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From: <stuart.knade@psba.org>
To: <stuart.knade@paonline.com>
Sent: Wednesday, March 21, 2007 1:48 AM
Subject: election board rejection of Act 1 ballot questions

Dear Colleagues:

Last week we alerted you about a memo sent by the Pa Dept. of State's Bureau of Commissions, Elections and Legislation to county election boards expressing the bald opinion (without any supporting discussion or analysis whatsoever) that Act 1 front end ballot questions must not deviate at all from the "form" set forth in Section 331.2 (e) of Act 1, and that it is the duty of local election boards to revise such questions so as to strip out any modifications. This email provides you with our thoughts on how school districts might best react to what local election boards do in response to that memo. It is rather lengthy, but we wanted to provide you with as much ammunition as we could assemble at this point.

PSBA believes that Dept of State's position is flat out wrong on both counts (as discussed further below). But, despite the fact that local election boards tend to follow blindly whatever guidance they get from the Dept of State (hereinafter "State"), since State has no actual legal authority nor statutory duty in connection with local ballot questions, there appears to be little or no basis for some immediate statewide legal solution (e.g., declaratory judgment action in Commonwealth Court). It appears to us that some kind of declaratory judgment action probably would be ripe only on a county by county basis, as each election board makes its its intentions clear about rejecting or modifying the school board authorized ballot question.

Should a school district wish to pursue such an action, PSBA would like to be notified ASAP, so we can participate as appropriate in support of the school district. The outcome still would require overcoming what might be an inclination on the part of common pleas courts to give deference to the positions of State or local election boards. However, there may be more efficient and politically effective approaches.

It is our sense that the Commonwealth administration, fearing that

Act 1 ballot questions might do poorly at the polls, is beginning to grasp around for reasons to blame school boards for such a result, and legal action could provide further ammunition for that blame game, regardless of who is legally correct. In that regard, State's misguided interference has done a disservice not only to school districts and to Act 1 itself, but to local election boards as well. State has put local election boards in a very difficult position, and essentially has directed local election boards to put themselves in the line of fire.

Consequently, we anticipate that any election boards or their solicitors giving much thought to this are likely to be very uncomfortable with this position, to be uncertain about their authority to alter the question duly authorized by the school board, and eager to obtain some kind of ratification from the school board to the modifications State has told them to make. Indeed, early reports indicate that election boards are doing just that---asking school boards to ratify the changes required by the State memo. We think there is a good possibility that if alerted to the questionable legality of what State is asking of them, the election board may be reluctant or unwilling to make unilateral modifications to the ballot question without such concurrence or ratification.

Accordingly, instead of litigation, it may be an effective response to the situation to make clear to the election board and especially its solicitor, that:
(1) the election board's authority to alter the submitted ballot question is extremely questionable (as discussed further below);
(2) that the election board would have to do so unilaterally and without concurrence or ratification from the school board, since the Act 1 deadline for school board action on the question has expired;
(3) that the effect of any modifications would be to reduce clarity and voter understanding, and to reduce likelihood of passage; and
(4) that the election board would be assuming sole responsibility for the legal and political consequences.

That is why in the latest PSBA Act 1 Newsletter, we counseled in effect that school boards should not feel any obligation to help the election board off the hook, as it were, by jumping through hoops to provide concurrence or ratification of proposed alterations to the submitted ballot question.

It is also our sense that local solicitors, or teams of them at the county level, are in the best position to communicate this kind of message to the county solicitor or other counsel advising the election boards, given

what we understand to be common connections and aquaintances within the county bar. PSBA is also exploring what other channels might be available to get this across, but we still believe local counsel are likely to be the most effective advocates on this matter.

On the other hand, with respect to the "non-legal interpretive statement" we think State is probably correct that legally, the ultimate responsibility for drafting it lies with the local election board, although we may not be entirely happy with the fact that the PDE models do not reflect all of our input.

The remainder of this email outlines the basic talking points and analysis you may wish to use in making the main points to the county solicitor or other counsel to your local election board.

1. Because it was immediately obvious that the model language in Act 1 clearly did not contemplate a number of complicating factors that could affect voter understanding of the question in a particular community, the issue of modifying the ballot question to address such things arose many months ago. PSBA's analysis concluded that the wording of Act 1 permitted some flexibility in the wording of ballot questions in order to enhance understanding and cure ambiguity, but our guidance also cautioned that the more extensive the modifications, the more a district might be going out on a limb.

2. Sub-section 331.2(e) of Act 1 does not simply prescribe the language for a ballot question and say that it must be "phrased as follows." Instead, the introductory paragraph of that subsection describes at length the elements the question must address, and requires that the "question shall be clear and in language that is readily understandable by a layperson," all of which would be unnecessary surplusage if the intent was that questions be strictly limited to the model formats appearing thereafter. Those formats are preceded by the instruction that the question be "framed in one of the following forms." Blacks Law Dictionary (7th Edition, West, 1999) defines "form" in relevant part as "the outer shape or substance of something, as distinquished from its substance or matter," or alternatively as "a model, a sample; an example."

3. Under Act 1, local election boards have a non-discretionary, ministerial duty to present to the voters the question duly authorized by the school board. Under Section 331.2, school boards

are required to "submit . . . a referendum question to the voters," and to authorize such a question by resolution adopted, after public hearing, no later than March 13, 2007. Boards of directors "shall submit the question . . . to [county] election officials . . . no later than 60 days prior to the primary election of 2007," and those "election officials shall cause the referendum question to be submitted to the electors . . .."

4. State's memo appears the product of some wild paranioa that school boards might attempt to spin the ballot question to discourage passage. Quite the contrary, in the vast majority of cases we've heard discussed, the modifications fell into five basic categories of a relatively minor nature to cure ambiguity or enhance voter understanding:

a. Inserting the words "estimated" or "approximately" before the amount of the property tax reduction (a modification reflected in the models posted on the PDE website); b. Indicating a lower number for first-year reduction, or stating a range to indicate the effect of first year EIT/PIT collection lag;
c. Indicating the portion of total EIT tax rate actually received by the school district where a municipality claims half pursuant to Act 511;
d. Indicating that property tax reduction would also apply to qualified farm buildings in addition to homesteads;
e. Adding the words "owner occupied" to clarify what "qualified residential property" would benefit from property tax reduction.

Some boards have also considered the more extensive approach of re-ordering the elements to mention property tax reduction first, or to add language stating that the effect would be revenue neutral to the district, in the belief that these might enhance the chance of voter approval.

5. State's misguided interference has created a much greater potential for suit to set aside the results than would otherwise have existed, and has place passage of Act 1 front end ballot questions in far more jeopardy. Unaltered, hundreds of ballot questions with fairly minor clarifying enhancements have now been declared by State to be contrary to statute.
But if the local election board follows State's direction and strips out such enhancements, the effect is to reduce clarity and voter understanding from what the school board submitted IAW Act 1 procedures, and perhaps reducing the likelihood of passage from whatever that likelihood might otherwise have been. If the election board chooses to

follow State's suggestion to meddle outside its statutory authority, it may have to do so on its own, and remain solely responsible for the legal and political consequences.

We hope you find this information helpful. Please keep us informed of developments at the local level, and let us know if you have any questions.

Best regards,

Stuart

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