



2005 - 052

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

January 27, 2005

TROY KING
ATTORNEY GENERAL

ALABAMA STATE HOUSE
11 SOUTH UNION STREET
MONTGOMERY, AL 36130
(334) 242-7300
WWW.AGO.STATE.AL.US

Honorable Virginia Delchamps
Chairman, Mobile County Board of Registrars
109 Government Street, Room 116
Mobile, Alabama 36602-116

Honorable Don Davis
Mobile County Probate Judge
Post Office Drawer 7
Mobile, Alabama 36601

**ALSO SEE THE OPINION ISSUED
TO DON DAVIS, MOBILE
COUNTY PROBATE JUDGE, AND
PAT TYRRELL, MOBILE COUNTY
BOARD OF REGISTRARS, DATED
7-27-2012, A.G. NO. 2012-071.**

Provisional Ballots - Elections -
Registrars, Board of - Voting -
Registration - Help America Vote Act of
2002

The board of registrars determines whether provisional ballots are entitled to be counted and the appointing board tabulates the provisional ballots that have been certified by the board.

If a voter casts a provisional ballot at a precinct in which the voter's residence is located and the voter is not registered to vote in that precinct, but the voter is registered to vote in another precinct located within the county when the ballot is to be cast, the board of registrars would use that voter's reidentification form, completed at the polling place, to update that voter's registration and should then certify that the provisional ballot be counted.

The board of registrars should not certify that a provisional ballot be counted if the voter does not reside in the precinct and is not registered to vote in the precinct where he or she is attempting to vote.

Honorable Virginia Delchamps
Honorable Don Davis
Page 2

If the board determines that a voter is not a resident of the precinct in which the provisional ballot is cast, the board should not certify the counting of that provisional ballot.

Dear Mrs. Delchamps and Judge Davis:

This opinion of the Attorney General is issued in response to your requests.

QUESTIONS

1. Should the Mobile County Election Canvassing Board count the vote of an elector that is cast by provisional ballot at the precinct in which the elector's residence is located when the elector is not registered to vote in the precinct (but is registered to vote in another precinct located within Mobile County)?

2. Should the Mobile County Election Canvassing Board count the vote of an elector that is cast by provisional ballot at a precinct when the elector does not reside in that precinct and is not registered to vote in that precinct?

3. Should the Mobile County Election Canvassing Board count the vote of an elector that is cast by provisional ballot at the precinct where the elector is registered to vote when the elector's ability to vote has been challenged by the inspector of the voting precinct because the elector does not live within the precinct?

FACTS AND ANALYSIS

During the 2003 Regular Session, the Alabama Legislature passed Act 2003-313, implementing the requirements of the federal Help America Vote Act of 2002 ("HAVA"), Pub. L. 107-252. See 42 U.S.C.A. § 15403 (West 2004). One of the new processes adopted in Act 2003-313 was provisional voting. A

voter is required to cast a provisional ballot at a polling precinct under the specific circumstances set forth in section 17-10A-2 of the Code of Alabama. This section states as follows:

(a) A voter shall be required to cast a provisional ballot when:

(1) The name of the individual does not appear on the official list of eligible voters for the precinct in which the individual seeks to vote, and the individual's registration cannot be verified while at the polling place by the registrar, deputy registrar, or a member of the canvassing board.

(2) An inspector has knowledge that the individual is not entitled to vote at that precinct and challenges the individual.

(3) The individual is required to comply with the voter identification provisions of Section 17-10A-1 but is unable to do so.

(4) A federal or state court order extends the time for closing the polls beyond that established by state law and the individual votes during the extended period of time. Notwithstanding any other provision of state law, where provisional ballots are cast pursuant to a federal or state court order extending the time for closing the polls beyond that established by state law, the provisional ballots shall be segregated from other provisional ballots into a separate sealed container for such purpose and shall be counted, tabulated, and canvassed only pursuant to the order of a court having proper jurisdiction.

ALA. CODE § 17-10A-2(a) (Supp. 2004).

