



# Pulaski County Election Commission

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The Honorable Dustin McDaniel  
Attorney General of Arkansas  
200 Tower Building  
Little Rock, AR 72201

Dear General McDaniel:

As the Pulaski County Board of Election Commissioners prepares for this year's election process, Act 595 of 2013, which was approved on April 2, 2013, raises some concerns. The Act, as codified in Ark. Code Ann. §7-5-201, requires that a voter provide "proof of identity to the election official when appearing to vote in person either early or at the polls on election day." When voting by absentee ballot, the voter is required to "submit with the ballot a copy of a current and valid photo identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter."<sup>1</sup> When the voter fails to provide proof of identity, Section 5 of Act 595, codified at Ark. Code Ann. §7-5-321, requires that the voter cast a provisional ballot which shall be counted if the "voter returns to the county board of election commissioners or the county clerk by 12:00 p.m. on the Monday following the election" and provides proof of identity or an affidavit stating that the voter cannot provide proof of identity because of indigence or a religious objection to being photographed. According to section 6 of the Act, codified at Ark. Code Ann. §7-5-418(d)(2), the procedure in Ark. Code Ann. §7-5-321 is to be followed for an early voter failing to provide identification. The Act is silent with regard to a remedy for an absentee voter that fails to "submit with the ballot" the required documentation concerning proof of identity.

The State Board of Election Commissioners has promulgated Rules for Voter Identification. Sections 805, 806, and 807 of those rules provide as follows:

## **§ 805 Postelection Submission of Proof of Identity or Affidavit of Indigence or Religious Objection**

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<sup>1</sup> Members of the uniformed services and the merchant marines, along with their spouses and dependents, who are absent from the county on election day because of service of the member are exempt from the identification requirements and residents of a long-term care or residential care facility licensed by the state may provide a letter from the administrator of the facility in lieu of the identification requirement.

A provisional ballot cast because a voter failed to present proof of identity when voting at the polls during early voting or on election day shall be counted and included in the certified results of the election if:

- (1) The voter's ballot is not successfully challenged for any other reason; and
- (2) The voter provides to either the county clerk or the county board of election commissioners by noon on the Monday following the election either the voter's proof of identity or an affidavit that the voter cannot provide proof of identity because of indigence or a religious objection to being photographed.

The voter may provide his or her proof of identity or his or her affidavit of indigence or religious objection to the county board by presenting the proof of identity or the affidavit at any meeting of the county board held before noon on the Monday following the election.

The voter may provide his or her proof of identity or his or her affidavit of indigence or religious objection to the county clerk by presenting the proof of identity or the affidavit to the county clerk before noon on the Monday following the election.

The voter shall present the proof of identity or deliver the affidavit of indigence or religious objection in person.

#### **§ 806 Assessment of Validity of Proof of Identity Submitted Postelection**

The county clerk or county board shall compare the photograph to the voter to determine whether the voter is the person depicted in the photograph, considering hair color, glasses, facial hair, cosmetics, weight, age, injury and other physical characteristics.

The county clerk or the county board receiving a proof of identity shall make a photocopy of the proof of identity and retain the copy with the voter's provisional ballot envelope. The county clerk or the county board shall provide a receipt to the voter containing the following information:

- (1) The name of the county clerk, or each county board member present at the meeting where the proof of identity was presented;
- (2) The name of the voter who presented the proof of identity;
- (3) The date and time the proof of identity was presented to the clerk or county board;
- (4) If it is determined that the photograph on the proof of identity depicts the voter, then a declaration of that finding;
- (5) If it is determined that the photograph on the proof of identity does not depict

- the voter, then a declaration of that finding including the reason for that finding;  
and  
(6) Any additional information the clerk or county board deems relevant.

The county clerk or county board shall retain a copy of the receipt.

