

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

<b>TRACIE HUNTER, et al.</b>	:	<b>Case No. 1:10-cv-820</b>
	:	
<b>Petitioner</b>	:	<b>Hon Susan J. Dlott</b>
	:	
<b>v.</b>	:	<b>RESPONSE OF DEFENDANT</b>
	:	<b>HAMILTON COUNTY BOARD OF</b>
<b>HAMILTON COUNTY BOARD OF</b>	:	<b>ELECTIONS TO PLAINTIFF'S</b>
<b>ELECTIONS, et al.</b>	:	<b>EMERGENCY MOTION TO</b>
	:	<b>ENFORCE PRELIMINARY</b>
<b>Respondents</b>	:	<b>INJUNCTION</b>

**RESPONSE**

On December 9, 2010, Plaintiff Hunter filed her emergency motion seeking an order from this Court directing the Board of Elections to conduct an investigation of provisional ballots for poll worker error and to immediately count, without further investigation, 286 disputed wrong precinct provisional ballots that were cast at polling locations containing multiple precincts. For the reasons that follow, Ms. Hunter's motion for emergency relief is not well-taken and must be denied.

**A. This Court's Order Of November 22, 2010 Did Not Require The Board To Count -- "Without Further Investigation" – Ballots Cast In The Wrong Precinct At The Correct Polling Location.**

On November 22, 2010, this Court issued an Order requiring the Board of Elections to investigate certain uncounted provisional ballots cast at the general election of November 2, 2010. The Court's Order was based upon its finding that the Board had reviewed and remade 26 absentee ballots<sup>1</sup> cast provisionally at the Board's offices prior to November 2<sup>nd</sup> due to "clear poll worker error," and that no similar examination was made by the Board pertaining to ballots

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<sup>1</sup> The actual number of absentee ballots cast at the Board that were re-made for this reason was 27.

cast in the wrong precinct on election day. Nowhere in its Order did this Court require the Board to count any specific ballot or subset of ballots “without further investigation,” as alleged by Ms. Hunter. The Court required that an investigation be done with respect to the wrong precinct ballots, and ordered that any such ballots improperly cast for reasons of clear poll worker error should be included in the recount in the election for Hamilton County Juvenile Court Judge involving Ms. Hunter and Mr. Williams. (Order at 9). While the Order is certainly mandatory in nature, it does not grant the relief that Ms. Hunter now insists upon.

**B. Ms. Hunter’s Insistence The Board Has Done Nothing Is Simply False**

Ms. Hunter insists that the Board is “squandering” its time, that the Board has taken no steps to investigate, and that “[a]ll evidence indicates the Board will not agree on a process or even begin the investigation before the end of the year.” While it is true that there has not been universal agreement on how to comply with this Court’s Order, it is simply not true that no steps have been taken.

By way of background, this Court’s Order was issued on November 22, 2010 and was subsequently stayed by order of the Sixth Circuit Court of Appeals on November 24<sup>th</sup>. The Board met on November 29, to discuss the impact of the stay on the automatic recounts required in the Juvenile Court and other elections. The recounts were scheduled to begin on December 3. On November 30, 2010, the Secretary of State issued Directive 2010-79 to investigate poll worker error only with respect to provisional ballots where the identification offered was the last four digits of the social security number. The Sixth Circuit vacated its stay late in the day on December 1, 2010. Although this stay was cancelled, the Court did set an expedited briefing schedule concluding on December 21, 2010 with oral argument immediately to follow. On December 3, the Board formally cancelled the recounts scheduled for that day and scheduled a

further meeting to discuss how the investigation required by this Court's Order would occur. That meeting took place on December 9<sup>th</sup>. Competing proposals were submitted by Chairman Triantafilou and Vice Chairman Burke with respect to the conduct of the investigation. The Board deadlocked upon these proposals as well as a proposal to count all ballots cast in the right location but wrong precinct. But, the Board did agree unanimously to require the Board's staff to complete the investigation of the 849 disputed ballots for other potential fatal errors.

