

## **DIRECTIVE 2008-29**

February 25, 2008

To: All County Boards of Elections, Members, Directors and Deputy Directors

Re: Rights of and limitations on election observers

This directive is intended to clarify issues regarding the provisions of the Ohio Revised Code that allow for election observers at various stages throughout the election process. While the Revised Code clearly articulates the process to become an observer, or who may and may not be an observer, it does not prescribe the rights of observers while observing, or what limitations boards of elections may place on observers' activities.

Poll observers play an important role in assuring the public that election processes are open and transparent, affecting public trust of the process, and thus, the potential for future participation in the democratic process. In the past, some issues regarding poll observers have engendered difficulty from the perspectives of both election officials and observers. The goal of this directive is to balance what may be competing interests and concerns and to, above all, protect the rights of voters to participate in elections free from hindrance or difficulty. In this process, care must be taken to protect the secrecy of a voter's ballot, to maintain "peace and good order" in polling places and to make the election system open to any voter who is eligible and wants to vote, all the while providing the opportunity for observation, ensuring election integrity.

Thus, pursuant to my authority under R.C. 3501.05(B) and (C), this directive is intended to provide consistent instructions for all eighty-eight of Ohio's county boards of elections to follow in training poll workers and board staff on what observers may and may not do while observing, consistent with existing laws on the appointment and activities of election observers.

While this directive is meant to amplify and assist in the implementation of laws regarding observers, it is not an exhaustive treatise on how to handle all situations. Please feel free to consult with the elections attorney at the Secretary of State's office who is assigned to assist your county for additional clarification if necessary. And as always, please feel free to consult your county prosecutor for legal advice that may relate to issues corollary to this directive.

**All boards of elections are instructed to provide one copy of this directive to each political party, candidate, group of candidates, or issue committee ("the appointing authorities") filing forms appointing observers for any election.**

## **I. Responsibilities of Election Officials as to Observers**

Several Ohio statutes provide that election officials have a responsibility to tend to the well being of observers. However, that responsibility carries with it a connected right to remove observers from their posts under very limited circumstances (*i.e.*, for behavior inconsistent with Ohio law or Secretary of State directive, or that interferes with, impedes, or disrupts an election).

R.C. 3501.33 provides, in relevant part, that:

all judges of elections . . . shall protect observers against molestation and violence in the performance of their duties, and may eject from the polling place any observer for violation of any provision of Title XXXV of the Revised Code.

Additionally, R.C. 3505.21 provides that “[t]he judges of elections shall protect . . . observers in all of the rights and privileges granted to them by Title XXXV of the Revised Code.”

Based on the provisions quoted above, election officials may only limit observers’ rights based on the performance of their duties and upon an observer’s conduct that violates Title XXXV of the Revised Code.

## **II. General Information**

There are five distinct points during an election at which the Revised Code contemplates the presence of observers:

- During the processing and counting of absent voters’ ballots and military and overseas ballots (R.C. 3509.022, R.C. 3509.06, R.C. 3505.21, and R.C. 3511.11);
- On Election Day at precincts or at the boards of elections (R.C. 3505.21);
- During the processing of provisional ballots (R.C. 3505.183(D) and R.C. 3505.21);
- During the official canvass (R.C. 3505.32(B) and R.C. 3505.21; and
- During any recount (R.C. 3515.03).

### **A. Appointing Observers for Election Day and for the Processing and Counting of Provisional and Absentee Ballots**

#### **i. Appointing Authorities**

Only certain groups may appoint observers for Election Day and for the processing and counting of absentee and provisional ballots. The following groups are referred to as “appointing authorities” throughout this directive:

- Any political party (county or state) that is supporting candidates to be voted upon at that election;
- Any group of five or more candidates; or
- A ballot issue committee recognized by the board of elections pursuant to law as supporting or opposing a ballot issue.

Please note that as of the date of this directive there are only two recognized political parties in Ohio, the Democratic and Republican parties.

**ii. Number of Observers**

**a. At Boards of Elections During Ten Days After Election or During Official Canvass**

The statutes that govern the appointment of observers (except as to recounts) limit the number of observers that may be appointed to the offices of a board of elections by any one appointing authority. R.C. 3505.21 provides that any appointing authority:

may appoint to the board of elections **or** to any of the precincts in the county or city **one person**, a qualified elector, who shall serve as observer for such party or such candidates during the casting and counting of the ballots; provided that separate observers may be appointed to serve during the casting and during the counting of the ballots.