### **§ 807 Postelection Submission of Affidavit of Indigence or Religious Objection**

The county clerk or county board receiving an affidavit of indigence or religious objection shall make a photocopy of the affidavit, provide the copy to the voter and retain the original affidavit with the voter's provisional ballot envelope. The county clerk or the county board shall provide a receipt to the voter containing the following information:

- (1) The name of the county clerk, or each county board member present at the meeting where the affidavit was delivered;
- (2) The name of the voter who delivered the affidavit;
- (3) The date and time the affidavit was delivered to the clerk or county board; and
- (4) Any additional information the clerk or county board deems relevant.

The county clerk or county board shall retain a copy of the receipt.

Like the Act, the Rules promulgated by the State Board of Election Commissioners do not address any remedy for absentee voters that fail to "submit with the ballot" the required documentation.

Additionally, it should be noted that Act 1424 of 2013, which was approved on April 22, 2013, amended Ark. Code Ann. §§7-5-412 and -416. These two statutes provide when an absentee ballot should be considered a "provisional ballot." According to Ark. Code Ann. §7-5-412, a first-time voter who registered by mail and did not provide identification at that time<sup>2</sup>, must submit a "copy of a current and valid photographic identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the first-time voter." Failure of the first-time voter to meet the identification requirements of Ark. Code Ann. §7-5-412 may cast the ballot by mail, and the ballot is considered as a provisional ballot. Arkansas Code Ann. §7-5-416 provides that an absentee ballot shall be considered a provisional ballot under the same circumstances as set out in Ark. Code Ann. §7-5-412 and when the name and when the name and address of the bearer, agent or administrator written on the absentee return envelope does not match the information on the voter statement. Other than a challenge by a candidate or qualified poll watcher (Ark. Code Ann. §7-5-417), no

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<sup>2</sup> The first-time voter who registered to vote by mail can also submit his or her driver's license number or at least the last four (4) digits of his or her social security number at the time of registration if the information matches the information in an existing state identification record bearing the same number, name, and date of birth as provided in the registration.

other reason is provided for considering an absentee ballot to be a “provisional ballot.”

This raises several questions about the implementation of Act 595 in elections conducted by the Pulaski County Election Commission.

- 1) Pursuant to Act 595 of 2013, should an absentee voter that is not exempt from the identification requirements and fails to “submit with the ballot a copy of a current and valid photo identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter” have his or her ballot considered a provisional ballot and be allowed the opportunity to provide identification by 12:00 p.m. of the Monday following the election?
- 2) If the answer to Question 1 is “yes,” how is the voter to be notified of the need to provide identification? (According to Ark. Code Ann. §7-5-416, processing of absentee ballots may not begin before 8:30 a.m. on election day; therefore, depending on the number of absentee ballots processing may not be completed in time to mail notifications that same day.)
- 3) If the answer to Question 1 is “yes,” will the absentee voter be required to present “proof of identity” as defined in Ark. Code Ann. §7-1-101 rather than “a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter?”
- 4) If the answer to Question 1 is “yes,” must the identification be provided in person as required by Ark. Code Ann. §7-5-321? Many people meeting the requirements to vote absentee (i.e., unavoidably absent from his or her voting place on the day of the election or unable to attend the polls because of illness or physical disability) would likely have the same difficulty appearing in person at the County Clerk’s office or an Election Commission meeting within the three and ½ business days between election day and the following Monday at noon.
- 5) If the answer to Question 4 is “no,” how will the County Clerk and Election Commission comply with Rules 806 and 807 promulgated by the State Board of Election Commissioners?

- 6) If the answer to Question 1 is “yes,” how should the election commission handle civilian overseas absentee ballots that are postmarked by election day but arrive after 12 p.m. on the Monday following the election (see Ark. Code Ann. §7-5-411) and do not contain the required identification documentation?
  
- 7) Would treating absentee voters differently from “in person” voters by denying them the right to submit the identification documentation at a later date create any problem under either the Arkansas or U.S. Constitution?

We are having a special election in Pulaski County on March 11, 2014, and would ask that you expedite your opinion.

Thank you for a prompt response.

Sincerely,

Leonard A. Boyle, Sr., Chairman  
Pulaski County Board of Election Commissioners