

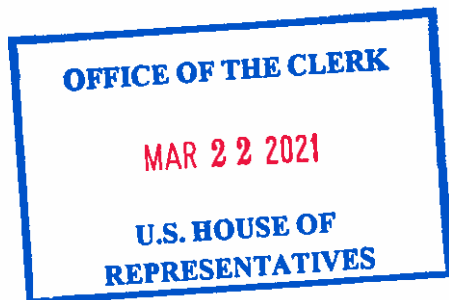
IN THE
UNITED STATES HOUSE OF REPRESENTATIVES

RITA HART,
Contestant,

v.

MARIANNETTE MILLER-MEEKS,
Contestee,

BRIEF IN RESPONSE TO LETTER FROM CHAIRWOMAN LOFGREN
REGARDING THE ELECTION CONTEST FOR REPRESENTATIVE
IN THE 117th CONGRESS FROM THE
SECOND CONGRESSIONAL DISTRICT OF IOWA



Alan R. Ostergren
Alan R. Ostergren, P.C.
500 Locust Street, Suite 199
Des Moines, IA 50309

Ryan G. Koopmans
Belin McCormick
666 Walnut Street, Suite 2000
Des Moines, IA 50309

Mark A. Schultheis
Nyemaster Goode
700 Walnut Street, Suite 1600
Des Moines, IA 50309

11:19 am

Introduction

This is an election contest that, as Rita Hart has reminded the Committee so many times, is filed under the Federal Contested Elections Act. That Act contains specific procedures for discovery (2 U.S.C. §§ 386-388), provides specific timelines for the Contestee to respond (2 U.S.C. § 384), and places the burden squarely on the contestant. 2 U.S.C. § 385. Because “there is an institutional deference to, and a ‘resumption of regularity’ of state election proceedings, results and certifications,” “[a]n election certificate from the authorized state official...is deemed to be prima facie evidence of the regularity and results of an election to the House.” Jack Maskell & L. Paige Whitaker, Cong. Rsch. Serv., RL33780, *Procedures for Contested Election Cases in the House of Representatives 2* (2010); accord 2 *Deschler’s Precedents* ch. 8, § 15, H.R. Doc. No. 94-661, at 946 (1994) (“Once Congress meets, the certificate constitutes a prima facie right to a congressional seat in the House.”).

Nevertheless, twelve days ago, Chairperson Lofgren sent a letter to both parties that ignores those standards and this chamber’s precedents. Purporting to be a request about “establishing procedures, principles, and timelines,” the letter attempts to move up the timelines for Congresswoman Miller-Meeks to

come forward with evidence and provide substantive responses to the contest allegations, thus attempting to place the burden on Congresswoman Miller-Meeks to defend Iowa’s certified election. (A certification that was signed by three Republicans and two Democrats.) It asks her to describe “as comprehensively as possible” any ballots that were erroneously excluded from, or erroneously included in, the State Canvassing Board’s certification. And it asks questions that are already clearly answered by the Federal Contested Elections Act and Iowa law—as if to say that a majority of the Committee already intends to alter the law as it sees fit.

The letter is troubling for what it portends, especially on the heels of the majority’s decision to “postpone disposition” of Congresswoman Miller-Meeks’ “motion to dismiss until the Committee considers the merits” of Rita Hart’s contest. (Committee Resolution 117-12). That motion was based on Ms. Hart's failure to first take her case to Iowa courts, and there is no reason to delay decision on this point. Either a majority of this Committee cares that Rita Hart skipped Iowa’s fair and impartial judicial process, or it does not. If it cares—if it does not want to give the green light to future candidates to skip a judicial process for a purely partisan one—then there is no need to spend any additional

taxpayer resources on this contest. If she is required to exhaust her state remedies before coming to this body (a precedent that has been reaffirmed time and again), then this proceeding is over. If she is not required to exhaust her state remedies—if the majority of this Committee is going to open the flood gates and start overriding state election law—then the Committee should come right out and say it. Let’s not beat around the bush.

But if this contest is to continue, as the majority of this Committee has requested, then it should be done consistent with the FCEA and the precedent of this body. Congresswoman Miller-Meeks is the certified winner, and the certificate of election she holds is afforded a strong presumption of legality and correctness. Indeed, that certificate is prima facie evidence that the election was conducted correctly. Deschler’s Precedents Ch. 9 §§ 36.1. Thus, the burden is on Hart (2 U.S.C. § 385), and because “a contest for a seat in the House of Representatives is a matter of most serious import and not something to be undertaken lightly,” that burden “is necessarily substantial.” *Tunno v. Veysey*, H.R. Rep. 92-626.

To the extent that the Committee asks for Congresswoman Miller-Meeks’ position on the procedure for this investigation, we provide it. But the

Congresswoman objects to any attempt to leapfrog the discovery procedures in the FCEA, require her to produce evidence at this stage of the contest, and to ultimately put the burden on her to defend a state-certified election. To that end, and with those objections, we address each question in turn.

