Opinion No. 2014-012

February 10, 2014

Leonard A. Boyle, Sr., Chairman
Pulaski County Board of Election Commissioners
501 West Markham, Suite A
Little Rock, Arkansas 72201

Dear Mr. Boyle:

I am writing in response to your request for my expedited opinion on the following questions concerning Act 595 of 2013, which amended Arkansas's election laws to establish new identification requirements for voters:

1. Pursuant to Act 595 of 2013, should an absentee voter that is not exempt from the identification requirements and fails to “submit with the ballot a copy of a current and valid photo identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter” have his or her ballot considered a provisional ballot and be allowed the opportunity to provide identification by 12:00 p.m. of the Monday following the election?

2. If the answer to Question 1 is “yes,” how is the voter to be notified of the need to provide identification? (According to Ark. Code Ann. § 7-5-416, processing of absentee ballots may not begin before 8:30 a.m. on election day; therefore, depending on the number of absentee ballots processing may not be completed in time to mail notification that same day.)

3. If the answer to Question 1 is “yes,” will the absentee voter be required to present “proof of identity” as defined in Ark.
Code Ann. § 7-1-101 rather than "a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter?"

4. If the answer to Question 1 is "yes," must the identification be provided in person as required by Ark. Code Ann. § 7-5-321? Many people meeting the requirements to vote absentee (i.e., unavoidably absent from his or her voting place on the day of the election or unable to attend the polls because of illness or physical disability) would likely have the same difficulty appearing in person at the County Clerk's office or an Election Commission meeting within the three and ½ business days between election day and the following Monday at noon.

5. If the answer to Question 4 is "no," how will the County Clerk and Election Commission comply with Rules 806 and 807 promulgated by the State Board of Election Commissioners?

6. If the answer to Question 1 is "yes," how should the election commission handle civilian overseas absentee ballots that are postmarked by election day but arrive after 12 p.m. on the Monday following the election (see Ark. Code Ann. § 7-5-411) and do not contain the required identification documentation?

7. Would treating absentee voters differently from "in person" voters by denying them the right to submit the identification documentation at a later date create any problem under either the Arkansas or U.S. Constitution?

RESPONSE

In my opinion, the answer to your first question is "no," rendering moot Questions 2 through 6. The answer to your final question is also "no," in my opinion.
Question 1 - Pursuant to Act 595 of 2013, should an absentee voter that is not exempt from the identification requirements and fails to “submit with the ballot a copy of a current and valid photo identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter” have his or her ballot considered a provisional ballot and be allowed the opportunity to provide identification by 12:00 p.m. of the Monday following the election?

As you noted in submitting your request for my opinion, Act 595 of 2013 amended A.C.A. 7-5-201 to require “proof of identity to the election official when appearing to vote in person either early or at the polls on election day[].” The act further amended this Code section to provide that persons voting by absentee ballot shall “submit with the ballot a copy of a current and valid photo identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter....”

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Act 595 defined “proof of identity” as follows:

(i) A voter identification card under § 7-5-322; or
(ii) A document or identification card that:
   (d) Shows the name of the person to whom the document was issued;
   (b) Shows a photograph of the person to whom the document was issued;
   (c) Is issued by the United States, the State of Arkansas, or an accredited postsecondary educational institution in the State of Arkansas; and
   (d) If displaying an expiration date:
      (1) Is not expired; or
      (2) Expired no more than four (4) years before the date of the election in which
          the person seeks to vote.

A.C.A. 7-1-101(30)(A) (Supp. 2013). The Secretary of State is required pursuant to A.C.A. 7-5-322(a)(1)(A) (Supp. 2013) to “provide by rule for the issuance of a voter identification card that may be requested by an individual to be used as proof of identity when appearing to vote in person.”

2 A.C.A. 7-5-201(d)(1)(B). The absentee voter identification requirement does not apply to active members of the uniformed services, members of the merchant marines, and both members’ spouses and dependents, who are absent on election day due to the members’ service. Id. at (d)(1)(B)(i) – (iii). The exemption also extends to residents of long-term care and resident care facilities, although they must provide documentation from the facility’s administrator attesting that they are residents. Id. at (d)(2).
Additionally, and most significant for purposes of your question, Act 595 established a procedure for counting the ballot of a person who fails to provide "proof of identity":

(i) If a voter is unable to provide this proof of identity, the poll worker shall:

(a) Indicate on the precinct voter registration list that the voter did not provide proof of identity; and

(b) Permit the voter to cast a provisional ballot.