When a voter casts a provisional ballot at the polling place, the voter must execute a written affirmation and complete a voter reidentification form. ALA. CODE § 17-10A-2(b) (Supp. 2004). When a voter casts a provisional ballot on the basis of an inspector's knowledge that the voter is not entitled to vote at a particular precinct, the inspector must sign a statement setting forth the facts that support that belief. *Id.* At the close of the polls, the provisional ballot is

sealed in a box containing only provisional ballots and is returned unopened to the sheriff who keeps the ballots until the provisional ballots are to be counted. ALA. CODE § 17-10A-2(d) (Supp. 2004). Each written affirmation of the provisional voter, along with the inspector-challenge statement and the voter reidentification form, are placed in a sealed envelope after the polls are closed and is sent to the board of registrars by no later than noon the day following the date of the election. *Id.*

It is the duty of the board of registrars to determine whether the provisional ballots are entitled to be counted and the reason for or against counting the ballot. Section 17-10A-2(e) of the Code of Alabama provides as follows:

(e) Upon receipt of materials returned from the polling places, the *board of registrars* shall forthwith update the state voter registration list utilizing the voter reidentification forms of provisional voters and *shall verify* by a certification attached to each provisional voter affirmation *whether the provisional vote is entitled to be counted* and the reason for or against counting the provisional ballot. When verifying a provisional ballot based upon the challenge of an inspector, the board of registrars shall promptly contact the voter by first class mail and provide an explanation of how the provisional voter may respond to the challenge. After determining that the provisional voter has had notice and an opportunity to be heard, the board of registrars shall verify by a certification attached to the challenge statement whether the provisional ballot is due to be counted and, if not, why it should not be counted. The board of registrars shall deliver the provisional voter affirmations and inspector challenge statements, with the certified findings of the board of registrars attached, to the judge of probate no later than noon seven days after the election until which time such findings shall remain confidential. Upon delivery of such materials, the board of registrars shall enter into the state voter registration list a voter history providing identification of voters who cast provisional ballots, whether their ballot was counted, and the reason the ballot either was or was not counted.

ALA. CODE § 17-10A-2(e) (Supp. 2004) (emphasis added).

Honorable Virginia Delchamps
Honorable Don Davis
Page 5

The appointing board shall meet at noon seven days after the date of the election for the purpose of tabulating provisional ballots. Section 17-10A-2(f) of the Code of Alabama specifically states as follows:

(f) Commencing at noon seven days after the election, *the appointing board for poll workers*, in the presence of watchers designated by any interested candidates, *shall tabulate provisional ballots which have been certified by the board of registrars as cast by registered and qualified voters of the precincts in which such ballots were cast*. For the purpose of making election returns of provisional ballots, provisional balloting results shall be returned and canvassed as a separate precinct while disclosing all votes for candidates and ballot measures cast in such ballots. The appointing board shall certify on a form to be prescribed by the Secretary of State the results of the provisional votes cast and shall post one copy in a public location within the courthouse and shall seal one copy with the provisional ballots, provisional voter affirmations, inspector or clerk challenge statements, and certifications of the board of registrars into a sealed container or, in the case of primary elections, containers designated for each political party for such purpose. Such containers shall be delivered and remain secured with the other records of the election in accordance with state law.

ALA. CODE § 17-10A-2(f) (Supp. 2004) (emphasis added).

Your request asks whether the canvassing board should count certain provisional ballots. Section 17-10A-2(f) of the Code specifically provides that "the appointing board for poll workers" shall tabulate provisional ballots. The appointing board is made up of the probate judge, the sheriff, and the circuit clerk, unless one of these persons is ineligible because he or she is a candidate for election to office at that election. ALA. CODE §§ 17-6-1 & 17-6-3 (1995). If one of these persons is ineligible, a replacement is appointed and serves as a member of the appointing board. See ALA. CODE § 17-6-4 (1995).

