

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
FOR THE WESTERN DIVISION

| | | |
|--|---|--|
| TRACIE HUNTER, <i>et al.</i> | : | Case No.: 1:10-cv-820 |
| Plaintiffs, | : | Judge Susan J. Dlott |
| v. | : | |
| HAMILTON COUNTY BOARD OF ELECTIONS, <i>et al.</i> | : | DEFENDANTS HAMILTON COUNTY BOARD OF ELECTIONS, ALEX TRIANTIFILOU, CHIP GERHARDT, TIMOTHY BURKE, AND CALEB FAUX MOTION IN OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE REGARDING OPENING PROVISIONAL BALLOT ENVELOPES AND MOTION TO QUASH |
| Defendants. | : | |

Defendants Hamilton County Board of Elections and its members, Alex Triantifilou, Chip Gerhardt, Timothy Burke and Caleb Faux (hereinafter "Board"), hereby file their Opposition to Plaintiffs' Motion In Limine Regarding Opening Provisional Ballot Envelopes.¹ Plaintiffs' Motion must be dismissed for the reasons discussed herein.

In addition, Defendants request that the Court quash the subpoena issued to Sally Krisel to bring to Court for trial: a) all of the original provisional envelopes and ballots that were rejected because they were cast in the wrong precinct; b) all original rejected provisional ballots and envelopes that are subject to the NEOCH consent decree; and c) the three original provisional ballots and envelopes found the by Board in May 2011.

ARGUMENTS

A. Opening Provisional Ballots

Opening the thirteen provisional envelopes that the Plaintiffs have requested the court to open in their Motion would be a violation of Ohio law and therefore this Court

¹ This Response is being filed to assist in the District Court's trial preparation process, but does not waive any right being asserted by the Defendants in the 6th Circuit Court of Appeals.

should deny the Plaintiffs' Motion. This is an unnecessary and unwarranted request that destroys the secrecy of the vote. Pursuant to Ohio state election law, information regarding the provisional ballot is limited to the voter. R.C. 3505.181(B)(5)(b). Sealed provisional envelopes are to be placed in a secure location at the Board of Elections and "[t]he sealed provisional ballot envelopes shall remain in that secure location until the validity of those ballots is determined..." R.C. 3505.183(A). If the Board determines that the voter is not eligible to cast a ballot in the particular precinct or if the Board is unable to determine whether the voter is eligible to cast a ballot in the particular precinct, the "...provisional ballot envelope shall not be opened, and the ballot shall not be counted." R.C. 3505.183(B)(4)(a)(ii) and R.C. 3505.183(B)(4)(b)(ii). The Board has already determined that the 849 provisional ballots shall not be counted because the voter voted in the wrong precinct. And even if the Board was unable to make a final determination regarding the ballots, according to Ohio law, none of these 849 provisional envelopes may be opened and the envelopes must remain sealed until the ballots are destroyed. R.C. 3505.183 (C)(2).

Additionally, the Plaintiffs are requesting this Court to open provisional ballot 10218 and have this Court count the ballot if the ballot contained within is for the correct precinct. Once again the Plaintiffs, through their Motion, are asking this Court to violate Ohio law. According to Ohio law, the provisional ballot envelope shall not be opened and the ballot shall not be counted if "[t]he individual has already cast a ballot for the election in which the individual cast the provisional ballot." R.C. 3505.183(B)(4)(a)(iv). Had the Plaintiffs examined the face of the provisional envelope for provisional voter 10218 before filing their Motion, the Plaintiffs would have noticed the large, highlighted note that states that this particular provisional ballot was soiled, and that the voter accurately cast a provisional ballot in the correct precinct with provisional number 8195. Provisional Ballot Envelope (See

Provisional Envelopes attached hereto as Exhibit A). The voter's correct precinct provisional vote was counted, and therefore any attempt to count the soiled provisional ballot of this particular voter would be a violation of Ohio law.