(ii) When a voter is unable to provide proof of identity, the voter and the election official shall follow the procedure under 7-5-321.3

Pursuant to A.C.A. 7-5-321, the provisional ballot cast by the voter who did not provide proof of identity must be counted if:

(1) The voter returns to the county board of election commissioners or the county clerk by 12:00 p.m. on the Monday following the election and:

(A) Provides proof of identity; or

(B) Provides an affidavit stating that the voter cannot provide proof of identity because the voter:

(i) Is indigent; or

(ii) Has a religious objection to being photographed; and

(2) The voter has not been challenged or required to vote a provisional ballot for any other reason.4

3 A.C.A. 7-5-305(a)(8)(B). See also A.C.A. 7-5-418(d)(2)(A) (Supp. 2013) (applying same procedure to those voting early who fail to provide proof of identity).

4 A.C.A. 7-5-321(c) (Supp. 2013).
In considering this statutory scheme, we are guided by well-established principles of statutory interpretation:

The first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Weiss v. McFadden*, 353 Ark. 868, 120 S.W.3d 545 (2003). We construe the statute so that no word is left void, superfluous, or insignificant; and meaning and effect are given to every word in the statute if possible. *Ozark Gas Pipeline Corp. v. Arkansas Pub. Serv. Comm'n*, 342 Ark. 591, 29 S.W.3d 730 (2000). When the language of the statute is plain and unambiguous, there is no need to resort to rules of statutory construction. *Weiss v. McFadden*, *supra*. When the meaning is not clear, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject. *Id.*

The application of these principles leads me to conclude that with the exception of certain first-time voters, the legislature did not intend to allow an absentee voter to cast a provisional ballot if they failed to submit the required identification when casting their absentee ballot. It is clear on the face of A.C.A. §§ 7-5-305 and 7-5-418 that the procedure for casting a provisional ballot applies to those who must provide “proof of identity” – a requirement that applies to those voting in person either early or at the polls on election day. When “proof of identity” is not provided, sections 7-5-305 (in person at the polls) and 7-5-418 (early voting) direct the election official to follow A.C.A. § 7-5-321, which sets out the procedure envisioned by your question – voting a provisional ballot with the opportunity to provide identification by 12:00 p.m. of the Monday following the election. This latter procedure applies to the voter who is “listed on the precinct voter registration list but fails to provide proof of identity....” Again, “proof of identity” is only required of those voting in person.

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6 First-time voters are discussed below.

7 A.C.A. § 7-5-201(d)(1)(A) (“Except as provided in subdivision (d)(2) and subsection (e) of this section, any person desiring to vote in this state shall ... [p]resent proof of identity to the election official when appearing to vote in person either early or at the polls on election day[.]” (Emphasis added)).

8 A.C.A. § 7-5-321(a) (emphasis added).
The statutory scheme is thus quite straightforward and unambiguous. According to my review, there is no comparable procedure for absentee voters who fail to submit the requisite identification with their ballots. I note that several statutes provide for provisional balloting, including one for those who receive an absentee ballot but then elect to vote in person:

Any person who receives an absentee ballot according to the precinct voter registration list but who elects to vote by early voting or to vote at his or her polling site on election day shall be permitted to cast a provisional ballot. ⁹

First-time voters who register to vote by mail without providing the necessary identification may also cast a provisional ballot when voting absence. ¹⁰

With the exception of the first-time voter provisions, none of the provisional balloting statutes can be read to encompass the person who votes absentee and does not provide the identification required by A.C.A. §7-5-201(d)(1)(B) (“a copy of a current and valid photo identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.”). I note, additionally, that a “provisional ballot” is one that is “[c]ast by special procedures to record a vote when there is some question concerning a voter’s eligibility....” ¹¹ These procedures include notice by the poll worker that the individual may vote a provisional ballot, and written information from the poll worker instructing the voter on how to determine whether their provisional ballot will be counted. ¹² The latter statutory provisions plainly do not extend to the absentee voter; and I have

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⁹ A.C.A. § 7-5-201(f). See also A.C.A. § 7-5-305(a)(11) (“Before a person is permitted to vote, the poll worker shall ... permit the person to cast a provisional ballot if the person received an absentee ballot according to the precinct voter registration list.”).

