

1 EXPEDITE
2 No Hearing Set
3 Hearing is Set:
4 Date: 7/31/2009
5 Time: 1:30 PM
6 Hon. Anne Hirsch

7 **STATE OF WASHINGTON**
8 **THURSTON COUNTY SUPERIOR COURT**

9 ROBERT EDELMAN, a
10 Washington citizen,
11
12 Petitioner,

NO. 08-2-02317-3

BRIEF OF RESPONDENT
SECRETARY OF STATE

11 v.
12 SECRETARY OF STATE,
13 Respondent.

14 **I. INTRODUCTION**

15 This is a judicial review under the Administrative Procedure Act (APA),
16 RCW 34.05, of a Final Determination by the Secretary of State (Secretary). Petitioner
17 Robert Edelman filed a complaint with the Secretary under the federal Help America
18 Vote Act of 2002 (HAVA), 42 U.S.C. §§ 15301-15545. The Secretary of State
19 assigned Mr. Edelman's complaint to an independent Administrative Law Judge (ALJ),
20 who considered the information presented by Mr. Edelman and by the staff of the
21 Elections Division of the Secretary of State. The ALJ denied the complaint and
22 Mr. Edelman appealed to the Secretary.
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1 The Secretary designated the Director of Elections as the Reviewing Officer.
2 The Reviewing Officer granted Mr. Edelman's request to admit some additional
3 evidence, received additional briefing from the parties, and issued a Final
4 Determination adopting, with some modifications, the findings and conclusions of the
5 ALJ and denying the complaint. While the Reviewing Officer denied the complaint on
6 the basis that Mr. Edelman had not shown a violation of HAVA, he directed staff to
7 review the issues raised by Mr. Edelman further and to determine whether, as a matter
8 of policy, the Secretary of State should modify any of its procedures.

9 Mr. Edelman then sought judicial review by this Court. The Secretary of State
10 requests that the Court affirm the Final Determination made by the Reviewing Officer.
11 Mr. Edelman received fair consideration of his complaint, and he cannot show that the
12 Final Determination should be overturned under any of the bases in the APA.

13 II. FACTS

14 A. Procedural History

15 This matter arises from a complaint filed with the Secretary of State under
16 HAVA. HAVA requires the state to establish and maintain state-based administrative
17 complaint procedures that meet certain requirements. 42 U.S.C. § 15512. In
18 Washington State, the Secretary of State has adopted state-based administrative
19 complaint procedures to comply with HAVA in WAC 434-263. Mr. Edelman has not
20 taken issue with any of the procedures adopted by the Secretary.

21 WAC 434-263-020 provides that "[a]ny person who believes that there is a
22 violation of [HAVA] . . . may file a complaint with the secretary under this chapter."
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1 The complaint must be filed “no later than thirty days after the certification of the
2 election at issue.” WAC 434-263-020(4).¹

3 Under WAC 434-263-030 complaints filed under WAC 434-263 “shall be
4 treated as brief adjudicative proceedings” under the APA.² In a brief adjudicative
5 proceeding, the presiding officer gives each party an opportunity to explain the party’s
6 view of the matter and may base the determination upon written submissions and
7 documents. WAC 434-263-050(2). An evidentiary hearing is not required unless a
8 party or the presiding officer requests a hearing on the record within ten days after the
9 filing of the complaint (which Mr. Edelman did not do). The presiding officer is to
10 issue a written initial decision. WAC 434-263-060(1). The rules provide for further
11 administrative review by a Reviewing Officer. WAC 434-263-070. If a violation of
12 HAVA is found, any remedies awarded “shall be directed to the improvement of
13 processes or procedures governed by Title III and must be consistent with state law.”
14 WAC 434-263-060(1).

15 Mr. Edelman filed his complaint on June 13, 2008. AR 0001-0009. The
16 Secretary scheduled the matter for a brief adjudicative proceeding and designated an
17 ALJ as presiding officer. The ALJ was assigned by the Office of Administrative
18 Hearings, a separate agency from the Secretary of State. The ALJ received declarations
19 and other information from the parties, written statements of position by the parties, and
20 heard oral argument by counsel. On August 19, 2008, the ALJ issued a ten page Initial
21 Decision, in which she entered findings of fact, conclusions of law, and dismissed

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23 ¹ The complaint process under WAC 434-263 “may not be used for the purpose of contesting
24 the results of any primary or election.” WAC 434-263-005. *See also* WAC 434-263-060(2) (remedies
under WAC 434-263 may not include invalidation, cancellation, or delay of any primary or election).

² *See generally* RCW 34.05.482-.494.

1 Mr. Edelman's complaint, concluding that he had not shown that any of the Secretary's
2 actions violated HAVA. AR 0951-0960.

