

**Denver Election Commission
200 W. 14th Avenue Suite 100
June 17, 2003
4:00 P.M.**

Present: Sherry L. Jackson, Commissioner
Mark Messenbaugh, Commissioner
Jan Tyler, Commissioner
Efrain Padro, City Attorney's Office
Susan Rogers, Commissioner-Elect
Sandy Adams, Commissioner-Elect
Kristy Bois, Denver Budget Management Office (BMO)
Gretchen Williams, City Council Staff
Marcia Johnson, City Councilmember-Elect
Frank Sullivan, Denver Democrats
Carolyn Metzler, Denver Republicans
Mike Nelligan, Denver Republicans
David Wilson, Petitioners Committee (repeal of "Quick Wins II")
Peter D. Pappas, Petitioner (repeal of "Quick Wins II")
Kent R. Olson, Protester (against referendum petition)
Steven Kaplan, Protester (against referendum petition)
Robin R. Rosenfeld, representing complainant C. Michael Freeman
(RE: North Denver Democrats hearing
Kevin Vaughn, Rocky Mountain News
Dominic Westminster, Rocky Mountain News
Sean Walsh, CRL Associates
Lynn Pressnall, Citizen
Karon Majeel Hatchett, Executive Director
Alan McBeth, Staff

Commissioner Jackson called the meeting to order at 4:00 p.m.
Commissioner Jackson moved that items B and C under "Executive Director Report" (Secretary of State HAVA Update and State Legislative Update) be tabled, and taken up at the next regular Commission Meeting. Commissioner Messenbaugh seconded the motion, which passed unanimously.

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I. Approval of minutes

A. Commissioner Messenbaugh moved that the minutes of the May 15, 2003 Commission Meeting be approved. Commissioner Jackson requested that the current meeting's Agenda be amended to indicate that the May 15th meeting was a Special Meeting to review the Referendum Petition to repeal the city's "Quick Wins II" ordinance. Commissioner Tyler seconded the motion (with the noted agenda change) which passed unanimously.

B. Commissioner Messenbaugh moved that the minutes of the May 20, 2003 Regular Commission Meeting be approved. Commissioner Tyler seconded the motion, which passed unanimously

II. Old Business

A. Petition Verification Procedures Rule Change regarding "Denver County"

Commissioner Messenbaugh noted that the proposed rule change has arisen from a case in which Carol Boigon (a candidate for City Council At-Large) disputed the rejection of submitted signatures that lacked the insertion of "Denver" under the "City/County" box on the petition signature pages. The Commission ruled that Boigon's petitions were "substantially compliant" with the governing statutes and ordinances, and accepted the disputed signatures. As a result, the candidate's name appeared on the ballot. The proposed rule change would formalize that decision and would ensure that the standard used in the case referenced would be used in all future municipal petition cases. (See enclosed copy of the rule, which clarifies petition rules in Denver matters.) In essence the rule states that petition signatures will be deemed in "substantial compliance" with the law if the signatures are verified in the voter registration database, even if they lack the word "Denver" on the signer's entry on the petition.

The proposed rule states:

"If the address on the petition either includes or omits a letter or number identifying an apartment or the directional location of a street, such as "E" for east, "SW" for southwest, or does not include "Denver" city or county, or zip code, the signature shall be deemed to be in substantial compliance if the signer can be verified as an eligible elector in the City and County of Denver, or the appropriate district, based on the information provided."

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Commissioner Jackson asked if there were comments from the audience. Sandy Adams indicated that the proposed rule seems to indicate that a signature of a voter registered anywhere in Denver would be valid, even if the signer's address were not the same as that voter's address as listed in the Commission's voter registration database. Adams asked if the Commission plans to count signatures (of registered voters) with incorrect addresses.

Commissioner Messenbaugh indicated that the Commission's intent was not to allow that situation to occur. He suggested adding "at the address provided on the petition" after "eligible elector" in the proposed rule.

Frank Sullivan asked for a definition of "substantial compliance." Commissioner Messenbaugh replied that he could not define the term. It is used in state election statutes and in Supreme Court rulings, and is defined on a case-by-case basis. Mr. Sullivan expressed his surprise that the Commission intends to use the term in this rule, but does not have a definition for it. Messenbaugh replied that a petition signer's signature would be deemed to be in "substantial compliance" if it were found (with the correct address) on the voter registration database. Messenbaugh indicated that law requires "substantial compliance" and the Commission is defining it as "a voter's name being in our database at the correct address."

