

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

TRACIE HUNTER, Committee	:	Case No. 10-4481
to Elect Tracie M. Hunter for	:	
Judge	:	
	:	
Plaintiff - Appellee,	:	MEMORANDUM IN
	:	OPPOSITION TO
NORTHEAST OHIO	:	INTERVENOR-APPELLANT
COALITION FOR THE	:	WILLIAMS' MOTION FOR
HOMELESS; OHIO	:	PANEL REHEARING
DEMOCRATIC PARTY	:	
	:	
Intervenors-Appellees	:	
	:	
v.	:	
	:	
HAMILTON COUNTY	:	
BOARD OF	:	
ELECTIONS, et al.	:	
	:	
Defendants	:	
	:	
and	:	
	:	
JOHN WILLIAMS	:	
	:	
Intervenor-Appellant	:	

MEMORANDUM IN OPPOSITION

The panel correctly decided to dissolve the stay. Counting all the eligible ballots cast in a race causes no irreparable harm. In this race for juvenile judge, Tracie Hunter is only 23 votes behind John Williams. After a three hour hearing, including testimony from two witnesses, the district

court correctly determined that 849 ballots were rejected for being cast in the wrong precinct. Of those, 286 ballots were cast in the right polling place but at the wrong table inside the polling place.^{1 2}

The court correctly held that the Board's disparate treatment of various provisional ballots miscast due to poll worker error "established a likelihood of success on the equal protection claim." R. 13, p. 3. The court then correctly ordered that the Defendant Board investigate the 849 ballots for poll worker error.

Mr. Williams is fighting for the right *not* to count ballots that the Board determines to be miscast due to poll worker error. The panel rejected this argument once and should do so again. The investigation is underway³ and the public interest in the investigation process is extremely high. The investigation ordered by the District Court may cause the bipartisan Board to conclude that some provisional ballots were miscast due to poll worker error. Having passed that bipartisan hurdle those votes should become part of the recount.

¹ Mr. Burke testified at the TRO hearing November 22, 2010 that the number was between 260 and 280. At the December 3, 2010 Board meeting the Board announced the exact number of provisional ballots cast at the right location, wrong table, is 286. R-20-2 p. 12-13.

² Since the appeal was filed, the record was expanded to include evidence of poll worker error. See R. 20 (Motion to enforce injunction).

A. Irreparable Harm

This panel correctly ruled that Mr. Williams will not suffer irreparable harm because if any of the 849 investigated ballots are found to have been miscast due to poll worker error and are counted, those ballots can be kept separate from the other ballots. This preserves the voter's anonymity and allows the Board to investigate and count ballots in a timely manner while the case is on appeal. This solution makes sense and should not be changed.

The Board keeps all ballots in groups, literally in locked bags. Consistent with this practice, the Board can simply lock in a separate bag all the ballots counted as a result of the injunction. Assuming that the results are still close, within one-half of one percent of the total votes cast, the Board will then conduct the automatic recount. At the end of the recount, the Board will vote to amend the certification. The Board initially certified the results and declared Mr. Williams the winner on December 3, 2010, after the district court denied the motion to enjoin the certification. The Board has 81 days from Election Day to amend the certification and declare the results final. O.R.C. Defendant § 3513.22. That date is January 22, 2011. Therefore, until the Board, investigates, counts any additional votes,

conducts the recount and amends the certification there cannot be any harm to Mr. Williams.

Mr. Williams argues in his petition that once the ballot is separated from its envelope there will be “no way of revisiting the issue of whether the factual determination was correct or not.” Petition p. 6. This argument misses the mark. The federal court is not reviewing the Board’s factual determination whether there was poll worker error or whether an individual ballot will be counted. That can be done through an election contest.⁴ In the unlikely event of a successful appeal in this case, this Court will be ruling that no investigation should have been ordered by the District Court. The appeal has been expedited so that it can be resolved before any vote to amend the certification will occur. Having segregated the ballots counted due to the injunction, relief following a successful appeal can effectively be ordered. This process causes no irreparable harm to Mr. Williams and properly balances the government interest in timely determining the election results against the minimal interest of Mr. Williams in blocking the count of votes that were miscast due to poll worker error.

