

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

- - - - -

North East Ohio :
Coalition For the :
Homeless, et al., :

Case No. 1:06-CV-00896

Plaintiffs, :

Judge Algenon Marbley

vs. :

Jennifer Brunner, et :
al., :

Defendants. :
:

- - - - -

DEPOSITION OF MATTHEW M. DAMSCHRODER

- - - - -

Taken at Franklin County Board of Elections
280 E. Broad Street, Room 100
Columbus, OH 43215
October 21, 2008, 2:36 p.m.

- - - - -

Mike Mobley Reporting
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A P P E A R A N C E S

ON BEHALF OF PLAINTIFFS:

Porter Wright Morris & Arthur LLP
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(Via Telephone)

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Sharon A. Jennings, Esq.
(Via Telephone)

ON BEHALF OF THE DEPONENT:

Franklin County Prosecuting Attorney
373 South High Street
Columbus, OH 43215
By Patrick J. Piccininni, Esq.

ALSO PRESENT:

Michael Stinziano, Board of Elections

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Tuesday Afternoon Session
October 21, 2008, 2:36 p.m.

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S T I P U L A T I O N S

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It is stipulated by counsel in attendance that the deposition of Matthew M. Damschroder, a witness herein, called by the Plaintiffs for cross-examination, may be taken at this time by the notary pursuant to subpoena; that said deposition may be reduced to writing in stenotypy by the notary, whose notes may thereafter be transcribed out of the presence of the witness; that proof of the official character and qualification of the notary is waived; that the signature of the witness to the transcript of said deposition is expressly waived by counsel and the witness; said deposition to have the same force and effect as though signed by the said Matthew M. Damschroder.

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I N D E X

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8	Q & A - Provisional Ballots	
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11	Shinn to Damschroder, et al., on 3/31/08	
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23	(Exhibits attached.)	
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1 MR. PICCININNI: Gentlemen and ladies,
2 before we begin, I'm going to object to my client
3 being subjected to this deposition for the same
4 reasons that have been set forth in the notice and
5 the responses that we've given you guys.

6 This case has been pending for two
7 years, and you wait till the 59th minute of the
8 11th hour to file a supplemental complaint on a
9 statute that's been in effect since March of 2006.

10 That being said, you may begin.

11 MR. HALLINAN: As I understand it,
12 you've produced two documents in response to the
13 subpoena, Patrick.

14 MR. PICCININNI: I produced three
15 documents.

16 MR. HALLINAN: I've got the Board of
17 Elections 2008-81.

18 MR. PICCININNI: Uh-huh. A three-page
19 e-mail, and then another page that begins, "The
20 purpose of this manual."

21 MR. HALLINAN: I don't have the third
22 document you're talking about.

23 MR. PICCININNI: Should have went out.
24 Should have been 19 pages total that were scanned
25 in. Look at it again; go through the directive.

1 This is what --

2 This is copied from my e-mail?

3 THE WITNESS: Uh-huh.

4 MR. PICCININNI: Let's go ahead and
5 start, and we'll get to it if we need to.

6 - - - - -

7 MATTHEW M. DAMSCHRODER,
8 being first duly sworn, testifies and says as
9 follows:

10 CROSS-EXAMINATION

11 BY MR. HALLINAN:

12 Q. Would you state your name for the
13 record.

14 A. Matthew M. Damschroder.

15 Q. What is your position?

16 A. I am Deputy Director of the Franklin
17 County Board of Elections.

18 Q. Can you describe your functions and
19 responsibilities in that position?

20 A. With the Director of the Board of
21 Elections and at the direction of the members of
22 the Board of Elections, we supervise all of the
23 election administration activities in Franklin
24 County, including but not limited to voter
25 registration, voting locations, poll worker

1 recruitment and training, absentee voting and the
2 like.

3 Q. What is your involvement -- generally
4 and then on a hands-on basis, what is your
5 involvement with the process for accepting or
6 rejecting provisional ballots?

7 A. With the Director of the Board of
8 Elections, we supervise the clerks of the Board
9 who are responsible for the day-to-day execution
10 of that process.

11 Q. How many clerks of the board are there?

12 A. We have 42 full-time employees who are
13 clerks and an additional I think about 150 or so
14 seasonal full-time clerks right now.

15 Q. 42 full-time and 150 seasonal or
16 periodic; is that fair?

17 A. Yes.

18 Q. Who decides whether to count or reject
19 a provisional ballot?

20 A. Any provisional ballot that's in
21 question following staff review is submitted to
22 the board for an actual vote, but most of the
23 validation process follows the directive. And
24 most of those decisions are made at the staff
25 level and do not require board review.

1 Q. Are any -- let's try it the obverse
2 way.

3 Are any ballots rejected by staff?

4 A. At the end of the process the board
5 votes on the results of the canvass that include
6 the ballot, the provisional ballots that are to be
7 counted.

8 Q. Okay. Let me try it a different way,
9 then.

10 The staff segregates provisionals into
11 those that the staff believes should be counted
12 and those that shouldn't be counted; is that fair?

13 A. Yes, by category.

14 Q. By category, they're either in or out
15 by staff.

16 Do both categories then get sent to the
17 board for vote, or are there certain ones that are
18 not sent to the board?

19 A. The board does not vote on each
20 individual provisional that's to be counted or not
21 counted in the same way that the board does not
22 vote on each individual absentee ballot as to
23 whether it should be counted or not counted.

24 Q. I gotcha. So, but in terms of
25 groupings of, for example, there may be -- there

1 may be categories within the rejections that the
2 staff recommends or the staff compiles, and the
3 board would vote by group as to rejecting that
4 group?

5 A. No. Most of the categories would not
6 even go to the board for actual vote because
7 there's no question or controversy. For instance,
8 I'll give the example of a provisional ballot
9 envelope that has -- that does not have the
10 voter's signature would not be -- it would be a
11 rejected provisional on its face under the statute
12 in the interpretation of the Secretary of State,
13 and so, therefore, there would be no reason to
14 submit it the board for a vote.

15 Q. Are there any other categories that
16 come to mind like that that are rejections on
17 their face?

18 A. Envelopes that would be completely
19 blank, envelopes that lack the print of the
20 signature of the voter, envelopes for purported
21 voters for whom there is no record of previous
22 registration in this county or in any of the other
23 87 counties, envelopes from voters who cast their
24 ballot outside of their home precinct under Ohio
25 law as interpreted by Judge Carr.

1 Q. Okay. Is there a voter affirmation
2 form that goes with the envelope or goes with the
3 ballot, the provisional ballot? If, for example,
4 there's a space for a birth date on there, do you
5 have that?

6 A. We do have a space for birth date on
7 the form.

8 Q. And if that space is left blank on the
9 affirmation form that -- the provisional ballot is
10 sent with, is that ballot counted or not counted
11 without the date of birth?

12 A. The absence of the information on the
13 date of birth line is not in and of itself a
14 disqualifying factor.

15 Q. What other information would also have
16 to be omitted or inaccurate in order to be
17 rejection with the date of birth?

18 A. Maybe I'll answer it this way. My
19 understanding and recollection of the law and of
20 the Secretary of State directive is that the only
21 information that is absolutely required in order
22 for a provisional ballot to be counted is the
23 voter's name, the statement that they're a
24 qualified elector eligible to vote in this
25 election, their signature, and a form of

1 identification. And identification can be
2 appended to the envelope during the ten days
3 following the election.