Additionally, R.C. 3505.32(B) provides that an appropriate appointing authority:

may designate **a qualified elector** who may be present and may observe the making of the official canvass.

Based on those provisions, an appointing authority may only appoint one person to observe at a board of elections office. However, there does not appear to be any provision in Title 35 prohibiting a board of elections from allowing additional observers under appropriate circumstances. For example, when a board of elections will be taking multiple days to complete the processing of provisional ballots, military and overseas absentee ballots, or the official canvass, or when those processes will be occurring in separate areas of the board offices, such that one observer cannot effectively monitor the process, it would be prudent for the board to permit an appointing authority multiple observers to accommodate the various times or locations and/or to permit the substitution of observers.

Under circumstances such as the examples described above, I strongly encourage boards of election to work with appointing authorities to come to a reasonable agreement as to the number of observers the board will allow at any particular time and/or to what extent a board will allow substitutions. The purpose of this recommendation is to ensure that the importance of observers to the election process is not diminished by the application of technical legal provisions that will frustrate the purpose of permitting observers at all.

**b. Number of Issue Observers – Precincts Only**

The third paragraph of R.C. 3505.21<sup>1</sup> concerns only observers for issue committees and limits the number of observers for issue committees for each precinct at any one election to six observers. This limitation applies only to observers for recognized issue committees, and does not apply to observers for political parties or groups of candidates. The last two sentences of the third paragraph of R.C. 3505.21 provide rules for determining which observers will observe if there are more than six issue observers identified for any one election in any one precinct. See footnote 1.

**Note that there is no provision for an issue committee to appoint observers to a board of elections office.**

**iii. Qualifications of Observers**

All observers must be qualified electors (*i.e.*, registered to vote at the address they list on the Notice of Appointment forms) in the State of Ohio, but they need not be registered to vote in the particular county where they will observe. Additionally, all observers must take an oath prior to commencing their duties as observers, as more fully discussed at Section II.A.xii of this directive.

**iv. Persons Not Eligible to Observe****R.C. 3505.21 provides several limitations on who may observe:**

No uniformed peace officer, state highway patrol trooper, member of any fire department, member of the armed services or the organized militia, no person wearing any other uniform, and no person carrying a firearm or other deadly weapon shall serve as an observer.

No candidate may serve as an observer unless the candidate also is a member of the party controlling committee appointing him or her.

No person may observe at an election without first taking the appropriate oath, set forth in the last paragraph of R.C. 3505.21. An election official at the precinct and/or board of elections office where the observer will serve must administer the oath.

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<sup>1</sup> “Not later than four p.m. of the twentieth day prior to an election at which questions are to be submitted to a vote of the people, any committee that in good faith advocates or opposes a measure may file a petition with the board of any county asking that the petitioners be recognized as the committee entitled to appoint observers to the count at the election. If more than one committee alleging themselves to advocate or oppose the same measure file such a petition, the board shall decide and announce by registered mail to each committee not less than twelve days immediately preceding the election which committee is recognized as being entitled to appoint observers. \* \* \* In no case shall more than six observers be appointed for any one election in any one precinct. If more than three questions are to be voted on, the committees which have appointed observers may agree upon not to exceed six observers, and the judges of elections shall appoint such observers. If such committees fail to agree, the judges of elections shall appoint six observers from the appointees so certified, in such manner that each side of the several questions shall be represented.”

No observer may accept compensation from a county, city, village or township for serving as an observer.

Because only Ohio electors may observe Ohio elections, no elector of another state may serve as an observer in Ohio.

**v. Forms**

**a. Petition Seeking Recognition of Issue Committee**

R.C. 3505.21 provides that any committee that in good faith supports or opposes a ballot issue and which desires to appoint observers must file, not later than four p.m. on the twentieth (20<sup>th</sup>) day before the election in question, a petition (SOS Form 218) seeking recognition from the board of elections in each county in which the issue is to appear on the ballot as the committee entitled to appoint observers for that election. Any committee recognized by a board of elections may appoint an Observer to each precinct in that county.

**b. Notices of Appointment**

All appointing authorities must appoint observers in writing using forms prescribed by the secretary of state. Secretary of state "Notice of Appointment" Forms include: Form No. 214 for state and county political parties; Form No. 216 for groups of candidates; and Form No. 219 for issue committees.

