

ADVISORY 2008-24

September 23, 2008

To: ALL COUNTY BOARDS OF ELECTIONS

Re: Observers During In-Person Absentee Voting

This office has received requests from boards of elections, political parties, advocacy groups and advocates seeking clarification on whether Ohio law provides for election observers during the 35-day period for in-person absentee voting at board of elections offices or other designated sites.

Upon review of the relevant provisions of the Ohio Revised Code, it appears that the Ohio General Assembly has not provided for election observers during the 35-day period for in-person absentee voting at boards of elections' offices or other designated sites. As indicated in Directive 2008-29, there are five distinct points during an election at which the General Assembly has provided for the presence of election observers in the Revised Code:

- During the ***processing and counting*** of absent voters' ballots, and military and overseas ballots (R.C. 3509.022, R.C. 3509.06, R.C. 3505.21, and R.C. 3511.11);
- On Election Day at precincts or at the boards of elections (R.C. 3505.21);
- During the processing of provisional ballots (R.C. 3505.183(D) and R.C. 3505.21);
- During the official canvass (R.C. 3505.32(B) and R.C. 3505.21; and
- During any recount (R.C. 3515.03).

The principal statute on election observers, R.C. 3505.21, appears only to address observers on Election Day. This limitation is reinforced by its placement in Chapter 3505, a chapter devoted to Election Day issues, as well as the fact that the General Assembly saw it necessary to include separate provisions for observers with respect to the processing and counting of absentee and provisional ballots, the official canvass, and recounts. Additionally, R.C. 3509.06(E), the most specific statute for observers relating to absentee voting, provides:

Observers may be appointed under section 3505.21 of the Revised Code to witness the *examination and opening of identification envelopes and the counting of absent voters' ballots* under this section.

The rules of statutory construction mandate that I presume that legislative silence or inaction is deliberate; if the General Assembly had intended to allow for observers during in-person

absentee voting, it could have included such a provision in R.C. §§ 3509.04 and/or 3509.05, the statutes governing the delivery of absentee ballots to electors and the procedures for voting absentee ballots. Alternatively, when the General Assembly amended R.C. 3505.21 as part of Am. Sub H.B. 234 in 2006 – at the same time it first allowed for “no fault” in-person absentee voting during the 35-day period prior to Election Day – it could have amended 3505.21 to clearly apply to the in-person absentee voting period as well as Election Day. However, it did not. Instead, the General Assembly amended the provisions of R.C. 3505.21 (principal statute on election observers) and R.C. 3509.06 (counting of absent voters’ ballots), without providing for the presence of observers during the 35-day period of in-person absentee voting before an election (other than during the processing and counting of absentee ballots).

In sum, the General Assembly has not specifically provided for election observers during the 35-day in-person absentee voting period immediately preceding Election Day. Additionally, the General Assembly appears to have intended to foreclose such observers during that time by limiting the expressly provided-for presence of observers, with respect to absentee voting, to the processing and counting of absentee ballots. For all of these reasons, I am advising Ohio’s boards of elections that they are not required to allow election observers during the 35-day in-person absentee voting period immediately preceding Election Day.¹

Individual boards may receive requests that they exercise their discretion to allow opportunities for observers to be present at board offices or satellite locations during hours when in-person absentee voting takes place. The allowance of these requests may result in court challenges based on disparate treatment between counties. If all boards operate consistently in following the advice contained in this advisory, which is issued pursuant to R.C. 3501.05(B), any litigation regarding this advisory would necessarily be centered on the secretary of state rather than individual boards, allowing boards to proceed with election preparation unhindered by litigation. In addition, no statute provides deadlines for filing requests to be observers or conduct of observers during periods of in-person absentee voting, leaving a board open to challenge on rules established for such observers by that individual board.

Finally, boards are advised and reminded that the Ohio Supreme Court has held that when a statute is open to two equally reasonable but differing interpretations, it is the court’s duty to defer to the secretary of state’s interpretation. Therefore, an opinion of a county prosecutor contrary to this advisory is subordinate to the advice and interpretation of law contained in this advisory or any other interpretation by the Secretary. *See, Whitman v. Hamilton County Bd. Of Elections*, 97 Ohio St. 3d 216, 2002-Ohio-5923.

¹ Please remember that Directive 2008-67, allowing for the processing of absentee ballots prior to election day in some cases, and R.C. 3509.06(E), quoted above, do require that boards of elections must allow duly appointed observers to observe the processing of absentee ballots, even when that occurs prior to election day. However, such observers shall, according to law, be limited to observing the *processing* of absentee ballots, and are not specifically authorized to observe in-person absentee voting unless those processes occur in the same area.

If you have any questions, please feel free to contact your assigned elections counsel by email or at (614) 466-2585.

Sincerely,

Jennifer Brunner