

ADVISORY 2009-09

July 23, 2009

To: All County Boards of Elections

Re: Settlement of Litigation—*League of Women Voters, et al. v. Brunner* [formerly Blackwell], Case No. 3:05-CV-7309, United States District Court, Northern District of Ohio.

I am pleased to announce the settlement of the lawsuit *League of Women Voters, et al. v. Brunner* [formerly *Blackwell*]. On June 16, 2009, Federal Judge James G. Carr signed an Order Enforcing a Settlement Agreement in the case (copy attached) and the order was filed with the court on July 19, 2009. As a result, the county boards of elections will be saved the expense of complying with time-consuming and costly discovery, including depositions and requests for records dating back to 1971.

The League of Women Voters filed the case on July 28, 2005, in a 66-page complaint that named Governor Taft and Secretary Blackwell as defendants. The plaintiffs alleged an Ohio elections system that suffered from “non-uniform standards, processes, and rules, and that employs untrained or improperly trained personnel, and that has wholly inadequate systems, procedures, and funding.” They claimed that these deficiencies denied Ohioans the fundamental right to vote and violated the Equal Protection and Due Process Clauses. Further, the League alleged that the problems with Ohio’s voting system date back at least to 1971 and were “pervasive, severe, chronic, and persistent.” Accordingly, the League sought declaratory and injunctive relief to require defendants-appellants the Secretary of State of Ohio and the Governor of Ohio “to put in place a competent and fair voting system.” The League also sought an award of attorneys’ fees and costs.

Both Secretary Blackwell and I vigorously defended in both the Federal District Court and the Court of Appeals these assertions of constitutional violations. However, on November 26, 2008, the Sixth Circuit Court of Appeals remanded the case back to the Toledo Federal District Court for trial based on its decision that the League’s allegations stated a constitutional claim of violations of the Equal Protection and Due Process Clauses of the United States Constitution. That decision gave a green light to the League to engage in the types of discovery discussed above.

At the strong urging of Federal Judge Carr, I engaged in settlement negotiations with the League plaintiffs. Ultimately Judge Carr suggested that another Federal Judge, Judge David A. Katz, act as a mediator to attempt to resolve the matter. My representatives met with Judge Katz and League representatives and attorneys in Toledo on February 23, 2009, and again on March 2, 2009. Negotiations continued until the final settlement was reached on June 16, 2009. The terms of that settlement have now been incorporated into a federal court order, and the court has the authority to enforce those terms. The vast majority of the settlement provisions are consistent with procedures and practices the boards already implemented in 2007 and 2008.

Certain provisions of the final agreement are likely to be of interest to boards of elections:

1. The agreement does not directly bind any of the boards and boards need not change any practices or procedures at this time, so long as boards follow the procedures established in the Ohio Revised Code and all directives issued by the Secretary of State that are currently in effect. A list of directives that are currently in effect is posted on the BOE Extranet.
2. The agreement contemplates that the Secretary of State will issue additional directives to the boards in the future concerning the administration of statewide general elections (November of even-numbered years) and the presidential primary election of March 2012. Boards will be promptly advised of those directives at the time they are issued. The court order incorporating the settlement agreement specifies that directives in the following areas be issued for those even-numbered year elections.
 - a. Backup paper ballots: In only statewide general elections (November of even-numbered years) and in the presidential primary election of March 2012, the court order requires the Secretary of State to “issue instructions to all [BOE’s] for the distribution of paper ballots in the event of long lines.” (Similar to Directive 2008-107)
 - b. Pre-election administration plans: In only statewide general elections (November of even-numbered years) and in the presidential primary election of March 2012, the court order requires the Secretary of State to issue directives requiring county boards of elections to submit plans for administering those elections. Our office has established a workgroup comprised of board directors and deputy directors in order to assist the office in developing the minimum required components of meaningful election plans. These officials have advised our office that they see great benefits accruing to boards from the preparation of these plans. A directive containing these components will be issued this year. (Similar to Directives 2008-01, 2008-02, 2008-25, 2008-44, 2008-56, 2008-57, 2008-64, 2008-65 2008-68, , 2008-73; 2008-74.)
 - c. Post-election reporting in six larger counties: In only statewide general elections (November of even-numbered years) and in the presidential primary election of March 2012, the court order requires the Secretary of State to issue directives requiring the boards of elections from Cuyahoga, Franklin, Hamilton, Montgomery, Lucas, Stark, Mahoning and Summit Counties to report precinct-level data in the same categories as was reported in connection with the EAC November 2008 Election Data Collection Grant Program (i.e., data concerning voters, provisional ballots, votes cast, votes cast for President, and votes cast for U.S. Congressional Representatives). (Similar to Directive 2008-122)
 - d. Post-election reporting concerning Pollworkers: After every statewide general election (November of even-numbered years) and the presidential primary election of March 2012, the court order requires the Secretary of State to issue directives instructing all county boards of elections to monitor and assess pollworker performance to determine whether individual pollworkers should be removed, retrained or reappointed. Our office has established a workgroup comprised of board directors and deputy directors in order to assist the office in developing the

minimum required performance standards for poll worker performance. A directive containing these components will be issued this year.

