

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	:	<u>Plaintiffs' Emergency Motion to</u>
ELECTIONS, ET AL.	:	<u>Enforce This Court's Preliminary</u>
	:	<u>Injunction (Doc. 13) And Enjoin</u>
	:	<u>Defendant Board From Complying</u>
Defendants.	:	<u>With Directive 2011-04</u>

Motion

Plaintiffs Tracie Hunter, Northeast Ohio Coalition for the Homeless, and the Ohio Democratic Party hereby move on an emergency basis for an order enforcing the Preliminary Injunction issued by this Court on November 22, 2010 (Doc. 13) and enjoining Defendant Hamilton County Board of Elections from complying with Directive 2011-04, which directly conflicts with this Court's Preliminary Injunction. Defendant Board has not yet complied with the Order. Nor will the Board take any action to comply with the Order in the future since the new Ohio Secretary of State ordered it last night to do no further investigation of *and not to count* the 849 ballots at issue, thereby directly contradicting and vitiating this Court's order. (Ex. A Directive 2011-4).

Time is of the essence. The Board meets tomorrow, January 12, 2011 at 3:30 p.m. and is expected to implement Directive 2011-4 at that time, absent a contrary order from this Court. Therefore, for the reasons stated in the attached memorandum in support, and based upon the exhibits attached thereto, Plaintiffs ask this Court to grant this Motion and immediately issue an order that 1) enjoins the Board from complying

with Directive 2011-04; 2) enjoins the Board from complying with the statutory deadline to amend the certification (see O.R.C. §§ 3505.32(A) and 3513.22); 3) requires the Board to count the approximately 165 ballots that were investigated and should be counted; 4) requires the Board to count an unknown number of additional ballots in those precincts where the questionnaires showed evidence of poll worker error; and 5) appoints a special master to conduct a meaningful investigation pursuant to federal constitutional law of a) the 21 NEOCH ballots cast in the wrong precinct that were not investigated for poll worker error as required by the NEOCH Consent Decree; b) the remaining NEOCH ballots (number unknown) that lacked a signature, printed name or full printed name and that were not investigated for poll worker error as required by the NEOCH Consent Decree; and c) the 565 ballots that the Board did not investigate.

MEMORANDUM OF LAW

INTRODUCTION

It has been seven weeks since this court issued a preliminary injunction to the Board of Elections ordering Defendant 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, Defendant has completed its investigation of some of the provisional ballots, but it has not completed its investigation of any of the NEOCH ballots nor has it completed its investigation of 565 provisional ballots, nor will it do so by January 22, 2011, which is the deadline for amending the certification, now

that the Ohio Supreme Court has disapproved of its investigation and the Secretary of State has ordered it to *reject* all 850 ballots at issue in this Court's order.

FACTS

A. The Board's Investigation Found Errors Which Led to a Vote to Count Sixteen (16) Additional Ballots and a Tie on Whether to Count 269 Ballots Additional Ballots.

- 1. The Board found seven (7) ballots were cast in the wrong precinct due to poll worker error and unanimously voted to count all seven ballots, but then stopped its investigation.**

On December 16 and 17, 2010 the Board interviewed 77 poll workers under oath. (Ex. B Transcript of December 16, 2010 Board Meeting and Ex. C Transcript of December 17, 2010 Board Meeting (a.m. and p.m. sessions)). The most productive of these interviews was of the seven poll workers who actually processed and signed the provisional ballot at issue. Each of these poll workers testified that they had made a mistake in processing the ballot. Specifically, the poll worker misidentified the voter's correct precinct. For example, one witness testified he processed provisional ballots and he trusted the other poll workers on his team to look up the voter's address to make sure she was in the correct precinct. When he was confronted with the fact that the voter's correct precinct was at another location in the polling place, the witness admitted the poll workers made a mistake in not getting the voter to the right precinct table. (Ex. C p. 7-11).

