Damschroder, Matthew M.

From: Shinn, Brian [bshinn@sos.state.oh.us]
Sent: Thursday, November 13, 2008 5:41 PM
To: Shinn, Brian; Piccinini, Patrick J.; Stinziano, Michael P.; Damschroder, Matthew M.
Cc: O'Brien, Ron J.; Souls, Nick A.; Wilson, Antoinette; Dora Rose; Bob DeRose
Subject: RE: Provisional Ballots with Signatures issues

Importance: High

Michael and Matt,

As I indicated yesterday, I am providing our office’s interpretation of the second issue raised in Mr. DeRose’s e-mail from Monday. The question is whether a provisional ballot with the name of the voter in the affirmation but no signature can be counted.

The following statutes lead us to conclude that it can be counted, assuming that the voter is registered, voted in the correct precinct, and was not required to provide additional information or ID to the board but failed to do so.

R.C. 3505.182 (last sentence) “If the individual declines to execute the affirmation, an appropriate local election official shall comply with division (B)(6) of section 3505.181 of the Revised Code.”

R.C. 3505.181(B)(6) “If, at the time that an individual casts a provisional ballot, the individual *** declines to execute such an affirmation *** the appropriate local election official shall record *** the fact that the individual declined to execute such an affirmation and include that information with the transmission of the ballot or voter or address information under division (B)(3) of this section. If the individual declines to execute such an affirmation, the appropriate local election official shall record the individual’s name and include that information with the transmission of the ballot under division (B)(3) of this section.”

R.C. 3505.181(B)(3) “An election official at the polling place shall transmit the ballot cast by the individual, the voter information contained in the written affirmation executed by the individual under division (B)(2) of this section, or the individual’s name if the individual declines to execute such an affirmation to an appropriate local election official for verification under division (B)(4) of this section.”

R.C. 3505.181(B)(4) “If the appropriate local election official to whom the ballot or voter or address information is transmitted under division (B)(3) of this section determines that the individual is eligible to vote, the individual’s provisional ballot shall be counted as a vote in that election.”

Finally, R.C. 3505.183 specifically provides:

(B)(1) To determine whether a provisional ballot is valid and entitled to be counted, the board shall examine its records and determine whether the individual who cast the provisional ballot is registered and eligible to vote in the applicable election. The board shall examine the information contained in the written affirmation executed by the individual who cast the provisional ballot under division (B)(2) of section 3505.181 of the Revised Code. If the individual declines to execute such an affirmation, the individual’s name, written by either the individual or the election official at the direction of the individual, shall be included in a written affirmation in order for the provisional ballot to be eligible to be counted; otherwise, the following information shall be included in the written affirmation in order for the provisional ballot to be eligible to be counted:

(a) The individual’s name and signature;
(b) A statement that the individual is a registered voter in the jurisdiction in which the provisional ballot is being voted;
(c) A statement that the individual is eligible to vote in the election in which the provisional ballot is being voted.

Thus, a provisional ballot with only the voter's name in the affirmation but no signature MAY BE COUNTED under the statutes cited above. This conclusion is consistent with Directive 2008-101 (page 9, section VII and page 7, section VI.D.1.c.4).

Let me know if you have any questions.

Brian Shinn

FRANKLIN COUNTY BOARD OF ELECTIONS
Columbus, Ohio

I hereby certify that this document is a true and accurate copy of the original on file with this office.

By [Signature]

Date 11-13-08

From: Shinn, Brian
Sent: Wednesday, November 12, 2008 6:20 PM
To: Shinn, Brian; Piccinini, Patrick J.; Stinziano, Michael P.; Damschroder, Matthew M.
Cc: O'Brien, Ron J.; Soulsa, Nick A.; Wilson, Antoinette; Dora Rose; Bob DeRose
Subject: RE: Provisional Ballots with Signatures issues
Importance: High

Michael and Matt,

I met with Secretary Brunner and our legal staff this afternoon. We discussed the provisional ballot issues raised in Mr. DeRose's email (below) that I responded to on Monday.

