

Provisional Ballots Cast in the Wrong Precinct Because of Poll-Worker Error

Hunter v. Hamilton County Board of Elections
(Susan J. Dlott, S.D. Ohio 1:10-cv-820)

In the 2010 election for Hamilton County Juvenile Court judge, twenty-three votes separated the two candidates with the validity of many provisional ballots unresolved. The trailing candidate filed a federal action to expand the number of provisional ballots deemed valid when she learned that some, but not all, cast in the wrong precinct would be counted if they were cast in the wrong precinct because of poll-worker error. The district court ordered an investigation into which ballots were cast in the wrong precinct because of erroneous instructions from poll workers. A circuit judge stayed the order, but a full panel dissolved the stay one week later. Litigation continued for eighteen months, and then the plaintiff joined the juvenile-court bench.

Subject: Provisional ballots. *Topics:* Provisional ballots; election errors; enjoining certification; interlocutory appeal; equal protection; matters for state courts.

After ballots were counted in the 2010 general election, Tracie Hunter was twenty-three votes behind John Williams in the election for Hamilton County Juvenile Court judge.¹ On Sunday, November 21, Hunter filed a federal action in the Southern District of Ohio’s Cincinnati courthouse, which is in Hamilton County, asking that the vote count include all provisional ballots cast in the wrong precinct because of poll-worker error, noting that the county was counting some such ballots.² “The [elections] board accepted for counting twenty-seven provisional ballots cast at the board’s offices in downtown Cincinnati before Election Day but for which voters, because of poll-worker errors, received ballots from the ‘wrong precinct.’”³

For financial and other administrative reasons, Hamilton County has decided to have some buildings serve as the polling location for several nearby precincts. In such locations, voters must go to the correct “precinct”—i.e., table—within the location to cast a valid ballot. To assist voters in finding the correct table, the County assigns an extra poll worker as a “precinct

1. *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 222 (6th Cir. 2011); *Hunter v. Hamilton Cty. Bd. of Elections*, 850 F. Supp. 2d 795, 799 (S.D. Ohio 2012); see *Service Employees Int’l Union v. Husted*, 887 F. Supp. 2d 761, 774 (S.D. Ohio 2012); see also *Hunter Sues to Block Hamilton County Juvenile Judge Count*, Cincinnati Enquirer, Nov. 23, 2010 (identifying Hunter as a Democrat and Williams as a Republican); Mark Niquette, *Local Case May Set U.S. Voting Precedent*, Columbus Dispatch, Jan. 19, 2011, at 3B (same).

2. Complaint, *Hunter v. Hamilton Cty. Bd. of Elections*, No. 1:10-cv-820 (S.D. Ohio Nov. 21, 2010), D.E. 1; *Hunter*, 635 F.3d at 225; *Hunter*, 850 F. Supp. 2d at 799. See generally Richard L. Hasen, *What to Expect When You’re Electing*, Fed. Law., June 2012, at 35 (summarizing the litigation).

3. Richard L. Hasen, *The Voting Wars* 147 (2012).

guide” at sixteen of its seventeen polling locations with four or more precincts.⁴

With her complaint, Hunter filed a motion for a temporary restraining order and a preliminary injunction.⁵ Williams sought to intervene,⁶ as did the Ohio Democratic Party⁷ and the Northeast Ohio Coalition for the Homeless.⁸

The court assigned the case to Judge Susan J. Dlott, who held a hearing from 4:50 to 8:05 p.m. on the following day, after a full day on the bench presiding over another case.⁹ Because the proceeding was not *ex parte*, she regarded the applicable motion as one for a preliminary injunction.¹⁰

That evening, Judge Dlott granted the intervention motions.¹¹ She also granted a preliminary injunction, requiring Hamilton County to investigate whether provisional ballots cast in the wrong precincts were so cast because of poll-worker errors, so that the county could apply a uniform policy of whether to count them.¹² Because the close election was already subject to a mandatory recount, Judge Dlott declined to enjoin certification of the election.¹³

On the next day, Hamilton County certified Williams the winner by twenty-three votes.¹⁴ On the day after that, the day before Thanksgiving Day, a judge on the court of appeals stayed Judge Dlott’s injunction.¹⁵ The circuit judge ruled alone, “[b]ecause of the exigent nature of the request and the ap-

4. *Hunter*, 635 F.3d at 223; *see also* Hasen, *supra* note 3, at 148.

5. Motion, *Hunter*, No. 1:10-cv-820 (S.D. Ohio Nov. 21, 2010), D.E. 2; *Hunter*, 635 F.3d at 226; *Hunter*, 850 F. Supp. 2d at 799.

6. Williams Motion to Intervene, *Hunter*, No. 1:10-cv-820 (S.D. Ohio Nov. 22, 2010), D.E. 10; *see* Transcript at 4, *id.* (Nov. 22, 2010, filed Nov. 26, 2010), D.E. 18.

