

DIRECTIVE 2010-94 (Reissue of SOS Directive 2008-100)

December 29, 2010

To: All County Boards of Elections, Members, Directors, and Deputy Directors

Re: Voter Eligibility and Challenges Regarding Absentee Ballots Based Upon Data Discrepancies from Federal and State Database Matches

The purpose of this Directive is to clarify that election judges or other election officials determining whether an absentee ballot may be counted may not reject it, or fail to count it, based solely on the fact that the absent voter has been the subject of a data discrepancy between computer records maintained by the Ohio Bureau of Motor Vehicles (including data originally obtained from the Social Security Administration database) and information provided by the person on his or her voter registration application and/or entered into the Statewide Voter Registration Database ("SWVRD") by the board of elections. This Directive supersedes Directive 2008-100.

R.C. 3509.06 governs the counting of absent voter's ballots. R.C. 3509.06(D) sets procedures for the handling of absentee ballots, as follows:

* * * The election officials shall compare the signature of the elector on the outside of the identification envelope with the signature of that elector on the elector's registration form and verify that the absent voter's ballot is eligible to be counted under section 3509.07 of the Revised Code. Any of the precinct officials may challenge the right of the elector named on the identification envelope to vote the absent voter's ballots upon the ground that the signature on the envelope is not the same as the signature on the registration form, or upon any other of the grounds upon which the right of persons to vote may be lawfully challenged. If no such challenge is made, or if such a challenge is made and not sustained, the presiding judge shall open the envelope without defacing the statement of voter and without mutilating the ballots in it, and shall remove the ballots contained in it and proceed to count them.

* * * If any such challenge is made and sustained, the identification envelope of such elector shall not be opened, shall be endorsed "Not counted" with the reasons the ballots were not counted, and shall be delivered to the board.

In addition to R.C. 3509.06, R.C. 3509.07 provides that "[t]he vote of any absent voter may be challenged for cause in the same manner as other votes are challenged, and the election officials shall determine the legality of that ballot." R.C. 3509.07 sets forth the reasons why an absentee ballot may be rejected, none of which is a computer data discrepancy between government databases.

I have issued Directive 2010-98, which clarifies that a poll worker may not make a R.C. 3505.20 challenge of a voter on Election Day based solely on information that the SWVRD record concerning that voter indicates a computer data discrepancy between the three databases (SWVRD, Bureau of Motor Vehicles ["BMV"], and Social Security Administration ["SSA"]) associated with the maintenance of the SWVRD list of registered Ohio voters. The challenges to absentee ballots authorized to be made by election officials by R.C. 3509.06 and 3509.07, quoted above, are analogous to Election Day poll worker challenges. The reasons underlying Directive 2010-98 apply with equal force to absentee ballot challenges.

Ohio's Voter Registration Database Verification Process

The Help America Vote Act of 2002 ("HAVA") requires all states, including Ohio, to maintain a system by which boards of elections can verify the information provided on voter registration applications and entered into the SWVRD by the board of elections by "matching" relevant voter record information against preexisting information, if any, in other government databases. However, Federal law does not provide for using this database information maintenance process as a means to establish or challenge the eligibility of a person registering to vote.¹ Moreover, another Federal law, the National Voter Registration Act of 1993, expressly restricts the ability of states to cancel a person's voter registration to specific limited situations not associated with computerized verification systems.

The voter record information used to "match" a registrant with information in preexisting government databases often results in a data discrepancy or "non-match" based on such circumstances as common as a data entry error or the use of a natural derivative of a person's given name (e.g., "Bob" for "Robert") when a match has already been attained with the provided driver's license number. In addition, Ohio driver's licenses currently contain a number located above the photo that is often mistaken for the driver's license number by the person completing a voter registration application form. This number is not the driver's license number. When the BMV attempts to "match" this number against its records, the BMV will fail to verify the number provided by the registrant and a "non-match" will result despite the fact that the person may indeed have a valid driver's license.

Similarly, verification of a registrant's identity based upon the last four digits of a nine-digit social security number is inherently incomplete. One in ten thousand voters will share the same last four digits of their social security numbers; thus, the use of incomplete data necessarily allows for inconclusive results when verifying a registrant.

Compounding these concerns is the inevitable possibility for typographical or technological errors existing within the voter registration database, the state bureau of motor vehicles database or the Social Security Administration database -- the latter of which is admittedly antiquated, subject to difficulties in use and operation, and has been known to be unavailable due to scheduled maintenance.