4 Q. Without appended -- -- strike that.

5 Without the addition of identification
6 information during that ten-day period, the ballot
7 would be rejected?

8 A. Yes, assuming that there was no other
9 information provided on election day. For
10 instance, if a person writes down the last four
11 digits of their social security number on the
12 envelope, they do not then also have to appear at
13 the Board of Elections to append additional
14 information.

15 Q. The social security number would in and
16 of itself be considered sufficient for purposes of
17 ID; is that correct?

18 A. For -- yeah, for an identification
19 requirement, but then it would also have to meet
20 the other requirements of the name, the
21 qualification statement, and the signature.

22 Q. Okay. So the -- if you have those
23 three things and an ID, then the ballot will be
24 counted. Absent any one of those three things or
25 the failure to provide ID, the ballot will not be

1 counted?

2 A. That's my recollection of Ohio law and
3 the Secretary of State directive. But I would --

4 Q. The synopsis you just gave us about
5 what is and what is not sufficient for counting a
6 provisional ballot, does that appear in any
7 policy, method, procedure, drafted by your board
8 of election or staff of your board of election on
9 the county level, or do you simply rely on the
10 accumulation of directives from the Secretary of
11 State, statute, things like that?

12 A. We do not have any written documents
13 that our office has produced that that is -- that
14 boils down the process in the kind of specificity
15 that I just described.

16 - - - - -

17 Thereupon, Exhibit 1 is marked for
18 purposes of identification.

19 - - - - -

20 Q. Sir, can you tell me if you've ever
21 seen this before or do you recognize it?

22 A. I don't have specific recollection of
23 reviewing it, but it has a familiarity to it as to
24 the format.

25 Q. At the top it's cut off, but it refers

1 to a Bulletin Board Q&A. Are you familiar with
2 the Bulletin Board Q&A sections from the Secretary
3 of State?

4 A. I am.

5 Q. Does this look like the kind of stuff
6 that you've seen at that Bulletin Board Q&A?

7 A. Yes.

8 Q. If you turn to page 2 under the second
9 boldfaced question, there are two paragraphs. Do
10 you see where I'm at?

11 A. The first paragraph you refer to begins
12 "Our BOE office stapled a voter registration
13 form," et cetera?

14 Q. Yeah, that's the question. And then
15 there are two -- or actually three answering
16 paragraphs underneath it, but the second one is
17 the one I'm interested in.

18 This generally refers to -- you can
19 read it if you want, but it generally refers to
20 what the BOEs do to verify voter identity and
21 qualifications after the provisional ballot has
22 been put in the envelope.

23 A. Uh-huh.

24 Q. Are you familiar with that process?

25 A. I'm familiar with what is written here

1 having read it.

2 Q. Bad question. Forget that. Let's try
3 it this way.

4 If you'll look at the last sentence in
5 that second paragraph where it talks about what
6 the BOE may do to count the provisional vote, it
7 says, "The process a BOE uses to verify the
8 voter's ID and qualifications is up to the Board -
9 and there should be a policy in place regarding
10 this."

11 Do you see that?

12 A. I do.

13 Q. Now, does Franklin County BOE have a
14 policy in place regarding the counting of voter --
15 or the verification of voter ID and qualifications
16 for provisional ballots?

17 A. We do not have a policy in place that
18 was adopted by a vote of the board.

19 Q. What do you have in place?

20 A. We have the past practice and the
21 directives issued by the Secretary of State.

22 Q. By a directive -- I ended up with one
23 directive in the documents that were produced, and
24 that's 2008-81.

25 A. Yes.

1 Q. By the way, why don't we go ahead and
2 mark that.

3 - - - - -

4 Thereupon, Exhibit 2 is marked for
5 purposes of identification.

6 - - - - -

7 BY MR. HALLINAN:

8 Q. That is the -- is Exhibit 2, FRA 6
9 through 13, that's the directive you were talking
10 about?

11 A. Correct. It was issued by the
12 Secretary of State on September the 5th, 2008, and
13 it supercedes directive 2007-06.

14 Q. When was the last time you looked at
15 this particular directive, the 2008-81?

16 A. Today.

17 Q. Can you point out to me anywhere in
18 there where it actually has criteria for accepting
19 or rejecting ballots?

20 A. Page 6 of the directive talks about the
21 provisional ballot affirmation statements, the
22 things that are required to be provided by the
23 voter on the form, including the name of the
24 voter, the statement, the "must be executed," the
25 form of identification to be provided.

1 Q. Okay. And you're talking about what's
2 on FRA 11; is that right?

3 A. Well, I'm talking about what's been
4 marked here locally as Franklin 2, which I
5 think...

6 Q. Page 6 of 8 of that guideline; is that
7 right?

8 A. That's correct.

9 Q. That's it?

10 A. Well, and I think, you know, some of
11 the balance of the directive there going into page
12 7 as well. And even into 8 I would consider to be
13 guidance on whether a provisional ballot is to be
14 counted or to be rejected.

15 Q. Okay. Good. Now, the next item in
16 that package of Exhibit 2 is FRA 14 and 15 -- I'm
17 sorry, 14, 15, and 16.

18 Please tell me what this e-mail or how
19 this e-mail was originated, how it got to you.

20 A. The e-mail is from Brian Shinn, who is
21 elections counsel in the Secretary of State's
22 office, to Matt Damschroder. At the time I was
23 Deputy Director of the Board of Elections. And
24 copied on the form on the e-mail is Dennis White,
25 who was the Director of the Board of Elections,

1 Todd Wedekind, who was the manager -- is the
2 manager of absentee voting who was handling much
3 of the provisional activity. Counsel of the Board
4 of Elections, Patrick Piccininni, is also copied
5 on it.

6 Q. All right. And just to short-circuit
7 this, this looks like it was generated back in
8 March about the time of the primaries; is that
9 right?

10 A. Yes. It was sent from the Secretary of
11 State's office on March the 31st at 1 p.m., and is
12 responding to questions that I sent to Brian Shinn
13 and Patrick Piccininni regarding provisionals.

14 Q. This response contains your
15 instructions on how to -- let me see if I can
16 phrase this more neutrally.

17 This is the information you were given
18 on how to handle these questions regarding
19 provisionals; is that fair?

20 A. These are responses -- these are
21 specific responses to specific questions that were
22 asked of the Secretary of State's office.

23 Q. The process of accumulating these
24 questions, did this come out from you originally
25 or did it come from your poll workers? Where did

1 it come from?

2 A. This was brought to Dennis White and
3 myself by our staff who were checking provisional
4 ballots.

5 Q. And then what happened to this e-mail?
6 Was it copied and distributed among your staff or
7 among the poll workers? How did it go?

8 A. I don't recall.

9 Q. If a poll worker had some questions
10 about provisionals at this point, would they
11 consult this e-mail or how would they get ahold of
12 this e-mail?

13 A. Well, it wouldn't have been poll
14 workers because poll workers are just election
15 day, so it would have been full and experienced
16 seasonal clerks of the board who would have
17 received this instruction through their
18 supervisors. And my guess is March the 31st we
19 were closing down the provisional ballot
20 validation process, and these were probably
21 cleanup items for which there was some question on
22 precisely how to handle them.

23 Q. I'm with you. But my -- and it's
24 before you, too, I understand, but the question is
25 in this e-mail in present circulation, is it

1 consulted now or is there some other source from
2 where they obtain this information?

