

Dear Ms. Haas,

Please forgive the lateness of this submission. I am in Peru without consistent access to reliable wifi.

Pursuant to the instructions of Angela Hartzler to Buddy Miller on Friday, September 22, 2023, attached is my public comment regarding the Adopted Regulation of the Secretary of State LCB File No. R200-22, which is the Commission's R200-22A (A REGULATION establishing requirements for conducting a hand count of ballots), Nevada Administrative Code 293, of the Regulations to be reviewed at the next meeting of the Legislative Commission on September 28, 2023.

This is a similar comment to one I submitted regarding R200-22 to the Nevada Secretary of State for the workshop and adoption hearings, updated to reflect some changes from the proposed rules to the adopted rules.

My sincere thanks for your consideration.

Kim Upham

September 27, 2023

Via Electronic Mail: Jordan.Haas@lcb.state.nv.us

Mr. Jordan Haas, Commission Secretary
Legislative Commission (NRS 218E. 150)
Grant Sawyer State Office Building, Room 4401
555 East Washington Avenue
Las Vegas, Nevada

RE Ballot hand-counting observations in Nye County in November 2022 General Election and R200-22A commentary (as approved by the Secretary of State)

Dear Mr. Haas,

I am a member of the Oregon state bar who has taken part in voting observation and vote tally observation in several states including New Hampshire (2016), Montana (2018), Arizona (2020), and Nye County Nevada in 2022. I was present from the first day of hand counting, October 26, 2022, in the Nye County Offices in Pahrump, through October 27, 2022, when a Nevada Supreme Court order effectively brought the hand count to a halt (until after the polls closed on election day, on November 8, 2022).

The stated reason for hand counting ballots in Nye County was that the Interim Clerk Mark Kampf and county commissioners believed that a hand count would be more accurate than the machine tallying of ballots. The hand count effort was described as an “audit,” but also was an attempt to demonstrate that hand counting could be as accurate as machine tally.

In my view, this effort fell short of this goal, and raised significant concerns. In order to carry out the responsibilities of the clerk to accurately count voters’ ballots, the process must have integrity, accountability and transparency. In addition, to ensure public trust, the staff carrying out this work must embody competence and integrity. Below are my observations of the ways these objectives were not met:

1. Observer rules were unclear and while observers were allowed in the counting rooms, no one was observing the chain of custody of the ballots in a separate room, adjacent to the counting rooms, where ballots were stored. Packets of fifty ballots were brought to, and were taken from, counting rooms. Mr. Kampf was present some of the time, but not the whole time. I did not see any of his deputy clerks or law enforcement keeping watch over ballots. Meanwhile, observers were instructed not to talk to any volunteer counters, but our instructions did not mention notetaking. Because two observers took notes, those two observers, and their affiliate, were ejected the first day in the afternoon. That meant of the five counting rooms, most of the time I was the only observer and member of the public who was present. The counting rooms were small, so could not accommodate many people, and I saw no other members of the public trying to observe.
2. Media was denied entry to the counting rooms and the staging area behind the counter where the training was taking place. In my view the media would provide an extra layer of transparency and accountability and therefore should be allowed to report on the process (so long as doing so did not divulge any of the actual vote counts). I thought the Associated Press

reporter Gabe Stern's article after day one (published October 27th, 2023) was an accurate depiction of the events of that day.

The second morning Gabe Stern was present, and when he stepped out to take a phone call, Mr. Kampf locked the door and told him he was excluded. Eventually he regained access, but said he was "stonewalled" by Mr. Kampf and everyone else who would not speak with him. Television reporters were not allowed to see the counting rooms. Since Mr. Kampf called this a demonstration project, I would think he would want the media present.