¹⁰ A.C.A. § 7-5-305(a)(8)(B)(iii) (in-person voting); A.C.A. § 7-5-412(a)(2) and (b) (Supp. 2013) (absentee voting); 7-5-416(b)(1)(F)(iii) (Supp. 2013) (counting of absentee ballots). The provisions applicable to first-time voters pre-date the 2013 voter identification legislation, and were presumably enacted in light of the Help America Vote Act of 2002 (“HAVA”), which established certain requirements with respect to first-time voters. 42 U.S.C. §§ 15482(a), 15484(b)(1)-(3).


¹² A.C.A. § 7-5-306(a)(1) and (?). (Repl. 2011).
found no language elsewhere establishing any similar procedure applicable to the absentee voter.

Considering the plain language of the statutes, therefore, I cannot say that the legislature intended for the absentee voter to cast a provisional vote and then return later with identification. I am constrained, in the issuance of legal opinions, as a court would be, to interpreting the plain language used by the legislative branch, and giving effect to that language absent an ambiguity. In my opinion, a court faced with the question will not read such a procedure into the statutory scheme as regards absentee voters.\textsuperscript{13} It is well established that unless a different legislative intent is indicated, a court will not resort to a strained construction for the purpose of restricting or expanding the meaning of a statute.\textsuperscript{14} I believe it would require a strained construction to conclude that the provisional ballot procedure applicable to those who vote in person and do not provide “proof of identity” also applies to those who vote absentee. Further bolstering this conclusion is the court’s adherence to the view that “there must be strict compliance with statutory provisions regarding the application for and casting of absentee ballots…”\textsuperscript{15}

In sum, therefore, I must conclude that the answer to your question is “no,” an absentee voter who is not exempt from the identification requirements and fails to submit identification as required by A.C.A. § 7-5-201(d)(1)(B) should not have his or her ballot considered a provisional ballot and be allowed the opportunity to provide identification by 12:00 p.m. of the Monday following the election.

Questions 2 through 6 are moot in light of this response.

\textit{Question 7 - Would treating absentee voters differently from “in person” voters by denying them the right to submit the identification documentation at a later date create any problem under either the Arkansas or U.S. Constitution?}

In constitutional terms, this concern about different treatment implicates the constitutional guarantee of “equal protection.” The equal protection doctrine

\textsuperscript{13} See generally MacSteel, 363 Ark. at 30 (“This court will not read into a statute a provision that simply was not included by the General Assembly.” (Citations omitted)).

\textsuperscript{14} Thompson v. Younts, 282 Ark. 524, 669 S.W.2d 471 (1984).

\textsuperscript{15} Womack v. Foster, 340 Ark. 124, 153, 8 S.W.3d 854 (2000) (citations omitted).
arises out of both the Fourteenth Amendment to the United States Constitution and Article 2, sections 2 and 3 of the Arkansas Constitution. The doctrine prohibits certain types of classifications that result in the disparate treatment of those who are "similarly situated."  

Although there is no reported Arkansas decision on point, other courts that have faced the question have held that absentee and in-person voters are not similarly situated for purposes of equal protection analysis. The courts have reasoned that absentee voting and in-person voting are "fundamentally" or "inherently" different:

Absentee voting is a fundamentally different process from in-person voting, and is governed by procedures entirely distinct from in-person voting procedures. See Ind. Democratic Party v. Rokita, 458 F. Supp.2d 775, 830-31 (S.D. Ind. 2006) ("absentee voting is an inherently different procedure from in-person voting").

The Tennessee Supreme Court’s reasoning was based in part upon the observation that "absentee voting is a 'special privilege' and 'a departure from the general rule governing the method of exercising the right to vote' that 'requires a stricter adherence to the legislative conditions imposed upon its exercise.'" Our court has also required strict compliance with laws governing absentee voting, "even if the challenge is brought after the election has occurred." Although not determinative of the issue at hand, I believe this suggests that our court would also

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16 Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). ("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike. Plyler v. Doe, 457 U.S. 202, 216 (1982)"). Waller v. Banks, 2013 Ark. 399, 8, 2013 WL 5603930, 3 ("... a viable equal-protection claim requires a showing that appellant is similarly situated to those he claims are receiving favorable treatment. See McWilliams v. Pope Bd. of Equalization, 2012 Ark. 427, ___ S.W.3d ___.").


