Ohio Legislative Service Commission

Bill Analysis   Emily E. Wendel

Sub. S.B. 296
131st General Assembly
(As Passed by the Senate)

Sens.   Seitz, Coley, Jones, Hite, Burke, Bacon, Jordan, Uecker, Patton, Eklund, Hackett

BILL SUMMARY

Pre-election court procedure

- Requires a person who files an election-related court action to file the action in the Ohio Supreme Court or in the appropriate court of appeals if the action is filed during the 50 days before Election Day and the action is one over which the Supreme Court and the courts of appeals have original jurisdiction.

Election Day court procedure

- Allows a person who seeks a court order that a polling place be kept open for extended hours on Election Day to file a petition in the county court of common pleas.

- Requires the petitioner to post a cash bond in an amount determined by the court, considering the cost of keeping the requested polling places open for the requested period of time, based on a board of elections estimate that includes the cost of compensating precinct election officials at a specified overtime rate.

- Requires the court to waive the bond requirement if the petitioner is indigent, but specifies that the court may extend polling hours only for the petitioner personally to vote if no bond has been posted.

- Specifies that if the court extends the polling hours but the decision is later overturned, the court may order that the bond be forfeited to the board of elections and that the petitioner pay the board any additional amount necessary to cover the cost of keeping the polls open during that time.

- Requires the petitioner to serve notice of the petition on the Secretary of State and the Attorney General, and requires the court to allow those officers or their designees to be heard in the case.

- Allows the court to order that the polls be kept open only if the petitioner has proved by clear and convincing evidence that no prospect of a fair election exists in the absence of the order, if certain evidentiary requirements are met, and if the procedures described above have been followed.

- Provides that an order to keep the polls open is subject to immediate appeal to a special Election Day panel of the court of appeals.

Provisional ballots

- Requires a person who votes after the close of the polls because of a court order to cast a provisional ballot, and specifies the procedure for processing that ballot.

CONTENT AND OPERATION

Pre-election court procedure

The bill requires a person who files an election-related court action to file the action in the Ohio Supreme Court or in the appropriate court of appeals – not in a court of common pleas – if all of the following apply:

- The action is filed during the period beginning on the 50th day before the day of an election and ending on the day before the day of that election.

- The action seeks a court order to modify the laws or procedures that the Secretary of State or a board of elections will follow in administering that election.

- The action is one over which the Ohio Constitution gives the Supreme Court and the courts of appeals original jurisdiction.

Under continuing law, the Supreme Court and the courts of appeals have original jurisdiction over certain types of legal actions. Elections cases often involve some of those types of actions, such as actions in quo warranto (challenging an official's exercise of power), mandamus (seeking to require an official to perform a particular

act), and prohibition (seeking to prevent a judicial or quasi-judicial authority from exceeding its jurisdiction).[1]

Election Day court procedure

The bill establishes several requirements that must be met in order for a court to order that a polling place be kept open for extended hours on the day of an election. (The bill applies only to cases filed in Ohio courts. If a person filed a complaint in a federal court seeking extended polling hours, the bill would not affect that action because federal law determines the procedures for federal courts.)

Expenses

Bond requirement

If a person seeks a court order that one or more polling places in a county remain open past the time for the closing of the polls, the bill allows the person to file a petition in the court of common pleas of that county. (Under continuing law, the polls generally close at 7:30 p.m., although a person who is waiting in line at that time may vote.) The petitioner must post a cash bond with the court clerk in an amount determined by the court in accordance with Civil Rule 65, which generally requires a bond to obtain a temporary restraining order or a preliminary injunction. In determining the amount of the bond, the court must consider the cost of keeping the requested polling places open for the requested period of time, based on the board of elections estimate discussed below.

If the court determines that the petitioner is indigent, the court must waive the bond requirement; in no other case may the court waive the bond. But, if no bond has been posted and the court extends the polling hours for one or more polling places, the court's order must allow the petitioner or petitioners, but no other person, to vote during that time.[2]

Estimate of expenses and overtime pay

Under the bill, before the day of an election, each board of elections must prepare an estimate of the hourly cost of keeping a polling place in the county open after 7:30 p.m. The estimate must include the cost of compensating the precinct election officials at an overtime rate of $22.50 per hour, as adjusted for inflation. Beginning in 2017, the Secretary of State must adjust that rate in January of each year according to the

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[1] R.C. 3501.40. See also Ohio Const. Art. IV, Sec. 2(B)(1) and 3(B)(1).

