

Commonwealth of Pennsylvania
Department of State
September 4, 2008

TO: County Boards of Election

FROM: Chet Harhut, Commissioner

SUBJECT: Passive Electioneering

At the annual Pennsylvania County Election Officials Conference held in Erie recently, the Department discussed with many of you its thoughts on the subject of "passive electioneering," which can include wearing tee shirts, clothing or buttons with a candidate's or political party's name, picture or emblem. On Primary Election Day, April 25, 2008, we received calls from voters as well as counties regarding this important issue. Our advice then and now remains the same. We believe that if such electioneering remains passive and the voter takes no additional action to attempt to influence other voters in the polling place, then the wearing of clothing or buttons would not constitute "electioneering" as that term is used in section 1220(c) of the Pennsylvania Election Code, 25 P.S. § 3060(c).

You should be aware that on August 19, 2008, the Secretary of the Commonwealth received the enclosed letter from the American Civil Liberties Union of Pennsylvania (ACLU) and the League of Women Voters of Pennsylvania asking us to provide an opinion clarifying this issue. The authors of the letter believe that this issue "implicates First Amendment free-speech rights" and urges us to adopt a narrow definition of the term "electioneer." The letter also lists examples where the ACLU and the League have received complaints from voters regarding this subject.

As we discussed at the conference, the term "electioneer" is not defined in the Pennsylvania Election Code. Furthermore, section 302(f) of the Election Code, 25 P.S. § 2642(f), provides that the county boards of elections (not the Department of State) shall "make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and elections." 25 P.S. § 2642(f). Furthermore, section 302(g) provides that the county boards of elections shall "instruct election officers in their duties . . . to the end that primaries and elections may be honestly, efficiently, and uniformly conducted." 25 P.S. § 2642(g).

Finally, the General Assembly has determined in section 1105-A of the Election Code that the Department of State may issue binding directives for the county boards of elections on only one subject: "the implementation of electronic voting procedures and for the operation of electronic voting systems." 25 P.S. § 3031.5(a). This issue relating to apparel in the polling place would not fall within the scope of electronic voting procedures or the operation of electronic voting systems. As such, the various suggestions and recommendations that we make

to the counties regarding this and other issues, must be reviewed and considered by the county boards of elections in conjunction with their solicitors. Therefore, we ask that those of you receiving this memo confer with your solicitor and commissioners regarding this issue

Of primary concern is that no duly registered person be turned away at the polls. If the conduct and apparel of a voter is determined to be more than passive, it should be addressed by the district election officials. We understand that many district election officials distribute jackets, sweaters, sweatshirts or other garments so that voters may cover up the clothing while they are in the process of voting. Again, care should be taken to allow individuals to vote. Furthermore, we know that many of you are now or soon will be educating your district election officials (poll workers) regarding matters such as this so that the decision that you make will be implemented uniformly and without discrimination throughout your county.

Finally, as some of you have asked, we believe that there is an important distinction between individual voters who wear clothing or political buttons and those who are watchers at the polling places in your county. Because watchers may be present throughout the day at the precincts and because voters cannot necessarily distinguish between watchers and district election officials, we believe it is reasonable for county boards of elections to prohibit watchers from wearing any clothing or political buttons that show or advocate the election of a candidate or candidates of a specific political party.

If you, your solicitor, or your commissioners would like to discuss this issue with the Department, we suggest that you contact Deputy Chief Counsel Larry Boyle at (717) 783-1657.

Enclosure

C: Harry VanSickle, Deputy Secretary