



COUNTY ADMINISTRATOR'S OFFICE

PIMA COUNTY GOVERNMENTAL CENTER
130 W. CONGRESS, FLOOR 10, TUCSON, AZ 85701-1317
(520) 724-8661 FAX (520) 724-8171

C.H. HUCKELBERRY
County Administrator

October 6, 2015

The Honorable Michele Reagan
Arizona Secretary of State
1700 W. Washington Street, Floor 7
Phoenix, Arizona 85007

Re: Request for Legal Opinion Regarding Hand Count of Local Elections

Dear Secretary Reagan:

Please find enclosed my October 6, 2015 request of Attorney General Mark Brnovich for a legal opinion regarding the permissibility of a hand count of local elections.

The Pima County Board of Supervisors is also requesting your office's review and guidance regarding this subject, as the Arizona Elections Procedures Manual prescribes hand count audits only for national or state elections, not local elections.

We would appreciate receiving your guidance as soon as possible to facilitate planning for a hand count audit.

Sincerely,

A handwritten signature in black ink, appearing to read "C.H. Huckelberry", is written over a large, sweeping flourish that extends from the signature down towards the typed name below.

C.H. Huckelberry
County Administrator

CHH/mjk

Enclosure



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C.H. HUCKELBERRY
County Administrator

October 6, 2015

The Honorable Mark Brnovich
Arizona Attorney General
1275 W. Washington Street
Phoenix, Arizona 85701-1367

Re: Request for Legal Opinion Regarding Hand Count of Local Elections

Dear General Brnovich:

The Pima County Board of Supervisors met today and requested an opinion from the Attorney General regarding the permissibility of a hand count audit of the County's November 3, 2015 Bond Election, as well as mayor and council races for the City of Tucson (a charter city) and the Town of Oro Valley recall election. If the County were to conduct this hand count, would Pima County be in violation of A.R.S. § 16-602(B)(2)(f)? That statute states in part:

"If there are no contested races as prescribed by this paragraph, a hand count shall not be conducted for that precinct for that election."

As you know, Pima County is not a charter county. We are a political subdivision and as such can take only those actions authorized by State law. See attached Pima County Attorney Opinion 08-03. A.R.S. § 16-602(B) and the referenced procedures established by the Secretary of State are silent regarding conducting a hand for local elections; however, a reading of Paragraph F cited above could be construed to preclude such. A violation of this section of State law could constitute a Class 6 felony, A.R.S. § 16-1010, and a violation of the Arizona Elections Procedures Manual could constitute a Class 2 misdemeanor, A.R.S. § 16-452(C). Accordingly, we will not proceed with a hand count audit of the local elections without guidance from your office.

The Honorable Mark Brnovich
Re: **Request for Legal Opinion Regarding Hand Count of Local Elections**
October 6, 2015
Page 2

We have also requested guidance from the Arizona Secretary of State concerning the Arizona Elections Procedures Manual. The Arizona Elections Procedures Manual also appears silent on such and prescribes hand count audits only for national or state elections, not local elections. Ariz. Sec'y of State, *Arizona Elections Procedures Manual*, at 189 (2014). However, it also states, "If there are no contested races in any of the designated categories, no hand count will take place." *Id.* at 193.

Pima County has an Election Integrity Commission (EIC), and the EIC's recommendation to the Board of Supervisors is attached for your information. We are in agreement with the EIC recommendation, provided we can conduct such a hand count audit without violating State law. Our elected officials need to be sure they will not be prosecuted for a hand count audit of the local elections.

We ask for your expedited review of this matter so we may plan for the hand count audit following the November 3, 2015 election.