The relevant form(s) listed above must be filed with the board of elections for each county in which the appointing authority seeks to appoint observers. These forms must be filed no later than four p.m. on the eleventh (11<sup>th</sup>) day before the election in question and must provide the names and qualified voting addresses of the appointees, along with the precinct and/or board of elections at which each appointee will serve.

The proper, statutorily designated persons must sign the forms referenced above. For political parties, those are the chairperson and secretary (unless the chairperson and secretary of a political party have delegated such authority according to party rules, in which case a copy of a written delegation of authority must be filed with the county board(s) of elections along with the Notice of Appointment forms). For observers appointed by a group of candidates, each of the candidates authorizing the appointment of observers must sign the relevant forms. In the case of issue committees, all members of an issue committee must sign the form(s).

**c. Amendments to Notices of Appointment**

Any amendment to an originally filed "Notice of Appointment" must be filed with the appropriate board of elections by four p.m. the day before the election.

Amendments may substitute one observer for another at a precinct or board of elections identified in the original filing (e.g., replace a “placeholder” name with the name of another elector).<sup>2</sup>

**However, no amendment from any appointing authority may add a precinct or board of elections office not identified in the original “Notice of Appointment” form filed by that appointing authority.** The purpose of this rule is, among others, to ensure that boards of elections have sufficient time to educate poll workers in the affected precincts or board offices about the rights and limitations of observers (including, for example, the requirements of this directive, which may or may not be part of the general poll worker training in any particular county).

**No amendment may be for the appointment of an additional observer by any appointing authority at any precinct. That is, the amendment cannot expand the number of observers at a precinct, beyond the statutorily provided number of one.**

**In the situation where observer(s) are being appointed to observe at a board of elections, where the board has previously agreed that more than one observer is appropriate, an amendment may provide for additional observers, according to the agreement with the board. Otherwise, no amendment may provide for more than one observer from any appointing authority at any or board of elections office.**

Finally, please note that it is permissible to appoint the same observer or to amend a Notice of Appointment to appoint the same observer to as many precincts as the appointing authority sees fit, as the observer may spend parts of a day at several locations.

#### **d. Certificates of Appointment**

- **Appointments by a Political Party**

The chair and secretary of a state or county political party that timely file a “Notice of Appointment” (Form 214) must sign and issue a completed “Certificate of Appointment” to each observer (Form 215), who in turn must file the certificate with election officials at the appropriate precinct or board of elections on or before Election Day, or in the case of post-election observation, at or before the time the observer appears for observation of the election procedure in question.

- **Appointments by a Group of Five or More Candidates**

A group of five or more candidates who timely file a “Notice of Appointment” (Form 216) must sign and issue a completed “Certificate of Appointment” to

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<sup>2</sup> A “placeholder” is an appointed observer who may give up his or her observer status to allow another to take his or her place as an observer. A placeholder may be listed in more than one Notice of Appointment form for more than one location for the same election.

each observer (Form 217), who in turn must file the certificate with election officials at the appropriate precinct or board of elections on or before Election Day, or in the case of post-election observation, at or before the time the observer appears for observation of the election procedure in question.

- **Appointments by a Recognized Ballot Issue Committee**

A recognized ballot issue committee that timely files a completed “Notice of Appointment” (Form 219) must issue a properly completed “Certificate of Appointment” (Form 220) to each observer who in turn must file the certificate with election officials at the appropriate precinct or board of elections on or before Election Day, or in the case of post-election observation, at or before the time the observer appears for observation of the election procedure in question.

## **vi. Signatures**

The signature(s) provided by any appointing authority on any Notice of Appointment, Amendment to Notice of Appointment, Certificate of Appointment need not be original. It is sufficient that the signatures are electronic replicas or photocopies of original signatures on an appropriate form. However, an appointing authority must be able to prove the validity of the signature(s) in question if challenged by a board of elections or by the Secretary of State.

If an electronic version of a signature is used, the authority by which an appointing authority uses that electronic signature must be readily available. Alternatively, if photocopies are used, the master forms with original signatures used to create the photocopies must be readily available.

## **vii. Filing**

Appointing authorities are encouraged to file original documents with the relevant board of elections either in person or by courier (e.g., FedEx, UPS, DHL, USPS, etc.). However, filing by facsimile or electronic mail (PDF attachment) transmission is permissible.

