

Report of the Fairfax County Electoral Board

Issues Surrounding the Counting of Absentee and Provisional Ballots
November 5, 2013 General Election

Adopted by the Board, December 11, 2013

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INTRODUCTION

The Fairfax County Electoral Board (“FCEB”) has developed the following report in response to concerns raised by the community regarding issues surrounding the November 5, 2013 General Election in Virginia. Given the intense scrutiny the Board and the Fairfax County Office of Elections (“FCOE”) came under during this election, given tabulation problems in the 8th Congressional District and controversy surrounding the Electoral Board’s handling of the provisional ballot meeting, the Board has chosen to provide this voluntary report on the events that occurred during the election and canvass where questions were raised by various participants.

The goal of this report is to explain to interested stakeholders and the public the sequence of events, the decisions made by the Board and the rationale for those decisions. It is the hope of the Board that by being transparent and open about these issues, the public will be reassured about the administration of the election and will conclude that the actions taken by the Board and the errors discovered during the canvass had no substantial impact on the overall outcome of the election in any race, and that all steps taken and Board decisions made were in accordance with the federal and Virginia Constitutions, the Virginia Code and mandatory State Board of Elections (“SBE”) guidance.

BACKGROUND

In order to place the events of the November 2013 General Election in context, it is important to review the current composition of the Fairfax County Electoral Board, the history of the provisional ballot process in Virginia and Fairfax County, the Democratic Party’s litigation against the Board filed shortly before the November 2012 General Election and the types of voting machines and equipment used in Fairfax County.

THE FAIRFAX COUNTY ELECTORAL BOARD

The Constitution of Virginia establishes local electoral boards, comprised of three members, in each county and city in the Commonwealth of Virginia.¹ Members of the Board are chosen by the Circuit Court of the jurisdiction in which they reside,² from names submitted by the two political parties entitled to appointments.³

The Electoral Board in Fairfax County currently is comprised of two Republicans and one Democrat.⁴ The Chairman of the Board is Seth T. Stark, Esq., who was appointed by the Court in March 2011 from a list of names submitted by the Fairfax County Democratic Committee (hereinafter “FCDC” or “Democratic Party”). The Vice Chairman of the Board is Stephen Hunt, who was appointed July 2013 to fill the unexpired term of former Secretary Carol Ann Coryell, who resigned for health reasons at the end of June 2013. The Secretary of the Board is Brian W. Schoeneman, Esq., who was appointed in March 2013 and became Vice Chairman. He became Acting Secretary upon the resignation of Carol Ann Coryell and was elected Secretary by a vote of the Board in August 2013. Both Secretary Schoeneman and Vice Chairman Hunt were selected from a list of names submitted by the Fairfax County Republican Committee (hereinafter “FCRC” or “Republican Party”).

By law, the Chairman and Secretary must be of differing political parties.⁵ Traditionally in Virginia, the Secretary receives higher compensation than the other two members and is considered the “working” member of the Board, responsible for the day-to-day responsibilities of the Board. In Fairfax the Secretary is also the Board’s chief media spokesman. By tradition statewide the Secretary is a member of the Governor’s political party, but some local boards elect the minority member as Secretary, depending on the decision of a local board and its members.

The General Registrar for Fairfax County is Cameron Quinn, Esq. Among other past experience, Ms. Quinn is a former Secretary of the Virginia State Board of Elections, a former senior elections attorney at the U.S. Department of Justice, and adjunct

¹ VA Const. art. I, § 8.

² VA Code Ann. § 24.2-106 (2013).

³ See VA Const. art. I, § 8 (stating “In the appointment of electoral boards, representation, as far as practicable, shall be given to each of the two political parties which, at the general election next preceding their appointment, cast the highest and the next highest number of votes.”)

⁴ See VA Code Ann. §24.2-106 (noting “[t]wo electoral board members shall be of the political party that cast the highest number of votes for Governor at [the preceding] election.”) Unless one of the two Republican members leaves the Board early, the FCEB will not change over to a Democratic Party controlled Board until March 2015, when Republican Vice Chairman Steve Hunt’s term of office ends. Board terms last 3 years and only one member’s term ends each year.

⁵ *Id.*

professor of election law at George Mason University. She was appointed General Registrar in September 2011 by the Fairfax County Electoral Board.

FCDC v. QUINN, ET AL. LAWSUIT

In October 2012, prior to the November 2012 General Election, FCDC filed suit against General Registrar Quinn, the Fairfax County Electoral Board (as it was then constituted – Secretary Carol Ann Coryell (R), Chairman Seth Stark (D), and Vice Chairman Hans von Spakovsky (R)) and the Virginia State Board of Elections. The suit dealt with a number of issues, including issues regarding the rights of party authorized representatives (pollwatchers), election officer training regarding pollwatchers and election officer assignments.⁶ That complaint was amended in January 2013 to include new counts from the 2012 General Election, including a count regarding the provisional ballot log and information that was disclosed to the political parties by the Electoral Board in that election. That complaint was again amended in June 2013, and again in October 2013.

As part of the first (and succeeding second and third) amendment,⁷ FCDC alleged that the State Board of Elections guidance⁸ on the information local Electoral Boards could release to political parties regarding voters who had cast a provisional ballot violated the Virginia Freedom of Information Act,⁹ the Virginia Declaration of Rights,¹⁰ and the Due Process and Equal Protection Clauses of the 14th Amendment to the U.S. Constitution,¹¹ among other statutory claims. After nearly a year's worth of negotiations, FCEB entered into a memorandum of agreement with FCDC to resolve the FCEB related counts in FCDC's complaint.¹² As of the date of this writing, this lawsuit remains pending before the Fairfax County Circuit Court, and no final decision has been rendered. A trial date has been set for March 2014, but as the parties have reached an agreement in principle, FCEB hopes to settle the case before trial.

As a result of this lawsuit, agents of both the SBE and the FCEB each separately engaged in a meet and confer process over the past year with FCDC in order to resolve the lawsuit in an expeditious manner. This has resulted in a number of policy changes made by both SBE and FCEB in regards to the handling of information regarding provisional ballots. At least one of these policies, regarding the release of certain non-

⁶ *Fairfax County Democratic Committee v. Cameron P. Quinn, et al.*, Case No. 2012-16179, Fairfax Cir. Ct. (2012).

⁷ *See id.*, ¶ 309-329.

⁸ This guidance came in two forms. First, the “Do’s and Don’ts for Campaigners and Authorized Representatives,” and a memorandum issued by State Board of Elections Secretary Donald Palmer on Friday, November 8, 2013 at 11:44 AM. The “Do’s and Don’ts” was most recently updated in September 2013.

⁹ VA Code Ann. § 2.2-3700 et seq. (2013).

¹⁰ VA Const. art. I, §§ 6, 11, 12.

¹¹ U.S. Const. amend. XIV, § 1.

¹² *See* Memorandum of Agreement between the Fairfax County Democratic Committee and the General Registrar and Electoral Board of Fairfax County, adopted October 11, 2013.

confidential information to the political parties, has been criticized by outside observers.¹³

MAJOR ISSUES RAISED DURING THE NOVEMBER 2013 GENERAL ELECTION

Given the closeness of two House of Delegates races in Fairfax County¹⁴ and the statewide Attorney General race, two major issues in the canvass process following the election have been subject to considerable scrutiny. First, there was an issue with the unofficial tabulation of results in the 8th Congressional District Central Absentee Precinct (“8th District CAP”) on election night. This issue, which has garnered both national and regional media coverage, resulted from a misreporting of unofficial results in the 8th District CAP on Election Night. Following its discovery, and a review of the situation, the Board unanimously accepted a corrected Statement of Results (“SOR”) from the canvassers that resulted in approximately 3,000 additional votes being added to the official vote totals for the 8th District CAP.

The second issue was criticism of the Board’s handling of the provisional ballot meeting, the release of information relating to provisional ballots, and the standards by which FCEB approved or rejected provisional ballots. Outside observers have criticized that Fairfax County provided lists of names and other information to the authorized political party representatives as part of the provisional ballot meeting. Observers have also criticized the Board’s decision to grant voters additional time to present information to the Board in person regarding their reasons for casting a provisional ballot, and the potential that the additional time gave Fairfax voters an undue advantage not allowed by law. Finally, they question the standards that FCEB used to adjudicate some provisional ballots.

Each of these issues will be discussed in turn.

¹³ See e.g., Steve Albertson, *Unfair in Fairfax*, The Bull Elephant Blog <http://thebullelephant.com/unfair-in-fairfax/>, accessed November 28, 2013.

¹⁴ The 86th House of Delegates race, between Republican Tom Rust and Democrat Jennifer Boysko, was certified by FCEB as a 54 vote victory for Rust, within the 1% recount threshold. The 34th House of Delegates race, between Republican Barbara Comstock and Democrat Kathleen Murphy, was certified by FCEB as a 422 vote victory for Comstock, just outside the 1% recount threshold.

ISSUES WITH THE COUNT IN THE CENTRAL ABSENTEE PRECINCT FOR THE EIGHTH CONGRESSIONAL DISTRICT

Background

Under state law, the governing body of each jurisdiction may establish one or more absentee voter precincts to receive and process absentee ballots.¹⁵ The Fairfax County Board of Supervisors has established one Central Absentee Precinct for Fairfax County, located at the Fairfax County Government Center.¹⁶ Results from the CAP are reported by Congressional District, as required by SBE. Three Congressional Districts are included within the boundaries of Fairfax County – the 8th, 10th and 11th districts. Because ballots are counted, tabulated and results are reported to SBE by Congressional District, FCEB has traditionally run three different CAP sub-precincts to ensure the results are separated by congressional district.