1) Secretary Brunner agrees with my earlier advice that a provisional ballot that contains the signature of a voter but not the written name MUST BE COUNTED if the person is a registered elector, the person voted in the correct precinct, and the person was not required to provide additional information to the board but failed to do so. R.C. 3505.182 prescribes the form of the provisional ballot affirmation but is only a substantial compliance statute. Directive 2008-81 (page 6) states that the voter must execute the affirmation and lists the required statements that must be included. "Execute" means sign. Franklin County uses a provisional ballot affirmation that is different from the SOS prescribed form (Form 12-B) in several regards. On our prescribed form, the poll worker is instructed to print the voter's name in the "Election Official Verification Statement." In contrast, Franklin County's form does not require the poll worker to print the person's name in step 3 or step 4. Thus, the Franklin County form omits a safeguard for the voter. While poll workers are trained to review the voter's affirmation statement before completing the poll worker statement, even the best trained poll workers make mistakes. It is not reasonable to assume that a person would sign a provisional ballot affirmation BUT refuse to write his or her name in. Directive 2008-101 must be read in conjunction with Directive 2008-103. Consequently, failure to write a voter's name on a provisional ballot affirmation is poll worker error that cannot be held against the voter under Directive 2008-103. Finally, we are all reminded by State ex rel. Myles v. Brunner, 2008-Ohio-5097, ¶ 22: "we 'must avoid unduly technical interpretations that impede the public policy favoring free, competitive elections.' State ex rel. Ruehmann v. Luken (1992), 65 Ohio St.3d 1, 3, 598 N.E.2d 1149; cf. Stern v. Cuyahoga Cty. Bd. of Elections (1968), 14 Ohio St.2d 175, 180, 43 O.O.2d 286, 237 N.E.2d 313.

2) I will provide more information regarding our interpretation of the voter name but no signature issue tomorrow.

3) We stand by our requirement in Directive 2008-109 that a voter with an error or omission on his or her absentee ballot envelope must come to the board office to correct it. The board is not required to send
out two staff members for a voter who cannot come to the board office. However, I know at least one
board of elections that has decided to do so.

4) While the deadline for a voter who is required to provide additional information to the board for a
provisional ballot to be counted is the tenth day, boards of elections have until the official canvass to
resolve all issues regarding provisional ballots, such as confirming voters who moved from one Ohio
county to another but failed to update their address. See Directive 2008-101 (Page 2, section II).

Brian Shinn

From: Shinn, Brian
Sent: Wednesday, November 12, 2008 9:42 AM
To: "Piccininni, Patrick J."; Stinziano, Michael P.; Damschroder, Matthew M.
Cc: O'Brien, Ron J.; Soulsa, Nick A.; Wilson, Antoinette
Subject: RE: Provisional Ballots with Signatures issues
Importance: High

Michael and Matt,

I respectfully disagree with Patrick on number 1. I believe that Judge Sargus' order regarding poll worker error
and Directive 2008-103 should be read liberally and in favor of counting provisional ballots rather than rejecting
them solely based upon technicalities.

The form of the provisional ballot affirmation under R.C. 3505.182 is a substantial compliance statute. While
Franklin County's form has the voter complete his or her name in column one, your poll workers are trained to
review the provisional ballot affirmation before completing the poll worker portion. Your poll worker should
have noticed that the voter did not put his or her name in column one and instructed the voter to do so. The
voter actually signed the provisional ballot affirmation, so the voter was cooperating and wanting his or her
ballot to be counted. That is why I conclude that the omission of a name is poll worker error.

If you can determine based upon the address and signature that the person is a registered elector, voted in the
correct precinct, and was not required to provide additional information, why would you not want to count the
ballot? Otherwise, you are disenfranchising the person.

We will discuss this issue with Secretary Brunner this afternoon as well as the issue of no signature but name
was printed on the affirmation and get back to you.

Brian Shinn

From: Piccininni, Patrick J. [mailto:pjpiccin@franklincountyohio.gov]
Sent: Wednesday, November 12, 2008 7:11 AM
To: Stinziano, Michael P.; Damschroder, Matthew M.
Cc: Shinn, Brian; O'Brien, Ron J.; Soulsa, Nick A.
Subject: Provisional Ballots with Signatures issues
Importance: High

FRANKLIN COUNTY BOARD OF ELECTIONS
Columbus, Ohio

I hereby certify that this document is a true and accurate
copy of the original on file with this office.

By: [Signature]
Date: 11-18-08

Gentleman: After our discussion of Brian Shinn's email, Directives 2008-101, 2008-103 and the provisional voter
envelope we are in agreement that:
1) While Directive 2008-103, provides that a provisional ballot may not be rejected for reasons that are attributable to poll worker error neither the directive nor the court order transformed all voter errors into poll worker errors. Under Directive 2008-101 many responsibilities remain the voters. Specifically, Directive 2008-101, §VI(D)(2)(c)(1) provides that the Board of Elections shall not open nor count a provisional ballot shall if the voter failed to provide their name and signature as the person who cast the ballot. The directive adopted by the Court states that both are required. The voter shall complete the information. Nothing in Directive 2008-101, 2008-103 nor the various court orders altered that requirement. R.C. §3505.181 puts the obligation on the voter to complete the application any omission of required information is voter error not poll worker error. Thus, the failure of the voter to put their name on the ballot is not poll worker error requiring the ballot be counted. The ballot should not be opened and not counted.