3 A. Well, I think to the extent that this
4 information provided on March the 31st is
5 superceded by the new directive from September the
6 5th, the new -- the current directive would be --
7 would be the guiding document. For questions for
8 which the directive is not relevant, we would look
9 back to this -- to this e-mail from March.

10 MR. HALLINAN: I'm going to turn you
11 over to the Secretary of State's office to ask
12 some questions at this point.

13 THE WITNESS: Great. Thank you.

14 - - - - -

15 CROSS-EXAMINATION

16 BY MR. EPSTEIN:

17 Q. How many precincts are there in
18 Franklin County for the 2008 election?

19 A. There are 854 precincts at
20 approximately 550 voting locations.

21 Q. So I take it from that response that
22 some of those voting locations are multiprecincts?

23 A. That is correct. A number of our
24 precincts vote at multiple precinct locations.

25 Q. And how many poll workers do you have?

1 A. 5,124, give or take a couple.

2 Q. Again, please.

3 A. 5,124, give or take one or two.

4 Q. What training do the poll workers
5 receive in advance of the election?

6 A. Poll workers in Franklin County are
7 assigned specific tasks on election day, and they
8 receive different training based on the task to
9 which they've been assigned. That training in all
10 cases includes a 100-plus page training manual, a
11 minimum 2-hour training class with plenary
12 instruction and hands-on work in small groups with
13 a single instructor. They also have the
14 opportunity to supplement their training by using
15 the Secretary of State's on-line poll worker
16 training program.

17 Q. When does that training take place?

18 A. Training began I think about the last
19 week of September. At this point we've probably
20 trained over half of all of our poll workers that
21 will work on election day. And training continues
22 until the Monday night before the election.

23 Q. Does the training include information
24 regarding the distribution of provisional ballots?

25 A. Can you expand on the word

1 "distribution"?

2 Q. Sure. Do the poll workers receive
3 information to help guide them as far as when you
4 give a provisional ballot as opposed to when to
5 allow the person to cast another ballot?

6 A. Yes. That information is included in
7 the training manual that all poll workers receive.
8 I believe it's also included in the on-line poll
9 worker training supplement provided by the
10 Secretary of State. And it is also one of the
11 primary focuses of the training session for the
12 individuals who are assigned the task of what we
13 call roster judge locally who are the individuals
14 assigned to the signature poll book and the
15 distribution and administration of provisional
16 voting in a precinct, including the direction of
17 the poll -- of the voter to the correct precinct
18 in the event that they are in the wrong place.

19 Q. Does that training also include
20 information or training about what to tell the
21 voter in the event that they need to provide
22 additional information within the ten-day window?

23 A. Poll workers are instructed to provide
24 to every provisional voter the Secretary of State
25 prescribed form that gives the voter that

1 information. I can't recall what the name or form
2 number is, but that's readily available if
3 requested.

4 Q. If the rules were to change regarding
5 what information is required in order to -- what
6 additional information is required in order to
7 make a provisional ballot be counted as a vote,
8 how would you get that information out to your
9 poll workers right now?

10 A. Our office has in the past been forced
11 by litigation to do remarkable things in terms of
12 communicating with poll workers as late as seven
13 o'clock p.m. on election day. Ideally the earlier
14 that we would have any such change, the better for
15 us and the more thorough we can be in providing
16 that information to poll workers. But some of the
17 processes that we would use would include, if time
18 allowed, the sending of amended information to
19 poll workers by regular U.S. mail and the changing
20 of our poll worker training for the balance of the
21 classes.

22 Obviously part of the challenge that
23 you have there is that some poll workers will
24 receive one set of training and others a different
25 set, so you have the potential for an unequal

1 treatment of rules based on the training that poll
2 workers receive simply because they were proactive
3 in getting the training early.

4 In the case, as has often happened,
5 where rules are changed as late as election day or
6 the night before, we have a process for delivering
7 limited information to polling places via a
8 recorded message phone call.

9 Q. How far ahead of November 4th would you
10 need to get information out by ordinary mail in
11 order for it to reach the poll workers?

12 A. It depends on when we would want that
13 information to actually be received by the poll
14 workers. You know, at this point, you know, we
15 would look at things like the creation of the
16 notice, the preparation of the 5,124 pieces, and
17 the mailing of that. In some cases it takes
18 longer to get mail in central Ohio than other
19 places. As I think about a statewide approach,
20 there's many boards of elections who wouldn't even
21 have the funding to do that kind of mailing.

22 MR. PICCININNI: Guys, I have a quick
23 question because now we're at three o'clock.

24 MR. EPSTEIN: I believe that I am done,
25 so I don't think you're going to have a problem.

1 MR. PICCININNI: No, no, my question
2 would be about the subpoenas on Monday -- for
3 Thursday. Are we still -- I mean, is live
4 testimony going to be required or are we using the
5 deposition? Because if we are, I can -- you know,
6 we can keep going till we get done so we don't
7 have to be there.

8 MR. HALLINAN: Patrick, from the
9 plaintiff's perspective, we'd like to use the depo
10 and dispense with the subpoena. On the other
11 hand, the Secretary of State does have a
12 legitimate right to have somebody come on the
13 subpoena, so it's up to them at this point, not
14 us.

15 If we have full examination here -- you
16 say you're done, Aaron?

17 MR. EPSTEIN: I am done. I don't think
18 the decision about whether we're going to need
19 somebody live depends upon how far we can get in
20 the questioning right now. What I can tell you is
21 that we're going to give you everything we can to
22 give you as much advance notice --

23 MR. PICCININNI: Fine. I'll file --
24 thank you, Aaron. I'll file my objection to the
25 subpoena tomorrow.

1 MR. EPSTEIN: That's fine. I
2 understand.

3 MR. PICCININNI: We go through this
4 every time somebody gets the urge to sue the
5 Secretary. The Franklin County Board of Elections
6 is caught in the crossfire, and we have to take
7 time out of our schedule to show up down to
8 Federal Court, and that's what I'm objecting to
9 with 14 -- 13 days to go before the election when
10 this could be resolved relatively quickly by
11 saying depositions could be used in lieu of
12 testimony.

13 MR. HALLINAN: Patrick, we understand
14 exactly what you're saying, and we understand the
15 problem. We're not in the same position you're in
16 so we don't have to experience the problem, but we
17 understand what you're saying.

18 And I think what Aaron's telling you is
19 he's going to cooperate as much as possible to get
20 this done with the least amount of inconvenience,
21 understanding that there may be some. But right
22 now it's not an issue because all you've got is
23 the subpoena. Whether or not he's going to call
24 you on the subpoena or not I guess is going to be
25 something done later on.

1 MR. PICCININNI: Well, it's your
2 subpoena. If you guys are -- if you guys release
3 the subpoena, then they -- then the secretary's
4 office has to issue a subpoena.

5 MR. HALLINAN: Well, I think -- I can't
6 release the subpoena because then he will say he
7 won't allow this thing to be used.

8 Is that right, Aaron?

9 So I've got to keep the subpoena in
10 place. I have no interest in calling you on it,
11 and I think he's going to tell you after he talks
12 to his folks that that's probably going to be the
13 case with him. But I don't think he's in a
14 position to say that right now.

15 Is that fair?

16 MR. EPSTEIN: I think that's very fair.

17 MR. HALLINAN: Okay. Patrick, I
18 appreciate the situation you're in, and we'll
19 communicate with you as best we can.