Commissioner Tyler asked if it is appropriate for the Election Commission to create law (via rule making) which may be inconsistent with current laws or rules. She questioned if it is right (even just with regard to municipal elections) to make rule changes based on political considerations, such as those that allegedly affected the "Boigon" decision. She indicated that she was uncertain of the validity of the rule changes being proposed, and that she does not believe these actions represent "good governing policy" even though they only apply to municipal elections. She indicated that in signature verification, things like street directions and apartment numbers can become contentious.

Commissioner Messenbaugh replied that Tyler's last comment must be taken in the context that it is not "Denver" rules, but Secretary of State rules that indicate signatures can be counted, even if they lack street directions or apartment numbers.

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Commissioner Jackson asked City Attorney Padro if the Commission has the authority to adopt the proposed rule without being in conflict with City Charter or ordinance, state law or Secretary of State rules. Mr. Padro indicated that, in his opinion, the Commission does have such authority.

Commissioner Messenbaugh reiterated that if a petition signature lacks street direction, apartment number, the word "Denver" or the zip code, it is nonetheless valid if the name and address match what is on the Commission's voter registration database.

On the use of the term "substantial compliance," Mr. Sullivan asked if it means "acceptable," or if there is "wiggle room" in the use of the term. Commissioner Messenbaugh replied in the negative, indicating that the rule defines "substantial compliance" in the case indicated, and that "substantial compliance" is what state election law requires.

Mr. Sullivan asked if it might be more appropriate to use the term "acceptable" rather than "substantial compliance." Initially, Commissioner Messenbaugh agreed with the use of the term "acceptable."

Commissioner Tyler also indicated that she'd like to see "acceptable" used in the rule. City Attorney Padro noted that "acceptable" is not legally equivalent to "substantial compliance" which is mentioned throughout the law. "Acceptable" would be hard to define, since law does not consider this term.

Commissioner Tyler indicated that she would not insist on "acceptable." Messenbaugh indicated his belief that the Commission, by means of this rule change, is making "substantial compliance" less indefinite than it has been.

Commissioner Messenbaugh moved the adoption of the rule as amended. Commissioner Jackson seconded the motion. The motion passed, two votes to one, with Commissioners Jackson and Messenbaugh voting in favor, and Commissioner Tyler voting against.

B. Hearing Officer's Findings: Repeal of Quick Wins II and North Denver Democrats.

Commissioner Jackson requested that the "North Denver Democrats" issue be taken up first, and asked for comment from the meeting attendees.

Robin Rosenfeld spoke, indicating that she represents C. Michael Freeman, who submitted a complaint against North Denver Democrats that resulted in the hearing recommendations being discussed. Rosenfeld read a letter to the Commission (copy attached).

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She indicated that if the Commission approves the recommendations and the complaint is referred to the City Attorney, she hopes to see the investigation include how much money was donated to North Denver Democrats, and what the funds were used for. She indicated her belief that the Election Commission should ask the City Attorney to subpoena records and question all of the parties involved.

Commissioner Messenbaugh asked City Attorney Padro if the Commission has the authority to broaden the

scope of the inquiry into the North Denver Democrats. Padro replied in the negative, and that the enquiry was limited to the question of "probable cause." If the Commission determines that "probable cause" of a violation of city campaign finance ordinance exists, the Commission must forward the case to the City Attorney. The City Attorney must then decide whether or not to proceed. If that happens and the defendants are found guilty, the punishment is a maximum fine of \$999.00 and one year in jail. Commissioner Jackson read the Hearing Officer's conclusion (that there is probable cause that a violation of law has occurred). Mr. Padro advised that the Hearing Officer's conclusions are recommendations, and that the Commission must decide whether to accept, modify or reject them. Commissioner Jackson asked for a motion. Commissioner Messenbaugh moved that the Commission adopt the Hearing Officer's findings and that it forward the case to the City Attorney's office. Commissioner Tyler seconded the motion, which passed unanimously. Commissioner Jackson asked if the City Attorney would notify the Commission of its decision on the matter. Mr. Padro assured her that his office would notify all of the Commissioners of its actions on the matter.

Hearing: Referendum Petition for Repeal of "Quick Wins II"

Commissioner Jackson asked for comment from meeting attendees. David Wilson, the petitioners' counsel, spoke. He noted that, the substance of the Hearing Officer's recommendations notwithstanding, the findings produced are late, and should be dismissed. The protest was filed on April 14, 2003. City Charter [8.3.2(H)] required that "Hearings shall be concluded and findings issued as soon as practicable, but not more than fifty (50) days after the filing of a protest with the Election Commission." June 3, 2003 was therefore the deadline for the hearing to be concluded and findings issued. Findings were not issued prior to the deadline.