3 Mr. Edelman appealed to the Secretary, AR 0961-0963, who designated Nixon
4 Handy, the Director of Elections, as Reviewing Officer. AR 1035-1036.³ The
5 Reviewing Officer received additional briefing by the parties and, over the staff's
6 objections, admitted some additional information submitted by Mr. Edelman. On
7 September 12, 2008, the Reviewing Officer issued, on behalf of the Secretary of State,
8 a 14-page Final Determination (plus incorporating the ALJ's initial decision).
9 AR 1091-1114. The Reviewing Officer adopted, with some modifications, the findings
10 and conclusions of the ALJ, and dismissed the complaint. However, the Reviewing
11 Officer directed staff to review some of the Secretary's procedures to determine
12 whether, as a matter of policy, they should be modified to improve the elections
13 process.

14 Mr. Edelman then petitioned for judicial review of the Final Determination
15 pursuant to the APA.⁴

16 III. STANDARD OF REVIEW

17 In general, the Secretary agrees with the discussion of the standard of review in
18 Mr. Edelman's opening trial brief. Opening Brief of Petitioner at 5-6. However,
19 Mr. Edelman's discussion of the standard of review and his brief overall is misleading

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21 ³ At the administrative level, Mr. Edelman objected to the designation of the Director of
Elections as Reviewing Officer. He has abandoned that objection on judicial review. Opening Brief of
Petitioner at 6.

22 ⁴ In his brief to this Court, Mr. Edelman argues that he has met the requirement in the APA of
23 being "substantially prejudiced" by the administrative order. Opening Brief of Petitioner at 24-25. See
RCW 34.05.570(1)(d). While the Secretary reserves the right in a future case to argue that a petitioner
24 might be prejudiced but not be "substantially" prejudiced by the administrative order, the Secretary is
not raising that issue in this matter.

1 in one respect. In judicial review under the APA, the trial court does not make findings
2 of fact of its own. “Although in nonadministrative proceedings the finder of fact is the
3 trial court, in administrative proceedings the facts are established at the administrative
4 hearing and the superior court acts as an appellate court.” *US West Commc’n, Inc. v.*
5 *WA Util. & Transp. Comm’n*, 134 Wn.2d 48, 72, 949 P.2d 1321 (1997). “Neither [the
6 Court of Appeals] nor the superior court is free to craft its own findings based on the
7 administrative record. . . . We, and the superior court, must base our conclusions on
8 those findings made by the administrative law judge.” *Kelly v. State Dep’t of Soc. &*
9 *Health Servs.*, 144 Wn. App. 91, 95, 181 P.3d 871, *review denied*,
10 165 Wn.2d 1004 (2008) (internal citations omitted). Under this standard, then, this
11 Court looks to the findings made at the administrative level and ascertains whether the
12 record contains substantial evidence to support them. The Court does not substitute its
13 own findings for those of the agency. Accordingly, any attempt by Mr. Edelman to
14 reargue the facts in his brief to this Court should be rejected.

15 Under the APA, the burden of demonstrating the invalidity of agency action is
16 on the party asserting the invalidity. RCW 34.05.570. The Court will overturn the
17 agency decision only if it finds that specific grounds are proven. Here, Mr. Edelman
18 asserts that the order is not supported by evidence that is substantial when viewed in
19 light of the whole record before the court, RCW 34.05.570(3)(e), and that the Secretary
20 has erroneously interpreted or applied the law. RCW 34.05.570(3)(d).

21 Findings of fact that are challenged are reviewed under the “substantial
22 evidence” standard. RCW 34.05.570(3)(e).⁵ Substantial evidence is “evidence in

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24 ⁵ Unchallenged findings of fact are treated as verities on appeal. *Kelly v. DSHS*, 144 Wn. App.
at 96.

1 sufficient quantum to persuade a fair-minded person of the truth of the declared
2 premises.” *Heinmiller v. Dep’t of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995).

3 On review of issues of law, the court gives substantial weight to an agency’s
4 interpretation of an ambiguous statute the agency is charged with administering.
5 *Pub. Util. Dist. 1 v. State Dep’t of Ecology*, 146 Wn.2d 778, 790, 57 P.3d 744 (2002).

6 IV. ARGUMENT

7 A. The Practice of “Pending” Voter Registration Applications From 8 Applicants Who Will Not Be 18 by the Next Election Does Not Violate 9 HAVA

9 The Washington Constitution requires individuals to be 18 or older to vote in
10 elections. Wash. Const. art. VI, § 1.⁶ In his complaint, Mr. Edelman contended that the
11 State was not in compliance with HAVA in three ways with respect to voter registration
12 applications by individuals who will not be 18 years of age by Election Day. The first
13 two relate to the statewide voter registration database. HAVA sets forth certain
14 requirements regarding computerized statewide voter registration lists.
15 42 U.S.C. § 15483. AR 0440-0447. HAVA Section 303 requires each state to
16 implement “a single, uniform, official, centralized, interactive computerized statewide
17 voter registration list.” *Id.* § 15483(a)(1)(A). The section requires each state to have:
18 “A system of file maintenance that makes a reasonable effort to remove registrants
19 who are ineligible to vote from the official list of eligible voters.” *Id.* § 15483(a)(4)(A)

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23 ⁶ Article VI, section 1 reads: “QUALIFICATIONS OF ELECTORS. All persons of the age of
24 eighteen years or over who are citizens of the United States and who have lived in the state, county, and
precinct thirty days immediately preceding the election at which they offer to vote, except those
disqualified by article VI, section 3 of the Constitution, shall be entitled to vote in all elections.”

