SECRETARY OF STATE OF THE STATE OF WASHINGTON

ROBERT EDELMAN, Complainant, v. SECRETARY OF STATE, Respondent.	NO. 2008-SOS-0001 FINAL DETERMINATION

INTRODUCTION

1. This is a brief adjudicative proceeding, brought under the authority of WAC 434-263. The matter comes before me as the reviewing officer on administrative review of an Initial Decision issued by an Administrative Law Judge, dismissing the Complaint. The Complainant has sought administrative review. As explained more fully below, I GRANT in part and DENY in part the relief requested in the Complaint.

NATURE OF PROCEEDING

2. The Complainant, Mr. Robert Edelman, commenced this administrative proceeding on June 13, 2008, by filing with the Office of the Secretary of State an administrative Complaint under the federal Help America Vote Act of 2002 (HAVA) (Public Law 107-252) and WAC 434-263.

3. Section 402 of HAVA (codified as 42 U.S.C. § 15512) requires that states receiving federal funds under HAVA must establish a state-based administrative complaint procedure permitting any person who believes that there is a violation of title III of HAVA to file a complaint. The Legislature has authorized the Secretary of State to implement this procedure by administrative rule. RCW 29A.04.611(52). The Secretary has done so by adopting chapter 434-263 WAC, under which this Complaint was filed and considered.

4. Mr. Edelman's Complaint alleges three violations of 42 U.S.C. § 15483(a)(1)(A)(i). That federal statute was enacted as part of title III of HAVA, specifically HAVA § 303. The Complaint accordingly raises allegations that, if correct, fall within the scope of this administrative complaint procedure. The three alleged violations consist of contentions that the Secretary of State allows counties to improperly register underage persons as voters, allows county auditors to improperly delay processing of applications for voter registration from underage voters, and that the mail-in voter registration form fails to include a particular warning statement.

5. The Secretary has, by rule, designated complaints filed under WAC 434-263 as brief adjudicative proceedings, and adopted by reference RCW 34.05.482 through 34.05.494 to govern such proceedings. WAC 434-263-030.

6. The Office of Administrative Hearings assigned Administrative Law Judge Rebekah R. Ross to this proceeding, and she served as presiding officer pursuant to WAC 434-263-050(1)(e).

7. Mr. Edelman was represented by counsel, Jonathan Bechtle, attorney at law.

8. The views of the staff of the Elections Division of the Secretary of State were presented through Shane Hamlin, Assistant Director of Elections, Paul Miller, Technical

Services Manager, and David Motz, Voter Services Manager. Assistant Attorney General Spencer Daniels represented the elections division staff.

9. Judge Ross held a telephonic prehearing conference on July 31, 2008, at which both parties were invited to participate in discussions on procedure. Both parties concurred that the Complaint would be resolved based on argument of counsel and written exhibits, which were agreed to at that time. A date of August 15, 2008, was set at that time.

10. Judge Ross received briefing and written exhibits from both parties to the proceedings, and held a hearing on the record on August 15, 2008. The hearing consisted of oral argument of counsel, which was consistent with the written briefing.

11. On August 19, 2008, Judge Ross issued an Initial Decision in this matter, ordering that the Complaint be dismissed. The Initial Decision included notice to the parties that any aggrieved party may request an administrative review of the initial decision. A copy of that Initial Decision is attached to this Final Determination, and incorporated herein by reference.

12. On September 8, 2008, the Secretary's office received from Mr. Edelman's counsel a request for administrative review of the initial decision. The Secretary of State designated me as the reviewing officer pursuant to WAC 434-263-070.

13. A final determination is required within 90 days after the Complaint is filed, unless the Complainant consents to a longer period, or a procedure for alternative dispute resolution must be employed. 42 U.S.C. § 15512; WAC 434-263-080. The ninetieth day after the filing of Mr. Edelman's complaint is September 11, 2008. Mr. Edelman has consented, through counsel, to an extension of the 90-day time limit by one day, to September 12, 2008.