The canvassing board consists of the probate judge, the sheriff, and the circuit clerk, which are usually the same officials that serve as the appointing board. See ALA. CODE § 17-14-1 (Supp. 2004). As stated above, however, the

Honorable Virginia Delchamps
Honorable Don Davis
Page 6

members of these two boards are not always the same persons. As set forth in section 17-10A-2(e) above, it is the duty of the board of registrars to determine whether a provisional ballot is entitled to be counted. The appointing board then meets to tabulate the provisional ballots that have been certified by the board of registrars. Accordingly, it is the appointing board, not the canvassing board, charged with tabulating the provisional ballots.

Sections of the Code in addition to the provisional ballot sections are applicable to your questions concerning whether a provisional voter is entitled to vote in a particular precinct. In 1875, Alabama adopted a statute providing as follows:

At all elections by the people of this State the elector must vote by ballot and in the county and precinct or ward where his residence is situated, and nowhere else, and if any elector attempts to vote in any other precinct or ward than that wherein he resides, his vote must be rejected.

1874-5 Ala. Acts No. 18, 76, 82, § 29. This provision has been codified, amended, and recodified in every Code of Alabama since 1876, with the current version in section 17-7-13 of the Code of Alabama. Section 17-7-13 currently provides as follows:

At all elections held within this state, the elector shall vote in the county and precinct of his or her residence and nowhere else and shall have registered as provided in this title. If any elector attempts to vote in any precinct other than that of his or her residence, his or her vote shall be rejected, except when casting a provisional ballot, as provided by law.

ALA. CODE § 17-7-13 (Supp. 2004).

After Congress enacted HAVA, the Legislature amended section 17-7-13 to provide for provisional ballots. See 2003 Ala. Acts No. 2003-313, 733, 749. The amendment did not, however, alter state law providing that “[a] vote cast at a place other the voting place at which the voter is entitled to vote shall be illegal” and should not be counted. ALA. CODE § 17-5A-6 (Supp. 2004). The amendment to section 17-7-13 recognizes the ability of a voter to cast a provisional ballot and requires that the provisional ballot be accepted by the polling officials. During the week following the election, a determination is made by the board of registrars as to whether the provisional ballot is due to be

Honorable Virginia Delchamps
Honorable Don Davis
Page 7

counted. This determination must be made in accordance with Alabama election laws.

Alabama law does not authorize the counting of provisional ballots cast at the wrong precinct. Moreover, HAVA does not displace state laws requiring voters to vote in the precinct and voting place of their residence. *Sandusky County Democratic Party v. Blackwell*, 387 F. 3d 565, 578 (6th Cir. 2004). The written affirmation that a voter must execute to cast a provisional ballot states that "I do solemnly swear (or affirm) that I am a registered voter *in the precinct in which I am seeking to vote* and that I am eligible to vote in this election." ALA. CODE § 17-10A-2(b)(2) (Supp. 2004) (emphasis added). The appointing board is only allowed to count "provisional ballots which have been certified by the board of registrars as cast by registered and qualified voters *of the precincts in which such ballots were cast.*" ALA. CODE § 17-10A-2(f) (emphasis added).

The regulations promulgated by the Office of the Secretary of State of Alabama likewise recognize that HAVA does not displace the requirement under Alabama law that voters must vote in their assigned precinct. Those regulations provide that "[t]he provisional ballot officer shall . . . use reasonable efforts to contact the county board of registrars and/or members of the appointing board to determine whether or not the individual is eligible to vote *in that precinct.*" ALA. ADMIN. CODE r. 820-2-6-.04 (eff. July 1, 2004) (emphasis added).

Your first question involves a situation where a voter casts a provisional ballot at the precinct in which the voter's residence is located and the voter is not listed as a registered voter in that precinct, but the voter is registered to vote in another precinct located within the county. (Essentially, the voter failed to update his or her voter registration information before the election.) In this situation, the voter would complete a voter reidentification form along with the provisional ballot. If the reidentification form shows that the voter's residence is located in the precinct where the vote is offered, the board would use that voter's reidentification form to update that voter's registration. The board would review the poll lists from the precinct where the voter's name appears on the list and, if the voter did not cast a ballot at that precinct, the board should certify that the provisional ballot be counted.