For the 2013 General Election, the Central Absentee Precinct was the responsibility of FCOE permanent staffers William Norton and Victoria Kinsman. They were assisted in coordination of CAP by FCOE long-time seasonal staffers Donna Curtin and Sing Lee. Each Congressional District was managed by a Chief Election Officer and an Assistant Chief Election Officer. The 8th Congressional District Chief, representing the Republican Party, was Larry Ichter and the Assistant Chief, representing the Democratic Party, was Mark Teare. Both are veteran Chief Election Officers and had previously served in CAP.

Absentee voting in Virginia includes two separate, but related processes. The first is traditional absentee voting by mail. The second is absentee in-person voting. The General Assembly has permitted localities to create satellite voting locations to improve voter access for in-person absentee voting prior to Election Day. In larger counties, this authority has been used for more than a decade.¹⁷ The County Board of Supervisors and FCEB established seven satellite voting locations, in addition to the legally required location of the Office of the General Registrar at the Fairfax County Government Center, for in-person absentee voting in Fairfax County. Times and dates for satellite voting change each year. In 2013, each satellite was open for Saturday voting only, beginning September 28, 2013 and continuing through October 12, 2013. Starting October 15, 2013 through November 2, the satellite locations were open from Monday through Saturday to receive in-person absentee voters. The Fairfax County Government Center location (inside FCOE) began allowing absentee voting in-person on Friday, September 20. From September 23 until November 2, in-person absentee voting was permitted at all times FCOE was open for business.

¹⁵ VA Code Ann. § 24.2-712(a) (2013).

¹⁶ Fairfax County, Va., Code § 7-1-2 (2013).

¹⁷ See VA Code Ann. § 24.2-707 (2013). Loudoun, Virginia Beach and Prince William County, for example, have more than one in-person location.

Because voters could visit any satellite and vote absentee in-person regardless of where they live in Fairfax County, each satellite voting location had six optical scan machines and six direct-recording electronic voting machines¹⁸ (“DREs” or “touchscreen machines”), two per Congressional District, to accept ballots. Following the completion of the absentee in-person voting time period,¹⁹ the voting equipment and ballots were returned to FCOE and stored in a secure area prior to Election Day.

Both the optical scan and DREs produce a final, electronic tabulation of votes on a long receipt tape, similar to those used in cash registers. These tapes include all votes counted for each election programmed to be accepted by the optical scanner or DRE. The machine tapes are run by the CAP officers of election to compile their Statements of Results and informal results sheets for each congressional district CAP after 7 PM on Election Night.

A Timeline of Errors in the 8th District CAP on Election Day

CAP was located on Election Day in the Fairfax County Government Center Conference Center. Each congressional district CAP was located in a separate room with a full complement of Officers of Election representing both political parties. Throughout the day, the Officers of Election processed mail-in absentee ballots that had been received prior to Election Day, as well as all the ballots that were received on Election Day.²⁰

After the polls closed, some Election Officers from each of the CAPs, along with one of the CAP Coordinators, began the tabulation and recording of the votes from the 59 machines in their custody in a room separate from the three regular CAP rooms. For the 8th District CAP, the staff was responsible for tabulating results from 20 optical scan and touch screen machines.

Prior to Election Day, an optical scan machine used in the Mason District Satellite location had malfunctioned on Friday, November 1. The memory card from that machine (A) was placed into another machine (B) and staff confirmed that the vote counter properly continued to tally votes after correctly capturing all the previous votes stored on the memory card. Each voting machine has a dedicated Machine Certification Log, used

¹⁸ DRE machines are for use as the handicap accessible voting machine required under Virginia law. *See* VA Code Ann. § 24.2-626.1 (2013). All voters are permitted to use them, but in 2013 were encouraged to use the optical scan equipment.

¹⁹ Virginia law requires all non-emergency absentee in-person applications be received no later than three days prior to Election Day. *See* VA Code Ann. § 24.2-701(B)(1) (2013).

²⁰ Virginia law forbids the tabulation of any results from a CAP until after the polls close at 7:00 PM on Election Day, but Election Officers in the CAP are permitted to “pre-process” ballots by running them through the optical scan machines prior to the close of the polls, so that at 7:00PM the results tapes can be run. *See* VA Code Ann. § 24.2-712. The Code also allows pre-processing of returned mail ballots in advance of Election Day, and FCEB authorized this be done by FCOE in 2013, so that the number needing pre-processing on Election Day is relatively few. This speeds up results from CAP, which in the past has often gone until into the next morning after Election Day. *Id.*

to document the machine's opening and closing vote totals, and to ensure proper public counter reconciliation between the recorded number of absentee applications received for each day the satellite is open and the total number of votes on the machine. An error occurred at the satellite location, when the Satellite Supervisor did not note that the memory card had been moved from machine A to machine B on either machine's Certification Log. This failure to note the event in the Machine Log meant Election Night staff was unclear what had happened. The total of the two-machine certification logs after weeks of in-person voting at the Mason District Satellite location was 723 voters, which matched the absentee application count.

On Election Night, as all the machines were being tabulated, the CAP Coordinator saw that one machine (A) in the 8th District was not printing a result tape and identified it as coming from the Mason Satellite location. Machine B did print a tape - referred to as the "723 tape" - that showed votes from 723 ballots, including 13 write-in ballots, which had been separated into a blue Write-In Bag as per standard procedure for write-ins. It was not noted that there were two machines from Mason Satellite or two certification logs at that time. When the logs were found, they did not elucidate what happened on November 1.

Out of concern that the ballots were not all accounted for, the Coordinator asked for all the Mason 8th District ballots to be retrieved and rescanned. This was done on a different machine for the 8th District CAP, a machine that had been in use all day to scan all of the optical scan ballots that had been received back by mail from voters. Except for the 13 ballots from the Write-In Bag, all the Mason 8th District ballots were rescanned (710 of them). The final total for this CAP machine was 2,688 votes. This tape has been referred to as the "2,688 tape."

The first clerical error of Election Night occurred when the 2,688 tape was not included on the AccuVote machine page, while the 723 tape was included on the certification log/pollbook page reported on the SOR. As a result, the unofficial results released on Election Night were off by 1,978 votes – the difference between the 2688 tape's full number and the 710 votes included on the 723 tape (less the 13 write-ins). Those results were then transmitted to FCOE and SBE and became available to the general public on the SBE and Fairfax County websites. This was the largest single error that contributed to the incorrect results report in the 8th District CAP.

Another clerical/mathematical error occurred that affected the Election Night 8th District CAP reporting of results due to a human error caused by the use of a difficult form. The Statement of Results ("SOR") form is difficult to understand, even for trained and experienced Election Officers. The SBE sample SOR form is insufficient for handling the large number of machines and logs used by the County's CAP in a general election. Further, on the SOR the Machine and Certification log/pollbook results are added across a row, rather than down in a column, which is counterintuitive. Given the large number of machines in CAP – far larger than in any normal precinct - there are two rows of numbers to add, not just one. When the SOR preparer tabulated the results late Election Night, the preparer failed to add both rows on the Certification Log/pollbook

page which resulted in a significant clerical error. This led to the unofficial vote count being released from the 8th District CAP Election Night as 5,293. The total number of votes tabulated and reported for the Governor’s race was 4,201, almost 1,000 votes lower than the total reported in the precinct.

After a review of CAP procedures as a result of these errors, it has been determined that, in past elections, the CAP Chief and Election Officers have never been furnished with copies of the statistics compiled by FCOE staff on the number of Absentee Ballots mailed, received and voted in-person in each Congressional District. FCEB and the General Registrar are confident that had the CAP staff received that information, they would have been aware that a total of 3,365 absentee ballots had been mailed to voters in the 8th District, and as of the polls closing on Election Day, 2,159 of those ballots had been returned. Additionally, they would have known that 5,113 absentee in-person ballots were cast in the 8th District CAP at the satellite locations prior to Election Day. This would have alerted them to some of the math and other clerical errors. The Office had received 7,272 in-person votes or mailed in ballots to count in the 8th District. While there is always a reduction in the number of ballots actually counted from the number returned,²¹ a reduction of over 2,000 ballots would be a major red flag to CAP officials. FCEB and FCOE will change procedures going forward to ensure that CAP officials are aware in advance of how many absentee ballots should be accounted for in the CAP results in the future.

Discovery of the Error in the 8th District CAP

As is often the case, a number of media outlets, the Virginia Public Access Project, bloggers, campaign officials and partisans and reporters were reviewing the results on Election Night, trying to spot trends and determine accurate outcomes ahead of the final tallies being announced. A number of these observers, who had been coordinating their release of information over social media sites such as Twitter, had observed the lower than expected number of ballots cast in the Governor’s race in the 8th District CAP. As the three Central Absentee Precincts in Fairfax County represent three of the largest precincts by vote total in the Commonwealth of Virginia, the media and election watchers often heavily scrutinize them. As early as late Tuesday evening, Election Day, rumors began to surface in a variety of media that there were “missing” ballots in the 8th District CAP.

After hearing these rumors on the morning of Wednesday, November 6, the Board informally asked General Registrar Quinn and the CAP Coordinators to confirm that all ballots in the 8th District CAP had been counted and that there were no missing ballots or ballot boxes that may have been overlooked. After their investigation, which included visiting the Fairfax County Government Center’s central mail processing facility, a single

²¹ Some ballots are inevitably disqualified in CAP for various errors made by voters. Those errors include omissions on the “B” envelope in which physical ballots are placed by the voter, sealed and returned, failure to sign the “B” envelope or have that signature witnessed, or other material omissions as determined by SBE. *See* VA Admin. Code § 20-70-20 (2013).

absentee ballot from the 11th District, which was sent to the office without postage, was discovered. All ballots and ballot boxes were accounted for, and there was no evidence that there were any “missing” ballots from the 8th District CAP that had not been counted.

