

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
NEW YORK STATE BOARD OF)
ELECTIONS; PETER S. KOSINSKI)
and STANLEY L. ZALEN, Co-Executive)
Directors of the New York State Board of)
Elections, in their official capacities; and,)
STATE OF NEW YORK;)
)
Defendants.)
_____)

Civil Action No. 06-CV-0263
(GLS)

PROPOSED REMEDIAL ORDER

Pursuant to this Court's March 23, 2006, Order (Docket #38) finding the New York State Board of Elections ("SBOE") in noncompliance with Sections 301 and 303(a) of the Help America Vote Act, 42 U.S.C. 15481 and 15483(a), the SBOE submitted to the Court a proposed Plan for Compliance with HAVA on April 10, 2006 (Docket #45). The State supplemented its proposed compliance plan on April 20, 2006 (Docket #49), and on May 15 and 16, 2006 (Docket #64-67). On April 28, 2006, the United States filed its Response to New York's Remedial Plan (Docket #57). On May 16, 2006, this Court held a conference in this action during which the parties further explained and argued their respective positions concerning the appropriate remedy in this litigation.

This Court has carefully considered the Complaint in this action, previous filings of the parties, and the specific filings and arguments of the parties concerning the proper remedy for the noncompliance with HAVA that this Court has found. This Court agrees with the United

States that the proposed State compliance plan will not bring the State of New York into full compliance with HAVA in time for the Fall 2006 federal elections (the September 2006 primary and the November 2006 general election) in New York. The Court recognizes that the State of New York will be unable to achieve full compliance with HAVA before the Fall 2006 elections, and that pushing for full HAVA compliance in time for those elections would overtax State election capabilities and risk a breakdown in the conduct of upcoming federal elections. However, the Court views the State's plan, as ordered herein, as leading, upon full implementation, to full compliance with HAVA. Moreover, the actions that the State and local jurisdictions in New York will take to partially comply with HAVA for the Fall 2006 elections will provide a practicable measure of compliance tempered by the need to ensure that the right of every voter to vote is not impaired and that the orderly conduct of the election process itself is not in any manner jeopardized.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that:

1. The State's April 10, 2006, remedial plan for compliance with Sections 301 and 303(a) of HAVA, 42 U.S.C. 15481 and 15483(a), as supplemented by the April 20 and May 15 and 16, 2006, filings of the SBOE, shall be implemented in full by the Defendants, subject to the following:

A. Voting Systems

1) With regard to all voting devices accessible to individuals with disabilities that will be deployed for the Fall 2006 federal elections pursuant to the State's interim plan, the overriding principles shall be deployment of one or more accessible HAVA-compliant voting device(s) in each jurisdiction that will provide the opportunity to vote

independently and privately to all voters with disabilities no matter their residence location in the jurisdiction. As the United States has pointed out in its Response to the State's proposed Remedial Plan, it may be that such accessible voting devices may be used only by a small number of voters with disabilities. To ensure to the extent possible in such situations the privacy of the individual vote of each voter with disabilities, the defendants shall take steps to encourage the use of the accessible voting devices by non-disabled persons as well as persons with disabilities;

2) No later than June 15, 2006, the SBOE must file with the Court, for each local jurisdiction: a) the specific polling locations at which accessible voting devices will be deployed as part of the State's interim voting systems plan; b) the number of accessible voting devices to be deployed in each such polling location; c) the specific geographic area and population served by each polling location (e.g., county, assembly district, election district, etc.); and d) confirmation of what provision will be made, where appropriate, for accessible transportation for disabled voters to reach each such polling location;

3) No later than August 15, 2006, the SBOE must file with the Court a proposed detailed schedule for implementation of its long term proposal for replacing all lever voting systems in the State with all HAVA-compliant voting systems in every polling place by September 2007;

4) For each local jurisdiction that, for whatever reason, does not timely comply with the State's plan for interim HAVA voting systems compliance, the SBOE will determine the type, number, and specific location(s) of accessible voting devices to be deployed

by such jurisdiction, consistent with the time line and other details set forth in the State's plan, and shall order such voting devices for such jurisdiction;

5) Notwithstanding any provision of law to the contrary, the fact that a vote cast in the Fall 2006 elections is cast by a voter using an accessible voting device located outside of the election district in which that voter resides shall not disqualify that vote from being counted when the ballots cast in the election are canvassed.

6) All ballots cast by use of a ballot marking device in any election district pursuant to the provisions of this Order shall be cast and canvassed in a manner to be prescribed by the SBOE.