Sincerely,



C.H. Huckelberry
County Administrator

CHH/anc

Enclosure

c: The Honorable Chair and Members, Pima County Board of Supervisors
The Honorable Barbara LaWall, Pima County Attorney
Thomas Weaver, Chief Civil Deputy Pima County Attorney
Chair and Members, Pima County Election Integrity Commission



OFFICE OF THE
Pima County Attorney
Civil Division

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Barbara LaWall
PIMA COUNTY ATTORNEY

OPINION NO. 08-03

To: C.H. Huckelberry, County Administrator

From: Christopher Straub, Chief Civil Deputy County Attorney
Daniel Jurkowitz, Deputy County Attorney

Date: October 24, 2008

Subject: *Hand Count Audit Requirements.*

Arizona counties use computerized elections systems for counting ballots. In 2006, the Legislature amended A.R.S. § 16-602 to establish a hand count audit procedure “[f]or each countywide primary, general and presidential preference election” to ensure the integrity of the electronic vote tabulating process. 2006 Ariz. Sess. Laws, ch. 394, § 5. You have asked six specific questions relating to the hand count audit of election results authorized by A.R.S. § 16-602. This Opinion will set forth each of your questions and the answers thereto in the order you have presented them.

1. Can local contested races be subject to the hand count audit, for example, contested races for the Board of Supervisors or any other local office that may be on the General Election Ballot?

The hand count audit procedures are set forth in detail in A.R.S. § 16-602. Subsection (C)(2) of that statute specifies the races that are subject to the hand count audit:

2. The races to be counted on the ballots from the precincts that were selected pursuant to paragraph 1 of this subsection for each primary and general election shall include up to five contested races. After the county recorder or other officer in charge of elections separates the primary ballots by political party, the races to be counted shall be determined by selecting by lot without the use of a computer from those ballots as follows:

- (a) For a general election, one statewide ballot measure, unless there are no measures on the ballot.
- (b) One contested statewide race for statewide office.

(c) One contested race for federal office, either United States senate or United States House of Representatives. If the United States House of Representatives race is selected, the names of the candidates may vary among the sampled precincts.

(d) One contested race for state legislative office, either state house of representatives or state senate. In either case, the names of the candidates may vary among the sampled precincts.

(e) If there are fewer than four contested races resulting from the selections made pursuant to subdivisions (a) through (d) and if there are additional contested federal, statewide or legislative races or ballot measures, additional contested races shall be selected by lot not using a computer until four races have been selected or until no additional contested federal, statewide or legislative races or ballot measures are available for selection.

(f) If there are no contested races as prescribed by this paragraph, a hand count shall not be conducted for that precinct for that election.

In addition to the four races described above, Subsection (C)(5) states: “[i]n elections in which there are candidates for president, the presidential race shall be added to the four categories of hand counted races.”

Generally, “[t]he only powers possessed by boards of supervisors are those expressly conferred by statute or necessarily implied therefrom.” *Bd. of Supervisors of Apache County v. Udall*, 38 Ariz. 497, 506, 1 P.2d 343, 347 (1931); *Hounshell v. White*, 522 Ariz. Adv. Rep. 27, ¶ 19, 175 P.3d 65, 69 (App. 2008). This is particularly true regarding election matters. *See Barrera v. Superior Court*, 117 Ariz. 528, 573 P.2d 923 (App. 1977) (There is no authority to recount an election absent a specific statute authorizing such recount.)

In this case, there is no express statutory authority enabling the Board of Supervisors to audit a local race, nor is there anything to indicate that this might be an implied power. Rather, the Legislature’s decision to include in A.R.S. § 16-602 only certain specific races demonstrates the Legislature’s intent to exclude all other races from the hand count audit. *In re Estate of Agans*, 196 Ariz. 367, 370, ¶ 16, 998 P.2d 449, 452 (App. 1999). (“[t]he expression of one or more items in a class generally indicates an intent to exclude all items of the same class that are not expressed.”) Here the Legislature’s intent to exclude local races is reinforced by the prohibition in Subsection (C)(2)(f) on hand counts for a particular precinct “[i]f there are no contested races as prescribed by this paragraph.” (Emphasis added.)

Pursuant to A.R.S. § 16-452(A),¹ the Secretary of State has adopted an Election

¹ This statute reads in pertinent part: “A. After consultation with each county board of supervisors or other officer in charge of elections, the secretary of state shall prescribe rules to achieve and maintain the

Procedures Manual (“the Manual”) which has been approved by the Governor and the Attorney General pursuant to A.R.S. § 16-452(B). Failure to comply with the Manual is a class 2 misdemeanor. A.R.S. § 16-452(C). The Manual provides additional detail regarding the manner in which the hand count audit is to be performed. Pages 217-242 of the Manual describe the selection of races to be hand counted from the randomly selected precincts. The Manual specifically provides:

“1. Determine the race categories available for this election. The possible race categories shall be Presidential Elector, Statewide Candidate, Federal Candidate, State Legislative, and Ballot Measure.”