Secretary Schoeneman provided that information to the media, both through the County’s Public Information Officer, as well as via Twitter. Despite this information being released, outside observers continued analyzing the results, and continued to believe that there was a significant problem with the vote totals in the 8th District CAP.

The canvass of the results in Fairfax County began at 9 AM on Wednesday, November 6. Given the narrow unofficial victory margins in the 86th and 34th House of Delegates races in the County, both the Republican and Democratic Parties requested, and the Board agreed, to begin the canvass with those two races. As staff worked to separate the precincts of the 86th and 34th, the canvass began canvassing a handful of precincts where both staff and outside observers believed there were clear transcription errors in the vote totals.²²

The next morning, prior to the start of the canvass, because of the closeness of the two House races and the AG’s race, FCOE staff, in consultation with the Board, made the decision that in addition to the regular canvass check, a second “double check” of arithmetic and proper completion of the Statement of Results would be done for all precincts. As a result of the double check, canvassing the precinct results took much longer than it had in some previous elections. The full canvass of the 86th and 34th Districts did not finish until the morning of Thursday, November 7.

Staff did not begin a canvass of the 8th, 10th and 11th District CAPs on Wednesday, due to standard Fairfax County canvassing procedures. Because of the size of CAP precincts, CAPs are canvassed after the canvassing teams have familiarized themselves with the canvass process on regular precincts. Thus, CAP canvasses typically start on the second day of a canvass in a General Election in Fairfax County. While a regular precinct takes from 30 to 60 minutes to canvass, a CAP – simply because of its size and the large number of machines – can take multiple hours to canvass. FCOE staff was able to complete the canvass on the 10th and 11th District CAPs by the evening of Thursday, November 7. The 8th District CAP had not yet begun.

²² There were clear transcription errors in Londontowne #1, Hollin Hall and Saratoga Precincts. In addition, in Cameron Glen precinct, there was a discrepancy of 13 votes between the number of individuals checked in on the pollbooks and the number of votes tabulated, leading the Board to believe there were 13 uncounted votes in Cameron Glen precinct. This lead FCEB to petition SBE to examine the ballots to determine if the pollbook number was correct and there were uncounted ballots. This would have required a visit to the Courthouse to inspect the ballots, and was originally scheduled for 10 AM on Friday, November 8th, but the issue in the 8th District CAP forced a cancellation of the visit. This issue should be resolved during the recount requested by Senator Obenshain on November 27th.

After adjournment of the canvass, late on the evening of Thursday, November 7, both Chairman Stark and Secretary Schoeneman were contacted directly by outside observers regarding the issues in the 8th District CAP. However, because of the limitations of the Virginia Freedom of Information Act, communication between members of the Electoral Board on any matters that may be before them are generally prohibited, so Secretary Schoeneman and Chairman Stark did not speak to each other directly that night.

In an effort to promote transparency, given the closeness of the races and the media attention on Fairfax, Secretary Schoeneman had been responding to outside observers and ordinary citizens with questions regarding the election and canvassing process over Twitter. That evening, he was asked a number of direct questions by David Wasserman of the Cook Political Report, who had spent the days since Election Night reviewing results from across the Commonwealth. Secretary Schoeneman also received a phone call from Ben Tribbett of the Not Larry Sabato blog, one of the leading Democratic blogs in Virginia. Both highlighted their concerns with the vote totals in the 8th District CAP.

At approximately the same time, Donald Brownlee, a campaign staffer for Congressman Gerry Connolly (D-11th District) reached out to Chairman Stark and walked him through similar concerns regarding the vote totals in the 8th District CAP. Chairman Stark also spoke to reporter Ben Pershing of the Washington Post.

During his Twitter conversations with Dave Wasserman, Secretary Schoeneman reviewed a copy of the absentee ballot report that had been provided to the Board on their final Board meeting before the election on November 4, 2013. That report indicated that, at a minimum, the vote totals in the 8th District CAP should be in the 7,000+ range, as noted above. Secretary Schoeneman looked at the vote totals being reported by Fairfax County on its unofficial spreadsheet of results on their website, which indicated that a total of 4,201 votes had been counted in the 8th District CAP for Governor – a nearly 3,000 vote margin below what should have been reported. At that point, it was clear there was a significant error.

Secretary Schoeneman called General Registrar Quinn immediately and asked her to pull the unofficial returns sheet for the 8th District CAP. That sheet listed a total number voting of 5,293 voters, and confirmed the 4,201 total for governor. The pre-election absentee ballot report from Saturday, November 2 indicated over 7000 voters in the 8th District CAP.

It was clear at that point, approximately 11:10 PM on Thursday, November 8, to both General Registrar Quinn and Secretary Schoeneman, that there was an error in the 8th District CAP, most likely that some voting equipment tapes had not been added in, that there was a math error in tabulating the results, or both. Secretary Schoeneman acting as the Board's chief media spokesman put out a statement on Twitter at 11:14 PM stating that he recognized there was an error, and that a canvass of the 8th District CAP was top priority when the canvass reconvened on Friday, November 8.

At 11:56 PM that evening, General Registrar Quinn alerted all of the relevant staff, candidates, and political party representatives, among others, via email of the issue, and Secretary Schoeneman reconfirmed in an email to FCOE staff managing the canvass that the 8th District CAP would be top priority Friday morning.

It was clear to both the Board and the staff that this error would have been found in the canvass through the regular course of the canvass, regardless of outside observers finding the error first. Unfortunately, due to the sheer number of precincts to canvass in Fairfax County (238, plus the three CAP precincts), and the maximum number of canvass teams able to be accommodated in the County Government Center's largest conference room, the canvass had not yet gotten to this large precinct until most other localities had finished their canvass. Thus, the sheer magnitude of additional votes in the various close races became a key focus for many who would not have been as conscious of such a single error had it been found on Wednesday or Thursday. In retrospect, given the questions raised about the 8th District CAP as early as Wednesday, it should have been prioritized during canvass over the other two congressional district CAPs.

Friday morning, FCOE staffers Victoria Kinsman, Bill Norton and Henry Rackowski began an investigation into what had occurred and began the canvass of the 8th District CAP. The results of their investigation have been outlined in the previous section. This initial canvass and investigation took the better part of Friday. Late Friday afternoon, the Board met with the team of 8th District CAP canvassers and staff to receive their preliminary report on what had caused the incorrect results. The staff indicated that while they had not yet completed their investigation, they believe they knew what had happened in regards to the majority of the errors, and recounted the math errors, as well as the story of the "723" and "2688" tapes. The staff requested additional time to verify their results, and conduct a 'double check', which the Board granted.

At a 10 AM meeting the next day, the staff presented their final review of the investigation and provided their draft SOR to the Board. After pointed questioning by Secretary Schoeneman, Chairman Stark, and Vice Chairman Hunt, as to whether the entire staff and bipartisan team of Election Officers working on the issue, including the 8th District CAP Chief Election Officer and the CAP coordinators, unanimously agreed with the final conclusions (which they did), the Board voted 3-0 to accept the revised SOR as determined through the canvass. The Board then held a press conference and released a statement regarding the investigation and resolution of the 8th District CAP issue.

To be clear, there was no evidence, and there continues to be no evidence, that there were *any* uncounted ballots in the 8th District CAP. No uncounted ballots were found, and no additional ballots in the 8th District CAP were counted after Election Day. *To repeat, every ballot was accurately counted on Election Day.* The errors were in the tabulation of results, including the over- and under-inclusion of proper tapes from machines, and arithmetic errors resulting from a non-intuitive form. At no time were any ballots from the 8th District CAP counted after Election Day.

Further, as stated above, it was clear that the error would have been caught in the regular canvass process and corrected. The closeness of the Attorney General and House of Delegates races in Fairfax, the timing of when the errors were first discovered and the considerable time needed to complete the overall canvass in Fairfax County brought more attention to this particular error in Election Night unofficial results than would have been the case in other elections, or even if the canvass of the 8th District CAP had occurred a day earlier. That attention helped speed the identification and correction of the error, but it would be incorrect, as some in the media have done, to state that without the help of outside observers, this error would not have been discovered and corrected.

PROVISIONAL BALLOT MEETING ISSUES

In Virginia, any voter whose name does not appear on the pollbooks, who does not have adequate identification at the polls, who is marked as having already voted or having been sent an absentee ballot, among other issues, is allowed to vote a provisional ballot.²³ Because these ballots are segregated from regular ballots, and are subject to review, adjudication and potential disqualification by local Electoral Boards, they have come under heavy scrutiny by the political parties and third party watchdog groups. Because of the number of very close races in Fairfax County in November 2013, the handling of the provisional ballot meeting by FCEB has come under close scrutiny and criticism.

There are three specific issues for which the Board has been criticized, along with a stated concern about uniformity. First, there have been concerns raised about the release of provisional voter information to the political parties by the Board. Second, there have been concerns raised about the announcement made by the Board to allow voters extra time to present information on their provisional ballots to the Board before final adjudication of those ballots. Third, there has been concern that provisional ballots were counted in contravention of SBE policy. In each case there have been allegations that the way FCEB handled these provisional ballots was in contravention of uniformity requirements in Virginia.²⁴

Each issue shall be addressed in turn. Before doing so, however, these issues must be put in context. First, it is important to note that while the Code states that uniformity is a goal, the Code itself envisions a system that clearly recognizes not everything regarding Election Day can, or should, be uniform. Were uniformity the only goal of Virginia's electoral system, the system would not have been designed to provide for appointment of 134 local electoral boards. Such a design anticipates that some local decision-making is necessary, or at least if uniformity were the overarching end goal, that the process would require greater SBE control over who is appointed to these local boards.

²³ See VA Code Ann. § 24.2-653 (2013).

²⁴ VA Code Ann. § 24.4-106(a) (stating that the State Board will supervise general registrars and local electoral boards “. . . to obtain uniformity in their practices and proceedings and legality and purity in all elections.”)

