

MEMORANDUM

TO: Supervisors of Elections

FROM: Dawn K. Roberts, Director

DATE: October 28, 2004

SUBJECT: Procedures for Election Day Challenges

The Department of State, Division of Elections (the "Division") understands that many of you have received letters from the Florida Democratic Party regarding the process by which electors and pollwatchers may challenge the right of voters to cast a ballot on Election Day. As a result of requests from various Supervisors of Elections for our input and in furtherance of the Division's statutory obligations, the Division is providing this guidance on the challenge process. As a preliminary matter, we make the following observations. First, the Division shares the concerns of all parties that the elections process be conducted in an orderly and efficient manner. As expressed in our September 29, 2004 memorandum, the Division has serious concerns that, if not handled correctly, the challenge process may result in logistical problems on Election Day, creating conditions that may deter eligible voters from casting their ballot. Second, the Division reiterates that if a challenge is successful at the polling place, no voter should be turned away without being offered a provisional ballot. Third, the challenge process should not be confused with provisional ballots given to voters who do not appear on the voter registration rolls. In appropriate circumstances, a person that does not appear on the voter registrations rolls must be given a provisional ballot without resort to the challenge process, as provided in the Polling Place Procedures Manual.

In order to maintain the orderly administration of the polls and the effective administration of Florida law, all Supervisors of Elections should adopt the following best practices with respect to voters whose eligibility is in doubt or challenged:

1. **Challenges to voters and doubts as to eligibility should be resolved off to the side without disrupting or delaying the process for other voters more than necessary.** The election board at each precinct must keep processing voters while any challenge or questions with respect to a voter's right to vote a regular ballot is being resolved.<sup>1</sup> It is critical that the voting process not be disrupted or delayed as a result of the processing of challenges, provisional ballots, any questions of eligibility, or for any other reason. All of these questions must be resolved in the manner least disruptive to the other voters waiting to cast their ballots.

<sup>1</sup> This does not mean that the pollworkers have any authority to keep the polling place open after 7:00 P.M. -- only voters in line at 7:00 P.M. can be allowed to cast ballots. Certainly, a challenged voter who was in line before the poll closing should be allowed to cast a regular or provisional ballot.

2. The clerks and inspectors must decide by majority vote whether a person is entitled to vote a regular ballot based on the oath and evidence presented. Specifically with respect to challenges, Section 101.111, Florida Statutes, sets forth a specific process for handling challenges to voters: (i) the challenger must make a specific challenge in writing under oath, (ii) the written challenge must be given to the voter<sup>2</sup>, (iii) the voter has the right to submit an oath affirming his or her eligibility, and (iv) the clerk and inspectors must resolve the challenge. Pursuant to Section 101.111(3)(a) and (b), the clerk and inspectors must decide by majority vote whether the challenged person may vote a regular ballot or vote a provisional ballot. If the challenged voter refuses to sign the oath affirming eligibility, then the person must be offered a provisional ballot.

Each clerk and inspector at the precinct must review the oaths and any other evidence presented to determine whether the challenged voter would be allowed to vote a regular ballot pursuant to Section 101.111, Florida Statutes; however, this provision does not require that the clerk and inspectors make such decision at one time and together. We, therefore, urge each Supervisor of Elections to provide detailed instructions to the clerk and the inspectors of each precinct to review the challenge documents individually or in groups and instruct the clerk to keep a running tally of the votes of the clerk and inspectors for each challenged voter. In order to minimize disruption,<sup>3</sup> an area in the polling room should be designated away from the immediate polling area in which to conduct the challenge process, and once a sufficient number has been reached to constitute a majority, then no additional votes need be tallied or solicited by the clerk.

Section 101.111, Florida Statutes, does not limit the type of evidence that may be presented to the clerk and inspectors when considering a challenge. In the absence of a clear directive from the Legislature, the Division will not restrict the type of evidence that may be considered by the clerk and inspectors in a challenge. Evidence with respect to eligibility may come in many forms - i.e., personal identification by a felon's victim, personal knowledge that someone has died, moved away from the jurisdiction, or adjudicated mentally incompetent, and all manner of documentation (whether or not certified) as to whether a person is eligible to vote or has cast a ballot in another jurisdiction - and, therefore, defies an exhaustive listing.<sup>4</sup>

<sup>2</sup> If a copying machine is not available, then the challenger should be asked to sign two originals, one of which should be provided to the challenged voter.

