

Docket No. 2008-SOS-0001

WASHINGTON STATE OFFICE OF ADMINISTRATIVE HEARINGS

ROBERT EDELMAN,

Appellant,

v.

SECRETARY OF STATE.

APPELLANT'S REPLY

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I. INTRODUCTION

As a first line of defense against election error and fraud, the Help America Vote Act required states to create a “single, uniform, official, centralized, interactive computerized statewide voter registration list...that contains the name and registration information of every legally registered voter in the State.” 42 U.S.C. § 15483(a)(4).

The accuracy of this list is of paramount importance under Washington’s predominantly vote-by-mail system, because all active voters receive a ballot in the mail, making it easy for ineligible voters on the roll to cast a ballot. RCW 29A.40.040. HAVA was intended to combat this danger by requiring states to ensure only eligible voters are in the database. To maintain uniformity in the processing of registrations HAVA also requires election officials to process registrations in an expedited manner.

In his position statement, however, the Secretary acknowledges that underage voters have been allowed onto the rolls, and he condones the practice of delaying for months the processing of registrations from underage voters. He excuses these violations of HAVA with speculative claims that 17-year-olds will be confused and disenfranchised if he does not continue these practices. We believe the young people of Washington, however, can grasp the concept of waiting to register until they are old enough to vote in the upcoming election.

Far from protecting the right to vote, the Secretary’s violations of HAVA have resulted in young people (in some instances, unintentionally) casting illegal ballots, putting them in jeopardy of the law and diluting the legitimate votes of legal voters. As the U.S. Supreme Court has recently said, “[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the

franchise.” *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

II. ARGUMENT

The Secretary’s response fails to explain how his position on the registration of underage voters is consistent with HAVA’s requirements.

1. The Secretary discusses his periodic reviews of the statewide database to remove ineligible persons but fails to address his responsibility to ensure that only eligible voters are registered in the first place. Without any quantifiable evidence he claims that “most” of the data Mr. Edelman submitted showing unlawful underage registrations is invalid, but the Secretary does not explain how that squares with the many illegal ballots cast by underage voters.
2. The Secretary describes an informal and unlawful procedure for preventing underage persons from registering to vote by delaying entry of their registration information into the voter list. The Secretary attempts to justify this by citing state laws that apply only to incomplete applications, not applications from ineligible voters.
3. The Secretary unnecessarily removed a useful and HAVA-required statement from the voter registration application on the basis of an unwarranted interpretation of guidance from the U.S. Election Assistance Commission.

A. Seventeen-year-olds are not eligible to vote unless they will turn 18 by the next election.

In his review of voter registration laws the Secretary attempts to confuse this issue by discussing whether a voter must be 18 at time of registration. While the law in that regard is not

as clear as he claims, Mr. Edelman is not suggesting HAVA requires such a standard.¹ What it does require, however, is that states allow only eligible voters to be entered into the statewide voter database. 42 U.S.C. § 15483(a)(4). A voter who is 17 at time of registration, and will still be 17 at the next election, is not an eligible voter under Article VI, Section 1 of the state constitution, as even the Secretary's voter registration form makes clear. Exhibit 7.

B. The Secretary has failed to prevent underage voters from registering, in violation of HAVA.

The Secretary claims he is not in violation of HAVA because his efforts to prevent underage voting have been "reasonable." Statement of Position, p. 8. He is incorrect.

Underage voters are a readily-identifiable category of ineligible voters, both when they first register and when they are on the database. It would be relatively simple for the Secretary to prevent them by instructing auditors to reject ineligible registrants, and by automatically preventing entry of underage applicants into the database. Yet the Secretary has not acted to prevent underage registrations, nor has he removed those on the roll during his regular reviews of the database. Exhibit 8 shows the pattern of underage registrations for the past eight years, and in the years following the implementation of the state database (2006-2007), underage registrations actually increase when compared to similar earlier off-election years (2002-2003). Even after Mr. Edelman informed the Secretary of the presence of underage registrations in December 2007 they continued to be added in substantial numbers. Exhibit 5, p. 6; Exhibit 1, pp. 387-403; Exhibit 9. This evidence contradicts the Secretary's claim that he has made a reasonable effort to ensure only eligible voters are in the database.²

¹ For example, while the voter registration oath found in RCW 29A.08.230 says only that the registrant will be "at least eighteen years old when I vote," RCW 29A.08.210(14) requires an applicant to sign an affirmation swearing, "I am legally eligible to vote." The present tense suggests the statement must be true at the time it is signed.