1 (emphasis added). The requirements of HAVA Section 303 became effective as to
2 Washington State on January 1, 2006. *See* 42 U.S.C. § 15483(d)(1)(B) and (2)(B).⁷

3 Mr. Edelman contended (1) that the State “has allowed county election officials
4 to add ineligible underage voters to the official state Voter Registration Database as
5 active voters,” and (2) that the State “has allowed county election officials to delay
6 entry of registration information into the state Voter Registration Database.”

7 Although the Secretary disagrees with many of Mr. Edelman’s statistics, the
8 basic facts regarding the practice about which he complained, that of “pending” voter
9 registration applications by individuals who will not be 18 by the next election, are not
10 in dispute. As explained in unchallenged findings by the ALJ in her Initial Decision
11 (adopted by the Reviewing Officer):

12 Washington State has established a centralized voter registration list
13 (“State VRDB”) maintained by the Secretary of State. However the
14 initial processing of voter registration forms is done by county auditors.
15 Counties sometimes receive applications from individuals who are not
16 eligible to vote because they will not turn 18 before the next Election
17 Day. The Secretary of State has allowed counties to accept those
18 applications, but not process them until the applicant reaches the required
19 age.

20 Finding of Fact 3.4.⁸

21 Counties use different systems to alert them about applications from
22 underage applicants that should be processed because the applicant has
23 reached the required age. One system is to simply put the application in a
24 drawer, and physically check to see whether an applicant has reached the
required age. Other systems involve tracking of the applicant’s age by
computer.

22 ⁷ These sections allow states to obtain an extension of the effective date from January 2004 to
23 January 2006 upon certification that such an extension is needed for good cause. It was undisputed that
24 Washington State submitted a certification and obtained such an extension.

⁸ To the best of the Secretary of State’s knowledge, no county will accept a voter registration
form submitted by an applicant younger than 17.

1 Finding of Fact 3.5.

2 When the counties ascertain that the applicant will be 18 by the next
3 election, they submit this information to the VRDB, and the applicant is
4 placed in “active status”, meaning the applicant is eligible to vote
(assuming there is no other impediment, such as a felony history).

5 Finding of Fact 3.6.⁹

6 Mr. Edelman complained that the practice of “pending” voter registration
7 applications from applicants who will not be 18 by the next election violates HAVA.¹⁰
8 “The Complainant [Mr. Edelman] asserts that the Secretary of State should require
9 counties to return applications to applicants when the applicant will not turn 18 by the
10 next election.” Finding of Fact 3.10.

11 Before the ALJ and the Secretary, and again before this Court, Mr. Edelman
12 contended that this process of “pending” applications has allowed large numbers of
13 underage, ineligible voters to cast ballots. As the ALJ found, such an assertion has no
14 basis. The ALJ found:

15 Thirteen individuals voted in 2006 elections in Washington State before
16 they turned 18. There were no underage voters in 2007. Four individuals
voted in 2008 elections in Washington State before they turned 18.¹¹ . . .
Exhibit 3, p. 4; Exhibit 8, p. 2.

17 Finding of Fact 3.9. This finding is supported by substantial evidence in the record.
18 *See* AR 0459.

19 The information to which Mr. Edelman points as indicating that large numbers
20 of underage individuals have been registered to vote is misleading. In his brief to this

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22 ⁹ “Active status” means a designation assigned to voters with complete voter registration
records signifying that the voter is eligible to vote.” WAC 434-324-005(1).

23 ¹⁰ The Secretary’s rules define “pending” thus: “Pending status” means a voter registration
record is not yet complete, and the applicant is not yet a registered voter.” WAC 434-324-005(15).

24 ¹¹ It should be noted that these four votes were in the 2008 presidential primary held in
February 2008 (out of 1,386,701 ballots cast).

1 Court, Mr. Edelman states: “In a March 2008 review of the statewide voter registration
2 database Mr. Edelman discovered 16,085 underage registrations between January 2000
3 through March 2008.” Opening Brief of Petitioner at 3. This purported figure must be
4 discounted for three reasons. First, HAVA did not become effective in Washington
5 State until January 1, 2006. Therefore, any purported underage voters registered before
6 that time could not involve any violation of HAVA. Second, under the Secretary’s
7 rules, any HAVA complaint must be filed within 30 days after the certification of the
8 election involved. While under this rule Mr. Edelman could complain that the State is
9 not in compliance with HAVA for the upcoming 2008 state primary and general
10 elections, he cannot complain about irregularities in the voter database used for
11 elections held years before he filed his complaint on June 13, 2008 (including the
12 February 2008 presidential primary).