Finally, Plaintiffs have presented no factual basis for their assertion that the thirteen provisional envelopes may contain the wrong ballot and, therefore, Plaintiffs' request to open the provisional envelopes should be denied. The Plaintiffs are asking this Court to violate Ohio law and open thirteen provisional envelopes from four separate precincts to determine whether the precinct listed on the provisional ballot matches the precinct that is listed on the provisional envelope. Plaintiffs' Motion In Limine (Doc. 93, p. 1). The Plaintiffs selected these thirteen provisional envelopes based on the Board of Elections help desk notes, which indicate that the four precincts were running low on provisional envelopes on Election Day. Plaintiffs' Motion in Limine (Doc. 93, p. 1; Doc. 93, p.2). However, there is no such evidence with regard to ballots. In fact, the evidence overwhelmingly shows that all of the precincts at issue had hundreds of ballots left over at the end of Election Day. See Affidavit of Sally Krisel, attached hereto as Exhibit B. Even if a precinct had run low on ballots, the Board's procedure is to instruct the poll workers to have voters use the DRE machines as opposed to borrowing from another precinct. *Id.* There is no evidence that this occurred on Election Day. *Id.* Therefore, the Plaintiffs' argument that ballot envelopes were shared cannot be used to support an argument that actual ballots were shared. Unlike staff at the Board of Elections, poll workers in precincts are only supplied with ballots for their precincts. *Id.* Because of this specific procedure and accounting of all ballots by the Board, there is no evidence that ballots were shared making it extremely unlikely that any of these thirteen envelopes contain a ballot from another precinct. *Id.*

According to the Director of the Board, Sally Krisel, the poll workers at both locations that the Plaintiff is investigating were informed of the proper procedure to follow when a precinct is required to borrow envelopes from another precinct. *Id.* The poll worker was directed to scratch out the stamp on the front of the envelope and write in the correct precinct. *Id.* There is no indication that the poll workers at either of Four Towers Apartments or Mt. Moriah Baptist Church did not follow this procedure. *Id.*

Once again, in the absence of evidence to the contrary, “poll worker error will not be presumed.” Secretary of State Directive (2010-74 at 1). The Plaintiffs have failed to establish that there is any correlation between the four provisional ballots that were discovered in the wrong provisional envelopes on November 19, 2010 and precincts running low on provisional envelopes on Election Day. Therefore, the Plaintiffs have provided no evidence that would overcome the presumption of no poll worker error.

The Plaintiffs are asking this Court to open thirteen provisional envelopes. However, because the Plaintiffs have failed to provide sufficient evidence to suggest that these envelopes contain different ballots, and because opening the requested envelopes would be a violation of Ohio law the Defendants respectfully request that the Court deny the Plaintiffs’ Motion In Limine Regarding Opening Provisional Ballot Envelopes.

B. Subpoena to Bring Ballots to Court

In addition, Defendants request that the Court quash the subpoena issued to Sally Krisel to bring to Court the provisional ballots. See Subpoena attached as Exhibit C. Copies of all ballot envelopes have already been provided to the parties. Under Ohio law, no provisional ballots may be opened until all are approved for counting, R.C. 3505.183(B). The Board would have to obtain security to escort Ms. Krisel to and from Court. There is no valid reason for Ms. Krisel to remove the sealed provisional ballots from the secure storage

location at the Board of Elections and bring them into Court. For the reasons stated herein, the subpoena issued to Sally Krisel should be quashed.

Respectfully submitted,

JOSEPH T. DETERS
PROSECUTING ATTORNEY
HAMILTON COUNTY, OHIO
BY:

/s/ Colleen M. McCafferty

James W. Harper
Thomas Grossmann
David T. Stevenson
Colleen M. McCafferty
Assistant Prosecuting Attorneys
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
ddn: (513) 946-3159 (Harper)
(513) 946-3120 (Stevenson)
(513) 946-3058 (Grossmann)
(513) 946-3133 (McCafferty)
Fax: (513) 946-3018
james.harper@hcpros.org
dave.stevenson@hcpros.org
tom.grossmann@hcpros.org
colleen.mccafferty@hcpros.org
*Attorneys for Hamilton County Board of
Elections*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed on July 15, 2011 using the Court's CM/ECF system, which will transmit notice of the filing to all counsel of record in this case.

/s/ Colleen McCafferty
Colleen M. McCafferty

377151

PROVISIONAL BALLOT AFFIRMATION

P 10218

ATTENTION PROVISIONAL

1. You **must** currently be registered in the State of Ohio.
2. You **must** vote in the precinct where you **currently** live.
3. You **must** complete and sign this provisional envelope.
4. You **must** provide a form of identification. (If Ohio drivers license, provide # -2 letters and 6 numbers)

YOUR BALLOT MAY NOT BE COUNTED IF THESE STEPS ARE NOT FOLLOWED

STEP 1

NAME

(print name of voter)
 I solemnly swear or affirm that I am a citizen of the United States, I will be at least 18 years of age at the time of the general election, I have lived in this state for 30 days immediately preceding this election, I am a registered voter in the precinct in which I am voting this provisional ballot and that I am eligible to vote in the election in which I am voting this provisional ballot.