² The Secretary asserts that "to the best of his knowledge, no county will accept a voter registration form submitted by an applicant younger than 17." Statement of Position, p. 6. But Exhibit 1 contains at least 327 sixteen-year-olds registered post-1999, twenty of whom registered after January 1, 2006.

Additionally, the Secretary seems to be asserting that his only responsibility for ensuring database accuracy is to conduct periodic reviews, but he omits an essential piece of HAVA, 42 U.S.C. § 15483(a)(4), which reads, “The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly....” [emphasis added]. Statement of Position, p. 11. In other words, the state is required to prevent ineligible persons from being entered into the database and correct the database when prevention has failed. Mr. Edelman’s data shows the Secretary has failed to perform either duty.

C. Delaying registrations for months by putting them in a real or electronic drawer violates federal and state law.

The Secretary’s response describes a procedure for delaying registration of persons who will not attain the age of 18 by the next election, either by placing them into an electronic “pending” file or in a physical drawer. Statement of Position, p. 6. This procedure violates RCW 29A.08.651(7) and 42 U.S.C. § 15483(a)(1)(A)(vi), both of which require registrations to be “entered into the computerized list on an expedited basis at the time the information is provided to the local official.” *Id.*

Entry into the database happens when a registration application is “complete.” RCW 29A.08.110(2) specifies the auditor’s procedure to determine this:

If the information required in subsection (1) of this section is complete, the applicant is considered to be registered to vote as of the original date of mailing or date of delivery, whichever is applicable. The auditor shall record the appropriate precinct identification, taxing district identification, and date of registration on the voter's record in the state voter registration list. Within forty-five days after the receipt of an application but no later than seven days before the next primary, special election, or general election, the auditor shall send to the applicant, by first-class mail, an acknowledgement notice identifying the registrant's precinct and containing such other information as may be required by the secretary of state. ...

Subsection (1) of this statute contains a list of general information that must be present on the application for it to be complete, but “not eligible yet” is nowhere to be found in the definition of

“complete.” If it was, the Secretary would have to also treat as incomplete a registration submitted by a non-citizen who was scheduled to obtain citizenship in a few months, or a felon who was soon to pay off his restitution and get his rights restored. Such a system would cause incredible chaos for auditors, and would greatly undermine the accuracy of the voter database.

An application from an underage voter that meets the information requirements of RCW 29A.08.110 is complete, and under HAVA and state law the Secretary must expedite its processing. 42 U.S.C. § 15483(a)(1)(A)(vi). Webster’s Dictionary defines “expedited” as “to accomplish promptly.” *Webster’s Encyclopedic Unabridged Dictionary* (1996).

But the Secretary violates this requirement by allowing counties to delay entry of completed registrations for ineligible underage voters by putting them in “pending status” or in a drawer until the applicant is old enough. His action even violates the definition of “pending status” in WAC 434-324-005, which allows the status to be used only if “a voter registration record is not yet complete....”

The Secretary’s argument that pending is necessary because an underage voter or an auditor may not know when the next election will occur is not a valid excuse for violating HAVA, and is not a legitimate concern.³ HAVA governs federal elections, for which the dates are known well in advance. But even state-only special elections must be held on statutorily prescribed dates, giving auditors a good idea of when the next election will be, and the 54 day minimum notification of any special election is at least enough time to identify and remove underage voters currently on the rolls. It would be a simple matter for an auditor to inform the voter of when they will be eligible to register, and it is the Secretary’s duty to educate the general public about upcoming elections.