Even before the Supreme Court's decision in *Bush v. Gore*,²⁵ uniformity was a stated goal in the Virginia Code, and SBE developed policies and processes to help ensure uniformity. Yet, even after *Bush v. Gore*, the Commonwealth and SBE have embraced certain procedural and statutory policy positions that are inherently non-uniform, such as localities being permitted to purchase different types of voting equipment.²⁶ Thus, it remains a challenge for both SBE and local electoral boards to determine exactly what needs to be uniform to satisfy the requirements of due process and equal protection.

Second, it is important to understand how FCEB had been handling the provisional ballot meeting and the log used by the Board at the provisional ballot meeting over the past few years. The provisional ballot meeting in Fairfax, as with all localities, begins at noon on Wednesday, following a Tuesday election. After voters who choose to attend the noon meeting, if any, finish their interviews with the Board, the meeting is recessed until a later date to provide time to complete research on all of the provisional ballots received. Even before the change in law that provided that ID provisional voters had until noon on Friday after an election to provide identification, FCOE often needed days to research provisional ballots, which often numbered in the hundreds or thousands in most November general elections.

Beginning in April 2011 FCEB, at the instigation of former General Registrar Edgardo Cortes (and with approval of former SBE Secretary Nancy Rodriguez) changed its format for the provisional ballot meeting. After the change, FCEB was provided an electronically produced log sheet that redacted some of the voters' information. This log sheet, using a random number tied to each provisional voter, did not display any provisional voter names. This log sheet was an abbreviated version of all of the master provisional ballot log information. When given to the Board members it provided the precinct, but not the address of the voter. This version of the log sheet also provided the reason for the provisional ballot, and the result determined by the General Registrar's research. The reasoning behind this revised process was to ensure that decisions were being made uniformly, based solely on the reason for the provisional ballot and what was determined by the research, and to provide privacy for the voter, as was believed to be required under the federal Help America Vote Act (HAVA), originally passed in 2002.²⁷ The revised procedure had the added benefit of ensuring that the Board members would

²⁵ See *Bush v. Gore*, 521 U.S. 98 (2000) (noting “[t]he question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.”)

²⁶ In 2001 the General Assembly set up a Joint Task Force, on which General Registrar Quinn in her then-capacity as Secretary of the SBE served, to review a number of election reform issues. The final report intentionally confirmed that, among other things, allowing multiple choices for voting equipment was an important design characteristic that should be continued in Virginia.

²⁷ 42 U.S.C. § 15301 et seq. (2013).

not be influenced in their deliberation by recognizing the name of a particular voter, so that the revised procedure enhanced uniformity by ensuring equal handling of all similarly situated voters.

FCEB’s Policy on the Release of Information from the Provisional Ballot Log

In 2012, the Virginia General Assembly made a number of changes to the provisional ballot rules codified in Sections 643 and 653 of the Code’s election title.²⁸ Those changes included the creation of a new form of provisional ballot for voters who did not have appropriate ID at the polls, the explicit permission for authorized representatives, voters and legal counsel, among others to attend the provisional ballot meeting (which was also exempted from Virginia FOIA open meeting rules), and the repeal of the attestation process that was available in the past for voters who did not bring appropriate ID to the polls.²⁹

The State Board of Elections has published in the General Registrar/Electoral Board Handbook (“GREB”) guidance for use by localities in conducting their provisional ballot meetings. This guidance, which is drafted by SBE staff, but is not adopted through the Virginia Administrative Process Act,³⁰ is considered to be “best practices,” and not always considered to be mandatory.³¹ The GREB is intended for use by localities as small as Highland County, with a little over 2000 residents, and as large as Fairfax County with over 1.1 million residents. Some portions of the GREB have been adopted after significant input from local election officials, but on other occasions provisions have been revised without any opportunity for local input and no requests from SBE for local input. As a result, the GREB manual includes some provisions that are simply unworkable for a large jurisdiction like Fairfax County, and others that create serious difficulty for smaller localities that do not have even a full-time General Registrar.³² In situations where such provisions were unworkable, the Board has, in some cases, worked

²⁸ VA Code Ann. § 24.2-653 (2013).

²⁹ For a number of years voters who showed up without identification could sign an affirmation form, under penalty of perjury, that essentially stated under oath “I am who I say I am,” and were permitted to vote in precinct on the voting machines. This process was heavily criticized as being too open to voter fraud, and was replaced by the General Assembly in 2012 with the current provisional ID system. See Chapters 838 and 839 of the 2012 Acts of Assembly; VA Code Ann. § 24.2-643.

³⁰ VA Code Ann. § 2.2-4000 et seq. (2013). The conduct of elections and determination of voter eligibility is specifically exempted from the provisions of the Virginia Administrative Process Act.) See VA Code Ann. § 2.2-4002(B)(8) (2013).

³¹ This is one reason why former General Registrar Edgardo Cortes was able to get approval from former SBE Secretary Rodriguez for an alternative provisional ballot meeting procedure, which will be discussed below.

³² E.g., GREB § 29.4.3 indicates that the General Registrar must attend the provisional ballot meeting “. . . with the pollbooks used at all precincts (having picked them up from the Clerk of Circuit Court if applicable).” In Fairfax County, with 238 precincts and over seven hundred electronic pollbooks, this is outdated and unworkable.

with SBE on alternative policies,³³ and in others has adopted policies designed to ensure that the spirit of the State Board's "best practices" guidance is followed in such a way that is workable for a large locality and promotes SBE's mission to ensure uniformity, legality and purity of elections in Virginia.³⁴

One of the policies adopted by FCEB in 2013 relates to the release of provisional voter information to authorized representatives. As background to understanding what occurred in 2013, the situation in 2012 needs to be reviewed. Recall that in 2012 FCDC filed suit against SBE, FCEB and the General Registrar regarding, among other things, the handling of provisional ballot information in the 2012 election. In 2012, FCDC had requested a list of provisional voters from the FCEB for the November General Election. A list was not provided because SBE guidance at the time barred the release of any official lists.³⁵ Because the Board wanted to follow SBE's guidance while providing the parties with information they were entitled to, it suggested and ultimately did provide photocopies of the provisional ballot log sheets – individual sheets for each precinct that listed the provisional voters at the precinct – to both political parties' authorized representatives with information deemed confidential by SBE redacted.³⁶ This was done subsequent to conversations with SBE staff approving the process suggested by the Board, though staff cannot recall which SBE staffer indicated this procedure was acceptable. A review of the SBE guidance memorandum of October 31, 2012,³⁷ is similar to the current SBE guidance and does not specifically disallow the procedure used in Fairfax in 2012. The pertinent part of that memo reads as follows:

³³ E.g., the revised provisional ballot log sheet used by the precinct Chiefs in Fairfax County was reviewed and permitted by SBE as an acceptable alternative to the standard log sheet. It only includes the name and reason for the provisional ballot, rather than this information *plus* address and other details. This was requested by FCEB/FCOE so that more than a handful of names could fit on one sheet, since during presidential elections a precinct may have dozens of provisional ballots. Moreover, the information put on the log sheet is duplicative of what is on each provisional ballot envelope, and the time needed to fill out the additional, duplicative information is not realistic given demands in County precincts on a November Election Day.

³⁴ See VA Code Ann. § 24.2-106(a) (stating that the State Board will supervise general registrars and local electoral boards “. . . to obtain uniformity in their practices and proceedings and legality and purity in all elections.”)

³⁵ SBE's "Do's and Don'ts for Campaigners and Authorized Representatives" as revised in August of 2012, included the following statement regarding the release of provisional ballot information: "Please note that provisional ballot logs, provisional votes pollbooks or other official lists of provisional voters cannot be released or made available for inspection by a local general registrar, electoral board member, or officer of election. §§ 24.2-406, 24.2-407, 24.2-444; 42 USC 15482(a)(5). Lists of persons voting in elections can be purchased from the State Board of Elections as provided in § 24.2-406." FCEB followed this guidance in 2012.

³⁶ Confidential information on the precinct log sheet included the reason the voted was required to vote on a provisional ballot. The column with the reason on logsheets was folded over to photocopy them.

³⁷ See SBE Memorandum on Provisional Ballot Log issues, October 31, 2013, 7:50 PM version.

“SBE has been asked to clarify . . . can authorized representatives copy non-confidential information displayed on the provisional ballot log, . . .? After close consultation with counsel from the Attorney General’s Office, SBE’s guidance is the following:

During the provisional ballot meeting, authorized representatives are permitted to inspect the provisional ballot log and take notes from the list . . . Suggested methods of preserving the confidentiality of information include the following:

Provide photocopies of the provisional ballot log during the meeting with confidential information redacted. The authorized representatives can then take notes from the redacted photocopied logs.³⁸

In 2012, Fairfax County had a total of 2,537 provisional ballots cast. The staff time required to photocopy and redact the information on those log sheets for release to the political parties was excessive and provided the parties with little time to contact voters to remind them of their right to present information to the Board. The format was also unwieldy, as it only provided names and precincts, and both parties complained about the difficulty in using the data provided to aid voters in availing themselves of their right to present information to the Board during the provisional ballot meeting process.