ARIZONA SECRETARY OF STATE ELECTION PROCEDURES MANUAL 221 (Oct. 2007) (emphasis supplied).

The Secretary of State’s interpretation would be entitled to deference by a court. See *Kahn v. Thompson*, 185 Ariz. 408, 916 P.2d 1124 (App. 1995) (the interpretation given to a statute by the officers charged with its implementation should be given great weight and deference). Therefore, local races are not included in the possible race categories for a hand count audit.

Arizona is a “covered jurisdiction” under Section 5 of the federal Voting Rights Act. A change to any “...practice or procedure with respect to voting...” first must be “precleared” by the U.S. Department of Justice under Section 5 of the Voting Rights Act. 42 U.S.C. § 1973c. A change would specifically include any change concerning counting of votes or in the method of determining the outcome of an election. 28 C.F.R. § 51.13 (2008).² Both A.R.S. § 16-602 and the Manual have already been submitted to and precleared by the Department of Justice. Because the results of a hand count audit could constitute the official count for a race, A.R.S. § 16-602(F), any change to the existing hand count procedure as specified in either statute or in the Manual would require additional preclearance from the Department of Justice.

2. What [is] the proper number of precincts to be audited, and can the Board of Supervisors, by administrative directive or approved motion, require that twice the number of precincts allowed by state law be subject to hand count audit?

“At least two per cent of the precincts in that county...” shall be subject to the hand count

maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots

B. Such rules shall be prescribed in an official instructions and procedures manual to be issued not later than thirty days prior to each election. Prior to its issuance, the manual shall be approved by the governor and the attorney general. . . .

C. A person who violates any rule adopted pursuant to this section is guilty of a class 2 misdemeanor.”

² Violations of the Voting Rights Act are enforceable by the U.S. Attorney General and may result in both civil and criminal sanctions. 42 U.S.C. § 1973j.

audit. A.R.S. § 16-602(C)(1). Two per cent is the minimum number of precincts that must be audited. The Board of Supervisors, however, has authority to audit more than two percent of precincts and could require that four per cent of precincts be audited in the hand count.³

The Board of Supervisors, pursuant to A.R.S. § 16-411, has established 417 precincts in Pima County. Two percent of 417 would be 8.34 and four percent would equal 16.68. The Secretary of State's Election Procedures Manual states:

At least two per cent of the precincts in the county...shall be selected at random from a lot consisting of every precinct in that county. A county shall round to the nearest whole number for the number of precincts to hand count.

ARIZONA SECRETARY OF STATE ELECTION PROCEDURES MANUAL 219 (Oct. 2007).

Applying this provision of the Manual to Pima County's 417 established precincts yields the following results: two percent of the precincts equal 8 precincts and four percent of precincts equal 17.

The Manual, however, further provides:

For any election where there are consolidated polling locations, the amount of precincts to hand count will be based on the number of active polling locations for that election. . . . Precincts without any registered voters shall be excluded from the pool of available precincts in the county.

Id. at 219-220. While there are 417 designated precincts in Pima County, there is one precinct without registered voters and only 373 actual polling locations. Two per cent of the resulting number is 7.44. Rounding to the nearest whole number, the Secretary of State would require that the County audit at least 7 precincts, but the County could choose to audit more. In fact, the Board of Supervisors has decided that four percent of precincts shall be audited for each election. This being the case, 15 precincts would be subject to the hand count audit.

Because the number of polling locations in Pima County is less than the number of precincts, the number of precincts to be audited will be different depending upon whether the dictates of A.R.S. § 16-602(C)(1) are followed or whether the Manual's directives are followed. The officer in charge of elections could rely on the statute alone in calculating the minimum number of precincts to audit because the County can always choose to audit more than the minimum number of precincts, regardless of how that number is calculated. Using the lower minimum number of precincts as required by the Manual, however, makes it more likely that a hand count audit will go forward. This is because it is more likely that the resulting lower number of necessary Hand Count Board members, as discussed in the next section of this Opinion, will in fact "arrive to perform the hand count," A.R.S. § 16-602(C)(7). It would also eliminate the possibility of selecting precincts with no voters.