2) As to the situation where the voter completed the entire application but failed to sign the affirmation is voter error that will invalidate the provisional ballot. The statute is clear that the voter must complete the written affirmation before a poll worker. RC §3501.011 provides that the signature is that of the voter. The duty mandated in R.C. §3505.181 is on the voter not the poll worker. Failure to do so is a fatal defect.

Patrick J. Piccininni
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Thank you.

From: Shinn, Brian [mailto:bshinn@sos.state.oh.us]
Sent: Mon 11/10/2008 6:03 PM
To: Bob DeRose; Stinziano, Michael P.; Damschroder, Matthew M.
Cc: Megan Kelley; Randy Borntrager; dora@ohiodems.org; Richard Topper; Mary S. Duffey; Sandy Spader; Keller, Keenan; Svoboda, Brian (Perkins Cole); Nickolas, Eric; Piccininni, Patrick J.
Subject: RE: Provisional Ballots with signature issues.

Michael and Matt,

I am writing to respond to some of the concerns raised by Mr. DeRose in his email. I have consulted with Directives 2008-101 and 2008-103 and R.C. 3505.181, 3505.182, and 3505.183. Michael also provided me with a copy of Franklin County’s provisional ID envelope.

As a preliminary matter, your board should be using Directives 2008-101 and 2008-103 to determine the validity of provisional ballots rather than any old emails that I sent you after the primary election.

There are three situations regarding provisional ballots described in the email below. Here are my suggestions for handling these:
1) The voter provided a signature in the affirmation statement, but neither the voter nor the poll worker wrote the voter's name anywhere on the provisional ballot envelope – if your board can determine from the information provided by checking the address and the digitized signature in your VR database that the person is registered to vote, voted in the correct precinct, and that the person was not required to provide additional information/ID within ten days, then the provisional ballot can be counted. The fact that a name was not recorded falls under the category of poll worker error described in Directive 2008-103.

2) The voter's name was written on the provisional ballot ID envelope but no signature – we will consult with Secretary Brunner and get back to you on Wednesday. There is an ambiguity that we need resolved before I can advise you on this situation.

3) The voter's name and signature are on the provisional ballot envelope but not necessarily in the correct places. If your board can determine from the information provided that the person is registered to vote, voted in the correct precinct, and that the person was not required to provide additional information/ID within ten days, then the provisional ballot can be counted. The fact that a name and signature were in the wrong place falls under the category of poll worker error described in Directive 2008-103.

The other issue raised by Mr. DeRose's email is whether the board must contact provisional voters who failed to sign the provisional ballot envelope. The only provisional voters whom the board must contact under Directive 2008-101 (section VI.A.2.b on page 4) are provisional voters who are required to provide additional information to the board of elections. Unlike absentee voters under Directive 2008-109, the board is not required to contact provisional voters with errors on their provisional ballot envelope except for those specified in the previous sentence.

Finally, I caution anyone from releasing information about the number of provisional ballots based upon observer information. Observers were sworn not to disclose information that might compromise the secrecy of the ballot.

Let me know if you have any questions.

Brian Shinn
Assistant General Counsel
Ohio Secretary of State Jennifer Brunner

FRANKLIN COUNTY BOARD OF ELECTIONS
Columbus, Ohio

I hereby certify that this document is a true and accurate copy of the original on file with this office.

By

Date 11-18-08

From: Bob DeRose [mailto:bderose@bhnlaw.com]
Sent: Monday, November 10, 2008 10:29 AM
To: Stinziano, Michael P.; mmdamsch@vote.franklincountyohio.gov
Cc: Shinn, Brian; Megan Kelley; Randy Borntrager; dora@ohiodems.org; Richard Topper; Mary S. Duffey; Sandy Spader; Keller, Keenan; Svoboda, Brian (Perkins Cole)
Subject: Provisional Ballots with signature issues.
Importance: High

Michael and Matt,

I am writing concerning the 800 individuals who were made to cast a provisional ballot and who have signature issues determined by you to be “fatally flawed.” As the Kilroy for Congress campaign understands the situation, provisional ballots that either lack a printed name but have a signature in the affirmation or have a printed name but lack a signature in the affirmation, will not be counted and the Board of Elections does not intend to notify the voter to come to the Board to cure the defect. It is the position of the Kilroy for Congress campaign that the Board’s position is incorrect because it does not follow the Ohio Revised Code nor the directives of the Ohio Secretary of State.
A review of R.C. §3505.181 provides at Section (B) (2):

The individual [voter] shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place stating that the individual is both of the following: (a) A registered voter in the jurisdiction in which the individual desires to vote; (b) Eligible to vote in that election.