STEP 2

CURRENT ADDRESS

Street Address
 City Zip County

Mailing Address if other than above

Voluntary information: Phone Number email address

STEP 3

FORMER ADDRESS (If Applicable)

Street Address
 City State County Zip

STEP 4

NAME CHANGE (If Applicable)

N/A

Former Name

Former Signature

STEP 5

BIRTH DATE

[Redacted]

Month / Day / Year

7701 LINCOLN HGTS A

Office Use Only

| NEW | VC | OLD |
|------------|----------------|-------------|
| LHC 703 | 01411386 WP | 136 1307 |

STEP 6

REASON FOR VOTING PROVISIONAL BALLOT

- Change of address
- My name is not listed in the Signature Poll Book
- Change of name
- Requested, but did not receive absent voter's ballot
- Signature Poll Book states: "Must Vote Provisionally"
- Voter lacks required identification
- Challenged Voter
- Signature does not match signature in Poll Book

STEP 7

FORM OF IDENTIFICATION PROVIDED (YOU MUST CHECK A BOX)

- Ohio Drivers License Number (Provide 2 letters and 6 numbers)
- Other valid photo identification (specify)

STEP 8

I further affirm for the affiliated provided Elections precinct, determine ballot w providing criminal falsificati knowledge and

Poll worker notation

VOTED IN CORRECT PRC

2ND BALLOT COUNTED IN LIN HGTS C

Donner Williams
 WITNESSING ELECTION OFFICIAL Date
 ID PROVIDED YES NO

PRE BUT DID NOT VOTE IN PRECINCT

WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE

THE ELECTION OFFICIAL VERIFICATION STATEMENT MUST BE COMPLETED ON THE BACKSIDE OF THIS ENVELOPE

EXHIBIT

A

SEAL YOUR BALLOT INSIDE THIS ENVELOPE
DO NOT SCAN YOUR BALLOT
MAKE SURE THE ELECTION OFFICIAL COMPLETES THIS SIDE OF THE ENVELOPE

ELECTION OFFICIAL VERIFICATION STATEMENT

1 THESE 4 SECTIONS MUST BE COMPLETED BY THE ELECTION OFFICIAL

The Provisional Ballot Affirmation of _____ was subscribed and affirmed before me this 2 day of Nov, 2010

2 IF APPLICABLE, THE ELECTION OFFICIAL MUST CHECK THE FOLLOWING TRUE STATEMENT CONCERNING ADDITIONAL INFORMATION NEEDED TO DETERMINE THE ELIGIBILITY OF THE PROVISIONAL VOTER.

- The provisional voter is required to provide additional information to the Board of Elections.
- An application or challenge hearing regarding this voter has been postponed until after the election.

3 THE ELECTION OFFICIAL MUST CHECK ONE OF THE FOLLOWING TRUE STATEMENTS CONCERNING IDENTIFICATION PROVIDED BY THE PROVISIONAL VOTER, IF ANY.

- Provided current and valid photo identification, or military identification.
- Provided current valid photo identification other than a driver's license or state ID card, with the voter's former address instead of current address and has provided the election official both the current and former addresses.
- Provided copy of a current utility bill, bank statement, government check, or other government document with the voter's name and current address.
- Provided the last four digits of social security number (also recorded on the front of this envelope) _____
- Unable to provide any of the above acceptable ID but does have one of those items and cannot provide the last four digits of the voter's social security number. Voter must provide one of the acceptable ID to the Board of Elections within ten days after the election.
- Does not have any acceptable ID, but has completed Form 10-T "Affirmation of Voter Unable to Provide Identification".
- Does not have any acceptable ID and has declined to execute an affirmation (Form 10-T).
- Voter declined to provide any acceptable ID, but does have one of those forms of ID. Voter must provide one of the acceptable ID to the Board of Elections within ten days after the election.

4 Donna Williams 11-2-10

| | |
|--|---|
| <p>Signature of Election Official _____ Date _____</p> <p>Office Use Only</p> <p><input type="checkbox"/> ACCEPT</p> <p><input checked="" type="checkbox"/> REJECT</p> <p><u>Chaffard</u> <u>12/13</u> Democrat Inspector</p> <p><u>Michael</u> <u>12/10</u> Republican Inspector</p> | <p>Office Use Only</p> <p>Reason(s) For Rejection</p> <p><input checked="" type="checkbox"/> Voted Wrong Precinct</p> <p><input type="checkbox"/> Not Registered</p> <p><input type="checkbox"/> No Signature</p> <p><input type="checkbox"/> AV Returned</p> <p><input type="checkbox"/> No ID</p> <p><input type="checkbox"/> Other _____</p> |
|--|---|