**An appointing authority bears the risk of improper or incomplete transmittal of Notice of Appointment forms for observers, and should verify receipt with the relevant board of elections to ensure receipt and to confirm the filing meets requirements utilizing some form of written documentation, whether it be by a written receipt or time-stamped copy, in the case of personal delivery, or by fax confirmation, electronic mail confirmation, or written notes from a follow up telephone call .**

## **viii. Terms of Observers**

### **a. Board of Elections Observers**

An observer appointed to observe at a board of elections office may do so from the time the polls open until the ballots for the county are tabulated or

otherwise processed and the unofficial results of the election are declared and any results transmitted to the Secretary of State.

Various sections of the Ohio Revised Code provide that this includes all times during which a board of elections is processing provisional and absentee ballots. Please note that if a board of elections will be processing absentee ballots prior to Election Day, any observers appointed to that board of elections must be given notice and the opportunity to observe.

Additionally, please note that the processing of provisional ballots occurs after declaration of unofficial results and transmittal of any results to the Secretary of State. Observers appointed to a board of elections pursuant to R.C. 3505.21 must be given notice of when provisional ballots will be processed and the eligibility determined and may also observe during the processing of provisional ballots, however long that takes.

An observer appointed to observe at a board of elections office also may observe at any precinct in that county. Such an observer need only *file* his or her certificate with the board of elections, but shall have a copy of that certificate with him or her to present to the presiding judge of any precinct he or she visits.

The presiding judge of the precinct shall admit such an observer to the precinct to observe unless the board of elections has informed the presiding judge that the observer in question has been removed from his or her post for misconduct, pursuant to section III. D. iii of this Directive. The presiding judge shall return the certificate presented by the observer to the observer for future use at other precincts unless the board of elections has informed the presiding judge that the observer in question has been removed from his or her post for misconduct, in which case the presiding judge may keep the certificate.

#### **b. Precinct Observers**

An observer appointed to a precinct may serve from the time beginning one-half hour before the polling place opens until the poll workers for that precinct finish processing the ballots cast or collected in that precinct, and have completed all other post-closing responsibilities and have taken all actions to return the ballots and other supplies to the board of elections. Unless also duly appointed to observe at a board of elections, no precinct observer may observe at a board of elections.

#### **ix. Sign-in**

It is advisable for a board of elections to have each observer sign in upon first arrival to his or her designated precinct or board of elections to ensure the security of all observers, poll workers and voters. If a board of elections implements such a policy, the observers in that county should sign in with the presiding judge at a precinct, or the director or deputy director at a board of elections or their designee(s).

In no case shall a person appointed to observe only at a precinct be required to sign in at a board of elections office.

**x. Identification**

A board of elections may implement a policy requiring the observers in that county to show identification at the time they first arrive at their post or when they sign in. Under such a requirement, the affected observers shall provide identification that would be sufficient for them to vote a regular (as opposed to provisional) ballot in an election in their own proper precincts and polling locations. For clarification on what identification is sufficient, see R.C. 3505.18 and Directive 2007-06.

**xi. Purpose of the Sign-In and Identification Requirements**

The sign-in information and identification for each observer should match the information on that observer's Certificate of Appointment. If it does not, that observer may be denied entry to the board office or polling location.

The purpose of such a requirement is to assist boards of elections in ensuring that all observers are in fact qualified electors. After an election, a board of elections may use the Certificates of Appointment, sign-in information, and identification information to ensure that the appointing authorities, who sign all observer forms under penalty of election falsification, are complying with the requirement that all observers be qualified electors.

Such a requirement will be particularly helpful where amendments were filed on the evening before an election. Under such time constraints boards of election may not be able to verify whether observers appointed in an amendment are Ohio electors before six o'clock a.m. on Election Day. Further, because observers need only be electors somewhere in Ohio, and not necessarily in the county in which they will observe, a board may have to confer with boards elsewhere in Ohio to confirm an observer's voter registration status.

**xii. Oath**

All observers must take the following oath, which must be administered by an election official, prior to beginning their observations:

You do solemnly swear that you will faithfully and impartially discharge the duties as an official observer, assigned by law; that you will not cause any delay to persons offering to vote; and that you will not disclose or communicate to any person how any elector has voted at such election.

Observers who will observe on multiple days need not take the oath every day, but must affirm to an election official each day that they understand they are still under oath.

