

**JENNIFER BRUNNER**  
OHIO SECRETARY OF STATE

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**DIRECTIVE 2008-01**  
January 2, 2008

To: All County Boards of Elections

Re: Optical Scan Ballots for Voters in Counties using DREs

Due to the concerns raised by the EVEREST report, and to avoid any loss of confidence by voters that their ballot has been accurately cast or recorded, I hereby direct all counties using direct recording electronic voting machines (DRE) to provide an optical scan ballot to any voter who requests it as an alternative method to casting a ballot on a DRE voting machine. This is similar to the procedures already in place for counties using a DRE for persons appearing at their office to cast an absent voter ballot (i.e. "Voting an Absent Voter's Ballot" in Directive 2007-06, specifically at page 8).

Therefore, effective January 3, 2008, all counties using DREs must provide an optical scan ballot to any voter making such a request at his or her polling place on Election Day.

**Determining Minimum Number of Optical Scan Ballots**

Boards shall determine the minimum number of optical scan ballots to provide for each precinct by multiplying the number of ballots cast in each precinct at a like election by 10%. This will provide the minimum number of optical scan ballots a board using DREs as their primary voting system must provide for each precinct.

**Secure Ballot Containers**

Boards shall provide a secure ballot container for the voter to place his or her optical scan ballot into after marking the ballot.

**Voter Privacy**

Boards shall provide a private area for a voter to mark his or her optical scan ballot. Privacy booths used by persons voting provisional ballots may be utilized for this purpose.

**Tabulation**

The optical scan ballots cast in a precinct are to be centrally counted at the Board on election night as part of the unofficial canvass.

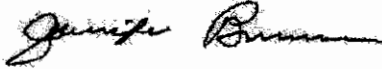
**Documenting Additional Costs in Complying with this Directive**

Please document and itemize the additional costs incurred as a result of complying with this directive to allow the Secretary of State to compile them and seek federal or other reimbursement of these costs as funds may become available. A further directive and accompanying reporting form will be provided to you after the March 4, 2008 primary election to allow you to report these documented and itemized costs.

Directive 2008-01 Optical Scan Ballots for Voters in Counties using DREs Page 2 of 2

If you have any questions concerning this directive, please contact the election attorney assigned to your county.

Sincerely,



Jennifer Brunner



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February 5, 2008

**Karla R. Herron, Director**  
**Union County Board of Elections**  
940 London Avenue, Suite 1000  
Union County Services Center  
Marysville, Ohio 43040

RE: Tie vote on whether the board must follow Directive 2008-01

Dear Ms. Herron:

On January 2, 2008, the Secretary of State's office issued Directive 2008-01 requiring boards of elections to provide an optical scan paper ballot to any elector requesting such a ballot in lieu of casting a ballot using a DRE voting machine. On January 9, 2008, the Union County Board of Elections reached a tie vote on the question of whether the board must follow Directive 2008-01. Although your board has not submitted the tie vote in accordance with the procedures outlined in the Ohio Election Official Manual within the fourteen-day deadline mandated by R.C. 3501.11(X), I will break the tie vote. My analysis and decision are outlined below.

**Background**

I issued Directive 2008-01 in response to security and performance concerns raised by the EVEREST Report regarding DRE voting machines and in anticipation of corresponding concerns by Ohio electors. Directive 2008-01 requires all Ohio county boards of elections using DRE voting machines: 1) to provide an optical scan ballot to any elector who requests an optical scan ballot in lieu of casting a ballot using a DRE voting machine; 2) to make available at each precinct optical scan ballots equal to at least 10% of the vote cast at a previous comparable election; 3) to provide secure ballot containers for the optical scan ballots; 4) to provide a private area in each precinct for voters to cast optical scan ballots; and 5) to tabulate all optical scan ballots centrally at the board of elections on election night.

On January 8, 2008, Board Member Robert W. Parrott unilaterally requested Union County Prosecutor David W. Phillips to advise the board whether the board must comply with Directive 2008-01. On January 8, 2008, Prosecutor Phillips issued a letter advising Mr. Parrott that Directive 2008-01 was not binding on the Union County Board of Elections.

Union County Board of Elections

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Tie Vote on whether the Board must follow Directive 2008-01

Although the board did not submit official minutes from the January 9, 2008 meeting in submitting the tie vote to me, Board Chair David R. Moots did provide unofficial minutes in conjunction with his position statement. It appears that Mr. Parrott made a motion to follow the advice of Prosecutor Phillips and not comply with Directive 2008-01. Apparently, the motion initially garnered no second. However, after a private conference between the Republican board members and you, the motion was renewed by Mr. Parrot and seconded by Board Member Max E. Robinson. Both Mr. Parrott and Mr. Robinson voted in favor of the motion, while Mr. Moots and Board Member Jack C. Foust voted against the motion.

My office received a position statement from Mr. Parrott on January 14, 2008, and a position statement and unofficial minutes from Mr. Moots on January 15, 2008. To date, the Union County Board of Elections has not provided my office with official minutes from the January 9, 2008 board meeting.

### Discussion

The tie vote of the Union County Board of Elections concerns whether the board must follow Directive 2008-01. However, in order to break this tie vote, two determinative questions must be addressed: 1) whether the Secretary of State has the authority to issue Directive 2008-01, and 2) whether complying with Directive 2008-01 requires a board of elections to adopt an additional voting system?

