



Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536



Telephone: (517) 373-5383
Fax: (517) 373-1986
TDD: (517) 373-0543

Senate Bills 973 through 976 (as reported without amendment)

Sponsor: Senator Bev Hammerstrom (S.B. 973)

Senator Wayne Kuipers (S.B. 974)

Senator Michael D. Bishop (S.B. 975)

Senator Alan L. Cropsey (S.B. 976)

Committee: Government Operations

Date Completed: 2-2-06

RATIONALE

The Board of State Canvassers is a bipartisan entity mandated by Article II, Section 7 of the State Constitution, which states, "A board of state canvassers of four members shall be established by law...A majority of any board of canvassers shall not be composed of members of the same political party." Although the Constitution does not prescribe responsibilities of the Board, Article II, Section 9, and Article XII, Section 2 require "the state officer authorized by law" or "the person authorized by law" to submit to the voters laws proposed by initiative petition and to perform certain functions concerning the certification of voter-initiated petitions for constitutional amendments. The Michigan Election Law, which governs the Board's appointment, states that these phrases in the Constitution refer to the Board of State Canvassers. While the Election Law sets forth additional responsibilities of the Board, its role in certifying petitions for the ballot has been the focus of debate and litigation over the years.

In 2002 and 2004, the Michigan Court of Appeals ordered the Board of State Canvassers to certify voter-initiated ballot proposals, after the Board had deadlocked, rejected a petition, or was unable to reach a decision. These cases involved the Board's authority (or lack of authority) to conduct a legal analysis of the constitutional issues or to examine the merits or legality of a proposal. In keeping with precedent, the Court held that the Board's authority was limited to determining whether the form of a petition complied with the statutory requirements and whether there were

sufficient signatures. More recently, the Board has been the subject of Court of Appeals orders concerning the Michigan Civil Rights Initiative (MCRI) petition, which proposes to prohibit the State, State universities, and other State entities from discriminating or granting preferential treatment based on race, sex, color, ethnicity, or national origin. In October 2005, the Court found that the Board had breached its duty to certify the petition, and ordered the Board to approve it for the November 2006 ballot. After the Board failed to do so, in December 2005, the Court ordered the Secretary of State to place the proposal on the ballot. (This litigation is discussed in more detail under **BACKGROUND**, below.)

In light of these events, some people believe that the responsibilities for certifying petitions should be transferred from the Board to the State Elections Director, who heads the Bureau of Elections in the Department of State.

CONTENT

The bills would amend the Michigan Election Law to transfer from the Board of State Canvassers to the State Elections Director responsibilities for canvassing petitions to determine the validity and sufficiency of signatures; performing other constitutional duties concerning ballot petitions; and holding hearings on complaints or to investigate signatures. The bills also would delete requirements for the Board to approve

ballot statements prepared by the Elections Director.

The bills are tie-barred to each other and to three bills that have not yet been introduced.

Senate Bill 973

The Election Law requires the Elections Director, with the approval of the Board of State Canvassers, to prepare a statement for the ballot of any proposed amendment or question to be submitted to the voters under Article XII, Section 2 of the State Constitution (which establishes the right of the voters to propose constitutional amendments by initiative petition). The bill would delete the requirement for approval by the Board of State Canvassers.

The bill also would require the State Elections Director to perform other duties as prescribed by the Election Law. Currently, the Director is required to perform the duties of the Secretary of State under his or her supervision with respect to the supervision and administration of the election laws.

Senate Bill 974

The Election Law states that those phrase "the state officer authorized by law" or "the person authorized by law" in Article II, Section 9 or Article XII, Section 12 of the Constitution means the Board of State Canvassers. (Article II, Section 9 provides for the power of the people to propose laws and to enact laws (the "initiative") and the power to approve or reject laws enacted by the Legislature (the "referendum").) Under the bill, the phrases would mean the State Elections Director. The bill would require the Elections Director, rather than the Board, to exercise the duties prescribed in the constitutional provisions.

Under the Election Law, it is the duty of the State Elections Director, with the approval of the Board of State Canvassers, to prepare a statement of purpose of any proposed amendment or question to be designated on the ballot for submission to the electors. The bill would delete the requirement for the Board's approval.

Senate Bill 975

The bill would require the State Elections Director, rather than the Board of State Canvassers, to assign a number designation to appear on the ballot for each question to be submitted on a statewide basis.

