

DIRECTIVE 2008-114

November 14, 2008

To: ALL COUNTY BOARDS OF ELECTIONS
MEMBERS, DIRECTORS, AND DEPUTY DIRECTORS

Re: Board members' duty to attend emergency meetings

Boards of elections must respond with immediacy to election issues as they arise, especially during the days leading up to an Election Day. Emergency meetings give board members the flexibility they need to address critical matters quickly and efficiently, and particular concern must be paid to those issues that affect an electors' right to vote. When board members, however, choose not to be responsive by not attending emergency meetings, they fail to perform their obligations under law.

Therefore, I direct boards of elections members to attend all emergency meetings called by a member of the board of elections, unless extenuating circumstances would prevent the member from doing so, or the board member can show good cause for not attending a meeting. Failure to attend an emergency meeting, absent extenuating circumstances or good cause, generally constitutes neglect of duty, malfeasance, misfeasance or nonfeasance in office.

Board members are required to attend emergency meetings absent extenuating circumstances or good cause

R.C. 3501.11(E) requires boards of elections to make and issue rules and instructions that the board determines are necessary for the guidance of election officers and voters. Boards must meet as a body to fulfill this obligation (See, R.C. 122.21(C)). In addition, when events arise that require immediate action, it is contemplated under R.C. 121.22(F) and (C) that one or members will call an emergency meeting to address the situation so that the public body's obligations under law can be fulfilled.

Although this year's general Election Day has passed, board members, in carrying out election administration processes, have the continual duty to make timely decisions and to provide clear instructions to election officers and voters. This duty is especially great when the board is faced with unexpected challenges. In these circumstances, board members must meet as a body, deliberate the issues and, by quorum, come to a decision. Under R.C. 3501.11(P), these decisions must be consistent with any laws, rules, directives or advisories issued by the Secretary of State. A board of elections should consult with its attorney at the Secretary of State's office to ensure its rules and instructions are consistent with any laws, rules, directives or advisories issued by the Secretary of State.

I hereby direct all boards of elections to adopt a policy that covers the request for and conduct of an emergency meeting. This policy must be consistent with this directive.

Board members who fail to perform their duties may face removal or suspension from office

Pursuant to R.C. 3501.16, the Secretary of State may:

summarily remove or suspend any member of a board of elections, or the director, deputy director, or any other employee of the board, **for neglect of duty, malfeasance, misfeasance, or nonfeasance in office, for any willful violation of Title XXXV of the Revised Code**, vacancies in the office of chairperson, director, or deputy director shall be filled in the same manner as original selections are made, from persons belonging to the same political party as that to which the outgoing officer belonged. If those vacancies cannot be filled in that manner, they shall be filled by the secretary of state.

In addition, R.C. 3599.16 states:

No member, director, or employee of a board of elections shall:

(A) Willfully or negligently violate or neglect to perform any duty imposed upon him by law . . .

Whoever violates this section shall be dismissed from his position as a member or employee of the board and is guilty of a felony of the fourth degree.

These statutes make it clear that board members are expected to conduct themselves with the highest standard of care and regard for the electorate they serve. Failure to take any action and/or failure to act in a manner that is in the best interest of the electorate contravenes this relationship of trust. This failure is both a violation of R.C. 3501.16 and the oath of office taken by board members under R.C. 3501.08 (“[E]ach member of the board of elections shall . . . subscribe to an oath that **he [or she] will . . . perform the duties of the office to the best of his [or her] ability [and] will enforce election laws.**”).

Board members who abuse the power to call an emergency meeting may face removal or suspension from office

R.C. 3501.16 gives the Secretary of State the authority to summarily remove or suspend any member of a board of elections for malfeasance or misfeasance. “Malfeasance” is commonly defined as “wrongdoing or misconduct especially by a public official,” while “misfeasance” is commonly defined as “the performance of a lawful action in an illegal or improper manner.” While one act alone can constitute malfeasance or misfeasance, a series or pattern of misconduct also can amount to a violation of R.C. 3501.16.

Boards are strongly urged to first consider the immediacy of the concern before calling an emergency meeting. A board member will be deemed to engage in misconduct and improper acts if she or he calls or attempts to call an emergency board meeting that is generally not necessary, as shown by clear and convincing evidence. Other examples of malfeasance and/or misfeasance include repeated calls and cancellations of an emergency board meeting, extending an emergency board meeting for an unreasonable amount of time, and/or calling an emergency board meeting for purposes other than the conduct of board duties. In accordance with the board’s policy on emergency meetings, boards should act responsibly and in the best interest of the voters.

Conclusion

As previously stated, boards of elections are the front lines of Ohio's bipartisan elections system. Failure to take up pressing election issues diminishes voters' confidence in the ability of Ohio's election officers to administer elections. It also leads to voter confusion and makes it significantly more difficult for other election officers to function. The Secretary of State's office will continue to support boards in their efforts to ensure that all elections are conducted in a fair, open and orderly process.

If you have any questions, please contact your assigned elections attorney at (614) 466-2585. Your cooperation is appreciated.

Sincerely,

Jennifer Brunner