20 And again, I apologize for today. We
21 just ran into a logistics problem that we did not
22 anticipate. We should have. We didn't. And I
23 apologize.

24 MR. PICCININNI: Okay.

25 MR. HALLINAN: Simple. And we'll try

1 not to let it happen the next time around. But
2 that's where it is.

3 If you don't have anything else,
4 Aaron...

5 MR. EPSTEIN: I don't.

6 MR. PICCININNI: Does Sharon have any
7 questions?

8 MR. HALLINAN: No, I have nothing to
9 follow up on.

10 MR. PICCININNI: No. Does Sharon have
11 any questions?

12 MR. HALLINAN: No, he's done -- Sharon
13 does not have any questions.

14 MR. EPSTEIN: Oh, she's not here.

15 MR. HALLINAN: The only thing that we
16 need to do is make sure that the court reporter
17 has e-mail information so that we can get a
18 transcript as quickly as possible.

19 - - - - -

20 Thereupon, the foregoing proceedings
21 concluded at 3:05 p.m.

22 - - - - -

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25

1 State of Ohio : C E R T I F I C A T E

2 County of Franklin: SS

3 I, Lance A. Boardman, RPR, CRR, a Notary
4 Public in and for the State of Ohio, certify that
5 Matthew M. Damschroder was by me duly sworn to
6 testify to the whole truth in the cause aforesaid;
7 testimony then given was reduced to stenotype in
8 the presence of said witness, afterwards
9 transcribed by me; the foregoing is a true record
10 of the testimony so given; and this deposition was
11 taken at the time and place specified on the title
12 page.

13 Pursuant to Rule 30(e) of the Fed. R. Civ. P.,
14 the witness and/or the parties have waived review
15 of the deposition transcript.

16 I certify I am not a relative, employee,
17 attorney or counsel of any of the parties hereto,
18 and further I am not a relative or employee of any
19 attorney or counsel employed by the parties
20 hereto, or financially interested in the action.

21 IN WITNESS WHEREOF, I have hereunto set my
22 hand and affixed my seal of office at Columbus,
23 Ohio, on October 21, 2008.

24 _____
25 Lance A. Boardman, Notary Public - State of Ohio
My commission expires July 30, 2011.

The following questions are of a general nature. The answer provided here may not be the appropriate answer if your county's circumstances are not identical. For more detailed information, please refer to directives, advisories, the appropriate statutes or municipal charters (if applicable), or call the Elections Division at (614) 466-2585.

Click on a question to see the answer. Click on the question again to hide the answer.

Provisional Ballots

▼ May a Board of Elections update a voter's record after the a 25th day before a Presidential Primary?

R.C. 3503.16 is very specific with regard to how an elector who has moved prior to election day must vote if the elector's change of address is received by the board of elections after the deadline.

The deadline for a change of address form to be received by the board of elections before the presidential primary election is the 25th day (February 8, 2008). If a change of address form is received after that date, then the change will not be effective for the presidential primary election. So, you must take the statutory deadline into account with regard to the updating of your poll books prior to the election. If the 25-day deadline has not passed, then you may update your poll books with regard to that elector.

If the elector moves within the same precinct in the county and fails to file a change of address on or before the 25th day before the presidential primary election, then that voter may still vote a regular ballot in that precinct polling place under the procedures in R.C. 3503.16(B)(1)(a).

If the elector moves to a different precinct within the county and fails to file a change of address with the board of elections on or before the 25th day before the presidential primary election, then that voter must vote a provisional ballot at the board of elections between the 24th day and the day before the election OR at that elector's new precinct polling place or at the board of elections on the day of the presidential primary election under the procedures in R.C. 3503.16(B)(2).

If the elector moves to a different county within the state and fails to register to vote in the new county within the state on or before the 25th day before the presidential primary election, then that voter must vote a provisional ballot either at the board of elections in the county where the elector now resides starting on 24th day before the presidential primary election through the day of the presidential primary election under the procedures in R.C. 3503.16(C) OR at the elector's new precinct polling place on the day of the presidential primary election under R.C. 3505.181(A)(9), (B), and (C).

The only exception is for electors who, due to illness, physical disability, or infirmity, cannot appear at the board of elections and vote an absentee ballot under R.C. 3503.16(G) (a provisional absentee ballot).

Please note that after the 25-day deadline has passed, electors who move to a different precinct in the county or to a different county within the state must vote a provisional ballot regardless if your poll books have been printed or not.

(as of March 3, 2008)

▼ Is a Board of Elections required to label Provisional Ballots in some way or print them on special paper stock to ensure they are designated as "provisional?"

No. The Secretary of State's office is not aware of any provision in law that requires some type of label or special designation for provisional ballots. (Absentee ballots, yes; but provisional ballots, no.) (as of November 21, 2007)

▼ Is the SOS prescribed Affirmation Statement that has been printed on a provisional ballot envelope sufficient to register a non-registered voter for future elections?

No. The form cannot be used to register a previously unregistered person. However, the SOS prescribed Provisional Ballot Affirmation Statement (SOS from 12-B) printed on a provisional ballot envelope, if completed properly, may serve several purposes. For example, it is an affirmation for providing a provisional voter's identity and qualifications to vote, and it may be used for voters who are currently registered by need to update their registration due to an address or name change. (as of 3/7/08)

▼ **Is a voter who is casting a provisional ballot at a precinct polling place required to complete a voter registration card for a change of address?**

No. Election officials may request, but shall not require, that a provisional voter complete a new voter registration card. It should be noted that the provisional ballot affirmation statement prescribed by the Secretary of State in 2006 serves two functions: it serves as a provisional voter affirmation statement as well as a change of name/address form (voter registration card).

Therefore, Boards of Elections need not attach a voter registration form to a provisional ballot envelope because the affirmation statement printed on the envelope, as designed by the SOS office, serves as a multi-function document; if properly completed it will serve to provide proof of identity and voter qualification, AND as a change of address form. Using the SOS prescribed affirmation statement as a multi-purpose form in this way will likely reduce confusion and BOEs are STRONGLY encouraged to do. (as of 3/7/08)

▼ **Our BOE office stapled a voter registration form to all our provisional ballot envelopes that went to the polling locations. We have some provisional voters that didn't put their ID information on the provisional ballot envelope but did put the ID information on the attached voter registration form. Can we use their ID information from the registration form as a valid reason to count the provisional ballot?**

Maybe. As stated in Directive 2007-06, on Pages 14-15, Section III.E., all that is *required* of a voter who casts a provisional ballot is that the voter affirm certain things by signing an affirmation statement. This affirmation statement should be preprinted on the provisional ballot envelope, so all a voter should *have* to do is sign it.

However, before counting the ballot, additional information may be needed for the BOE to verify the voter's identity and qualifications to vote - which is why we encourage election officials to ask the voter to complete the rest of the info requested in our office's prescribed affirmation statement for provisional ballot envelopes. If - **based on the information provided by the voter** - the BOE can verify the voter's identity and qualifications, the BOE may count the provisional vote. The process a BOE uses to verify the voter's ID and qualifications is up to the Board - and there should be a policy in place regarding this.