Senate Bill 976

Under the Election Law, when the Secretary of State receives petitions for a statewide vote under Article II, Section 9, or Article XII, Section 2 of the Constitution, he or she is required to notify the Board of State Canvassers. Upon receiving the notification, the Board must canvass the petitions to determine whether they have been signed by the requisite number of qualified and registered voters. If the Board cannot verify the genuineness of a petition signature using the digitized signature contained in the qualified voter file, the Board may have the signature checked against the registration records of the clerk of a political subdivision where the petitions were circulated. The clerk is required to cooperate fully with the Board.

Under the bill, the State Elections Director would have to canvass the petitions and could check doubtful signatures against local registration records, and the clerk of a political subdivision would have to cooperate with the Elections Director.

The Election Law authorizes the Board of State Canvassers to hold hearings upon any complaints filed or for any purpose considered necessary by the Board to investigate the petitions. To conduct a hearing, the Board may issue subpoenas and administer oaths. The bill would transfer to the Elections Director the authority to hold hearings. The Elections Director also could issue subpoenas and administer oaths with the approval of the Board.

Currently, at least two business days before the Board of State Canvassers meets to make a final determination on challenges to and the sufficiency of a petition, the Elections Bureau must make public its staff report concerning the disposition of challenges filed against the petition. Beginning with the receipt of any document from local election officials (to authenticate signatures or verify registrations), the Board

must make that document available to petitioners and challengers on a daily basis. The bill would refer in these provisions to the State Elections Director, rather than the Board.

MCL 168.32 (S.B. 973)
168.474 (S.B. 974)
168.474a (S.B. 975)
168.476 (S.B. 976)

BACKGROUND

Board Appointment & Responsibilities

Under the Michigan Election Law, the members of the Board of State Canvassers are appointed by the Governor with the advice and consent of the Senate. The Board must consist of two members from each major political party, selected by the Governor from a list of three names submitted by each party's State central committee. If a party's State central committee fails to submit names within the time allowed, the Governor must appoint an individual who was formerly elected as a State officer of the party and is presently affiliated with it. A Board member's term of office is four years.

Three members of the Board constitute a quorum, and an action of the Board is effective only if at least one member of each major political party concurs in the action.

The Board's role in certifying petitions for statewide ballot proposals originates from Article II, Section 9, and Article XII, Section 2 of the State Constitution. Article XII, Section 2 includes the following language:

"Such petitions [proposing amendments to the Constitution] shall be filed with *the person authorized by law* to receive the same...Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law. *The person authorized by law* to receive such petition shall upon its receipt determine, as provided by law, the validity and sufficiency of the signatures on the petition, and make an official statement thereof at least 60 days prior to the election at which the proposed amendment is to be voted upon...

"The ballot to be used in such election shall contain a statement of the purpose of the proposed amendment...Such statement of

purpose and caption shall be prepared by *the person authorized by law*, and shall consist of a true and impartial statement of the purpose of the amendment in such language as shall create no prejudice for or against the proposed amendment." (Emphasis added.)

Under Article II, Section 9, if a law is proposed by initiative petition, the Legislature must enact or reject it. If the Legislature does not enact the law, "...*the state officer authorized by law* shall submit such proposed law to the people for approval or rejection at the next general election" (emphasis added).

As noted above, the Michigan Election Law states that the terms "the state officer authorized by law" and "the person authorized by law", as used in these provisions, mean the Board of State Canvassers.

MCRI Petition

The MCRI petition was filed with the Secretary of State on January 6, 2005. On April 18, a group known as "By Any Means Necessary" filed a challenge to the petition, based on alleged misrepresentation by the petition circulators. In July, the Chief Deputy Attorney General advised the Board of State Canvassers that it did not have constitutional or statutory authority to consider claims of misrepresentation in determining the validity and sufficiency of petition signatures. The Bureau of Elections determined that an estimated 455,373 valid signatures appeared on the petition (while the number required was 317,757), and the Elections Director recommended that the Board certify the petition as sufficient.

When the Board met on July 19, 2005, a motion to certify the petition received two "no" votes, one "yes" vote, and one abstention. The MCRI Committee then appealed to the Michigan Court of Appeals. In its opinion and order of October 31, 2005, the Court found that there was no dispute that the form of the petition was proper or that there were sufficient signatures; concluded that the Board "breached its clear legal duty to certify the petition"; and ordered the Board to approve the petition for placement on the November 2006 ballot (*Michigan Civil Rights Initiative v Board of State Canvassers*, 268 Mich App 506). The

Court also found that the Board did not have the authority to investigate the allegations asserted by the challengers.

