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8 **BEFORE THE REVIEWING OFFICER**
9 **SECRETARY OF STATE OF THE STATE OF WASHINGTON**

10 ROBERT EDELMAN,

11 Complainant,

12 v.

13 SECRETARY OF STATE,

14 Respondent.

NO. 2008-SOS-0001

RESPONDENT RESPONSE
TO COMPLAINANT'S
MOTION FOR RECONSIDERATION
OF DECISION TO DENY NEW
EVIDENCE

15 Respondent Secretary of State submits this response to Complainant Robert Edelman's
16 Motion for Reconsideration of Decision to Deny New Evidence. By previous e-mail,
17 Respondent objected to the motion on the basis that the proffered evidence does not meet the
18 standards for newly discovered evidence. A copy of that e-mail is attached to this response to
19 ensure it is part of the official record. Without waiving the objection, Respondent responds as
20 follows to the proposed additional exhibits.
21

22 Exhibit 10. This exhibit does not contradict any assertions made by Respondent to the
23 ALJ. In its written submission and in its oral argument, Respondent noted the points in the
24 voter registration process at which underage applicants should be detected, including when the
25 county receives their application and, under some of the voting systems, when the ballots go
26

1 out or when the ballots are received back. Respondent did not represent that it had issued
2 formal written procedures or directions to the counties. The counties should already know
3 that applicants who will not be 18 by the next election should not be activated in the statewide
4 database. Rather, the written communications from Respondent to the counties are a general
5 advisory regarding a specific election or inquiries about particular voters, such as the
6 documents in Exhibit 11. Before the ALJ Respondent described its role in reviewing the
7 information the counties had entered into the statewide voter database and in notifying
8 counties when Respondent noted an apparent underage voter being activated. Nothing in
9 Exhibit 10 is inconsistent with Respondent's presentation to the ALJ or provides a basis for
10 reaching a different decision.
11

12 Exhibit 11. By e-mail of September 11, 2008, at 12:31 p.m., Mr. Edelman has
13 acknowledged that he had Exhibit 11 prior to the brief adjudicative proceeding, except for the
14 June 12, 2008, e-mail to Beverly Lamm. If anything, the e-mail to Ms. Lamm is an example
15 of Respondent working with the counties to ensure that underage voters are not inadvertently
16 placed in active status due to either system design or human error.
17

18 With regard to the remainder of Exhibit 11, Mr. Edelman now concedes that he had
19 this information and, accordingly, it does not qualify as newly discovered evidence.
20 However, even if considered, this exhibit shows, if anything, that Respondent has continued to
21 improve its procedures for identifying and notifying counties of underage voters on the
22 database. In February 2008 Respondent notified counties of apparent underage voters on the
23 database contemporaneously with the election. By August 2008, Respondent was reviewing
24 county entries into the database for underage voters daily. *See Ex. G--Declaration of David*
25 *Motz par. 7.*
26

1 Exhibit 12. Same response as to Exhibit 11. In addition, even if this exhibit is
2 considered, Respondent does not believe it ever made any representations regarding the
3 number of underage voters who were shown as active immediately prior to the February 2008
4 Presidential Primary, only the number of underage voters who actually voted in that election.
5

6 Exhibit 13. The August 18, 2008, public records act request involved in this exhibit
7 asks for status change transactions for 2277 voters. The voters identified in the request have
8 nothing uniquely to do with underage voters. As the response to the request indicates, the
9 Secretary of State has to restore data from tapes in order to respond to the request.
10

11 From this, Mr. Edelman draws the conclusion that Respondent could not have looked
12 at records when it indicated in the HAVA proceeding that most of the underage voter
13 registrations had not actually been entered as active until the voter was of age. Mr. Edelman's
14 reasoning is faulty. Respondent can determine whether a voter shows as active by looking at
15 the monthly extracts, which are available publicly (and which Mr. Edelman himself has relied
16 on). For example, of 49 records for May, June, and July 2008 that Mr. Edelman pointed out
17 as being active in reports for those months, David Motz was later able to determine were no
18 longer active as of August 1, 2008. (Ex. G.) Mr. Motz could do this by looking at the current
19 status reports. That the Secretary of State has to go to its archived records to respond to Mr.
20 Edelman's public records request to find the dates when specific transaction entries were
21 made does not contradict Respondent's information provided to the ALJ.
22

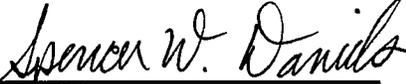
23 Exhibit 14. Exhibit 14 is a document in which David Motz summarized his verbal
24 conversations with the four counties who had underage voters actually voted in the February
25 2008 Presidential Primary. Mr. Edelman asserts that this document belies Respondent's
26 statement that it continues to work with counties to develop solutions to the problems that

1 occurred in the Presidential Primary. However, the document does show that Respondent and
2 the counties discussed the causes of the problems and that as of the date of the summary at
3 least two of the counties had changed their procedures to prevent a reoccurrence. Moreover, it
4 does not contradict Mr. Motz's declaration to the effect that Respondent is actively working
5 with these and other counties to prevent a reoccurrence.
6

7 For the above reasons, if the Reviewing Officer does not deny Mr. Edelman's motion
8 to allow new evidence, the Reviewing Officer should nonetheless conclude that none of
9 Mr. Edelman's new exhibits undermines the findings or conclusions in the initial decision
10 issued by the ALJ. The Reviewing Officer should affirm that decision and dismiss
11 Mr. Edelman's complaint.