## B. Appointing Observers for the Official Canvass

R.C. 3505.32 provides that the following appointing authorities may designate an elector to observe the making of the official canvass:

- The county executive committee of each political party;
- Each committee designated in a petition nominating an independent or nonpartisan candidate;
- Each committee designated in a question or issue petition to represent the petitioners; and
- Any committee opposing a question or issue that was permitted to have an observer at the election pursuant to R.C. 3505.21.

In order to ensure that only persons duly designated by proper appointing authorities observe the canvass, boards of elections shall require the designation to be in writing, signed by a recognized member of the group appointing the observer in question.

## C. Appointing Observers for a Recount

R.C. 3515.03 provides that any person entitled to receive notice of a recount (the chairperson of a group of electors filing for a question or issue recount, or any person for whom votes were cast for nomination or election) may:

- Attend and observe the recount; and
- In the case of a candidate election, designate any person whom the *candidate* chooses to attend and observe the recount.

R.C. 3515.01, at paragraph three, provides that the chairperson of a group filing for a question or issue recount is “the applicant,” and that all notices must be sent to him or her. Thus, for question and issue election recounts, the group filing the application may have one observer – the chairperson of the group.

Additionally, R.C. 3515.01, at paragraphs one and two, provides that candidates for whom votes were cast for nomination or election may file an application for a recount. Thus, the candidate is the applicant who must receive notice of a recount. Thus, for nomination or election recounts, each candidate may have two observers, himself or herself and any one other person whom the candidate chooses. There is no legal requirement that the person whom a candidate designates as an additional observer must be an elector.

Any individual entitled to attend the recount may be accompanied by his or her attorney. Any group of electors filing for a question or issue recount or for the candidate for whom votes were cast for nomination or election, whichever is appropriate, may designate an attorney to attend and observe the recount in addition to the individuals listed above.

Please note that R.C. 3515.03 provides:

In the case of a recount of votes cast upon a question or issue, any group of five or more qualified electors, who voted upon such question or issue **and whose votes were in opposition to the votes of the members of the group of electors who applied for the recount, or for**

**whom the recount was required by section 3515.011 of the Revised Code**, may file with the board a written statement to that effect, shall designate in it one of their number as chairperson of such group, may appoint an attorney at law as their legal counsel, and may request that the persons so designated be permitted to attend and observe the recount. Thereupon, the persons so designated may attend and observe the recount.

When designating attorneys to attend and observe a recount, the procedures set forth in the above statute must be followed when an attorney is appointed for a group of electors in relation to a question or issue recount, and should be followed for all other legal counsel who will represent clients in the recount attendance and observation process.

### **III. Rights of Observers**

- A.** This section applies to observers at all stages of an election. However, its provisions should be applied according to the appropriate circumstances. For example, a board of elections cannot apply a provision that, by its terms, relates solely to a precinct observer on Election Day to a board of elections observer on Election Day or at any other time.

#### **B. Movement of Observers Within Polling Places**

- i.** Single precinct polling locations: R.C. 3505.21 provides that duly appointed observers at precinct polling locations may be “in and about the polling place for the precinct during the casting of the ballots.” In single precinct polling locations this means that observers may freely move about in the polling place to the extent they do not disrupt or interfere with the election, take any action so as to intimidate voters, or put themselves in any position that could violate either the secrecy of the ballot or a voter’s privacy. An observer acting in a manner contrary to this direction must be warned once. Subsequent violations may result in removal from the polling location by the presiding judge for the precinct in question. If the presiding judge removes the observer from the polling location, he or she may request from the observer his or her certificate of appointment and return it to the board of elections at any time during Election Day with a notation that the observer was removed from the polling location. If the observer refuses to or cannot provide the certificate of appointment, the presiding judge may notify the board of elections at any time during Election Day of the observer’s removal from the polling location.
- ii.** Multiple precinct polling locations: Observers may not observe at precincts to which they are not duly appointed to observe. Thus, in polling places with more than one precinct “in and about the polling place *for the precinct*” means that an observer is free to move about in the polling place to the extent necessary to move to and from the precinct he or she is appointed to observe, and to the extent necessary to observe within the precinct he or she is appointed to observe in accordance with the paragraph immediately above. An observer improperly exceeding this limitation must be warned once. Subsequent violations may result in removal from the polling location by the presiding judge for the precinct in question. If the presiding judge removes the observer from the polling location, he or she may request from the observer his or her certificate of appointment and return it to the board of elections at any time during Election Day with a notation that the observer was removed from the polling location. If the observer refuses to or cannot provide the certificate of

appointment, the presiding judge may notify the board of elections at any time during Election Day of the observer's removal from the polling location.