³ And much of the time it’s simply not true. At the time they registered, all of the underage voters who cast a ballot in the February 19 primary would clearly still have been 17 at the next scheduled election. Exhibit 3, p. 4.

The Secretary excuses his violations of federal and state law by (1) claiming that “no more than a few underage voters actually cast ballots in elections,”⁴ (2) that rejecting registrations from ineligible voters may deny some individuals the right to vote, and (3) that HAVA leaves implementation of the act to the discretion of the states. Statement of Position, pp. 8, 10-11.

On the first point, Exhibit 3 lists 127 unlawful votes, including 16 cast in the 2004 general election. The gubernatorial race in that election was decided by only 133 votes, and there are a significant number of other races the past eight years that have been decided by only a few votes. One would think the Secretary would be sensitive to that fact, understanding the harm that a dozen illegal ballots can cause in a close race. On his second excuse, it is pure speculation that any individuals would be denied the right to vote if the Secretary ceased violating HAVA, whereas Exhibit 3 provides hard evidence that dozens of legal voters have had their votes diluted by the unlawful votes cast by underage voters. Third, HAVA does not give states discretion to violate its provisions.

D. The Secretary’s continued violations of HAVA pose great danger to the integrity of the 2008 general election.

Exhibit 9 is an update to Exhibit 1, showing the more recent status of underage voters on the registration database. It confirms that underage voters have continued to be allowed onto the voter roll. The Secretary agrees that many of these voters are still on the rolls as of August 1.⁵

⁴ The Secretary asserts that Mr. Edelman changed his figures of how many underage votes have been cast, but both Exhibit 3 and Exhibit 8 show 127 votes. He offers no evidence to refute that number except an email Mr. Edelman sent in December 2007, which merely represents an early stage of his analysis. Exhibit 5, pp. 2-3.

⁵ The Secretary notes that 25 of the persons were still registered as of August 1. He states, “seven are held by three counties that have confirmed that their records are pended locally” and that the “other 18 have been brought to the attention of election officials in four counties that have election management systems that prevent ballots received from underage individuals from being counted.” Statement of Position, p. 10. This is a perplexing response. No matter what the counties have done, the statewide database is the single authority for voting eligibility and these 25 persons must be allowed to vote until their registrations are cancelled in the state database. As HAVA says, “The

Statement of Position, p. 10. The Secretary thus knowingly continues to violate HAVA. But just as disturbing is his trivialization of the issue. Exhibit 8 shows the propensity for underage registrations to rise dramatically in a presidential election year, and this year is likely to be no different. As 2007 was a very minor election year, it's not surprising there were no underage votes cast. Exhibit 9, p. 2. But 2004 saw 74 votes cast by underage voters, and the Secretary cannot guarantee that the ad hoc measures (some of which are unlawful, like delaying entry of registrations) he has allowed the counties to use will prevent such a surge again this year. With the possibility of another close gubernatorial race looming, it's imperative that the rolls be as accurate as possible and that every known source of illegal votes be addressed.

E. Evidence from past elections is admissible to show the Secretary's pattern of noncompliance with HAVA.

The Secretary attempts to invalidate Exhibit 1 and 3 by arguing that WAC 434-263-020(4) prohibits evidence of past elections from being introduced. But the rule they cite is not an evidentiary rule; it merely lays out the allowable scope of complaints. Mr. Edelman's complaint is about a violation of HAVA which "is occurring," and he is using evidence from past elections to show how the violation has affected the integrity of the voter rolls. *Id.* For example, data from 2004 is valuable in demonstrating the likelihood that underage registrations and votes will rise dramatically in a presidential election year. And while it is true that HAVA did not require Washington to implement a statewide database until January 1, 2006, Mr. Edelman is not using the prior data to show a violation of HAVA in those early years, but to demonstrate that the

computerized list [the statewide database] shall serve as the single system for storing and managing the official list of registered voters throughout the State." 42 USC 15483(b)(4)(A). And RCW 29A.08.651 requires that "The computerized list must serve as the single system for storing and maintaining the official list of registered voters throughout the state."