3. I had significant concerns about ballot chain of custody because, to the best of my knowledge, no one was allowed to observe the main room where ballots were stored and retrieved from. If Mr. Kampf was the primary or sole person transporting the ballots to and from the county building (original site of the hand count) this would be an obvious conflict of interest between his roles as candidate for office and clerk. I did not observe and I do not have knowledge of how the ballots were transported to the counting site, and if they came from Tonopah or elsewhere in Pahrump.
4. Ballot counters at the Nye County office in Pahrump were enthusiastic, and arguably sincere in their desire to help, but the level of competency varied significantly among those undertaking the tallying. Because of hearing, eyesight, or perhaps cognitive issues, some counters were not tracking the information read from the ballots by the reader. This resulted in mismatches between the team of three people. When team members did not agree on the counts, the process would have to be repeated from the beginning until each of the three counters obtained the same result. In one instance, after several such attempts, and with growing frustration in the room, I notified the head volunteer, Laura, who intervened and swapped out the volunteer having difficulties with another volunteer. While I believe all the volunteers were well meaning, they did not all share equivalent competency. Because the demographics of volunteers skewing to older age, physical and mental stamina was a concern.
5. I observed the procedure where a clerk publicly announced the race and who the voter voted for, but I understand that the Secretary of State has now changed that procedure in Sections 4 and 5 of the R200-22A. Nevertheless, mistakes will still be made when the tally clerks tally the wrong race, candidate or ballot question, which will happen due to inattention, fatigue, vision problems or interruption when other members of the team talk. In addition, the verification clerk must review the tallies of the tally clerks. If there are discrepancies, then "the reason for the discrepancy must be identified and corrected before the hand count tally team may continue tallying." Section 5.4(f)(2). But the regulation does not prescribe the methodology for identifying and making the correction, which is a serious concern given that "[h]and count tally teams are allowed to talk, but must not read out loud the votes to be tallied or discuss information concerning the tallied number of votes." Sec. 4.4
6. Due to the difficulties described, the hand count took far longer than anticipated. A group of five, including three talliers, one reader and a verifier, would be expected to take 90 minutes to complete tallying fifty ballots. However, one group I observed took three hours to count fifty ballots. The first afternoon shift only 90 ballots total were tallied in a four-hour period. I expected that when the volunteers became more experienced and the effort was fully staffed, they could count up to 900 ballots per day. But as they increased in speed, this resulted in more mismatch errors. At that rate it would take at least 29 days to tally all the ballots cast.

During the two days that I observed the hand counting of the ballots before election day, these problems resulted in far less progress than expected. I believe that the volunteer selection would need to be more stringent and the training more substantial to make a hand count feasible. In addition, far more individuals would be needed to accomplish the task, as demonstrated by the numerous mismatches and subsequent recounts I observed. It would not have been possible for Nye County to count all of the ballots cast in the time allotted with the number of people involved to certify or announce the results by the statutory deadline. If hand counting continues, this will likely lead to missed deadlines, and uncertainty for both candidates and voters.

And finally, chain of custody concerns raises significant doubts about the validity of the process and results.

After the hand count was initially shut down by court order, I switched to observing early voting at the Bob Ruud Center in Pahrump. The staff there, including Mr. Kampf's deputies, demonstrated competency and answered all my questions that arose from observations. I found them to be knowledgeable and transparent. Observers were able to observe all aspects of the process from opening through closing. I did not have any of the same concerns about transparency and chain of custody that the hand count invoked.

In short, I believe the machine counting of ballots, with widely accepted sampling methods for pre- and post-election day audits, would lead to far more certainty and confidence in the election results, consistent with voters' constitutional rights to cast ballots and have their vote count. If hand counting is permitted, guidelines should be modified to take into account some of the problems observed in Nye County in 2022.

Sincerely yours,
/s/ Kim Upham

See the Associated Press article by Gabe Stern, October 26, 2022 (corrected October 28), "Nevada officials begin unprecedented hand count of ballots," at <https://apnews.com/article/2022-midterm-elections-nevada-voting-las-vegas-617fc7a37e9cd8d1a512e4fb7be77574>.

See generally twitter thread by AP Reporter Gabe Stern dated October 24, 2022 at <https://twitter.com/gabestern326/status/1585805808612188160?cxt=HHwWglClikeT-9IEsAAAA>, including letter to SoS from Kampf's attorneys explaining how they planned to comply with the October 21 Order and other information on Nye County's Kampf's response.

See also tweet by AP Reporter Gabe Stern dated October 27, 2022, "Massive ruling re Nye County's parallel hand-count" at <https://twitter.com/gabestern326/status/1585786202761748480?cxt=HHwWglCjlcMJ7IEsAAAA>.

See AP News article by Gabe Stern, Ken Ritter and Scott Sonner, dated October 27, 2022, entitled "Hand vote count on hold after Nevada high court says illegal," at <https://apnews.com/article/2022-midterm-elections-biden-cabinet-nevada-american-civil-liberties-union-59d6599a4c7667f4f8f6bcc5bb6c182d>. See also October 27, 2022 letter from Nevada SoS to Kampf halting the parallel hand count, attached to a tweet by AP Reporter Gabe Stern dated October 27, 2022 at <https://twitter.com/gabestern326/status/1585805808612188160?cxt=HHwWglClikeT-9IEsAAAA>.

PHOTOS OF HAND COUNT TRAINING (NO ACTUAL BALLOTS PRESENT)





