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ADVISORY 2011-03

March 16, 2011

To: All County Boards of Elections

Re: Determining the Validity of Provisional Ballots Consistent with Directive 2010-96

SUMMARY

This Advisory is issued to provide uniform statewide standards and assist in the consistent interpretation and application of the relevant provisions governing the review of provisional ballots.

Rule: As noted in several previous directives issued by the Secretary of State's Office, including Permanent Directive 2010-96 issued December 29, 2010, **provisional ballots cast in the wrong precinct must not be counted.**

Only Exception: As required by the NEOCH consent decree, if a voter casts a provisional ballot **using only the last four digits of the voter's social security number** as identification, then the voter's provisional ballot must not be rejected solely because 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.

INSTRUCTIONS

Provisional ballots cast in the wrong precinct must not be counted except in the very narrow instances where the terms of the NEOCH consent decree apply. (The *Northeast Ohio Coalition for the Homeless v. Brunner*, S.D. Ohio No. 2:06-ev-896 consent decree is attached; boards of elections are reminded that they must comply with the consent decree and post the required notice.)

Under state law, provisional ballots cast in person (whether it is during the 28 days before the election or on Election Day) must be reviewed for validity and sufficiency, and must be rejected if the voter's ballot was cast in the wrong precinct (i.e., a precinct in which the voter is not legally registered), unless the narrow exception explained below applies.

Board members who fail to count provisional ballots consistent with the law as summarized in this Advisory may be suspended or removed in accordance with Ohio Revised Code Section 3501.16. Precinct elections officials and clerks of the board who fail in their duties should be evaluated by the board and retrained or removed (see Directive 2010-55).

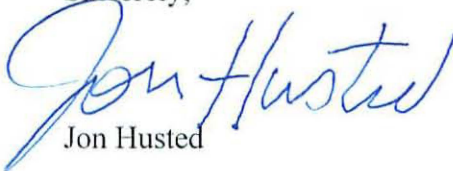
As noted in several directives issued by the Secretary of State's Office, **provisional ballots cast in the wrong precinct must not be counted.** Ohio Revised Code 3505.183(B)(4)(a)(ii).

As required by the NEOCH consent decree, if a voter casts a provisional ballot **using only the last four digits of the voter's social security number** as identification, then the voter's provisional ballot must not be rejected solely because the voter cast his or her provisional ballot in the wrong precinct, but in the correct polling place, when the voter did so for reasons attributable to poll worker error. Poll worker error must not be presumed and must be demonstrated through evidence. In other words, if there is no evidence of poll worker error related to a voter, who used the last four digits of the voter's social security number as identification, casting a provisional in the wrong precinct, then the voter's provisional ballot must not be counted. Additionally, if the voter did not provide the last four digits of his or her social security number at the time the provisional ballot was cast or by the close of business on the tenth day following the election, then the voter's provisional ballot does not qualify under the NEOCH exception described above and must not be counted if voted in the wrong precinct.

I recognize that the *Hunter* case regarding counting wrong precinct provisional ballots is still pending from last fall. However, that case is factually limited to the Hamilton County Board of Election's decision regarding which provisional ballots to count in the contest for Hamilton County Juvenile Court Judge.

If you have additional questions or concerns please feel free to direct them to your assigned Elections Counsel at (614) 466-2585 or by e-mail.

Sincerely,



Jon Husted