This complaint manifested itself in an amended complaint to the aforementioned *FCDC v. Quinn et. al* lawsuit, arguing that SBE’s policies regarding the provisional ballot log and release of information about provisional voters were invalid. FCDC and SBE engaged in a series of meet and confer sessions regarding this portion of the lawsuit, resulting in a change in SBE’s guidance in September 2013. SBE amended their “Do’s and Don’ts for Campaigners and Authorized Representatives” to include the following new section regarding the provisional ballot logs and releasable information:

“With regard to the provisional ballot logs, during the provisional ballot meeting, authorized representatives are permitted to inspect the provisional ballot log and take notes from the list, including the names, phone numbers, year of birth, and addresses of individuals who have voted provisionally. However, general registrars and electoral board members need to take steps to ensure that confidential information on the log is not disclosed. Information deemed confidential and not available for copying includes the voter’s social security number, day and month of birth, and the reason for voting provisionally. Information not deemed confidential includes the voter’s name, phone number, and address. You may preserve the confidentiality of information by providing photocopies, if practicable,

³⁸ SBE guidance memorandum of October 31, 2012 from Justin Riemer (7:50PM version).

of the provisional ballot log during the meeting with confidential information redacted. The authorized representatives can then take notes from the redacted photocopied logs. There is no prohibition for the authorized representatives to bring in a list of registered voters or other list that would allow them to cross-check the names on the provisional ballot list with the names on the list of registered voters.”³⁹

It is worth noting, given today’s technology tools, that the guidance uses language that relies on photocopies, rather than recognizing that by using tools such as Microsoft Excel or Access, one can create different versions of the log with various data fields redacted to suit the circumstances and needs of the Board, General Registrar or outside observers.

Given SBE’s relatively late change in policy, and in an effort to adopt that policy to conform to the 2012 release of the names/precincts of provisional voters, as well as to fit the large numbers of provisional voters in a large jurisdiction,⁴⁰ FCEB adopted a new provisional ballot policy at their October 21, 2013 Board meeting. Under the new policy, the General Registrar would provide an Excel spreadsheet including only non-confidential information to the authorized party representatives as part of the provisional ballot meeting process. According to the minutes of that FCEB meeting,

“[t]he Board voted 3-0 that the General Registrar be directed after each election (beginning on November 5, 2013), in lieu of providing photocopies of the redacted precinct provisional ballot[] [log sheets], promptly following completion of data entry of voter identifying information from the provisional ballot envelopes and initial proofing of the same into the draft spreadsheet that is anticipated to form the Master Provisional Ballots Log, to make the following information available to authorized representatives of those political parties and candidates, who have so requested the data prior to noon on the Monday before the election, and are entitled under VA Code § 24.2-653 to have representatives present during that election’s provisional ballots meeting:

“the names, phone numbers, year of birth, and address of individuals who have voted provisionally” (cited from the State Board of Elections’ Do’s and Don’ts for Campaigners

³⁹ See SBE’s “Do’s and Don’ts for Campaigners and Authorized Representatives” as revised September 2013.

⁴⁰ Given that authorized representatives would be permitted to take notes of most of the identifying information on the provisional ballot log, it was anticipated that both political parties would demand sufficient time to copy all relevant data they wished to copy from the log. Since SBE made clear that the parties had a right to this information, FCEB determined it would be both unreasonable and unfair to not provide both parties with sufficient time to copy the information they desired from the log. Using the 2012 election as a high water mark for provisional ballots, it was determined that the amount of extra time required to be sufficient for copying would be excessive if a large number of provisional ballots were required in November 2013.

and Authorized Representatives, REV 9/2013), as furnished on and transcribed from the provisional ballot envelopes, along with the precinct where the ballot was offered.

When such parties or candidates make their request to the General Registrar, to receive the draft spreadsheet when it becomes available, they should indicate whether the party or candidate prefers to receive the draft spreadsheet as an electronic spreadsheet via email, or as an electronic spreadsheet on a CD or as a printed document for pick up at the Registrar's office. An authorized party or candidate representative prior to final adjournment of the provisional ballots meeting may also request such copies."

Both FCRC and FCDC representatives were present at the Board Meeting when this policy was adopted and both parties acknowledged and supported the policy as it was described to them. Staff proceeded to prepare for the release of such information in the format the Board had prescribed to the parties, beginning with the November 2013 General Election.

Subsequently, on October 23, 2013, less than 2 weeks prior to the election, SBE Secretary Don Palmer sent a memorandum to Electoral Board Members and General Registrars across Virginia under the subject "Important Provisional Ballot Meeting Guidance." The memo further addressed inspection rights of the provisional ballot log. Section #1 read:

"SBE's guidance is that the provisional ballot log is available for inspection by the authorized representatives during the provisional ballot meeting. This guidance is nearly identical to that SBE gave for last year's election with the exception that SBE has determined the date of birth should not be redacted.⁴¹

During the provisional ballot meeting, authorized representatives are permitted to see and hear the process, to inspect the provisional ballot log and take notes from the list, including the names, phone numbers, date of birth, and addresses of individuals who have voted provisionally. While authorized representatives may take notes from the log, they should not be

⁴¹ Both this sentence and the second reference in the subsequent paragraph below make clear that SBE was changing their guidance regarding the release of birth information. The Do's and Don'ts from September 2013 referred to "year of birth" while SBE's guidance here allowed the release of the full date of birth. FCEB complied with this change in the guidance.

permitted to leave the meeting with any photocopy.⁴² The access rights are limited to inspection and note-taking.

General registrars and electoral board members need to take steps to ensure that confidential information on the log is not disclosed:

Information deemed confidential and not available for inspection includes the voter's Social Security Number, reason for voting provisionally, and whether the provisional ballot was counted.

Information not deemed confidential includes the voter's name, date of birth⁴³, phone number, and address (unless protection claimed under § 24.2-418).

The best practice for preserving the confidentiality of information is to provide a photocopy for inspection of the provisional ballot log during the meeting with confidential information redacted. The authorized representatives can then take notes from this redacted photocopied log.⁴⁴

The language in the memorandum refers frequently to guidance and best practice. There is no indication that the SBE Board met to adopt this as a regulation or had this provision incorporated in the Virginia Administrative Code, as was done in other situations with formal Board policy changes.⁴⁵

This guidance was shared with both political parties. At the subsequent request of FCRC, General Registrar Quinn, Secretary Schoeneman and Acting Assistant General Registrars Virginia Franco and Roseanna Bencoach⁴⁶ reviewed the guidance and best practice suggestion given by Secretary Palmer to determine whether FCEB's policy ran afoul of this new guidance. Their unanimous determination was that it did not and FCRC was notified of this determination, both via email and on the record during the FCEB's pre-election Board Meeting on Monday, November 4. Specifically, SBE made clear that authorized representatives could take notes from the logs, and could have access to non-confidential information including voter names, addresses, birthdates, and phone numbers. Authorized representatives were barred from leaving the meeting "with any

⁴² Compare September 2013 "Do's and Don'ts for Campaigners and Authorized Representatives" where "providing a photocopy" in the meeting was suggested. See full quote on page 16.

⁴³ *Id.*

⁴⁴ Memorandum from SBE Secretary Don Palmer dated October 23, 2013 regarding "Important Provisional Ballot Meeting Guidance."

⁴⁵ See discussion of absentee ballot material omissions in this report at page 30.

⁴⁶ Ms. Franco retired from Alexandria's Office of Elections as Deputy General Registrar within the past four years. Ms. Bencoach spent 10 years at SBE as Policy Manager before leaving to serve as General Registrar in New Kent County, VA. Both were serving FCOE this fall to replace Deputy General Registrar Gary Scott who was out on extended medical leave.

photocopy,” which clearly seemed to indicate any photocopy of the “Master” provisional ballot log, since the full log would include confidential information that the parties were not entitled to, like the reason for voting provisionally.

Because FCEB’s policy simply represented an administrative convenience – providing an Excel spreadsheet with the information available for “note taking” typed out rather than forcing the parties to handwrite the information or reproducing, as in 2012, the precinct logs, which would have required considerable staff time – it did not violate State Board’s guidance. Moreover, the policy improved the provisional ballot process by providing stakeholders with equal access to accurate, timely information in a standardized format. This policy prevented possible administrative errors common in instances where information must be transcribed rapidly, and saved many hours that would have been needed for the meeting to continue while the two authorized representatives wrote down all the information they were entitled to have.

Most important, because neither party was permitted a photocopy of the provisional ballot log, the copy of the log sheet provided FCEB and the authorized representatives when in closed session deliberating on provisional ballots was still abbreviated as described above, without the names of voters and other identifying information. FCEB’s policy ensured that SBE’s fundamental goal of ensuring that no confidential information be released to the parties⁴⁷ in the provisional ballot meeting was followed, while adapting SBE’s best practice suggestion into one that was workable for a very large locality with several hundred, or in some years, including this year, thousands of, provisional voters.

It is important to note that SBE has not provided any policy, citation to law, or general rationale for their guidance that the authorized observers should not be permitted a typed list of provisional voters. Given that SBE has clearly indicated through its updated guidance, both in the “Do’s and Don’ts” and in Secretary Palmer’s October 23 memo, that the parties have inspection and note-taking rights – meaning they have the right to both the information and to remove the information from the provisional ballot meeting – a blanket prohibition on providing an official non-hand-written list appears to be arbitrary and capricious, with no rational goal other than to force the authorized representatives into an unnecessary, overly laborious and pedantic hand copying of data

⁴⁷ FCEB and FCOE contend that the process followed in Fairfax more effectively ensures that information deemed confidential is less likely to be accidentally provided to the authorized representatives than through the recommended practice. During the consideration of whether to count a provisional ballot it is generally necessary to explain why a particular provisional voter voted provisionally and what the subsequent research revealed, so having a handwritten list of all of the non-confidential information would allow authorized observers to match names to individual ballots and the reason for those ballots as they are adjudicated. In FCEB’s process, using the random number to tie the reason to the voter without revealing the voter’s name, an individual voter’s reason is kept confidential. In most localities the discussion during the meeting is handled on a ballot-by-ballot basis; it is hard to imagine how the reason is not, for the period of the discussion, tied to an individual voter in the presence of the authorized representatives and thus not entirely confidential.

the parties are clearly entitled to have. We urge SBE to review this guidance and either provide a rational policy statement justifying it or rescind it.

