

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

TRACIE HUNTER	:	Case No. 1:10-cv-820
	:	
	:	Judge Dlott
PLAINTIFF,	:	
	:	
v.	:	
	:	
HAMILTON COUNTY BOARD OF ELECTIONS, ET AL.	:	JOHN WILLIAMS
	:	MEMORANDUM IN OPPOSITION
	:	TO TEMPORARY RESTRAINING
DEFENDANT.	:	ORDER AND PRELIMINARY
	:	INJUNCTION

This matter is before the Court upon the motion filed by Tracie Hunter (“Hunter”) for an order enjoining the certification of the vote for Hamilton County Juvenile Court Judge and for an order requiring that provisional ballots cast in the wrong precinct be counted. In support of the motion, Ms. Hunter ignores controlling Ohio statutory authority and Sixth Circuit precedent. Ms. Hunter’s motion should be denied.

BACKGROUND

On November 2, 2010, voters from Hamilton County cast ballots in numerous races, including the race to determine who would become the next Juvenile Judge for Hamilton County Court of Common Pleas. Approximately 230,000 ballots were cast in that race, including 11,000 provisional ballots. After all the absentee ballots and ballots cast at the polling place were counted, John Williams led the race by a margin of roughly 3,000 votes.

Thereafter, the Hamilton County Board of Elections (the “Board”) went to work verifying whether the 11,000 provisional ballots cast were eligible under Ohio law to be counted. In so doing, the Board followed directives set out by Secretary of State, Jennifer Brunner,

including Directive 2010-74 (the “Directive”) which plainly states that “[i]f the person who cast the provisional ballot is either **not registered to vote or is not eligible to vote in the particular election** in question (e.g., if the vote is cast in the wrong precinct), then pursuant to R.C. 3505.183(B)(4)(a)(i) and (ii), **the board may not count that ballot.**” (emphasis in the original). There is one and only one exception to that statement. The Board should count those provisional ballots cast in the proper polling place, but wrong precinct if: (1) the voter uses the last four digits of his social security number for identification; (2) the ballot was cast in the wrong precinct in a multi-precinct polling location; and (3) the ballot was cast as a result of poll worker error. Secretary of State, Directive 2010-74, at n.2.

The Board followed the Directive and held a public meeting on Thursday, November 19, 2010, in which it voted on which provisional ballots would be counted. Consistent with the Directive, the Board voted 4-0 not to count those provisional ballots that were cast in the proper polling place, but wrong precinct unless the above criteria were met.

After all valid provisional ballots were determined, they were counted,¹ and John Williams had 23 more votes than Ms. Hunter. Tracie Hunter filed a motion for injunctive relief preventing the Board from certifying the election and requiring the board to count ballots that were cast in the wrong precinct but right polling place, regardless of the identification used, if there was demonstrated poll worker error.

¹ Under Ohio law, no provisional ballots are to be counted until all provisional ballots have been reviewed and it is determined which ones are valid. R.C. 3505.183(D) (“No provisional ballots shall be counted in a particular county until the board determines the eligibility to be counted of all provisional ballots cast in that county”).

ARGUMENT

1. Hunter has no likelihood of success on the merits as Ohio law plainly provides that votes casts in the wrong precinct are not to be counted.

In order for a party to be entitled to injunctive relief, they must show that they have a substantial likelihood of success on the merits. *Leary v. Daeschner*, 228 F.3d 729, 276 (6th Cir. 2000). Tracie Hunter has no chance of success on the merits as Ohio law plainly provides that votes cast in the wrong precinct are not to be counted. *See* O.R.C. 3599.12 (A)(1). R.C. 3599.12 (A)(1) provides that no person shall “[v]ote or attempt to vote in any primary, special or general election in a **precinct in which that person is not a legally qualified elector.**” (emphasis added). Notwithstanding this statute, Ms. Hunter has asked that this Court require the Board to count ballots that were casts in the wrong precinct. Such an order is contrary to Ohio law.