13 Most importantly, however, nearly all instances of underage voters apparently
14 being placed on the active voter database are illusory. Pursuant to RCW 29A.08.110,
15 when a voter registration application is determined to be complete, “the applicant is
16 considered to be registered to vote as of the original date of mailing or date of delivery,
17 whichever is applicable.” Under this statute, when a county places an applicant in
18 active status in the statewide voter database, the date shown as the “registration date” is
19 the date the voter registration form was mailed or received.¹² However, for underage
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21 ¹² There is one exception to this. Counties must ascertain whether a voter has registered the
22 requisite amount of time prior to the election specified by statute, which is normally 30 days. However,
23 state law also permits new voters to register no later than 15 days before the election. The systems used
24 by the counties can handle only one such registration cut-off date. So, for new voters who register
between the 29th day and the 15th day before the election, counties use the 30th day before the election
as the registration date for such applicants. This practice is not restricted to, and has no special bearing
on, underage applicants.

1 applicants whose registration the county “pended,” this does not mean that the applicant
2 was activated as a voter prior to the individual’s being 18 in time for the next election
3 or that the individual was actually allowed to vote prior to being 18. As the ALJ noted:

4 . . . The fact that the database does not accurately reflect the date of
5 registration, but instead the receipt date of the application, does not mean
6 that the registration is actually happening prematurely. The fact that there
7 were no actual underage votes in 2007, and only four in 2008, is strong
8 evidence that the current policies are working to prevent underage
9 registration and voting.

10 Finding of Fact 3.11.¹³ See also Finding of Fact 3.7.¹⁴

11 The ALJ found that the Secretary of State does not have a policy or procedure
12 that allows counties to register underage voters. Finding of Fact 3.11. On the contrary,
13 the ALJ found that the office of the Secretary has been taking reasonable steps to avoid
14 having underage voters cast ballots.¹⁵ With regard to the four individuals who voted in

15 ¹³ Mr. Edelman points to “a list of 127 votes cast by underage voters between January 2000 and
16 February 2008.” Opening Brief of Petitioner at 14. See AR 0927-0930. Unlike the 16,085 figure, this
17 figure at least deals with underage individuals who actually cast ballots. However, it still suffers from
18 the two other defects noted above, *i.e.*, largely being outside the legally relevant timeframe for a HAVA
19 complaint. As the undisputed finding made by the ALJ indicates, there were no votes cast by underage
20 voters in 2007 and only four cast in the 2008 presidential primary.

21 ¹⁴ Mr. Edelman sets forth other figures that he purports show that certain underage individuals
22 were placed on the voter database as active voters. See, *e.g.*, Opening Brief of Petitioner at 14-15.
23 Both prior to his filing his HAVA complaint and in the course of the Secretary’s responding to the
24 complaint, the Secretary’s staff pointed out how most of Mr. Edelman’s figures are incorrect or
unreliable in various respects. AR 0448-0457. In his brief to this Court, Mr. Edelman asserts that the
rate of underage voter registrations has risen since the creation of the statewide voter database.
Opening Brief of Petitioner at 17. However, an examination of the document Mr. Edelman relies upon
for this assertion clearly demonstrates that it is incorrect. AR 0947.

¹⁵ As part of its statutory responsibilities, the Secretary of State monitors actions by the counties
of placing individuals in active voter status on the statewide voter registration database and must review
the database at least quarterly. RCW 29A.08.125(2); RCW 29A.08.651(14). (In 2009, RCW 29A was
recodified. For consistency for administrative briefing, this brief uses the RCW numbers in effect when
the complaint was being considered.). The Secretary of State actually reviews the database more often
than that and notifies counties whenever they appear to have activated a voter who will not be 18 by the
next election. If “at any time” the Secretary of State finds that a voter does not meet the qualifications
to vote, the Secretary will refer the matter to the county auditor for appropriate action.
WAC 434-324-113. In addition to these statutory and rule requirements that were in place when
Mr. Edelman filed his complaint, in his Final Determination, the Reviewing Officer directed the

1 the 2008 presidential primary before they turned 18, the ALJ found: “David Motz, the
2 Voter Services Manager, has investigated the four 2008 ballots. He has been provided
3 an explanation of how they occurred, and is actively working with the counties to
4 prevent any reoccurrence. Exhibit G, p. 2.” Finding of Fact 3.9. This finding is
5 supported by substantial evidence in the record, namely, Mr. Motz’s unrefuted
6 declaration. AR 0458-0459.¹⁶ As the ALJ found:

7 The evidence also shows that the Secretary of State is removing underage
8 registrants from VRDB as his office learns of them. This does not, as the
9 Complainant contends, show that the current system is broken, but rather
10 that it is working.

