



AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO

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Donetta Davidson
Secretary of State
1560 Broadway, Suite 200
Denver, Colorado 80202

Secretary Davidson:

I write to provide comment about the proposed changes to the Secretary of State's Election Rules, which are set for a rulemaking proceeding on Thursday September 30, 2004. Please consider these comments and include them in the administrative record.

The American Civil Liberties Union of Colorado (ACLU) urges the Secretary of State to ensure that persons throughout Colorado who are eligible to vote have the opportunity to register, to vote, and to have their vote counted. This must be achieved by means of clearly-written rules that ensure that uniform standards apply throughout the state.

In recent informal conversations with the Secretary of State's office, the ACLU has already raised questions about the forms being used for voter registration and for provisional ballot affidavits. These forms erroneously state that certain information was required when it was not. Using these forms poses the risk that persons who realize they cannot fulfill the erroneously-listed "requirements" will not bother to complete the forms and thus will be disenfranchised. I appreciate the fact that attorneys in the Secretary of State's office were open to considering these issues and have agreed to change the voter registration form and the provisional ballot affidavit. I hope the Secretary of State will be equally receptive to the comments offered here.

As I will explain further, the proposed rules are sometimes unclear, and some rules appear to contradict others, which of course makes their requirements even less clear. This lack of clarity is particularly dangerous because of the large number of persons throughout the state who must understand and implement the election rules. Vague and confusing rules pose the risk that election officials in one county may understand and implement them differently than election officials in a different county.

Persons without driver's licenses, State of Colorado ID, or social security numbers

Some persons in Colorado do not have a driver's license, do not have a State of Colorado ID card, and have no social security number. The text of the proposed rules fails to

make it sufficiently clear that such persons can register to vote. Moreover, although the rules state that such persons can cast a provisional ballot, other rules seem to suggest, erroneously, that those provisional ballots will not be counted. Accordingly, the proposed rules should be modified to make it absolutely clear that persons in this situation have the right to register to vote, the right to vote, and the right to have their vote counted.

Rule 2.4 states that persons who register to vote in person will be asked to provide a copy of a driver's license, or a Department of Revenue ID card, or the last four digits of their social security number. It would be helpful if this rule were modified to include or to reference the additional provisions that appear in rule 30.3.1 through 30.3.5. At a minimum, it should include the following:

If an applicant for voter registration has not been issued a current and valid Colorado driver's license, or a current and valid identification card issued by the Department of Revenue, or a social security number, the election official shall nevertheless register the voter.

This text parallels the text that is already included in proposed rule 30.3.5.

The ACLU is pleased that the Secretary of State has added rule 30.3.5. As written, however, the rule does not make it clear, as does, for example Rule 30.3.4, that it describes a situation in which the election official must register the elector. The text of Rule 30.3.5 could be improved if it were modified to read as follows.

If an applicant for voter registration has not been issued a current and valid Colorado driver's license, or a current and valid identification card issued by the Department of Revenue, or a social security number, the election official shall nevertheless register the voter. The election official shall assign the application a number (a unique identification number) that will serve to identify the applicant for voter registration purposes.

Counting provisional ballots

As Colorado statutes make clear, Colorado citizens can register to vote even they have never been issued a social security number or a driver's license or a State of Colorado ID card. C.R.S. § 1-2-204(2.5). Yet the regulations fail to make it clear that those persons can vote and have their votes counted. If such persons go to the polls and cannot provide any of the listed identification, then they are entitled to cast a provisional ballot. That ballot should be counted. The proposed rules, however, suggest otherwise.

Before casting a provisional ballot, a voter must first fill out and sign a provisional ballot affidavit. Rule 26.4 specifies the information that the voter must provide in this affidavit. The rule states that the voter must provide either a driver's license number, a State of Colorado ID number, or the last four digits of the elector's social security number. Obviously, a person who has no driver's license, no State of Colorado ID card, and no social security number will not be able to complete the affidavit as required by Rule 26.4.

As I will explain, the rules fail to make it clear that a provisional ballot cast by such a person must be counted, even without the information requested by Rule 26.4. Instead, the rules suggest, erroneously, that any provisional ballot cast by such a person will not be counted.

For example, Rule 26.4 states that the listed information must be provided “so that the designated election official may verify the information and count the provisional ballot.” The title of Rule 26.4.1 states that the provisional ballot affidavit must be “properly completed.”¹ Rule 26.15 specifies that one reason for rejecting a provisional ballot is “Required information is incomplete.” And the text of Rule 26.4.1 states that “if the elector does not complete the provisional ballot affidavit information required by Rule 26.4 (a) through (i), the ballot shall not be counted” All of these statements in the rules convey the erroneous message that a provisional ballot will not be counted if the voter fails to fill out all the information required by Rule 26.4 (a) through (i).