### **The secretary of state has clear legal authority to issue Directive 2008-01.**

The secretary of state is the chief election officer of the state and is granted the powers and duties with respect to administering elections provided in Title 35 of the Ohio Revised Code. R.C. 3501.04. Under R.C. 3501.05(B), (C), and (M), the secretary of state is authorized to issue instructions to boards of elections by directives and advisories as to the proper conduct of elections and to compel the observance of elections laws by elections officials. Similarly, the Ohio Revised Code requires boards of elections to provide instructions for the guidance of election officials and voters "not inconsistent with laws or the rules, directives, or advisories issued by the secretary of state" and to "[p]erform other duties as prescribed by law or the rules, directives, or advisories of the secretary of state." R.C. 3501.11(E)&(P). Ohio courts have consistently recognized the authority of the secretary of state to direct the boards of elections in administering elections. See, e.g., *State ex rel. Donegan v. Cuyahoga Cty. Bd. of Elections* (2000), 136 Ohio App.3d 589, 596. The Supreme Court of Ohio has recognized that boards of elections must follow lawful directives of the secretary of state as long as the directives do not conflict with other provisions of Ohio law. See *State ex rel. White v. Franklin Cty. Bd. of Elections* (1992), 65 Ohio St.3d 5, 8. Additionally, the Supreme Court of Ohio has held that the secretary of state's interpretation of Ohio election law is entitled to more weight than interpretations by other Ohio officials. *State ex rel. Chance v. Mahoning Cty. Bd. of Elections* (1996), 75 Ohio St.3d 42, 44; *State ex rel. Herman v. Klopfeisch* (1995), 72 Ohio St.3d 581, 586.

Tie Vote on whether the Board must follow Directive 2008-01

In addition to the secretary of state's general authority to direct the boards of elections in administering elections as described above, R.C. 3501.30(B) specifically requires the boards of elections to follow the secretary of state's guidance with regard to providing supplies for polling places. R.C. 3501.30(B) provides: "The board of elections shall follow the instructions and advisories of the secretary of state in the production and use of polling place supplies." "Ballots" are among the polling place supplies that boards of elections must provide for each polling place under R.C. 3501.30(A). Further, under R.C. 3505.181 and Directive 2007-06, boards of elections are already required to provide optical scan ballots at all polling places for use by voters who must cast a provisional ballot. Therefore, Directive 2008-01's requirement that boards of elections provide an additional quantity of optical scan ballots for voters who do not want to vote using a DRE voting machine is consistent with R.C. 3501.30 because the directive merely requires boards of elections to provide additional supplies of optical scan ballots at all polling places. Thus, the secretary of state has the authority to issue Directive 2008-01 under several sections of the Ohio Revised Code.

**Complying with Directive 2008-01 does not require the boards of elections to adopt a new voting system.**

The Union County Prosecutor opined that requiring boards of elections to provide optical scan ballots at every polling place amounted to nullification of the Union County Board of Elections' decision to adopt DRE voting machines and requires the board of elections to adopt a new voting system in contravention of the board's authority under R.C. 3506.02. However, the prosecutor's opinion ignores the fact that every board of elections in Ohio, including the Union County Board of Elections, has already adopted a central count optical scan voting system for absentee ballots under R.C. 3509.01. Additionally, under Directive 2007-06, every board of elections in Ohio is already using a central count optical scan voting system for provisional ballots. The additional optical scan ballots required by Directive 2008-01 may be identical to the optical scan ballots that the board of elections is already providing each polling place for use as provisional ballots. Thus, Directive 2008-01 does not require the Union County Board of Elections to adopt a new voting system, nor does it conflict with the board of elections' authority under R.C. 3506.02.<sup>1</sup>

Because the secretary of state has the authority to issue Directive 2008-01 and because Directive 2008-01 does not violate R.C. 3506.02 or any other provision of the Ohio Revised Code, the Union County Board of Elections must follow Directive 2008-01. All board members took an oath to perform their duties to the best of their abilities and to enforce Ohio election laws.

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<sup>1</sup> The Union County Prosecutor relied on Ohio Attorney General Opinion 2005-006 for the proposition that the secretary of state cannot require the boards of elections to adopt a particular voting system. However, as indicated above, Opinion 2005-006 is inapplicable because every board of elections in Ohio has already adopted a central count optical scan voting system for absentee and provisional ballots. Unlike the facts cited in Opinion 2005-006, Directive 2008-01 merely requires boards of elections to provide optical scan ballots at polling places and to count those optical scan ballots using the board's existing central count optical scan voting equipment.

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Tie Vote on whether the Board must follow Directive 2008-01

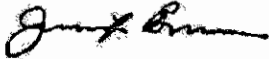
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Failure of a Board of Elections member to follow Directive 2008-01 is tantamount to insubordination and could be considered a violation of his or her oath.

**Decision**

For the foregoing reasons, I vote with Board Chair Moots and Board Member Foust AGAINST the motion not to follow Directive 2008-01. Accordingly, the motion fails. The Union County Board of Elections is hereby instructed to follow Directive 2008-01 immediately.

Sincerely,



Jennifer Brunner