- iii. R.C. 3505.21 and R.C. 3506.13 both provide that observers may be present from the opening until the closing of the polls and after the close of the polls. A reasonable interpretation of this section allows observers to be present from 6:00 a.m. through the time the poll workers for that precinct finish processing the ballots cast or collected in that precinct, and have completed all other post-closing responsibilities and have taken all actions to return the ballots and other supplies to the board of elections.
- iv. Observers at precinct polling locations are permitted to observe as election officials deliberate or discuss questions of election administration or election law.
- v. Observers at precinct polling locations are permitted to observe in any area of the precinct where ballots are being cast, processed, or counted for the entire period of their appointment, so long as their observation activities do not interfere with a voter's privacy or the secrecy of the ballot of an individual voter.

### C. Movement of Observers at Board Offices

Observers are permitted to observe in any area where ballots are being cast, processed, counted, or recounted at a board of elections office, and generally, may move about freely to do so.

- i. If already duly appointed, observers at boards of elections are permitted to observe while election officials set up for the voting, processing, or counting of ballots.
- ii. Observers at boards of elections are permitted to observe as election officials deliberate or discuss questions of election administration or election law.
- iii. Observers at boards of elections are permitted to observe in any area of the office where ballots are being cast, processed, or counted, and are permitted to do so for the entire period of their appointment, so long as their observation activities do not interfere with a voter's privacy or the secrecy of the ballot of an individual voter.

A board may deny an observer access to any other parts of its offices. An observer exceeding this limitation must be warned once. Subsequent violations may result in the removal of the observer in question from the board of elections office by the Director or the Deputy Director. If an observer is removed from the board of elections, the Director or Deputy Director may request from the observer all certificates of appointment. If the observer refuses to or cannot provide the certificate of appointment, the Director or Deputy Director may notify the presiding judge of any polling location at any time during Election Day of the observer's removal from the board of elections.

### D. Movement of Observers Generally

- i. The right of observers to move about in a precinct polling location or a board of elections office may be restricted, even in areas where an observer has a legal right to be, when such movement will interfere with, impede, or otherwise disturb an election. **However, such severe restrictions shall not be imposed without good cause.** For example, an observer's right to move about while observing may

- be limited when the abilities of election officials to complete their official duties or the abilities of voters to cast their ballots and to do so in secrecy are jeopardized. Only the presiding judge in a precinct or the Director or Deputy Director of a board of elections shall determine when and to what extent such severe limitations may apply, except that such determination may be overruled in writing by the Secretary of State.
- ii. Duly appointed observers are free to come and go to the relevant precinct and/or board of elections offices as they deem necessary during the period during which they may observe pursuant to their appointment.
  - iii. An observer who has once been removed from his or her appointment shall be denied entry to the precinct and/or board offices to which he or she was appointed to observe, for purposes of his or her appointment, for the remainder of the election including not only Election Day, but also the period for processing absentee and provisional ballots, the official canvass, and any recounts. In such a case, the appointing authority that appointed the removed observer may substitute in writing another proper observer who must meet all of the relevant requirements of both Ohio law and this directive.

#### E. “Watching” and “Inspecting”

Pursuant to R.C. 3505.21 observers are permitted to “*watch* every proceeding of the judges of elections from the time of the opening until the closing of the polls” at a polling location, and to “*inspect* the counting of all ballots in the polling place or board of elections from the time of the closing of the polls until the counting is completed and the final returns are certified and signed.” However, the terms “watch” and “inspect” are not defined terms in the Revised Code.

Pursuant to my authority to provide instructions to boards of elections under R.C. 3501.05, and to ensure consistent enforcement of R.C. 3505.21, the terms “watch” and “inspect” shall be defined in the primary, ordinary manner, as found in The New Oxford American Dictionary (2001):

- “Watch” means to “look at or observe attentively,” or to “keep under careful or protective observation”; and
- “Inspect” means to “look at closely, typically to assess . . . condition or to discover any shortcomings.”