B. Statewide Voter Registration List

1) No later than September 15, 2006, the SBOE shall file with the Court a proposed detailed schedule for development and implementation of the NYSVoter permanent statewide voter registration list;

2) No later than June 15, 2006, for NYSVoter I, and no later than December 31, 2006, for NYSVoter, the SBOE shall file with the Court proposed implementation regulations for such voter registration system. The United States shall have fourteen (14) days from the date of each filing to review such regulations and file comments with the Court. If no objection to such regulations is noted by the United States or the Court, the SBOE shall adopt finally such regulations in a timely manner, but in no event later than August 15, 2006 for NYSVoter I. Where there is an objection, the Court shall resolve the issue(s) and order adoption of such regulations as appropriate;

C. Reporting and Recordkeeping

1) The SBOE shall report to the United States, on a bi-weekly basis until the general election on November 7, 2006, and on a monthly basis thereafter, in writing (by e-mail or overnight delivery) or through personal report from SBOE staff, concerning progress in implementing the terms of this Order;

2) The Defendants shall retain any and all records concerning the subject matter of this Order during the term of this Order. Subject to applicable privileges, the United States may request access to such records, and access shall be provided by the Defendants within a reasonable period of time after any such request. The Defendants shall make appropriate State personnel available to the United States at any and all reasonable times in order to answer questions and provide information concerning compliance issues that arise during the term of this Order;

3) It shall be the responsibility of each of the Defendants to provide advance notice that such Defendant is about to be in breach of any of the terms of this Order or any of the schedules to be devised pursuant to the Order, such advance notice to include the nature and causes of such breach, and the steps the Defendants propose to take to resolve the breach and ensure that such breach does not recur in any part of the State of New York;

4) If at any time the United States obtains information that any of the Defendants is about to be in breach of any of the terms of this Order, the United States shall advise the SBOE and the State of New York in writing by notice sent by e-mail or overnight delivery, and facsimile. The Defendants shall have two (2) business days following transmission of such notice to respond in writing (by e-mail or overnight delivery, and facsimile) to the

United States (unless such breach is within ten (10) days of a federal election, in which case Defendants shall have one (1) business day to respond orally or in writing). The parties shall thereafter immediately attempt to resolve any issue of potential noncompliance. If the parties are unable to agree on a resolution of the issue, any party may bring the matter before the Court for appropriate resolution. Nothing in this Agreement shall otherwise prevent the United States from taking any actions required to enforce any and all provisions of HAVA other than those that are the subject of this action;

5) Changes in voting procedures under this Order are subject to the preclearance requirement of Section 5 of the Voting Rights Act, 42 U.S.C.1973c, in counties covered by the preclearance requirement, and the State Board of Elections has applied to the United States Attorney General for preclearance of such changes in covered counties. In such covered counties, implementation of any changes to voting procedures under this Order shall be contingent on the Attorney General's prompt issuance of the requisite preclearance;

6) Any notices sent by the respective parties pursuant to provisions of this Order shall be sent to:

For the United States:

Chief
Voting Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W., Room 7254-NWB
Washington, D.C. 20530
Phone: (800) 253-3931
Fax: (202) 307-3961
Email: brian.f.heffernan@usdoj.gov
Email: chris.herren@usdoj.gov

For the State Board of Elections:

Todd D. Valentine, Esq.
Patricia L. Murray, Esq.
Counsel
Board of Elections of the State of New York
40 Steuben Street
Albany, New York 12207
Phone: (518) 474-8100
Fax: (518) 486-4068
Email: tvalentine@elections.state.ny.us
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For the State of New York:

Bruce D. Feldman, Assistant Attorney General
Jeffrey M. Dvorin, Assistant Attorney General
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Email: jeffrey.dvorin@oag.state.ny.us
Email: douglas.goglia@oag.state.ny.us

D. Scope of Remedial Order

This Remedial Order is binding on all defendants, including the State of New York, consistent with Rule 65 of the Federal Rules of Civil Procedure.

E. Retention of Jurisdiction

The provisions of this Remedial Order shall expire on January 1, 2008, absent further extension for good cause shown. The Court retains jurisdiction of this action to enforce the terms of this Order during the effective period of this Order.

ENTERED this 2 day of ^{June}~~May~~, 2006, at Albany, New York.

Gary L. Sharpe

~~GARY L. SHARPE~~

UNITED STATES DISTRICT JUDGE