On December 10, the Secretary of State issued Directive 2010-80, requiring an investigation substantially broader than her previous directive issued following this Court's Order. The Board met on December 11, 2010, specifically to discuss the implementation of this directive. During this meeting, the following motion offered by Chairman Triantafilou was approved:

Therefore, I move that:

1. The Hamilton County Board of Elections staff identify the poll workers and other Election Day employees who would have worked at affected polling locations on Election Day.
2. The board staff should identify any observers located in any of these precincts.
3. That we immediately issue subpoenas to all of the people identified above pursuant to §3501.11(J) for them to appear at the Hamilton County Board of Elections on a date selected by the Board members.
4. These poll workers should all be brought down on a date determined by this board and then given further instructions, as determined by this board, about when and how they are to testify.
5. Board staff, with the advice of the prosecuting attorney and the Secretary of State, should determine an orderly method of questioning poll workers for approval by the board.
6. Board staff should coordinate a regular schedule of board meetings where examination of poll workers should be undertaken.

7. This Board immediately notify the Ohio Supreme Court that we are under a federal court order to investigate poll worker error and that investigation must include “contact” with each poll worker thereby leaving the potential for a vacancy on the Hamilton County Court of Common Pleas, Juvenile Division on January 1, 2011 if the board has not concluded its investigation and contact with each poll worker.
8. Request an opinion of the prosecuting attorney about what standard of proof this board should use in evaluating the evidence of poll worker error and to overcome the presumption in state law against poll worker error.
9. Undertake, simultaneously with this effort, a review of poll books for each of the precincts within the affected polling locations and the envelopes for each of the 849 provisional ballots for indications that poll workers directed the voter to the wrong precinct — this was essentially what we had proposed be undertaken by the Board in our proposal of Thursday, December 9, 2010.

(Krisel Declaration).

While details are still being discussed by Board staff, poll workers are being subpoenaed to appear at the offices of the Board on Thursday, December 16, 2010, for the purpose of responding, under oath, to questions of the Board pertaining to the performance of their duties during the general election. Such questioning will continue until the Board has investigated all 849 disputed ballots. The Board will then determine which ballots were cast improperly due to poll worker error and cause them to be included in the recount pursuant to this Court’s Order.

Additionally, the Board’s staff has not been idle during this time frame. Following the vacation of the Sixth Circuit’s stay, the staff was directed by the Board at its December 3<sup>rd</sup> meeting to 1) prepare a recommendation on how the Board was to proceed with its investigation; and 2) review all 849 disputed ballots for other potential flaws. (Krisel Declaration). Director Krisel prepared a proposal that was distributed on Sunday December 5<sup>th</sup>. Staff began to discuss Ms. Krisel’s proposal and others the morning of December 6<sup>th</sup>. The staff worked diligently on this process for several days which proved inherently difficult because of different interpretations

of how this Court's Order interacted with directives from the Secretary of State and other federal court orders. (Krisel Declaration).

The staff has not finished its review of the 849 disputed ballots for other fatal errors.<sup>2</sup> It is anticipated that this review will be accomplished prior to beginning poll worker questioning.

In short, while the Board's progress has been difficult, and at times acrimonious, it is untrue and unfair to claim that no progress has been made. Ms. Hunter's chief complaint is that progress is not occurring according to her desired schedule. She also appears to be asking this Court to preside over this dispute as a "super" secretary of state and decide how the investigation should proceed. The Court should decline to accept such invitation. The relief Ms. Hunter now demands is not appropriate and the Court should allow the Board of Elections to proceed and ultimately conclude its investigation. If the process encounters further deadlocks, there are state methods of which Ms. Hunter is aware that are available to resolve them.

Respectfully submitted,

JOSEPH T. DETERS  
PROSECUTING ATTORNEY  
HAMILTON COUNTY, OHIO

/s/ James W. Harper  
James W. Harper, 0009872  
David T. Stevenson, 0030014  
Thomas Grossmann, 0017965  
Colleen M. McCafferty, 0079858  
Assistant Prosecuting Attorneys  
230 East Ninth Street, Suite 4000  
Cincinnati, Ohio 45202  
ddn: (513) 946-3159 (Harper)  
(513) 946-3120 (Stevenson)  
Fax: (513) 946-3018  
*Trial Attorneys for Respondent  
Hamilton County Board of Elections*

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<sup>2</sup> The staff's failure to accomplish this was noted during both the 12/9 and 12/11 meetings by Board member Burke. Mr. Burke clearly believed that this was being done following the meeting of 12/3 and was surprised and disappointed that it had not occurred.