⁴ The Board voted on December 11, 2010 on an investigation process and that process is now underway. R-26 (Board of Elections Memorandum in Opposition to Motion to Enforce Preliminary Injunction). The investigation process is following the Secretary of State Directive 2010-80 issued on December 9, 2010. R-21-1.

B. Likelihood of Success on The Merits

This panel decided that Mr. Williams has not demonstrated a likelihood of success on the merits of his requested stay. The District Court found a likely equal protection violation when some ballots that are miscast due to poll worker error were counted and others not counted even though they also were miscast due to poll worker error. Mr. Williams attempts in his petition to recast the equal protection debate by claiming that so long as the Board took the same inadequate acts – looking only at the envelope – then there can be no equal protection violation. This celebrates form over substance and creates a classification designed solely to reach his desired result. The Equal Protection violation found by the district court and correctly reiterated by this panel is that the Board treated provisional ballots that were cast in the wrong precinct differently. The Board determined that some ballots were miscast due to poll worker error and counted them. Other ballots cast in the wrong precinct were not counted and the role of poll worker error was ignored. That correct factual determination cannot be effectively revisited with unsupported statements and partial transcripts on this motion to stay.

Additionally, it should be noted that the Defendant, Hamilton County Board of Elections, has not appealed the injunction (see docket sheet). The

Secretary of State had to break the tie on whether an appeal should be filed and she determined that voters who miscast ballots in the wrong precinct due to poll worker error should not be disenfranchised. Ex. A (December 9, 2010 letter from Secretary Brunner to Hamilton County Board of Elections).

C. Harm to Plaintiff Hunter and the Public Interest

In deciding not to appeal the district court injunction, Secretary of State Brunner stated that an appeal would only cause delay and voter uncertainty and would serve no viable purpose. Ex. A p.3. The public has a keen interest in Hamilton County fairly treating all voters and ensure that all qualified ballots are counted. There has been much publicity and a dramatic increase in public attendance at Board meetings. If Tracie Hunter wins the race she will be the first African American to serve on the juvenile court. Halting the process now would cause voters who were treated disparately to lose complete confidence in the electoral process. Over 11,000 provisional ballots were cast in Hamilton County this election. Those voters, and all future provisional voters, need to know that the Board of Elections will treat their ballots equally.

Furthermore, Plaintiff Hunter has suffered injury by the delay. The Ohio Supreme Court denied her admittance to the new judge week long training that started this week. The Court has a policy of only allowing the

“certified” winner to attend. Ex. B. (December 10, 2010 letter from Nuzum to Branch). Unlike Mr. Williams, who is a public employee, Ms. Hunter has a private law practice to wind down if she is declared the winner. The sooner the investigation, the count of provisional ballots, the recount, and the amended certification are accomplished, the sooner Ms. Hunter can be prepared to serve as judge. The District Court, the Board, and the Secretary of State have set out a clear path to get this work done on a fair basis. The candidates should simply let them get their work done.

For these reasons, the panel should not reconsider its decision to deny the stay. Denying the motion will allow the Board to proceed with its investigation of the 849 provisional ballots for poll worker error and then it can count these ballots.

Respectfully submitted,

/s/ Jennifer L. Branch

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CERTIFICATE OF SERVICE

I hereby certify all Counsel for all parties to this Appeal and counsel for non-appellant, Defendant Hamilton County Board of Elections, David Stevenson, were served with a copy of this pleading by email service on December 14, 2010.

