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## **DIRECTIVE 2012-21**

**June 13, 2012**

To: All County Boards of Elections

Re: Observers

### **SUMMARY**

The purpose of this Directive is to clarify issues regarding observer activity throughout various stages of the election process. This Directive replaces Directives 2008-29, 2008-97, and Advisory 2008-34, which are rescinded.

All boards of elections are instructed to provide one copy of this Directive to each political party, candidate, group of candidates, or issue committee (“appointing authorities”) filing forms appointing observers for any election.

### **INSTRUCTIONS**

#### **I. Categories of Observers**

There are several points during an election at which the presence of observers is contemplated. For ease of discussion, these types of observers have been grouped into separate categories as follows:

- Observers at an In-Person Absentee Voting Location;
- Observers at a Board of Elections Office prior to the Official Canvass;
- Observers at Precincts on Election Day;
- Official Canvass Observers;
- Recount Observers; and
- Election Audit Observers

## **I. General Rules for All Categories of Observers**

There are some general principles that apply to all observers, regardless of what category the observer falls into.

### **A. Qualifications**

All observers (except recount observers) must be qualified electors in the State of Ohio. However, observers do not need to be registered to vote in the particular county where they will observe. For qualifications relating to recount observers, see pages 7-8 of this Directive.

### **B. Persons Not Eligible to Observe**

The following people are not permitted to serve as observers at an in-person absentee voting location, at a board office prior to the official canvass, or at a precinct on Election Day<sup>1</sup>:

- Uniformed peace officer;
- Uniformed state highway patrol trooper;
- Uniformed member of any fire department;
- Uniformed member of the armed services or the organized militia;
- No person wearing any other uniform; or
- No candidate, unless the candidate is also a member of the party controlling committee.

A candidate is permitted to serve as an observer at an official canvass, recount, or election audit. An observer may not accept compensation from a county, city, village, or township for serving as an observer.<sup>2</sup>

### **C. Oath**

Every observer is required to take an oath prior to commencing his or her duties. The form of the oath is prescribed as follows:

“You do solemnly swear that you will faithfully and impartially discharge the duties as an official observer, assigned by law; that you will not cause any delay to persons

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<sup>1</sup> R.C. 3505.21, ¶1

<sup>2</sup> R.C. 3505.21, ¶4

offering to vote; and/or that you will not disclose or communicate to any person how any elector has voted at such election.”<sup>3</sup>

For observers on Election Day, a judge of elections must administer the above oath. For all other observers, an election official, director, or deputy director may administer the oath. Additionally, where an observer is observing over the course of multiple days, that observer does not need to take the oath every day. It is sufficient to have the observer affirm to an election official each day that the observer understands that he or she is still under oath.

#### **D. Election Officials’ Duties**

Several Ohio statutes provide that election officials have a responsibility to allow observers to be present. That responsibility carries with it a connected right to remove observers from their posts under very limited circumstances including behavior inconsistent with Ohio law or Secretary of State Directive, or that interferes with, impedes, or disrupts an election.<sup>4</sup>

## **II. Observers at In-Person Absentee Voting Locations, Board of Elections Offices, and Precincts on Election Day**

Appointing authorities are permitted to appoint observers at an in-person absentee voting location, a board of elections office prior to the official canvass, and precincts on Election Day.

#### **A. Appointing Authority Defined**

The following “appointing authorities” are permitted to appoint observers at any primary, special, or general election:

- Any political party (county or state) that is supporting candidates to be voted upon at that election
- Any group of five or more candidates
- A ballot issue committee recognized by the board of elections pursuant to law as supporting or opposing a ballot issue.<sup>5</sup>

Any committee that in good faith advocates or opposes a ballot question or issue may file a petition with the county board of elections asking to be recognized as the

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<sup>3</sup> R.C. 3505.21, ¶5

<sup>4</sup> R.C. 3501.33 and 3505.21, ¶1

<sup>5</sup> R.C. 3505.21, ¶1, ¶3

committee entitled to appoint observers for the election. Such petitions must be filed no later than 4:00 p.m. on the 20<sup>th</sup> day before election.<sup>6</sup> If more than one committee files to be the recognized committee advocating or opposing a measure, the board must decide which committee will be recognized as being entitled to appoint observers. The board must make this decision not less than 12 days prior to the election and send a notice via registered mail to each committee.<sup>7</sup>

## **B. Notice of Appointment**

An appointing authority must first notify the board of elections of the names and addresses of its appointees and the location(s) at which they will serve.<sup>8</sup> As discussed above, potential locations include the board's in-person absentee voting location, the board office, and specific precincts for Election Day. Keep in mind that one person is permitted to observe at multiple locations, as the observer may spend parts of the day at several locations, or observe at different locations depending on the day and point in the election.

