



Ohio Legislative Service Commission

Final Analysis

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Sub. S.B. 296

131st General Assembly
(As Passed by the General Assembly)

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

Reps. Blessing, Buchy, Green, McColley, Antani, Brenner, McClain, Retherford, Schaffer, Sears, Slaby, R. Smith, Terhar, Young

Effective Date: Vetoed

ACT SUMMARY

Pre-election court procedure

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

Election Day court procedure

- Would have allowed a person who sought 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.
- Would have required the petitioner to serve notice of the petition on the Secretary of State and the Attorney General, and would have required the court to allow those officers or their designees to be heard in the case.
- Would have allowed the court to order that the polls be kept open only if the petitioner had proved by clear and convincing evidence that no prospect of a fair election existed without the order, if certain evidentiary requirements were met, and if the procedures described above had been followed.
- Would have prohibited a court order to keep the polls open from becoming effective until the petitioner had posted a bond in an amount determined by the court, considering the cost of keeping the requested polling places open for the requested

time period, based on a board of elections estimate that included the cost of compensating precinct election officials at a specified overtime rate.

- Would have required the court to waive the bond requirement if the petitioner was indigent, but would have allowed the court to extend polling hours only for the petitioner personally to vote if no bond had been posted.
- Would have allowed the court, if the court extended the polling hours but the decision was later overturned, to 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.
- Would have made an order to keep the polls open subject to immediate appeal to a special Election Day panel of the court of appeals.

Provisional ballots

- Would have required a person who voted after the close of the polls because of a court order to cast a provisional ballot, and would have specified the procedure for processing that ballot.

CONTENT AND OPERATION

Pre-election court procedure

The act would have required a person who filed 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 applied:

- The action was filed between the 50th day before Election Day and the day before Election Day.
- The action sought a court order to modify the laws or procedures that the Secretary of State or a board of elections would follow in administering that election.
- The action was one over which the Ohio Constitution gives the Supreme Court and the courts of appeals original jurisdiction.

Under the Ohio Constitution, 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 act would have established several requirements that must have been met for a court to order that a polling place be kept open for extended hours on Election Day. (The act would have applied only to cases filed in Ohio courts. If a person filed a complaint in a federal court seeking extended polling hours, the act would not have affected that action because federal law determines the procedures for federal courts.)

If a person sought a court order that one or more polling places in a county remain open past the time for the closing of the polls, the act would have allowed the person to file a petition in the court of common pleas of that county. Under current law, which the act would not have changed, the polls generally close at 7:30 p.m., although a person who is waiting in line at that time may vote.²

Notice to Secretary of State and Attorney General

Upon filing a petition to keep the polls open, the petitioner would have been required to serve notice of the petition on the Secretary of State and the Attorney General. As discussed below, the court would have been required to afford those officers or their designees an opportunity to be heard in the case.³

Conditions for court order

Under the act, when a petition was filed in a court of common pleas, seeking an order to keep the polls open for extended hours, the court would have been allowed to issue the order only if all of the following conditions were met:⁴

- The petitioner had served notice of the petition on the Secretary of State and the Attorney General.
- The court had afforded the Secretary of State and the Attorney General or their designees an opportunity to be heard in the case.

¹ R.C. 3501.40; See also Ohio Constitution Article IV, Section 2(B)(1) and 3(B)(1).

² R.C. 3501.32 and 3501.321(A).

³ R.C. 3501.321(A)(1) and (B)(1)(b).

⁴ R.C. 3501.32 and 3501.321(B).



- The petitioner had proved by clear and convincing evidence that no prospect of a fair election existed without the order.
- The court's decision was based solely on testimonial evidence submitted under oath and on any physical evidence submitted to the court. The court could not have considered evidence gathered from a media report that was not submitted under oath and could not have considered hearsay.