18 Santillanes, 546 F.3d at 1320.

19 Hargett, 414 S.W.3d at 110 (quoting Hilliard v. Park, 370 S.W.2d 829, 833 (Tenn. 1963)).

20 Womack, 340 Ark. at 153.
recognize that there are essential differences between absentee and in-person voters.

In contrast to these decisions, my research has yielded no case in support of the contention that a state may not impose different requirements on absentee and in-person voters. On the basis of the above authorities, and the absence of any authority to the contrary, I anticipate that our court would similarly hold that the equal-protection clause is not implicated by the different treatment of absentee and in-person voters because the two are not similarly situated. Accordingly, the answer to your question is “no,” in my opinion.

Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDaniel
Attorney General

DM:EAW/eyh
Opinion No. 2014-018

February 13, 2014

The Honorable Jake Files
State Senator
300 Free Ferry Landing
Fort Smith, Arkansas 72903

Dear Senator Files:

This is in response to your request for my opinion “regarding the application of Arkansas Code Section 7-5-321 and 7-5-412 as a ‘cure’ for absentee ballots sent in without valid identification.” Attached to your request is a copy of a letter from the Sebastian County Election Commission, dated February 7, 2014, stating that the Commission had received the following conflicting advice from two state agencies:

1. The State Board of Election Commissioners opines that absentee ballots sent in without valid identification should not be counted (Code Section 7-5-412).

2. The Secretary of State’s office joins A.C.A. § 7-5-412 (absentee ballots) to Code Section 7-5-321, which applies to election day voting, and opines absentee ballots sent in without valid identification should be classified as provisional.

RESPONSE

In my opinion, current Arkansas law does not allow an absentee voter to cast a provisional ballot if they failed to submit the required identification when casting their absentee ballot. The basis for this conclusion is fully set forth in Attorney General Opinion 2014-012, a copy of which in enclosed for your convenience. I will not here reproduce the analysis, except to note that the procedure for casting a
provisional ballot with the opportunity to provide identification by 12:00 p.m. of the Monday following the election applies to those voting in person who fail to provide the required “proof of identity.”

Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM: EAW/cyh

Enclosure
STATE BOARD OF ELECTION COMMISSIONERS
501 Woodlane, Suite 401N
Little Rock, Arkansas  72201
(501) 682-1834 or (800) 411-6996

MINUTES OF FEBRUARY 19, 2014

I. Roll Call

Chairman Mark Martin called the meeting to order at 1:00 p.m.

Members Present: Others Present:
Chairman Mark Martin Justin Clay, SBEC Director
Rhonda Cole Tim Humphries, SBEC Legal Counsel
Chad Pekron Jon Davidson, SBEC Educational Services Manager
Stuart Soffer Bernetta Levy, SBEC Election Coordinator
C.S. Walker Doug Matayo, Chief Deputy Secretary of State
Barbara McBryde AJ Kelly, Deputy Secretary of State
J. Harmon Smith Martha Adcock, Secretary of State, General Counsel
Members Absent:
None Rob Hammons, Secretary of State, Director of Elections
Leslie Bellamy, Secretary of State, Election Coordinator
Alex Reed, Secretary of State Press Secretary

II. Approval of the Minutes of December 4, 2013

Commissioner Cole moved to approve the minutes of December 4, 2013. Commissioner Walker seconded the motion. The motion passed unanimously.
III. Director Comments

Director Clay provided an update of the County Election Commissioner trainings that have occurred as well as an overview of the upcoming Poll Worker Certification trainings that have been scheduled. Clay advised that staff has received the 2014 Running for Public Office Handbooks and have fulfilled request orders for those publications. Clay also advised that staff expects to receive the remaining publications in the coming weeks. Finally, Clay mentioned that the redesigned website had been launched.

IV. Approval of AASIS Reports for October 2013, November 2013, and December 2013

Commissioner Walker moved to approve AASIS Reports for October 2013, November 2013, and December 2013. Commissioner Pekron seconded the motion. The motion passed unanimously.

V. Discussion of “I Voted Stickers” Standard

After discussion, the board agreed that further discussion was needed on this topic. Commissioner Soffer agreed to work with the staff on language to include during training sessions conducted by staff. No formal action was taken.

Public comments were heard from Ginna Watson, Garland County Election Commissioner and Susan Inman.

VI. Procedures for Absentee Ballots Returned Without Required ID

A presentation of the Secretary of State’s position on this issue was conducted by Martha Adcock, Secretary of State General Counsel.

Public comments were heard from George Ritter, Ritter Law Firm, Bob Hammons, Secretary of State Director of Elections, Martha Adcock, Secretary of State General Counsel, and Ginna Watson, Garland County Election Commissioner.

