



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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October 15, 2014

FILE NO. 14-001

ELECTIONS:

Proper Time for Counting
Absentee Voters' Ballots
and Early Voters' Ballots

The Honorable Brian J. Towne
State's Attorney, LaSalle County
President, Illinois State's Attorneys' Association
707 East Etna Road, Suite 251
Ottawa, Illinois 61350

Dear Mr. Towne:

During the general primary election held on March 18, 2014, an issue arose in at least one Illinois county regarding the proper time to count absentee voters' ballots and early voters' ballots. Specifically, the issue was whether it is permissible for local election authorities and their staffs to process absentee voters' ballots and early voters' ballots by running them through a ballot tabulator before 7:00 p.m. on the day of the election, as long as they wait until after 7:00 p.m. to upload the totals for the ballots and to consolidate those totals with the in-person precinct tabulations.

To provide guidance to election authorities and their legal advisors, and to promote the uniform application of the State's election laws, the Office of the Attorney General provides the following legal analysis, a copy of which will be provided to all local election authorities. This analysis focuses on the Election Code (10 ILCS 5/1-1 *et seq.* (West 2012)) requirement that absentee voters' ballots and early voters' ballots received on or before the day of the election must be counted after 7:00 p.m. on election day. Consequently, it is my opinion that no absentee voters' ballots or early voters' ballots should be placed into the tabulators prior to 7:00 p.m. on the day of the election.

ANALYSIS

Articles 19 and 20 of the Election Code (10 ILCS 5/19-1 *et seq.*, 20-1 *et seq.* (West 2012)), respectively, set out the procedures for voting by absent electors and by absent electors who are members of the United States Service¹ and their qualifying family members. Sections 19-8 and 20-8 of the Code (10 ILCS 5/19-8, 20-8 (West 2012)) provide, with respect to absentee voters' ballots received before the closing of the polls on election day:

(b) Each absent voter's ballot returned to an election authority, by any means authorized by this Article, and received by that election authority before the closing of the polls on election

¹"Member of the United States Service" refers to:

(a) members of the Armed Forces while on active duty and their spouses and dependents of voting age when residing with or accompanying them, (b) members of the Merchant Marine of the United States and their spouses and dependents when residing with or accompanying them and (c) United States government employees serving outside the territorial limits of the United States. 10 ILCS 5/20-1(2) (West 2012).

day shall be endorsed by the receiving election authority with the day and hour of receipt and shall be counted in the central ballot counting location of the election authority on the day of the election after 7:00 p.m., except as provided in subsections (g)^[2] and (g-5).^[3]

* * *

(d) Special write-in absentee voter's blank ballots returned to an election authority, by any means authorized by this Article, and received by the election authority at any time before the closing of the polls on election day shall be endorsed by the receiving election authority with the day and hour of receipt and shall be counted at the central ballot counting location of the election authority during the same period provided for counting absent voters' ballots under subsections (b), (g), and (g-5). * * *

* * *

(f) *Counting required under this Section to begin on election day after the closing of the polls shall commence no later than 8:00 p.m. and shall be conducted by a panel or panels of election judges appointed in the manner provided by law. The counting shall continue until all absent voters' ballots and special write-in absentee voter's blank ballots required to be counted on election day have been counted. (Emphasis added.)*

Similarly, article 19A of the Election Code (10 ILCS 5/19A-5 *et seq.* (West 2012)), which sets out the procedure for early voting, provides that early ballots "shall not be counted until after the

²Subsections 19-8(g) and 20-8(g) of the Election Code (10 ILCS 5/19-8(g), 20-8(g) (West 2012)) set forth the circumstances in which an absentee voter's ballot may be rejected.

³Pursuant to subsections 19-8(g-5) and 20-8(g-5) of the Election Code (10 ILCS 5/19-8(g-5), 20-8(g-5) (West 2012)), absentee voters whose ballots are rejected are required to be notified of the rejection and given an opportunity to contest the rejection.

polls are closed on election day." 10 ILCS 5/19A-25.5 (West 2012). Polls are required to close at 7:00 p.m. on the day of the election. 10 ILCS 5/17-1 (West 2012).⁴

The primary purpose of statutory construction is to ascertain and give effect to the intent of the General Assembly. The best indicator of the legislature's intent is the language of the statute, given its plain and ordinary meaning. *Blum v. Koster*, 235 Ill. 2d 21, 29 (2009). Where statutory language is clear and unambiguous, it must be given effect as written. *First American Bank Corp. v. Henry*, 239 Ill. 2d 511, 516 (2011).