Thus, observers may *never* handle any election materials. The role of observers is limited to watching the proceedings of an election, although they may do so freely and may move about to do so, unless otherwise restricted as stated elsewhere in this directive or in Ohio law.

This section of the directive is not intended to diminish in any way the importance or rights of observers. Boards must bear in mind that observers have significant rights under the laws of Ohio and boards have a duty to respect those rights. R.C. 3505.16 amplifies the rights of observers by providing, in relevant part, that:

[t]he ballot boxes, the package of ballots, registration forms, and other supplies shall at all times be in full sight of the observers, and no ballot box or unused ballots during the balloting or counting shall be removed or screened from their full sight until the counting has been closed and the final returns completed and the certificate signed by the judges.

Finally, boards of elections must ensure that any information contained in election records that is exempt from disclosure under the Public Records Act is sufficiently protected from the view of observers. See, *e.g.*, Directive 2007-32.

#### **F. Communicating with Election Officials**

Observers may ask questions of election officials (poll workers or board of elections staff), and when feasible, such as during slow times on Election Day, or when the election officials are not otherwise occupied with official election duties, election officials should make every effort to answer observers' questions. However, observers may never interfere with election officials completing their official duties.

This does not prohibit observers from bringing perceived errors in the administration of an election to the attention of the election officials. That should be done, however, respectfully and with discretion to avoid voter confusion. It is advisable that the airing of perceived errors in the administration of an election be brought to the attention of election officials when voters are not immediately present or within hearing distance.

If an observer is deemed to have interfered in the election in any manner, as determined by the presiding judge in any precinct in a polling location, or by the director or deputy director at a board of elections, the observer must be warned once. Subsequent violations may result in the removal of the observer by a presiding judge or the director or deputy director. If the observer is removed, the presiding judge or the director or deputy director may request from the observer his or her certificate of appointment, and in the case of a precinct observer, return it to the board of elections at any time during Election Day with a notation that the observer was removed from the polling location. If the observer refuses to or cannot provide the certificate of appointment, the presiding judge may notify the board of elections at any time during Election Day of the observer's removal from the polling location. In the case of an observer at a board of elections, the Director or Deputy Director may request from the observer all certificates of appointment. If the observer refuses to or cannot provide the certificate of appointment, the Director or Deputy Director may notify the presiding judge of any polling location at any time during Election Day of the observer's removal from the board of elections.

It must be noted that minor inconveniences and discussions do not rise to the level of interfering with, impeding, or disrupting an election. Observers may only be ejected from their posts for good cause, as provided in numerous sections of the Revised Code and in this directive.

#### **G. Direct Line to Board of Elections**

The presiding judge for the precinct at which an observer is appointed to observe shall provide the observer with a telephone number for the board of elections that will allow the observer to speak with an election official at that county's board of election who can answer questions that the judges of elections cannot answer or are too busy to answer.

The director or deputy director of a board of elections shall designate at least one person at the board office to answer questions from observers (both by phone and in person at the board offices) during an election.

#### **H. Observer Conduct Inside the Flags**

R.C. 3501.30(A)(4) specifically excludes observers from the prohibitions relating to conduct anywhere inside a polling location or board of elections office, or within the area between the entrance to the polling location and the United States flags placed approximately 100 feet from the entrance to the polling location by the judges of elections except to the extent provided for in R.C. 3501.35. Obviously, this does not permit observers to campaign at a polling place (or inside the flags), or at a board of elections office in violation of R.C. 3501.35(A).

Election officials may only limit the speech or conduct of observers who violate the provision against campaigning in a polling location or inside the flags placed at a polling location, or if the observers impede, interfere with, or disrupt the election in some manner, or in some way intimidate voters, or risk violating the secrecy of the ballot or the privacy of voters.

#### **IV. Limitations on Observers**

- A.** The provisions in this section of apply to observers at all stages of an election. However, there are exceptions. This does not mean that all sections apply to all observers. For example, a board cannot apply a provision that, by its terms, relates solely to an Election Day observer at a precinct to a board of elections observer on Election Day or at any other time.

#### **B. Statutory Prohibitions**

Unless specifically exempted by law, all observers are subject to the statutory prohibitions in Title 35 of the Revised Code, including, but not limited to R.C. 3501.35 (controlling access to and conduct in and around a polling place), 3501.90, (prohibiting obstruction of access to polling places and providing for an individual, civil cause of action for electors harmed by violations of 3501.35 and 3501.90) and any section of Chapter 3599 relating to prohibited activity in elections.