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COMPLAINANT'S REQUEST FOR DISQUALIFICATION OF REVIEWING OFFICER

14. The reviewing officer pursuant to WAC 434-263-070 may be the Secretary of State, Assistant or Deputy Secretary of State, or the Director of Elections. I am the Director of Elections, and the Secretary has designated me in writing as the reviewing officer.

15. In his request for administrative review, Mr. Edelman asserted that none of the officials designated by WAC 434-263-070 could serve as reviewing officer. Noting that the actions of the Secretary's office are at issue in this Complaint, Mr. Edelman asserts that all of the officers who could potentially be designated to serve as reviewing officer be disqualified pursuant to RCW 34.05.425. Mr. Edelman has not supported this contention with argument or citations to authority, but has merely asserted that the issues raised by the Complaint relate to actions of the Secretary's office.

16. I reject this request and conclude that I am qualified to serve as reviewing officer pursuant to RCW 34.05.425 and WAC 434-263-070. I base this conclusion on the following facts and reasons.

17. I note, as a finding of fact, that upon the filing of this Complaint the Office of Secretary of State established an internal screen, pursuant to which various functions were divided among staff and separate counsel from the Attorney General's Office were retained. Assistant Director of Elections Shane Hamlin and others on the staff of the Elections Division were designated to present the views of staff, and were represented for this purpose by Assistant Attorney General Spencer Daniels. Secretary Reed and myself, as well as Assistant Secretary of State Steve Excell and Deputy Secretary of State Dan Speigle, were screened from this function in recognition of the fact that under WAC 434-263-070 we could be designated as the reviewing officer. Staff members were instructed not to discuss the matter with us, and we did not have

access to materials related to the Complaint, other than to the Complaint itself. Until after the Initial Decision was issued, we were unaware of specific events in these proceedings and did not participate in discussions, and did not see documentation, concerning the matter. Even after the Initial Decision was issued, we took no part in, and were unaware of, any discussions between Mr. Hamlin and other staff with their counsel, Mr. Daniels. Similarly, our regular general counsel, Deputy Solicitor General Jeffrey T. Even, was screened from his colleague in the Attorney General's Office, Mr. Daniels, and from Elections Division staff, so that Mr. Even would be available to provide independent counsel to the reviewing officer.

18. A reviewing officer is potentially subject to disqualification for bias, prejudice, interest, or any other cause for which a judge may be disqualified. RCW 34.05.425(3). No such cause is present in this matter, because I have been screened from this proceeding as described above. Mr. Edelman offers no indication of personal bias or prejudice, either on my part or the part of other potential reviewing officers permitted by WAC 434-263-070. *See* CJC Canon 3(D).

19. Moreover, the merits of the Complaint relate to official functions of the Secretary of State related to the administration of elections, in which the interest of the Office is to improve performance and to resolve any deficiencies in current practices. The Legislature has delegated the function of implementing the administrative complaint procedure required by federal law to the Secretary of State. RCW 29A.04.611(52). Mr. Edelman's request essentially amounts to a request that the Office of the Secretary of State be entirely disqualified from making a decision that has been specifically delegated by statute to this Office. This request sweeps too broadly, as it is in the nature of an administrative hearing that the final decision will typically reside with head of the responsible agency, or his or her designee. RCW 34.05.491 (administrative review in brief adjudicative proceedings); RCW 34.05.464 (providing for administrative review of initial decisions by an agency head or his or her designee). The Secretary arranged for an

Administrative Law Judge from the Office of Administrative Hearings to serve as presiding officer in this matter, but final decision-making authority is ultimately vested in the elected Secretary, as the chief elections officer of this state, or in his designee. *Id.*; RCW 29A.04.611(52) (delegation of HAVA complaints to Secretary); RCW 29A.04.230 (Secretary of State serves as chief elections officer). By law, the reviewing officer must be a person "authorized to grant appropriate relief upon review." RCW 34.05.491. Mr. Edelman's request for disqualification would effectively exclude anybody with authority to do so, and is accordingly denied.