It should be noted that Boards of Elections need not attach a voter registration form to a provisional ballot envelope because the affirmation statement printed on the envelope, as designed by the SOS office, serves as a multi-function document; if properly completed, it will serve to provide proof of identity and voter qualification, AND as a registration form. Using the SOS prescribed affirmation statement as a multi-purpose form in this way will likely reduce confusion and BOEs are STRONGLY encouraged to do. (as of 9/10/07)

▼ **Our Board of Elections printed its SOS prescribed Affirmation Statements for provisional voters on a piece of paper separate from the provisional ballot envelopes (we were trying to use up our old supply of plain envelopes). The precinct Election Official sealed the Affirmation Statement in the provisional ballot envelope. How should this be handled?**

This should not have happened because the SOS prescribed provisional voter affirmation statement was redesigned based on changes in law and the current version should now be printed on the outside of the provisional ballot envelopes used by boards; old provisional ballot envelopes without affirmation statements printed on them, or with outdated affirmation statements printed on them, should not be used. Please refrain from using old envelopes and affirmation statements in the future, and please address this situation with your poll workers in case the poll workers don't understand the purpose of the affirmation statement or the need for an affirmation to be accessible without also accessing the ballot.

Because state law seems to indicate that the determination as to the sufficiency of the affirmation statement must be made before the envelope is opened, there is an argument that there is no way to count these ballots without violating state law. As such, you should certainly make your legal counsel, the county prosecutor, aware of the circumstances.

As for dealing with these particular ballots, there are two options:

1. First, the voter should not be disenfranchised because of mistakes made by election officials and, after discussing the situation with others here in the office, I think the situation can be resolved without jeopardizing the secrecy of the ballot by following the process outlined below:
 - o First, a Democrat and a Republican, together, should carefully unseal the envelope, without looking at the contents of the envelope, so that the envelope may be resealed with tape later in the process. During this step, the team of election officials MUST NOT remove anything from the envelope.

- o Second, the team should carefully look in the envelope to determine whether or not the affirmation statement was in fact sealed in the envelope. If it was, remove ONLY the affirmation statement, reseal the envelope with the ballot still inside, and mark the envelope with an explanation why the envelope was opened prematurely. If no affirmation statement is found inside, the ballot cannot be counted and the envelope should be resealed and marked as rejected with an explanation as to why the envelope was opened at all. At no time should either member of the team look at the actual provisional ballot.
 - o Third, assuming an affirmation statement was found and the envelope was resealed, review the affirmation statement to verify the voter's identity and qualifications to vote. If the affirmation statement is sufficient, follow office procedures for processing the envelope and ballot as you would for any other valid provisional ballot.
2. Alternatively, the Board could simply determine, in consultation with its legal counsel, not to count these ballots on the grounds that the Board may violate state law by doing so. Of course, if the Board chooses this option, it will need to deal with whatever public response may arise because of the mistake and subsequent decision not to count the provisional ballots in question. (as of 9/10/07)

▼ A precinct Election Official failed to sign the SOS prescribed Affirmation Statement printed on the outside of the provisional ballot envelope. Should the provisional ballot be counted?

The BOE should ask the election official who failed to comply with his or her statutory duty why they failed to do so. If the election official failed to do so because of a perceived problem with the affirmation statement, then the affirmation statement should be reviewed for sufficiency with the election official's concern in mind. If there is no good reason for the official's failure to sign the statement, then, assuming the BOE can verify the voter's identity and qualifications to vote based on the information provided by the voter, the ballot should be counted. The voter should not be penalized for the mistake of an election official, but the BOE should deal with the election official as necessary and appropriate. (as of 9/10/07)

▼ A provisional voter provided no ID and completed the SOS prescribed Affirmation Statement printed on the provisional ballot envelope. The Election Official signed the Affirmation Statement but did not record any information on the Election Official Verification Statement form. May the ballot be counted?

Maybe. As noted at p. 14, Section III.E., of Directive 2007-06, all that is *required* of a voter to vote a provisional ballot is that the voter complete the provisional ballot affirmation statement. Thus, a provisional voter may cast a provisional ballot without providing ID. If the BOE can verify the voter's identity and qualifications to vote based on the information provided by the voter, then the BOE shall count the ballot.

However, if the BOE cannot verify the voter's identity and qualifications to vote based on the information provided by the voter, and the voter does not provide additional identification information within 10 days after the election, then the vote shall not count. (as of 9/10/07)

▼ If the name and address of the voter are missing on a provisional ballot envelope's Affirmation Statement prescribed by the SOS, but it contains the voter's signature, should the ballot be counted?

No. According to the provisional ballot affirmation statement requirements in R.C. 3505.181, and described in R.C. 3505.182, the voter's name must appear in the statement, but the voter's address need not. So based on the fact that the name is missing, the ballot should not be counted.

Although the voter's address is not required, it should still be noted that on Page 14 of Directive 2007-06 ("Section E - Provisional Ballot Affirmation Statement"), election officials should encourage provisional voters to provide additional information on the Affirmation Statement (such as the voter's date of birth, current address, etc.), which may be needed to verify the voter's identity before the ballot can be counted. If the board cannot verify the voter's identity and eligibility using the information provided, then the ballot cannot be counted. (as of 9/10/07)

▼ May a board count a provisional ballot if it was cast in a precinct in which the voter does not currently reside?

In general, the answer is "no." R.C. 3505.183(B)(4)(a) provides: "If, in examining a provisional ballot affirmation and additional information under divisions (B)(1) and (2) of this section, the board determines that any of the following applies, the provisional ballot envelope shall not be opened, and the ballot shall not be counted:

- (ii) The individual named on the affirmation is not eligible to cast a ballot in the precinct or for the election in which the individual cast the provisional ballot."

The exception is if the voter is registered in Ohio and has moved into a new precinct and has not updated his or her registration. In that case, if the voter has cast his or her provisional ballot in a new precinct in which he or she now resides, the ballot is counted. (as of 9/10/07)

▼ **If a voter provides the wrong number from his/her Ohio driver's license on the SOS prescribed Affirmation Statement that is printed on a provisional ballot envelope, I've heard the Board of Elections has two days to contact voter. Where is this in the Revised Code?**

It is not in the Revised Code; It is part of Directive 2007-06 issued by Secretary Brunner, acting in her capacity as the state's chief elections officer. (as of 9/10/07)

▼ **Can the last 4 digits of the Driver's License be used, instead of the last four digits of the SSN, as verification of identity for a provisional voter when the BOE is reviewing the SOS prescribed Affirmation Statement printed on the provisional ballot envelope to determine whether or not the provisional ballot should be counted?**

A: If the BOE can verify the identity of the voter and his or her qualifications to vote, based on the information provided on the SOS prescribed Affirmation Statement while following the identity verification process implemented by Board, then the ballot may be counted. While electors are required to provide ID, the ORC only requires that a provisional voter complete the SOS prescribed Affirmation Statement. If, based on information in the statement, the BOE can verify the identity of the voter, then the ballot should be counted. (as of 9/10/07)

▼ **Are Observers allowed to view the verification process of provisional ballots and if so how do we hide Social Security Numbers from them ?**

Yes, official "observers" as described in R.C. 3505.21 are allowed to view the verification process of provisional ballots, as provided by R.C. 3505.181(D):

"Provisional ballots that the board determines are eligible to be counted under division (B)(3) of this section shall be counted in the same manner as provided for other ballots under section 3505.27 of the Revised Code. 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 under division (B) of this section for that election. **Observers, as provided in section 3505.21 of the Revised Code, may be present at all times that the board is determining the eligibility of provisional ballots to be counted and counting those provisional ballots determined to be eligible. No person shall recklessly disclose the count or any portion of the count of provisional ballots in such a manner as to jeopardize the secrecy of any individual ballot.**" (Emphasis added.)