12 DATED this 12th day of September, 2008.

13 ROBERT M. MCKENNA
14 Attorney General

15 
16 SPENCER W. DANIELS
17 Assistant Attorney General
18 WSBA No. 6831
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1 **PROOF OF SERVICE**

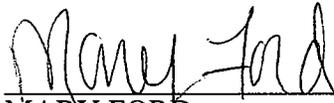
2 I certify that I served a copy of this document on all parties or their counsel of record
3 on the date below as follows:

4 US Mail Postage/Prepaid via Consolidated Mail Service and Electronic Mail to:

5
6 Mr. Jonathan Bechtle
7 Evergreen Freedom Foundation
8 PO Box 552
9 Olympia, WA 98507
10 jbechtle@effwa.org

11 I certify under penalty of perjury under the laws of the state of Washington that the
12 foregoing is true and correct.

13 DATED this 12th day of September, 2008, at Olympia, WA.

14 

15 _____
16 MARY FORD
17 Legal Assistant

Daniels, Spencer (ATG)

From: Daniels, Spencer (ATG)
Sent: Thursday, September 11, 2008 12:37 PM
To: Handy, Nick; Jonathan Bechtle
Subject: RE: Edelman v. Secretary of State

I apologize for not getting back to you sooner.

The Elections Division does object to the motion to submit additional evidence. Contrary to the Complainant's assertion, all of the additional evidence that he seeks to submit, with the possible exception of proposed Exhibit 13, could have been obtained prior to the ALJ's closing the record on this matter. Per mutual agreement of the parties and the ALJ, the Elections Division submitted its written material on August 8, 2008, the Complainant submitted his reply documents on August 14, 2008, and the parties made their oral arguments on August 15, 2008. The ALJ issued her decision on August 21, 2008. The Complainant did not send his public records requests to the agency until after the close of the proceedings (August 18 PRR) or after the issuance of the decision (August 25 PRR).

It is evident that the information obtained as a result of the public records request could have been obtained prior to the close of the record had the Complainant filed his requests sooner. In addition, the Complainant never requested that the ALJ extend the time for consideration of the matter in order for the Complainant to seek to obtain additional evidence. Note that under both HAVA and the Secretary's rules, the time for considering the complaint can be extended with the consent of the Complainant. Nor did the Complainant ever request an evidentiary hearing in the matter in which he could examine the agency's witnesses. Using the Complainant's own standard, this evidence does not constitute "evidence that could not have been reasonably discovered until after the agency action."

The Respondent requests that the motion to submit additional evidence be denied on that basis. Without waiving this objection, the Respondent is prepared to submit a response to the substance of the proposed evidence by 5:00 pm on September 12, 2008.

From: Handy, Nick
Sent: Thursday, September 11, 2008 10:50 AM
To: Jonathan Bechtle
Cc: Daniels, Spencer (ATG)
Subject: RE: Edelman v. Secretary of State

Thank you. I will advise further when I've heard from Mr. Daniels.

From: Jonathan Bechtle [mailto:JBechtle@effwa.org]
Sent: Thursday, September 11, 2008 10:45 AM
To: Handy, Nick
Cc: spencerd@atg.wa.gov
Subject: RE: Edelman v. Secretary of State

We would agree to an extension until Friday, September 12, at 5:00 p.m.

Jonathan Bechtle, J.D.
Legal Counsel
Evergreen Freedom Foundation
(360) 956-3482
www.effwa.org

"...because freedom matters!"

From: Handy, Nick [mailto:nhandy@secstate.wa.gov]
Sent: Thursday, September 11, 2008 10:46 AM
To: Jonathan Bechtle; spencerd@atg.wa.gov
Cc: courtneyA@atg.wa.gov; Even, Jeff
Subject: Edelman v. Secretary of State

Messrs Bechtle and Daniels,

In light of Mr. Bechtle's motion to introduce new evidence, I would appreciate hearing from both of you regarding the following.

Would both parties be agreeable to an extension of the deadline for a final administrative decision in this matter to Friday, September 12, 2008, at 5 pm for the purpose of allowing Mr. Daniels an opportunity to provide responsive information by 10 am Friday, September 12, 2008, and to allow the reviewing officer additional time to consider this additional evidence submitted by both parties.

In addition, I'm inquiring whether Mr. Daniels has any objection to the new evidence offered by Mr. Bechtle, or any argument opposing admission of that evidence.

Thank you for your prompt responses to these inquiries.

Nick Handy
Reviewing Officer
Office of Secretary of State

From: Jonathan Bechtle [mailto:JBechtle@effwa.org]
Sent: Thursday, September 11, 2008 9:54 AM
To: Handy, Nick; spencerd@atg.wa.gov
Cc: courtneyA@atg.wa.gov
Subject: Edelman v. Secretary of State

Please find attached a copy of Mr. Edelman's Memorandum in Support of Review, as well as a Motion for Reconsideration of the Decision to Deny New Evidence. A certificate of service is attached, and hard copies of all documents will be placed in the U.S. Mail.

Sincerely,

Jonathan Bechtle, J.D.
Legal Counsel
Evergreen Freedom Foundation
(360) 956-3482
www.effwa.org
"...because freedom matters!"