THE PARTIES HAVE RECEIVED AN OPPORTUNITY TO EXPLAIN THEIR VIEWS OF THE MATTER ON ADMINISTRATIVE REVIEW

20. Mr. Edelman's request for administrative review states the grounds upon which he contends the Initial Decision erred. Mr. Edelman also noted that the allotted 90-day time period for a final determination of this Complaint would expire shortly.

21. The Complainant indicated in his request for administrative review that he desired to submit additional evidence and argument regarding the Initial Decision. On September 9, 2008, I notified both counsel of their opportunity to further state their views of this matter, by 10:00 AM on September 11, to provide the Respondent an opportunity to respond. At that time I stated that I considered the factual record to have been closed, and to be limited to the exhibits submitted prior to the hearing. Before the September 11 deadline, I received Mr. Edelman's Memorandum in Support of Request for Administrative Review and the Response of Respondent to Complainant's Appeal From the Initial Decision. I also timely received Mr. Edelman's Motion for Reconsideration of Decision to Deny New Evidence, to which I next turn.

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REQUEST TO CONSIDER ADDITIONAL FACTUAL MATERIAL

22. In response to my indication that the factual record is closed, Mr. Edelman formally moved for reconsideration of the decision not to permit the submission of new evidence at this stage of the proceeding, and tendered an offer of proof consisting of the additional exhibits he proposed to submit. Complainant contended that he did not possess the additional evidence prior to the hearing, explaining that he obtained it through a request for public records after the issuance of the Initial Decision. Motion for Reconsideration of Decision to Deny New Evidence, Exhibits 10 through 14. Mr. Edelman subsequently acknowledged possession of a portion of this evidence prior to the original deadline for the submission of exhibits.

23. Respondent objected to the introduction of new evidence at this stage, on the basis that all of the additional exhibits could have been obtained and submitted prior to the close of the record. I took Mr. Edelman's request under advisement, and stated that I would resolve it in this decision. I also offered to the Respondent the opportunity to submit a response to the Complainant's additional evidence by 10:00 AM on September 12. Respondent timely submitted written argument addressing the additional evidence on September 12, which I have read.

24. I now grant the Complainant's Motion For Reconsideration of Decision To Deny New Evidence, and admit Exhibits 10 through 14, attached to that motion, into evidence. I concur with the Respondent's argument that Complainant's evidence could have been obtained and submitted earlier, and a sufficient legal basis exists upon which I could exclude that evidence. I nonetheless exercise my discretion in this particular case to admit the evidence in the interest of creating a more complete record. The objective of an administrative complaint under HAVA and WAC 434-263 is to improve the future administration of elections. In this instance, the additional evidence suggests at least one way in which this can be accomplished. I also note,

for future reference, that proceedings such as this one would benefit from diligent preparation that would give the presiding officer an opportunity to consider all evidence, and would make last minute additions to the factual record, such as this one, unnecessary.

25. I make the following findings of fact based upon the additional exhibits admitted above.

a. I find that Exhibit 10 does not contradict, as Mr. Edelman contends, the finding of fact that the procedures were in place to identify and remove underage voters from the registration rolls, or that county auditors have procedures for addressing under age registrations. *See* Initial Decision, ¶ 3.11. Exhibit 10 merely establishes that the Secretary does not have the specific, formal, documented procedures Mr. Edelman requested in his public records request. In fact, the evidence in the record demonstrates that the Elections Division was actively monitoring underage registration, both with respect to the Voter Registration Data Base and through communications with the counties. Statement of Position of Secretary of State, Elections Division, at 6-7; *see also* Declaration of Miller, ¶ 4 (verifying description of voter registration process); Declaration of Motz, ¶ 3 (verifying information regarding numbers of voters). This is not to say that the Elections Division should not have specific documented procedures, as discussed below.