/s/ Jennifer L. Branch



JENNIFER BRUNNER
OHIO SECRETARY OF STATE

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December 9, 2010

Sally J. Krisel, Director
Hamilton County Board of Elections
824 Broadway, Room 100
Cincinnati, OH 45202

Re: *Tie Vote of November 23, 2010 Concerning Whether to Appeal a Federal Court Order in Case No. 1:10-cv-00820, Hunter v. Hamilton County Board of Elections, et. al.*

Dear Director Krisel:

The Hamilton County Board of Elections held a special meeting on November 23, 2010 and considered, among other things, a motion to appeal a federal court order in Case No. 1:10-cv-00820, *Hunter v. Hamilton County Board of Elections, et. al.* Board member Gerhardt moved that the Board instruct legal counsel to appeal the Order. The motion was seconded by Chairperson Triantafilou and resulted in a tie vote of the Board with Chairperson Triantafilou and Board member Gerhardt voting in favor of the motion and Board members Burke and Faux voting against the motion.

In accordance with R.C. §3501.11(X) and with the procedures outlined in the Ohio Election Officials Manual, the Hamilton County Board of Elections submitted the tie vote to me on December 6, 2010, including position statements of the Board members and a transcript of the meeting. My analysis and decision are outlined below.

Background

The official canvass of ballots voted in the November 2, 2010 General Election for Hamilton County Juvenile Court Judge declared Candidate John Williams ("Williams") the winning candidate against Candidate Tracie Hunter ("Hunter") by a margin of 23 votes. In certifying the vote on this race, the Hamilton County Board of Elections rejected at least 849 provisional ballots cast in the November 2, 2010 General Election. Candidate Hunter filed a federal court action on November 21, 2010, seeking relief and requesting the United States District Court for the Southern District of Ohio to require the Hamilton County Board of Elections to take action regarding certain provisional ballots. On November 22, 2010, Chief Judge Susan J. Dlott held an emergency hearing and ordered the Hamilton County Board of Elections to do the following:

- Investigate whether poll worker error contributed to the rejection of 849 provisional ballots that are at issue in a recount of the race for Hamilton County Juvenile Court Judge; and
- Include in the recount of the race for Hamilton County Juvenile Court Judge any provisional ballots cast in the wrong precinct that the Hamilton County Board of Elections determines through its investigation were attributable to poll worker error.

Exhibit A

Candidate Williams has intervened in this matter and sought a stay of the District Court's Order in the United States Court of Appeals for the Sixth Circuit. The Hamilton County Prosecuting Attorney filed a brief on behalf of the Hamilton County Board of Elections, and the Sixth Circuit issued a temporary stay of the District Court's Order, which the Sixth Circuit subsequently dissolved on December 1, 2010.

Discussion

The tie vote of the Hamilton County Board of Elections ("the Board") relates to whether the Board should appeal the District Court's Order requiring that the Board investigate whether poll worker error contributed to the rejection of 849 provisional ballots in a recount of the race for Hamilton County Juvenile Court Judge. The District Court noted that the race for Hamilton County Juvenile Court Judge is subject to a mandatory recount because the number of votes cast for Candidate Williams does not exceed the number of votes cast for Candidate Hunter by a margin of one-half of one percent or more of the total vote, pursuant to R.C. 3515.011. The District Court focused on whether the 849 provisional ballots that were rejected, "perhaps improperly," by the Board should be included in the mandatory recount. The District Court considered Directive 2010-74 for guidance and noted that a board of elections may not reject a provisional ballot cast by a voter who uses the last four digits of his or her Social Security number as identification when the voter cast his or her provisional ballot in the wrong precinct, but in the correct polling location, if for reasons attributable to poll worker error. Next, the District Court examined the testimony provided by Board Member Burke who stated that at least one of the 849 provisional ballots included a voter who used his or her Social Security number as identification and cast his or her ballot in the wrong precinct. However, the District Court noted that the Board did not contact any of the poll workers as directed by Directive 2010-74 to determine if any of the provisional ballots that were cast in the wrong precinct were attributable to poll worker error.

