



**GUIDANCE CONCERNING EXAMINATION OF ABSENTEE AND
MAIL-IN BALLOT RETURN ENVELOPES**

Date: May 24, 2022

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Background

On May 19, 2022, the U.S. Court of Appeals for the Third Circuit issued a judgment and order in *Migliori, et al. v. Lehigh County Board of Elections, et al.*, No. 22-1499. Citing the “materiality” provision of the federal Civil Rights Act of 1964 (52 U.S.C. § 10101(a)(2)(B)), the Court of Appeals held that undated ballots cast in Lehigh County in the November 2021 election must be counted. It held that there is no basis to refuse to count the undated ballots because “inasmuch as there is no dispute that ballots that have the wrong date were counted in the [Lehigh] election . . . , the dating provisions contained in the [Pennsylvania Election Code] are immaterial.” Subsequent to that judgment, on May 19, the Department of State (Department) asked counties to segregate undated or incorrectly dated ballot return envelopes in anticipation of further guidance from the department.

Though the *Migliori* judgment was issued in the context of the November 2021 election in Lehigh County, it has been the Department’s position that ballots that appear to have “incorrect” dates must be counted. Now, in light of the conclusion of the Third Circuit in *Migliori* it is the Department’s position that ballots with an undated return envelope must also be counted for the May 17, 2022, Primary. However, out of an abundance of caution the Department advises, that those ballots should be segregated and remain segregated from all other voted ballots during the process of canvassing and tabulation. In other words, those ballots with undated ballot return envelopes or with incorrectly dated ballot return envelopes that have been set aside, should continue to be maintained, preserved, and appropriately logged pending litigation, which we anticipate will be undertaken on an expedited basis. A determination on whether the segregated tabulations will be used in certifying elections has not yet been made, given the ongoing litigation.

Counties should further segregate the ballots in question into two categories:

1. Undated.
2. Dated with an “incorrect” date.

Like the pre-canvass and canvass of absentee and mail-in ballots last week, the canvass of the undated ballot return envelopes and any incorrectly dated ballot return envelopes that were set aside must be conducted in an open meeting:

- One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the ballots are canvassed.
- No challenges by authorized representatives or any third party are permitted during canvass of the mail-in and absentee ballots.
- To facilitate transparency and ensure that all validly cast ballots are counted, it is critically important that county boards maintain accurate records of the disposition of ballots received during this period as directed below.

Canvass Procedures

The guidance concerning mail-in and absentee ballots previously provided by the Department on [September 28, 2020](#), continues to apply unless otherwise specified herein.

The county board of elections shall canvass segregated absentee and mail-in ballots that were previously set aside due to being undated or incorrectly dated.

The canvass meeting shall continue until all segregated absentee and mail-in ballots have been canvassed.

The county board of elections shall examine the voter declaration on each envelope to ensure that it is signed and verify that the voter's name appears on the approved list of mail-in and absentee voters.

Please keep in mind that the county board of elections should continue to set aside and not open or count any of the following:

- Ballots cast by any voter who died prior to the opening of the polls on May 17, 2022.
- Ballots that were received after 8:00 p.m. on May 17, 2022.
- Ballots with a missing signature on the Declaration Envelope.
- Ballots that lack the inner secrecy envelope.
- Ballots where the inner secrecy envelope contains any text, mark, or symbol which reveals the identity of the voter or the voter's candidate preference.

Additionally, the county board of elections should not open or count any ballots pending ID verification as follows:

- If proof of identification for an absentee or mail-in voter was not received or could not be verified, the ballot should not be counted unless the elector provided proof of identification, that can be verified by the county board, by the sixth calendar day following the Primary or on or before Monday, May 23rd.

Other than ballots falling into one of the categories set forth above, mail-in and civilian absentee ballots that comply with the Election Code and the Department's prior guidance shall be canvassed as follows:

- Ballots on which the Declaration Envelopes are signed are valid and must be counted.
- Ballots that are signed and either undated or incorrectly dated are valid and must be counted.
- County boards of elections must maintain separate counts for undated and incorrectly dated ballots.