11 Finding of Fact 3.12.

12 Thus, the ALJ, as affirmed by the Reviewing Officer, found that the policy and
13 procedures of the Secretary of State were not intended to allow underage individuals to
14 be placed on the active voter database or to cast ballots and that the Secretary removes
15 any such registrants as soon as it identifies them. As the ALJ further noted: “If, despite
16 precautions put in place, some applicants slip through the cracks, there are processes to
17 remove them from the database.” Conclusion of Law 4.3. The Findings of Fact made

18 Elections Division staff to adopt written policies, and additional rules if necessary, regarding their
19 practices with respect to reviewing the database and giving direction to county elections officials. Final
20 Determination, paragraph 34.

21 ¹⁶ In his brief to this Court, Mr. Edelman responds that: The Secretary has provided no
22 evidence to show what the counties are doing with referrals of underage voters.” He then refers to the
23 four underage votes cast in the 2008 presidential primary and states: “Upon notification from the
24 Secretary of State, three of the four counties (Whitman, Thurston, and King) took no new corrective
action to prevent ineligible votes.” Opening Brief of Petitioner at 18. Mr. Edelman’s chronology is
misleading. The statement in Mr. Motz’s declaration that he has been working with the counties to
prevent a reoccurrence is in regard to these very votes in the 2008 presidential primary. Moreover,
Mr. Edelman does not dispute the further statement in Mr. Motz’s declaration that, as of August 2008,
his “present practice is to review, or have my staff review, the county entries into the statewide voter
database for underage voters daily.” AR 0458-0459.

1 by the ALJ and adopted by the Reviewing Officer are supported by substantial evidence
2 in the record and should be affirmed by the Court.

3 From these findings, the ALJ and the Reviewing Officer concluded correctly that
4 Mr. Edelman had not established a violation of HAVA. The ALJ looked at the express
5 language in HAVA, which speaks of the state election system as requiring “[a] system
6 of file maintenance that makes a **reasonable effort** to remove registrants who are
7 ineligible to vote from the official list of eligible voters.” 42 U.S.C. § 15483(a)(4). *See*
8 Conclusion of Law 4.2. The ALJ concluded:

9 . . . HAVA requires only that the Secretary of State make a reasonable
10 effort to *remove* registrants who are ineligible to vote. It does not discuss
11 steps to prevent erroneous registration of underage voters, other than the
12 provisions of the Mail-In Voter Registration Form, discussed below. 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.

13 Conclusion of Law 4.4.

14 In making this conclusion, the ALJ (affirmed by the Reviewing Officer) was
15 rejecting Mr. Edelman’s claim, reasserted on judicial review, that HAVA should be
16 read as requiring the Secretary of State to prevent underage voters from being placed on
17 the voter database. While Mr. Edelman points to various provisions in HAVA from
18 which he contends the Court should infer such a requirement, he cannot point to any
19 express language to this effect, as there is in the case of removing ineligible voters. If
20 Congress had intended to impose such a requirement on the states, one assumes it
21 would have used express language to that effect, as it did with removal of ineligible
22 voters. HAVA is certainly not “unambiguous” in this regard, as Mr. Edelman claims.
23 Opening Brief of Petitioner at 10. Moreover, it appears that under-inclusiveness was
24 more of a concern of HAVA than over-inclusiveness. For example, HAVA requires

1 that the state election system have “[s]afeguards to ensure that eligible voters are not
2 removed in error from the official list of eligible voters.” As the United States District
3 Court has noted, in a HAVA complaint against the Secretary of State:

4 The statute [HAVA] was passed in large part to ensure that eligible voters
5 would not be left off the voting rosters or turned away from the polls.
6 HAVA seeks to ensure that voting and election administration systems
7 will “be the most convenient, accessible, and easy to use for voters”
8 42 U.S.C. §§ 15381(a)(1) and (3).

9 *WA Assoc. of Churches v. Reed*, 492 F. Supp. 2d 1264, 1268 (W.D. Wash. 2006).

10 Mr. Edelman also argued that the pending of applications from individuals who
11 will not be 18 before the next election violates another provision of HAVA, which
12 reads:

13 All voter registration information obtained by any local election official
14 in the State shall be electronically entered into the computerized list on an
15 expedited basis at the time the information is provided to the local
16 official.

17 42 U.S.C. § 15483(a)(1)(A)(vi). In relying on this provision, Mr. Edelman is taking the
18 flip-side of his position that county and state election officials should reject and return
19 applications from applicants who will not be 18 before the next election. Here, he is
20 arguing that HAVA requires the state to process any voter application immediately
21 upon receipt, and since an underage voter should not be entered into the voter database,
22 the practical effect is again to require that such an application be returned, rather than
23 pending.