SBE’s Guidance that Attorneys Are Prohibited from the Closed Provisional Ballot Meeting Without a Voter Being Present and the “Extension” of Hours for Voters to Present Information to the Board

Background – Fairfax County’s Past Practice

In 2012, the General Assembly amended Virginia Code § 24.2-653 to specifically allow voters to be represented by counsel in the closed provisional ballot meeting, and that meeting’s deliberations be exempted from the Virginia Freedom of Information Act.⁴⁸ As a result, during the November 2012 General Election, the political parties and campaigns informed voters that they could have legal counsel present in the Electoral Board’s closed provisional ballot meeting. While the Republican Party and their campaign representatives did not specifically offer to provide free legal counsel to voters who were required to vote provisionally, the Democratic Party and campaign representatives did.

In the November 2012 General Election, the Obama presidential campaign, in coordination with FCDC, began a practice where their authorized representatives inside polling places closely observed the Officers of Election, and in any situation where a voter was given a provisional ballot, those authorized representatives were to leave the polling place and offer the voter a pre-printed authorization sheet to sign, accepting the campaign’s pro bono legal representation in the closed provisional ballot meeting. Voters who agreed signed their name and were assured by Democratic representatives that those provisional voters would be represented in the closed provisional ballot meeting before the Board and they did not need to be physically present when their ballot was reviewed by FCEB.

During the 2012 General Election closed provisional ballot meeting, the Obama campaign had an attorney present, without the voter, when the Board reviewed each ballot cast by a voter who had signed a representation card. This attorney was not FCDC’s authorized observer in the closed provisional ballot meeting, and the attorney left when the represented voter’s ballot was no longer being reviewed. Because none of the races the General Election in 2012 were close, there was little pressure on voters – from either political party – to present information in person before the Board, as it was clear that the provisional ballots would not have an appreciable impact on the outcome of the election.

FCDC adopted this practice in 2013, and made plans to implement it in the November 2013 general election. Instead of pre-printed forms, FCDC used pre-printed

⁴⁸ See Chapter 592 of the 2012 Acts of Assembly, amending VA Code § 24.2-653.

cards that were given to voters. On Election Day 2013, FCDC signed up approximately 50 individuals to be represented by their pro bono counsel before the Board. And, as was the practice in 2012, voters were assured that they would not need to be present before the Board, as they would be represented by counsel in the closed session.

SBE's New Guidance on Attorneys

Prior to the start of the provisional ballot meeting, the General Registrar, at the request of Secretary Schoeneman, had drafted a "provisional ballot meeting procedures" memorandum for review by the Board. She also made a copy of this draft available to SBE and the political parties. Both parties as well as Board members suggested a number of changes to the procedures. While the General Registrar did review and provide additional drafts, given the pressures of the canvass and the provisional ballot meeting research, the draft document was never formally adopted by the Board and it was not treated as an approved policy document, nor was it released to the public.

As per Virginia law, FCEB began its provisional ballot meeting on Wednesday, November 6.⁴⁹ Given that the deadline for submission of ID information relating to provisional IDs was set for Friday at noon,⁵⁰ the Board initially told the political parties prior to the election to expect the adjudicatory portion of the provisional ballot meeting to begin at approximately 2 PM on Friday, November 8, although the provisional ballot meeting would officially begin, as required by Code, on Wednesday at noon. On Wednesday, a total of four voters appeared to provide information about their provisional ballots. The Board moved into closed session for the purpose of hearing from voters, and following the intake of information from those four voters, the provisional ballot meeting stood in recess, subject to the call of the Chair.

During this time, staff continued creating the Master provisional ballot log and researching the provisional ballots and preparing the spreadsheet noted above for release to the political parties. On Thursday, November 7, the Board gaveled back into the provisional ballot meeting, moved into closed session for the purpose of hearing from voters, and heard from an additional two voters. At approximately 2 PM, the Board was notified by the General Registrar that the spreadsheet was complete and had been sent to the political parties, as per the Board's policy of October 21, 2013. Staff continued their research on the provisional ballots throughout Thursday and Friday. It was clear by

⁴⁹ See VA Code Ann. § 24.2-653 (requiring that "[t]he electoral board shall meet on the day following the election and determine whether each person having submitted such a provisional vote was entitled to do so as a qualified voter in the precinct in which he offered the provisional vote..

⁵⁰ See *id.* (stating that officers of election are required to provide notice to a voter "voting provisionally when required by §24.2-643 that he may submit a copy of one of the forms of identification specified in subsection B of § 24.2-643 to the electoral board . . . no later than noon on the third day after the election.")

Friday, however, that staff would need until at least Saturday to complete research on the provisional ballots, but given the other issues with canvass, this should not delay final completion of the provisional ballot meeting.

The Board, in the meanwhile, was focusing on the issues in the 8th District CAP. At approximately noon Friday, General Registrar Quinn notified FCEB that SBE had issued new guidance regarding the conduct of the closed provisional ballot meeting, specifically that attorneys would not be permitted to represent voters without the voter being present and that the guidance had been approved by the Office of the Attorney General and was “not discretionary.” General Registrar Quinn and Secretary Schoeneman had spoken earlier in the day to SBE’s Justin Reimer regarding concerns about the provisional ballot spreadsheet, and had been informed that guidance on the issue of attorney representation in the provisional ballot meeting was forthcoming.

At the same time the Board was being formally given the new guidance, General Registrar Quinn provided that guidance to the political parties. The Democratic Party strenuously objected to the new guidance, pointing out that this was a change from the past practice in Fairfax County since 2012’s law change, and that they had been informing voters they would not need to be present if they had filled out a representation card with FCDC at the time they voted provisionally or had requested FCDC representation after the fact. Chairman Stark strongly agreed with the Democratic Party position and informed the Board that when it met again in open session, he wished to make a statement on the record on the subject. Chairman Stark was concerned with the deviation from Fairfax’s past practice, that barring an attorney from representing a client without the client present was a relatively rare prohibition in American jurisprudence, and that the guidance came down nearly three days after the required beginning of every locality’s provisional ballot meeting.⁵¹

The primary concern, however, was that voters had been told that they did not need to appear before the Board to have information presented on their behalf by an attorney representing them. Secretary Schoeneman suggested that the Board make every effort to ensure that the parties had an opportunity to contact voters to inform them that, despite any statements made by representatives of the parties to the contrary, voters would not be permitted to send attorneys or representatives to the closed provisional ballot meeting without the voter being present. Anticipating a large number of voters to interview, including those who had been told they could have an attorney present on their behalf in closed session, the Board discussed the idea that it would be in the best interests of voters to provide specific times for when the Board would be present and available to meet with voters for the duration of the provisional ballot meeting. This was an informal discussion, however, and the Board took no specific action on Friday, November 8, as their primary focus was on the issues with the 8th District CAP.

⁵¹ VA Code Ann. § 24.2-653 (requiring that “[t]he electoral board shall meet on the day following the election and determine whether each person having submitted such a provisional vote was entitled to do so as a qualified voter in the precinct in which he offered the provisional vote.”)

That 8th District CAP issue resolved itself Saturday morning as noted above. Closely following the press conference at noon on Saturday November 9 called to discuss the issue in the 8th District CAP, the Board met in open session to discuss the attorney issue in greater detail. Chairman Stark entered into the record his disagreement with SBE's guidance. Secretary Schoeneman also entered his disagreement into the record, and made three motions. The first motion, which passed 2-0 with Vice Chairman Hunt abstaining, was to formally disagree with the State Board's guidance. Vice Chairman Hunt stated that he was not prepared to disagree or agree with State Board's guidance given the limited amount of time he had been given to review it. Secretary Schoeneman's second motion, which passed 3-0, was to request an Attorney General's Opinion – a more formal view of the law than that which had been given by SBE – after the election on SBEs guidance regarding attorney representation of provisional voters. Secretary Schoeneman's third motion was to establish over a dozen hours⁵² for provisional voters to present information to the Board on Sunday, November 10th through Tuesday, November 12th. This motion also passed on a 3-0 vote.

It is important to note that while both Chairman Stark and Secretary Schoeneman were concerned about the guidance, at no time did any member of the Board suggest that the guidance not be followed. The SBE guidance was followed and no attorneys were permitted to present information to the Board in closed session without a voter present.

Announcement of Hours for Voters to Present Information to the Board

Virginia Code § 24.2-653 provides local Electoral Boards with the discretion to review and adjudicate provisional ballots for up to seven days following an election.⁵³ Notwithstanding the desire to provide voters an opportunity to present information to the Board, it was clear to Board, after consultation with the General Registrar and FCOE staff, that full research on all of the provisional ballots would not be completed on Friday, November 8. Between the additional requirements of the canvass, the investigation into the issues in the 8th District CAP, and the increased coordination required by such a heavy media and outside observer presence, the number of full-time and trained seasonal

⁵² Because FCEB still intended at that time to go to the Fairfax Courthouse on the issue in Cameron Glen precinct, the start time for the final hours available Tuesday were not clear. General Registrar Quinn in announcing the hours to the party representatives made clear that no voter who arrived after 1PM would be allowed to present to the FCEB.

⁵³ VA Code Ann. § 24.2-653 (stating “If the board is unable to determine the validity of all the provisional ballots offered in the election, or has granted any voter who has offered a provisional ballot an extension to the following day as provided in subsection A, the meeting shall stand adjourned from day to day, not to exceed seven calendar days from the date of the election, until the board has determined the validity of all provisional ballots offered in the election.”). Seven calendar days expired on Tuesday, November 12. *See* VA Code Ann. § 1-210 (2013) (noting “When an act of the General Assembly . . . requires that an act be performed within a prescribed amount of time after any event . . . the day on which the event . . . occurred shall not be counted against the time allowed.”)

staff available to research voter registration issues was not sufficient to complete the research in the three days following Election Day. Staff review of the provisional envelopes indicated a total of 493 provisional ballots would need to be reviewed.⁵⁴ This represented the largest single number of provisional ballots in any jurisdiction in Virginia in the November 2013 General Election.

