



DENNIS J. HERRERA
City Attorney

JULIA A. MOLL
Deputy City Attorney

DIRECT DIAL: (415) 554-4705
E-MAIL: julia.moll@sfgov.org

MEMORANDUM

TO: JOHN ARNTZ
Director of Elections

FROM: JULIE MOLL
Deputy City Attorney

DATE: March 23, 2004

RE: Processing Write-In Votes

You requested advice concerning the processing of write-in votes where the voter's intent is clear but where the voter failed to mark the ballot as specified in the voting instructions. This memorandum confirms our advice. Please let us know if you have questions about this memorandum.

Question Presented

May the Department of Elections count a vote for a write-in candidate if it is clear that the voter intended to vote for a particular write-in candidate for a particular office, but the voter failed to mark the ballot as specified in the voting instructions (the voter failed to "connect the arrow" next to the space provided for write-in candidates)?

Summary of Advice

No. California Elections Code Section 15342(a) specifically provides that "no write-in vote shall be counted unless the voting space next to the write-in space is marked or slotted as directed in the voting instructions." For this reason, even if the voter clearly indicates his or her choice of a write-in candidate for a particular office, the voter's failure to mark the optical scan ballot as specified in the voting system instructions invalidates the write-in vote, and the Department of Elections may not count the vote. Even prior to the adoption of Section 15342(a), the California Court of Appeal had held that write-in votes may not be counted when cast in conflict with ballot instructions, even when voter intent is reasonably clear.¹ Nonetheless, an invalid write-in vote does not invalidate the entire ballot. The Department of Elections is required to count all *lawfully cast* votes for candidates and measures on the ballot.

¹ On March 22, 2004, I discussed this issue with members of the California Secretary of State's staff and they agreed with this advice. The Secretary of State's office is the agency charged with administration and enforcement of the California Elections Code. For this reason, its interpretation would be a significant factor considered by a court when determining the meaning and application of the Code. See *Coca-Cola Co. v. State Board of Equalization* (1945) 25 Cal.2d 918, 921; see also *Andal v. Miller* (1994) 28 Cal.App.4th 358, 365, note 3;

Memorandum

TO: JOHN ARNTZ
Director of Elections
DATE: March 23, 2004
PAGE: 2
RE: Processing Write-In Votes

Background

Using San Francisco's optical scan voting system, voters are instructed to "complete the arrow" next to their candidate of choice and next to either the "yes" or "no" following each ballot measure. To vote for a write-in candidate, voters are instructed to, "WRITE THE PERSON'S NAME ON THE BLANK LINE PROVIDED AND COMPLETE THE ARROW" (upper case in the original). These voting instructions are printed on each ballot card, in English, Spanish and Chinese.

In the March 2, 2004 Consolidated Primary Election, Terry Baum was a qualified write-in candidate for the Green Party's nomination for United States Congressional District 8. Ms. Baum ran unopposed. Although unopposed, Ms. Baum was required to receive at least 1,605 votes to qualify to have her name printed on the ballot for the November 2, 2004 Consolidated General election. Cal. Elections Code § 8605(a) (no write-in candidate at a direct primary election may qualify to have his or her name printed on the ballot for the following general election unless the candidate receives votes equal to at least one percent of all votes cast for the office at the last general election at which the office was filled).

During the initial canvass of election results for the March 2, 2004 election, the Department of Elections determined that Ms. Baum received 1,430 votes.² At the request of Ms. Baum, the Department then reviewed, by hand, all remaining Green Party ballots.³ The Department determined that 229 additional voters wrote Ms. Baum's name on the ballot but did not connect the arrow next to the space for write-in candidates, as specified in the voting instructions for the City's optical scan voting system. Because these voters did not connect the arrow, the City's optical scan voting equipment could not detect that write-in votes were cast on these ballot cards.

You asked us to advise you whether the additional 229 votes are valid – whether you are required to or prohibited from counting these additional votes for Ms. Baum. If the additional votes are valid, Ms. Baum would have more than the 1,605 required to qualify to have her name printed on the ballot for the November 2, 2004 Consolidated General election.

² All information contained in this memorandum concerning the number of ballots cast in the March 2, 2004 Consolidated Primary Election is current as of today's date. These numbers may and are in fact likely to change as the Department of Elections completes its canvass of results. The Department is required to complete the canvass no later than March 30, 2004.

³ In the March 2, 2004 Consolidated Primary Election, a total of 175,754 partisan ballot cards were cast in San Francisco. Of this total, only 5,509 ballots were cast by members of the Green Party. In contrast, 139,953 Democratic Party ballots and 24,472 Republican Party ballots were cast.

Memorandum

TO: JOHN ARNTZ
Director of Elections
DATE: March 23, 2004
PAGE: 3
RE: Processing Write-In Votes

Discussion

California law provides that votes cast *in accordance with State elections laws* shall be counted. Cal. Const. Art. II, § 2.5. California law further provides that, under certain circumstances when a ballot is unreadable by the vote counting and tabulating equipment, the elections official must remake the ballot to reflect and give full effect to voter intent. Cal. Elections Code § 15210 (when a ballot is unreadable by the voting equipment because the ballot is torn, bent or otherwise defective, the elections official shall remake the ballot “following the intention of the voter insofar as it can be ascertained from the defective ballot.”)

Although, as a general rule, all *lawfully cast* votes must be counted and certain *lawfully cast* but defective ballots must be remade to give full effect to voter intent, votes that are *not* properly cast under State elections laws are invalid and may not be counted. *See, e.g.*, Cal. Elections Code § 15154(a)(any ballot that is not marked as provided by law, or that is marked or signed by the voter so that it can be identified by others, is invalid and shall not be counted); § 15342(c) (use of a sticker or stamp to indicate the name of a write-in candidate on the ballot is invalid, and the write-in vote shall not be counted).