b. I find that Exhibits 11 and 12 do not contradict, as Mr. Edelman contends, the findings of fact that the Secretary has a reasonable process in place to identify and remove ineligible underage voters, or that very few underage voters are actually placed into the database as active registered voters while still ineligible to vote. *See* Initial Decision, ¶ 3.12. To the contrary, Exhibits 11

and 12 support these findings by demonstrating that the Secretary's staff took action to accomplish these objectives. Although Exhibits 11 and 12 suggest that continued improvements to these procedures are possible, they also demonstrate that in February 2008 Respondent notified counties of apparent underage voters contemporaneously with the election, and further demonstrate that by August 2008 Respondent was reviewing county entries into the database for underage voters daily. *See* Ex. G—Declaration of David Motz at ¶ 7.

c. With regard to Exhibit 13, I find that, as explained in that exhibit, the data that Mr. Edelman requested in his August 18, 2008, public records request could not be provided before September 25, 2008, because of the technical difficulty of restoring data from computer back up tapes. At most this indicates that the Elections Division staff did not review the specific data that Mr. Edelman recently requested. The Elections Division was, however, able to determine through other data that voters Mr. Edelman claimed were improperly registered were no longer active as of August 1, 2008. Exhibit G. Exhibit 13 does not contradict the finding that the registration date shown in the voter registration data base is the date a voter registration form was mailed or received, and that this date does not demonstrate that a voter was registered too early. *See* Initial Decision, ¶ 3.7; *see also* Statement of Position of Secretary of State, Elections Division, at 9; *see also* Declaration of Miller, ¶ 4 (verifying description of voter registration process); Declaration of Motz, ¶ 3 (verifying information regarding numbers of voters).

d. I find that Exhibit 14 does not contradict, as Mr. Edelman contends, the finding of fact that the staff of the Elections Division is actively working with the counties to prevent the reoccurrence of past instances of underage voting. *See* Initial Decision, ¶ 3.9. To the contrary, Exhibit 14 documents such action. Nor does Exhibit 14 support Mr. Edelman's view that three counties are not taking corrective action to prevent future underage registrations. To the contrary, Exhibit 14 documents the nature of the errors that resulted in specific incidents of underage voting, and states that each of the counties involved were, as of July 14, 2008, using specific processes to prevent their recurrence.

ADMINISTRATIVE REVIEW

26. I have fully reviewed Mr. Edelman's request for administrative review, and the materials filed by counsel for the respective parties on September 11, 2008, which consist of:

- Mr. Edelman's Memorandum in Support of Request for Administrative Review;
- Mr. Edelman's Motion for Reconsideration of Decision to Deny New Evidence;
- Response of Respondent to Complainant's Appeal From Initial Decision;
- Respondent's objection (by email) to request for new evidence; and
- Respondent's Response to Complainant's Motion for Reconsideration of Decision to Deny New Evidence.

27. I have also fully reviewed the agency record compiled before Judge Ross, as well as her Initial Decision. I have also listened to the audio recordings of the prehearing conference held on July 31, 2008 (22 minutes in length), and the hearing held on August 15, 2008 (48 minutes in length). Based upon this review, I conclude as follows.

28. There is no reason to convert this proceeding into a formal adjudicative proceeding under RCW 34.05.491(3). The issues of law raised by the Complaint can be fully resolved based upon the factual materials presented prior to the Initial Decision, and both counsel have had sufficient opportunity to brief issues of law.

29. I conclude that, "It is the policy of the state of Washington to encourage every eligible person to register to vote and to participate fully in all elections, and to protect the integrity of the electoral process by providing equal access to the process while guarding against discrimination and fraud." RCW 29A.04.205. Encouraging registration and participation by young adults is just as essential to instilling democratic values as is the discouragement of premature voting by those who have not yet attained the age of majority.