Secretary is not screening the database for underage registrations, as the level of such registrations has not subsided since 2005.⁶

The Secretary also contends that “most of what Mr. Edelman characterizes as instances of underage individuals being registered as voters simply reflects how the legislature has established the system and does not in fact show that underage individuals were placed in active voter status or allowed to vote.” Statement of Position, p. 9. This is stated without any proof. The Secretary speculates that most of the underage registrations were (unlawfully) delayed entry into the database until the applicant was eligible for the next election but does not quantify “most.” It would be simple for the Secretary to determine which were activated and which were delayed through database transaction records. He has not done so. Further, the fact that at least 127 underage voters have cast ballots disproves his argument and shows that a significant number of underage persons were active registrants.⁷

F. The Election Assistance Commission has not given the Secretary permission to violate HAVA.

The Secretary relies on voluntary guidance from the EAC to support his position that he does not have to include the statement required in 42 U.S.C. 15483(b)(4)(A)(iii) on the registration form. But he misinterprets HAVA and has taken the EAC guidance too far. The phrase “subject to State law” in 42 U.S.C §15483(b)(4)(B) modifies only that subsection, which governs the procedure election officials are to follow when an applicant fails to answer the

⁶ Even if data before January 1, 2006 were excluded there were still approximately 3,700 underage registrants, 16 of whom voted, since that date.

⁷ The Secretary also tries to explain away the data as anomalies in how certain counties entered information, and lists several database errors as examples. Statement of Position, p. 10. But these were accounted for in Exhibits 1 and 3, as follows: (1) King County election dates were incorrect in some of the voting records, but these were corrected to the proper dates in both exhibits; (2) Pend Oreille and Yakima County voting records were uploaded incorrectly, but these two counties were disregarded in the underage voting analysis; and (3) isolated errors such as bad birthdates were present, but obvious errors such as extreme underage registrations were excluded in Exhibit 3.

citizenship question on the form. It does not modify Subsection (b)(4)(A), which governs the design of the form, and the EAC does not say it does. Exhibit E.

The EAC was not giving states permission to simply abandon the checkbox requirements in Subsection (b)(4), but voluntary guidance on how states should handle a situation where a voter has neglected to check one of the boxes. The Secretary apparently misinterpreted that to mean he no longer had to encourage voters to check the boxes, so he went far beyond the EAC guidance and removed the sentence required by Subsection (b)(4)(A). Doing so renders the checkboxes nearly irrelevant, which cannot have been the intent of HAVA or the EAC. The EAC was advising states only of the flexibility they have in dealing with the processing of problematic forms, not any flexibility they have in designing the forms.

The only reference in the EAC guidance to form design is in the last sentence, which reads, “HAVA does not require states to redesign their state voter registration forms to include check-off boxes.” This must be read as the end of a paragraph starting with “HAVA requires that the federal mail-in registration form include....” Exhibit E. 42 U.S.C. § 15483(b) modifies the provisions of 42 U.S.C. 1973gg-4 (Motor-Voter Act), which mandates the contents of voter registration forms used in federal elections. A state is free to design its own form for use in state elections. But Washington has chosen to use one voter registration form for both state and federal elections, and therefore the form must contain both the checkboxes and the warning statement described in Subsection (b)(4)(A). RCW 29A.08.220(1); see also Exhibit 6.

III. CONCLUSION

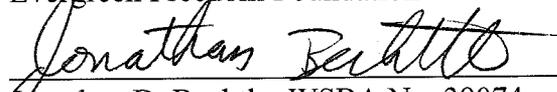
The Secretary has failed to justify either the presence of ineligible voters on the registration roll, the ad hoc delayed registration system he has allowed the counties to adopt, or his decision to remove a useful and required sentence from the voter registration form. All of

these actions violate HAVA, and all could have grave consequences in the very important and possibly close races to be decided on November 4.

For these reasons, Mr. Edelman respectfully requests the presiding officer to find the Secretary in violation of HAVA, and order the Secretary to take immediate steps to bring the state of Washington back into compliance with HAVA.

RESPECTFULLY SUBMITTED this 14th day of August, 2008.

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