24 The ALJ (affirmed by the Reviewing Officer) correctly rejected Mr. Edelman’s
argument that this section of HAVA was violated. As the ALJ concluded:

I reject the Complainant’s argument, because HAVA only requires
registration of applicants who are eligible and who submit complete
applications. Indeed, it clearly does not require processing of incomplete
forms, but instead requires that the applicant be given the opportunity to
complete the form in a timely manner. 42 U.S.C. § 15483(b)(4)(B). It

1 would be an absurd reading of the statute to require an expedited
2 processing of an application from an ineligible applicant, where the
3 application on its face shows that the applicant will become eligible
4 through the mere passage of time.

5 Conclusion of Law 4.6.

6 The issue in this judicial review is whether or not the Secretary violated HAVA.
7 The ALJ and the Reviewing Officer correctly concluded that the Secretary's practice of
8 allowing counties to pend applications from individuals who will not be 18 by the next
9 election did not violate HAVA. However, it should be noted that Mr. Edelman's
10 proposed alternative procedure of requiring counties to reject and return such
11 applications, rather than pend them, is problematic under Washington law.

12 Mr. Edelman's proposed procedure could deny some individuals their right to
13 vote guaranteed by the Washington Constitution. The Washington Constitution
14 provides: "All persons of the age of eighteen years or over who are citizens of the
15 United States and who have lived in the state, county, and precinct thirty days
16 immediately preceding the election at which they offer to vote . . . shall be entitled to
17 vote at all elections." Wash. Const. art. VI, § 1. The Constitution itself does not use
18 the terms "registering to vote" or "registered voter." Thus, the Constitution does not
19 state that an individual must be 18 to register to vote, only that the individual be 18 at
20 the time of the election.

21 Voter registration is dealt with in state statutes. RCW 29A.08.210 provides:

22 **Application, required information, warning.**

23 An applicant¹⁷ for voter registration shall complete an application
24 providing the following information concerning his or her qualifications
as a voter in this state:

¹⁷ A person who has applied or is applying to become a registered voter in Washington State is called an "applicant." WAC 434-324-005(2).

1 (3) The applicant's date of birth;

2

3 (10) A check box allowing the applicant to confirm that he or
4 she is at least eighteen years of age;

5

6 (15) The oath required by RCW 29A.08.230 and a space for the
7 applicant's signature;

8 The statute referenced in RCW 29A.08.210(15), RCW 29A.08.230, provides:

9 **Oath of applicant.**

10 For all voter registrations, the registrant shall sign the following
11 oath:

12 I declare that the facts on this voter registration form are true. I am
13 a citizen of the United States. I am not presently denied my civil rights as
14 a result of being convicted of a felony. I have lived at this address for
15 thirty days immediately before the next election at which I vote, *and I will
16 be at least eighteen years old when I vote.*

17 (Emphasis added.)

18 Thus, while RCW 29A.08.210(10) appears to require an applicant to confirm
19 that he or she is 18 at the time the applicant submits the voter registration form,
20 RCW 29A.08.230 (incorporated into RCW 29A.08.210(15)) provides only that the
21 registrant declare that he or she will be at least 18 when he or she votes.

22 RCW 29A.08.140 provides that, in general, an individual must register to vote
23 no later than thirty days prior to the election.¹⁸ The statute states, in part: "No person
24 may vote at any primary, special election, or general election in a precinct polling place
unless he or she has registered to vote at least thirty days before that primary or election

¹⁸ RCW 29A.08.145 allows for late registration in person at the county auditor's office no later than the 15th day before an election.

1 and appears on the official statewide voter registration list.” See also
2 WAC 434-324-075. If, as Mr. Edelman wants, an applicant had to be 18 in order to
3 even submit a voter registration form, applicants whose eighteenth birthday fell within
4 the 30 days prior to the next election would be unable to register to vote because of
5 RCW 29A.08.140. Yet such individuals are guaranteed a right to vote by article VI,
6 section 1 of the Washington Constitution. Mr. Edelman does not respond at all to this
7 problem in his approach.

8 In addition, Mr. Edelman’s approach is likely to discourage some younger
9 citizens from registering to vote or at least from registering in time to vote in some
10 elections. Having county elections officials return voter registration applications, or
11 turn applicants away at the counter, is likely to result in needless confusion to
12 applicants and would likely discourage some potentially eligible voters from registering
13 in time to vote. Both HAVA and state law recognize that individuals can legally
14 register to vote prior to their 18th birthday. Not all 17-year-old applicants will know
15 when the next election is.¹⁹ Mr. Edelman would have election officials reject or return
16 a voter registration form, even though the applicant might become eligible just a few
17 days later. Mr. Edelman’s approach is overly bureaucratic and is at odds with the
18 overall goal of encouraging citizens to register to vote. As the Reviewing Officer
19 noted, the stated policy of the State is to “encourage every eligible person to register to
20 vote.” RCW 29A.04.205. Final Determination Conclusion of Law 29.

