

Dwight Shellman

From: Andrea Gyger
Sent: Tuesday, October 08, 2013 4:07 PM
To: Dwight Shellman
Subject: Fwd: Letter from Boulder County on proposed Election rules
Attachments: 10-8-13 Letter to SOS Re Proposed Election Rules.pdf; ATT00001.htm; ATT00001.txt; ATT00002.htm

Sent from my iPhone

Begin forwarded message:

From: "Hall, Hillary" <hhall@bouldercounty.org>
To: "SoS Rulemaking" <SoS.Rulemaking@SOS.STATE.CO.US>
Subject: Letter from Boulder County on proposed Election rules

Dear Secretary Gessler,

Please accept the attached letter in response to the proposed election rules. I appreciate all the time and effort that went into the review by all parties. In addition to our letter, our county supports the comments made by the Election Statute Review Committee of the Colorado Clerk's Association.

Hillary Hall
Boulder County Clerk ad Recorder

10-8-13 Letter to SOS Re Proposed Election Rules.pdf attached



Office of the County Attorney

Phone: 303.441.3190 · Fax: 303.441.4794 · Email: ca@bouldercounty.org
Mailing Address: Post Office Box 471 · Boulder, Colorado 80306 · www.bouldercounty.org

October 8, 2013

Hon. Scott Gessler
Colorado Secretary of State
1700 Broadway Suite 250
Denver, CO 80209

Via e-mail to SoS.Rulemaking@sos.state.co.us

RE: Proposed Election Rules

Dear Secretary Gessler:

These comments are made on behalf of Boulder County Clerk and Recorder Hillary Hall on several proposed election rules included in the draft proposed version dated October 1, 2013. In addition, Clerk Hall supports the comments and changes recommended by the Election Statute Review Committee of the Colorado County Clerk's Association.

Clerk Hall's concerned with the proposed rules that deviate from statutes adopted by the General Assembly in the Colorado Election Code. These deviations will result in Election Rules that purportedly require county clerks to conduct certain aspects of an election contrary to the manner prescribed by law. Such incongruities will create the potential for confusion, disagreement, and litigation. For this reason, Clerk Hall urges the Secretary to change the proposed election rules as follows:

1. **Proposed Rules 1.1.7(c) and 1.11.11**

This proposed rule adopts a new and expanded definition of "damaged ballot." Under the Election Code, a damaged ballot is a ballot that is "damaged or defective *so that it cannot be properly counted by the electronic vote-county equipment.*" C.R.S. § 1-7-508 (emphasis added). The term is defined this way in statute so that election officials know the appropriate (and limited) circumstances under which duplicate copies of a ballot must be made. The General Assembly appropriately defined the specific circumstances under which duplicate ballot is necessary because the duplication process unavoidably (1) slows the processing and counting of ballots and (2) creates the potential for human error by duplicating votes from one ballot to another.

The proposed rule identifies damaged ballots as "ballots that the elector marked in a way that would disclose his or her identity." This definition is contrary to the

commonly understood meaning of “damage, and the result is a requirement that Clerks create duplicate ballots in circumstances other than those established by the Election Code. The new requirement is emphasized in proposed rule 1.1.11, which defines a duplicate ballot as one “for which a true copy must be made . . . because of . . . improper marking . . .” Depending on how these new rules are interpreted, this could require the duplication of hundreds if not thousands of ballots during the course of an election, inducing into the election process the efficiency and accuracy pitfalls the General Assembly sought to avoid. For these reasons, these rules should be modified or eliminated to avoid a situation in which the Secretary has exceeded his authority and enacted a rule that jeopardizes the integrity of Colorado elections.

2. Proposed Rule 1.1.13

This proposed rule alters and expands the definition of “election official” to include “Secretary of State Staff” within the definition of Election Official. The term “election official” is defined by statute as: “any county clerk and recorder, election judge, member of a canvassing board, member of a board of county commissioners, member of a board of directors authorized to conduct public elections, representatives of a governing body, or other person contracting or engaged in the performance of election duties.” C.R.S. § 1-1-104(10). In crafting this definition, the General Assembly was aware of the existence of the office of the Secretary of State because that office is referred to numerous times throughout the Election Code. Therefore, under common rules of statutory interpretation, it can be assumed that the General Assembly intended to exclude the Secretary from this definition. The reason for this exclusion is apparent: “election officials” are local or regional officials and their appointees who are in charge of their own elections.