### **1. Timing**

Written notification must be given to a board of elections not less than 11 days before the election on forms prescribed by the Secretary of State. Written amendments for a notification may be filed with the board of elections at any time until 4:00 p.m. the day before the election.<sup>9</sup> An amendment may substitute one observer for another at a precinct or board of elections identified in the original filing. However, an amendment cannot add a location that was not identified in the original filing. An amendment also cannot add additional observers at a location or serve to expand the number of observers at a location beyond what is permitted.

### **2. Forms**

The following Secretary of State forms should be used to notify boards of elections of appointments and any subsequent amendments:

- A state or county political party committee will use Form 214, signed by the chairperson and secretary of the controlling committee.
- Groups of candidates will use Form 216, signed by the group of candidates.

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<sup>6</sup> R.C. 3505.21, ¶3

<sup>7</sup> R.C. 3505.21, ¶3

<sup>8</sup> R.C. 3505.21

<sup>9</sup> R.C. 3505.21

- A recognized ballot issue committee will use Form 219, signed by committee members.

Appointing authorities are encouraged to file original documents with a county board of elections in person. However, filing by facsimile or electronic mail with a PDF attachment is permissible. An appointing authority bears the risk of improper or incomplete transmittal of a notice of appointment or amendment for an observer.

### **C. Certificate of Appointment**

After filing a timely notice of appointment with the board of elections, the appointing authority is responsible for issuing a certificate of appointment to the observer. The following Secretary of State forms should be used to issue certificates of appointment to observers:

- A state or county political party committee will use Form 215, signed by the chairperson and secretary of the controlling committee.
- Groups of candidates will use Form 217, signed by the group of candidates.
- A recognized ballot issue committee will use Form 220, signed by committee members.

The duly appointed observer will present his or her certificate of appointment to the appropriate election official at the time that the observer arrives at the location where he or she will observe.

### **D. Observers at an In-Person Absentee Voting Location**

Observers may be appointed to observe the casting of ballots at an in-person absentee voting location. Depending on the particular county, this location will either be the board office or a separate designated site.

An appointing authority is permitted to appoint one observer to the in-person absentee voting location. Because in-person absentee voting occurs over multiple days, it may be prudent for a board to permit the substitution of observers on different days. However, an appointing authority cannot have more than one observer observing the casting of ballots at an in-person absentee voting location at any one time.

### **E. Observers at a Board of Elections Office**

Observers may be appointed to a board of elections office to observe the casting of ballots, the examination and opening of absent voters' ballots, the casting and counting

of ballots at the board of elections office on Election Day, and the processing of provisional ballots leading up to the official canvass.

A board of elections must notify appointed observers of the times when the board will be processing and counting absent voters' ballots. Likewise, a board of elections must notify all duly appointed observers of the times when the board will be determining the eligibility of provisional ballots to be counted.<sup>10</sup>

An appointing authority is permitted to appoint one observer to the board of elections office.<sup>11</sup> Under appropriate circumstances, a board of elections may choose to permit an appointing authority to appoint more than one observer to a board of elections office. For instance, where the processing of provisional ballots will take place over a number of days, it would be prudent for the board to permit an appointing authority to appoint multiple observers and/or permit the substitution of observers.

Please note that an observer appointed to observe at the board office is permitted to observe at the board office and at any precinct in the county.<sup>12</sup> An appointing authority is only allowed to have one observer who is permitted to observe at both the board office and at any precinct in the county. Such an observer will file his or her certificate of appointment with the board of elections, and then shall take a copy of the certificate with him or her to present to the presiding judge at any of the precincts he or she visits.

#### **F. Observers at Precincts on Election Day**

Observers may be appointed to observe the casting and counting of ballots at one or multiple precincts on Election Day.