There is one portion of one of the regulations that arguably suggests that a voter without any of the three ID numbers might nevertheless be fortunate enough to cast a provisional ballot that is actually counted. But as written, the text is too vague. It fails to provide sufficient guidance to election officials, and it does not justify confidence that voters who have no identification numbers will not be disenfranchised. The full text of Rule 26.4.1 states as follows:

Pursuant to C.R.S. 1-9-301(6), if the elector does not complete the provisional ballot affidavit information required by Rule 26.4 (a) through (i), the ballot shall not be counted unless the county clerk and recorder or designated election official determines that the elector was properly registered in the precinct and county.

The underlined portion of the proposed regulation arguably permits, as it should, the counting of a provisional ballot even when the voter has no social security number, no driver’s license, and no State of Colorado ID card. But as written, the text leaves much to be desired.

First, Rule 26.4.1 is drafted as though the county clerk and recorder has the option of saving an provisional ballot affidavit by determining the elector is registered. The rule should be revised to make it clear that election officials have a mandatory duty to determine whether the voter is registered. Second, the rule as drafted puts the primary emphasis on rejecting the provisional ballot if the affidavit is not complete, rather than placing the primary emphasis on the election official’s duty to determine whether the elector is registered. Third, Rule 26.4.1 is overly broad because it provides that a provisional ballot may be rejected because the affidavit is not complete, even if the missing information is not

¹ The title of proposed Rule 26.4.1 states “Provisional Ballots Must be Properly Completed and the Elector Must be Properly Registered.” It appears that this title erroneously refers to the ballots rather than the affidavits.

essential to the task of determining whether the elector is registered or not.² Finally, Rule 26.4.1 introduces needless confusion by suggesting that the test for validating a provisional ballot is whether the elector is “properly” registered, instead of whether the elector is registered.³

The text of Rule 26.4.1 must be rewritten. A good starting point for a model is Rule 5.5.7, which deals with evaluating provisional ballots in non-partisan elections that are not coordinated by the county clerk. That rule states as follows:

5.5.7 Verification of Information in Provisional Ballot Affidavit. The Designated Election Official shall verify the information contained in the provisional ballot affidavit pursuant to Rule 26. If the information contained in the affidavit provides adequate criteria such that the designated election official, using the rule 26 search, can ascertain the eligibility of the elector, the provisional ballot shall count.

(emphasis added). Rule 26.4.1 should be modified so that it clearly states, as does Rule 5.5.7, that the primary consideration is whether the affidavit provides enough information to determine whether the voter is registered, and that election officials must attempt to confirm registration before rejecting a provisional ballot affidavit. Rule 26.4.1 should also state clearly, as does Rule 5.5.7, that when the elector determines that the voter is registered, then the provisional ballot shall be counted.

Rule 26.8

Rule 26.8 lists the databases that must be checked to verify that an elector casting a provisional ballot is registered to vote. This rule should be revised so that it states what is currently included only in the comment to the rule: that the election official is searching the databases only to confirm that the elector is registered and is therefore eligible to vote. Without such a clarification, there is the risk that election officials could mistakenly believe that they must confirm all of the information contained in the provisional ballot affidavit. Such a misunderstanding would result in disenfranchising persons who are registered to vote but whose registration records do not happen to include information that may

² In addition, the comment that appears in the proposed rules after Rule 26.4.1 confuses rather than clarifies: the comment address the necessity of offering a provisional ballot to persons who do not show ID at the polls, but the text of Rule 26.4.1 concerns the different issue of whether a provisional ballot will be counted.

³ Although the term “properly registered” appears in the title and the text of Rule 26.4.1, the term is not defined anywhere in the rules. If the Secretary of State intends to distinguish, for purposes of counting provisional ballots, between persons who are “properly registered” and persons who are merely “registered,” then the term “properly registered” must be clearly defined in the rules. This point is especially critical if the Secretary of State regards voters who are “tagged” pursuant to Rule 30.6 as not being “properly” registered. (See additional discussion at page six.)

appear in the provisional ballot affidavit, such as the last four digits of the social security number.

Grounds for rejecting provisional ballots

Rule 26.12

This rule lists grounds for rejecting provisional ballots. In order to further the goal of clarity, this rule should provide a complete list of the possible grounds for rejecting provisional ballots. The current text, however, leaves open the possibility that the list in this rule is not exhaustive. Such a reading is supported by Rule 26.15, which lists rejection codes and includes some grounds for rejecting provisional ballots that do not appear in Rule 26.12. Rule 26.12 should be re-drafted to make it clear that the grounds listed here are the only grounds for rejecting a provisional ballot.