EXHIBIT
A

PROVISIONAL BALLOT AFFIRMATION
ATTENTION PROVISIONAL VOTER

1. You **must** currently be registered in the State of Ohio.
2. You **must** vote in the precinct where you **currently** live.
3. You **must** complete and sign this provisional envelope.
4. You **must** provide a form of identification. (If Ohio drivers license, provide # -2 letters and 6 numbers)

YOUR BALLOT MAY NOT BE COUNTED IF THESE STEPS ARE NOT FOLLOWED

STEP 1 NAME
[Redacted]

solemnly swear or affirm that I am a citizen of the United States, I will be at least 18 years of age at the time of the general election, I have lived in this state for 30 days immediately preceding this election, I am a registered voter in the precinct in which I am voting this provisional ballot and that I am eligible to vote in the election in which I am voting this provisional ballot.

STEP 2 CURRENT ADDRESS
[Redacted]

City _____ Zip _____ County _____
Mailing Address if other than above _____
Voluntary information: Phone Number _____ email address _____

STEP 3 FORMER ADDRESS (If Applicable)
[Redacted]

Street Address _____
City _____ State _____ County _____ Zip _____

STEP 4 NAME CHANGE (If Applicable)
Former Name _____
Former Signature _____

STEP 5 BIRTH DATE
[Redacted] ✓
Month / Day / Year

| | | |
|------------------------|-----------|--------------------|
| 7703 LINCOLN HGTS C | | |
| Office Use Only | | |
| NEW | VC | OLD |
| 7703 LINE #13C | 01471386 | 1307 Cw 13-6 |

STEP 6 REASON FOR VOTING PROVISIONAL BALLOT

- Change of address
- My name is not listed in the Signature Poll Book
- Change of name
- Requested, but did not receive absent voter's ballot
- Signature Poll Book states: "Must Vote Provisionally"
- Voter lacks required identification
- Challenged Voter
- Signature does not match signature in Poll Book

STEP 7 FORM OF IDENTIFICATION PROVIDED (YOU MUST CHECK A BOX)

- Ohio Drivers License Number (Provide 2 letters and 6 numbers) [Redacted] ✓
(located left hand side of state ID card beginning with two letters)
- Other valid photo identification (specify) _____
- Last four digits of my social security number are: _____
- Other _____
- None

STEP 8 SIGNATURE

I further declare, if the election is a primary election, by requesting a ballot for the [Redacted] party, I hereby state that I desire to be affiliated with and support the party. I understand that, if the above-provided information is not fully completed and correct, if the Board of Elections determines that I am not registered to vote, a resident of this precinct, or eligible to vote in this election, or if the Board of Elections determines that I have already voted in this election, my provisional ballot will not be counted. I further understand that knowingly providing false information is a violation of law and subjects me to possible criminal prosecution. I hereby declare, under penalty of election falsification, that the above statements are true and correct to the best of my knowledge and belief.

X [Redacted] ✓ 11-2-10
SIGNATURE OF VOTER Date

X *Christina Rivers* 11/2/10
WITNESSING ELECTION OFFICIAL Date
ID PROVIDED YES NO

WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE

THE ELECTION OFFICIAL VERIFICATION STATEMENT MUST BE COMPLETED ON THE BACKSIDE OF THIS ENVELOPE

EXHIBIT
A

SEAL YOUR BALLOT INSIDE THIS ENVELOPE
DO NOT SCAN YOUR BALLOT
MAKE SURE THE ELECTION OFFICIAL COMPLETES THIS SIDE OF THE ENVELOPE

ELECTION OFFICIAL VERIFICATION STATEMENT

1 THESE 4 SECTIONS MUST BE COMPLETED BY THE ELECTION OFFICIAL

The Provisional Ballot Affirmation of _____ was subscribed and affirmed before me this 2nd day of November 2010.

Print Voter's Name

Month Year

2 IF APPLICABLE, THE ELECTION OFFICIAL MUST CHECK THE FOLLOWING TRUE STATEMENT CONCERNING ADDITIONAL INFORMATION NEEDED TO DETERMINE THE ELIGIBILITY OF THE PROVISIONAL VOTER.

- The provisional voter is required to provide additional information to the Board of Elections.
- An application or challenge hearing regarding this voter has been postponed until after the election.