An appointing authority for *candidates* is permitted to appoint one observer to each precinct in a county. An observer may be appointed to observe at multiple precincts, but no more than one observer may be appointed to each precinct.<sup>13</sup>

An appointing authority for a *ballot question or issue* is permitted to appoint one observer to each precinct in a county. An observer may be appointed to observe at multiple precincts, but no more than one observer may be appointed to each precinct.<sup>14</sup>

However, there are some additional limitations where ballot question or issue observers are involved. At any election, a precinct cannot have more than six observers total appointed by separate ballot issue committees. Where the number of observers exceeds

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<sup>10</sup> R.C. 3505.183(D)

<sup>11</sup> R.C. 3505.21

<sup>12</sup> R.C. 3505.21, ¶1

<sup>13</sup> R.C. 3505.21, ¶1

<sup>14</sup> R.C. 3505.21, ¶3

six, the recognized ballot issue committees may agree upon which observers will observe. If the committees fail to agree, the judges of election will choose six observers from the certified appointees in a manner that represents each side of the several issues.<sup>15</sup>

Observers appointed to precincts on Election Day are permitted to be present from the opening until the closing of the polls, as well as after the polls close. Accordingly, an observer would be permitted to be present from one-half hour before the polling place opens through the time the poll workers for that precinct finish processing the ballots cast or collected in that precinct, and have completed all other post-closing responsibilities and have taken all actions to return the ballots and other supplies to the board of elections.<sup>16</sup>

### **III. Official Canvass Observers**

Certain appointing authorities are permitted to designate a qualified elector to observe the making of the official canvass. The following “appointing authorities” are permitted to appoint an observer to the official canvass:

- The county executive committee of each political party;
- Each committee designated in a petition nominating an independent or nonpartisan candidate;
- Each committee designated in a petition to represent the petitioners for a ballot question or issue; or
- Any committee opposing a ballot question or issue that was permitted to have a qualified elector serve as an observer at the election pursuant to R.C. 3505.21.<sup>17</sup>

Boards of elections must require the designation of an official canvass observer to be in writing, signed by a recognized member of the group appointing the observer. Following the instructions given on pages 3-4, an appointing authority may file this written appointment in person, via facsimile or electronic mail using a PDF.

### **IV. Recount Observers**

#### **A. Candidate Recounts**

For candidate recounts, each candidate in the contest to be recounted may attend and observe the recount and may designate one other person in addition to him or herself, not necessarily an elector, to also observe the recount on his or her behalf. In the event

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<sup>15</sup> R.C. 3505.21

<sup>16</sup> R.C. 3505.21, 3506.13

<sup>17</sup> R.C. 3505.32

that a county board of elections performs the recount at more than one station, the candidate may appoint a sufficient number of observers to have one at each station for the time during which that station is actively recounting ballots.<sup>18</sup>

### **B. Question or Issue Recounts**

For question or issue recounts, the designated chairperson of a committee organized in accordance with R.C. 3505.21 to support or oppose a ballot question or issue may observe. Additionally, an attorney appointed as legal counsel by the committee may also observe.<sup>19</sup>

### **C. Method of Appointment**

The appointment of recount observers must be in writing, signed by the candidate or ballot issue chairperson, and submitted to the board of elections no later than five days following board notification of the date and time of the recount.<sup>20</sup> Following the instructions given on pages 3-4, an appointing authority may file these documents in person, via facsimile or electronic mail using a PDF.

## **V. Election Audit Observers**

Any entity that appointed observers pursuant to R.C. 3505.21, or official canvass observers pursuant to R.C. 3503.32, may appoint observers to the post-election audit. Appointments must be made in writing, signed by a recognized member of the group appointing the observer, no later than five days after the board gives notice of the date and time of the post-election audit. Substitutes may be appointed if notice of the substitution is made in writing and filed with the board of elections at least one day before the post-election audit begins. Following the instructions given on pages 3-4, an appointing authority may file these documents in person, via facsimile, or electronic mail using a PDF.

## **VI. Rights and Limitations of Observers**

The provisions of this section apply to observers at all stages of an election. However, please note that some provisions will relate solely to a certain category of observers or a particular situation as described below.

