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STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

TROY KING
ATTORNEY GENERAL

ALABAMA STATE HOUSE
11 SOUTH UNION STREET
MONTGOMERY, AL 36130
(334) 242-7300
WWW.AGO.STATE.AL.US

October 29, 2004

Honorable Gilbert E. Loftin
Chairman, Lowndes County Board of Registrars
Post Office Box 311
Hayneville, Alabama 36040

Provisional Ballots – Absentee
Ballots – Voting – Elections

Section 17-10A-2(a)(1) allows an absentee applicant to vote by provisional ballot at the polling place if he claims that he lost the ballot, did not receive the ballot, or otherwise did not vote an absentee ballot.

If the board of registrars finds that the absentee applicant did not vote by absentee ballot, then the board of registrars should authorize the appointing board to count the provisional ballot submitted at the polling place, assuming that the individual meets all the other qualifications to vote. The Secretary of State should adopt procedures prescribing the method the board of registrars should use to determine if an individual voting by provisional ballot has also voted by absentee ballot.

Dear Mr. Loftin:

This opinion of the Attorney General is issued in response to your request on behalf of the Lowndes County Board of Registrars.

QUESTIONS 1 AND 2

1. Given 17-10-5(c) and AG Opinion 2000-231, may a voter who has applied for an absentee ballot, and whose name has been stricken from the list of registered voters for his or her precinct, be issued a provisional ballot on election day?

2. If the answer to question one is in the affirmative, which of the statutorily-prescribed reasons for casting a provisional ballot apply in this circumstance, given that the voter's name will appear on the list of registered voters, although stricken, and there is not necessarily a question about the person's eligibility to vote?

FACTS AND ANALYSIS

Absentee ballots are delivered to voters pursuant to the provisions of section 17-10-5 of the Code of Alabama, which provides, in pertinent part, as follows:

Upon receipt of an application for an absentee ballot as provided in Section 17-10-3(a) if the applicant's name appears on the list of qualified voters produced from the state voter registration list in the election to be held, or if the voter makes an affidavit for a provisional ballot, the absentee election manager shall furnish the absentee ballot to the applicant by: (1) Forwarding it by United States mail to the applicant's or voter's residence address or upon written request of the voter, to the address where the voter regularly receives mail or (2) by handing the absentee ballot to the voter in person or, in the case of emergency voting, his or her designee in person.

ALA. CODE § 17-10-5(a) (Supp. 2004). Paragraph (c) of section 17-10-5 also provides:

The absentee election manager shall enroll the name, residence, and polling place of the applicant, and the date the application was received on a list of absentee voters. Each day the absentee election manager shall enter on the list the names, addresses, and polling places of each voter who has that day applied for an absentee ballot and shall, for all elections other than municipal elections, post a copy of the list of applications received each day on the regular bulletin board or other public place in the county courthouse. . . . Before the polls open at any election on election day, the absentee election manager shall effectuate the delivery to the election officers of each polling place a list showing the name and address of every person whose name appears on the official list of qualified electors for the polling place who applied for an absentee ballot in the election. The name of the person who applied for an absentee ballot shall be stricken from the list of qualified electors kept at the polling place, and the person shall not vote again.

ALA. CODE § 17-10-5(c) (Supp. 2004).

Section 17-10A-2 of the Code of Alabama provides the grounds upon which a provisional ballot must be issued:

A voter shall be required to cast a provisional ballot when: (1) The name of the individual does not appear on the official list of eligible voters for the precinct in which the individual seeks to vote, and the individual's registration cannot be verified while at the polling place by the registrar, deputy registrar, or a member of the canvassing board. (2) An inspector has knowledge that the individual is not entitled to vote at that precinct and challenges the individual. (3) The individual is required to comply with the voter identification provisions of Section 17-10A-1 but is unable to

do so. (4) A federal or state court order extends the time for closing the polls beyond that established by state law and the individual votes during the extended period of time. Notwithstanding any other provision of state law, where provisional ballots are cast pursuant to a federal or state court order extending the time for closing the polls beyond that established by state law, the provisional ballots shall be segregated from other provisional ballots into a separate sealed container for such purpose and shall be counted, tabulated, and canvassed only pursuant to the order of a court having proper jurisdiction.