The answer to Question One would be different if the voter were registered in a county other than the one where the provisional ballot is offered. Section 17-4-125 of the Code of Alabama requires a voter who is registered in one county and who moves to another county to register to vote in the new county. ALA. CODE § 17-4-125 (1995). Accordingly, if a voter casts a provisional ballot in the new county in which the voter resides, where the voter has not registered to vote, the board cannot certify the counting of that ballot

Honorable Virginia Delchamps
Honorable Don Davis
Page 8

because the voter was not registered in the new county. A voter must reside in the precinct in the county where he or she seeks to vote and must be registered to vote in that county.

Your second question involves a voter who does not reside in the precinct and is not registered in the precinct in which the provisional ballot is cast. The board of registrars should not certify that a provisional ballot be counted if the voter does not reside in the precinct and the voter is not registered to vote in the precinct where he or she is attempting to cast a ballot. ALA. CODE § 17-7-13 (Supp. 2004).

The third question concerns a voter who cast a provisional ballot at the precinct where the voter is on the registration list, but the inspector challenges that vote on the basis that the voter does not reside in the precinct. The board must review the statements provided by the inspector that support the inspector's belief that the voter is not entitled to vote in that precinct. The board must also contact the voter and allow the voter an opportunity to respond to whether the voter resides in that precinct and whether his or her vote should be counted. ALA. CODE § 17-10A-2(e) (Supp. 2004).

The Alabama Supreme Court has provided guidance in determining a voter's residency. The term "residency," when used in connection with political rights, is synonymous with "domicile." *Harris v. McKenzie*, 703 So. 2d 309 (Ala. 1997); *Mitchell v. Kinney*, 242 Ala. 196, 5 So. 2d 788 (1942). To establish a domicile, an individual must establish residence with the intention to remain permanently or for an unlimited time. *Osborn v. O'Barr*, 401 So. 2d 773 (Ala. 1981). With respect to the residency of a voter, the Alabama Supreme Court has stated the following:

A voter having acquired a legal residence, been duly registered as a voter of the county and precinct or ward . . . may retain such residence until he has abandoned and removed therefrom with the intent to become a resident elsewhere. Temporary absence from one's residence for the purposes of his employment and the like, without the intent to abandon the home town and acquire a domicile elsewhere permanently, or for an indefinite time, does not forfeit his right to vote.

Jacobs v. Ryals, 401 So. 2d 776, 778 (Ala. 1981) (quoting *Wilkerson v. Lee*, 236 Ala. 104, 181 So. 296 (1938)). Accordingly, if the board determines from all the information provided that the voter is not a resident of the precinct where he

Honorable Virginia Delchamps
Honorable Don Davis
Page 9

or she casts a ballot, the board should not authorize the appointing board to count that provisional ballot.

CONCLUSION

The board of registrars has the duty to determine whether provisional ballots are entitled to be counted, and the appointing board has the duty to tabulate the provisional ballots that have been certified by the board.

If a voter casts a provisional ballot at a precinct in which the voter's residence is located and the voter is not registered to vote in that precinct, but the voter is registered to vote in another precinct located within the county when the ballot is to be cast, the board of registrars would use that voter's reidentification form, completed at the polling place, to update that voter's registration and should then certify that the provisional ballot be counted.

The board of registrars should not certify that a provisional ballot be counted if the voter does not reside in the precinct and is not registered to vote in the precinct where he or she is attempting to vote.

If the board determines that a voter is not a resident of the precinct in which the provisional ballot was cast, the board should not certify the counting of that provisional ballot.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Brenda F. Smith of my staff.

Sincerely,

TROY KING
Attorney General

By:



BRENDA F. SMITH
Chief, Opinions Division

TK/BFS
174011v3/72424