The Election Code provides that absentee voters' ballots received by the election authority before the closing of the polls on election day "shall be counted * * * on the day of the election after 7:00 p.m." Early ballots also "shall not be counted until after the polls are closed on election day." The act of running absentee voters' ballots and early voters' ballots through tabulator equipment which computes and totals the number of absentee ballot and early ballot votes received by each candidate clearly constitutes "counting" as that term is ordinarily understood. *Accord* 10 ILCS 5/24B-10.1 (West 2012) ("Ballots may then be counted by entering or scanning each ballot into the automatic tabulating equipment").

⁴Polls may stay open beyond the statutorily mandated 7:00 p.m. closing time in certain, limited circumstances. *See, e.g.*, 10 ILCS 5/18A-5(a)(3) (West 2012), as amended by Public Act 98-691, effective July 1, 2014 ("A person who claims to be a registered voter is entitled to cast a provisional ballot under the following circumstances: * * * [a] federal or State court order extends the time for closing the polls beyond the time period established by State law and the person votes during the extended time period"). Further, voters in line when the polls close must be allowed to vote. *See* Illinois State Board of Elections, Optical Scan Manual of Instructions for "In-precinct" Vote Tabulation Systems for Illinois Election Judges 2014, at 14 (updated August 1, 2014), available at <http://www.elections.il.gov/Downloads/ElectionInformation/PDF/OpScanInprecinct.pdf>.

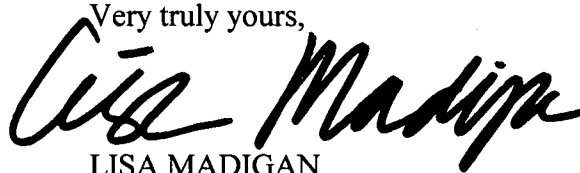
We recognize that the act of running only the absentee voters' ballots and/or early voters' ballots through the tabulator equipment does not result in a total precinct count for a candidate or proposition. To arrive at a total vote count for the precinct, the absentee voter and early voter totals must still be uploaded and consolidated with the in-person precinct vote count. However, the initial computation of absentee and early votes is still "counting." Accordingly, pursuant to the plain language of sections 19-8, 20-8, and 19A-25.5 of the Election Code, it is my opinion that a local election authority may not run absentee voters' ballots or early voters' ballots through a tabulator before 7:00 p.m. on election day.

This construction of the statutory language is also supported by public policy considerations. Election "laws exist to preserve the integrity of republican government, and impose a duty of obedience on all persons within their scope." *See generally Glenn v. Radden*, 127 Ill. App. 3d 712, 714-15 (1984), citing *People ex rel. Harris v. Powell*, 35 Ill. 2d 384, 387 (1966) and *Hester v. Kamykowski*, 13 Ill. 2d 481, 485 (1958). By beginning to count the ballots before the polls close at 7:00 p.m., it may be suggested that because of the irregular procedure employed, the conduct of the election authorities somehow affected the outcome of the election or gave a particular candidate or political party an unfair advantage (e.g., that absentee ballot and/or early ballot election results were leaked by or posted by the staff of the election authority). Further, by waiting until after the polls close to count all ballots, the election authorities may ensure that "[e]ach political party, candidate, and qualified civic organization" has the opportunity to observe the entire ballot counting process. *See* 10 ILCS 5/19-8(h), 20-8(h) (West

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2012); *see also* 10 ILCS 5/24A-13, 24B-13, 24C-14 (West 2012). Therefore, it is my opinion that no absentee voters' ballots or early voters' ballots should be placed in the tabulators before 7:00 p.m. on the day of the election.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa Madigan". The signature is written in a cursive, flowing style with a large initial "L".

LISA MADIGAN
ATTORNEY GENERAL

cc: The State Board of Elections
All State's Attorneys
All County Clerks
All Election Commissions