
WASHINGTON STATE OFFICE OF SECRETARY OF STATE

ROBERT EDELMAN,

Appellant,

v.

SECRETARY OF STATE.

**MEMORANDUM IN SUPPORT OF REQUEST FOR
ADMINISTRATIVE REVIEW**

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I. INTRODUCTION

On August 20, 2008, Administrative Law Judge Rebekah Ross dismissed a complaint filed by Robert Edelman concerning three violations of 42 U.S.C. § 15483, a section of the Help America Vote Act, by Washington's Secretary of State in relation to the registration and voting of ineligible underage voters. Many of the judge's conclusions of law and fact in her initial decision were in error, and the final dismissal of Mr. Edelman's complaint will result in continued violations of HAVA and weaken the integrity of upcoming elections. On September 5, 2008, we filed a request for administrative review of the dismissal with the Office of Secretary of State in accordance with WAC § 434-263-070. This memorandum explains why the initial decision should be reviewed and reversed.

II. ARGUMENT

In her initial decision the judge determined that the Secretary of State had no duty under HAVA to prevent known ineligible voters from being added to the state database, found the Secretary's actions to identify and remove such voters from the rolls to be reasonable, and saw no violation of HAVA in the Secretary's arbitrary decision to remove an instruction specifically required to be printed on voter registration forms. But the judge based these conclusions on several errors of fact, ignoring evidence showing that underage voters are being entered into the database and that they are able to cast illegal ballots.

She also made several errors of law in relation to the Secretary's duties under HAVA. Contrary to the judge's decision, the Secretary's refusal to make a simple fix to prevent a known problem that has led to database inaccuracy and illegal votes is unreasonable and a violation of HAVA. The judge misread HAVA to allow the practice of delaying completed registrations from

underage voters for months at a time, and she misconstrued guidance provided by the Election Assistance Commission in determining it was legal for the Secretary to ignore a clear mandate of HAVA.

A. The judge erred in finding that HAVA does not place a duty on the Secretary of State to prevent known, easily-identifiable ineligible voters from being added to the registration rolls.

The judge focused her review of the Secretary's duties entirely on 42 U.S.C. § 15483(a)(4)(A), which requires states to perform a system of file maintenance. But her view of HAVA is far too narrow. 42 U.S.C. § 15483(a)(1)(A) requires a state's chief elections official to create a statewide voter database "that contains the name and registration information of every legally registered voter in the State" (emphasis added). 42 U.S.C. § 15483(a)(4) sets up the a minimum standard for the accuracy of the database, requiring states to write "provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following" (emphasis added). At that point HAVA lists several specific duties included in the general duty, one being "a system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters." 42 U.S.C. § 15483(a)(4)(A). Nowhere in the section does it indicate the specific duties are exclusive.

But the judge focused exclusively on Subsection (a)(4)(A) in her decision, determining that because a duty to prevent ineligible registrations isn't actually listed it doesn't exist. If the only duties were specific ones, however, there would have been no need for Congress to include the general statement in Subsection (a)(4). For the Secretary to knowingly refuse to prevent obviously ineligible voters from being added to the rolls, especially when it is simple to do so, flies in the face of the general duties in Subsections (a)(1)(A) and (a)(4). HAVA's intent is to set up an accurate database with only legal voters in it, but the judge's decision ignores this intent by

setting up a magical switch that occurs once the button is pressed to enter an ineligible voter into the database. The moment before entry the Secretary has no duty to reject the registration, but the moment after entry he has a duty to remove it (which can be a lengthy process under the National Voter Registration Act, 42 U.S.C. 1973gg).

The Secretary has a general duty to maintain an accurate database with only legal voters. To find that duty does not require the Secretary to prevent registrations from obviously ineligible voters, as the administrative law judge did, is contrary to the language and intent of HAVA.

