

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RICE

NINTH JUDICIAL DISTRICT

Case Type: Other Civil

Benda for Common-sense, a Minnesota
Non-Profit Corporation, and Kathleen
Hagen,

Court File No. 66-cv-22-2022

Judge: Carol M. Hanks

Petitioners/Plaintiffs

v.

Denise Anderson, Director of Rice County
Property Tax and Elections,

**MEMORANDUM OF LAW
IN OPPOSITION TO
PETITIONERS' MOTION FOR AN
ORDER TO CORRECT ERRORS
AND OMISSIONS**

Respondent/Defendant;

and

Minnesota Secretary of State Steve Simon,

Intervenor.

INTRODUCTION

Denise Anderson, Director of Rice County Property Tax and Elections, Respondent for purposes of the Petition for Correction of Errors and Omissions Under Minn. Stat. § 204B.44 (“Petition”), respectfully requests that the Court deny the Petitioners’ “Motion for an Order to Correct Errors and Omissions – Count III” (“Motion”). Without citing to any legal authority, Petitioners’ Motion seeks to supplement their Petition. This Motion does not resolve the procedural and jurisdiction defects of the Petition, which Respondent previously addressed in her Motion to Dismiss, nor does the Motion support the requested relief. Despite this supplementation,

Petitioners still fail to demonstrate any error or omission attributable to Ms. Anderson.

Petitioners' request for this Court to alter Rice County's voting equipment and process on the eve of the 2022 election should be denied in its entirety.

I. Legal Standard under Minn. Stat. § 204B.44

Petitioners brought the Petition and purportedly bring this Motion under Minn. Stat. § 204B.44.¹ The burden of proof in a petition brought under Minn. Stat. § 204B.44 rests with the Petitioners. Specifically, the Petitioners must show that Respondent committed an error, omission, or wrongful act that must be corrected under Minn. Stat. § 204B.44. *See Butler v. City of Saint Paul*, 936 N.W.2d 478, 484 (Minn. 2019) (stating that the petitioner “has the burden to prove that the City made an error that requires correction”); *Paquin v. Mack*, 788 N.W.2d 899, 904 (Minn. 2010) (stating that petitioner “has the burden to prove that leaving his name off the ballot is an error that must be corrected under Minn. Stat. § 204B.44”); *see also* Minn. Stat. § 204B.44.

II. Petitioners Fail to Show that Respondent Committed an Error or Omission.

Petitioners have not shown that Ms. Anderson committed or will commit an error or omission leading up to the 2022 election. Petitioners have, unfortunately, created a convoluted record.

Initially, Petitioners submitted a wholly inadequate petition that provided no legal or factual basis for the requested relief and instead merely stated: “Upon information and belief, Defendant (Respondent) intends to utilize an Electronic Voting System in the

¹ Minn. Stat. § 204B.44 does not allow for a petitioner to supplement their petition through motion practice.

November 8, 2022 election that has hardware, software or features that are not properly approved, certified, or secure.”² Then, a month after the Petition was filed, Petitioners filed this Motion with numerous exhibits of questionable significance, including a 2014 Memorandum from the “State of Wisconsin\Government Accountability Board,” correspondence involving other counties and a non-party, a written complaint filed with the Minnesota Secretary of State’s Office by a non-party,³ a curriculum vitae of one of the Petitioners, online news articles, and correspondence from a coalition of non-governmental organizations.⁴

Petitioners have also submitted a Memorandum of Law in Support of Motion to Prohibit Use of Uncertified Electronic Voting Systems in Rice County (“Petitioner’s Memorandum of Law”) that mischaracterized both law and fact. Now, despite the fact that this Court explicitly reserved its decision on Petitioner’s request for court ordered discovery “pending the outcome of the hearing on the Petition,”⁵ Petitioners are attempting to issue subpoenas and conduct depositions in this matter ahead of the hearing. *See* Soderlind Decl., Exs. 1, 2, and 3.

² The Petition is included as Count III of the “Complaint and Petition for Correction of Errors and Omissions Under Minn. Stat. 204B.44” filed by Petitioners on August 23, 2022. *See* Index No. 2.

³ *See, e.g.*, Affidavit of Evan Peterson, Exhibits 1, 2, 7, and 8.

⁴ *See, e.g.*, Affidavit of Kathleen Hagen, Exhibits 1, 2, 5, 8, and 9.

⁵ *See* Index No. 30, Order Following Hearing on Ex Parte Motion, at paragraph 3.