Question 1: Please describe as clearly, precisely, and comprehensively as possible the rules and procedures, if any, that the Committee should adopt for (a) determining whether particular ballots were validly cast by eligible voters; (b) examining, inspecting, and counting ballots, consistent with voters' intent; and (c) facilitating the just and speedy disposition of this contested election case.

Response: This is an election for Iowa's Second Congressional District, conducted under Iowa law to choose who will represent Iowans. The "rules and procedures" the Committee should follow are Iowa election laws. To suggest that the Committee should do anything else is an affront to the people of Iowa and to the fairness of Iowa's election process. Indeed, "[w]ith respect to election contests, Congress has repeatedly said that it will follow state laws and decisions of state courts unless they are shown to be unsound." *Carney v. Smith*, H.R. Rep. 63-202; Cannon's Precedents, Ch. 162, §§ 91 and 92.

Iowa has specific statutes and rules on whether a ballot has been validly cast and on the processes for examining, inspecting, and counting ballots. There is no reason for this Committee to follow anything different. To say that the Committee has the power to do so is not a justification.

Question 2: How would your proposed rules and procedures promote fairness, impartiality and nonpartisanship, the accurate counting of all ballots validly cast by eligible voters and only those ballots, transparency, public confidence, timely dispute resolution, the equal right of all eligible voters to participate in the election, and the integrity of the election?

Response: Following Iowa election law, which was passed by Iowans' legislative representatives, signed by Iowa's governor, and enacted before the election, is the best and only way to "promote fairness, impartiality and nonpartisanship, the accurate counting of all ballots validly cast by eligible voters and only those ballots, transparency, public confidence, timely dispute resolution, the equal right of all eligible voters to participate in the election, and the integrity of the election." That is, after all, why we have election laws. Establishing new rules after the election, and after the votes are known, undermines public confidence in our election system and show Iowans that their

laws do not matter, that their elections do not matter, and that they will be represented by whichever party controls the House.

Question 3: Please describe as clearly, precisely, and comprehensively as possible (a) any ballots that were validly cast by eligible voters but were erroneously excluded from the state-certified vote totals at any point during the initial tabulation of results, the canvass, or the recount, and (b) what, if anything, the Committee should do to determine whether and how each of these ballots should be added to the vote totals.

Response: This question conflicts with the FCEA and goes beyond Committee Resolution 117-10, which establishes a process for requesting information on procedure, legal principles, and timelines. The question does not ask about the procedure or legal principles that should apply (see questions 1 and 2), and it is clearly not about timelines. Instead, the question leapfrogs the statutory discovery procedures in the FCEA, flips the burden of proof to Congresswoman Miller-Meeks and seeks to require that she prematurely put on a defense to Hart's allegations. That is not appropriate and contrary to the FCEA.

Congresswoman Miller-Meeke is the certified winner, and the certificate of election she holds is afforded a strong presumption of legality and correctness. Indeed, that certificate is prima facie evidence that the election was conducted correctly. Deschler's Precedents Ch. 9 §§ 36.1. Thus, the burden is on Hart (2 U.S.C. § 385), and because "a contest for a seat in the House of Representatives is a matter of most serious import and not something to be undertaken lightly," that burden "is necessarily substantial." *Tunno v. Veysey*, H.R. Rep. 92-626.

At this pre-discovery stage of the contest, the FCEA makes clear that the Contestee's obligations are minimal; she need only admit or deny Hart's allegations, or say nothing at all. 2 U.S.C. §§ 383(a), 385. Discovery will soon begin, as the Committee has chosen not to take a position on whether Hart's claim should be dismissed for failure to exhaust state remedies. At the conclusion of that process, the Congresswoman may introduce evidence regarding ballots that were erroneously excluded from the canvass or the recount. But for now, it is for Hart, and Hart alone, to come forward with allegations of irregularities.

Question 4: Please describe as clearly, precisely, and comprehensively as possible (a) any ballots that were not validly cast by eligible voters but were erroneously included in the state-certified vote totals and (b) what, if anything, the Committee should do to determine whether and how each of these ballots should be deducted from the vote totals.

Response: See response to Question 3.

Question 5: Please describe as clearly, precisely, and comprehensively as possible (a) any other ballot-counting or ballot-tallying errors or irregularities that affected the state-certified vote totals and (b) what, if anything, the Committee should do to correct them.

Response: See response to Question 3.

Question 6: Which, if any, of these alleged ballot-counting or ballot-tallying errors or irregularities could either party have reasonably foreseen and successfully challenged through Iowa state administrative or judicial procedures prior to (a) Election Day (November 3, 2020) or (b) the Iowa State Canvassing Board's final certification of the election (November 30, 2020)? If either party did unsuccessfully challenge any of these alleged errors or irregularities, please describe those challenges.

Response: Hart has not identified any ballot-counting or ballot-tallying errors that occurred prior to Election Day.