B. The judge erred in finding that underage voters have not been added to the state database.

The judge concludes that “when the applicant is put in active status, the registration date that shows on the VRDB is the date the voter registration is mailed or received. Accordingly, after the voter is of age, it might appear from a review of the database that the voter was registered too early.” Initial Decision, Sec. 3.7 (emphasis added). She went on to find that “the fact that the database does not accurately reflect the date of registration, but instead the receipt date of the application, does not mean that the registration is actually happening prematurely.” *Id.*, at Sec. 3.11. She further concludes “there is no evidence that this procedure [the current procedure of delaying underage registrations] allows underage applicants to actually show up on the computerized database as registered voters.” *Id.* at Sec. 4.3. In essence, the judge concluded that underage voters are not being entered into the database, it only appears that way because of the state law requirement to enter the date of receipt of the registration as the registration date.

This conclusion cannot be accurate, however, based on the evidence provided by Mr. Edelman. Four underage voters cast ballots in the February 19, 2008 presidential primary, which could not have happened if they were not active voters in the database. The Secretary’s own staff

affirmed that the forty-nine underage voters Mr. Edelman identified in Exhibit 9 had been entered into the database as active voters:

Mr. Edelman purports to list 49 underage voters placed on the statewide voter database between May and July 2008. As of August 1, 2008, 24 of these records were no longer active on the statewide database. Of the 25 remaining records, seven are held by three counties that have confirmed that their records are pended locally. The other 18 have been brought to the attention of election officials....¹

Secretary's Statement of Position at 10. And the Secretary provided no evidence to support his assertion that most underage voters are not added to the database until they are eligible. *Id.* at 9. All the evidence presented by both parties on this issue reveals that a substantial number of underage voters have been and are being entered into the registration database, and that the Secretary has, by his omission to act, allowed it to occur.

The low number of votes cast by underage voters in 2007-2008 does not indicate "the system is working," as the judge concluded. Initial Decision, Sec. 3.12. The steady influx of underage registrations in those years, and the lack of high-profile elections, makes it more likely that the voters themselves simply chose not to vote. But in the major federal election coming this fall, the likelihood that they will want to vote is certainly higher.

According to Exhibits B and C, only a small number of counties are equipped to prevent registered underage voters from casting a ballot. Only those using the ES&S and Votec systems will be notified if they are sending a ballot to an underage voter, and only the Votec system will

¹ The Secretary refers to seven of these as being pended locally but does not deny that they were active in the statewide voter database which HAVA requires to be the "single system for storing and managing the official list of registered voters throughout the State." 42 U.S.C. § 15483(a)(1)(A)(i).

highlight if a ballot is returned by an underage voter. Seventy-four percent of registered voters in the state of Washington live in counties not using one of these systems.

C. The judge erred in concluding that the Secretary's efforts to identify and remove underage voters from the statewide database are reasonable.

The judge concluded "there is no evidence that the Secretary of State is failing to make reasonable efforts to remove registrants who are ineligible to vote, or is failing in any duty with respect to list maintenance. Initial Decision, Sec. 4.3. This conclusion of law was based on the conclusion of fact that "The Secretary of State reviews the VRDB and notifies the counties when they appear to have activated a voter who will not be 18 by the next election." *Id.*, Sec. 3.8. She further accepts as fact that "the evidence shows that the Secretary of State is removing underage registrants from VRDB as his office learns of them." These conclusions were in error, as the evidence provided by Mr. Edelman and the Secretary's statements to the judge demonstrate that the Secretary's "procedures to identify and remove underage voters" are not part of a reasonable system of file maintenance, but in reality are merely a reaction to problems uncovered by Mr. Edelman. There is no evidence that any of the underage voters would have been discovered by the Secretary if Mr. Edelman had not brought up the matter, nor does the evidence support a conclusion that the Secretary has now put a system in place to identify and actually remove underage voters.

This can be seen in the sequence of events laid out in Exhibits 2-5. Mr. Edelman discovered the existence of underage voters and communicated it to Mr. Paul Miller, the Secretary's Technical Services Manager. At no point in the emails between Mr. Miller and Mr. Edelman does Mr. Miller indicate that the Secretary had any procedures to scan the database for underage voters. He says that with the voter database he is "now able to track and warn counties about underage voting registrations," but never confirms that is actually occurring. Exhibit 5,

Page 1. Mr. Edelman notified the Secretary of the problem of underage registrations on December 17, 2007, and continued to follow up on the problem for the next month. Exhibits 2, 4-5. Despite these warnings, the Secretary admits that at least four underage voters were able to vote in the February 19, 2008, presidential primary even though their database records clearly showed that they would not be 18 prior to that election.