During the Board's interviews, other witnesses were asked to look up addresses in the precinct finder book and find the correct precinct. Each of these witnesses admitted that on Election Day they looked up the address wrong and made a mistake about which precinct the voter was in. For example:

13 MR. BURKE: What I'd like you to
14 do, Mr. G, is go to the green book
15 and determine the correct precinct those
16 voters should have voted in.
17 CHAIRMAN TRIANTAFILOU: We saw that
18 on Election Day, about the way it was
19 turned upside down

...

7 MR. E G: 4715 -- I think
8 I made a mistake.
9 MR. BURKE: Say again please.
10 MR. E G: I made a
11 mistake, I guess, on that one. Should
12 have been 2F instead of 2G.
13 MR. BURKE: And on Election Day,
14 you were going through this same process
15 with a lot of people there?
16 MR. E G: Right.
17 MR. BURKE: Trying to get things
18 done in a hurry?
19 MR. E G: Right, just
20 wasn't too -- you know.
21 MR. BURKE: Understand. And then,
22 again, nobody --
23 MR. E G: You are right,
24 515 people waiting in line and so forth . . .

(Ex. B 6:00 p.m. session p. 63-64.). The witness went on to explain how he made the same mistake with two additional ballots. *Id.* 57-67. Another witness looked up the address for the Board and determined the voter was to vote in Cincinnati Precinct 4A. However, he got it wrong. When used correctly, the book indicated that the correct Precinct was 4C. It was clear the witness did not pay attention to the fact the voter's address was an even number. (Ex. C Transcript p. 45-50).

At the Board Meeting on December 28, 2010, Alex Triantafilou moved to count all seven of these ballots. The motion passed unanimously. (Ex. D Transcript of December 28, 2010 Board Meeting p. 68-73). Under Secretary Husted's Directive 2011-

04, these ballots will not be counted even though the Board unanimously agreed that they were deficient because of poll worker error.

However the Board then stopped its process of interviewing poll workers. On December 17, 2010 the Secretary of State issued Directive 2010-87 (Ex. F) telling the Board to speed up its investigation and subpoena all remaining poll workers by December 20, 2010. The directive also told the Board to issue questionnaires to poll workers by December 20, 2010. Finally, the directive told the Board to make its decisions by December 28, 2010. In response, the Board requested a waiver of the requirement to subpoena more witnesses, which was granted. (Ex. G waiver emails). As a result, the Board conducted no more poll worker interviews.

2. The Board's investigation found that nine (9) ballots were properly cast in the right precinct.

At the December 28 meeting the Board found that nine (9) provisional ballots had been cast in the right location/right precinct all along. The Board realized that on November 16 staff had improperly included these nine ballots in the group of 849 "wrong precinct" ballots. Due to *staff* error (not poll worker error), these nine ballots were rejected. The Board corrected this at the December 28 meeting and unanimously voted to count these nine provisional ballots. Under Secretary Husted's Directive 2011-04, these ballots will not be counted even though they were cast in the right precinct.

3. The Board's investigation found that approximately 149 ballots were cast in the right location/ wrong precinct due to poll worker error in determining whether the street address was located inside the precinct.

Board members Burke and Faux presented evidence to the Board of their investigation into the addresses of approximately 56% of the 269 right location/ wrong precinct provisional ballots. Their analysis showed that:

- 31% of the 269 provisional ballots cast in the right location/ wrong precinct (approximately 83) were found to have been cast in the wrong precinct because the voters' addresses were located on the wrong side of the boundary street of the precinct in which the voter should have cast a ballot. This problem was illustrated during the Board interviews where poll workers were confused about the fact that an even house number on a street would be in one precinct and an odd house number on the same street would be in a different precinct. (Ex. B 6:00 p.m. session pp. 57-65; Ex. D pp. 76-80; Ex. H Burke Affidavit Ex. 1).
- 15% of the 269 provisional ballots cast in the right location/ wrong precinct (approximately 40) were found to have been cast in the wrong precinct because the voters' addresses were located outside of the address range of a boundary street of the precinct in which the voter should have cast a ballot. (Ex. H Burke Affidavit Ex. 1).
- 10% of the 269 provisional ballots cast in the right location/ wrong precinct (approximately 26) were found to have been cast in the wrong precinct because the voters' addresses were located on streets that pass through the precinct in which the voter voted, but the addresses did not fall within the correct address

range of the precinct in which the voter should have cast a ballot. (Ex. H Burke Affidavit Ex. 1).