Rule 26.15

Rule 26.15 spells out various codes to correspond with various reasons for rejecting provisional ballots. This rule provides rejection codes that do not correspond to the reasons for rejecting provisional ballots that are enumerated in Rule 26.12. This rule should be re-drafted, in coordination with the re-drafting of Rule 26.12. All of the possible reasons for rejecting a provisional ballot should be listed in Rule 26.12. The rejection codes that correspond to each of the reasons should be listed and defined in Rule 26.15.

Rule 26.15 also contains rejection codes and definitions that are problematic. For example, Rule 26.15 states that the INC rejection code will be used when “Required information is incomplete.” The rule does not explain what information is “required.” In the absence of any explanation, it appears that this rejection code applies when a provisional ballot affidavit does not include all of the information required by Rule 26.4. Thus, this portion of Rule 26.15 suggests, erroneously, that a provisional ballot must be rejected when the voter does not provide the identifying numbers required by Rule 26.4 (g) and (h). As explained earlier, however, the absence of these numbers from a provisional ballot affidavit should not automatically result in rejecting the voter’s provisional ballot. Accordingly, the INC rejection code should be deleted unless the rules also provide a precise list of the information that will be regarded as “required.” Without such clear guidance, it is likely that standards will vary widely from county to county. In addition, any list of the information that will be regarded as “required” must be scrutinized carefully to ensure that it includes only the minimum information necessary for confirming that the voter is registered.

Another portion of proposed Rule 26.15 would eliminate a rejection code that appeared in the rules until September 20, 2004. Until the new proposed rules were released, Rule 26.15 included an “ID” rejection code, which was defined as follows:

ID (1) no ID provided and not found in Rule 26 database check or (2)

No ID provided and ID tagged.

In proposing that the above text be deleted from the new version of the rules, the Secretary of State provided the following comment:

Comment: The "ID" Rejection Code duplicates the "INC" rejection code.

The ACLU agrees that the "ID" rejection code should be deleted. The ACLU does not agree, however, that the "ID" rejection code should survive under a different name. The Secretary of State's proposal will result in disenfranchising persons whose provisional ballots should be counted.

According to the "ID" rejection code, a provisional ballot must be rejected whenever a voter has not shown identification at the polls and the voter's ID is "tagged." The word "tagged" is defined in Rule 30.1.3. Voters are "tagged" when they register by mail and do not provide a copy of the required identification. Such voters are "tagged" even if they include their social security numbers with their mail-in application, if the clerk is not able to confirm the social security number. See Rule 30.6.5. If those "tagged" voters arrive at the polls and do not produce any of the listed forms of identification, they are entitled to cast a provisional ballot. Yet the former "ID" rejection code, and the Secretary of State's interpretation of the surviving "INC" rejection code, means that these provisional ballots will automatically be rejected, in each and every case.

The Secretary of State's comment, and the Secretary of State's interpretation of the "INC" rejection code, are not consistent with other portions of the rules. For example, the Secretary of State's interpretation is inconsistent with Rule 5.5.7 and with the comment to Rule 26.8, both of which state that the information in a provisional ballot affidavit is sufficiently complete if the election official can determine that the affiant is registered to vote. A voter whose ID is "tagged" is registered to vote. Thus, when an election official discovers that a provisional voter's ID is "tagged," the official has also confirmed that the voter is registered to vote. Accordingly, the requirements of Rule 5.5.7 and the comment to Rule 26.8 are satisfied, which means the provisional ballot should be counted. Yet the Secretary of State's comment regarding the former "ID" rejection code erroneously suggests that the provisional ballot will not be counted.

Rule 2.3 imposes overly strict requirements for registration

Rule 2.3 specifies the requirements for first-time voters who register by mail. According to Colorado statute, such voters must include a copy of a listed form of identification or the last four digits of a social security number or a Colorado driver's license number. The Rule, however, fails to state clearly that providing a driver's license number is an acceptable method of satisfying the identification requirement. Rule 2.3 also misstates the law by suggesting that electors registering by mail who rely on a social security number for identification must provide "a copy of" the last four digits of an applicant's social security number. The rule should make it clear that providing the number itself, not a copy, is

sufficient.

Rule 2.4 imposes overly strict requirements for registration

Rule 2.4 states that persons who register to vote in person must provide “a copy of” a driver’s license, a Department of Revenue ID, or at least the last four digits of the elector’s social security number. The statute, however, requires only that the elector provide one of the numbers. It does not require that copies be provided. The rule should be revised to reflect the less burdensome requirements of the statute.

I appreciate the opportunity to provide these comments.

Sincerely,

Mark Silverstein,
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