June 8, 2009

Michael Stinziano, Director
Franklin County Board of Elections
280 East Broad Street, Room 100
Columbus, Ohio 43215

RE: Tie votes of May 21, 2009 concerning supplemental funding requests

Dear Director Stinziano:

The Franklin County Board of Elections ("the board") met on May 21, 2009. During this board meeting, the board voted on two motions concerning a supplemental funding request to the Franklin County Commissioners ("the county commissioners") to cover the cost of the August 4, 2009 Special Election. Both of these motions resulted in a tie vote of the board. In accordance with R.C. §3501.11(X) and with the procedures outlined in the Ohio Election Official Manual, the board submitted the tie votes, including position statements of the board members and a transcript of the meeting, to me on May 29, 2009. My analysis and decision are outlined below.

**Background**

On May 11, 2009, the Columbus City Council passed a resolution to submit an ordinance providing for an income tax increase to the electors of the city at the August 4, 2009 Special Election. On May 18, 2009, the Board of Education of the South-Western City School District passed a resolution to submit a tax levy to the electors of the school district at the August 4, 2009 Special Election. The Franklin County Board of Elections held a special meeting on May 21, 2009. One of the issues that the board considered at the special meeting was the need to seek supplemental appropriations from the county commissioners to cover the expenses of the special election. Tr. 8. The 2009 budget for the board included no appropriation to cover the expenses of a special election to be held on August 4, 2009. Id.

The board reached tie votes on the following motions:

1) Board Member Joseph L. Mas made a motion to seek supplemental funding from the county commissioners in the amount of $721,075.61, and Board Member Kimberly E. Marinello seconded the motion. Board Members Mas and Marinello voted in favor of the motion, while Board Chair Douglas J. Preisse and Board Member Michael F. Colley voted against the motion, resulting in a tie vote. Tr. 8, 14.

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1 References to the transcript of the May 21, 2009 board meeting are referred to by the abbreviation "Tr." and the page number in the transcript.
2) Board Member Colley made a motion to seek supplemental funding from the county commissioners in the estimated amount of $1,028,275.61, which includes the cost of mailing an absentee ballot application to every active registered voter eligible to vote at the special election, which was seconded by Board Chair Preisse. Board Member Colley and Board Chair Preisse voted in favor of the motion, while Board Members Mas and Marinello voted against the motion, resulting in a tie vote. Tr. 14-15, 22.

Discussion

The tie votes of the board concern the amount of supplemental appropriations to request from the county commissioners to cover the costs of the August 4, 2009 Special Election. While all the board members agree on the need to seek supplemental appropriations from the county commissioners, the board members disagree on the amount of supplemental appropriations to request. The sole basis of the disagreement is whether the board should seek funds to mail an absentee ballot application to all electors of the county who are eligible to vote in the special election.

The position statement submitted by Board Members Marinello and Mas recognizes recent instances of the board requesting the cost of mailing absentee ballot applications to all electors for every election in its budget appropriation, whether the county commissioners have granted similar budget requests in the past or not. However, they assert that the county commissioners already have denied a similar request for the primary and general elections of 2009. Board Members Mas and Marinello also assert that the over $300,000 in additional expense is not justified given the historically low voter turnout in special elections. Finally, they suggest that the additional expense of mailing absentee ballot applications will place a significant burden on the city and the school district due to the increased chargeback amount that these entities will be assessed with only two issues on the ballot in most precincts.

The position statement submitted by Board Member Colley and Board Chair Preisse notes that the board has requested funding from the county commissioners to cover the cost of sending an absentee ballot application to every eligible elector for every election since 2007. They assert that sending absentee ballot applications to every eligible elector has increased voter participation in other counties. Additionally, they appear to suggest that the board should not consider the financial impact on political subdivisions in making appropriations requests.

Separate from the issues raised by the board members, I have a significant legal concern about equal protection considerations, at least with regard to the Columbus income tax issue. The City of Columbus overlaps into six precincts in Fairfield County and four precincts in Delaware County. The Delaware County Board of Elections and the Fairfield County Board of Elections have not been appropriated any funds to mail absentee ballot applications to all eligible electors for the special election, and neither board is contemplating mailing absentee ballot applications to all eligible electors. Ohio law does not require such a mailing. If the Franklin County Board of Elections mails absentee ballot applications to all eligible electors but the Delaware and

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2 The position statement of Board Members Marinello and Mas cites slightly different figures than those cited by Board Member Colley and Board Chair Preisse in their position statement and those cited in the transcript. However, the precise dollar amount is not critical to the question of seeking funding for mailing absentee ballot applications to all eligible electors.
Fairfield County Boards of Elections do not, then the electors of Franklin County are being given an advantage not enjoyed by the electors of Delaware and Fairfield Counties in the same election on the same issue. The Ohio Supreme Court has cautioned elections officials against unequal treatment of voters in different counties in the same election. State ex rel. Skaggs v. Brunner, 120 Ohio St.3d 506, 2008-Ohio-6333, at ¶ 57-59.

The issue of mailing absentee ballot applications to some electors who are eligible to vote in the special election but not all electors who are eligible to vote in the special election on the same issue needs to be resolved before the board submits a supplemental appropriations request to the county commissioners. Consequently, the board should consult with the Delaware and Fairfield County Boards of Elections on this issue prior to finalizing a supplemental appropriations request for a final vote of the board.

**Decision**

For the foregoing reasons, I vote with Board Members Mas and Marinello against the motion to request supplemental appropriations of approximately $1,028,275.61, which represents an amount that includes the cost of mailing an absentee ballot application to all eligible electors of the county. I also vote with Board Member Colley and Board Chair Preisse against the motion to request supplemental appropriations of approximately $721,075.61, which represents an amount that does not include the cost of mailing an absentee ballot application to all eligible electors of the county. Accordingly, both motions fail. The Franklin County Board of Elections is hereby instructed to consult with the Delaware and Fairfield County Boards of Elections prior to finalizing their supplemental appropriations request for submission to the county commissioners in accordance with this tie vote decision.

Sincerely,

Jennifer Brunner