 2005 report in the Heflin/Vo election contest. Those guidelines, while still valid, are dependent on the constitutionally required determination that the voter is domiciled in Texas, and offer no guidance regarding the fundamental determination of legal domicile.

The voter's representation on the FPCA that the voter is "eligible to vote in the requested jurisdiction," standing alone, does not demonstrate the voter's requisite intent to maintain residence in Texas, and merely tells the election clerk that the voter is entitled to receive one of the two types of ballots generated by an FPCA. Similarly, because part 3 of the FPCA does not state whether the voting residence address is the voter's current domicile or former domicile, the mere listing of an address does not answer the question of where the voter is domiciled.

The Master finds that the act of checking Box 1(c) on the FPCA is a clear statement of the applicant's present intention not to return to Texas, and constitutes a representation that the applicant has no domicile within the United States. It is effectively a statement of nonresidence. The result of checking Box 1(c) is that the applicant is not entitled to receive a full state and federal ballot, and is only entitled to receive the limited federal ballot.

It is conceivable that some voters did not understand the difference between "temporary" and "indefinite" absence from Texas, and would have checked Box 1(b) rather than Box 1(c) if fully informed of the consequences. Several voters who checked the "outside the U.S. indefinitely" box were legally registered to vote in House District 48 at the time that they sent in the FPCA, and perhaps misunderstood that their FPCA would negate that registration with regard to state races. The Master finds that this possibility in and of itself is not sufficient to counter the effect of checking Box 1(c). The state's election system is based heavily on forms involving millions of citizens, and the House cannot alter ballot applications based on the possibility that voters may have checked the wrong box. Although four voters provided supplemental comments on their FPCAs that perhaps should have caused the Travis County Elections Clerk to inquire with the voters as to whether or not they were requesting permanent registration and full state and federal ballots, election officials were not required by law to second guess the voter's selection of Box 1(c) on the FPCA.

At least 191 of the 222 FPCAs in question were submitted prior to the 2008 general election. All 191 overseas voters received only federal ballots for the 2008 election. The fact that they did not change their FPCAs before the 2010 general election is evidence that they did not intend to receive full state and federal ballots in 2010.

### **Conclusion:**

The Master finds that the Travis County Elections Clerk processed the 222 FPCAs correctly and pursuant to Texas law.

# APPENDIX A