³ On July 1, 2008, the Board of Supervisors approved the County Administrator's recommendation to "double the number of precincts for hand counting verification over the minimum prescribed by law."

3. **What specific number of Party designated hand count auditors are required to conduct the hand count audit for precincts selected, and does the law prohibit the discretion of the Parties regarding conducting the hand count audit with fewer Party representatives than specified, even though there is agreement and consensus among the Parties to conduct the audit?**
4. **If the specified number of party observers fail[s] to appear for the hand count audit, can the hand count audit be conducted?**

These questions concern the same subject matter and therefore merit a single response. The minimum number of hand count auditors required to complete the hand count audit is set forth in A.R.S. § 16-602(C)(7) which states in pertinent part:

For each precinct that is to be audited, the county chairmen shall designate at least two board workers... If there are less than two persons for each audited precinct available to participate on behalf of each recognized political party, the recorder or officer in charge of elections, with the approval of at least two county party chairpersons in the county in which the shortfall occurs, shall substitute additional individual electors who are provided by any political party from anywhere in the state without regard to party designation to conduct the hand count... If the total number of board workers provided by all parties is less than four times the number of precincts to be audited, the recorder or officer in charge of elections shall notify the parties of the shortage by 9:00 a.m. on the Wednesday preceding the election. The hand count shall not proceed unless the political parties provide the recorder or officer in charge of elections, in writing, a sufficient number of persons by 5:00 p.m. on the Thursday preceding the election and a sufficient number of persons, pursuant to § 16-602, subsection C, paragraph 7, arrive to perform the hand count.

The Manual similarly provides:

For each precinct that is to be audited, the County Political Party Chairmen shall designate in writing at least two Hand Count Board members to the County Officer no later than 5:00 p.m. on the Tuesday preceding the election. The County Political Party Chairman shall also designate an appropriate number of alternative Hand Count Board members.

If the total number of Hand Count Board members provided on the lists from all the County Political Party Chairmen is less than four times the number of precincts to be audited, the Election Official shall notify the parties of the shortage by 9:00 a.m. on the Wednesday preceding the election.

The hand count shall not proceed unless the political parties provide the County Officer, in writing, a sufficient number of persons by 5:00 p.m. on the Thursday preceding the election.

The hand count may not proceed unless the County Political Party Chairmen from two different recognized political parties participate in the hand count. For the hand count to proceed, no more than 75 per cent of the persons performing the hand count shall be from the same political party.

* * *

If less than four Hand Count Board members per precinct fail to appear to perform the Precinct Hand Count and Early Ballot Audit, no hand count will be conducted and the electronic tabulation is deemed the official count. [A.R.S. § 16-602(C)].

ARIZONA SECRETARY OF STATE ELECTION PROCEDURES MANUAL 226 – 227 (Oct. 2007).

Therefore, according to both the applicable statute and the Manual, the minimum number of hand count auditors must equal four times the number of precincts to be audited. Moreover, the hand count audit cannot proceed absent the minimum number of hand count auditors prescribed by both the statute and the Manual.

With one possible exception, these mandates may not be altered by agreement of the political parties. As previously noted in response to Question 1, there is no authority allowing the officer in charge of elections to deviate from the statutory scheme, particularly with respect to the counting of ballots. *Barrera v. Superior Court*, 117 Ariz. 528, 573 P.2d 923 (App. 1977).⁴ And, we are unaware of any attempt by the Division of Elections to obtain preclearance from the Department of Justice under Section 5 of the Voting Rights Act for any alternative procedures with respect to the hand count audit.

The only exception to this rule would be in those cases where the Board of Supervisors has authorized *more* than two per cent of precincts to be audited, but only a number of hand count auditors equal to at least four times the number of those required to audit two percent of precincts “arrive to perform the hand count.” A.R.S. § 16-602(C)(7). This is because A.R.S. § 16-602(C), read in its entirety, appears to mandate that a hand count of two percent of precincts must go forward if the minimum prerequisites are met.