ALA. CODE § 17-10A-2(a) (Supp. 2004).

Section 17-10A-2(a)(1) requires a provisional ballot to be cast when the individual's name "*does not appear* on the official list of eligible voters for the precinct in which the individual seeks to vote." (Emphasis added). Pursuant to section 17-10-5(c), a person who has applied for an absentee ballot shall have his name stricken from the list of qualified voters kept at the polling place, and the person shall not vote again. This language creates a presumption that a person who has applied for an absentee ballot has voted by absentee ballot. Opinion to Honorable Jim Bennett, Secretary of State, dated September 30, 2000, A.G. No. 2000-244; Opinion to Honorable Philip Henry Pitts, City Attorney, Selma, dated September 7, 2000, A.G. No. 2000-231. The problem is that the absentee applicant's name, though stricken, technically still appears on the list of qualified voters kept at the polling place.

The fundamental rule of construction is to ascertain and give effect to the intent of the legislature in enacting the statute. *Ex parte Alabama Dept. of Mental Health and Mental Retardation*, 840 So. 2d 863, 867 (Ala. 2002); *Gholston v. State*, 620 So. 2d 719, 721 (Ala. 1993). In construction of statutes, legislative intent may be gleaned from the language used, the reason and necessity for the act, and the purpose sought to be obtained. *Bama Budweiser v. Anheuser-Busch*, 611 So. 2d 238, 248 (Ala. 1992); *Tuscaloosa County Comm'n v. Deputy Sheriffs' Ass'n of Tuscaloosa County*, 589 So. 2d 687, 689 (Ala. 1991).

The purpose of the list of qualified voters kept at the polling place is to inform the election officials whether an individual is allowed to vote at that polling place. It is illegal for an individual to cast his ballot in

any election if his name does not appear on this official list. ALA. CODE § 17-4-127 (Supp. 2004). Section 17-4-127 further provides that an individual may vote by provisional ballot if his name does not appear on this list.

Webster's Dictionary defines "strike" as "to delete something." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1167 (1986). An absentee applicant's name is stricken off the list of qualified electors to prevent this person from voting at the polling place. *See* ALA. CODE § 17-10-5(c) (Supp. 2004). The Legislature intended that if someone's name was stricken from the list of qualified electors, that name would be considered to "not appear on the list of eligible voters." With his name deleted from the official list, the applicant can only vote by provisional ballot. Accordingly, section 17-10A-2(a)(1) allows an absentee applicant to vote by provisional ballot at the polling place if he claims that he lost the ballot, did not receive the ballot, or otherwise did not vote an absentee ballot.

This Office has previously stated that a "person who applied for an absentee ballot and who wanted to vote in person at the polling place because he claims that he did not receive the ballot or that it was lost would be entitled to vote by challenged ballot at the polling place." Opinion to Honorable Jim Bennett, Secretary of State, dated September 30, 2000, A.G. No. 2000-244. That Opinion was written before the Alabama Legislature passed Act 2003-313, implementing the requirements of the federal Help America Vote Act of 2002, Pub. L. 107-252. *See* 42 U.S.C.A. § 15403 (West Supp. 2004). One of the changes adopted in Act 2003-313 was the use of provisional ballots instead of challenged ballots to contest the right to vote for those persons whose names do not appear on the official list of voters. Based on our previous opinion, a person who applied for an absentee ballot but claims that he lost the ballot, did not receive the ballot, or otherwise did not vote an absentee ballot is entitled to vote by provisional ballot at the polling place.