#### **C. Communication Devices and Audio and Video Devices**

Observers may not use any electronic or communication device or any audio/visual recording device in any manner that impedes, interferes with, or disrupts an election, or in any way intimidates a voter, or risks violating a voter's right to a secret ballot or a voter's privacy. If a presiding judge or a director or deputy director determines that an observer is using such equipment in a manner contrary to that enumerated above, he or she must warn the observer once. Subsequent violations may result in removal of the offending observer by a presiding judge or the director or deputy director. If the observer is removed, the presiding judge or the director or deputy director may request from the observer his or her certificate of appointment, and in the case of a precinct observer, return it to the board of elections at any time during Election Day with a notation that the observer was removed from the polling location. If the observer refuses to or cannot

provide the certificate of appointment, the presiding judge may notify the board of elections at any time during Election Day of the observer's removal from the polling location. In the case of an observer at a board of elections, the Director or Deputy Director may request from the observer all certificates of appointment. If the observer refuses to or cannot provide the certificate of appointment, the Director or Deputy Director may notify the presiding judge of any polling location at any time during Election Day of the observer's removal from the board of elections.

If a voter objects to being photographed or otherwise recorded, the election officials present shall require the observer in question to cease the objectionable conduct as to that voter. If additional voters object to the same or similar conduct by the same observer, the election officials present shall require the observer in question to cease the offending conduct for the remainder of the observer's term. Observers who continue the offending conduct beyond this point may be removed by the presiding judge, director, or deputy director, as appropriate. If the observer is removed, the presiding judge or the director or deputy director may request from the observer his or her certificate of appointment, and in the case of a precinct observer, return it to the board of elections at any time during Election Day with a notation that the observer was removed from the polling location. If the observer refuses to or cannot provide the certificate of appointment, the presiding judge may notify the board of elections at any time during Election Day of the observer's removal from the polling location. In the case of an observer at a board of elections, the Director or Deputy Director may request from the observer all certificates of appointment. If the observer refuses to or cannot provide the certificate of appointment, the Director or Deputy Director may notify the presiding judge of any polling location at any time during Election Day of the observer's removal from the board of elections.

Observers cannot use cellular or digital telephones, walkie-talkies, or any other wired, wireless, or satellite audio communication device to discuss the election, or a perceived problem with the administration of the election, within 20 feet of an elector who has appeared to vote anywhere inside a polling location or board of elections office, or within the area between the entrance to the polling location and the United States flags placed approximately 100 feet from the entrance to the polling location by the judges of elections.

Nothing in this section shall be interpreted to prevent an observer from collecting or transmitting information from the registration lists posted throughout the day in each precinct pursuant to R.C. 3503.23(C). That statute provides that any person may enter the polling places for the sole purpose of reviewing the registration lists so long as they do not engage in "harassment" as defined in R.C. 3501.90.

#### **D. Clothing and Other Items**

Pursuant to R.C. 3501.30 and R.C. 3501.35(A)(1), no observer may wear any clothing or accessory that may be construed as campaigning or campaign related into any polling location or within the area between the entrance to the polling location and the United States flags placed approximately 100 feet from the entrance to the polling location by the judges of elections, whether or not there are any electors present. Additionally, no observer may bring with him or her any other campaign, candidate or issue related item that may be construed as campaigning or campaign related. Such items are prohibited in

polling places and in the area between the entrance to the polling location and the United States flags.

Nothing in this section prohibits observers from bringing any item, such as training manuals provided to them by the appointing authorities or boards of elections, with them to their posts unless the item exhibits to the general public a clear indication of party affiliation or may be considered to be campaign material.

#### **E. Removal of Observers**

Only the appointing authorities, presiding judges, directors, and deputy directors have authority to administratively remove observers from their posts. Additionally, however, law enforcement officials have the statutory duty to remove observers at the order of a presiding judge.

A thorough review of this Directive is intended to aid you, your poll workers and observers and their appointing authorities in fostering positive and cooperative relationships that will benefit voters and the public on Election Day and in the activities that follow the election. I appreciate your cooperation with the instructions contained in this Directive. If you have questions concerning this Directive, please feel free to contact the elections attorney assigned to your county.

Sincerely,

Jennifer Brunner