

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



P.O. Box 30736
LANSING, MICHIGAN 48909

Clerk of the Court
Michigan Court of Claims
919 West Ottawa Street
Lansing, Michigan 48909

October 18, 2022

Re: *O'Halloran et al v Benson, et al*, 22-000162, *DeVisser et al v Benson, et al*, 22-000164

Dear Clerk:

Pursuant to this Court's Order of October 14, 2022, Defendants Secretary Benson and Director Brater provide the following letter in response to the Court's questions.

First, the Court has asked whether the prohibition on cell phones and other electronic devices in absent voter counting boards (AVCB) is limited to challengers and poll watchers, or whether it also includes election inspectors, election officials, and other election workers. The exclusion of cell phones and other devices is *not* limited to poll watchers and challengers. Election workers and inspectors are also prohibited from communicating information out of the AVCB and are prohibited from leaving (i.e., they are "sequestered") pursuant to MCL 168.765a(9)-(10). As described below, clerks are responsible for ensuring election inspectors do not use cell phones and other devices and determining the method of enforcement; additionally, there is an exception for certain election officials and authorized personnel.

Second, the Court has asked—if the prohibition against cell phones applies to election workers and inspectors—where that is explained in Bureau of Elections (Bureau) instructions. The restrictions applicable to election workers and inspectors are not included in the May 2022 instructions for poll watchers and challengers because that document does not describe all rules and duties relating to election inspectors. However, in training materials the Bureau provides the clerks operating AVCBs, the Bureau instructs clerks that the AVCB space—that is, the actual physical space occupied by the AVCB—must be sequestered and "no cell phones" are permitted. (Ex A, Training Slide.) The accompanying text for that slide shows that the *only* cell phone allowed in the AVCB is the one used by inspectors to contact election officials. (Ex B, Text of Training Audio.) The Bureau also instructs clerks that "Election inspectors, poll challengers, poll watchers, or media entering an [AVCB] must be provided the understanding that they will be sequestered until 8 p.m." (Ex B.) Also, the Election Officials' Accreditation materials, MCL 168.31(1)(j), provide that election inspectors *and* challengers are sequestered until 8 p.m. and may not have cell phones. (Ex C, Election Officials Accreditation 2019, Chapter 8, Absent Voter Ballot Election Day Processing, p 8-1.) The requirements of sequestration, therefore, apply equally to challengers and election inspectors in the AVCB until after the polls close.

The Bureau does not dictate the specific manner in which clerks must supervise their election inspectors to ensure phones are not used. Clerks supervise election inspectors in the performance of their duties and determine the specific method of supervision to ensure all legal requirements are followed. This includes prohibiting election inspectors from using cell phones

in AVCBs for the same reason challengers and poll watchers cannot use them; they are prohibited from communicating “in any way any information relative to the processing or tallying of votes” in the counting board. MCL 168.765(9). As the officials responsible for supervising election inspectors work in compliance with the Michigan Election Law, clerks have discretion to prohibit election inspectors from being in possession of cell phones within an AVCB or to instead prohibit election inspectors from using cell phones while allowing election inspectors to keep them in their possession. For example, one election inspector may need to keep a cell phone in their possession if needed to contact the clerk. Otherwise, in the Bureau’s experience, clerks typically prohibit election inspectors from being in possession of cell phones, but that is the clerk’s decision so long as the clerk ensures election inspectors do not use them.

The Bureau instructs clerks to prevent challengers and poll watchers from bringing communication devices into AVCBs to ensure these devices are not used; the Bureau has determined this is the proper method of preventing improper communication by individuals that clerks do not directly supervise or control. Although challengers and poll watchers must follow election inspector instructions, clerks do not employ or supervise challengers or poll watchers. Clerks do not train, pay, or retain contact information for them and do not have the same practical ability to ensure through training and supervision that they are not using these devices.

Third, the Court has asked what penalties might be applied to inspectors who violate the prohibition on cell phones. Election inspectors are appointed by the local boards of election commissioners, see, e.g., MCL 168.674, and must take an “oath” swearing or affirming that they “will faithfully discharge the duties of the office of inspector of elections according to the best of” their abilities, MCL 168.680. The penalty for an election inspector who fails to follow directions is ordinarily dismissal. (Ex D, Authority of City and Township Clerks Over Elections Inspectors.) Clerks are the chair of the city or township election commission, see MCL 168.25, 168.26, which hires election inspectors and determines the terms of their appointment and dismissal. MCL 168.677.

An election inspector serving in an AVCB during the sequestration period who is dismissed is still bound by their legal obligation to remain sequestered until the close of polls. (Ex D.) To avoid breaching that obligation, the clerk instructs the dismissed election inspector to remain in a room or area of the location containing the AVCB, but which is separated from the area where absent voter ballots are being processed. (Ex D.) A dismissed election inspector who breaks sequestration by prematurely leaving the location containing an absent voter ballot processing facility before the close of polls violates the oath they took upon entering the facility, MCL 168.765a(9), and their constitutional oath, MCL 168.680. An election inspector serving in an AVCB who is dismissed after the sequestration period ends must leave the facility without disturbing the ballot tallying process. Additionally, election inspectors who willfully fail to perform a required duty may also be charged with a misdemeanor. MCL 168.932(h).

Fourth, the Court asked whether the prohibition on electronic devices applied *except* for “authorized individuals” (citing to ¶ 47 of Director Brater’s earlier affidavit), and further asked where the “authorized individuals” were identified. While the prohibition does apply to election inspectors and election workers, MCL 168.765a(12) provides:

Subject to this subsection, *a local election official who has established an absent voter counting board or combined absent voter counting board, the deputy or employee of that local election official, an employee of the state bureau of elections, a county clerk, an employee of a county clerk, or a representative of a voting equipment company* may enter and leave an absent voter counting board or combined absent voter counting board after the tally has begun but before the polls close. A person described in this subsection *may enter an absent voter counting board or combined absent voter counting board only for the purpose of responding to an inquiry from an election inspector or a challenger or providing instructions on the operation of the counting board.* Before entering an absent voter counting board or combined absent voter counting board, a person described in this subsection must take and sign the oath prescribed in subsection (9). The chairperson of the absent voter counting board or combined absent voter counting board shall record in the poll book the name of a person described in this subsection who enters the absent voter counting board or combined absent voter counting board. *A person described in this subsection who enters an absent voter counting board or combined absent voter counting board and who discloses an election result or in any manner characterizes how any ballot being counted has been voted in a precinct before the time the polls can be legally closed on election day is guilty of a felony.* As used in this subsection, *"local election official" means a county, city, or township clerk.* [Emphasis added.]

The persons described in § 765a(12) are not subject to sequestration, and they would only enter an AVCB in order either to respond to an inquiry or to provide instructions to the counting board. The category of persons described is exceedingly limited—clerks, deputy clerks, Bureau staff, or a representative of the voting equipment company—and does not include inspectors. Once the issue that brought these persons into the AVCB is resolved, they may leave. These are the “authorized persons” to whom Director Brater referred in ¶ 47 of his earlier affidavit. Because these “authorized” individuals are not subject to sequestration, the communication device prohibitions need not be and are not applied to them. However, as stated in § 765a(12), if these individuals disclose an election result or characterize how a ballot has been voted before polls close, they are guilty of a felony—just the same as poll watchers, challengers, and inspectors sequestered under MCL 168.765a(10).

Sincerely,



Heather S. Meingast
Division Chief
Civil Rights & Elections Division