

## **DIRECTIVE 2010-80**

December 9, 2010

TO: HAMILTON COUNTY BOARD OF ELECTIONS  
MEMBERS, DIRECTOR, AND DEPUTY DIRECTOR

RE: Supplemental Procedures Regarding the 849 Provisional Ballots Subject to the Court Order in *Hunter*

This Directive provides clarification to the Hamilton County Board of Elections regarding the counting of provisional ballots pursuant to Directives 2010-73, 2010-74, and 2010-79 and reflects changed circumstances as a result of my resolution of the tie vote matter regarding the appeal of the decision of Chief Judge Susan Dlott of the U.S. District Court for the Southern District of Ohio in *Hunter v. Hamilton Cty Bd. of Elections*, S.D. Ohio Case No. 1:10-cv-00820, on November 22, 2010, and the U.S. Sixth Circuit Court of Appeals' order dissolving its earlier stay of that decision issued December 1, 2010. *Hunter v. Hamilton Cty Bd. of Elections*, Sixth Circuit Case No. 10-4481. In light of these changed circumstances, this Directive provides additional guidance to the board of elections with regard to the investigation of 849 provisional ballots, as ordered by Judge Dlott.

### I. Scope of Poll Worker Error Inquiry under Directives 2010-73, 2010-74, and 2010-79

Directives 2010-73, 2010-74, and 2010-79 addressed the consent decree in *Northeast Ohio Coalition for the Homeless v. Brunner*, S.D. Ohio No. 2:06-cv-896 (*NEOCH*), which prohibits boards of elections from rejecting a provisional ballot cast by a voter who uses **only the last four digits of his or her Social Security number** as identification for the following reasons:

- 1) The voter provided the last four digits of a Social Security number but did not provide a current driver's license, state issued identification, or other document which serves as identification required for a regular election ballot under Ohio law;
- 2) The voter did not provide a date of birth;
- 3) The voter did not provide an address that is tied to a house, apartment, or other dwelling provided that the voter indicated that he or she resides at a non-building location, including but not limited to a street corner, alley, or highway overpass located in the precinct in which the voter seeks to cast a ballot and that the non-building location qualifies as the individual's voting residence under R.C. 3503.02;
- 4) The voter indicated that he or she is homeless;
- 5) The voter cast his or her provisional ballot in the wrong precinct, but in the correct polling place, for reasons attributable to poll worker error;
- 6) The voter did not complete or properly complete and/or sign the provisional ballot application for reasons attributable to poll worker error; or

- 7) The poll worker did not complete or properly complete and/or sign the provisional ballot application witness line and/or the provisional ballot affirmation form, except for reasons permitted by the governing statutes.

Directive 2010-79 provided objective criteria for determining poll worker error and additional steps for the board of elections to take to determine the validity of the provisional ballots.

## II. Scope of the Order in *Hunter v. Hamilton County Board of Elections*

The order issued by Judge Dlott in the *Hunter* case requires the Hamilton County Board of Elections to investigate 849 provisional ballots cast in the wrong precinct to determine if poll worker error was the reason for the ballots being cast in the wrong precinct and to count any ballots cast in the wrong precinct due to poll worker error. Thus, Judge Dlott's order only applies to the 849 provisional ballots cast in the wrong precinct that were not previously counted by the board of elections. However, the investigation of poll worker error required by Judge Dlott's order is broader in the scope than Directives 2010-73, 2010-74, and 2010-79 in that, for the 849 provisional ballots at issue, the determination of poll worker error is not limited to persons who voted using only the last four digits of their Social Security number.

Consequently, this Directive provides instructions to the Hamilton County Board of Elections to assist it in complying with Judge Dlott's order.

## III. Objective Criteria for Determining Poll Worker Error

As explained in Directive 2010-79, poll worker error occurs when a poll worker acts contrary to or fails to comply with federal or Ohio law or directive issued by the Secretary of State. Poll workers have a duty to follow federal and state election laws, the directives of the Secretary of State and the rules, instructions and policies explicitly outlined in the Poll Worker Manual.

In determining whether poll worker error occurred, a board of elections should apply the following criteria:

- 1) Did the poll worker carry out his/her duties in accordance with directives and federal and state law?
- 2) Did the poll worker adhere to the procedures/guidelines outlined in the Poll Worker Manual regarding provisional voting? For example, did the poll worker properly do the following:
  - Check-in each voter? Review the Supplemental Voter List in the back of the Signature Poll Book to find the voter's name (if applicable)?
  - Check the Precinct Voting Location Guide pursuant to R.C. 3505.181(E)(2), also known as the Precinct Street Directory, to verify if the voter's current address is in, or out of, the precinct?
  - Examine the identification provided by the voter to determine if it is a valid form of identification?

#### IV. Additional Steps to Determine Validity

The court identified 849 provisional ballots that were cast in the wrong precinct and ordered the board to investigate whether poll worker error caused the ballots to be cast in the wrong precinct. The board must take the following steps during its investigation:

- 1) Identify the precincts in which the 849 provisional ballots were cast and all of the poll workers for each of those precincts;
- 2) By applying the criteria outlined above in Section III of this Directive, the board should contact each poll worker for the precincts involved to determine whether each followed the board's instructions for ensuring that voters were directed to the correct precinct;
- 3) The board should also question each poll worker to determine whether they followed Ohio law, Secretary of State Directives, and the Poll Worker Manual procedures for casting and processing provisional ballots;
- 4) The board should examine the poll books for each precinct for indications of poll worker error in directing voters to the wrong precinct; and
- 5) The board should examine the envelopes for each of the 849 provisional ballots for indications that poll workers directed the voter to the wrong precinct.

If the Hamilton County Board of Elections determines through its investigation that any of the provisional ballots were cast in the wrong precinct as a result of poll worker error, then those ballots should be counted as required by Judge Dlott's order.

In addition to the five steps listed above, the board may also choose to interview the individual voters who cast these provisional ballots for evidence that the voter was directed by poll workers to the wrong precinct. If the board decides to interview voters as part of its investigation, the interview must be conducted by a bipartisan team of election officials. Moreover, the same questions should be asked of each voter interviewed to ensure consistent treatment of voters.

If you have questions about this Directive or the consent decree, please contact the elections attorney assigned to your county at 614-466-2585.

Sincerely,

Jennifer Brunner