Election officials should cover Social Security numbers using non-permanent tape that is of an appropriate size and which can be removed without damaging, or leaving residue on, the provisional ballot envelope's affirmation statement. as of (9/10/07)



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DIRECTIVE 2008-21
September 5, 2008

**TO: ALL COUNTY BOARDS OF ELECTIONS
MEMBERS, DIRECTORS, AND DEPUTY DIRECTORS**

RE: Guidelines for Provisional Voting

This directive supersedes Section III appearing on page 9 of Directive 2007-06. This directive is intended to clarify Ohio's provisional voting requirements as applied by Ohio's boards of elections, Ohio election officials and poll workers in Ohio.

During the 2006 general election, 21% of all provisional ballots cast throughout Ohio were rejected (23,064 out of 106,212). While the percentage of Ohio voters having to cast provisional ballots has decreased, as has the percentage of voters whose provisional ballots have been rejected, reducing the number of provisional ballots will aid enfranchisement for all electors. Prior to Directive 2007-06, many instances of the ballot has occurred in favor of having a voter cast a provisional ballot when not at all times was this necessary. Ohio's requirements for processing provisional ballots require the expenditure of both voter and poll worker time on Election Day and can add to the length of time it takes to vote, slowing down the process for other voters as well. Unnecessary provisional ballots increase the administrative time and effort for boards of elections after Election Day and increase the anxiety for voters who are uncertain whether their vote counted.

All boards of elections shall implement the instructions provided in this directive.

The Secretary of State's office has incorporated the instructions contained in this directive in its Poll Worker Manual of Instructions and its Poll Worker Quick Reference Guide, which is provided to boards of elections and referenced in Directive 2008-77. Presiding judges must be provided with a copy of this directive, and the Secretary of State's office offers further assistance to boards of elections in interpreting or applying this directive through the elections attorneys in the Secretary of State's office assigned to county boards of elections.

CONTINUING PROHIBITION AGAINST PROVISIONAL VOTING ON DRE'S

No person, other than a person eligible to vote on a DRE because of a disability, may vote a provisional ballot on a DRE machine. Voting provisional ballots on DRE machines has been prohibited since May 9, 2007, and that prohibition remains in place. All provisional ballots must be cast on paper optical scan ballots regardless of the type of voting machine or method used for regular voting.

EXHIBIT

Franklin 2

This prohibition is based on the difficulty of conducting recounts using VVPATs containing provisional ballots (as evidenced by the procedures set forth in prior Directive 2006-05) and based on the risks to the secrecy of the ballot created by those procedures and VVPAT technology (resulting in failure to randomize first voted ballots).

GENERAL RULES FOR PROVISIONAL VOTING

Ensure Voters are in the Correct Precinct or Location

Generally speaking, on any given Election Day Ohioans must cast their ballots, whether regular or provisional, at their assigned precinct polling locations. More specifically, federal law, Ohio law and federal case law provide that boards of elections cannot count provisional ballots cast in a precinct to which the voter has not been assigned, in a precinct that is not assigned to the voter's current residence address or at a board of elections office on Election Day, unless the law allows for the voter to cast a provisional ballot there.

The single most common reason provisional ballots cast in Ohio are rejected by boards of elections is that the voter cast the provisional ballot at an incorrect location. During the 2006 general election, 46% (10,610) of the provisional ballots rejected statewide were rejected for being cast in an incorrect precinct.

For this reason, before any poll worker or election official offers a voter a provisional ballot, that poll worker or election official must first seek to ensure that the voter is in his or her correct precinct or voting location based on the voter's situation calling for voting a provisional ballot and the voter's current residence address. Poll workers or election officials assisting voters with provisional ballots must verify what are the voters' correct precincts or voting locations by referring to a "precinct voting location guide." Every board of elections must ensure that its office and every precinct in every polling location in the county are equipped with a precinct voting location guide, pursuant to R.C. 3505.181(C) and (E).

If the voter is not in the correct precinct, the poll worker is required to determine the correct precinct for the voter based on the current residence address provided, AND must advise the voter of both of the following:

- that the voter is in an incorrect precinct; and
- the location of that voter's correct polling location and precinct, as determined by referring to the precinct voting location guide and/or in consultation with the county board of elections, if appropriate.

If the voter clearly indicates to the election official that the voter still desires to vote in that precinct, the election official must notify the voter of both of the following:

- The voter has the right to cast a *provisional* ballot at that precinct; AND
- That, according to law, all provisional ballots cast at an incorrect precinct *shall not* be counted.

TIME FRAME AND LOCATIONS FOR PROVISIONAL VOTING

Before Election Day

For any election other than a presidential primary election, provisional voting begins twenty-eight (28) days before the election. R.C. 3503.16(B), (C). For presidential primary elections, provisional voting begins twenty-five (25) days before the election.

Any voter needing to vote a provisional ballot may do so by appearing "at anytime during regular business hours on or after the twenty-eighth day prior to the election in which that registered elector wishes to vote . . . through noon of the Saturday prior to the election at the office of the board of elections," or "at anytime during regular business hours on the Monday prior to the election at the office of the board of elections . . ."

On Election Day

Certain Persons Permitted to Vote at Board of Elections Offices on Election Day

Generally speaking, on Election Day Ohioans may not vote at a board of elections office.

More specifically, under Ohio law no one may cast a regular ballot at a board of elections office on Election Day, and only certain people may cast provisional ballots at a board of elections office on Election Day. Those persons are:

ELECTORS WHO MOVE FROM ONE PRECINCT TO ANOTHER WITHIN A COUNTY: Registered electors who move from one precinct to another within a county and who, on or before the day of a general, primary, or special election, have not filed a notice of change of residence address with the board of elections at least 30 days before the election. Such voters must also complete a voter registration change of address form. Such voters may vote either at the polling location for their current residence address or at the board of elections office;

ELECTORS WHO MOVE FROM ONE PRECINCT TO ANOTHER WITHIN A COUNTY AND CHANGE THEIR NAME: Registered electors who move from one precinct to another within a county and who, on or before the day of a general, primary, or special election, have not filed a notice of change of residence address with the board of elections at least 30 days before the election and who have changed their name and have not filed a notice of change of names with the board of elections at least 30 days before the election. Such voters must also complete a voter registration change of address form and a voter registration change of name form. Such voters may vote on either at the polling location for their current residence address or at the board of elections office;

ELECTORS WHO MOVE FROM ONE COUNTY TO ANOTHER COUNTY WITHIN OHIO: Registered electors who move from one county to another county within the state on or before the day of a general, primary, or special election and have not registered to vote at least 30 days before the election in the county to which that registered elector moved. Such voters must also complete a voter registration change of address form. Such voters may vote on either at the polling location for their current residence address or at the board of elections office.

Those persons listed immediately above must vote a provisional ballot. They may vote their provisional ballot at a board of elections office or at the correct precinct polling location.

Persons Required to Vote at Precinct Polling Location on Election Day

ELECTORS WHO CHANGE THEIR NAME BUT HAVE NOT MOVED: Registered electors who present themselves to vote on Election Day who changed their name on or before the day of a general, primary, or special election, and who have not filed a notice of change of name with the board of elections at least 30 days before the election, and did not move, must appear at their assigned precinct polling location. They must, in addition to voting a provisional ballot, complete a voter registration change of name form.