The decision to exclude a statewide official from this definition is consistent with Colorado’s longstanding tradition of preserving and protecting local government authority, including the authority of County Clerks to run their own elections. Clerk Hall believes that voters in Boulder County—and other jurisdictions throughout the state—will be dismayed to learn about an election rule that upsets the carefully crafted state/local balance established by the General Assembly. For these reasons, this proposed rule should be modified or eliminated to avoid a situation in which the Secretary has exceeded his authority and interfered with the duties of an elected local office established by the Colorado Constitution.

3. Proposed Rule 1.1.37

This proposed rule alters and expands the definition of “voting system.” The Election Code defines a “voting system” as “a process of casting, recording, and tabulating votes using electromechanical or electronic devices or ballot cards and includes, but is not limited to, the procedures for casting and processing votes and the operating manuals, hardware, firmware, printouts, and software necessary to operate the voting system.” The broadening of this definition goes beyond what was contemplated by the General Assembly in its definition. Further, the proposed language is so broad and

vague that it will create confusion and uncertainty related to certification of voting systems. The proposed rule makes it unclear what practices and associated documentation must be certified, how that certification takes place, and what standards the Secretary will use to make such a determination. For these reasons, this proposed rule should be modified or eliminated to avoid a situation in which the Secretary has exceeded his authority and injected confusion and uncertainty into Colorado Elections.

4. Proposed Rule 8.4.2(b)

This rule is contrary to the precautions the General Assembly established related to voting equipment and voting booths in the Election Code. Specifically, C.R.S. § 1-5-503 states: “The voting equipment or voting booths and the ballot box shall be situated in the polling location so as to be in plain view of the election officials and watchers. No person other than the election officials and those admitted for the purpose of voting are permitted within the immediate voting area, which is considered as within six feet of the voting equipment or voting booths and the ballot box, except by authority of the election judges or the designated election official, and then only when necessary to keep order and enforce the law.” The statutory language is specific regarding watchers, establishing that the equipment must be in “plain view” but prohibiting watchers within six feet of the voting area. No exception allows watchers to enter the voting area when a voter is not voting. Moreover, the Election Code places the authority to make exceptions to the prohibition in the hands of designated election official, not the Secretary, and such exceptions may only be made when necessary to keep order and enforce the law. For these reasons, this proposed rule should be modified or eliminated to avoid a situation in which the Secretary has exceeded his authority and interfered with a duty assigned to the designated election official.

In addition to the legal issue expressed above, Clerk Hall is concerned with many of the other numerous changes and additions proposed throughout Rule 8.4. The new rule is riddled with vague terms, inconsistencies, and language that, depending on how it is interpreted, could be contrary to the statutorily-established roles of watchers. If the Secretary believes that his current watcher rules are inadequate, Clerk Hall recommends that he delay implementation of changes to Rule 8.4 until 2014, during which time the Secretary and the Colorado Clerks Association could work together to develop a clearer and more workable rule.

5. Proposed Rule 17.1.2

This proposed rule indicates that provisional ballots issued at a voter service and polling center when the center loses connectivity to SCORE. This rule skips a step provided for by statute. Specifically, C.R.S. § 1-5-102.9(3.5) states: “If an elector desires to vote by casting a ballot at a voter service and polling center but there are technical problems accessing the centralized statewide voter registration system maintained pursuant to 1-2-301 at the voter service and polling center, and his or her

Hon. Scott Gessler

October 8, 2013

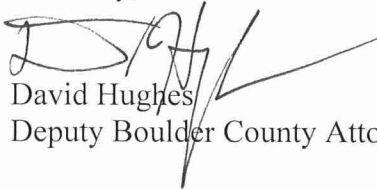
Page 4

eligibility cannot be verified by a voter service and polling center election judge after the judge contacts the county clerk and recorder by telephone or electronic mail, if practicable, the elector is entitled to cast a provisional ballot in accordance with article 8.5 of this title.” As a result, proposed rule 17.1.2 should be changed to reflect the telephone confirmation process outlined in the Election Code.

In addition to the major concerns above, Clerk Hall wishes to point an apparent clerical error on p.64, line 7 of the draft rules, where the referenced number should be “D” rather than “E.”

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Hughes', with a long horizontal stroke extending to the right.

David Hughes
Deputy Boulder County Attorney