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February 2, 2011

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

Re: *Tie Vote of January 31, 2011*

Concerning Whether to Take All Necessary Steps to Appeal the Decision of the Federal Appellate Court in Hunter v. Hamilton County Board of Elections

Dear Director Krisel:

As you know, the Hamilton County Board of Elections held a special meeting on January 31, 2011. During the meeting, Chairman Triantafilou made a motion that the Board take all steps necessary to appeal the decision to the Sixth Circuit Court of Appeals filed January 27, 2011 in *Hunter v. Hamilton County Bd. of Elections*. The motion was seconded by Board Member Gerhardt and resulted in a tie vote of the Board with Chairman Triantafilou and Board Member Gerhardt voting in favor of the motion and Board Members Burke and Faux voting against the motion.

In accordance with Ohio Revised Code 3501.11(X) and the procedures outlined in the Ohio Election Officials Manual the Hamilton County Board of Elections submitted the tie vote to me on February 1, 2011 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, the federal district court issued a preliminary injunction requiring 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 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.

On November 23, 2010, the Hamilton County Board of Elections unanimously voted to certify the election results for the race for Juvenile Court Judge. That race will be subject to a mandatory recount because the margin of victory is less than one half of one percent of the total vote. Ohio Revised Code 3515.011.

On December 20, 2010 Williams filed a complaint in mandamus with the Ohio Supreme Court and on January 7, 2011, the Ohio Supreme Court issued a decision. *See State ex rel. Painter v. Brunner*, Slip Opinion No. 2011-Ohio-35. The Ohio Supreme Court held that under Ohio law only ballots cast in the correct precinct may be counted as valid as the plain language of several statutes provides. The Ohio Supreme Court wrote: “These statutes do not authorize an exception based on poll-worker error to the requirement that ballots be cast in the proper precinct in order to be counted.”

The Ohio Supreme Court specifically rejected any review based on the improper investigation conducted by the Board as ordered by the former Secretary of State. The Ohio Supreme Court wrote: “Insofar as two of the board members appear to presume poll-worker error in connection with the 269 provisional ballots cast in the wrong precinct but correct location in a multi-precinct polling place, this is incorrect. Neither they nor respondents could rely on the evidence obtained from the improper investigation ordered by the secretary of state and conducted by the board.”

The Ohio Supreme Court ordered the Hamilton County Board of Elections to do the following:

- Rescind its decisions made pursuant to Directives 2010-80 and 2010-87; and
- Review the 850^[1] provisional ballots that are the subject of the federal district court’s November 22, 2010 order and are not subject to the consent decree, “with exactly the same procedures and scrutiny applied to any provisional ballots during the board’s review of them leading up to its decision on November 16.”

Subsequently, I issued two Directives – Directive 2011-04 and Directive 2011-05. Directive 2011-04 implemented the language of the Ohio Supreme Court decision. Directive 2011-05

^[1] Because one voter cast two provisional ballots in the wrong precinct, any prior reference by the board or elections, courts, or secretary of state to 849 disputed provisional ballots are mistaken. Accordingly, the directive will refer to the number of disputed provisional ballots as 850.

expanded on Directive 2011-04 and ordered the Board to complete its canvass of the votes cast for Hamilton County Juvenile Court Judge on November 2, 2010, count the 9 provisional ballots that were issued in the correct precinct and amend its certification accordingly. Directive 2011-05 further ordered the Hamilton County Board of Elections, as part of the mandatory recount, to do the following:

- Review the provisional ballots that were the subject of the 2011-04 directive in a manner that is consistent with both the Ohio Supreme Court's Order in *Painter* and the board's obligations under Judge Dlott's order of November 22, 2010, as well as Directive 2010-78;
- Examine the provisional ballots that are the subject of Judge Dlott's order, and are not subject to the consent decree in *Northeast Ohio Coalition for the Homeless*, consistent with the Ohio Supreme Court's January 7, 2011 decision in *Painter* by examining only the poll books, help-line records, and provisional-ballot envelopes; and
- Examine those provisional ballots that are subject to the consent decree in *Northeast Ohio Coalition for the Homeless*, in accordance with the requirements of Directives 2010-74 and 2010-79, which, as the Ohio Supreme Court correctly pointed out in *Painter*, are limited to the situation in which provisional ballots are cast by voters who used only the last four digits of his or her Social Security number as identification.