Hart's allegations about recount irregularities could have been challenged in state or federal court during the recount, and thus before the Iowa State Canvassing Board's final certification of election on November 30, 2020. But that would have required Hart to challenge the actions of her own members on the recount boards. The alleged "inconsistency" in the recount was caused by Hart's campaign and her representatives. It was Hart's representatives on the various county recount boards who sought different recount procedures (machine or hand) in different counties and, indeed, in different precincts within the same county. In the worst example, Hart's recount board representative persuaded the Scott County recount board to apply a different recount standard to ballots within the same precinct. Again, if Hart believed that the actions of her recount board representatives violated the Constitution, she could have sought injunctive relief against them in state or federal court before the completion of the recount and the Iowa State Canvassing Board's final certification of the election on November 30, 2020. She declined to do so.

Question 7: Given the decision in Committee Resolution 117-12 not to immediately dismiss this contested election case, what measures, if any, should the Committee take in response to Contestant's decision not to file a state-court case contesting the Iowa State Canvassing Board's November 30, 2020, final certification of the election?

Response: The Committee should reconsider its decision and immediately dismiss this case. As stated above, there is no legal basis to withhold judgment on the motion until the merits of Hart's contest. The Committee either agrees there is an exhaustion requirement, consistent with prior precedent, or it does not. Holding the motion over only wastes taxpayer resources.

Question 8: Do you intend to depose witnesses or subpoena documents or other tangible things, as described in the FCEA? Should the Committee limit (a) the number of deposition hours available to each party and/or (b) the number or types of documents or other tangible things available to each party? Should the Committee impose any other limits on discovery?

Response: Under the FCEA, Hart will conduct discovery first. Thus, Congresswoman Miller-Meeks' discovery may depend on the scope of Hart's

discovery, though the Congresswoman expects that she will likely issue subpoenas for documents and depose witnesses after Hart's discovery period has ended. The FCEA states that either party may take the testimony of "any person, including the opposing party" so long as the deposition is done within the prescribed time period in 2 U.S.C. § 386(c). The FCEA also states that those "witnesses may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending contested election case." 2 U.S.C. § 386(b). The FCEA allows for no other limits on the number of depositions or the scope of the examination. As for a time limit for any individual deposition, the limit contained within the Federal Rule of Civil Procedure 30 (one day for seven hours) is reasonable.

Question 9: What physical evidence, including ballots, other records or papers, voting machines, or other equipment, might the Committee need to examine? For each type of evidence, please explain why examination might be necessary; the specific claim or defense to which the evidence might relate; and where, how, and by whom the evidence is currently being maintained.

Response: It is not possible to identify specific items of physical evidence that the Committee would need to examine until the completion of the discovery process.

Question 10: If you have any concerns about the current preservation or security of any physical evidence, please explain those concerns.

Response: Iowa law requires county auditors to preserve all records related to a federal election for 20 months. Congresswoman Miller-Meeks has no concerns about the security and preservation of physical evidence by these public officials.

Question 11: For each county, please describe whether the November 2020 recount was conducted by hand, by machine, or a mix of the two; and if a mix of the two, please describe what types of ballots were counted by hand, and what types were counted by machine.

Response: See the affidavits submitted in the appendix to the motion to dismiss filed by Congresswoman Miller-Meeks. Any further request of the Congresswoman at this stage wrongfully shifts the burden to her.

Question 12: For each county, please describe which of the rules, procedures, and methods that the county recount board used were requested or agreed to by your designee to the board.

Response: See the affidavits submitted in the appendix to the motion to dismiss filed by Congresswoman Miller-Meeks. Any further request of the Congresswoman at this stage wrongfully shifts the burden to her.

Question: 13: Please propose a timeline that includes (a) the close of any discovery; (b) the close of any Committee investigation; (c) any post-investigation briefing; (d) announcement of any Committee decision; and (e) any other deadlines the Committee should impose.

Response: Under the FCEA's default rules, 2 US.C. § 386(c), discovery would close on May 31, 2021, 70 days from the date the Congresswoman files her answer, unless the Committee granted an extension. Congresswoman Miller-Meeks does not yet know whether an extension will be necessary, as it may depend on upon the scope of Hart's discovery.

Post-investigation, like discovery, should be staggered, with Contestant filing first, Contestee responding, and Contestant filing a reply, if any. We suggest 60 days for the Contestant to file her brief post investigation, 60 days

for Contestee to file her responsive brief, and 21 days for Contestant to file any reply.

Question 14: Please identify any other considerations the Committee should take into account to adjudicate and resolve this contested election case.

Response: The Committee should carefully consider the harm to our democratic norms and values that would result from validating Hart's strategy to skip over the Iowa courts.

Mariannette Miller-Meeks
Member of Congress
Second Congressional District of Iowa

By:



Alan R. Ostergren
Alan R. Ostergren, P.C.
500 Locust Street, Suite 199
Des Moines, IA 50309

Ryan G. Koopmans
Belin McCormick
666 Walnut Street, Suite 2000
Des Moines, IA 50309

Mark A. Schultheis
Nyemaster Goode
700 Walnut Street, Suite 1600
Des Moines, IA 50309