(emphasis added)

Section (B) (2) uses the term “before” as a preposition meaning, “in the presence of an election official.” R.C. §3505.181 confers upon the poll worker the duty to have the voter complete the provisional ballot envelope in their presence. The use of the word “before” as a preposition is supported by R.C. §3505.182 where in the Revised Code mandates that a poll worker attest to the voter’s completion of the affirmation. In relevant part, R.C. §3505.182 requires the following language to be used on provisional ballots and same is used by the Franklin County Board of Elections; “The Provisional Ballot Affirmation printed above was subscribed and affirmed before me this ........... day of .......... (Month), .......... (Year).” Finally, R.C. §3505.182 requires that the poll worker sign their name to the provisional ballot envelope to attest to the voter’s completion of the provisional ballot envelope’s affirmation section. Further, in the event an individual declines to sign the affirmation, R.C. §3505.182 directs the poll worker to follow procedures set out in R.C. §3505.181 (B)(6).

R.C. §3505.181 (B)(6) requires that “at the time an individual casts a provisional ballot, ... the appropriate election official shall record...the fact that the affirmation was executed, or the fact that the individual declined to execute such an affirmation and include that information with the transmission of the ballot or voter or address information under division (B)(3) of this section. If the individual declines to execute such an affirmation, the appropriate local election official shall record the individual’s name and include that information with the transmission of the ballot under division (B)(3) of this section.” Read together, R.C. §3505.181 and R.C. §3505.182 confer upon the poll worker a duty to make sure that the affirmation section of the provisional ballot envelope is completed correctly by the voter. This duty was codified in SOS Directive 2008-81. The poll worker’s duty would include making certain that the voter placed their printed name in the correct section and signed the affirmation. Permitting a provisional ballot to be cast without the necessary information in the voter affirmation section is contrary to the poll worker’s statutory duty, especially since a poll worker is required by statute to record the affirmation or the declination of a voter to affirm. It stands to reason that the poll worker would check each provisional ballot for the information necessary to discharge their statutory duties and when the information is incomplete they would inquire of the voter if they intended not to sign or place their printed name in the affirmation section. The lack of a signature or a printed name on a provisional ballot envelope’s affirmation section is the result of a poll worker’s error in not checking the provisional ballot before it was cast.

Pursuant to SOS Directive 2008-103, “provisional ballots may not be rejected for reasons that are attributable to poll worker error, including a poll worker’s...failure to comply with any duty mandated by R.C. 3505.181.” As such, any provisional ballot that lacks a printed name but has a signature, or that has a printed name but lacks a signature, or lacks a printed name and has no signature was cast on November 4, 2008 as a result of poll worker error. It is our understanding that approximately 620 of the 800 provisional ballots contain a signature but lacks a printed name. As to these 620 provisional ballots that were cast by an otherwise eligible voter, meaning that there is sufficient information to confirm the identity of the voter, these should be reviewed for registration, their signature compared to the registration and counted as a vote. It is our understanding that approximately 30 provisional ballots have a printed name but lack a signature. As to these 30 provisional ballots, because you have a name and the precinct where the provisional ballot was cast, the Board of Elections should immediately notify these voters of the defect and have them come into the Board to sign the affirmation. To the extent that the Board can determine the voter’s identity from other sources, the ID provided by the voter to the Board should notify the voter of the defect and have them come into the Board to cure.
This issue is of extremely high importance and needs to be addressed immediately since time is running out for these individuals to cure their defects. Because of the time sensitive nature of this issue, I have copied Brian Shinn on this email. Also, can you confirm the numbers I cited for each of the signature issue? Thank you.

Bob DeRose  
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360 S. Grant Avenue  
P.O. Box 1989  
Columbus, Ohio 43216-1989  
614-221-4221  
614-744-2300 (Fax)  
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FRANKLIN COUNTY BOARD OF ELECTIONS  
Columbus, Ohio  
I hereby certify that this document is a true and accurate copy of the original on file with this office.  

By ____________________________  
Date 11-18-04