

DIRECTIVE 2008-60

August 1, 2008

To: All County Boards of Elections
Re: Procedures if a Court Order Causes Any Precinct Polling Place to Remain Open on Election Day Past 7:30 p.m.

The Secretary of State's office is aware that lawsuits may be brought on Election Day and that a court, upon hearing the case on an expedited basis, may require polling locations to remain open after the statutory 7:30 p.m. poll closing time. In anticipation of such occurrences, this directive provides procedures for boards of elections to follow to ensure that the court order and relevant law are followed.

Issuance of Directive

Should polling locations in your county be ordered to remain open, the Secretary of State will issue a directive that provides instructions on how to follow the court order. The Secretary of State will attach the order issued by the judge to those instructions.

The Secretary of State will follow court orders until such orders are modified by the court or by a higher court with jurisdiction. As such, you are instructed to continue following the directive and order unless or until you receive further instruction from the Secretary of State's office, or if your board is a party to the litigation, your own legal counsel.

Communication from the Secretary of State's Office

Prior to the 7:30 p.m. closing time of polls, all boards of elections must review their Secretary of State e-mail to ensure that they have not received an emergency/late directive from the Secretary of State that requires polling locations to remain open. In addition to checking the Secretary of State e-mail, all boards of elections must contact their assigned Secretary of State regional liaisons prior to the closing of the polls and request a status update from the liaisons regarding any further instructions from the Secretary of State's office.

Provisional Voting Only

In accordance with federal law, all court-ordered voting permitted after 7:30 p.m. **must** be by provisional ballot only. Please remember that pursuant to the most recent Secretary of State directive on provisional voting, (cite the directive), no provisional voting may take place on direct recording electronic (DRE) voting machines.

Where Court Order and/or Directive Affects Manner of Vote Count Utilizing Direct Recording Electronic Voting Machines in a County, District or the State

Depending on the nature of the situation or court order, it may be necessary for personal electric ballots and flash memory cards, in the case of ES&S direct recording

electronic machines or [what is the correct name for Premiere cards?], in the case of Premiere direct recording electronic machines, to remain in the voting units and to be transported with the voting units to the board of elections for removal by board of elections personnel. In such case, all memory cards and cartridges shall be returned to the board as contained in the machines and shall not be removed from the machines, except by board of elections personnel. Machines may be tendered by the presiding judge of a voting precinct or by all the presiding judges of multiple precincts of a single polling location to a duly appointed representative of the board of elections or Secretary of State or to an identified law enforcement officer and thereafter transmitted, with the memory cards still in the machines, beginning at the closing time pursuant to the relevant court order and/or accompanying directive. No poll worker shall leave the polling place until all items that must be returned to the board are prepared for transport and tendered to the presiding judge and a poll worker(s) designated by the presiding judge or judges of the opposite major political party.

Where Court Order and/or Directive Affects Manner of Vote Count Utilizing Precinct-Based Optical Scan Units in a County, District or the State

Depending on the nature of the situation or court order, it may be necessary for memory cards for precinct-based optical scan units to remain in the tabulation units and to be transported with the units to the board of elections for removal by board of elections personnel. In such case, all memory cards shall be returned to the board as contained in the machines and shall not be removed from the machines, except by board of elections personnel. Machines may be tendered by the presiding judge of a voting precinct or by all the presiding judges of multiple precincts of a single polling location to a duly appointed representative of the board of elections or Secretary of State or to an identified law enforcement officer and thereafter transmitted, with the memory cards still in the machines, beginning at the closing time pursuant to the relevant court order and/or accompanying directive. No poll worker shall leave the polling place until all items that must be returned to the board are prepared for transport and tendered to the presiding judge and a poll worker(s) designated by the presiding judge or judges of the opposite major political party.

Where Court Order and/or Directive Affects Manner of Vote Count for Paper Ballots from Polling Locations that Will Be Centrally Counted

Any precinct polling place required by court order to remain open and provide voting past 7:30 p.m., the statutory time for the closing of the polls, must use provisional ballots for any votes cast for voters who appear and vote after 7:30 p.m. These ballots must remain segregated from provisional ballots voted by voters appearing and voting before and until 7:30 p.m. It is advisable to have a plan on how to segregate these two types of provisional ballots, which must be separated and security, if a precinct polling place is required to remain open after 7:30 p.m. Some boards may provide an extra container for such contingency use, while others may be able to devise a method using existing equipment and supplies that will provide adequate security for segregating and transporting ballots.

After the polls have closed and procedures below have been completed, all paper ballots may be tendered by the presiding judge of a voting precinct or by all the presiding judges of multiple precincts of a single polling location to a duly appointed representative of the board of elections or Secretary of State or to an identified law enforcement officer and

thereafter transmitted, with ballot boxes remaining sealed, to the board of elections. No poll worker shall leave the polling place until all items that must be returned to the board are prepared for transport and tendered to the presiding judge and a poll worker(s) designated by the presiding judge or judges of the opposite major political party.

In such an event, the following procedures govern the handling and preparation for transport to the board of elections of any paper ballots used in a polling place:

Poll Worker Preparation of Optical Scan Paper Ballots When Polls Remain Open Past 7:30 p.m. on Election Day:

The following ballots should be segregated in separate containers or clearly segregated within a single container:

- 1. Regular Ballots**
- 2. Provisional Ballots Cast Prior and up to 7:30 p.m.**
- 3. Provisional Ballots Cast After 7:30 p.m.**

All ballot containers should be sealed in a manner so that they cannot be opened without breaking the seal or the material of which the container is made.

Provisional ballots voted after 7:30 p.m. **must** be maintained separately from other provisional ballots cast on Election Day. Under R.C. 3505.183(A), when ballots are delivered to the board of elections office from a precinct, the board must separate provisional ballots envelopes from the rest of the ballots. Once the ballots have reached the board of elections office the following procedures must be observed:

- Boards must keep provisional ballots voted after 7:30 p.m. separate from other provisional ballots.
- Teams of employees of the board consisting of one member of each of the two major political parties must place the two sets of sealed provisional ballot envelopes in a secure location within the board office.
- The sealed provisional ballot envelopes must remain separated and in that secure location until the validity of those ballots is determined.

Please refer to R.C. 3505.183(B) and the most recent Secretary of State directive regarding provisional voting for instructions on determining the validity of provisional ballots.

Poll Worker Reconciliation/ Certification

Under R.C. 3505.26, poll workers must complete the required reconciliation certification in the poll book. If the poll workers are unable to reconcile (e.g., the number of voted ballots is different than the number of voters whose names appear on the poll books), the presiding judge must enter on the poll books the explanation of that discrepancy. If all poll workers agree to this explanation, they must all subscribe to that explanation and sign their names.

Boards of Elections to Remain in Session and No Reporting of Results Until All Polls Close

R.C. 3505.30 requires boards of elections to remain in session until the unofficial results of the election are communicated to the Secretary of State. Log-ins to the Secretary of

State's election night reporting system will not be permitted prior to the time at which the last polling location closes after 7:30 p.m. pursuant to a court order.

If any precinct polling place in the State of Ohio remains open past 7:30 p.m., no board of election nor the Secretary of State's office may publicly report or disclose the results of any election on any race or issue until the close of all polls on election night. Boards **may** begin publicly counting votes in the presence of any qualified observers after the polls close at 7:30 p.m., but these results may not be reported until all polls have closed.

If you have any questions concerning this Directive, please contact your assigned elections counsel in Secretary of State's office. Thank you for your efforts to be prepared.

Sincerely,

Jennifer Brunner