

DIRECTIVE 2008-91

September 11, 2008

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

RE: In Person Absentee Voters Who Register and Vote During the Five-Day "Overlap" Period

Under R.C.3509.01, absentee ballots must be ready for distribution 35 days before the general election, while the deadline for voter registration is not until five days later (30 days before the general election) (R.C.3503.19(A)). As a result, at least¹ a five-day "overlap" period exists during which a voter may register to vote and receive an absentee ballot when registration and the ballot request are made in person at the board of elections or at its satellite office established for in person absentee voting. While the overlap period has existed for years, this is the first election in which issues have been raised concerning the effects of this overlap period, presumably because it is the first presidential election in which no reason need be given to vote an absentee ballot.

Beginning September 30, 2008, boards of elections may receive a large volume of in person new or changed registrants who thereafter request to vote absentee ballots in person at the board's office or satellite location during the six days before and on the voter registration deadline of October 6, 2008, or during any such similar "overlap" period before an election. R.C. 3509.07 provides that, "The vote of any absent voter may be challenged for cause in the same manner as other votes are challenged, and the election officials shall determine the legality of that ballot." Under R.C. 3509.07, 3501.05 and 3501.11, and Directive 2008-79, challenges to voters of absentee ballots made under the state's two challenge statutes, R.C. 3503.24 and 3505.19², must be heard and adjudicated by boards of elections before Election Day, so that challenged persons are afforded due process and the board's cancellation of the voter's registration (and thereby its disqualification of the absentee ballot) complies with the National Voter Registration Act and the United States Constitution.

Accordingly, any challenge that may be filed to a voter who votes an absentee ballot must be adjudicated in compliance with state and federal law, including case law and federal constitutional law. To protect the secrecy of such a challenged absentee voter's ballot, boards of elections are required to provide optical scan paper absentee ballots with identification envelopes to voters who both register and vote on the same day at the board of elections office or

¹ When the voter registration deadline falls on a weekend or holiday and when a public office in which an act is to be performed is closed for the day, the deadline extends to the first business day the public office is open. R.C. 1.14. In 2008, the voter registration deadline is Sunday, October 5, 2008, extending the deadline to Monday, October 6, 2008. In other years the Columbus Day holiday may add an additional day to the voter registration deadline.

² However, a challenge made under R.C. 3505.19 is unlikely, because the challenged voter has just registered to vote, unless the voter was previously registered, moved, and did not change his or her address.

at its satellite location during the "overlap" period.

Boards of elections in counties that use DRE voting systems as their primary voting systems may, for the overlap period, use ballots from each precinct's allotment of backup paper ballots required to be produced for each election precinct as required by Directive 2008-59 for Election Day voting (minimum 25% of the last presidential election's voter turnout).

Having these "overlap" voters (who register and vote during the "overlap" period) vote a paper absentee ballot with an identification envelope preserves the secrecy of their ballots. If those particular voters are challenged pursuant to R.C. 3509.07, and more specifically pursuant to R.C. 3505.19 or 3503.24, and if any of the challenges is successful, such voters' ballots will be able to be identified and disqualified without jeopardizing the secrecy of their votes, because their voted ballots will remain in the identification envelopes.

R.C. 3503.16 prevents boards of elections from requiring persons who register and vote during the "overlap" period to vote by provisional absentee ballot, since that statute which authorizes provisional absentee voting does not permit this type of voting to occur until twenty-eight days or less before the election. (See, R.C. 3503.16(B)(2)). Regardless, provisional absentee voting would not be necessary for these "overlap" voters, since any deficiency in registration that could be resolved by requiring provisional voting would be resolved by the new or updated voter registration which occurs before the voter registration deadline.

Boards of elections may find it advisable to continue to use optical scan paper absentee ballots for in person absentee voting until the deadline for filing challenges (twenty (20) days before the general election, or October 15, 2008, this year). Boards using DRE voting systems may only use their stock of backup paper ballots for the "overlap" voting period. If they wish to use optical scan paper ballots for the 10-day period through the close of the challenge deadline, they should order more paper absentee ballots accordingly.

If you have any questions, please feel free to contact your assigned elections counsel by email or at (614) 466-2585.

Sincerely,

Jennifer Brunner