Standard procedure for the provisional ballot meeting in Fairfax includes researching voter history and registration information for each ballot. In addition, whenever a provisional voter noted on the provisional ballot envelope that they had attempted to register at DMV, staff requested all DMV records for that voter. For transfers in and out of Fairfax County, staff worked with SBE, through VERIS⁵⁵ and directly with SBE staff, to determine full voting histories. In a handful of cases, staff reached out to General Registrars in bordering jurisdictions to confirm registrations. After Friday, research that required assistance from other localities or state government agencies was more limited since this was a holiday weekend. SBE did make SBE staff available part of Sunday to assist on potential DMV research that became needed when voters came to provide information regarding their provisional ballot with FCEB and asserted this problem for the first time. Because of this limitation, staff knew that for a number of provisional ballots, staff would have to wait until Tuesday, November 12 to obtain information needed to finish determining some provisional voter qualifications.

Thus, as early as Friday afternoon and definitively on Saturday afternoon when the Board voted to provide additional hours for voters to present information, it was clear to the General Registrar, FCOE staff, and FCEB that it was impossible for the Board to finish evaluation of all of the provisional ballots until Tuesday, November 12 at the absolute earliest. Had the Board rushed to complete the provisionals without full research, including DMV and other records, the Board would have opened itself up to criticism that it was not making decisions based on all information available and that voters were being disenfranchised in the Board's haste to complete the process quickly, rather than thoroughly. Because of the tightness of the Attorney General race, FCEB chose to err on the side of caution and wait until it had all information possible to completely determine all provisional voters' qualifications. Thus, completion of both the provisional ballot meeting and the canvass could not occur before Tuesday.

SBE's own guidance from October 21, 2013 made it clear that Electoral Boards with outstanding provisional ballots, ID-related or otherwise, had to meet each day until all provisionals had been accepted or rejected, counted and added to the final vote totals

⁵⁴ Following research, that 493 number was revised down to 489, as there were four voters who, through error or inattention, had been able to insert their provisional ballots into an optical scan machine rather than place them in the green envelope and segregate them. FCEB intends to follow up specifically with each Chief in precincts where this occurred.

⁵⁵ VERIS is the Virginia Election and Registration Information System, SBE's centralized voter registration and election management database. Each jurisdiction in Virginia uses VERIS to ensure uniformity in voter registration and to aid in registration transfers in and out of locations within the Commonwealth.

as part of the canvass.⁵⁶ The Code clearly provides that voters have the right to meet with the Board to present information as to why they are qualified to vote when the Board is meeting to consider provisional ballots.⁵⁷ Thus, even had the Board not advertised hours for voters to provide information, the Board would not have had discretion to bar voters from presenting information while the Board was meeting to process provisional ballots.

Critics of the Board's decision to announce additional hours to voters to present information have claimed that the Board's decision was not authorized by the Code and that it violates the uniformity requirements of both the Code and Supreme Court precedent.⁵⁸ These arguments are without merit. First, as noted above, the Code grants local electoral boards the authority to grant individual voters a one-day extension to provide information to the Board at the voter's request.⁵⁹ The next sentence in § 24.2-653, however, makes the Board's power to grant extensions broader, not restricting it specifically to voter requests, stating "[t]he electoral board shall have the authority to grant such extensions which it deems reasonable to determine the status of a provisional vote."⁶⁰ The Code clearly envisions that local electoral boards have broad discretion to grant extensions to voters to present information to aid the local boards in determining whether to accept or reject a provisional ballot.

Even if one were to read the Code more narrowly, the Board was still within its rights to announce the additional hours, given the belief that there was no way to complete the provisional ballot meeting and accept or reject all outstanding provisional ballots until Tuesday, November 12. The Code specifically requires that

“if the board is unable to determine the validity of all the provisional ballots offered in the election, or has granted any voter who has offered a provisional ballot an extension to the following day as provided in subsection A, the meeting shall stand adjourned from day to day, not to exceed seven calendar days from the date of the election, until the board has determined the validity of all provisional ballots offered in the election.”⁶¹

Thus, under at least two separate Code sections, FCEB was within its authority to allow voters additional time to present information regarding their provisional ballots.

In regards to the uniformity concern, the text of the Code is explicit that issues relating to the provisional ballot meeting length must be resolved on a case-by-case basis

⁵⁶ See October 23 Guidance, § 5.

⁵⁷ See VA Code Ann. § 24.2-653.

⁵⁸ See Albertson, *Unfair in Fairfax* at 1.

⁵⁹ See VA Code Ann. § 24.2-653 (stating “At the meeting, the voter may request an extension of the determination of the provisional vote to the following day in order to provide information to prove that the voter is entitled to vote in the precinct pursuant to § 24.2-401.”)

⁶⁰ *Id.*

⁶¹ *Id.*

by local boards of election. The Code contemplates that some jurisdictions will complete their provisional ballot process later than others, which is why it provides for a final deadline of seven days following the election to complete the process. That some local boards will take a shorter amount of time to complete their provisional ballot meeting is inevitable, and does not raise uniformity, equal protection or due process concerns, so long as voters had both notice and the opportunity to present information to their local election boards while those boards were meeting to review and adjudicate provisional ballots, as envisioned by the Code. If the General Assembly believed that all jurisdictions must complete their provisional ballot meeting in the same time period or that each voter in Virginia be given exactly the same ability to appear before their local electoral board, the Code would not be written to give such broad authority to local boards to handle the meeting itself. Clearly, this provision is partially due to the fact that some localities have more provisional voters than others. Even in 2000, Fairfax County had approximately 1,000 provisional – then called conditional – voters. This is simply one area where true uniformity of time allowed would create – not prevent -- unfairness.

To be clear, FCEB believes that the Code provides for only two official deadlines in regards to provisional ballots. First, as noted above, the Code requires that all voters who voted provisionally because of identification issues provide a copy of that identification to an electoral board no later than noon on the Friday following the election.⁶² FCEB followed that requirement and did not accept provisional ballots from voters who failed to present their identification to the Board by the Friday deadline.⁶³ Second, the Code requires that the provisional ballot meeting be completed no later than seven days following the election. FCEB followed that requirement as well, though it was close, completing the provisional ballot meeting and proceeding to count the 271 accepted provisional ballots the evening of Tuesday, November 12.

It is important to note that while some voters were able to present information to the Board that allowed the Board to properly adjudicate their ballots, the majority of provisional ballot voters did not appear before the Board. Further, for almost all of those voters who did appear before the Board the information they provided the Board had no impact and was duplicative of staff research.

Finally, it should also be pointed out to those who claim that Fairfax's provisional ballots made the difference in the Attorney General race that by the time Fairfax County completed its provisional ballot meeting, Senator Mark Herring was leading Senator Mark Obenshain in the Attorney General's race by a total of 113 votes according to SBE's unofficial totals. Had FCEB rejected every single provisional ballot cast in Fairfax County, Senator Herring would still have led in the unofficial vote count. Of the 271 provisional ballots accepted, Senator Herring received 160 votes and Senator

⁶² *See id.*

⁶³ It is important to note that of the 489 provisional ballots FCEB reviewed, only 21 of those were provisional ID ballots. Of those 21, FCEB accepted 6 and rejected 15 for failure to provide ID by the noon deadline.

Obenshain received 103.⁶⁴ Senator Herring was certified the winner of the Attorney General race by SBE on November 25 by 165 votes.

OBJECTIONS TO THE BOARD'S ACCEPTANCE OF 271 PROVISIONAL BALLOTS

In his objections to the Board's acceptance of 271 provisional ballots on Tuesday, November 12, Republican observer Miller Baker, Esq., objected that the Board had accepted a number of provisional ballots that had not been signed by the voter on Election Day, and expressed concern that some voters who were similarly situated had been treated differently. He specifically charged that voters who had failed to fill out Section 7 of the SBE Voter Registration Application form, which requires the voter to provide his past registration history, were treated differently, as FCEB accepted some provisional ballots cast for this reason and others were rejected. These two issues will be discussed in turn.

The Board's Acceptance of 13 Provisional Ballots Without Signatures

As part of the provisional ballot procedures, the Virginia Code requires voters to provide certain identifying information on the provisional ballot envelope.⁶⁵ The Code states:

“[The provisional ballot voter] shall be given a paper ballot and provide, subject to the penalties for making false statements pursuant to § 24.2-1016, on a green envelope supplied by the State Board, the identifying information required on the envelope, including his social security number, if any, full name including the maiden or any other prior legal name, date of birth, complete address, and signature.”⁶⁶

Unlike the past practice in Virginia, prior to the 2012 Amendments to § 24.2-653, there is no formal attestation or affirmation process as part of the non-ID provisional ballot process under § 24.2-653 as amended. The Code is clear that voters are required to provide identifying information only, and that by providing that information, they are subject to penalties for making false statements for any identifying information they intentionally falsify.

Subsequent to the 2012 Amendments, as referenced earlier, SBE engaged in a meet and confer process with FCDC as a result of their lawsuit. One of the issues related to the provisional ballot envelope and the privacy notice. Revised SBE policy came out during 2013 on various issues related to the lawsuit, as well as due to other reasons. It

⁶⁴ The discrepancy between 271 and the total of 263 votes in the AG's race is due to two provisional ballot envelopes being opened to discover no ballot within and six undervotes in the AG's race.

⁶⁵ See VA Code § Ann. 24.2-653.

⁶⁶ *Id.*

was not always clear if SBE memoranda and policy guidance was a result of the lawsuit when rendered, but because FCEB was a party to the lawsuit, it was clear that the October 23 memorandum from SBE Secretary Palmer was related.