<sup>3</sup> The poll watchers should be allowed to observe the process. The clerk, however, should ensure that poll watchers maintain decorum.

<sup>4</sup> Even though the Division will not limit the type of evidence acceptable to use in a challenge, the Division has taken the position that the felon component of the Central Voter Database does not constitute sufficient proof for making a determination on whether a person is a felon because of specific issues arising from the match criteria used in the Central Voter Database. Therefore, a list of names from the felon component of the Central Voter Database without corroboration from some other form of documentation should not be considered sufficient evidence to sustain a valid challenge.

The clerk and inspectors must decide by majority vote whether there is a doubt as to the person's eligibility. See Section 101.111(3)(a) and (b). The standard to be applied by each clerk and inspector in making such decision is whether the evidence presented creates a reasonable question as to the person's eligibility. It is important to note that the decision by the clerk and inspectors is not a final determination of ineligibility, rather the decision of whether to ultimately count the ballot is left to the canvassing board. By giving the voter a provisional ballot, the voter's right to vote is protected. However, if the challenged voter is given a regular ballot and is later determined to be ineligible, then there is no means of correcting such mistake after-the-fact.

If the determination is made that a challenged voter should vote a provisional ballot, then the pollworkers should instruct the voter to provide in the "Voter Comment" section of the provisional ballot certificate a narrative explanation in support of his or her eligibility. Furthermore, the challenged voter and the challenger should be given an opportunity to present any additional evidence to the supervisor of election and each should be advised to do so immediately. The supervisor of elections should gather all evidence and present such evidence to the canvassing board for their final determination on the status of the provisional ballot.

3. **This challenge process does not affect the right of voters to receive provisional ballots in all other appropriate circumstances.** The Polling Place Procedures Manual, as supplemented, describes the circumstances in which a voter is entitled to a provisional ballot. The challenge process outlined herein does not affect the rights of voters to receive a provisional ballot, if such voter is not otherwise challenged pursuant to law.

4. **The canvassing board makes the final determination on the status of the provisional ballot, applying a presumption in favor of eligibility.** Irrespective of whether the validity of the provisional ballot is based on a challenge or a registration question, the canvassing board applies the same standard of review to determine the validity of all provisional ballots. The canvassing boards review provisional ballots to determine that (i) the signature on the provisional ballot matches the voter's records, (ii) the voter has not cast another ballot, (iii) the voter was properly registered and in the right precinct, and (iv) the voter was entitled to vote (a qualified voter under state law). See Section 101.048, Florida Statutes. In most instances, however, the weighing of the evidence will be relatively easy because any question will simply be resolved by the application of law to facts and will result in a clear answer, i.e. a person claims to be registered, but the supervisor of elections records reflect that the person never filed a voter registration form or that the person filed an incomplete voter registration form that was not timely completed pursuant to the law. In those cases where questions of fact arise, the canvassing board should apply a presumption in favor of a voter's eligibility and determine whether this presumption of eligibility is overcome by the preponderance of the evidence available to the canvassing board that the voter is ineligible to vote.

5. **Each Election Board Must Maintain Order at the Polling Place.**  
Pursuant to Section 102.031, Florida Statutes, the election board possesses full authority to maintain order at the polls and enforce obedience to its lawful commands during the election. If any person, whether the challenger, the challenged, or another pollwatcher, disrupts the elections process, then such person can be removed from the polling room. The elections board, however, needs to be mindful of the lawful and important role played by pollwatchers – observing the elections process and challenging voters – and should not base any decision of removal on the mere exercise of such role. If the pollwatcher, however, goes beyond his or her statutory prescribed role, i.e. actively engaging voters or disrupting pollworkers in the conduct of their jobs, the pollwatcher should be asked to leave the polling room.

We strongly urge that each of you provide direction to each pollworker on how to manage the challenge process and further discuss the ways to minimize the disruption of any challenges on the elections process. There is a real and concrete need for each of you to address this issue immediately and certainly before Election Day. **We respectfully request that you provide the Division with confirmation whether your county will adopt the procedures outlined herein and, if not, what procedures you will have in place to address challenges and the canvassing of provisional ballots.**