In addition, section 17-10A-2 authorizes the Secretary of State to adopt regulations addressing the means of identifying ballots cast by particular provisional voters by the appointing board. ALA. CODE § 17-10A-2 (Supp. 2004). The Secretary of State has adopted procedures pursuant to this section. These procedures provide that a provisional ballot should be issued to a voter who applied for an absentee ballot if the poll worker "believes that the individual applied for but did not receive or vote an absentee ballot for said election." ALA. ADMIN. CODE ch. 820-2-6 (2004)

(effective July 1, 2004). These procedures are consistent with this opinion.

CONCLUSION

Section 17-10A-2(a)(1) allows an absentee applicant to vote by provisional ballot at the polling place if he claims that he lost the ballot, did not receive the ballot, or otherwise did not vote an absentee ballot.

QUESTION 3

3. If the answer to question one is in the affirmative, under what circumstances, if any, should the board of registrars authorize the counting of the provisional ballot?

FACTS AND ANALYSIS

Section 17-10A-2 of the Code of Alabama directs the board of registrars to determine whether a provisional ballot should be counted. This section provides, in part, as follows:

[T]he board of registrars . . . shall verify by a certification attached to each provisional voter affirmation whether the provisional vote is entitled to be counted and the reason for or against counting the provisional ballot. . . . The board of registrars shall deliver the provisional voter affirmations and inspector challenge statements, with the certified findings of the board of registrars attached, to the judge of probate no later than noon seven days after the election until which time such findings shall remain confidential.

ALA. CODE § 17-10A-2(e) (Supp. 2004). "Commencing at noon seven days after the election, the appointing board for poll workers . . . shall tabulate provisional ballots which have been certified by the board of registrars as cast by registered and qualified voters of the precincts in which such ballots were cast." ALA. CODE § 17-10A-2(f) (Supp. 2004).

Section 17-23-1 prohibits any person from voting "more than once at any election held in this state." ALA. CODE § 17-23-1 (1995). The board of registrars must determine whether the absentee applicant voted by absentee ballot. If the board of registrars finds that the absentee applicant did not vote by absentee ballot, then the board of registrars should authorize the appointing board to count the provisional ballot submitted at the polling place, assuming that the individual meets all the other qualifications to vote.

During the 2003 Regular Session, the Alabama Legislature passed Act 2003-313, implementing the requirements of the federal Help America Vote Act of 2002, Pub. L. 107-252. *See* 42 U.S.C.A. § 15403 (West 2003). Provisional voting was one of the new processes adopted in Act 2003-313. Section 17-4-255 directs the Secretary of State to "promulgate rules and prescribe forms as shall be necessary to implement . . . the Help America Vote Act of 2002." ALA. CODE § 17-4-255 (Supp. 2004). In addition, section 17-10A-2 authorizes the Secretary of State to adopt regulations addressing the means of identifying ballots cast by particular provisional voters by the appointing board and the method of providing confidentiality and security to communications with provisional voters seeking information about the status of their ballot. ALA. CODE § 17-10A-2 (Supp. 2004). Pursuant to these provisions, the Secretary of State should adopt procedures prescribing the method the board of registrars should use to determine if an individual voting by provisional ballot has also voted by absentee ballot.

CONCLUSION

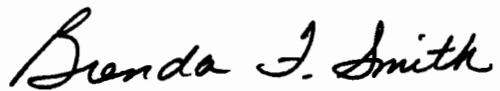
If the board of registrars finds that the absentee applicant did not vote by absentee ballot, then the board of registrars should authorize the appointing board to count the provisional ballot submitted at the polling place, assuming that the individual meets all the other qualifications to vote. The Secretary of State should adopt procedures prescribing the method the board of registrars should use to determine if an individual voting by provisional ballot has also voted by absentee ballot.

Honorable Gilbert E. Loftin
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I hope this opinion answers your questions. If this Office can be of further assistance, please contact Rushing Payne of my staff.

Sincerely,

TROY KING
Attorney General
By:



BRENDA F. SMITH
Chief, Opinions Division

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