On January 11, 2011 Plaintiffs filed a motion in federal district court to enforce the November 22, 2010 preliminary injunction. The next day, January 12, 2011, the federal district court issued a decision ordering the Hamilton County Board of Elections to do the following:

- Count the 149 ballots that were investigated and found to have been cast in the wrong precinct due to poll worker error in determining whether the street address was located inside the precinct;
- Count the 7 ballots that were investigated, found to have been cast in the wrong precinct due to poll worker error, and unanimously voted upon at the Board's December 28, 2010 meeting;
- Count the 9 ballots that were investigated, found to have been cast in the correct precinct but were rejected due to staff error, and unanimously voted upon at the Board's December 28, 2010 meeting; and
- Investigate all ballots subject to the NEOCH Consent Decree for poll worker error and count those ballots as required by that Consent Decree.

On January 12, 2011, the board voted unanimously to request an opinion of the Hamilton County Prosecutor. The Hamilton County Prosecutor provided a legal opinion recommending that the Board appeal the January 12, 2011 decision. The Board held a special meeting on January 14, 2011 and considered a motion to appeal the January 12, 2011 federal district court order. The vote resulted in a tie that I broke in favor of an appeal.

The Board subsequently appealed and on January 27, 2011, the federal appellate court issued a decision remanding the matter to the federal district court to direct the Hamilton County Board of Elections how to proceed regarding the following:

- The 9 ballots unanimously determined by the board to have been cast in the correct precinct;
- The 7 ballots unanimously determined by the board to have been miscast because of poll worker error;
- The 269 ballots cast in the correct location but wrong precinct in which the determination of poll worker error remains disputed; and
- The *NEOCH* ballots pursuant to the consent decree.

The Board held another special meeting on January 31, 2011, and considered a motion that the Board take all steps necessary to appeal the decision to the Sixth Circuit Court of Appeals filed January 27, 2011 in *Hunter v. Hamilton County Bd. of Elections*. The vote resulted in a tie, which is at issue here.

In accordance with Ohio Revised Code 3501.11(X) and the procedures outlined in the Ohio Election Officials Manual the Hamilton County Board of Elections submitted the tie vote to me on February 1, 2011 including position statements of the board members and a transcript of the meeting.

Discussion

The tie vote of the Hamilton County Board of Elections resulted from a motion to take all necessary steps to appeal the decision of the federal appellate court in *Hunter v. Hamilton County Board of Elections*. On January 27, 2011 the federal appellate court remanded the matter to the federal district court to determine how to count certain provisional ballots in the Hamilton County Juvenile Court Judge race.

The position statement provided by Board Member Burke states that it is the position of Board Members Burke and Faux that no further appeal should be undertaken, writing that "it is time to get on with counting the votes of those voters who did everything correctly, but in reliance upon our paid inside poll workers giving them a ballot, ended up casting their vote at the wrong table even though they were in the right polling location."

The position statement provided by Chairman Triantafilou and Board Member Gerhardt states: “The decision by the federal Sixth Circuit contains language that can be construed as internally inconsistent and does not provide this Board with a clear mandate as to how we should proceed in this election or future elections.”

The federal appellate court remanded the case to the federal district court to “direct the Board how to proceed” with counting provisional ballots despite the Ohio Supreme Court’s direction that those ballots should be reviewed “with exactly the same procedures and scrutiny applied to any provisional ballots during the board’s review of them leading up to its decision on November 16.”

Here there is a question of exceptional importance: Whether a federal court has the authority to direct how ballots in a county judicial race should be counted when the highest court in the state has already directed that the ballots be counted consistent with Ohio law. Accordingly further review of the *Hunter* decision is required.

Decision

For the reasons stated above, I break the tie vote in favor of allowing the Hamilton County Board of Elections to take all necessary steps to appeal the decision of the federal appellate court in *Hunter v. Hamilton County Board of Elections*. Accordingly, the motion passes.

Sincerely,



Jon Husted