21
22 ¹⁹ An applicant might submit a voter registration form in the summer, thinking that the next
23 election is in November, not recognizing that there is a primary election earlier in the fall. Also, an
24 applicant might not know, or even have reason to know, that a special election may occur in February,
March, April, or May. Indeed a county auditor may not know this either; jurisdictions are not required
to give auditors more than 54 days’ notice of intent to hold a special election.

1 In his brief to this Court, Mr. Edelman raises, for the first time, a new
2 suggestion. He proposes: "The Secretary could minimize any risk by instructing
3 auditors to maintain a list of individuals who were rejected as being too young, and the
4 auditors could mail a registration application to those individuals upon reaching the age
5 of eligibility." Opening Brief of Petitioner at 13. But this proposal involves far more
6 time, expense, and record keeping on the part of elections officials than the present
7 practice of "pending" the applications and is unlikely to decrease the confusion and
8 discouragement that rejecting and returning applications is likely to cause. HAVA
9 expressly provides that methods of implementation of the federal act are left to the
10 discretion of the states. "The specific choices on the methods of complying with the
11 requirements of this title shall be left to the discretion of the State." 42 U.S.C. § 15485.
12 Mr. Edelman is certainly free to suggest to the Secretary of State ways in which to
13 improve the State's registration procedures. Absent a HAVA violation, however,
14 neither Mr. Edelman nor the Court can impose any requirement that the Secretary
15 change its procedures.²⁰

16 **B. The State's Mail-In Voter Registration Form Does Not Violate HAVA**

17 The other aspect of Mr. Edelman's complaint arises from another provision in
18 HAVA. 42 U.S.C. § 15483(b)(4)(A), relating to mail-in voter registration forms, states,
19 in pertinent part:
20
21

22 ²⁰ Mr. Edelman makes various suggestions for modifications to the voter registration system
23 which he contends would be "relatively simple." *See, e.g.*, Opening Brief of Petitioner at 12. Suffice it
24 to say that the Secretary does not concur that modifications to the existing statewide voter registration
database or the various voter registration systems hardware used by the counties would always be
simple or inexpensive.

1 The mail voter registration form developed under section 6 of the
2 National Voter Registration Act of 1993 (42 U.S.C. 1977gg-4) shall
include the following:

3 (i) The question “Are you a citizen of the United States of
4 America?” and boxes for the applicant to check to indicate whether the
applicant is or is not a citizen of the United States.

5 (ii) The question “Will you be 18 years of age on or before
6 election day?” and boxes for the applicant to check to indicate whether or
not the applicant will be 18 years of age or older on election day.

7 (iii) The statement “If you checked ‘no’ in response to either of
8 these questions, do not complete this form.” . . .

9 The Washington State mail-in voter registration form does include the questions
10 about citizenship and age set forth in the HAVA statute and a box to check “yes” or
11 “no.” The voter registration form issued by the Secretary of State asks the applicant:
12 “Will you be at least 18 years of age or older before Election Day? [Check yes or no.]”
13 The form also asks for date of birth. The form contains a voter declaration: “By
14 signing this document, I hereby assert, under penalty of perjury, that I am legally
15 eligible to vote . . . I declare that the facts on this registration form are true; . . . I will be
16 at least 18 years old when I vote.” The form also contains a voter declaration in which
17 the applicant must assert that he or she is legally eligible to vote, including that “I will
18 be at least eighteen years old when I vote.”

19 However, the form does not include the statement about not completing the form
20 if the applicant checked “no” to either question. Washington decided not to include the
21 statement about “do not complete this form” based on input it received from the United
22 States Election Assistance Commission. *See* 42 U.S.C. §§ 15321, 15322. The
23 Commission adopts voluntary guidance to assist states in meeting the requirements of
24 HAVA. 42 U.S.C. § 15501. In 2004, the Commission advised the states as follows:

1 HAVA requires that the federal mail-in registration form include check-
2 off boxes for citizenship and being 18 years of age by Election Day. If
3 either the "yes" box or the "no" box is checked, the State is required to
4 notify the applicant of the incomplete form with sufficient time to allow
5 completion of the form. This subsection is "subject to state law," so the
6 state may choose to honor the affirmation of citizenship and age that goes
with the signing of the registration form and register a person who did not
check the "yes" box. (If a "no" box is checked, the application should be
rejected.) HAVA does not require states to redesign their state voter
registration forms to include check-off boxes.

7 This remains the Election Assistance Commission's position today.

8 This advice meant (1) the State's mail-in registration form did not need to have
9 check-off boxes (although the form does include these); (2) the form does not need to
10 be rejected (or the applicant notified that the form is incomplete) if the applicant did not
11 check the "yes" box for age (or citizenship), so long as the form has a voter's
12 declaration to this effect that the applicant did sign. On September 21, 2004, the
13 Secretary of State, with the concurrence of its assigned Assistant Attorney General,
14 issued a "Clearinghouse" memo to Washington election officers to this effect.