**Certificate of Service**

I hereby certify that the foregoing was filed in the Court's electronic case management system which will send notice to counsel for all parties of record.

/s/ David T. Stevenson, 0030014

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

TRACIE HUNTER, et al.	:	Case No. 1:10-cv-820
	:	
Petitioner	:	Hon. Susan J. Dlott
	:	
v.	:	DECLARATION OF SALLY
	:	KRISEL, DIRECTOR OF THE
HAMILTON COUNTY BOARD OF	:	HAMILTON COUNTY BOARD OF
ELECTIONS, et al.	:	ELECTIONS
	:	
Respondents	:	

I, Sally J. Krisel, pursuant to 28 U.S.C. § 1746, declare under the penalty of perjury under the laws of the United States of America, that the following are true and correct:

1. I am the director of the Hamilton County, Ohio, Board of Elections.
2. The Board of Elections met on December 11, 2010, to discuss the implementation of Secretary of State Directive 2010-80.
3. At the meeting, the following motion was made and approved by the Board:
  1. The Hamilton County Board of Elections staff identify the poll workers and other Election Day employees who would have worked at affected polling locations on Election Day.
  2. The board staff should identify any observers located in any of these precincts.
  3. That we immediately issue subpoenas to all of the people identified above pursuant to §3501.11(J) for them to appear at the Hamilton County Board of Elections on a date selected by the Board members.
  4. These poll workers should all be brought down on a date determined by this board and then given further instructions, as determined by this board, about when and how they are to testify.

5. Board staff, with the advice of the prosecuting attorney and the Secretary of State, should determine an orderly method of questioning poll workers for approval by the board.
6. Board staff should coordinate a regular schedule of board meetings where examination of poll workers should be undertaken.
7. This Board immediately notify the Ohio Supreme Court that we are under a federal court order to investigate poll worker error and that investigation must include "contact" with each poll worker thereby leaving the potential for a vacancy on the Hamilton County Court of Common Pleas, Juvenile Division on January 1, 2011 if the board has not concluded its investigation and contact with each poll worker.
8. Request an opinion of the prosecuting attorney about what standard of proof this board should use in evaluating the evidence of poll worker error and to overcome the presumption in state law against poll worker error.
9. Undertake, simultaneously with this effort, a review of poll books for each of the precincts within the affected polling locations and the envelopes for each of the 849 provisional ballots for indications that poll workers directed the voter to the wrong precinct — this was essentially what we had proposed be undertaken by the Board in our proposal of Thursday, December 9, 2010.

4. Pursuant to the Board's direction, subpoenas will be issued to poll workers requiring their appearance before the Board to determine whether they performed their assigned duties in accordance with Ohio law. Those hearings will begin on Thursday, December 16, 2010.

5. Following the Order of the United States District Court (SD Ohio) of November 22, 2010 in the matter to which this declaration pertains, the Ohio Secretary of State issued Directive 2010-79 entitled "Supplemental Procedures Regarding Provisional Ballots." This Directive identified certain ballots that were to be reviewed and described the procedures under which the review was to take place.

6. On December 3, 2010, the Board met to discuss the impact of the aforementioned court order on the recount which had been scheduled to begin on that day. Because the Order mandated that certain disputed ballots were to be examined and possibly included within the recount, the recount was postponed. The Board set a further meeting for December 9, 2010, and directed the Board staff to develop a recommendation on how the investigation contemplated by the Court Order the Secretary of State Directive would be accomplished. The Board also directed Board staff to examine the 849 disputed ballots for other possible fatal errors.

7. I circulated a draft proposal on how to proceed on December 5, 2010. The Board's administrative staff spent December 6, 7, and 8, discussing and refining the proposal. This task was made more difficult due to differing interpretations of the Court Order, and Directive 2010-79. During this period, it was assumed by Board staff that Directive 2010-79 was issued as a result of the Court Order.

8. During all of this, the Board staff also was responding to numerous public records requests related to the Williams / Hunter election as well as accomplishing their day to day duties including preparing for an election that will occur on February 8, 2011.

Executed on this 13<sup>th</sup> day of December 2010.

  
Sally J. Krisel, Director