

DIRECTIVE 2010-79

November 30, 2010

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

RE: Supplemental Procedures Regarding Provisional Ballots

I have learned that the Hamilton County Board of Elections rejected over 1,000 provisional ballots cast in the November 2, 2010 General Election. I have also learned that no conclusive review or inquiry to demonstrate the existence or lack thereof of poll worker error in specific provisional ballot situations has been undertaken by the board pursuant Directive 2010-74, Directive 2010-73 and the consent decree issued by the federal court in *Northeast Ohio Coalition for the Homeless v. Brunner*, S.D. Ohio No. 2:06-cv-896 (“*NEOCH*”). This Directive 2010-79 is being issued to inform the Hamilton County Board of Elections that it must comply with the aforementioned directives and consent decree pursuant to R.C. 3501.11 in determining the validity of provisional ballots cast in the November 2, 2010 General Election. This directive is issued to specify the application of Directives 2010-73 and 2010-74 regarding the process for determining the validity of provisional ballots.

As explained in Directive 2010-73, poll worker error will not be presumed and must be demonstrated through evidence.

I. PROVISIONAL BALLOTS THAT MAY NOT BE REJECTED DUE TO POLL WORKER ERROR

As cited in Directive 2010-74 and explained in Directive 2010-73, under the consent decree issued by the federal court in *Northeast Ohio Coalition for the Homeless v. Brunner*, S.D. Ohio No. 2:06-cv-896 (“*NEOCH*”), 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:

- 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.

Examples of Evidence of Poll Worker Error for Which Provisional Ballots May Not be Rejected

- A. **PROVISIONAL BALLOT AFFIRMATION STATEMENT:** One example of the type of poll worker error contemplated under the *NEOCH* consent decree occurs when a voter fails to sign the provisional ballot affirmation statement portion of SOS Form 12-B, but the poll worker completes and signs the verification statement portion of SOS Form 12-B indicating that the voter has completed the affirmation and without indicating that the voter declined to complete the affirmation. **If this occurs, the board of elections should, either in writing, with written response from the poll worker, or at a public meeting of the board, question the poll workers in that precinct to determine whether they followed the board's instructions for completing the verification statement, both as to the specific ballot in question and in general on Election Day.** Where a poll worker's response indicates that he or she did not properly complete the verification statement, that response and the completed poll worker verification statement, taken together, provide objective evidence of poll worker error in that the poll worker did not ensure that the voter had completed the affirmation before the poll worker filled out the verification statement portion of SOS Form 12-B. If the board finds that poll worker error of this nature existed, it shall not reject the provisional ballot, unless other valid reasons for rejection exist, and the board shall count the votes for all races and issues for which the elector was eligible to vote.
- B. **RIGHT POLLING LOCATION, WRONG PRECINCT:** Another example of poll worker error is where the provisional ballot affirmation envelope (SOS Form 12-B) contains notations indicating that a poll worker directed the voter to the wrong precinct at a polling location containing multiple precincts. Because it is a poll worker's duty to ensure that the voter is directed to the correct precinct, these notations provide objective evidence that the poll worker did not properly or to the fullest extent required carry out his or her Election Day duties. **Similarly, if a board of elections finds multiple provisional ballots voted in the correct polling location but wrong precinct, it should, either in writing, with written responses from the poll workers, or at a public meeting of the board, question the poll workers in that polling location to determine whether they followed the board's instructions for ensuring that voters were directed to the correct precinct. If the board finds that poll worker error of this nature existed, it shall not reject the provisional ballot, unless other valid reasons for rejection exist, and the board shall count the votes for all races and issues for which the elector was eligible to vote.**
- C. Failure of a poll worker to complete and sign the "Election Official Verification Statement" portion of SOS Form 12-B is clear evidence of poll worker error because election officials are required by R.C. 3505.182 to complete this information. If the board finds that poll worker error of this nature existed, it shall not reject the provisional

ballot, unless other valid reasons for rejection exist, and the board shall count the votes for all races and issues for which the elector was eligible to vote.

II. OBJECTIVE CRITERIA FOR DETERMINING POLL WORKER ERROR

As a general matter, 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 ID provided by the voter to determine if it is a valid form of ID?

III. ADDITIONAL STEPS TO DETERMINE VALIDITY

In accordance with the federal court's decision in *NEOCH* and Directives 2010-73 and 2010-74, the Hamilton County Board of Elections is hereby ordered to take additional steps to determine whether the provisional ballots that were cast by voters using the last four digits of their Social Security number as identification were improperly rejected for any reason stated in Section I of this Directive or as a result of poll worker error. The board must take the following steps during its investigation:

- 1) Identify the precincts where the provisional ballots that were cast by voters using the last four digits of their Social Security number as identification were cast and all of the poll workers for each of those precincts;
- 2) Determine which of the provisional ballots in question were cast in the correct polling location but wrong precinct;
- 3) By applying the criteria outlined above in Section III of this Directive, the board should contact each poll worker to determine whether they followed the board's instructions for ensuring that voters were directed to the correct precinct.

If the Hamilton County Board of Elections determines through its investigation that any of the provisional ballots cast by voters using the last four digits of their Social Security number as

identification were improperly rejected or as a result of poll worker error, then those ballots should be counted.

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