5. Can other precincts be selected for hand counting after the drawing of selected precincts if those precincts are found to have some form of defect such as a seal that has been changed or does not match other documentation?

⁴ It should also be noted that a failure to comply with elections statutes subjects the officer in charge of elections to potential criminal penalties. See, e.g., A.R.S. §§ 16-452(C) (violation of a rule contained in the Secretary of State’s procedures manual constitutes a class 2 misdemeanor), 16-1009 (knowingly failing to perform a duty in the manner prescribed by law constitutes a class 3 misdemeanor), 16-1010 (knowingly failing to perform a duty or violating a provision of election law constitutes a class 6 felony unless a different punishment for such act is prescribed by law).

The manner in which precincts are to be selected for the hand count audit is set forth in A.R.S. § 16-602(C)(1) which states:

1. At least two per cent of the precincts in that county, or two precincts, whichever is greater, *shall be selected at random from a pool consisting of every precinct in that county.* The county political party chairman for each political party that is entitled to continued representation on the state ballot or the chairman's designee shall conduct the selection of the precincts to be hand counted. The precincts *shall be selected by lot* without the use of a computer, and the order of selection by the county political party chairmen shall also be by lot. The selection of the precincts shall not begin until all ballots voted in the precinct polling places have been delivered to the central counting center. The unofficial vote totals from all precincts shall be made public before selecting the precincts to be hand counted. Only the ballots cast in the polling places and ballots from direct recording electronic machines shall be included in the hand counts conducted pursuant to this section. Provisional ballots, conditional provisional ballots and write-in votes shall not be included in the hand counts and the early ballots shall be grouped separately by the officer in charge of elections for purposes of a separate manual audit pursuant to subsection G of this section. (Emphasis added.)

The Manual similarly provides:

The County Political Party Chairmen shall conduct the selection of the precincts to be hand counted. *The precincts shall be selected by lot* without the use of a computer and the order of selection by the County Political Party Chairmen shall also be by lot. The County Officer and the County Political Party Chairmen shall agree to the lot method.

The selection of the precincts shall not begin until all ballots voted in the precinct polling places have been delivered to the central counting center. The unofficial vote totals from all precincts shall be made public before selecting the precincts to be hand counted. The selection of precincts shall occur prior to the selection of the races to be counted.

At least two percent of the precincts in the county or two precincts, whichever is greater, shall be selected at random *from a lot consisting of every precinct in that county.* A county shall round to the nearest whole number for the number of precincts to hand count.

For any election where there are consolidated polling locations, the amount of precincts to hand count will be based on the number of active polling locations for that election.

ARIZONA SECRETARY OF STATE ELECTION PROCEDURES MANUAL 219 (Oct. 2007) (emphasis added).

The specified procedure for selecting precincts is as follows:

The process for selecting the precincts for Primary and General Elections is:

- 1. Determine Selection Order.** Select by lot the order in which the County Political Party Chairman shall choose. The selection order will apply for the entire hand count process.
- 2. Create Lot.** Create a lot containing all precincts.
- 3. Select Precincts.** Draw the required two per cent or two precincts to be counted *among a lot containing every precinct in the county*. Precincts without any registered voters shall be excluded from the pool of available precincts in the county. The County Political Party Chairmen shall alternate selecting precincts based on the order defined in step one from the lot until the required number of precincts is selected.
- 4. Record Precincts.** The County Officer shall record the precincts to be hand counted in Section A of the Master Precinct and Race Selection Worksheet. The precincts shall be listed in order selected. The order of the precincts shall be used when selecting the contested races in section VI of this procedure.

ARIZONA SECRETARY OF STATE ELECTION PROCEDURES MANUAL 219-220 (Oct. 2007)
(emphasis added.)

As the emphasized language indicates, *every* eligible precinct must be included in the lot of precincts subject to the random selection. If the Legislature had intended a different result, it could have specifically provided that precincts with certain anomalies would not be included in the hand count audit. The fact that such exclusions do not appear in the statute is consistent with the Legislature's intent to ensure the ballots from all precincts are subject to random inspection. Otherwise, the very purpose of the random audit might be defeated because those persons intent on tampering with election results would have an incentive to cause the disqualifying anomalies in certain precincts, thereby preventing the hand counting of ballots cast in those precincts.