Additionally, Exhibit 9 shows the results of a further review Mr. Edelman conducted of the public voter database releases for May-July, 2008. It revealed that a steady stream of underage registrations had continued to be added to the database. Nineteen of the forty-nine underage voters identified in the exhibit were active voters on the database for the entire three-month period. This exhibit would have looked very different if the Secretary had actually been scanning the database for underage voters on a "daily" basis, as Mr. David Motz claims in his declaration, or even a quarterly basis, as required by 42 U.S.C. § 15483(a)(4)(A). The Secretary says he has now dealt with these underage voters identified by Mr. Edelman. Statement of Position, p. 10. But he provides no evidence that he has permanent procedures in place to identify future underage voters, even though such a procedure would be simple.

The judge also erred in concluding that the Secretary is "removing underage registrants from VRDB as his office learns of them." Initial Decision, Sec. 3.12. The Secretary does not remove underage registrants; he "refers the matter to the county auditor for appropriate action." Statement of Position, p. 7. But this is a mischaracterization of his duties under state law, and he has provided no evidence to show what the counties are doing with his referrals of underage voters. HAVA places the primary duty for list maintenance on the chief election officer. 42 U.S.C. § 15483(a)(1). State law requires the Secretary to "review and update the records of all registered voters on the computerized list on a quarterly basis to make additions and

corrections.” RCW 29A.08.651(14). The Secretary is not actually removing the ineligible registrations, as the judge concluded.²

Because the judge’s conclusions of fact related to the Secretary’s efforts to identify and remove underage voters is in error, her conclusion of law based on those facts is also incorrect. It is unreasonable for the Secretary to ignore a known problem with underage voting until forced to acknowledge it by a citizen complaint, and even then to not implement any regular procedures for finding and removing underage voters. His actions have not been reasonable, and he is in violation of 42 U.S.C. § 15483(a)(4)(A).

D. Washington’s practice of pending underage registrations violates HAVA’s requirement that completed registrations be processed in an “expedited” manner “at the time the information is provided to the local official.”

The judge concluded that “when the counties ascertain that the applicant will be 18 by the next election, they submit this information to the VRDB, and the applicant is placed in ‘active status.’” Initial Decision, Sec. 3.6 She further concluded that the Secretary is “allowing counties to delay entry of applications from underage voters.” These conclusions are erroneous in that they encompass the idea that there are regular procedures being followed by the counties to delay underage voter registrations. But there was no documentation provided to the judge proving that this is actually happening or that there are even written procedures in place. Even the descriptive diagrams in Exhibit B were created by Mr. Paul Miller specifically for the Secretary’s Statement of Position. Exhibit A, p. 2. So the judges conclusions of fact were based only on the Secretary’s assertions, which are contradicted by Mr. Edelman’s evidence that underage voters continue to be added to the database.

² The Secretary also shows no sign that he has fulfilled his duties under WAC 434-324-113(2) to refer information on ineligible underage voters to county prosecutors. This duty is important to deter illegal activities designed to allow illegal registrations and/or voting.

But the judge made a greater error in her conclusion of law that this process does not violate 42 U.S.C. § 15483(a)(1)(A)(vi), which reads,

All voter registration information obtained by any local election official in the State shall be electronically entered into the computerized list on an expedited basis at the time the information is provided to the local official. (emphasis added)

The judge called it “absurd” to conclude that HAVA requires election officials to reject complete applications from ineligible underage voters, but the opposite is true. Initial Decision, Sec. 4.6. Read together with the requirement in 42 U.S.C. § 15483(a)(1) for the database to contain only legal voters, HAVA requires all registrations to be expeditiously processed at the time an official receives them, and if a registration is submitted by an illegal voter, that registration must be rejected to ensure only legal voters are in the database. State law duplicates this provision, granting officials the authority to delay processing only if an application is incomplete. RCW 29A.08.651(7). But nowhere in state law or HAVA does the definition of “incomplete” include “not yet eligible.” In fact, 42 U.S.C. § 15483(a)(4)(A) indicates Congress’s intent that if a person is not a citizen or will not be 18 by the next election they should not even complete a registration form, let alone submit it for processing. Washington’s current practice of delaying completed registrations not only violates Subsection (a)(1)(A)(vi), but also opens the door to other violations of state and federal law.

