

DIRECTIVE 2010-102 (Reissue of SOS Directive 2008-96)

December 29, 2010

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

Re: Mandatory Duty of a Board of Elections to Conduct Investigations Relating to Violations of Title XXXV of the Revised Code and to Report the Findings of Such Investigations to the Secretary of State and to the County Prosecutor

This Directive is a reissue of and supersedes Directive 2008-96.

Boards of elections are the frontlines of elections administration in Ohio. As a result, R.C. 3501.11(J) empowers boards of elections to ensure, through prompt and thorough investigations, the integrity of the electoral process. Additionally, R.C. 3501.11(Q) authorizes boards of elections to “[i]nvestigate and determine the residence qualifications of electors.” Together, these sections of the Ohio Revised Code impose a special duty on boards of elections that must be carried out in a lawful manner and in regard to specific allegations or evidence of a violation of Title XXXV of the Ohio Revised Code.

In order to maintain voter confidence in the integrity of elections in Ohio, I hereby direct boards of elections to swiftly and fully investigate all specific allegations or evidence of voter registration fraud, illegal voting, or voter suppression in their respective jurisdictions. I further direct that boards of elections promptly vote to forward to the Secretary of State the findings of any such investigations. Boards should also refer the findings of such investigations to their county prosecutors. In carrying out this public duty, boards of elections must comply with the directives, advisories, and memoranda issued by the Ohio Secretary of State and with the laws of Ohio and of the United States.

Investigative duties under R.C. 3501.11(J)

R.C. 3501.11 provides as follows:

Each board of elections shall exercise by a majority vote all powers granted to the board by Title XXXV of the Revised Code, shall perform all the duties imposed by law, and shall do all of the following:

* * *

(J) Investigate irregularities, nonperformance of duties, or violations of Title XXXV of the Revised Code by election officers and other persons; administer oaths, issue subpoenas, summon witnesses, and compel the production of books, papers, records, and other evidence in connection with any such investigation; and report the facts to the prosecuting attorney or the Secretary of State;

In 2007, Amended Substitute House Bill No. 119 amended this statute to provide a board of elections the option of reporting the facts adduced in an investigation conducted pursuant to R.C. 3501.11(J) to the Secretary of State or to the county prosecutor.

A board of elections should consult with the Secretary of State and county prosecutor **before** launching an investigation to ensure that statutory procedures are followed. As set forth in Directive 2008-79¹, any investigation of the qualifications of a voter must be conducted before the election at which the voter's registration would otherwise qualify him or her to vote and must afford the voter a hearing. If a board of elections determines that a hearing should be held regarding any investigation of alleged violations of election law, the hearing must be held at a public meeting of the board at which a quorum is present. The board shall provide due process to any person or group accused of violating Ohio's elections laws.

Compelling the attendance of witnesses and production of documents

As noted in Advisory 2008-10, boards of elections should consult with the county prosecutor in preparing for any hearing and should follow the Ohio Rules of Civil Procedure in compelling the attendance of witnesses or production of documents by subpoena at an investigatory hearing. This should protect boards of elections in the event that the investigation produces evidence sufficient to forward the case for review and possible prosecution. Please note that a witness may appear and refuse to testify at a hearing held by the board of elections under claim of the right against being compelled to testify against himself or herself, under the Fifth Amendment to the United States Constitution. Documents regarding the matters under investigation by the board remain a public record. It is only when the prosecutor conducts further investigation that the documents and other matters relating to an investigation become shielded from disclosure, except under Rule 16(B)(1)(g) of the Ohio Rules of Criminal Procedure for the purposes of cross-examination of a witness at trial.

Mandatory referral

Under R.C. 3501.11(J), boards of elections must, "[i]nvestigate irregularities, nonperformance of duties, or violations of Title XXXV of the Revised Code by election officers and other persons; *** and report the facts to the prosecuting attorney or the secretary of state." The referral provision of this statute is mandatory. Therefore, boards of elections are directed to refer the facts adduced through an investigation and a hearing both to the Secretary of State and the

¹ Directive 2008-79 was issued on September 5, 2008, prior to the effective date of H.B. 350 and the enactment of R.C. 3501.053 (providing for temporary and permanent directives). Thus, Directive 2008-79 is still in effect.

prosecuting attorney. As has been the practice in the past, the Secretary of State may request the assistance of the Attorney General with a prosecutor's investigation, especially when more than one county may be involved, when resources may be limited in a particular county, or when the prosecuting attorney may decline to investigate beyond the board's investigation.

When a county board of elections reports the facts of its investigation to the Secretary of State and the prosecuting attorney, it shall do so in writing. The report should provide a historical summary of the matter and a list of the board's factual findings. The board may attach relevant exhibits or other documents to its report.

Conclusion

Interference with the required administration or conduct of an election, whether through voter registration fraud, illegal voting, or voter suppression, is an actionable criminal offense. Attached to this Directive is a copy of Chapter 3599 of the Ohio Revised Code, containing prohibited offenses and associated penalties. While other sections of Title XXXV of the Revised Code contain prohibitions and offenses, this chapter contains activities that are specifically listed as criminal activities and should be guarded against in the board's administration of elections before, during, and after an election.

Boards of elections must continue to demonstrate our shared commitment to fully and fairly investigating specific allegations or evidence of election law violations. The Secretary of State's office, through its regional liaisons and elections attorneys, will continue to support boards in their efforts to protect voter's rights and prevent election fraud.

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

Sincerely,

Jennifer Brunner

Attachment: R.C. Chapter 3599