The Board voted on whether to count the entire group of 269 right location/ wrong precinct ballots and tied 2 to 2. The Secretary of State broke the tie in favor of rejecting the entire 269 group. Secretary of State Brunner simultaneously issued Directive 2011-03 which directed the Board to count these three categories, which comprise 56%, or 149, of this group of 269 ballots. (Ex. I). Secretary of State Husted, on the evening of his first day in office issued Directive 2011-04 which “superseded” Directive 2011-03. Ex. A. Secretary of State Husted directed the Board to reject all 849 ballots, including this subset. *Id.*

4. The Board’s investigation found that an unknown number of ballots were cast in the right location/ wrong precinct due to poll worker error because there was no evidence of voter error.

The Board sent questionnaires to over one thousand poll workers and received over 800 responses to the questionnaires before the December 28, 2010 Board meeting. The questionnaires solicited information about whether any voter, when told to go to another table in the polling place, refused to move to the correct precinct table. Of the 830 questionnaires returned, there was no evidence of voters refusing to go to the correct table. All the returned questionnaires indicated that when the voter was asked to move to the correct precinct, the voter complied. (Ex. D p. 69, 76; Ex. H Burke Aff. ¶ 13.) Additionally, all 77 poll workers who testified under oath testified the same. *Id.*

In voting 2 to 2 on the 269 ballots cast at the right location/ wrong precinct, Board members Burke and Faux pointed to this evidence as additional support for counting the 269 ballots. Approximately 900 poll workers stated that no voter refused to go to the

correct precinct. The statute requires each poll worker confronted with a wrong-precinct voter to inform him that he is in the wrong precinct, direct him to the correct precinct, and instruct him that his ballot will not be counted if he insists on casting a ballot in the wrong precinct. O.R.C. § 3505.181(C). Poll workers are presumed to comply with their statutory duties. Because the evidence affirmatively shows that each of these voters (who interacted with these 900 poll workers) did not err by refusing to move to the correct precinct table, then they could only have cast their provisional ballots in the wrong precinct because the poll worker believed that the voter was in the correct precinct. In other words, this evidence proves that for each these ballots (the number of which is currently unknown), the poll worker erred by failing to determine the voter's correct precinct. Under Secretary Husted's Directive 2011-04, these ballots will not be counted even though there is evidence of poll worker error.

B. The Board Did Not Investigate Any of The NEOCH Ballots For Poll Worker Error In Violation Of The NEOCH Consent Decree.

There were 21 NEOCH ballots identified by the Board as being part of the 849 rejected provisional ballots subject to this Court's Injunction. (Ex. E.) The Board did not investigate these ballots for poll worker error. The Board failed to conduct this investigation even though it, like all boards of election in Ohio, was ordered by the Secretary of State prior to Election Day to investigate miscast NEOCH ballots for poll worker error before rejecting them. (Doc. 1-3 Ex. A SOS Directive 2010-74). Directive 2010-74 directed the Board how to investigate poll worker error: *question poll workers*. The Board has not done this with regard to the 21 NEOCH ballots that are a subset of the 849 rejected ballots. Moreover, under Secretary Husted's Directive 2011-04, these ballots will not be counted even though the Ohio Supreme Court's recent decision in

State ex rel. Painter v. Brunner, 2011-Ohio-35, ***expressly excepted these ballots from its order***. *Id.*, ¶ 52 (ordering the secretary of state to compel the board of elections to “review the 850 provisional ballots that are the subject of Judge Dlott’s order *and are not subject to the consent decree in Northeast Ohio coalition for the Homeless*, with exactly the same procedures and scrutiny applied to any provisional ballots during the board’s review of them leading up to its decision on November 16”) (emphasis added).