30. Thus there are two dimensions to state policy regarding voter registration: not only should the rolls of registered voters *not* include ineligible individuals, but they *should* include eligible voters who submit complete and timely applications for registration. Mr. Edelman stresses only one of these policies, the suppression of ineligible registrations, but the Secretary must seek to implement both policies. Accordingly, the danger of permitting an ineligible voter to become registered can only be minimized while also attempting to avoid the danger of denying the franchise to those eligible to register and vote.[1]

31. Were I to grant in full the relief requested, I would risk denying eligible voters the right to vote, without at the same time adding meaningfully to the safeguards against voting by ineligible underage voters.

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[1] Were I of a mind to phrase the matter more colorfully, I would compare the task at hand to the legendary goal of steering "between Scylla and Charybdis." According to myth, Scylla and Charybdis were sea monsters, lying on opposite sides of a narrow channel, such that sailors attempting to avoid one would sail too close to the other and perish as a result. *See* http://en.wikipedia.org/wiki/Charybdis. Mr. Edelman stresses solely the avoidance of one monster; the Secretary must devote due diligence to both.

32. I adopt all of the findings of fact and conclusions of law set forth in the Initial Decision rendered by Administrative Law Judge Rebekah R. Ross, as supplemented by the additional findings of fact stated in this Final Determination, except as modified below. I accordingly attach a full and complete copy of the Initial Decision and incorporate it in this Final Determination by this reference.

MODIFICATIONS TO INITIAL DECISION

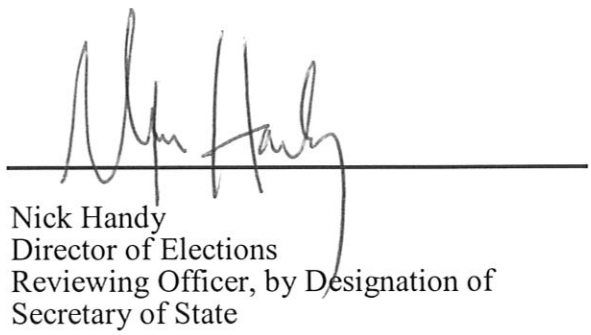
33. I conclude that there is at least possible merit — as a matter of policy, not legal requirement — to the contention that the voter registration form should include the statement set forth in 42 U.S.C. § 15483(b)(4)(A)(iii). I accordingly modify the Initial Decision by instructing the staff of the Elections Division to fully consider this matter, and to report back to me by January 5, 2009, with a proposed modified voter registration form that contains, in association with the "check box" questions concerning age and citizenship, the statement, "If you checked 'no' in response to either of these questions, do not complete this form." Along with this proposal for a revised form, I direct staff to provide me with their written analysis and recommendations regarding both the potential advantages and disadvantages of this change, including an evaluation of the potential for such a change to discourage registration by both ineligible and eligible individuals.

34. I also conclude that practices and procedures designed to both minimize registration and voting by ineligible voters and to maximize registration and voting by eligible voters could be improved by developing carefully written practices and procedures. I accordingly direct the staff of the Elections Division, also by January 5, 2009, to develop written practices and procedures for use in (1) screening applications for voter registration for underage voters; (2) periodically checking for and removing underage voters from the Voter Registration Database; (3) communicating with County Auditors regarding potential or actual underage

voting; and (4) communicating with county prosecuting attorneys in cases of probable criminal activity. These practices and procedures must be consistent with the state policies set forth above, and balance the encouragement of registration and voting by those eligible with practical steps to prevent or detect underage voting. I also direct staff to consider the degree (if any) to which such practices and procedures should, or must, be set forth in administrative rule.

35. IT IS HEREBY ORDERED, based on the foregoing, that the relief requested in the Complaint is GRANTED as provided in paragraphs ~~32~~ 33 and ~~33~~ 34 above, and DENIED in all other respects.