In his October 23 memo on the provisional ballot meeting, SBE Secretary Don Palmer specifically addressed the requirement in § 24.2-653 for the voter to include his social security number on the provisional ballot envelope. Palmer's memo said:

“#2: Failure to Provide either a full or partial Social Security Number on the Provisional Ballot Envelope shall not be Grounds for Determining a Vote Invalid

SBE staff recently sent a communication to the localities making clear that a voter's failure to provide either a full or partial Social Security Number (SSN) on the provisional ballot envelope shall not be independent grounds for determining a vote invalid. (See 9/23 email from Chris Piper.) While the Code requires the voter provide his full SSN to help localities determine the identity of a voter, a voter's failure to include full or partial SSN may not be used to determine the eligibility of the voter. *The electoral board's sole function in reviewing provisional ballots is to determine "whether each such person having submitted a provisional vote in the precinct in which he offered the vote is entitled to do so as a qualified voter in the precinct in which he offered the provisional vote."* Va. Code § 24.2-653.

Similarly, an officer of election's failure to complete information on the provisional ballot envelope should not be independent grounds for determining a vote invalid. See also generally GREBook Chapter 29.5 Provisional Ballots. (emphasis added)

Ultimately, the purpose of requiring specific personal information of the voter on the envelope is to determine the voter's identity and reason for voting provisionally. So long as there is sufficient information that allows you to identify the voter, then that should be sufficient for the board to take the next step and determine whether the provisional ballot should be counted. (For example: Did the individual provide a copy of their ID by the noon on Friday deadline?). If the voter has not provided sufficient identifying information (e.g.: last name, DOB, and last four of SSN) then that *may* prevent the Board from determining identity and eligibility and it may be impossible to count the ballot. However, every

effort should be made to identify the voter, including by referencing the provisional ballot log.”⁶⁷

As mentioned above, the Code is clear that voters are required to provide identifying information only; the signature requirement is included in the same sentence with requirements relating to social security numbers, full name, birth date and complete address and is specifically referred to as “identifying information” in that sentence of the Code. Because the signature requirement and social security number requirement both appear to be identifying information and SBE’s guidance held that the social security number was not needed, it is difficult to understand the distinction between a lack of a social security number, and a lack of a signature when dealing with non-ID provisional ballots.

During the provisional ballot meeting, FCEB reviewed this guidance and made the determination that the signature requirement was analogous to the social security number requirement in the Code, and should not be considered an independent ground to reject any non-ID provisional ballot that did not include a signature.⁶⁸ The language in the Code refers to the signature as “identifying information” and SBE’s guidance is clear that no ballot should be rejected solely because of a lack of other identifying information if there is sufficient identifying information to determine the voter’s identity. A review of ballots accepted by FCEB indicated that there were a total of 13 ballots accepted that were not signed. In each of these situations, however, the identity of the voter was confirmed. Of these 13 provisional ballots accepted without a signature on the provisional ballot envelope, in some cases there were handwritten documents signed by voters. In some cases the voters came in person to tell their story to FCEB. In at least one case the voter should not have been asked to vote a provisional ballot in the first place, as they qualified for a regular ballot under the “moved voter” rules. However, regardless of the specifics of the voter’s reasons for voting provisionally, in all cases FCEB unanimously believed these should be counted.

Given that FCEB and SBE training of Officers of Election includes training to ensure that provisional ballots are filled out properly, including the signature sections, any voter who was allowed to leave a polling place without signing their provisional ballot envelope was subject to an error made by the Officer of Election. There is a strong public policy argument that no voter should be deprived of a fundamental right, like voting, because of bureaucratic error. Thus, SBE’s guidance, coupled with the strong public policy argument against rejecting provisional ballots for lack of signature, demonstrates that FCEB’s handling of these 13 ballots was proper.

⁶⁷ Memorandum from SBE Secretary Don Palmer dated October 23, 2013 regarding “Important Provisional Ballot Meeting Guidance” at 2.

⁶⁸ It is important to distinguish ID provisional and non-ID provisional ballots. The envelope for an ID provisional does include an attestation, in which the voter swears under penalty of perjury that they are who they claim to be. Thus a signature on an ID provisional ballot is more than simply identifying information. FCEB reviewed both envelopes and did not accept any ID provisional ballots with no signature.

SBE Chairman Charlie Judd was noted in media reports as being concerned that some jurisdictions counted Absentee Ballots that were not properly signed.⁶⁹ This did not happen in Fairfax County. FCEB and FCOE adhered scrupulously to SBE's regulations regarding signatures on absentee ballot B envelopes.⁷⁰

The Board's Handling of Registration Issues Relating to the Section 7 Issue

Section 7 of the SBE-mandated voter registration application requires that all voters answer in the affirmative or negative whether they have been registered to vote in the past and, if so, where they were last registered to vote. Failure to complete Section 7 generally will result in a rejection of a new voter's registration, and a letter is generated and sent to the potential registrant informing them that their registration was rejected and why. A new voter registration form is always included to encourage the potential voter to register correctly as soon as possible. A handful of provisional ballots were the result of issues with Section 7 on the voter registration application.

The purpose of Section 7 of the voter registration application is to assist General Registrars in Virginia in ensuring that voters are not registered in more than one jurisdiction simultaneously. When a new voter registration application is received, notification is sent to the voter's previous registration authority to inform them that the voter has transferred to Fairfax County and their registration in the previous jurisdiction may be cancelled.

Typically, the failure to complete Section 7 is only fatal to a registration attempt when a voter is new to Virginia. Through Virginia's statewide voter registration database (VERIS), FCOE staff are able to verify prior voter registrations within the Commonwealth and can easily inform another Virginia General Registrar of transfers out of their jurisdiction, thus ensuring voters are not registered in two Virginia locations. In these cases, the failure to complete Section 7 of the voter registration application, if this is the only thing not provided, is not fatal to a voter trying to transfer registration to a new location⁷¹.

Additionally, under SBE guidance, a Fairfax or Virginia resident who moved may, under certain timing and other circumstances, vote on the machine after filling out a new Voter Registration Application and in some cases an Affirmation of Eligibility.

⁶⁹ See Laura Vozella, *Herring wins Attorney General race, election board announces*, *Washington Post*, A1, November 26, 2013.

⁷⁰ See 1 VA Admin. Code § 20-70-20 (2013).

⁷¹ There is no comparable system to VERIS for transfers from jurisdictions outside Virginia, and the process for notifying non-Virginia jurisdictions of transfers is more difficult. Given how many jurisdictions there are across the United States, if a voter from out-of-state moves to Virginia and does not complete Section 7, it is next to impossible to determine where they may be previously registered to vote and thus their application must be rejected until that information is provided.

Depending on when (usually only three years prior, except for moves within the same precinct) and where (within precinct, within jurisdiction, and/or within Virginia depending on any congressional district change) the voter moved, the voter may be able to vote on machine in the new precinct, or in the old precinct, or may not be allowed to vote at all. These rules are difficult to follow, and unfortunately some Officers of Election do not recognize the issue and do not follow the “What If . . .” instructions. As such, Officers of Election sometimes require such voters to vote provisionally in contravention of SBE policy and state law.

In some cases before FCEB in November 2013, it was clear that the voter who had moved was entitled to vote on machine and the Chief erroneously had the voter cast a provisional ballot.⁷² In a couple of cases where Chiefs required voters who did not appear on the rolls to vote provisionally, staff research indicated that FCOE staff had failed to recognize that the voter was transferring from another Virginia locality and had been erroneously issued a denial letter for failure to complete Section 7 of the voter registration application. Further review made the staff error clear. When in such cases the evidence showed the voter attempted to register before the October 15 deadline, and the research showed the voters failed to complete Section 7, but were transferring in from another Virginia locality, FCEB voted to accept these provisional ballots. FCEB’s decision to do so was based on the fact that the voter should have been registered and allowed to vote on machine but for the staff’s voter registration rejection error. The Board felt strongly that a voter should not have their ballot rejected for failure to register because of a documented bureaucratic error. FCEB did not count the votes cast by unregistered voters who transferred from locations outside Virginia and failed to complete Section 7.

The Section 7 issue, unlike others, was heavily fact specific and the Board evaluated each situation in the context of the voter’s unique situation. FCEB did, however, apply a uniform standard in determining whether to accept or reject ballots because of Section 7 registration issues.

CONCLUSION

Despite the concerns raised by outside observers addressed in this report, the November 2013 General Election in Fairfax County was one of the most well run in recent memory. Many of the issues and concerns raised by the community in the November 2012 presidential election had been remedied. Voters were not subject to long lines, and the transition from DREs to optical scan machines as the primary voting device was made without significant incident.

⁷² For example, for one voter had moved within his precinct and had changed his voter registration address but not his driver’s license address. Because of the difference, he was required to vote provisionally because his license did not match his registration address. This was a clear Officer of Election error.

In regards to the 8th District CAP incident, FCEB's investigation and resolution of the issue make it clear that the errors in the result totals released on Election Night were the result of multiple human errors in tabulation of those results. There were no missing ballots or missing machines in the 8th District CAP, and no votes in the 8th District were counted after Election Night. The errors were corrected in the canvass, as contemplated by Virginia law.

FCEB's handling of the provisional ballot meeting comported with federal and Virginia law, and substantially complied with SBE guidance, as adapted to fit the needs of a large locality. FCEB's adjudication of provisional ballots was proper, generally followed SBE guidance and standards, and was uniform for all voters.

In short, there were no irregularities in the November 2013 General Election in Fairfax County. Further, any errors discovered were corrected, and the Electoral Board's handling of the provisional ballot meeting comported with federal and Virginia law, as well as SBE's guidance, both binding and non-binding. Finally, Fairfax County's provisional ballots, when added to the final vote tallies and certified, were not decisive in determining a final outcome in any race within Fairfax County or statewide.