After additional discussion Commissioner Pekron moved to direct the staff of the State Board to meet with the staff of the Secretary of State as expeditiously as possible to come up with an emergency rule for board consideration in order to establish a process that is consistent with the Secretary of State’s interpretation of Act 595 of 2013 allowing for absentee ballots that are returned without required identification to be counted. Commissioner Soffer seconded the motion. The motion passed unanimously.
VII. Absentee Guide Update

Clay advised that the absentee guide is nearing completion after positive discussions with the Secretary of State’s staff. Clay mentioned that, upon completion, the absentee guide will likely be disseminated to the County Clerk’s Association and to the Election Commission Association before mass distribution.

At this time, Secretary Martin announced that the board would enter into executive session to discuss opinions coming from the State Board of Election Commissioners and how to handle the issue in the future. The board entered into executive session at 1:58 p.m. The executive session terminated at 2:34 p.m. Commissioner Pekron moved for the board to advise the director of the State Board of Election Commissioners to exercise discernment to ensure that the members of the State Board and the Secretary of State’s office are in substantial agreement prior to taking or making a legal opinion on controversial issues. Commissioner McBryde seconded the motion. The decision of the executive session was made in the form of a motion and passed.

VIII. Board Member Comments

No board member comments were forthcoming.

IX. Public Comments

Public comments were made by Susan Inman, Ginna Watson, Garland County Election Commission, Chris Burks, Pulaski County Election Commission, and Commissioner Soffer.

X. Confirmation of Next Scheduled Meeting of the Board

The next meeting of the State Board of Election Commissioners was scheduled for February 28, 2014, at 1:00 p.m.

XI. Adjournment

Commissioner Pekron moved to adjourn. Commissioner McBryde seconded the motion. The motion passed unanimously. The meeting was adjourned at 2:50 p.m.

Signed by: ________________________________
Mark Martin, Chairman

Date Approved: February 28, 2014
Dear County Commissioners, Clerks, and Coordinators,

Emergency Rules:
The State Board of Election Commissioners met on Friday, February 28th to approve emergency changes to the board’s Rules for Voter Identification and Rules for Poll Watchers, Vote Challenges, and Provisional Voting. These emergency rules were filed on March 4th and are now in effect. Summaries of the changes to these rules and the final emergency rules themselves are attached and are available on our website at http://www.arkansas.gov/sbec/rules/.

These emergency rules were approved to address absentee ballots that are returned without required identification. Under these emergency rules, which will be in effect until July 2, 2014, absentee ballots that are returned without required identification are to be treated as provisional ballots. Voters who submit an absentee ballot without required identification may submit required identification by noon on the Monday following the election. Under these rules, election commissioners are required to send notice to these absentee voters whose ballots were made provisional for failure to provide required identification. A sample notice is also attached to this email and is available on our website at http://www.arkansas.gov/sbec/rules/. This postelection submission for absentee voters may be done in person, by mail, or by a third person. Additional details are contained in the aforementioned summaries and the rules themselves.

Proposed Rules:
In order for these emergency rules to be made permanent beyond July 2, 2014, the rules must follow the normal rule-making process. Therefore, these same emergency rules are also being considered as proposed rules, subject to a thirty day public comment period. The notice of rulemaking is attached to this email as well and will be published in the 3/7 – 3/9 editions of the Arkansas Democrat Gazette. Summaries of the changes to these rules and the proposed rules themselves are attached and may be viewed on our website at http://www.arkansas.gov/sbec/rules/.

A public hearing on these proposed rules will be held on March 19, 2014, at 10:00 a.m. in the Board’s Conference Room located at 501 Woodlane, Suite 401N, Little Rock, Arkansas.

Written comments regarding these proposed rules must be received no later than 4:30 p.m. on April 6, 2014. Comments should be sent by email to info.sbec@sos.arkansas.gov or by mail to:
Arkansas State Board of Election Commissioners, 501 Woodlane, Suite 401N, Little Rock, AR 72201.

Reminder:
These emergency rules are currently in effect and counties must operate under the requirements of these rules during any upcoming elections that you may have.

Please feel free to contact us if you have any questions or if we can provide you with any additional information.

Thank you,

Justin Clay  
Director, State Board of Election Commissioners  
501 Woodlane, Suite 401 N  
Little Rock, Arkansas 72201  
(501) 682-1013  
(800) 411-6996  
www.arkansas.gov/sbec