In Petitioners' Memorandum of Law, Petitioners finally attempted to articulate the alleged "error" charged against Ms. Anderson. Petitioners allege that the voting machines utilized by Rice County are not certified as required by "State Law and the Rice County Commissioners." These allegations do not amount to "errors" attributable to Ms. Anderson nor are the allegations true.

A. Resolution #22-046 is not evidence of an error or omission attributable to Ms. Anderson.

In support Ms. Anderson's alleged error, Petitioners claim as "undisputed fact" the following: "By Resolution #22-046 dated June 28, 2022, Rice County has further instructed Defendant, Denise Anderson that all voting equipment must be 'certified and approved' by 'test labs accredited by the US Election Assistance Commission and undergo additional testing by the Office of the Minnesota Secretary of State.'"⁶

Petitioners have misread and misconstrued Resolution #22-046.

Even a cursory reading of the one-page resolution reveals that this was not an instruction or directive to Ms. Anderson, nor was it a suggestion that election equipment in Rice County was improper. In fact, the "Recitals" in the Resolution provide the opposite of what Petitioners now argue as "undisputed fact." Specifically, the Resolution reads, in pertinent part, as follows:

WHEREAS[,] Before being certified for use in Minnesota, all voting equipment must be tested and certified by test labs accredited by the U.S. Election Assistance Commission and undergo detailed additional testing by the Office of the Minnesota Secretary of State[;]

⁶ Petitioners' Memorandum of Law in Support of this Motion, citing to Hagen Aff. Ex.3 at _0019.

[...]

WHEREAS, Rice County *currently*⁷ *uses election equipment that has been certified and approved* for use in the State of Minnesota[;]

WHEREAS, Said hardware and software *has been* audited and approved by both the State of Minnesota and by Rice County[;]

WHEREAS, the approved hardware and software *is secure and adequate* for the purposes of conducting free and fair elections in Rice County[.]”

NOW THEREFORE, LET IT BE RESOLVED, that the Rice County Board of Commissioners, hereby establishes that the use of the election hardware and software from only certified and approved vendors will be required in all Rice County polling places.

(emphasis added).

The plain language of this Resolution reveals that this was not an instruction to Ms. Anderson to modify the current hardware or software to be used in the 2022 elections. To the contrary, the Resolution provides that the hardware and software is “secure and adequate for the purposes of conducting free and fair elections in Rice County” and that the current hardware and software should be used. If anything, the Resolution was a direction not to deviate from the current plan as everything was in order: the system was approved by the Minnesota Secretary of State and approved by the County. The Petitioners’ attempt to cherry-pick language from the Resolution is misleading. This Resolution is neither evidence of an instruction imposed upon Ms. Anderson nor is it evidence that Ms. Anderson violated such an instruction.

⁷ Resolution #22-046 was on the Agenda dated June 28, 2022. *See* Anderson Decl., Ex. A.

Moreover, for the sake of argument, even if the Rice County Board of Commissioners had instructed Ms. Anderson to do something that she did not do, Petitioners have provided no authority showing that such employment directives would fall within the scope of Minn. Stat. § 204B.44. As the Minnesota Supreme Court observed in *Begin v. Ritchie*, “[t]he ‘principal purpose’ of this statutory remedy ‘is to provide a mechanism for correcting errors alleged to have occurred before the election, such as ... in preparing or printing the official ballot.’” *Begin v. Ritchie*, 836 N.W.2d 545 (Minn. 2013) (quoting *Coleman v. Ritchie*, 762 N.W.2d 218, 231 n. 13 (Minn. 2009)). The Court should decline Petitioners’ invitation to use this mechanism to interpret and expand upon a resolution of the Rice County Board of Commissioners under the guise of section 204B.44.

In sum, contrary to Petitioners’ misguided allegation, Resolution #22-046 does not show an error or omission attributable to Ms. Anderson.

B. While Petitioners purportedly brought this action against Ms. Anderson, their dispute is with the Minnesota Secretary of State.

Now that Petitioners have finally articulated the alleged error in Petitioners’ Memorandum of Law, it is apparent that Petitioners are using this Petition as a vehicle to challenge the Minnesota Secretary of State. This is not the forum to do so.