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Mr. Wilson indicated his opinion that, given the missed deadline, the Commission must immediately forward the petition to City Council for repeal of the ordinance in question or placement of the referendum on the ballot. The findings are late, and therefore of no weight.

Commissioner Messenbaugh asked what the case law is on such a situation. In other words, he asked, what is the Commission to do if Mr. Wilson is correct? Mr. Wilson indicated that he hand-delivered a letter to the Commission on June 5, 2003 indicating that the 50 days had elapsed and that the Charter deadline had been missed. Ms. Hatchett asked City Attorney Padro what the Commission is allowed to do after such a deadline has passed. Mr. Padro replied that the Commission has "options," but that these should be discussed in Executive Session.

Commissioner Tyler asked why this should be done in Executive Session, rather than in full view of the public. Mr. Padro indicated that the options to be discussed are covered by attorney/client privilege, and should not be discussed publicly. Tyler responded that the Commission is responsible for the situation and that therefore its decisions on the matter should be made in public. Padro advised that although the Commission's decisions should be made publicly, the discussion of legal options should be done privately, in Executive Session.

At 4:35 p.m. Commissioner Jackson moved that the Commission recess for 10-15 minutes, go into Executive Session, then reconvene the meeting. Commissioner Messenbaugh seconded the motion, which passed unanimously.

At 4:50 p.m. the Commission meeting was reconvened. Commissioner Jackson announced that the Commissioners had been advised of their options in this matter. Commissioner Messenbaugh expressed the opinion that the Commission was late in issuing the findings of the Hearing Officer. He indicated that the Commission was responsible for two mistakes. The hearing results were issued after the 50-day Charter deadline, and the protest, therefore should not be entertained. In addition, Commission staff provided, and the Commissioners approved, the use of incorrect forms for the petitioners, use of which was at the root of the protest.

Noting that the Informational Packet for Municipal Candidates has an accurate "Affidavit of Circulator," Commissioner Jackson indicated that the Commissioners rely on the staff as the basis of the Commission's approval of petitioners' submissions. Karon Hatchett indicated that the

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reason the "Affidavits of Circulator" for the protested petitions lacked spaces for the Circulators' addresses was due to court rulings that indicate that circulators need not be electors.

Commissioner Messenbaugh added that the "Affidavit of Circulator" approved by the Commission (which was then challenged) also lacked a signed statement that the circulator has read and understands the laws governing the circulation of petitions – as required by CRS 1-40-111(2).

Commissioner Tyler discussed issues concerning improper administration at the Election Commission. She opined that the staff has too little time to adequately administer the petition process, and that the Commission should be certain that budget cuts do not jeopardize the conduct of elections in Denver. She noted that the Commission has 18 full-time staff members, and that this number has not changed since 1970, although the number of Denver voters and the demands placed upon the Commission have

expanded significantly in the last 30 years. Commissioner Tyler indicated her belief that Commission is in need of staff restructuring, and that the issues brought to light by the protest under discussion are directly related to staffing and budget issues at the Commission.

Steve Kaplan, attorney for the petition protesters, indicated his belief that the Election Commission (if it finds that missing the deadline for submission of hearing findings is fatal to the protesters' case) has violated the protesters' rights. Kaplan indicated that there is no immediate need for the deadline to be immutable, and that the Commission has denied the protesters' rights due to its own mistake. Kaplan believes that the Commission should consider a remedy.

Commissioner Messenbaugh asked Mr. Kaplan if he had a "remedy" in mind and added that the protesters always have the option of going to court. Kaplan responded that they should not have to go to court simply because the Commission missed the deadline, and if the Commission refuses to honor the protest, it will face substantial problems in the future for the entire petition process.

Commissioner Messenbaugh asked Mr. Kaplan if the protesters could file another protest. Kaplan responded in the negative, noting that the period of time in which they could have protested has elapsed. City Attorney Padro agreed. Commissioner Tyler indicated that she understands the issues presented by the protesters. Commissioner Messenbaugh asked if the issue involves "substantial compliance." Mr. Kaplan responded that if the Commission invalidates the protest, it will disadvantage the protesters,

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but if the Commission rules against the petitioners, no one would be disadvantaged. Kaplan opined that it would be ironic if the petition got onto the ballot due to the Commission's error, even though it lacks accurate paperwork. Kaplan insisted that the integrity of the process is at stake, and that the Commission should rule on the substance of the matter, not on the technicalities of its own missed deadline.