The position statement provided by Chairperson Triantafilou and Board member Gerhardt asserts that the state statutory scheme for challenging election results is adequate for any candidate who believes that the election process was handled improperly. Chairperson Triantafilou and Board member Gerhardt stated that they believe that the Board should appeal the District Court's Order and present arguments to preserve the Board's ruling on rejecting the 849 provisional ballots. They also assert that Judge Dlott's Order is "difficult to interpret and even more difficult to harmonize with state law" and directives issued by the Secretary of State's office. I respectfully disagree with Chairperson Triantafilou and Board member Gerhardt's perspective on following the judge's order and its ability to be harmonized with existing state law.

Issues surrounding provisional voting have become extremely complex in Ohio elections. My office has issued several directives and advisories to clarify Ohio statutes and case law concerning issuing, processing, and counting provisional ballots. In this case, Board members Burke and Faux indicate in their position statement that voters who were forced to vote provisionally and who cast a ballot in the wrong precinct as a result of poll worker error should not be disenfranchised by having their ballot rejected. I firmly agree. It is my understanding that there were at least 284 provisional ballots that were cast in the right polling location, but wrong precinct. A thorough and sufficient investigation will help bring closure to this matter with efficiency and efficacy. A thorough and sufficient investigation will allow for the most accurate vote count possible to protect the community's voting rights, fully determine all eligible ballots and assure the public that all eligible ballots were counted.

Furthermore, Judge Dlott's Order requiring the Board to conduct an investigation of whether the 849 provisional ballots that were cast in the wrong precinct were attributable to poll worker error is not ambiguous. The Order requires the Board to take additional steps for the identified ballots to ensure that all provisional voters in Hamilton County are treated equally. Directive 2010-79 specifies that the Board must conduct an investigation to determine if the casting of a provisional ballot being cast in the wrong precinct is attributable to poll worker error and to investigate other forms of poll worker error. See Directives 2010-79, 2010-74, and 2010-73. To appeal the matter at this juncture causes delay and voter uncertainty and serves no viable substantive purpose, especially in light of the Sixth Circuit's actions already taken in regard to the certification and recount of this election.

Decision

For the foregoing reasons, I vote with Board Members Burke and Faux **against** the motion to allow the Hamilton County Board of Elections to appeal the Order issued by Chief Judge Susan J. Dlott on November 22, 2010 in Case No. 1:10-cv-00820, *Hunter v. Hamilton County Board of Elections, et. al.* Accordingly, the motion fails.

I am issuing Directive 2010-80 simultaneously with this tie vote decision in regards to the investigation of 849 provisional ballots, as ordered by Judge Dlott.

Sincerely,



Jennifer Brunner

The Supreme Court of Ohio

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December 10, 2010

Ms. Jennifer L. Branch
Gerhardstein & Branch
432 Walnut Street, Suite 400
Cincinnati, OH 45202

Re: Tracie Hunter, Hamilton County Juvenile Court candidate

Dear Ms. Branch:

I received your letter sent on December 10th on behalf of Tracie Hunter. I understand the unique circumstances of Ms. Hunter's judicial election, I also understand further that the Hamilton County Board of Elections has certified a winner, but the election remains an ongoing matter. Finally, I understand her desire to participate in our New Judge Orientation Part I program next week. I have consulted with our in-house counsel on this matter and it is our opinion that we must abide by the Judicial College policy to admit to the New Judge Orientation program only the certified winner of each judicial race. Currently in Hamilton County that person is Ms. Hunter's opponent. If the certification changes, and she is certified as the winner, we will be able to admit her to the program and all future programs that are developed for judges of her jurisdiction. If she is ultimately declared the winner of the election after New Judge Orientation Part I has concluded, we will provide her with the necessary resources and materials to prepare her for her duties as judge of the Hamilton County Juvenile Court.

Sincerely,



W. Milton Nuzum III
Director

cc: Steven C. Hollon, Esq.
Douglas R. Stephens
D. Allan Asbury, Esq.