[2] R.C. 3501.32 and 3501.321(A) and (B)(2). See also Ohio Rules of Civil Procedure, Rule 65(C), available at supremecourt.ohio.gov/LegalResources/Rules/civil/CivilProcedure.pdf, accessed May 11, 2016.

percentage change in the federal Consumer Price Index. (Currently, precinct election officials earn a maximum of $133.72 per day.) The board must file the estimate with the Secretary of State, and the Secretary of State must make the estimate available on the Secretary's official website not later than 6:30 a.m. on Election Day.[3]

Disposition of bond and additional payment

If the petition does not result in any polling places remaining open past 7:30 p.m., or if the petition results in one or more polling places remaining open and the court's decision is not overturned, the bond is returned to the petitioner. However, if the petition results in one or more polling places remaining open past 7:30 p.m. and a court of competent jurisdiction later makes an unappealed final ruling that the ballots cast during that time are not eligible to be counted, the court of common pleas may order that the bond be forfeited to the board of elections, up to the amount of the total cost the board incurred as a result of keeping the polls open. Further, if the amount of the bond is less than that total cost, the court may order the petitioner to pay the board the amount necessary to cover that total cost.

Upon receiving a payment, the board must determine the portion of the total cost that was paid by the state, the county, and each political subdivision, as applicable, and refund that amount to each entity. If the amount of the payment is less than the total cost, the board must divide the amount of the payment by the total cost, multiply the quotient by the amount each governmental entity paid, and refund the resulting amount to each governmental entity. (For example, if the payment covers 75% of the cost of keeping the polls open, each governmental entity receives a refund of 75% of its portion of the cost.)[4]

Notice to Secretary of State and Attorney General

Upon filing a petition to keep the polls open, the petitioner must serve notice of the petition on the Secretary of State and the Attorney General. As is discussed below, the court must afford those officers or their designees an opportunity to be heard in the case.[5]

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[3] R.C. 3501.17(K)(1), 3501.28, and 3501.32 and Ohio Secretary of State, *Election Official Manual* at 2-91 (2015), available at sos.state.oh.us/sos/upload/elections/EOResources/general/2015EOM.pdf, accessed April 14, 2016.

[4] R.C. 3501.17(K)(2) and 3501.321(D).

[5] R.C. 3501.321(A)(1) and (B)(1)(b).

Conditions for court order

The bill specifies that when a petition is filed in a court of common pleas, seeking an order to keep the polls open for extended hours, the court may issue the order only if all of the following conditions are met:[6]

- The petitioner has posted the required bond, unless the court has determined that the petitioner is indigent. If the petitioner is indigent, the court may allow only the petitioner to vote after the close of the polls (see "**Bond requirement**," above).

- The petitioner has served notice of the petition on the Secretary of State and the Attorney General.

- The court has afforded the Secretary of State and the Attorney General or their designees an opportunity to be heard in the case.

- The petitioner has proved by clear and convincing evidence that no prospect of a fair election exists in the absence of the order.

- The court's decision is based solely on testimonial evidence submitted under oath and on any physical evidence submitted to the court. The court must not consider evidence gathered from a media report that is not submitted under oath and must not consider hearsay.

Appeal

The bill requires each court of appeals to establish a special Election Day panel for each day on which an election is held in the court's territory. The panel must be available upon instant notice to hear and determine any appeals of orders to extend polling hours. If a court of common pleas issues an order extending the polling hours, the order is subject to immediate appeal to the panel and, if it is appealed, the order must be stayed pending the panel's decision. The panel must decide the appeal immediately, without briefing, based on oral arguments and on the evidence submitted to the lower court. The panel's decision is subject to appeal in the same manner as any other decision of the court of appeals.

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[6] R.C. 3501.32 and 3501.321(B).

If a court of common pleas denies a petition to keep the polls open, the denial is not subject to immediate appeal to the panel. Instead, the order is subject to appeal in the same manner as any other court decision.[7]

Provisional ballots

The bill requires a person who votes after the close of the polls because of a court order to cast a provisional ballot. Then, the board of elections must wait until the 11th day after the day of the election to examine the ballot. If, at the time the board examines the ballot, a court has entered an unappealed final order that ballots cast after 7:30 p.m. are not eligible to be counted, the board must not count the ballot (see **COMMENT**).[8]

The Secretary of State currently directs election officials to require any person who votes after the close of the polls under a court order to cast a provisional ballot. The election officials mark those ballots as being cast during that time and keep those ballots separate from other provisional ballots.[9]

COMMENT

The bill requires a person who votes after the close of the polls because of a court order to cast a provisional ballot. If the order is reversed, the ballot must not be counted. The As Introduced version of the bill required the precinct election officials to note on the provisional ballot affirmation that the ballot was cast under those circumstances, but the current version of the bill does not include that requirement. As a result, it will not be possible to tell by examining a provisional ballot affirmation that the ballot was cast after the close of the polls, unless the precinct election officials take some other action not contemplated in the bill to keep the ballot separate from other provisional ballots.

HISTORY

ACTION	DATE
Introduced	03-14-16
Reported, S. Civil Justice	05-11-16
Passed Senate (23-10)	05-11-16

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[7] R.C. 2505.40 and 3501.321(C).

[8] R.C. 3505.18(C), 3505.181(A)(8), and 3505.183.

[9] Ohio Secretary of State, *Election Official Manual* at 7-39 (2015), available at sos.state.oh.us/sos/upload/elections/EOResources/general/2015EOM.pdf, accessed April 14, 2016.