3 THE ELECTION OFFICIAL MUST CHECK ONE OF THE FOLLOWING TRUE STATEMENTS CONCERNING IDENTIFICATION PROVIDED BY THE PROVISIONAL VOTER, IF ANY

- Provided current and valid photo identification, or military identification.
- Provided current valid photo identification other than a driver's license or state ID card, with the voter's former address instead of current address and has provided the election official both the current and former addresses.
- Provided copy of a current utility bill, bank statement, government check, or other government document with the voter's name and current address.
- Provided the last four digits of social security number (also recorded on the front of this envelope) _____
- Unable to provide any of the above acceptable ID but does have one of those items and cannot provide the last four digits of the voter's social security number. Voter must provide one of the acceptable ID to the Board of Elections within ten days after the election.
- Does not have any acceptable ID, but has completed Form 10-T "Affirmation of Voter Unable to Provide Identification".
- Does not have any acceptable ID and has declined to execute an affirmation (Form 10-T).
- Voter declined to provide any acceptable ID, but does have one of those forms of ID. Voter must provide one of the acceptable ID to the Board of Elections within ten days after the election.

4 X Christine Stevens 11/2/10

Signature of Election Official Date

Office Use Only

ACCEPT

REJECT

Frank Kloppe
Democrat Inspector

Corranbeck
Republican Inspector

Office Use Only

Reason(s) For Rejection

- Voted Wrong Precinct
- Not Registered
- No Signature
- AV Returned
- No ID
- Other _____

EXHIBIT
A

9. There is no evidence, nor did the Board of Elections receive any reports, that any precinct ran low on ballots on Election Day.

10. Each ballot sent to a precinct is accounted for by the Board.

11. For Lincoln Heights A, 500 ballots were printed and 244 ballots were used. Lincoln Heights A had 256 ballots remaining.

12. For Lincoln Heights B, 825 ballots were printed and 353 ballots were used. Lincoln Heights B had 472 ballots remaining.

13. For Lincoln Heights C, 775 ballots were printed and 367 ballots were used. Lincoln Heights C had 408 ballots remaining.

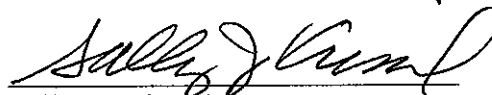
14. For Cincinnati 25-A, 800 ballots were printed and 307 ballots were used. Cincinnati 25-A had 493 ballots remaining.

15. For Cincinnati 25-G, 575 ballots were printed and 210 ballots were used. Cincinnati 25-G had 365 ballots remaining.

16. For Cincinnati 25-J, 975 ballots were printed and 261 ballots were used. Cincinnati 25-J had 714 ballots remaining.

17. In the event a precinct would run out of ballots, the Board's procedure is to instruct the poll workers to have voters vote on the DRE machine as opposed to borrowing ballots from any precinct.

18. The employees at the Board of Elections have access to all ballots. In contrast, poll workers only have access to the ballot for that precinct.


Sally J. Krisel, Director
Hamilton County Board of Elections

Sworn to and subscribed in my presence this 15TH day of JULY, 2011.


NOTARY PUBLIC



KAREN M. RECHEL
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES 10-19-15

AO 88 (Rev. 07/10) Subpoena to Appear and Testify at a Hearing or Trial in a Civil Action

UNITED STATES DISTRICT COURT
for the
Southern District of Ohio

Tracie Hunter,
Plaintiff
v.
Hamilton County Board of Elections, et al.,
Defendant
Civil Action No. 1:10-cv-820

SUBPOENA TO APPEAR AND TESTIFY
AT A HEARING OR TRIAL IN A CIVIL ACTION

To: Sally Krisel, Hamilton County Board of Elections, 824 Broadway, Cincinnati, OH 45202-1345

YOU ARE COMMANDED to appear in the United States district court at the time, date, and place set forth below to testify at a hearing or trial in this civil action. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Table with 2 columns: Location (Potter Stewart U.S. Courthouse, 100 East Fifth Street, Cincinnati, Ohio 45202) and Courtroom/Time (Courtroom No.: 117, Date and Time: 07/18/2011 9:00 am)

You must also bring with you the following documents, electronically stored information, or objects (blank if not applicable): All of the original provisional envelopes and ballots that were rejected because they were cast in the wrong precinct; all original rejected provisional ballots and envelopes that are subject to the NEOCH consent decree; the three original provisional ballots and envelopes found by the Board in May 2010.

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Fed. R. Civ. P. 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 7-5-11

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk (blank line) OR Attorney's signature (Jennifer L. Branch)

The name, address, e-mail, and telephone number of the attorney representing (name of party) Plaintiff Tracie Hunter, who issues or requests this subpoena, are:

Jennifer L. Branch (513) 621-9100
Gerharstein & Branch jbranch@jbfirm.com
432 Walnut Street, Suite 400
Cincinnati, OH 45202