- e. Post-election reporting concerning other election data: After every statewide general election (November of even-numbered years) and the presidential primary election of March 2012, the court order requires the Secretary of State to issue directives instructing all county boards of elections to provide post-election data regarding voter registration, ballots cast, ballots counted, provisional ballots, absentee ballots, military and overseas ballots. Boards will also be required to report on election expenses incurred and significant voting equipment problems and malfunctions occurring in the election. (Similar to Directives 2008-111 and 2008- 119.)
- f. Multi-precinct polling locations and oversize precincts: The court order requires the Secretary of State to monitor counties for compliance with the statutory requirement that precincts not exceed the maximum size established in the Revised Code (i.e., 1400 electors, absent a waiver from the Secretary of State). (R.C. 3501.18(A)) The Secretary of State will continue to monitor and notify boards of elections of non-compliance. The Secretary of State is also required to issue recommended best practices concerning layout and operation of multi-precinct polling locations. (Similar to Directive 2008-65)
- g. Pollworker training materials: The court order requires the Secretary of State to issue poll worker training materials that substantially conform to those used in the 2008 November election. Boards may use training materials prepared at the county level, but those materials shall not contain information inconsistent with the Secretary of State's instructions and materials. (Similar to Directive 2008-77)
- h. Board member, director and deputy director training: The court order requires the Secretary of State to continue to require comprehensive training of all board of elections members, directors and deputy directors no later than six months after their appointment, with periodic retraining following the initial training. Our office has established a workgroup comprised of board directors and deputy directors in order to assist the office in updating the existing minimum required training hours in accordance with the training rules.
- i. Absentee ballot processing: In only statewide general elections (November of even-numbered years) and in the presidential primary election of March 2012, the court order requires the Secretary of State to issue directives instructing boards of elections to report on absentee ballot processing in the period leading up to those elections. (Similar to survey issued October 22, 2008)
- j. Regional liaison observation of voter registration. The court order requires the Secretary of State to continue directing regional liaisons to, on an annual basis, personally observe each board of elections' processing of voter registration applications. Our office will have regional liaisons continue do so.

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- k. Disability access: The court order requires the Secretary of State to continue the requirement that each board provide, prior to each election, a signed certification of compliance with R.C. 3501.29(B)(1)(a), (b), (c) & (d). (Similar to Directive 2008-44.)
- l. Election Technology: In only statewide general elections (November of even-numbered years) and in the presidential primary election of March 2012, the court order requires the Secretary of State to:
- i. Require public post-election audits such as were implemented after the 2008 primary and general elections. (Similar to Directives 2008-39 and 2008-113.)
 - ii. Direct counties utilizing DREs to offer paper ballots to voters in the event of machine problems or breakdowns. (Similar to Directives 2008-59 and 2008-107.)
 - iii. Develop and adopt statewide standards for logic and accuracy testing of tabulating machines. (Similar to Directives 2008-89 and 2008-90.)
 - iv. Develop and adopt statewide standards regarding quality of paper and method of handling of the voter verified paper audit trail. (Similar to Directives 2008-55, 2008-56, 2008-57; 2008-73.)
 - v. Develop and adopt statewide security procedures concerning voting system components. (Similar to 2008 25, 2008-56, 2008-57, and 2008-73)
 - vi. Develop and adopt statewide standards regarding the physical security of voting equipment and components and requiring boards of elections to keep an accounting of all voting machines and other permanent equipment distributed to voting precincts within the count and whether any voting equipment is missing or nonfunctioning and needs replacement. (Similar to 2008-02, 2008-25, 2008-56, 2008-57, 2008-68, 2007-72, 2008-73, 2008-74 and Advisory 2008-20.)
3. The terms of the settlement agreement are binding through January 11, 2015 on me and my successor in the office of Secretary of State. The Secretary of State must demonstrate to the Federal Court that good cause exists, such as a change in state or federal law, in order to change any of the binding terms of the settlement.

If you have any questions, please contact the elections attorney in this office assigned to assist your county board of elections.

Sincerely,

Jennifer Brunner