Ms. Poland testified at the TRO hearing that these ballots were investigated for poll worker error and none was found. (R. 18 TR. pp. 90-92). However, they were never discussed at the Board meeting on November 16, 2010. (See generally Doc. 1-3 Ex. B to Complaint, Transcript of November 16, 2010 Board Meeting). There was a statement that they would be discussed, but they never were. What is clear from the Board meeting is that these ballots were not segregated from the 849 and were therefore rejected en masse. (*Id.* pp. 34-end).

In addition, the Board did not investigate any of the other NEOCH ballots that were rejected for reasons other than being cast in the wrong precinct. For example, the Board rejected a number of provisional ballots where the voter either did not print their name on the affirmation on the envelope but signed the envelope or printed their name but did not sign the envelope. The Board rejected these ballots without determining whether the poll worker error was involved. Complaint ¶ 34. Additional ballots were rejected without determining whether there was poll worker error. *Id.* ¶35. The NEOCH ballots were not identified or investigated before the Board rejected these ballots. (Doc. 1-3 Ex. B Transcript November 16 Board meeting). The Board’s actions violated both the pre-election Directive 2010-74 and the NEOCH consent decree.

C. **The Ohio Supreme Court’s Opinion Ordered the Board to Conduct the Same “Investigation” This Court Previously Rejected.**

Defendant John Williams filed a mandamus action in the Ohio Supreme Court December 20, 2010. Plaintiffs moved twice to enjoin the Supreme Court action. Doc. 29 and 35. This Court denied Plaintiffs’ first motion to enjoin, stating that it was within the Ohio Supreme Court’s province to determine whether the Secretary of State’s directives comply with state law governing election procedures. Doc. 32. However, this Court also stated that Plaintiffs could re-file their motion if Plaintiffs believed the Ohio Supreme Court had issued a ruling that either interferes with this Court’s Injunction or “Plaintiffs believe is otherwise contra to constitutional or federal law.” *Id.*

Plaintiffs are now re-filing their prior motion, albeit under a different title, because both circumstances apply. The Ohio Supreme Court issued its Opinion on January 7, 2011, *State Ex Rel. Painter et al. v Brunner*, Slip Op. 2011-Ohio-35. The Ohio Supreme Court held that Ohio statutes did not authorize an exception based on poll worker error to the requirement that ballots be cast in the proper precinct in order to be counted. *Id.* ¶ 35. The Ohio Supreme Court further held that the Secretary of State’s post election directives instructing the Board how to investigate the 849 ballots this Court ordered be investigated was erroneous under state law. *Id.* ¶ 36.

While the Court did not formally adjudicate the U.S. Constitutional claims Plaintiffs have made in the case at bar under the Equal Protection Clause and the Due Process Clause—nor could it do so, as those claims were not before it—it nevertheless purported to rule on the Equal Protection claim that was the subject of this Court’s November 22, 2010 order ***based on its interpretation of federal law*** (not state law) by holding that “any equal-protection claim did not require an investigation—it merely

required the same inquiry that the board had engaged in for its initial determination of the validity of the provisional ballots.” *Id.* ¶ 40.

In essence, notwithstanding the fact that the issue had not been raised or briefed by the parties, the Ohio Supreme Court held that this Court’s Injunction, which required an *immediate investigation*, was not in fact required by “an equal-protection claim.” *Id.* ¶ 40. The Ohio Supreme Court further held that the Supremacy Clause of the U.S. Constitution did not require it to follow decisions of the U.S. District Court on federal statutory or constitutional law. *Id.* ¶ 46.

