

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

TRACIE HUNTER,	:	Case No. 1:10-cv-820
	:	
Plaintiff,	:	Chief Judge Susan J. Dlott
	:	
vs.	:	
	:	
HAMILTON COUNTY BOARD OF ELECTIONS, ET AL.	:	EMERGENCY MOTION TO ENFORCE PRELIMINARY INJUNCTION
	:	
Defendants.	:	

Plaintiff Tracie Hunter hereby moves for an order to enforce the Preliminary Injunction issued by this Court on November 22, 2010. Defendant Hamilton County Board of Elections has not yet complied with the Order. Nor will the Board be taking any action in the next several weeks to comply with the Order. Time is of the essence since the Juvenile Court Judge is to take office on January 1, 2011. The Board has squandered the last two and a half weeks. The Board has not agreed to an investigation process and as such has taken no steps to investigate. All evidence indicates the Board will not agree on a process or even begin the investigation before the end of this year. Furthermore, two members of the Board voted to count the 286 ballots that were cast in the right location but in the wrong precinct,¹ however the other two members voted against the motion. Therefore, those 286 ballots have not been counted in direct opposition to the Order. For these reasons, Plaintiff requests that this Court issue an order directing Defendants to comply with its Order, or in the alternative, issue a show

¹ Mr. Burke testified at the TRO hearing November 22, 2010 that the number was between 260 and 280. At the December 3, 2010 Board meeting the Board announced the exact number of provisional ballots cast at the right location, wrong table, is 286. Ex. A p. 12-13.

cause order why Defendants should not be held in contempt and conduct an evidentiary hearing on the show cause order.

MEMORANDUM OF LAW

On Sunday evening, November 21, 2010 Plaintiff filed an Emergency Motion for Preliminary Injunction. After a full day of trial on another case this Court scheduled a hearing on the Motion at 4:30 p.m. on November 22, 2010. After a three hour hearing this Court issued a Preliminary Injunction late at night on November 22, 2010. Plaintiff and this Court have acted with great speed. The same cannot be said of Defendants.

This Court ordered Defendants to “**IMMEDIATELY** begin an investigation into whether poll worker error contributed to the rejection of the 849 provisional ballots now in issue and include in the recount of the race for Hamilton County Juvenile Court Judge any provisional ballots improperly cast for reasons attributable to poll worker error.”

(Doc. 13 p. 9, emphasis added). To date Defendants have taken no steps toward investigating poll worker error. Before the Order was stayed by the Sixth Circuit Court of Appeals on November 24, 2010 at 3 p.m., the Defendants had taken no action to investigate poll worker error. Since the Stay was dissolved on December 1, 2010, at 3 p.m. the Defendants have taken no actions to investigate poll worker error.

In fact, the Defendants met on Friday December 3, 2010 to discuss how to comply with the Order but made no decisions. (Ex. A Transcript 12-3-10 BOE meeting). The Board staff offered no recommendations on how to implement the Order. (Ex. A p. 12). Plaintiff’s counsel presented the Board’s attorney with a proposed implementation process. (Ex. G Branch Dec. 3, 2010 letter). Yet the Board did not review it. The Board asked Intervenor Defendant John Williams to submit a similar proposal. (Ex. A p. 41)

The Board ended the meeting without discussing any implementation process and ordering its staff to not contact poll workers or do any investigation. (Ex. A p. 23-25, 53). The Board decided it would meet again on December 9, 2010.²

A. Request For Order Directing Board to Comply with Injunction Requirement to Conduct Investigation of Provisional Ballots for Poll Worker Error

The purpose of the December 9th meeting was for the Board to implement an investigation procedure. However, the Board did not agree on a procedure. Defendants Burke and Faux proposed a procedure (Ex. B) which Defendants Triantafilou and Gerhardt opposed.³ Defendants Triantafilou and Gerhardt proposed a procedure (Ex. C) which Defendants Burke and Faux opposed. When there is a tie vote or a disagreement in the board, the chairperson or director submits the matter to the Ohio Secretary of State “not later than fourteen days after the tie vote.” O.R.C. § 3501.11 (X). The Secretary of State breaks the tie vote, however, there is no deadline for her decision. *Id.* Defendant Burke and Faux requested that the matter be submitted to the Secretary of State within one day. Mr. Triantafilou stated he wanted the entire 14 days permitted by the statute to submit the issue to the Secretary of State. Thus, the matter will not reach the Secretary of State until Christmas Eve eve. It is unlikely that the Secretary will render her decision until the final week of the year. Even assuming her vote approves one process over the other, the investigation of poll worker error will not begin until after Christmas, and surely will not end until after the first of the year. Such a delay will cause irreparable injury to Plaintiff Tracie Hunter, who may be the putative winner of the election. Ms.

² Defendants attempted to schedule a meeting for December 7th but Intervenor Defendant John Williams requested the meeting not take place on December 7th due to his inability to attend. The Board then changed the date to Thursday December 9, 2010 at 9:00 a.m. (Ex. A p. 48-49).

³ The transcript from the December 9, 2010 meeting will be available for a few days, but will be filed with this Court as soon as it is produced.

Hunter has already suffered by the delay. The Ohio Supreme Court has barred her from registering for the New Judge Training that takes place next week because she is not the “certified” winner.