Given the inherent limitations of the verification system and the language of HAVA it is plainly apparent that it is not to be used as a sole basis to determine a voter's eligibility to vote or even to cause that voter to vote provisionally. Therefore, the existence in the SWVRD of a data discrepancy or "non-match" between databases for a voter does not, without other existing statutory conditions that would raise questions about a voter's eligibility, justify or serve as a

¹ Generally, the attempted matching of voter registration data from the SWVRD with other state and federal databases was contemplated by HAVA to alleviate the need for the providing of voter identification at polling places, except for first time voter registrants by mail. However, in 2006, the Ohio General Assembly adopted blanket voter identification requirements for all Ohio voters, regardless of other means of verifying identity.

basis for designating a voter's name in a poll book or poll list as being a candidate for provisional voting, nor does it, without other such statutory conditions, serve as a basis for a challenge to an absent voter's ballot under R.C. 3509.06 or 3509.07.

As part of HAVA, the United States government sought to develop a system by which each state could more easily manage and keep current the information contained within voter registration applications by matching that information with preexisting information databases. In order to facilitate this goal, HAVA required every state to develop a centralized, electronic, statewide voter registration database. In Ohio, this database was developed by one or more contractors for the last Secretary of State. The database was developed by placing data-entered information taken from county voter databases using three (3) different vendors for this entry process.

HAVA also requires states to conduct regular audits of their registration databases to ensure that: "the name of each registered voter appears in the computerized list; only voters who are not registered or who are not eligible to vote are removed from the computerized list; and duplicate names are eliminated from the computerized list." 42 USC 15483(a)(2)(B). Although states were allowed to determine their own methods of populating and maintaining their databases, HAVA contained multiple provisions that expressly limit its purpose to that of information verification and not cancelation of registration or determination of a person's qualifications to vote.

Under HAVA section 303(a)(5)(B)(i), codified at 42 USC 15483(a)(5)(B)(i), the Ohio Secretary of State and the Registrar of the Ohio Department of Public Safety, Bureau of Motor Vehicles (BMV) are required to develop and maintain a process by which information from the SWVRD can be matched with information contained within the databases of the BMV. However, this section expressly provides that the information derived from the BMV databases may be used only to the extent required "to verify the accuracy of the information provided on applications for voter registration."

Additionally, HAVA section 303(a)(5)(C), codified at 42 USC 405(r)(8)(C), granted the Commissioner of the SSA the authority to develop a system to verify the accuracy of information provided by state agencies with respect to voter registration applications. With that authority, the Commissioner developed a system whereby the Ohio BMV must forward its verification request to the American Association of Motor Vehicle Administrators that then forwards the request to the SSA. As a result, the secretary of state and boards of elections are reliant upon the Ohio BMV, which is itself reliant upon the American Association of Motor Vehicles Administrators, to acquire social security information from the SSA.

In addition, 42 USC 405(r)(8)(F) requires that information provided by the SSA under this process be kept strictly confidential and limits its use solely to the verification of voter registration applications. Thus, should an election official use information provided by the SSA for purposes of challenging the votes cast by an absent voter, based on the existence of a computer data discrepancy for the voter, the election official would be constrained from providing the information upon which the singling out of the voter is based. This would, in essence, be denying the voter constitutionally required due process, even if a hearing on the challenge would be held after the election, because the information on which the limitation of rights is based is confidential. Moreover, because of the federally defined use of the data, a board of elections and/or the election official using the existence of data discrepancies in the SWVRD for this purpose could be held to be acting in violation of federal law.

Conclusion

Therefore, election judges or other election officials determining whether an absentee ballot may be counted may not reject an absent voter's ballot, or fail to count it, based solely on the fact that

the voter has been the subject of a data discrepancy between computer records provided by the BMV (including SSA data) and voter registration records in the SWVRD provided by a county board of elections.

In addition, the statutes that govern the counting of absentee ballots contemplate an immediate resolution of the question of whether an absentee vote should be counted or rejected. This is demonstrated by the fact that R.C. 3509.06 instructs election officials that, when a challenge to an absentee ballot is not sustained, they are to “open the envelope, * * * remove the ballots contained in it and proceed to count them.” If, however, a challenge to an absentee ballot is sustained by the election officials and a ballot is rejected, the ballot is to be marked “Not counted” and returned or retained by the board of elections. R.C. 3509.06 and 3509.07, the specific statutes governing the counting or rejecting of absentee ballots, do not provide for other methods of segregating absentee ballots or postponing the counting of absentee ballots pending further investigation.

If you have any questions about this directive, you may contact the elections attorney assigned to your board.

Sincerely,

Jennifer Brunner