For one, it means that election officials are knowingly accepting applications containing false statements. If a voter indicates via birth date that he or she will be younger than 18 by the next election, but signs the oath at the bottom of the form swearing to the fact that the voter “will be at least eighteen years old when I vote,” he or she is likely making a false statement, yet the Secretary condones acceptance of such forms by county auditors. Exhibit 7, p. 1.

Second, by condoning the practice the Secretary is intentionally allowing the database to be inaccurate, as registration dates will not reflect the actual registration date of the voter. In fact, the dates may be months apart for a voter under age 17. This procedure decreases the accuracy of the database in violation of the Secretary's duty under HAVA to ensure it is accurate. 42 U.S.C. § 15483(a)(4). Also, during the delay in entry the voter may move, commit a felony, change their name, or any number of things that will affect their eligibility and decrease the accuracy of the database.

Both HAVA and Washington state law strove to set up a bright line to reduce confusion in the registration process and ensure only legal voters were on the database. That bright line is at the time of registration, when election officials must quickly process registrations from legal voters and reject those from illegal voters. The judge erred in concluding that HAVA allows the Secretary to muddy the waters by condoning an ad hoc process of delaying completed registrations from underage voters.

E. The Election Assistance Commission has not interpreted HAVA to allow Washington to remove the mandated “do not complete this form” warning language from its registration form.

The judge concluded that the Election Assistance Commission interprets 42 U.S.C. § 15483(b)(4)(A) to be subject to state law, and thus allows a state to remove the required checkboxes and the warning to “not complete the form” in Subsection (b)(4)(A)(iii). But her conclusion is in error due to a misreading of the EAC guidance.

42 U.S.C. § 15483(b)(4)(A) requires mail-in voter registration forms “developed under section 6 of the National Voter Registration Act of 1993” to include two eligibility questions regarding citizenship and age and the statement “If you checked ‘no’ in response to either of these questions, do not complete the form.” Subsection (b)(4)(B) describes how a state should respond if an applicant fails to answer the questions, and includes the parenthetical “subject to

State law.” A plain reading of the statute is that voter registration forms created to meet the requirements of the National Voter Registration Act must include the two questions and the statement, but that a state has discretion in how they communicate with an applicant who fails to answer the questions.

The EAC guidance does not differ from this plain reading. It states, “HAVA requires that the federal mail-in registration form include check-off boxes for citizenship and being 18 years of age by Election Day.” (emphasis added) Later on the guidance document adds, “HAVA does not require states to redesign their state voter registration forms to include check-off boxes.” (emphasis added) The judge relied on this latter statement to find that states also do not have to add the “do not complete” statement to the form. But she completely ignored the significance of the distinction between state and federal forms, which reflects the fact that 42 U.S.C. § 15483(b)(4)(A) only concerns registration forms developed to comply with the National Voter Registration Act. Some states may have separate state voter registration forms which do not fall under this federal mandate. Washington uses only one form, and it is required by state law to be in compliance with the NVRA. RCW 29A.08.220(1).

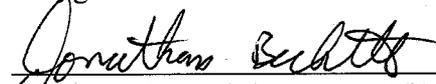
The judge incorrectly ignored this distinction. When the Secretary arbitrarily chose to remove the “do not complete” sentence from Washington’s voter registration form he violated HAVA and weakened the security and accuracy protections provided by the form. Nothing in HAVA or the EAC guidance indicates that if a person answers “no” to either of the two questions he should complete the form. Yet the removal of the “do not complete” statement makes this ambiguous and could contribute to the problem of ineligible voter registrations.

II. RELIEF REQUESTED

For these reasons, Mr. Edelman respectfully requests that the initial decision be reversed, and the Secretary be found in violation of HAVA and required to address the problem of underage voter registrations in accordance with the remedies outline in Mr. Edelman's complaint.

RESPECTFULLY SUBMITTED this 11th day of September, 2008.

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