

number.”³ In an Affidavit by Mr. Morfeld attached to the Complaint, Mr. Morfeld stated while he was observing the Evans Towers polling location he “personally witnessed seven voters over the course of a half hour who wished to vote provisionally, and could not get through the election commissioners office to obtain their voter identification number, and were subsequently turned away because they did not have their voter identification number in order to vote provisionally.”⁴

Additional affidavits by other election observers indicated locations other than Evans Towers were requiring voter identification numbers to vote provisionally. An Affidavit by David Panowicz, field director of the twenty-six non-partisan election observers in Douglas County, stated he was informed that precincts 03-18, 02-19, 03-17, 02-05, 02-21, 03-06, 03-21, 03-07, and 03-17 required a voter identification number to vote provisionally.⁵ Affiant Megan Mikolajczyk, an election observer at Florence Towers, stated she observed persons exiting the polling location with green sheets of paper that had a space for the voter to write his or her voter identification number. She estimated she “witnessed at least twenty individuals leave with green sheets in hand with the mission of obtaining the required voter identification number.”⁶

II. Questions Presented

The issues to be determined by the Hearing Officer are: first, whether requiring a voter to provide his or her voter identification number in order to vote provisionally is a violation of the Help Americans Vote Act, and, if so, whether such practice occurred during the November 6, 2012, general election in Douglas County.

³ Tr. Ex. 2, p. 2.

⁴ Tr. Ex. 2, Morfeld Aff. ¶ 9.

⁵ Tr. Ex. 2, Panowicz Aff. ¶¶ 8 and 10.

⁶ Tr. Ex. 2, Mikolajczyk Aff. ¶ 7.

III. Relevant Law

Section 302 of HAVA outlines the provisional voting requirements of the Act. Specifically, it provides:

If an individual declares that such individual is a registered voter in the jurisdiction in which that individual desires to vote and that individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot.⁷

The statute goes on to indicate that the election official “shall notify the individual that the individual may cast a provisional ballot,” and requires the provisional voter to affirm in writing that he or she is a registered voter in that jurisdiction and eligible to vote in the election.⁸

Nebraska law also requires an individual to satisfy certain requirements to vote provisionally.⁹ If an individual’s name is not on the precinct list of registered voters at the polling place where he or she is a resident, or he or she is on the list but moved to a new residence within the same county and precinct, or it appears he or she received an early ballot, the individual may vote a provisional ballot if certain requirements are met. These requirements include claiming “he or she is a registered voter who has continuously resided in the county in which the precinct is located since registering to vote,”¹⁰ and “has appeared to vote at the polling place for the precinct to which the person would be assigned based on his or her residence address.”¹¹

⁷ 42 USCA § 15482 (Title III, Sec. 302(a)).

⁸ *Id.*

⁹ See Neb. Rev. Stat. § 32-915.

¹⁰ Neb. Rev. Stat. § 32-915(1)(a).

¹¹ Neb. Rev. Stat. § 32-915(1)(d).

Notably, Nebraska law also provides that if an individual's name does not appear on the precinct list for the polling place and the judge or clerk of election determines that the individual's residence address is located in another precinct within the same county, then the judge or clerk of election "shall direct the person to his or her correct polling place to vote."¹²

The provisional ballot requirements under state and federal law make no mention of a voter identification number being required in order to vote provisionally.

IV. Conclusions

As aforementioned, neither state nor federal law requires a voter must provide his or her voter identification number to vote provisionally. Further, testimony indicated the voter identification number is of limited value to the poll worker, and the information it does provide may be obtainable through other means.¹³ It does not appear, and testimony did not reveal, that the voter identification number was needed to assist in satisfying any of the requirements outlined by Section 302 of HAVA or Neb. Rev. Stat. § 32-915. Therefore, I believe requiring a voter identification number prior to issuing a provisional ballot is a violation of HAVA.

It next must be determined whether a violation occurred in Douglas County during the general election on November 6, 2012. Testimony from Mr. Morfeld indicated he observed voters being denied provisional ballots because they could not obtain their voter identification number.¹⁴ He also testified, "Upon asking the poll workers at Evans Towers how many people did not cast a provisional ballot because they could not get through to the election commissioner's office to get their voter identification number, they stated it was at least fifty."

¹² Neb. Rev. Stat. § 32-915(5).

¹³ See Tr. 60:9-17. Specifically, Neal Erickson, Deputy Secretary of State for Elections, testified "I am not sure that I see any value in that unique identifier [voter identification number] for the poll worker, other than possibly being able to identify what split or which particular ballot . . . they [the voter] are entitled to. That's about the only use I can see, and I think that can probably be done in other ways..." *Id.*

¹⁴ "We [Mr. Morfeld and another election observer] both discovered that voters were being denied provisional ballots because they could not obtain their voter identification number, either by bringing it with them or calling into the election office, which many had to do, but no one could get through in many cases." Tr. 11:19-25.