A federal court previously was asked to do the exact same thing in *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004). In this case, the Sandusky County Democratic Party and various labor unions obtained a preliminary injunction enjoining boards of elections from applying a directive issued by then-Secretary of State, Ken Blackwell related to provisional ballots. Specifically, the case addressed whether a poll worker could refuse to provide provisional ballots to prospective voters based on the poll workers “on the spot” determination that the person should be voting in another precinct. The district court issued preliminary injunction requiring that Secretary Blackwell issue a revised directive that permitted: (1) any voter to cast a provisional ballot upon affirming that he or she is eligible to vote and is registered to vote in that county; (2) required poll workers to notify any voter making this affirmation of his or her right to cast a provisional ballot, even if the poll worker determines that the voter does not reside in the precinct in which they are voting; and (3) that the provisional

ballots cast by a voter in the county in which he or she is registered to vote must be counted even if they are cast in the wrong precinct. *Id.* at 571.

The Sixth Circuit, applying Ohio law, reversed the portion of the preliminary injunction that required that the votes be counted even if they were cast in wrong precinct stating “[u]nder Ohio law, then, only ballots cast in the correct precinct may be counted as valid.” *Id.* at 578. *See also Bell v. Marinko*, 235 F.Supp.2d 772 (“One simply cannot be a ‘qualified elector’ entitled to vote unless one resides in the precinct where he or she seeks to cast his ballot.”). In so doing, the court recognized that Ohio law plainly and unambiguously provides that only those votes casts in the proper precinct will be counted. *Id.* at 576 (citing O.R.C. 3503.01 which provides that an eligible voter “may vote at all election in the precinct in which the citizen resides” and O.R.C. 3599.12(A)(1) which makes it a crime for a voter to knowingly vote anywhere except in the precinct in which he or she resides).

Ms. Hunter is seeking an order asking for the exact same thing that the Sixth Circuit determined was impermissible in *Sandusky County Democratic Party* under Ohio law—that votes casts in the wrong precinct be counted. Accordingly, this Court should deny Ms. Hunter’s motion.

2. Ms. Hunter cannot show irreparable harm.

In addition to failing to show that she cannot succeed on the merits, Ms. Hunter also cannot show irreparable harm. Under O.R.C. 3515.09, Ms. Hunter can challenge the elections results after the automatic recount and certification of the results. In so doing, the court can fashion a remedy that includes the counting of the disputed provisional ballots.

This very type of situation has already been addressed by the Ohio Supreme Court in *In re Election of Member of Rock Hill Board of Education*, 76 Ohio St.3d 601 (Ohio 1996). In *Rock Hill*, a statutory elections challenge was made based on the exclusion of twenty-four

absentee ballots that were rejected by the local board of elections. The Ohio Supreme Court upheld the lower court's order that the twenty-four ballots be counted stating "the trial court was correct in ordering the counting of the twenty-four ballots" when they improperly excluded under state law. *Id.* at 608.

This is the exact type of relief that Ms. Hunter seeks—to have ballots counted that the Board has determined should not be counted. There is no irreparable harm in this instance because after the results are certified and the recount occurs, Ms. Hunter can follow the statutory procedure for challenging the elections results in which a court can fashion the remedy that she seeks. *In re Election of Member of Rock Hill Board of Education*, 76 Ohio St.3d 601 (Ohio 1996).

3. Ms. Hunter cannot obtain the relief that she seeks.

Ms. Hunter is asking this Court to unilaterally order an extension of the Directive so that the Board follow a different criteria for counting votes than that set forth in the Directive and followed by every other county in the state—that provisional ballots cast in the right polling place but wrong precinct be counted if there is demonstrated poll worker error—regardless of the identification used by the voter. Such selective extension of the Directive is not permissible under Ohio law.

In *State ex rel. Skaggs v. Brunner*, 120 Ohio St.3d 506, 900 N.E.2d 982, 2008-Ohio-6333, the court addressed the exact relief sought by Ms. Hunter. Plaintiffs sought a mandamus seeking to compel the Secretary of State to issue a new directive that provisional ballots containing partial affirmation be counted. The Secretary of State had previously issued a directive to the county board of elections stating that provisional ballots containing an improper affirmation would not be counted. The race for the 15th Congressional seat between Mary Jo Kilroy and Steve Stivers was extremely close. An attorney for the Kilroy campaign sent an

email to several members of the Franklin County Board of Elections challenging the board's position that provisional ballots containing a partial affirmation should be counted. The Secretary of State then issued a later directive on November 20, 2008 that all ballots that contain only a partial affirmation should be counted. By that time, several counties, including Union and Madison counties had already applied the previous directive and certified their results. The Ohio Supreme Court found that this later directive was invalid stating "[t]his selective modification of instructions, particularly at the request of one of the candidates for office, concerning provisional ballots was fundamentally unfair." *Id.* at ¶57. The Court went on to state that "[b]y changing her instructions for one county but not for others after the election at the request of one candidate, the secretary of state failed to ensure that the same rules would be applied to each provisional voter of every county in the state. The other counties have now certified their election results based on the secretary's original instructions, those results cannot be modified." *Id.* at ¶58.