State elections laws specifically provide that elections officials *shall not* count write-in votes if the voter fails to mark the box, arrow or other space next to the write-in candidate's name as directed in the voting instructions. Cal. Elections Code § 15342(a). This rule may seem contrary to both public policy and common sense if ballots are invalidated even though voter intent is reasonably clear. Nonetheless, Section 15342(a) appears designed to ensure the uniform treatment of write-in votes.

Specifically, Section 15342(a) appears designed to ensure that when machines (such as the City's optical scan voting equipment) are used to count or tabulate votes, the machines can detect and record the write-in votes.⁴ The current voting system technology does not detect

⁴ Compare Cal. Admin. Code § 20103 (a *lawfully cast* write-in vote may be counted even if the candidate's name is misspelled or incomplete if the name as written bears a reasonable resemblance to the name of a qualified write-in candidate, and there is no reasonable doubt about the voter's intent); § 20102 (a *lawfully cast* write-in vote may be counted even if no office is indicated if the candidate is a qualified write-in candidate for that office and there is no reasonable doubt about the voter's intent); § 20104 (a *lawfully cast* write-in vote may be counted even if the candidate's name is misspelled or incomplete and no office is indicated). Sections 20102, 20103 and 20104 demonstrate a significant distinction made under California law: As long as a write-in vote is *lawfully cast* and recorded in a manner that can be detected by the vote count and tabulation equipment, and as long as there is no reasonable doubt about voter intent, the vote will not be invalidated based on a spelling or technical error. (The reader should note that because San Francisco's voting system provides a space to write-in candidates directly below the list of candidates for each elective office, voters are not instructed or required to indicate the office.)

Memorandum

TO: JOHN ARNTZ
Director of Elections
DATE: March 23, 2004
PAGE: 4
RE: Processing Write-In Votes

write-in votes unless the arrow is connected. In this case, because there were only 5,509 ballots cast by members of the Green Party, the Department of Elections was able to comply with Ms. Baum's request to examine every ballot by hand. As indicated in foot note 3, above, San Francisco voters cast a total of 175,754 partisan ballots in the March 2, 2004 Consolidated Primary Election. This total includes 139,953 Democratic Party ballots and 24,472 Republican Party ballots. In an election with qualified write-in candidates in multiple contests and in each political party, it would be extremely difficult if not impossible for San Francisco (and other large counties such as Los Angeles and Sacramento) to examine every ballot card by hand. By requiring that the voter cast write-in votes in a manner that can be detected by the vote count and tabulation equipment, Section 15342(a) ensures that all write-in votes are treated the same – that the counting of a write-in vote is not left to chance that an elections worker might notice that a name was written on the ballot.

The California Court of Appeal recognized the need for uniform treatment of write-in votes in a case very similar to the current situation. In *Fair v. Hernandez* (1981) 116 Cal.App.3d 868, the court considered the validity of four write-in votes where the voters clearly indicated the name of the write-in candidate by writing it on either the front or back of San Bernardino's punch card ballot. There was no doubt as to voter intent, but the voting system was not designed for write-in votes to be recorded on the punch card ballot. Instead, voters were instructed to record write-in votes on the secrecy envelope containing the punch card ballot. The secrecy envelope had a specially-designed section for write-in voting, and was counted and tabulated by hand. The *Fair* court held that the four write-in votes were invalid: "In each of these four instances the will of the voters was evident But it is not enough to find out generally the voter's will, such will must be expressed in the manner prescribed by law." *Fair*, 116 Cal.App.3d at 875.

As noted above, this result may seem contrary to both public policy and common sense. Nonetheless, since the Court of Appeal issued its decision in the *Fair* case in 1981, the California Legislature has reaffirmed this rule and made the rule even more restrictive.

In 1994, the Legislature adopted a comprehensive revision of the California Elections Code. Included in this revision was former Section 15350, which stated:

Any name [of a qualified write-in candidate] written upon a ballot, including a reasonable facsimile of the spelling of a name, shall be counted . . . for the office under which it is written, if it is written in the blank square therefor, *whether or not a cross (+) is stamped or made with pen or pencil in the voting square after the name so written.*

Memorandum

TO: JOHN ARNTZ
Director of Elections
DATE: March 23, 2004
PAGE: 5
RE: Processing Write-In Votes

(Emphasis added.) Consistent with the ruling in *Fair*, the Legislature explicitly stated that a write-in vote would be invalid if written in the wrong place on the ballot. Significantly, under that rule, as long as the voter recorded the write-in vote in the correct space, failure to mark the ballot according to the voting instructions would not invalidate the vote. If former Section 15350 were still in effect, our advice in this matter would be different.

In 1998, the Legislature repealed former Section 15350 and replaced it with Section 15342(a). As discussed above, Section 15342(a) explicitly states elections officials *shall not* count write-in votes if the voter fails to mark the ballot as directed in the voting instructions. San Francisco's voting instructions state: "TO VOTE FOR QUALIFIED WRITE-IN CANDIDATE, WRITE THE PERSON'S NAME ON THE BLANK LINE PROVIDED AND COMPLETE THE ARROW." For this reason, even if a voter clearly indicates his or her choice of a write-in candidate for a particular office, the voter's failure to connect the arrow as specified in the voting instructions invalidates the write-in vote, and California Elections Code section 15342(a) prohibits the Department of Elections from counting the vote.

Finally, an invalid write-in vote does not invalidate the entire ballot. The Department of Elections is required to count all *lawfully cast* votes for candidates and measures on the ballot. Cal. Const. Art. II, § 2.5.

J.A.M.

cc: Members, San Francisco Elections Commission