7. Ohio Democratic Party Motion to Intervene, *Hunter*, No. 1:10-cv-820 (S.D. Ohio Nov. 22, 2010), D.E. 98; Transcript, *supra* note 6, at 3.

8. NEOCH Motion to Intervene, *Hunter*, No. 1:10-cv-820 (S.D. Ohio Nov. 22, 2010), D.E. 8; Transcript, *supra* note 6, at 3.

9. Docket Sheet, *Hunter*, No. 1:10-cv-820 (S.D. Ohio Nov. 21, 2010) [hereinafter S.D. Ohio Docket Sheet]; Transcript, *supra* note 6, at 3, 133; *Hunter*, 850 F. Supp. 2d at 799; *see Judicial Candidate Tracie Hunter Questions Uncounted Votes*, Cincinnati Enquirer, Nov. 23, 2010.

For this report, Tim Reagan interviewed Judge Dlott and her law clerk Sarah Fairweather by telephone on July 30, 2012.

10. Preliminary Injunction, *Hunter*, No. 1:10-cv-820 (S.D. Ohio Nov. 22, 2010), D.E. 13, 2010 WL 4878957; *Hunter*, 850 F. Supp. 2d at 799–800 n.2.

11. *Hunter*, 850 F. Supp. 2d at 799–800; Transcript, *supra* note 6, at 6–8 (noting no opposition to the motion by Williams); *see Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 226 (6th Cir. 2011).

12. Preliminary Injunction, *supra* note 10, at 1, 5–7, 9; *Hunter*, 635 F.3d at 226; *Hunter*, 850 F. Supp. 2d at 799–800; *see Local Election Fight Now in Federal Court*, Cincinnati Enquirer, Nov. 24, 2010 [hereinafter *Local Election Fight*].

13. Preliminary Injunction, *supra* note 10, at 1, 7–9; *Hunter*, 635 F.3d at 226.

14. *Hunter*, 635 F.3d at 226; Ohio *ex rel. Painter v. Brunner*, 128 Ohio St. 3d 17, 19, 941 N.E.2d 782, 788 (2011); *see Local Election Fight*, *supra* note 12.

15. Stay Order, *Hunter v. Hamilton Cty. Bd. of Elections*, No. 10-4481 (6th Cir. Nov. 24, 2010); *Hunter*, 635 F.3d at 226; *see Cincinnati Appeals Court Blocks Judge Vote Probe*, Cincinnati Enquirer, Nov. 25, 2010.

proaching Thanksgiving holiday.¹⁶ One week later, a full appellate panel dissolved the stay.¹⁷

On December 13, Ohio began to subpoena 2,200 poll workers to investigate whether poll-worker error caused provisional ballots to be cast in incorrect precincts.¹⁸ The term of office for the Juvenile Court position began on January 1, 2011.¹⁹ On Friday, January 7, Ohio's supreme court granted Williams mandamus relief and ordered Ohio to limit its investigation of poll-worker error to the method used to identify the original obvious errors that led to the counting of some incorrectly cast provisional ballots.²⁰ That same day, Ohio's secretary of state issued a directive specifying which types of incorrectly cast provisional ballots would be counted.²¹

On January 10, a new secretary of state for Ohio came to office; he replaced his predecessor's directive with one forbidding the counting of additional provisional ballots.²² On January 12, Judge Dlott nullified by injunction the new secretary's directive and ordered certain categories of incorrectly cast provisional ballots counted by January 22, the deadline for amending certification of the election.²³ On January 14, Judge Dlott enjoined the election results from going into effect until further order of her court.²⁴

On January 27, the court of appeals affirmed Judge Dlott's November 22, 2010, injunction and remanded for further proceedings on which miscast provisional ballots should be counted.²⁵ A retired judge filled the elective position at issue while litigation continued.²⁶

16. Stay Order, *supra* note 15, at 1.

17. Order, *Hunter*, No. 10-4481 (6th Cir. Dec. 1, 2010); *Hunter*, 635 F.3d at 226; *see Rejected Ballots to Be Investigated*, Cincinnati Enquirer, Dec. 2, 2010.

18. *Painter*, 128 Ohio St. 3d at 22, 941 N.E.2d at 790; *see Hunter*, 635 F.3d at 227.

19. *Painter*, 128 Ohio St. 3d at 18, 941 N.E.2d at 786.

20. *Id.* at 33, 941 N.E.2d at 798; *Hunter*, 635 F.3d at 228–29.

21. *Hunter*, 635 F.3d at 228–29; *Hunter v. Hamilton Cty. Bd. of Elections*, 850 F. Supp. 2d 795, 800 (S.D. Ohio 2012); Order at 4–5, *Hunter v. Hamilton Cty. Bd. of Elections*, No. 1:10-cv-820 (S.D. Ohio Jan. 12, 2011), D.E. 39 [hereinafter Jan. 12, 2011, Order].