- 6. What is the authority of the Elections Director to conduct the hand count process and maintain order and control of the process to ensure that it is accomplished in an accurate manner?**

The officer in charge of elections, currently in Pima County the Elections Director, has authority to "...prohibit persons from participating in the hand count if they are taking actions to disrupt the count or are unable to perform the duties as assigned." A.R.S. § 16-602(C)(7). The Secretary of State's Election Procedures Manual expands this authority:

The County Officer has the right to remove any Hand Count Board member they deem to be disruptive to the hand count process. The County Officer may prohibit persons from participating in the hand count if they are taking actions to disrupt the count or are unable to perform the duties as assigned.

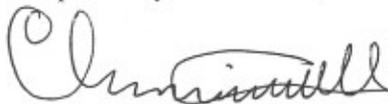
ARIZONA SECRETARY OF STATE ELECTION PROCEDURES MANUAL 227 (Oct. 2007).

Conclusion.

The questions you have presented have been clearly addressed in the statutes and in the Secretary of State's Election Procedures Manual. It is the unambiguous intent of the Legislature that elections are to be conducted with "the maximum degree of correctness, impartiality, uniformity and efficiency." See, e.g., A.R.S. §16-452(A). Deviation from the statutes and the Manual, for whatever reason, that contravene that intent or that result in procedures that have not been precleared by the Department of Justice are generally impermissible.

Please let us know if you have any additional questions or concerns regarding this matter.

Respectfully,



Christopher Straub
Chief Civil Deputy County Attorney



Daniel Jurkowitz
Deputy County Attorney

cc: Barbara LaWall, Pima County Attorney
Amelia Cramer, Chief Deputy County Attorney
Brad Nelson, Director, Division of Elections

ELECTION INTEGRITY COMMISSION

Pima County, Arizona

TO: Honorable Sharon Bronson, Chair
Pima County Board of Supervisors

FROM: Tom Ryan, Chair
Election Integrity Commission



DATE: September 28, 2015

RE: Recommendation for Hand Count Audit Following November County Bond
and City Election

The upcoming November 3 election, to be conducted by Pima County Elections, combines county bond issues with City of Tucson Mayor and council races and city propositions. Currently there is no plan to do a post-election hand count for any of these issues and races since the state law on hand count audits for elections does not apply to non-partisan and local elections.

The Pima County Election Integrity Commission recommends, by a unanimous vote, that a post-election hand count be performed for this election. The Commission recommends this hand count audit for three reasons:

1. Pima County has recently purchased new election equipment and this is the first election that will employ that equipment. Since we have no track record with this equipment, we need to establish the integrity of the tabulation process. This will also provide a better opportunity to become familiar with the new system and its peculiarities.
2. The proposed hand count is consistent with the City of Tucson's standard practice of doing a limited hand count for their elections. The City conducted a hand count for the primary election.
3. We wish to avoid or at least reduce the likelihood of expensive legal proceedings that might arise from distrust of the election system. We recall the cases arising from the 2006 RTA bond election and do not wish a recurrence.

There is nothing in state law to preclude the County from doing a voluntary hand count.

The hand count we recommend would follow the prescription provided in state law and the Secretary of State's Election Procedures Manual, modified as needed for this election's unique circumstances. In this case we would hand count one bond issue, one city council race, and one city proposition, selected randomly. The selected races would be hand counted for ballots cast in 4% of the precincts (about 8) and 1% of the early ballots selected randomly in the manner used in previous elections. As with regular audited elections, the hand count will occur only if a sufficient number of volunteers are available. These hand counters will be paid the usual stipend of \$75. The total cost has been estimated at \$4,500.

Please add this topic to the agenda for the October 6, 2015 Board meeting for discussion and action.

cc: Chuck Huckelberry, Pima County Administrator
Robin Brigode, Clerk of the Board
Roger Randolph, City Clerk

SEP 28 15 12:03 POC/KCF/RO