

DIRECTIVE 2010-73 (Issued Pursuant to Court Order)

November 1, 2010

To: All County Boards of Elections
Re: Directive Issued Pursuant to Court Order

Directive 2010-48 informed boards of elections of the settlement reached in a federal lawsuit filed by the Northeast Ohio Coalition for the Homeless and other plaintiffs challenging Ohio's identification and provisional ballot laws and the right of Ohioans who lack permanent addresses to vote. The parties reached a settlement in the case, and on April 19, 2010, the U.S. District Court for the Southern District of Ohio issued a consent decree that is effective until June 30, 2013.

The consent decree requires the Secretary of State to issue a directive before every primary and general election instructing boards of election to comply with the injunctive relief and requires the Secretary of State to distribute the text of the injunctive relief to all board of election members, directors and deputy directors.

The consent decree reiterates several provisions of existing Ohio election law:

- An Ohio elector who lacks identification may vote a provisional ballot using the last four digits of his/her social security number. R.C. 3505.181(A)(2) specifically permits an individual who lacks identification to vote a provisional ballot using the last four digits of his/her social security number only. Such an individual does not have to show the poll worker his/her social security card. Moreover, under R.C. 3505.181(B)(8), an individual who votes a provisional ballot and provides the last four digits of his/her social security number **is not required** to take any additional steps or to provide additional information to the board of elections in the ten days after the election in order for the provisional ballot to be counted.
- Ohioans who do not have a traditional address based upon a building (such as an address with a street name and number) still may register and vote.

The consent decree incorporates Directive 2008-80 (Voter Identification Requirements) as an order of the court.

The consent decree provides that an individual voting a provisional ballot using the last four digits of his/her social security number may not be deprived of the fundamental right to vote because of a failure of a poll worker to follow Ohio law. However, poll worker error will not be presumed and must be demonstrated through evidence.

The consent decree also requires boards of elections that delegate the processing of provisional ballots to board staff to adopt a policy setting forth the procedures for processing provisional ballots. An example of a policy for processing provisional ballots that a board of elections may consider adopting is the process provided in Directive 2010-74.

Each board of elections must post a notice in a conspicuous place in every location in which provisional ballots are processed after an election that contains the text of the injunctive relief granted. The Secretary of State's office has produced and previously distributed a notice poster that complies with the court order which was provided to each county board of elections prior to the May primary election. In addition, the poster is available on the BOE Extranet for downloading and printing.

The injunctive relief adopted by the court in the consent decree is as follows:

III. GENERAL INJUNCTIVE RELIEF.

1. The Court ADOPTS and annexes hereafter Directive 2008-80 as an Order of this Court.
2. Defendant Secretary of State, her agents, employees and representatives will instruct Ohio's county Boards of Elections to adhere to the following rules regarding the casting and counting of provisional ballots for persons without identification other than a social security number:
 - a. Boards of Elections must count the provisional ballot cast by a voter using only the last four digits of his or her social security number as identification if all of the following conditions are met:
 - i. The individual who cast the provisional ballot is registered to vote;
 - ii. The individual is eligible to cast a ballot in the precinct and for the election in which the individual cast the provisional ballot;
 - iii. The provisional ballot affirmation includes a statement that the individual is registered to vote in the precinct in which the provisional ballot was cast and a statement that the individual is eligible to vote in the election in which the provisional ballot was cast;
 - iv. The individual's name and signature appear in the correct place on the provisional ballot affirmation form, unless the voter declined to execute the affirmation and the poll workers complied with their statutory duties under R.C. 3505.182 and R.C. 3505.181(B)(6) when a voter declines to execute the affirmation;
 - v. The signature of the voter substantially conforms to the signature contained in the Board of Election's records for that voter;
 - vi. The provisional ballot affirmation includes the last four digits of that voter's social security number, which is not found to be invalid;

- vii. The individual's right to vote was not successfully challenged;
 - viii. The individual did not already cast a ballot for the election in which the individual cast the provisional ballot; and
 - ix. Pursuant to R.C. 3505.183(B)(2), the Board of Elections determines that, in addition to the information included on the affirmation, there is no additional information for determining ballot validity provided by the provisional voter or to the Board of Elections during the ten days after the day of the election that casts doubt on the validity of the ballot or the individual's eligibility to vote.
- b. Boards of Elections may not reject a provisional ballot cast by a voter, who uses only the last four digits of his or her social security number as identification, for any of the following reasons:
- i. 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 under Ohio law;
 - ii. The voter did not provide a date of birth;
 - iii. 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;
 - iv. The voter indicated that he or she is homeless;
 - v. 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;
 - vi. The voter did not complete or properly complete and/or sign the provisional ballot application for reasons attributable to poll worker error; or
 - vii. 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.
- c. Boards of Elections must observe the following rules regarding the delegation of processing provisional ballots, and determining their validity, to board staff:
- i. Ultimately, the members of Boards of Elections must determine the validity of all votes cast in an election and must certify the results of all elections. However, nothing in Ohio law requires that

the members of a Board of Elections must personally complete all tasks associated with preparing for that certification.

- ii. Thus, Boards of Elections may, under a policy adopted by the Board, delegate the processing and some aspects of counting provisional ballots to board staff. Such processing must be done in bipartisan teams.
- iii. If a Board of Elections delegates the processing of provisional ballots, it must first adopt a policy setting forth procedures for the processing of provisional ballots. Under that policy, board staff responsible for processing provisional ballots must make a recommendation to the Board as to the eligibility of each provisional ballot cast in the county, either on an individual basis, or as to groups or categories of similarly situated provisional ballots.
- iv. Ultimately, the members of Board of Elections must determine the eligibility or ineligibility of all provisional ballots cast within the county in accordance with Ohio law. Boards may not delegate this task.
- v. Each Board of Elections must then cause the ballots to be counted by board staff, and must include the tabulation of that count in its official canvass of the election results and, to the extent required, its certification of the election results to the Secretary of State.

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