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<sup>18</sup> R.C. 3515.03

<sup>19</sup> R.C. 3515.03

<sup>20</sup> R.C. 3515.03

### **A. Watching and Inspecting**

Observers at a precinct are permitted to “watch every proceeding of the judges of elections from the time of the opening until the closing of the polls.”<sup>21</sup> Observers are also permitted to “inspect the counting of all ballots in the polling place or board of elections from the time of the closing of the polls until the counting is completed and the final returns are certified and signed.”<sup>22</sup> The role of observers is limited to observing the proceedings of an election. Accordingly, while observers are permitted to watch and inspect, observers are never permitted to handle any election materials.

### **B. Observer Communication with Election Officials**

While observers are permitted to engage precinct election officials in casual conversation, including gathering information about how the voting location is being run during down times, their statutorily appointed purpose is to “watch.” Observers are not to serve as enforcers of the laws nor act as advocates for voters before the precinct election officials. They may, however, leave the voting area to contact the Board of Elections to raise concerns, which, the Board of Elections may, in turn and as appropriate, address. Observers may never interfere with election officials completing their official duties.

### **C. Movement of Observers within Polling Place**

Observers are permitted to move freely about the polling place to the extent that they do not engage in any prohibited activity (see *Limitations*, below).<sup>23</sup> Observers are not permitted to observe at precincts to which they are not duly appointed.

### **D. Movement of Observers within Board of Elections**

Observers are permitted to observe in any area where ballots are being cast, processed, counted, or recounted at a board of elections office, and generally, may move about freely to do so to the extent that they do not engage in any prohibited activity (see *Limitations*, below). A board may deny an observer access to parts of its office where ballots are not being cast, processed, counted, or recounted.

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<sup>21</sup> R.C. 3505.21

<sup>22</sup> R.C. 3505.21

<sup>23</sup> R.C. 3505.21

## **E. Recount Observer Conduct**

A recount observer may freely observe the recount, but cannot interfere with the recount or touch the ballots. Because such challenges are reserved for a Contest of Election, observers at a recount may not challenge the board's determination of whether or not a ballot or vote is counted during a recount.<sup>24</sup>

## **F. Limitations**

### **1. Statutory Prohibitions**

Although observers are granted the ability to move about the polling place as they conduct their duties within the polling place, including the area marked by the flags, observers must be mindful that certain behavior is prohibited, including:

- Engaging in any kind of election campaigning;
- Hindering or delaying an elector in reaching or leaving the polling place;
- Impeding, interfering with, or disrupting the election in some manner;
- Intimidating, harassing, or attempting to influence voters or precinct election officials;
- Carrying a firearm or other deadly weapon; or
- Risk violating the secrecy of the ballot or the privacy of voters.

Unless specifically exempted by law, all observers are subject to the statutory prohibitions in Title 35 of the Revised Code, including, but not limited to, R.C. 3501.35, 3501.90, and any relevant section of Chapter of 3599.

### **2. Communication Devices and Audio Video Devices**

Observers may not use any electronic or communication device or any audio/visual recording device in any manner that impedes, interferes with, or disrupts an election, or in any way intimidates a voter, risks violating the secrecy of the ballot or voter privacy. Observers using a cellular or digital telephone, walkie-talkie, or any other wired, wireless, or satellite audio communication device to discuss the election or a perceived problem with the administration of the election may not do so within the polling place. Absent a person engaging in harassment,<sup>25</sup> nothing in this section shall be interpreted to prevent an observer from collecting or

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<sup>24</sup> OAG 1974-103

<sup>25</sup> As defined by R.C. 3501.90.

transmitting information from the registration lists posted throughout the day in each precinct pursuant to R.C. 3503.23(C).

### **G. Removal**

Only the presiding judges, directors, deputy directors, and appointing authorities have the authority to administratively remove observers from their posts. Additionally, law enforcement officials have the statutory duty to remove observers at the order of one of the above listed election officials.<sup>26</sup>

If the observer is removed, the person removing the observer may request his or her certificate of appointment and return it to the board office with a notation that the observer was removed from the polling location.

If you have any questions concerning this Directive, please feel free to contact the Secretary of State's elections attorney assigned to your county at (614) 466-2585.

Sincerely,



Jon Husted

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<sup>26</sup> R.C. 3501.33