

## **ADVISORY 2010-08**

December 14, 2010

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

RE: Supplemental Poll Worker (Voter) Investigation Procedures

On November 30, 2010, the Secretary of State's office issued Directive 2010-79 amplifying required procedures regarding provisional ballots cast in the November 2, 2010 General Election. In response to a federal court order issued by Chief Judge Susan J. Dlott for the U.S. District Court for the Southern District of Ohio in *Hunter v. Hamilton Cty Bd. Of Elections*, S.D. Ohio Case No. 1:10-cv-00820, on November 22, 2010, and the U.S. Sixth Circuit Court of Appeals' order dissolving its earlier stay of Judge Dlott's decision issued on December 1, 2010, the Secretary of State's office issued Directive 2010-80 amplifying required procedures regarding the 849 provisional ballots that were subject to Judge Dlott's order in *Hunter*.

### **Poll Worker Error**

As explained in Directive 2010-73, poll worker error will not be presumed and must be demonstrated through evidence. Directives 2010-79 and 2010-80 provide objective criteria for determining poll worker error. Generally, poll worker error occurs when a poll worker acts contrary to or fails to comply with federal or Ohio law or a 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.

Directives 2010-79 and 2010-80 also provide the additional measures that the Hamilton County Board of Elections ("the Board") must follow to determine whether poll worker error was attributable to the 849 provisional ballots being cast in the wrong precinct pursuant to Judge Dlott's order in the *Hunter* case.

### **Scope and Purpose**

The purpose of this Advisory is to provide the Board with specific guidance for conducting the investigation regarding potential poll worker error and in furtherance of the requirements of the federal court order in *Hunter*.

### **Investigation Procedures**

The Board is hereby advised to conduct a thorough and efficient investigation that brings closure to this matter within a reasonable time. In addition to the procedures explicitly stated in Directives 2010-79 and 2010-80, the Board is advised as to all of the following:

- *Issuing Subpoenas*: The Board may subpoena poll workers to give testimony, under oath and recorded by a court reporter, about instructions the poll workers gave to voters who cast provisional ballots in the precincts being investigated and other relevant

matters to determine whether poll worker error occurred regarding the provisional ballots in question.

- *Issuing Questionnaires In Lieu of Subpoenas*: In addition to issuing subpoenas, the Board may send each poll worker a questionnaire. For those poll workers who also were issued a subpoena, the questionnaire may specify that if the questionnaire is completed and postmarked within seven (7) calendar days from the date the subpoena/questionnaire is sent, the poll worker may be notified by the Board that the poll worker does not have to appear and give testimony pursuant to the Board's subpoena.
- *Review of Documents to Narrow Investigation*: The Board may review documents on file with the Board to better focus its investigation on those ballots for which there appear to be indications from related documents that poll worker error occurred. Such a review, if conducted, may contemporaneously be taking place while testimony is taken regarding any poll worker error, pursuant to subpoenas or questionnaires or both. The document review should be conducted by bi-partisan teams evenly comprised of members of the two major political parties, in this case, Democrats and Republicans. The taking of testimony should be under oath and recorded by a court reporter, as is set forth below.
- *Appointment of Attorneys – Questioning Poll Workers/Voters*: The questioning of poll workers does not have to occur in the presence of the Board at a public meeting (although as indicated above it must be conducted under oath and recorded by a court reporter). The Board may appoint individuals, preferably attorneys, or at least notary publics who are authorized to take oaths, who are experienced in taking sworn statements when questioning poll workers. Initial questions of poll workers should be consistent from poll worker to poll worker, with additional questions being asked reflective of what is learned in the testimony. The attorney or notary should prepare a report to the Board that includes recommendations regarding the counting of individual ballots, if any. It would be advisable for the Board to appoint teams of attorneys, each with one Democrat and one Republican. These teams may also question individual voters if given that authority by the Board. The Board should provide each team with a deadline for completing the investigation and making a report and recommendation. The Board should then meet promptly after the deadline, with prior notice, and vote on the recommendations in the reports.
- *Unavailability of Poll Worker/Voters*: If a poll worker (or voter) cannot be reached or may not be available before the deadline that the Board sets to conclude the investigation, then the investigation may proceed without that particular poll worker or voter. But in no instance should any member or agent of a member of the Board encourage a poll worker or voter to avoid service of process in the investigation of the provisional ballots in question or the circumstances involved in the casting of a provisional ballot.

It would be advisable for the Board to set a deadline by which its investigation should be completed and a deadline by which the Board must bring the matter to closure, including voting

on any recommendations made in the investigative reports. Failure to set a definite timeline may invoke further action from the Secretary of State. The Board must follow the law as established by the U.S. District Court for the Southern District of Ohio and by state law as is interpreted by the Secretary of State pursuant to R.C. 3501.11 and Title 35 of the Ohio Revised Code. I urge you to move expeditiously in this matter with an objective of fairness for all, for the benefit of the candidates and the voters of Hamilton County, Ohio.

If you have questions about this Advisory, please contact the elections attorney assigned to your county at 614-466-2585.

Sincerely,

Jennifer Brunner