

DIRECTIVE 2010-98 (Reissue of SOS Directive 2010-69)

December 29, 2010

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

Re: Election Day Voter Challenges Based Upon a Failure to Match Voter Record Information in the Statewide Voter Registration Database with Bureau of Motor Vehicles and/or Social Security Administration Records

The purpose of this Directive is to clarify that a poll worker may not challenge a person offering to vote on Election Day based solely on the fact that the person has been the victim 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 is a reissue of and supersedes Directive 2010-69.

The Help America Vote Act of 2002 (“HAVA”) requires all states, including Ohio, to maintain a system by which boards of elections can review and compare certain information (e.g., first name, last name, date of birth, driver’s license number, or last four digits of social security number) provided on a voter registration application and entered into the SWVRD by “matching” that information against preexisting information, if any, in other government databases. However, it is important to recognize that Federal law does not provide for using this database information comparison process as a means to establish or to challenge the eligibility of a person to register to vote.¹ Moreover, another Federal law, the National Voting 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 by the person completing a voter registration application form for the driver’s license number. This number is not the driver’s license number. When the Bureau of Motor Vehicles (“BMV”) attempts to “match” this number against its records, the

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.

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 potential for typographical or technological errors existing within and between 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 at critical time periods due to scheduled maintenance by the federal government.

Given the inherent limitations of the verification system and the language of HAVA, 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 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 an Election Day challenge by a poll worker under R.C. 3505.20.

Ohio’s Voter Registration Information Verification Process

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 Secretary of State serving at the time of HAVA’s enactment. 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 contains 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 Social Security Administration (“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, which 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 a board of elections use this to “flag” voters’ names in a poll book, and/or should a poll worker attempt to make an Election Day challenge based solely on the existence of a computer data discrepancy for a voter, the board and poll worker 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 were to be held on the challenge 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 poll worker using the existence of data discrepancies in the SWVRD for this purpose could be held to be acting in violation of federal law.

Conclusion

Accordingly, a poll worker may not perform a R.C. 3505.20 challenge on Election Day based solely on information that the SWVRD record indicates a computer data discrepancy between the three databases (SWVRD, BMV, and SSA) attempted to be matched under the relevant provisions of HAVA. Therefore, in the absence of other conditions contained in statute which would constitute an independent statutory basis for marking a voter’s name in a poll book or poll list for provisional voting or for the lodging of an Election Day challenge by a poll worker, voters whose names appear in poll books or poll lists as registered voters must be provided the opportunity to vote a regular ballot. There is no statutory support for requiring registered voters whose SWVRD records indicate a data discrepancy to vote a provisional ballot or to be challenged on that basis alone.

A copy of this directive must be included in the poll worker packets distributed to all poll workers.

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

Sincerely,

Jennifer Brunner