Plaintiff requests this Court to issue an order directing the Board of Elections to investigate poll worker error by:

1) Reviewing all paperwork in its possession (all provisional ballot envelopes, poll books (regular and provisional and signature), help desk notes, emails, notes) for each precinct where the 849 ballots were cast, including all precincts in the multi-precinct polling location.⁴

2) Contacting all poll workers for each precinct where the 849 ballots were cast, including all precincts in the multi-precinct polling locations. Poll workers have a duty to direct voters to the correct precinct. SOS Directive 2010-74 p. 12 (Doc. 1-2). The most important poll workers to contact are the provisional judge and the precinct guide. The provisional judge is required to handle all the provisional balloting. (Ex. D (Poll Worker Comprehensive Manual Chapter 7) p. 7-3). The precinct guide was assigned only in multi-polling locations where four or more precincts voted. The precinct guide is responsible for ensuring the voter gets to the right table in the location. (Ex. E (Precinct Guide) p. 2). The purpose of the contact is to inquire if the poll workers followed their duties. The contact should be in the form of the questionnaire that Defendants Burke and Faux proposed to the Board (Ex. B).

3) Contacting provisional voters, who will have the best memory, to find out why they voted in the wrong precinct, if they were told they were at the wrong table or

⁴ Multi-polling locations refer to polling locations where there are multiple precincts located.

precinct, and if they were warned their vote would not count if they voted at the wrong precinct.

4) Completing the investigation and counting all otherwise eligible ballots miscast due to poll worker error within five calendar days. A five day deadline is more than reasonable given the fact the Board complied with state law by reviewing the 11,000 provisional ballots in the 10 days following Election Day.

Board Chair Triantafilou repeatedly stated at the December 3, 2010 Board meeting that he did not now how to conduct the investigation and was struggling to understand it. (Ex. A p. 8, 45:13-14, 56:24). He said the Order was “inherently confusing and doesn’t give us the guidance that we need to do what needs to happen next.” *Id.* 59: 14-17. This Court can give that guidance to the Board and issue an Order offering the Board the guidance to start their investigation and a deadline in which to compete the investigation and count the ballots.

B. Request For Order Directing Board to Comply with Injunction Requirement to Count Provisional Ballots that were Rejected Due to Poll Worker Error

This Court ordered that the Board count the provisional ballots that were rejected due to poll worker error. Board members Burke and Faux at both the December 3, 2010 Board meeting and the December 9, 2010 Board meeting urged the Board to count one group of ballots where poll worker error was demonstrated: the 286 ballots that were cast in the right location but at the wrong table. They articulated how the Board had circumstantial evidence of poll worker error, and therefore, under the Order moved to count these ballots on December 9, 2010. Defendants Triantafilou and Gerhardt opposed the motion. This tie vote in 14 days will be sent to the Secretary of State to break the tie.

The Board has sufficient evidence before it to have voted to count the 286 right location/ wrong precinct provisional ballots. Poll workers have a duty to direct voters to their correct precincts. (SOS Dir. 2010-74 p. 12 (Doc. 1-2); Ex. D Comprehensive Manual Chapter 7; Ex. E Precinct Guide). The provisional judge is a poll worker who is assigned to the provisional voter processing. (Ex. D p. 7-3). When a voter tries to vote in a precinct and her name is not in the signature poll book, the provisional judge is to check the voter's current address in the Precinct Street List to make sure that they live in the precinct in which they are trying to vote. (Ex. D p. 7-4). If the name is not there, the provisional judge is to look the name up in the street address books (ward/ township and county⁵). *Id.* The provisional judge can call the Board of Elections to determine the voter's correct precinct location. (Ex. H (Quick Guide) p. 13). The provisional judge is to tell the voter where the correct precinct is and offer directions to the right precinct. *Id.*

Furthermore, the Board knows that voters become confused in multiple polling locations, so it appoints precinct guides in larger multiple polling locations. The Board instructs the precinct guides:

There are times when a voter enters a multiple location and ends up voting at the wrong precinct – table. In these cases, the voter's ballot cannot be counted. We continue to work to find ways to make sure that once a voter gets to their polling location – they vote at the correct precinct and that their vote gets counted.

(Ex. E p. 2). The precinct guide is there to help voters get to the right table. The problem is the Board did not place precinct guides in every multiple polling location. They were only in the locations where four or more precincts voted together. By not staffing all multiple precinct polling locations with precinct guides the Board knew poll workers would make mistakes and voters would end up voting at the wrong table.

⁵ Sample pages of the precinct list and street lists are found at Ex. D p. 7-13 to 7-15.

Given the Board's acknowledgment that voters need guidance to get to the right table, that the Board understood the need for precinct guides but did not staff them at all locations, that there are times when the voter does not get to the right table, and it is the poll worker's duty to guide voters to the right table, the Board should have concluded, as Burke and Faux did, that there is sufficient circumstantial evidence that the poll worker caused the voter to vote at the wrong table. Thus, since there is circumstantial evidence of poll worker error, the Board should have counted the 286 votes. Plaintiff requests that this Court Order the Board to comply with the Preliminary Injunction Order and count this group of 286 votes.

Hamilton County would not be alone in counting provisional ballots cast at the wrong table. Other counties in Ohio count these ballots.⁶ (Ex. F. Minutes of Boards of Elections for Lucas, Seneca, Williams, and Trumbull counties).

CONCLUSION

Plaintiff respectfully requests that this Court direct Defendants on how to conduct their investigation and to complete the investigation within five days. Plaintiff also requests that the Board count the group of 286 ballots cast in the right location but in the wrong precinct without further investigation.

Respectfully submitted,

/s/ Jennifer L. Branch
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⁶ Other counties, such as Montgomery and Franklin, also counted the right location wrong table ballots but their minutes are not yet available. When they are received the record will be supplemented.

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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2010, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

/s/ Jennifer L. Branch