In support of their argument against Ms. Anderson, Petitioners cite to Minn. Stat. § 206.57 and Chapter 8220 of the Minnesota Administrative Rules. Contrary to Petitioners’ claim that the petition is against Ms. Anderson, Minn. Stat. § 206.57 and Chapter 8220 of the Minnesota Administrative Rules involve rules and procedures under

the purview of the Minnesota Secretary of State. For example, Rule 8220.035 sets forth the requirements for an application to the Secretary of State by a vendor pursuant to Minn. Stat. § 206.57. Such citations and arguments are directed at the Secretary of State. Furthermore, as previously addressed, Petitioners are now issuing subpoenas to the Minnesota Secretary of State's Office and attempting to conduct depositions.

While the Secretary of State is better positioned to speak to its own rules, procedures, and findings, it is notable that Petitioners again ignore language in the certification records they cite to as evidence of an error attributable to Ms. Anderson. Namely, while Petitioners highlight the language in the certifications that “modem functions” were excluded from the certifications, Petitioners ignore the surrounding language.

For example, one of the certifications called out by Petitioners goes on to provide: “The presence of the modem in EVS 6.0.7.0 did not affect the ability of the system to accurately count ballots and report results. The testing process did demonstrate that when the polls are closed on the DS200s, the results tape is printed prior to the system presenting an option to transmit results via modem.” Benda Aff., Ex. 3 at _0046. Another certification provides: “This Certification Report, as in previous reports, does not cover any of the modeming functions of the EVS 5.3.4.1 Voting System. However, the testing process did demonstrate that when the polls are closed on the DS200s, the results tape is printed prior to the system presenting an option to transmit results via modem.” Peterson Aff., Ex. 1 at _0026. Presumably, Petitioners ignored this language in the certifications because the language makes clear that the mere presence of a modem on

a machine, or the use of modem functions after the election closes, does not invalidate the machines or the certification.⁸

In addition to the certifications themselves, the statutory language also refers to transmission via modem. *See* Minn. Stat. 206.845, subd. 2 (providing that the head election judge “may transmit the accumulated tally for each device to a central reporting location using a telephone, modem, Internet, or other electronic connection”). While Petitioners deem any use of a modem an “error,” the statutory framework states otherwise.

Petitioners also suggest Ms. Anderson and/or the Minnesota Secretary of State somehow bypassed the requirements of U.S. Election Assistance Commission (“EAC”) and is now seeking to use a modem to transmit unofficial results for no good reason. The EAC has no legal authority over Minnesota elections. The Court may take notice that the EAC creates *guidelines* that, according to the EAC website, “were created to assist state and local election officials in effectively managing and administering elections.”⁹ Tellingly, those EAC guidelines recognize the practice of using a modem to transmit unofficial results. The EAC guidance provides, “**Modem Transmission of Unofficial**

⁸ As Petitioners acknowledge, Rice County utilizes the modems to transmit unofficial polling places results. Rice County is one of six counties in Minnesota that utilize ES&S voting equipment with the option to transmit unofficial election results after the polls are officially closed and all voting has ended. These modems are not operational during the election.

⁹ The Election Management Guidelines are publicly available at: https://www.eac.gov/election_management_resources/election_management_guidelines.aspx

Results. The caution about not permitting network access does not apply to the use of modems on election night to transmit *unofficial* polling place results to the central office.” *Id.*, Chapter 2 (bold and italics retained from original).

Just like Petitioners’ argument with respect to Resolution #22-046, a close review the alleged violation shows that there is no error attributable to Ms. Anderson.

C. Petitioners’ public policy argument is out of place.

Lastly, Petitioners make a public policy argument that is not supported by any law. Section 204B.44 is not a mechanism to debate policy; it is a mechanism designed to quickly identify and address errors or omissions, primarily in the preparation or printing of an official ballot. Here, Petitioners have not shown that an error, omission, or wrongful act has been committed or will be committed by Respondent.

While Petitioners may be interested in debating public policy and may desire to advocate for certain election policies and procedures, this forum, mere days before the 2022 election, is not the place to do so.

CONCLUSION

As previously addressed in Respondent’s Motion to Dismiss, the Petition should be dismissed even before it is considered on the merits. The Petition was not properly pled, not brought before the appropriate court, and not timely. Even if this matter was appropriately before this Court, Petitioners failed to show an error attributable to Ms. Anderson requiring intervention under Minn. Stat. § 204B.44, and therefore have failed to carry their burden of proof. Accordingly, Respondent respectfully requests that the Court deny the Motion and dismiss the Petition in its entirety.

RATWIK, ROSZAK & MALONEY, P.A.

Dated: October 12, 2022

By:  _____

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