Mr. Williams, speaking for the petitioners, indicated that if the petitioners had missed their initial deadline, the issue would not have come up. There is, he said, a reason for the deadlines set in law. The petitioners had 90 days after publication of the ordinance to file a referendum petition, and they did so in a timely manner. The 50-day deadline for submission of hearing findings is found in City Charter. Commissioner Messenbaugh asked for the purpose of the "50 days." Wilson responded that the deadline exists to protect petitioners' rights, and to ensure that the process moves along and that protests do not drag on indefinitely. The Charter provisions are a roadmap to enable the Commission to administer its duties, he claimed, asserting that the timetable in Charter is unequivocal. Wilson reiterated his belief that the petition should be forwarded to City Council immediately, so that Council can repeal the "Quick Wins II" ordinance itself, or put the question of repeal onto the ballot. He added that the Commission is already past the 50 days for completion of the hearing and for submission of the hearing officer's findings.

Mr. Kaplan suggested that Mr. Wilson's insistence on enforcement of the 50-day deadline is rooted in his clients' interests, and again claimed that the petitioners would not be harmed by ignoring the missed deadline and acting on the Hearing Officer's recommendations. Kaplan opined that making a decision 12 days after the deadline has passed is the best choice among a bad range of alternatives.

Commissioner Jackson asked how the Commission can possibly act upon this difficult issue today. Mr. Padro opined that the matter will likely end up in court in any case.

Peter Pappas, one of the petitioners, proposed a "perfect remedy." He suggested that the referendum petition be sent to City Council. If Council puts it onto the ballot, all Denver citizens can be heard on the issue. He noted that three people protested the petition, but that 4,500 people signed it. He iterated that if the petitioners had missed a deadline, they would not be here, and that it would be inappropriate to ignore the deadline that affects the protesters.

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Commissioner Messenbaugh again mentioned that the situation is a result of the Commission's mistake, not of an error of the petitioners or protesters.

Mr. Pappas spoke again, noting that the protest was based upon the lack of addresses for petition circulators. The petitioners acted in good faith, using "Affidavits of Circulator" approved by the Election Commission. If these forms were improper, the petitioner would be hurt. Pappas said that he believes that City Charter rules in this case, and that it is clear on the 50-day deadline. Pappas admitted that the petitioners realize that it was their responsibility to read the law, but added that the Election Commission must also obey the law – City Charter in this case. His solution, so that no party is hurt, is to send the referendum to City Council.

Commissioner Messenbaugh indicated that he wants a hearing to be held, to hear the merits of the case and determine if the protesters' "due process" would be violated if the Commission refused the protest based on its missing the 50-day deadline. Commissioner Tyler asked Mr. Kaplan how the protesters would be hurt if the referendum went to a vote. Kaplan responded that if all the rules are ignored, people would be able to vote on anything, even in the face of no popular sentiment (evidenced by a successful petition) for the issue under consideration.

Commissioner Jackson indicated that the Commission must rule on the Hearing Officer's recommendations. Commissioner Messenbaugh noted that the Commission is at the stage in which it must

decide whether or not to even consider the protest, given the "missed deadline." If the Commission opts not to approve the protest, the signatures would be considered sufficient.

Mr. Wilson, arguing on behalf of the petitioners, opined that the hearing and its findings are improper, since they are late. As a result, the petition should be forwarded to City Council immediately. If the Commission does not send the petition to City Council, Commission might schedule an additional hearing. However, in Mr. Wilson's opinion, that would violate the statute that indicates that hearings held after 50 days following the protest are improper.

Commissioner Messenbaugh moved that a hearing be scheduled to consider the protest to the referendum petition. Commissioner Tyler seconded the motion. City Attorney Padro suggested that the Commission might take the Hearing Officer's recommendations under advisement and rule on the matter after its proposed hearing. Commissioner Messenbaugh

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indicated that he wanted to hold the hearing immediately – at this meeting. Commissioner Tyler explained that she could not stay for such a hearing, but suggested holding the hearing on Friday, June 20, 2003. She referenced the difficulty of the matter, in that the Commission might rule contrary to the recommendations of the initial Hearing Officer (which it has not done in past), and that there are other factors the Commission must consider.

Mr. Wilson commented that the Commission cannot use the fact that it has never before disagreed with this Hearing Officer as a "precedent" to be followed. Commissioner Messenbaugh agreed that there is no compelling reason to follow the Hearing Officer's recommendations if other information is in conflict with those recommendations. Commissioner Tyler noted that, in any case, a hearing should be held promptly.

Mr. Wilson reiterated that any hearing on the matter held after the 50-day deadline is illegal.

Commissioner Messenbaugh indicated again that he wants to hold the hearing now. Commissioner Tyler asked how long such a hearing would take.