Based on these holdings, the Ohio Supreme Court went beyond its interpretation of Ohio law (which is not relevant to this Court’s order) and purported to overrule this Court with respect to its interpretation of Plaintiffs’ rights under federal law and the United States Constitution. Specifically, the Ohio Supreme Court held that “any equal-protection claim would have merely required the same examination that the board conducted in – concluding incorrectly under Ohio law – that 27 provisional ballots cast in the wrong precinct at the board of elections during the early-voting period should be counted even though they were cast in the wrong precinct due to poll worker error.” *Id.* ¶ 49. The Ohio Supreme Court did not explain its “equal-protection” holdings which, as stated above, were not briefed by the parties. *Id.*

Based on its holdings under both state and federal law, the Ohio Supreme Court concluded that the Board was not allowed to rely on any evidence obtained during the investigation ordered by the Secretary of State. *Id.* ¶51. Thus, the Board was ordered to rescind its decisions made pursuant to the Directives 2010-80 (Ex. J) and 2010-87 (Ex. F) and conduct the same “investigation” it had conducted before November 16. *Id.* ¶ 52. As

noted by Secretary Husted, if the Board conducts the same “investigation” it conducted before November 16 then it will necessarily reach the same result, which will require it to reject all 850 ballots at issue in this Court’s Order. (Ex. A).

D. The Ohio Secretary of State Issued a Directive Ordering the Board To Do No Further Investigation, Not to Count any of Ballots the Board already Found Should be Counted, and To Certify the Election without any further action

Amazingly, the new Secretary of State issued a directive that told the Board that it “must determine now” that all 850 ballots are “invalid and shall not be counted.” (Ex. A Directive 2011-4). This Directive directly contradicts this Court’s Injunction and the U.S. Constitution. (Doc. 13). The Secretary of State ignored this Court and has put the Board of Elections in the position of having to choose whether to comply with Directive 2011-4 or be held in contempt of the U.S. District Court. The Board of Elections will be meeting tomorrow, January 12, 2010 at 3:30 p.m. to implement this Directive.

ARGUMENT

This Court unambiguously ordered the Board to investigate the 849 ballots at issue for poll worker error and, if error is found, to count them. The investigation that the Board has conducted to date, although limited in several respects, has provided evidence of poll worker error with respect to a substantial number of the ballots at issue in this Court’s prior order. Those ballots should be counted.

Nevertheless, at the urging of Intervenor-Respondent Williams, the Ohio Supreme Court and the Secretary of State have now declared that the Board’s investigation is invalid and that the Board must not count the 850 ballots at issue—in direct contravention of this Court’s order. The Board will likely follow that guidance and Directive 2011-04 Wednesday, unless this Court acts promptly to protect and effectuate its prior Order.

A. This Court Should Enjoin The Board From Following Directive 2011-04 And Voting To Reject The 850 Ballots At Issue In That Directive.

This Court can and must enjoin the Board from following the Secretary of State's directive implementing the Ohio Supreme Court's decision (Directive 2011-04, attached as Exhibit A). The Ohio Supreme Court's ruling on the application of state law is not relevant to any issue before this Court, as only federal claims are raised here. And this Court is clearly not bound by the Ohio Supreme Court's interpretation of federal law—particularly on a claim that was not before it, that was not raised or briefed by the parties, and that was already the subject of this Court's order.

Instead, it is within the province of this Court to interpret and enforce its own orders. Due process also requires that the Plaintiffs be allowed to litigate their federal claims, and not have those claims be “cut off” by a defendant's end-run around this Court's Order by obtaining a contrary order from a state court lawsuit in which the Plaintiffs *could not* bring its federal claims. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S. Ct. 1148 (1982) (holding that “a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause” and that litigants cannot be deprived of their right to bring a cause of action without “constitutionally adequate notice and hearing procedures.”). Therefore, this Court should enjoin the Board from implementing Directive 2011-04 and voting to reject the 850 ballots at issue in that Directive.