The Douglas County Election Commissioner, Dave Phipps, testified that his office “receive[d] a handful of calls stating that poll workers at a few precincts were requiring serial ID numbers [voter identification numbers] for voters needing to vote provisionally.”¹⁵ Mr. Phipps indicated in instances when this was brought to the attention of those in his office, the poll workers were contacted and advised that voter identification numbers were not necessary to vote provisionally.¹⁶ He also indicated that provisional ballots were reviewed at the Evans Towers Precinct, and there were instances where provisional ballots were cast and accepted as a vote without a voter identification number, but stated “there probably were instances where people were mistakenly turned away.”¹⁷ He emphasized that requiring a voter identification number to vote provisionally is “not something we train our poll workers . . . and it’s not in their material that supports them, so it obviously was . . . just a procedural error, from our point of view.”¹⁸

Despite attempts by the Douglas County Election Commissioner and his staff to provide training and written materials identifying what information is necessary to issue a provisional ballot, the evidence indicates there were instances when provisional ballots were not issued to voters due to their inability to provide their voter identification number. As it is my belief a voter identification number is not required prior to issuance of a provisional ballot¹⁹, I find a violation of HAVA occurred in Douglas County during the 2012 general election.

V. Recommendations

The Douglas County Election Commissioner identified in his testimony that his office trained approximately 2,500 poll workers to serve on election day and an additional several dozen

¹⁵ Tr. 30:1-5.

¹⁶ *Id.* at 5-8.

¹⁷ Tr. 46:6-8.

¹⁸ Tr. 46:14-19.

¹⁹ Such finding is further supported by the case law of other jurisdictions. *See* Tr. Ex. 6.

telephone operators to assist poll workers and voters on election day.²⁰ These individuals received training regarding how to assist provisional voters, and this training included ensuring that the voter is in the correct precinct to ensure their provisional vote will count.²¹ If the voter votes a provisional ballot in the wrong precinct, his or her vote will not be counted.²² Mr. Phipps indicated his office spoke to some poll workers after the 2012 election and “determined that some of them assumed that the voter ID or the serial ID number²³ was required because it was listed on some other election materials.”²⁴ He further stated “In order to try to prevent this from happening in the future, our office is planning to remove all serial ID number references from provisional election materials.”²⁵

These election materials provided by the Douglas County Election Commissioner included: the Provisional Ballot Voting Procedures²⁶, the forms completed by poll workers for provisional voters²⁷, the Contact Sheet for voters who need to contact the Election Commissioner’s office or who need to be directed to a different polling location²⁸, and the Provisional Pin Receipt provided to voters who vote provisionally.²⁹ The forms completed by poll workers for provisional voters and the Contact Sheet have a place for the worker or voter to

²⁰ Tr. 27:21-25, 28:1-5.

²¹ Mr. Phipps testified that while he does not have any statistics on the percentage of people who are at the wrong location to vote, “anecdotally it’s a fairly high number” and “that ten percent number [which was provided by Mr. Morfeld in his testimony] doesn’t surprise me.” Tr. 35:17-20.

²² Neb. Rev. Stat. § 32-1002(5) states “A provisional ballot cast by a voter pursuant to section 32-915 shall not be counted if: ... (e) The residence address provided on the registration application completed pursuant to subdivision (1)(e) of section 32-915 is in a different county or in a different precinct than the county or precinct in which the voter voted.” Neil Erickson, Deputy Secretary of State for Elections, also testified that the voter “has to be in the correct precinct under current Nebraska law [for his or her vote to count].” Tr. 62:5-12.

²³ These are one and the same, as indicated by Mr. Phipps. See Tr. 33:4-13.

²⁴ Tr. 30:9-13.

²⁵ Tr. 30:13-17.

²⁶ Tr. Ex. 9.

²⁷ Tr. Ex. 10 and 11.

²⁸ Tr. Ex. 12. During the hearing there was some dispute whether election observers observed voters leaving with this Contact Sheet, or a provisional PIN receipt. Mr. Morfeld, however, testified that he observed voters exiting with the green sheet that is Exhibit 12. He stated “[Exhibit 12] is the one they [were] coming out with. I did see Exhibit 13 when they did receive a provisional ballot, but this [Exhibit 12] was the predominant one that was out for people when they weren’t at the right polling location or if there was an issue.” Tr. 63:22-25 and 64:1-3.

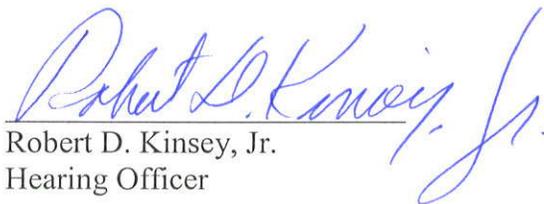
²⁹ Exhibit 13.

supply the voter's identification number, however, the Provisional Ballot Voting Procedures state "If you do not have the voter's serial number, you may still allow the person to vote provisionally; simply leave the serial number column blank."³⁰

It is my suggestion that the Douglas County Election Commissioner remove all references to the voter identification number on materials provided to poll workers. This would include removing reference to the voter identification number on the forms completed by poll workers for provisional voters and the Contact Sheet. Additionally, I recommend the Provisional Ballot Voting Procedures instructions regarding the Contact Sheet remove reference to the voter identification number.³¹ I suggest both poll workers and call center operators receive additional instruction during their training informing them it is not necessary for a voter to provide his or her voter identification number to vote provisionally.

Dated this 13th day of February, 2013.

Respectfully submitted,


Robert D. Kinsey, Jr.
Hearing Officer

³⁰ Tr.Ex. 9, p. 20.

³¹ See Tr. Ex. 9, p. 19, which reads: "Election Official – Ask the voter for the green Election Commission Contact Sheet, if he or she has one. If the voter has not contacted the Election Commission to receive his or her voting information (i.e. ward and precinct, ballot number, and voter serial number), ask the voter to contact the Election Commission at (402) 444-VOTE (8683)."