Just as in *Skaggs*, Ms. Hunter is asking for a selective modification of instructions to be applied to only one judicial race in one county. Nine Ohio counties have already certified their election results and have not applied the criteria that Ms. Hunters seeks to have applied in her race. Such an action is not permitted under Ohio law.²

4. Ohio law does not provide that votes should be counted when there is "demonstrated poll worker error."

The cornerstone of Ms. Hunter's motion is that the provisional ballots cast in the right polling place but wrong polling place should be counted if there is "demonstrated poll worker error." *See Motion* at 7. In making this argument, Ms. Hunter relies on the case of *Northeast Coalition for the Homeless v. Brunner*, S.D. Ohio, No. 2:06-cv-896 (Marbley J.), which

² Ironically, Ms. Hunter argues that the state must employ uniform standards in counting ballots, but is seeking a separate criteria be applied to her race alone.

addressed the situation in which a homeless person casts a ballot in the proper polling place but the wrong precinct. *NEOCH* provides that these ballots should be counted when there is “demonstrated poll worker error.”

NEOCH is contrary to state law. There is no exception under Ohio law for “demonstrated poll worker error.” Instead, Ohio law unequivocally provides that a person may only cast a ballot in the precinct in which he or she resides. *See* O.R. C. 3503.01. The Sixth Circuit has interpreted Ohio law to mean that only ballots cast in the correct precinct will be counted. *See Sandusky County Democratic Party*, 387 F.3d at 578. As such, this Court should follow binding precedent and not create an exception that is contrary to Ohio law.

A. The Board followed the Directive.

But even if this Court were to find that *NEOCH* does not conflict with Ohio law, Ms. Hunter is not entitled to the relief she seeks because the Board followed the Directive. The transcripts from the November 19, 2010 hearing of the Board of Elections make clear that none of 849 ballots that the Board chose not to count met the criteria set forth in *NEOCH*. *See* Transcript of November 19, 2010 meeting of Board of Elections (the “Hearing”) at 25 (“These don’t include the ones who voted in the wrong precinct, but used their social security, last four digits of their social security. Voted at the right poll locations, wrong table and demonstrated poll worker error.”).

Ms. Hunter is asking that this Court expand the Directive to include all persons who voted in the correct polling location but wrong precinct **solely in the Hunter Williams Race**. That interpretation is inconsistent with the Directive and creates a fundamentally unfair situation where a different criterion is used in one Ohio Race. Under *Skaggs*, this selective application is not permissible.

B. There is no demonstrated poll worker error.

Ms. Hunter's complaint also does not contain a single instance of demonstrated poll worker error. Under, Ohio law, "[i]n the absence of evidence to the contrary, public officers, administrative officers and public authorities, within the limits of the jurisdiction conferred upon them by law, will be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully." *Skaggs*, 120 Ohio St.3d at ¶51. Instead, Ms. Hunter is asking that demonstrated poll worker error be presumed. There is no evidence that any of these provisional ballots were casts as a result of poll worker error. For instance, Ms. Hunter has not submitted a single affidavit from someone stating they were directed to the wrong precinct.

Ms. Hunter has alleged that Board did not investigate to determine if poll worker error occurred. That is not true. The Board reviewed the notes at the end of the poll books to look for Poll Worker error.³ None was found. As a result, these provisional ballots should not be counted.

³ The Directive states that poll worker error can be demonstrated by the poll worker notes at the back of the poll book.

CONCLUSION

The Court should deny Ms. Hunter's motion. She has not likelihood of success on the merits because Ohio law does not permit ballots cast in the wrong precinct to be counted.

Respectfully submitted,

/s/ R. Joseph Parker

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed on November 22, 2010 using the Court's CM/ECF system, which will transmit notice of the filing to all counsel of record in this case.

/s/ Beth A. Bryan

Beth A. Bryan