Expenses

Bond requirement

A court order to keep the polls open could not have become effective until the petitioner had posted a 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. Under that rule, a bond may be a surety bond (a contract in which a person agrees to pay the amount if necessary), cash, a cashier's check, a certified check, or negotiable government bonds. In determining the bond amount, the court would have been required to 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 determined that the petitioner was indigent, the court would have been required to waive the bond requirement; in no other case could the court waive the bond. But, if no bond had been posted and the court extended the polling hours for one or more polling places, the court's order would have been required to allow the petitioner or petitioners, but no other person, to vote during that time.⁵

Estimate of expenses and overtime pay

Under the act, before Election Day, each board of elections would have been required to prepare an estimate of the hourly cost of keeping a polling place in the county open after 7:30 p.m. The estimate would have included 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 would have been required to adjust that rate each January according to the percentage change in the federal Consumer Price Index. The board would have filed the estimate with the Secretary of State, and the Secretary would have been required to make the estimate available on the Secretary's official website not later than 6:30 a.m. on Election Day.

⁵ R.C. 3501.321(B)(2). See also Ohio Rules of Civil Procedure, Rule 65(C), available at supremecourt.ohio.gov/LegalResources/Rules/civil/CivilProcedure.pdf.

Precinct election officials earn a maximum daily amount that is set in statute and adjusted for inflation. In 2016, the maximum daily pay for a precinct election official is \$133.72. The act would have allowed a precinct election official who worked overtime because of a court order to earn the overtime rate specified in the act in addition to that daily maximum amount.⁶

Disposition of bond and additional payment

If the court's order to keep the polls open past 7:30 p.m. was not enforced because it was reversed on appeal, or if the order was enforced and the court's decision was not overturned, the act would have required the court to return the bond to the petitioner. However, if the petition resulted in polling places remaining open past 7:30 p.m. and a court later made an unappealed final ruling that the ballots cast during that time were not eligible to be counted, the court of common pleas could have ordered that the bond be forfeited to the board of elections, up to the amount of the board's total costs from keeping the polls open. Further, if the bond amount was less than that total cost, the court could have ordered the petitioner to pay the board the difference.

Upon receiving a payment, the board would have been required to determine the portion of the total cost that was paid by the state, the county, and each political subdivision and refund that amount to each entity. If the payment was less than the total cost, the board would have been required to divide 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 covered 75% of the cost of keeping the polls open, each governmental entity would have received a refund of 75% of its portion of the cost.)⁷

Appeal

The act would have required each court of appeals to establish a special panel for each Election Day in the court's territory. The Election Day panel would have been required to be available upon instant notice to hear and determine any appeals of orders to extend polling hours. If a court of common pleas issued an order extending the polling hours, the order would have been subject to immediate appeal to the panel and, if appealed, the order would have been stayed pending the panel's decision. The act would have required the panel to decide the appeal immediately, without briefing, based on oral arguments and on the evidence submitted to the lower court. The panel's

⁶ 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.

⁷ R.C. 3501.17(K)(2) and 3501.321(D).

decision would have been subject to appeal in the same manner as any other decision of the court of appeals.

If a court of common pleas denied a petition to keep the polls open, the denial would not have been subject to immediate appeal to the panel. Instead, the order would have been subject to appeal in the same manner as any other court decision.⁸

Provisional ballots

The act would have required a person who voted after the close of the polls because of a court order to cast a provisional ballot. Then, the board of elections would have been required to wait until the 11th day after Election Day to examine the ballot. If, at the time the board examined the ballot, a court had entered an unappealed final order that ballots cast after 7:30 p.m. were not eligible to be counted, the act would have prohibited the board from counting the ballot (see **COMMENT**).⁹

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.¹⁰

COMMENT

The act would have required a person who voted after the close of the polls because of a court order to cast a provisional ballot. If the order was reversed, the ballot could not have been counted. However, the act would not have required the precinct election officials to note on the provisional ballot affirmation that the ballot was cast under those circumstances. As a result, it would not have been 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 took some other action not contemplated in the act to keep the ballot separate from other provisional ballots.

⁸ R.C. 2505.40 and 3501.321(C).

⁹ R.C. 3505.18(C), 3505.181(A)(8), and 3505.183.

¹⁰ Ohio Secretary of State, *Election Official Manual* at 7-39 (2015), available at sos.state.oh.us/sos/upload/elections/EOResources/general/2015EOM.pdf.

HISTORY

ACTION	DATE
Introduced	03-14-16
Reported, S. Civil Justice	05-11-16
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