Commissioner Jackson suggested that the Commission complete consideration of the items on the agenda for this meeting, then take up the matter of an additional hearing. Indicating his feeling that Commissioner Tyler does not have time to participate in a hearing today, Mr. Wilson asked that the hearing be scheduled later. Commissioner Messenbaugh again moved that a hearing be conducted on the matter – at a date and time to be determined later. Commissioner Tyler again seconded the motion, which passed unanimously. Mr. Wilson reiterated that he was not comfortable with holding the hearing immediately, since it was clear to him that Commissioner Tyler was also not comfortable with an "immediate" hearing. Commissioner Messenbaugh suggested that the hearing be held on Friday, June 20th at 8:00 a.m. Commissioner Tyler noted that she wants the City Attorney to explain all of the legal issues involved to the Commissioners prior to the hearing. It was agreed that this meeting would be handled via conference call.

III. New Business

A. New petition filing: "Increasing Public Safety by Creating Peace"

Karon Hatchett reported that the petitioners have submitted their signatures. They need 31 additional valid signatures, and have time to "cure" their submission (until July 15, 2003). The petitioners are in the Denver Election Commission

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process of collecting additional signatures. The rejected signatures were invalid because they were not in the "Denver" database. Susan Rogers asked if any signatures were invalidated because the signer failed to write "Denver" under "City and County." Ms. Hatchett answered in the negative.

B. Election Commission Open House for new Denver Elected Officials

Karon Hatchett indicated that the Commissioners should set a date for this event, which might include a briefing on the federal Help America Vote Act (HAVA), among other things. Commissioner Jackson indicated that there should be an "Open House" for the new Commissioners-elect. Commissioner Tyler suggested that the current Commissioners plan the event for Denver's elected officials, but that the new Commissioners hold it. Commissioner Tyler noted that some may attend, but few probably will. She noted that it might be held for newly elected City Council members. Commissioner-elect Adams opined that such an event need not happen now, and Commissioner-elect Rogers noted that many new City Council members have no idea what the Commission does. Ms. Hatchett opined that such an Open House should be for all newly elected city officials, not just for City Councilmembers. Commissioner Jackson noted that the event would happen after the current Commissioners are out of office. Ms. Hatchett suggested (and it was agreed upon) that the topic be tabled, and that the new election Commissioners should take it up at a later date.

IV. Executive Director Report

A. Revenues for May 2003: \$2,161.29

Revenues, Year to Date: \$95,057.15

B. Secretary of State HAVA Update – Tabled until July meeting

C. State Legislative Update – Tabled until July meeting

V. Announcements and Comments by Commissioners, Staff and Guests

Frank Sullivan noted that, according to the minutes of the March meeting, there was no Commission vote on whether to allow or disallow Carol Boigon's candidate petition signatures that lacked the word "Denver" under "City and County." As a result, opined Sullivan, the Commission should not have put Boigon's name on the ballot and the votes for her should not have been counted.

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Commissioner Messenbaugh countered that the intent of the Commission was clear: to count signatures that were valid but lacked "Denver." Sullivan again noted that the Commission violated parliamentary procedure and that Boigon's name should not have gotten onto the ballot. Sullivan insisted that the vote that was taken was not on the "question," but on whether to call the question. Commissioner Messenbaugh reiterated that the Commission's intention was clear – to allow the signatures lacking "Denver." Lynn Wolfe ended the discussion by pointing out that the Commission has never formally adopted the use of Roberts Rules of Order, and is therefore not bound by them. Carolyn Metzler asked when "voter history" including the May and June elections would be available. Ms. Hatchett indicated that she would call Ms. Metzler with the exact date this information would be available. Commissioner Tyler suggested that the Commission needs rules, procedures and timelines to have such information available in a predictable and timely manner. Commissioner Jackson noted that the next Regular Meeting of the Commission will be held on July 15, 2003 at 4:00 p.m. For the record, she indicated her "requirement" that Commissioner Tyler attend the final meeting of the current Commission (July 15, 2003). Commissioner Tyler did not comment.

VI. Motion for Executive Session
Commissioner Messenbaugh moved that the Commission go into Executive Session to discuss personnel matters. Commissioner Tyler seconded the motion, which passed unanimously.

VII. Adjournment
Commissioner Tyler moved that the meeting be adjourned. Commissioner Messenbaugh seconded the motion, which passed unanimously.

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THE DENVER ELECTION COMMISSION

Sherry L. Jackson, Commissioner

Mark W. Messenbaugh, Commissioner

Jan Tyler, Commissioner

Attest:

Karon Majeel Hatchett, Executive Director

Dated: _____