Following a series of motions filed by all of the parties, the Court of Appeals, on December 7, 2005, again directed the Board to approve and certify the petitions. The Board met on December 14, 2005. As widely reported in the news media, the meeting was subject to considerable disruption by opponents of the petition. A motion to approve the petition received two "yes" votes, one "no" vote, and one abstention. Although there is some dispute about the intention of the members who failed to vote "yes", the petition had not been certified when the meeting adjourned.

The matter returned to the Court of Appeals, which issued an order on December 20, 2005. The order stated, "Notwithstanding this Court's December 7, 2005 clear and unconditional directive, certain members of the Board of State Canvassers failed to comply with our Court's Order and thus, once again, the Board of State Canvassers failed to discharge its legal obligation under our State Constitution, statutes, and Court Orders to certify the petitions". The Court therefore ordered the Secretary of State "...forthwith to take all necessary steps and measures, consistent with State election laws, to place the initiative on the November 2006 ballot".

In regard to the language that will appear on the ballot, on December 22, 2005, the Court denied a motion by the MCRI Committee that the Court approve language proposed by MCRI. The Court ordered the Elections Director to prepare and submit to the Board a statement of purpose of the proposed amendment by January 6, 2006, and ordered the Board to approve a statement by January 20, 2006. On January 20, the Board approved language recommended by the Elections Director.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Given the history of litigation over the role of the Board of State Canvassers in certifying ballot petitions, and the recent

orders of the Michigan Court of Appeals, it is clear that the Board is dysfunctional. Instead of promoting the integrity of the elections process in Michigan, the Board is impeding the people's right to vote. Although the Michigan Supreme Court and the Court of Appeals have said numerous times that the Board has no authority to consider the merits of a proposal, the Board has continued to refuse to certify petitions that are in the proper form and have sufficient signatures. As the Court of Appeals stated on December 20, 2005, regarding the MCRI petition, "...this failure by the Board of State Canvassers wrongfully thwarts and interferes with the clear constitutional mandate that the citizens of this State have the right to amend or not amend their Constitution by a vote of the people."

The bills would remove the petition-certification responsibilities from an entity that is partisan by design, and whose members are appointed by virtue of their affiliation with a major political party. While some Board members are able to exercise their constitutional and statutory duties without bias, others evidently are not. The Court of Appeals should not have to order the Board repeatedly to fulfill its responsibilities or, as it did in December, suggest that the Court might address the apparent misconduct of some Board members in contempt proceedings.

The Elections Bureau already does the actual work of canvassing petitions and drafting ballot language. Under the bills, the office also would have the power to determine the sufficiency of the petitions and decide on language that will appear on the ballot. The Board of State Canvassers would continue to be responsible for canvassing and certifying the results of elections on ballot questions and for elective office, and performing other responsibilities under the Election Law.

Opposing Argument

The bills are an overreaction to recent developments on the Board, which historically has performed well. The constitutional and statutory provisions governing the Board ensure a system of checks and balances, which involves the Governor, both major political parties, and, at times, the judiciary. The Board is not simply a partisan entity—it is a *bipartisan* body that cannot take action without the

agreement of at least three members, which means that at least one from each major political party must concur. The Board also must comply with the Open Meetings Act.

Although the current Elections Bureau and its director may do an excellent job and perform without any appearance of bias, there is no guarantee that future staff will do the same. The Elections Director, after all, is appointed by the Secretary of State, who is a partisan elected official. It is not inconceivable that the decisions of Elections Bureau personnel could be influenced by the person to whom they answer. Furthermore, under the bills, these decisions could be made in a nonpublic forum and without the public input that currently informs the Board of State Canvassers. Although it is the practice of the Elections Bureau to meet with interested parties in developing ballot language, the Bureau is not required to do so. Under the bills, the Elections Director potentially could make a unilateral decision about what appears on the ballot or whether to certify a petition.

Opposing Argument

Some of the problematic issues before the Board have resulted from the signature-gathering process. Concerning the MCRI petition, in particular, there have been widespread allegations that the circulators deceived voters. Instead of changing the end of the process, legislation should address problems that occur in the beginning.

Response: The signature-gathering process and the petition-certification process are separate issues, and both should be addressed.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bills would have a minimal impact on State government and no impact on local units of government. Members of the Board of State Canvassers are entitled to necessary expenses and receive a per diem of \$75.

In FY 2004-05, \$5,851.50 was spent on per diems and expenses. To the extent that the bills would reduce the number of meetings, minimal savings would occur.

Fiscal Analyst: Bill Bowerman

A0506\s973a

This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.