ELECTORS WHO HAVE MOVED WITHIN A PRECINCT (NO NAME CHANGE): Registered electors who present themselves to vote on Election Day who moved within a precinct on or before the day of a general, primary, or special election, and who have not filed a notice of change of residence address with the board of elections at least 30 days before the election, must appear at their assigned precinct polling location. They may vote a regular ballot and must complete a voter registration change of address form.

REGULAR VOTERS: Voters who are voting a regular ballot on Election Day must vote in their assigned precinct, unless a court order provides otherwise (e.g. in the event a court order were issued because flooding or other natural disaster would prevent the voter from reaching his or her assigned precinct polling location.)

OTHER REASONS REQUIRING THE CASTING OF A PROVISIONAL BALLOT

1. **Voter's name does not appear in poll list**

A voter whose name does not appear in the poll list or signature poll book must vote a provisional ballot. The general rules for provisional voting must be followed.

2. **Voter lacks required identification to vote a regular ballot**

All voters who present themselves to vote at a polling place on the day of an election must provide one of the acceptable forms of identification as is described in Directive 2008-80, prescribing requirements for voter identification for voting. A voter who is unable or unwilling to provide any of these forms of ID may still, under the law, vote a *provisional* ballot. In some cases provisional voters must provide required ID to the board of elections no later than 10 days after the election for their ballots to count.

3. **Returned Notices from Board of Elections**

Returned Acknowledgement Notice

If a board of elections has sent a newly registered voter an acknowledgement by nonforwardable mail as is required by law, and if that notification has been returned to the board of elections as undeliverable, the board of elections is obligated to investigate and send a confirmation notice to the voter's correct address.

If that confirmation notice is also returned to the board of elections as undeliverable, then at the first election thereafter, at which the voter named in the acknowledgement notice and confirmation notice seeks to vote, that voter must provide election officials with one form of the required identification and must vote a *provisional* ballot.

Returned Notice of Election

This section of this directive applies only to the November 2008 general election because the relevant provisions of R.C. 3501.19 do not apply to any subsequent election, unless subsequently extended by the Ohio legislature.

On the sixtieth (60th) day before General Election, every board of elections is required by law to send every registered voter in the county a Notice of Election by nonforwardable mail. The requirements of that notice are set forth in R.C. 3501.19(A).

If a voter's Notice of Election is returned to the board of elections as undeliverable, that voter's name shall be so marked in the poll list or signature poll book.

At the first election thereafter, at which the voter named in the returned Notice of Election seeks to vote, that voter must provide election officials with one proper form of identification (see Directive 2008-30). However, in this limited circumstance, any form of identification (even an Ohio driver's license or state ID card) must contain the current address that matches the address shown for the voter in the poll list or signature poll book for the voter to be permitted to cast a *regular* ballot. Otherwise, the voter must vote a *provisional* ballot. See R.C. 3501.19(C).

4. Voter Requested an Absent Voter's Ballot but Appears on Election Day or Before to Vote In Person

If a voter has requested an absent voter's ballot, his or her name must be marked to that effect in the poll list or signature poll book to prevent a voter from both voting an absentee ballot before Election Day and voting a regular ballot when appearing in person to vote on Election Day. Any voter whose name is so marked and who appears and attempts to vote at a polling location, including at the board of elections, whether on or before the date of an election, must vote a *provisional* ballot.

5. Challenged Voters

If election officials cannot determine a voter's eligibility to vote, or if a voter does not appear to be eligible to vote and that voter insists on voting, that voter must cast a *provisional* ballot. R.C. 3505.20

If an application for the correction of a precinct registration list is filed or if a challenge to a voter's right to vote is filed, after the thirtieth (30th) day before the day of an election, the law provides that the board may postpone the hearing on the filing until after the election.

The Secretary of State has advised in Advisory 2008-23 that boards should not postpone such hearings but rather hold a hearing to provide each voter due process in the event the board seeks to remove a voter's name from the list of registered voters or the signature poll book

A voter seeking to vote a party ballot at a primary election who refuses to make a statement of party affiliation (e.g. to complete Form 10X or 10W) and who a majority of precinct officials find either lacks the qualifications to vote or is not affiliated with the party whose ballot the voter desires to vote must cast a *provisional* ballot.

6. Non-Matching Signature

If the election officials determine that the signature of an individual who appears and attempts to vote does not match the signature on file for that voter, that voter must cast a *provisional* ballot. However, if the voter has a form of identification as set forth in Directive 2008-80 on Voter Identification his or her name and current address appearing in the poll list or signature poll book, election officials are discouraged from determining that the voter must vote a provisional ballot. H.B. 3 recognizes that a voter's signature may change over time and permits a voter to update his or her signature in the records of the board of elections. Nevertheless, in the case where there may be two individuals in the same household with the same name (e.g. "senior" and "junior"), election officials may with justification determine that a provisional ballot must be cast by that voter.

PROVISIONAL BALLOT AFFIRMATION STATEMENTS

Generally

Every voter who votes a provisional ballot must seal his or her provisional ballot in an envelope provided by the election officials administering the election. The envelope, as required by statute, must contain an affirmation that must be executed by the voter for the vote to count. The voter must sign the affirmation, which must state both that:

- The voter is a registered voter in the jurisdiction in which the individual desires to vote; and
- The voter is eligible to vote in that election.

Additionally, please note that other spaces may be provided on the envelopes for information such as the voter's date of birth, the voter's current and former addresses, the voter's driver's license or state ID card number, or the last four digits of the voter's Social Security number. Poll workers must ask every provisional voter to complete this additional information. While Ohio law does not specifically require that provisional voters complete this additional information, boards of elections may need it to verify the voter's identity before the vote may be counted.

If the voter does not provide required identification, including some of the additional information referred to above, either at the polling place or at the board of elections within ten (10) days after the election (see below), and the voter's identity cannot be verified using the information provided by the voter, the vote is not permitted by law to be counted.

Additionally, election officials must record, in the section of the provisional ballot ID envelope or form designated for election official use, all of the following that apply for every provisional voter:

- The type of ID provided, if any;
- The last four digits of that voter's Social Security number, if provided;
- The fact that the affirmation noted above was executed, if applicable; or

- That the voter refused to execute the affirmation.

The above information must be included with the voter's ballot if a provisional ballot is voted, or with the voter or address record information when transmitting ballots and materials to the county board of elections.

Reminder: Election officials must provide to every provisional voter a copy of the Provisional Voter Hotline Notice at the time the voter casts his or her provisional ballot. A copy of that notice is attached to this directive for your reference.

Provisional Ballot Affirmation Statements as Voter Registration Forms

The Secretary of State prescribed Provisional Ballot Affirmation Statement serves multiple purposes. For several years the form has served as a change of name or change of address form for already registered voters in addition to serving as an affirmation. However, the form has not served as a voter registration form for new voters. Because one of the leading statewide causes for rejection of provisional ballots has historically been that the person who voted the provisional ballot was not registered to vote, the most recent revision of the affirmation statement form (in June of 2008) also allows the form to be used as a voter registration form for new voters, if necessary.

Thus, while a provisional ballot cast by someone not registered to vote still cannot count, boards of elections may now use the information provided by the person who completed the form to register that person to vote for subsequent elections.