22. *Hunter*, 635 F.3d at 229–30; Jan. 12, 2011, Order, *supra* note 21, at 5; *see New Secretary of State: Don't Count Provisional Ballots in Contested Vote*, Cincinnati Enquirer, Jan. 11, 2011.

23. Jan. 12, 2011, Order, *supra* note 21, at 1, 10; *Hunter*, 850 F. Supp. 2d at 800; *Hunter*, 635 F.3d at 230–31; *see Judge Choice Thrown Into Chaos*, Cincinnati Enquirer, Jan. 13, 2011.

24. Order, *Hunter*, No. 1:10-cv-820 (S.D. Ohio Jan. 14, 2011), D.E. 47; *Hunter*, 635 F.3d at 231; *see Federal Judge Wants Explanation on Lack of Ballot Count*, Cincinnati Enquirer, Jan. 15, 2011.

25. *Hunter*, 635 F.3d at 247; *Hunter*, 850 F. Supp. 2d at 800, 832–33; *see Appeals Court: Ballots Cast Aside Because of Poll-Worker Error Should Be Counted*, Cincinnati Enquirer, Jan. 28, 2011; Edward B. Foley, *How Fair Can Be Faster: The Lessons of Coleman v. Franken*, 10 Election L.J. 187 (2011) (judging the appellate opinion one of “the most significant implementation[s] of the Equal Protection ruling in *Bush v. Gore*[, 531 U.S. 98 (2000)]”); Daniel P. Tokaji, *Election Law in a Nutshell* 174–75 (2013).

26. *See Juvenile Court Election Now in Federal Court*, Cincinnati Enquirer, July 19, 2011 [hereinafter *Now in Federal Court*].

The case could not be resolved without a full examination of the facts.²⁷ Judge Dlott presided over a three-week injunction trial from July 18 to August 5, 2011.²⁸ On September 29, Hamilton County's other juvenile court judge announced her retirement.²⁹ The governor appointed Williams to fill her seat.³⁰ He would have to run in 2012 for the two years remaining in the unexpired term.³¹

On February 8, 2012, Judge Dlott ordered the counting of provisional ballots cast in the wrong precinct.³² She also observed,

Ohio's precinct-based voting system that delegates to poll workers the duty to ensure that voters are directed to the correct precinct but which provides that provisional ballots cast in the wrong precinct shall not be counted under any circumstance, even where the ballot is miscast due to poll-worker error, is fundamentally unfair and abrogates the Fourteenth Amendment's guarantee of due process of law. However, because Plaintiffs did not challenge the constitutionality of Ohio's election statutes, this Court is without jurisdiction to order a remedy.³³

After the provisional ballots were counted, Hunter was declared the winner, and she joined the juvenile court bench 18 months after election day.³⁴ Appeals from Judge Dlott's final ruling were voluntarily dismissed on July 12.³⁵

Judge Dlott had high praise for the lawyering in this case.³⁶ Although the case was politically charged, the lawyers presented their arguments with great professionalism, and it was difficult to discern political agendas from a casual listen to the conversations.³⁷

27. Interview with Hon. Susan J. Dlott and her law clerk Sarah Fairweather, July 30, 2012 (observing that the capacity for poll-worker error in directing voters to the correct precinct was distressing).

28. S.D. Ohio Docket Sheet, *supra* note 9; *see Now in Federal Court*, *supra* note 26.

29. *See Retirement Adds Uncertainty to Juvenile Court Race*, Cincinnati Enquirer, Sept. 29, 2011.

30. *See Williams Appointed Juvenile Court Judge*, Cincinnati Enquirer, Nov. 11, 2011.

31. *See id.*

32. *Hunter v. Hamilton Cty. Bd. of Elections*, 850 F. Supp. 2d 795, 847 (S.D. Ohio 2012); *see Robert Barnes, In Ohio, a Fight Over Votes Not Counted*, Wash. Post, Aug. 6, 2012, at A1.

33. *Hunter*, 850 F. Supp. 2d at 847; *see Service Employees Int'l Union v. Husted*, 887 F. Supp. 2d 761, 776 (S.D. Ohio 2012) (noting that the jurisdictional defect resulted from the plaintiffs' failure to give proper notice to Ohio's attorney general).

34. *See Bailiff Hire Prompts Questions*, Cincinnati Enquirer, June 17, 2012, at B1; *Will Ohio Count Your Vote*, Cincinnati Enquirer, July 29, 2012, at A1.

35. Orders, *Hunter v. Hamilton Cty. Bd. of Elections*, Nos. 12-3224 and 12-3266 (6th Cir. July 12, 2012).

36. Interview with Hon. Susan J. Dlott and her law clerk Sarah Fairweather, July 30, 2012.

37. *Id.*