B. The Court Should Enforce Its Injunction By Ordering The Board To Count Those Ballots For Which There Is Evidence Of Poll Worker Error.

This Board has already conducted an investigation that provides evidence of poll worker error for 165 ballots. Specifically, it found that: (1) 9 ballots were cast in the

correct precinct all along, and so should be counted, (2) 7 ballots were cast in the wrong precinct as a result of poll worker error, (3) 149 ballots were cast in the wrong precinct due to poll worker error in determining whether the street address was located inside the precinct, and (4) an unknown number of ballots that were handled by 900 poll workers who stated that no voter refused to go to the correct precinct. This Court should order the Board to identify the ballots in the latter category and then count all four of these categories of ballots.

C. The Court Should Enforce Its Injunction By Appointing A Special Master To Investigate The Remaining Ballots At Issue In This Case.

That leaves three categories of ballots to be investigated: (1) the 21 NEOCH ballots cast in the wrong precinct that were not investigated for poll worker error as required by the NEOCH Consent Decree; (2) an unknown number of NEOCH ballots (i.e., cast with a social security number) that lacked a signature, printed name or full printed name and that were not investigated for poll worker error as required by the NEOCH Consent Decree—although these ballots were not included in this Court’s prior order, they are in the Plaintiff’s Complaint and evidence relating to them was adduced at the November 22, 2010 hearing; and (3) the 565 ballots that the Board did not investigate. To the extent that any of these ballots can be addressed by the evidence from the 900 poll workers who attested that no voter refused to leave the wrong precinct and vote in the correct precinct, no further investigation may be necessary.

The Ohio Supreme Court and Secretary of State will not provide guidance as to how to conduct an investigation that exceeds what the Board already did. This Court has already rejected the “investigation” that the Board conducted before November 16. Doc. 13. And due process requires that any such investigation be meaningful. *Boddie v.*

Connecticut, 401 U.S. 371, 91 S. Ct. 780 (1971). Therefore, this Court must provide the necessary guidance.

Plaintiffs understand that this Court's time and resources are limited. Therefore, pursuant to Rule 53, Plaintiffs respectfully request that this Court appoint a Special Master to oversee and conduct the investigation. That investigation should include the subpoena and cross-examination of witnesses, the production of provisional ballot envelopes under a protective order, and an evidentiary hearing. Following a report and recommendation from the Special Master, this Court can then issue an order with respect to the remaining ballots.

D. This Court Should Enjoin The Board From Amending Its Certification By The 81st Day Following The Election.

Due to no fault of the Plaintiffs, the Board's lack of compliance with this Court's November 22, 2010 injunction makes it necessary to take a longer period of time to conduct the required investigation. It will be impossible to conduct and conclude the investigation before January 22, 2011, which is the 81st day following the election. Therefore, this Court should also enjoin the Board from complying with the statutory deadline to amend the certification (see O.R.C. §§ 3505.32(A) and 3513.22). The investigation should be conducted promptly and with all deliberate speed so that the certification can be amended at the earliest practicable time.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court immediately order the Board to

- 1) enjoin the Board from complying with Directive 2011-04;

- 2) count the approximately 165 ballots that were investigated and found to involve poll worker error;
- 3) order the Board to identify and count an additional unknown number of ballots in those precincts where the questionnaires showed there was evidence of poll worker error;
- 4) appoint a special master to conduct a meaningful investigation pursuant to federal constitutional law of
 - a) the 21 NEOCH ballots cast in the wrong precinct that were not investigated for poll worker error as required by the NEOCH consent decree;
 - b) the remaining NEOCH ballots (number unknown) that were not investigated for poll worker error as required by the NEOCH consent decree; and
 - c) the 565 ballots the Board did not investigate; and
- 5) enjoin the Board from complying with the statutory deadline to amend the certification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2011, 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