PROVIDING PROOF OF IDENTITY WITHIN 10 DAYS AFTER THE ELECTION

Before a provisional ballot can be included in the official count of an election, the board of elections must confirm the voter's eligibility to cast the ballot, as well as the validity of the ballot that was cast. In some cases, a provisional voter can establish his or her eligibility to vote by appearing in person at the board of elections office within 10 days immediately *after* Election Day and doing the following:

If the voter cast a provisional ballot because he or she had -- but could not provide to election officials at the time of voting -- a required form of identification or the last four digits of his or her Social Security number, the voter must provide to the board of the elections one of the following:

- Required identification described in Directive 2008-80 on Voter Identification; or
- The last four digits of the voter's Social Security number.

If the voter cast a provisional ballot because, at the time he or she voted, he or she had -- but declined to provide -- a required form of identification or the last four digits of his or her Social Security number, AND the voter declined to execute the written affirmation statement, the voter must provide to the board of the elections one of the following:

- Required identification described in Directive 2008-80 on Voter Identification; or
- The last four digits of the voter's Social Security number.

If the voter cast a provisional ballot because, at the time of voting, he or she did not have any required form of identification or a Social Security number, AND the elector declined to execute the written affirmation statement, the elector must do one of the following:

- Required identification described in Directive 2008-80 on Voter Identification; or
- The last four digits of the voter's Social Security number; or
- Complete the affirmation statement.

If the voter cast a provisional ballot because the voter's right to vote was challenged at the polling place under R.C. 3309.30, and the election officials either determined that the voter was ineligible to vote, or they were unable to determine the voter's eligibility, the voter must provide identification or other documentation required to resolve the challenge, relevant to the nature of the challenge.

If you have questions about this directive, please contact your assigned elections counsel at 614-460-2588.

Sincerely,



Jennifer Brunner

Damschroder, Matthew M.

From: Shinn, Brian [bshinn@sos.state.oh.us]
Sent: Monday, March 31, 2008 1:00 PM
To: Damschroder, Matthew M.; Piccininni, Patrick J.
Cc: White, Dennis L.; Wedekind, Michael; Thomsen, Katherine
Subject: RE: Provisionals
Importance: High

Denny and Matt,

Todd and I have discussed most of the situations below. It is my understanding that your board would appreciate written responses.

Generally, most issues about provisional ballot affirmation statements are covered by Directive 2007-06 on pages 14-16, which explains the provisions of R.C. 3505.183 with regard to provisional ballot affirmation statements.

Under R.C. 3505.183(B)(1), the board is required to examine its records to determine whether the person who cast the provisional ballot is registered and eligible to vote. The only information that is **REQUIRED TO BE INCLUDED IN THE AFFIRMATION FOR THE VOTE TO BE COUNTED IS:** 1. [3505.183(B)(1)(a)] the voter's name and signature; 2. [3505.183(B)(1)(b)] a statement that the individual is a registered voter in the jurisdiction in which the provisional ballot is being voted; and 3. [3505.183(B)(1)(c)] a statement that the individual is eligible to vote in the election in which the provisional ballot is being voted. All other information is optional and is intended to aid the board in identifying whether the voter is registered in the jurisdiction. Contrary to Franklin County's provisional ballot envelope, date of birth is **NOT REQUIRED**. Even if the voter did not provide ID, the provisional ballot still may be counted under R.C. 3505.183(B)(4)(a)(vii) if the voter completed the affirmation statement under R.C. 3513.18(A) OR R.C. 3513.181(B).

Answers to your specific questions:

- 1) More than one ballot in the provisional ballot envelope – apparently some of your poll workers for whatever reason instructed voters to complete a party ballot or even both party ballots and an issues-only ballot. Unlike the absentee ballot statutes, there is no specific statute that says that a provisional ballot cannot be counted if there are multiple ballots in a provisional envelope. If your board determined that the voter was eligible to vote in the primary for a party, then that ballot should be counted only. If the person is only eligible to vote issues, then the issues-only ballot would be counted. If the person did not name a party on the envelope or on a form 10-W or 10-X, then the issues-only ballot is the one that would be counted. All other ballots should not be counted and should be voided. The poll workers in these precincts should be questioned and instructed **NOT** to issue multiple ballots in the future.
- 2) Poll worker did not sign affirmation statement – the ballot should still be counted if the voter provided the required information outlined above. No statute makes the poll worker signature necessary for the ballot to be counted.
- 3) Poll worker signed but did not check box for ID. As stated above, if the statutory requirements are met, then the ballot may be counted without ID being provided as long as the board can identify the voter as a registered voter in the jurisdiction where the voter cast the provisional ballot.
- 4) If only column one of Franklin County's provisional ballot envelope is completed then the ballot still may

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be counted for the reasons stated above (because column one contains all the information and statements required by statute) as long as the board can identify the voter as a registered voter in the jurisdiction where the voter cast the provisional ballot.

- 5) Voter did not print his or her name on column one but signed the provisional ballot affirmation statement. The ballot cannot be counted unless the voter's name appears somewhere on the provisional ballot affirmation envelope written by the voter or a poll worker. Name AND signature are required by R.C. 3505.183(B)(1)(a) as stated above.
- 6) Voter was issued an absentee ballot, and the voter brought it to polling place on election day. Rather than instructing the voter to deliver the absentee ballot to the board of elections or issuing the voter a provisional ballot, the poll worker had the voter complete a provisional ballot envelope and placed the voted absentee ballot in it. The ballot can be counted IF the affirmation statement was properly completed as described above and IF the board can determine that no other absentee ballot was cast by the voter. The voter should not be disenfranchised due to the poll worker's error.

You may contact me if you have any questions about these explanations.

Brian Shinn

From: Damschroder, Matthew M. [mailto:mmdamsch@vote.franklincountyohio.gov]
Sent: Thursday, March 27, 2008 5:47 PM
To: Piccininni, Patrick J.; Shinn, Brian
Cc: White, Dennis L.
Subject: FW: Provisionals

These are some of the issues we are facing on provisionals:

From: Wedekind, Michael
Sent: Thursday, March 27, 2008 4:59 PM
To: Damschroder, Matthew M.; White, Dennis L.
Cc: Kico, Renee M.; Tompkins, Mary D.; Heard, Howard H.; Shell, Gene F.
Subject: Provisionals

Matt, Denny, here are the questions that we need answered before we count the provisional ballots.

- 1.) What should we do when there is more than one ballot in the Provisional Envelope?
 - a.) Some have a party and an issue ballot and some have all three possible ballots.(Dem, Rep, and issue only)
- 2.) Do we count the provisional ballots when the poll worker did not sign the pollworker affirmation statement?
- 3.) Do we count the provisional ballots when the pollworker did sign the pollworker affirmation statement, but there is no box checked stating that the voter provided an acceptable form of identification and no other form of identification is listed in column 2, and column one is completed?
- 4.) Do we count the provisional ballot if column 1 is complete, but column 2 are 3 are not completed by the voter or the pollworker?
- 5.) Do we count the provisional ballot when the voter did not print his or her name at the top of column one, but they did sign the affirmation statement at the bottom of column one?
- 6.) Do we count an absentee ballot that was returned to the polling location and the pollworker had the voter complete a provisional envelope, but had the voter seal the absentee ballot in the provisional envelope rather than giving the voter a provisional ballot to vote?

Todd

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