15 Since the official federal advice is that the state form does not in fact require that
16 applicants check either the "yes" or "no" box as to age (or citizenship), it follows,
17 therefore, that the provision about, "do not complete this form if you checked 'no' to
18 either question," did not need to be included in the state form.

19 Based on this, the ALJ concluded that Mr. Edelman had not shown a violation of
20 HAVA with respect to the mail-in voter registration form. The ALJ concluded:

21 The Complainant argues that the "subject to State law" language only
22 relates to the section regarding providing the applicant the opportunity to
23 complete an incomplete form in a timely manner. The placement of that
24 language within subsection (B) appears to support the Complainant's
position. Nevertheless, the Complainant's position is not the position of
the U.S. Election Assistance Commission (EAC). According to advice
from EAC, HAVA does not even require states to redesign their state

1 voter registration forms to include the check-off boxes. As the federal
2 agency charged with guidance regarding HAVA, it is appropriate to defer
3 to the EAC's interpretation. I find the EAC's interpretation to be
4 reasonable. If the "subject to State law" language applies to the part of
5 42 U.S.C. § 15483(b)(4)(A) relating to check-off boxes, it logically also
6 applies to the other requirements of 42 U.S.C. § 15483(b)(4)(A). The
7 Complainant does not argue that the Mail-In Voter Registration form
8 violates Washington state law.

9 Conclusion of Law 4.8.

10 On review, the Reviewing Officer concluded that, while the ALJ was correct
11 legally, the Secretary should review, as a matter of policy, whether the form should be
12 modified. The Reviewing Officer stated:

13 I accordingly modify the Initial Decision by instructing the staff of the
14 Elections Division to fully consider this matter, and to report back to me
15 by January 5, 2009, with a proposed modified voter registration form that
16 contains, in association with the "check box" questions concerning age
17 and citizenship, the statement, "If you checked 'no' in response to either
18 of these questions, do not complete this form." Along with this proposal
19 for a revised form, I direct staff to provide me with their written analysis
20 and recommendations regarding both the potential advantages and
21 disadvantages of this change, including an evaluation of the potential for
22 such a change to discourage registration by both ineligible and eligible
23 individuals.

24 Final Determination, Conclusion of Law 33.

The ALJ, as affirmed by the Reviewing Officer, correctly concluded that the
State's existing form did not violate HAVA. Any modification to the form is properly
in the province of the Secretary of State as a matter of policy.

For the above reasons, the ALJ and Reviewing Officer correctly concluded that
Mr. Edelman had not shown a HAVA violation with regard to the mail-in voter
registration form.

1 **C. Even If He Were to Prevail, Mr. Edelman Is Not Entitled to Attorneys' Fees**
2 **and Costs Under the Equal Access to Justice Act**

3 Mr. Edelman requests attorneys' fees and costs under the Equal Access to
4 Justice Act (EAJA), RCW 4.84.350, should he prevail. Opening Brief of Petitioner at
5 26. Even assuming Mr. Edelman were to prevail and that he met the test for being a
6 "qualified party" under RCW 4.84.340(5) to receive such an award,²¹ the Court should
7 not grant it. The Court should not grant attorneys' fees and costs under the EAJA
8 where "the court finds that the agency action was substantially justified or that
9 circumstances make an award unjust." RCW 4.84.350. *See, e.g., Constr. Indus.*
10 *Training Coun. v. State Apprenticeship & Training Coun.*, 96 Wn. App. 59, 977 P.2d
11 655 (1999).

12 Here, even if found to be a violation of HAVA, the actions of the Secretary of
13 State were substantially justified. The practice of "pending" voter registration
14 applications does not violate any express language in HAVA. The language of the
15 State mail-in voter registration form was based on a good-faith reading of advice from
16 the responsible federal agency, as well as legal advice from the agency's assigned legal
17 counsel.

18 //

19 //

20 //

21 //

22 ²¹ See *Edelman v. State ex rel. Pub. Disclosure Comm'n*, 152 Wn.2d 584, 592, 99 P.3d 386
23 (2004) (attorneys' fees under EAJA denied, where requester did not establish that met requirements).
24 In addition, the Secretary reserves the issue of whether, under the circumstances of this case, the
petitioner is really Mr. Edelman or the Evergreen Freedom Foundation and whether that organization is
a "qualified party" under the statute. AR 0001.

1 **PROOF OF SERVICE**

2 I certify that I served a copy of this document on all parties or their counsel of
3 record on the date below as follows:
4

5 US Mail Postage Prepaid via Consolidated Mail Service and
6 Electronic Mail to:

7 Michael J. Reitz
8 Evergreen Freedom Foundation
9 2403 Pacific Avenue SE
10 Olympia, WA 98501
11 mreitz@effwa.org

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

14 DATED this 6th day of July, 2009, at Olympia, WA.

15 *Courtney Amidon*
16 COURTNEY AMIDON
17 Legal Assistant
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