DATED this 12th day of September, 2008.



Nick Handy
Director of Elections
Reviewing Officer, by Designation of
Secretary of State

NOTICE TO PARTIES

This determination is the final administrative resolution of this complaint, and no further administrative review is available. WAC 434-263-070. Judicial review of this final determination may be available under chapter 34.05 RCW.

Certificate of Service

I certify that I caused to be served a copy of the Designation of Reviewing Officer on all parties or their counsel of record on the date below by way of United States Postal Service First Class Mail and electronic transmission as follows:

Robert Edelman
c/o Jonathan Bechtle, J.D.
Evergreen Freedom Foundation
PO Box 552
Olympia, WA 98507
JBechtle@effwa.org

Spencer Daniels
Assistant Attorney General
PO Box 40108
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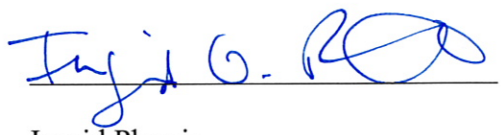
Shane Hamlin
Assistant Director of Elections
Office of the Secretary of State
PO Box 40229
Olympia, WA 98504-0229
shamlin@secstate.wa.gov

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

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



Ingrid Pharris

BEFORE THE WASHINGTON STATE OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE OFFICE OF THE SECRETARY OF STATE

In Re: ROBERT EDELMAN, Complainant v. SECRETARY OF STATE, Respondent	Docket No. 2008-SOS-0001 INITIAL DECISION

1 BRIEF ADJUDICATIVE PROCEEDING

1.1 **Date:** August 15, 2008

1.2 **Administrative Law Judge:** Rebekah R. Ross

1.3 **Agency:** Office of the Secretary of State

1.4 **Also present:** Shane Hamlin, Assistant Director Elections; Paul Miller, Technical Services Manager; David Mott, Voter Services Manager

1.5 **Agency Representative:** Spencer Daniels, Assistant Attorney General

1.6 **Complainant**[1]**:** Robert Edelman, through counsel

1.7 **Complainant Representative:** Jonathan Bechtle, attorney at law

2 SUMMARY OF ORDER

2.1 The Complaint is DISMISSED.

3 RELEVANT FACTS

3.1 On June 13, 2008, the Complainant filed a Complaint based on the Help America

[1]In some Office of Administrative Hearings documents, the Complainant is referenced as the Appellant. The more accurate designation is Complainant.

Vote Act (HAVA). It is undisputed that the Complainant is a registered voter with standing to bring a complaint under HAVA.

3.2 The Complaint alleges that the Secretary of State is allowing counties to register underage persons, resulting in underage voters; that the Secretary of State is allowing county auditors to delay applications from underage voters; and that Washington's Mail-in Voter Registration form violates HAVA. The facts relevant to each of those allegations is addressed in turn.

A. Facts Relating to whether the Secretary of State is allowing counties to register underage persons, resulting in underage voters.

3.3 The Mail-In Voter Registration Form developed by the Secretary of State asks for the following information at the top of the form:

> Will you be at least 18 years of age or older before Election Day?
> ○ YES ○ NO
> Are you a citizen of the United States? ○ YES ○ NO

The form requires completion of the applicant's date of birth and verification. The Voter Declaration at the bottom of the form states:

> By signing this document, I hereby assert, under penalty of perjury, that I am legally eligible to vote. If I am found to have voted illegally, I may be prosecuted and/or fined for this illegal act. In addition, I hereby acknowledge that my name and last known address will be forwarded to the appropriate state and/or federal authorities if I am found to have voted illegally. (RCW 29A.08.210)
>
> • I declare that the facts on this registration form are true;
> • I am a citizen of the United States;
> • I am not presently denied my civil rights as a result of being convicted of a felony;
> • I will have lived in Washington state at this address for thirty days immediately before the next election at which I vote;
> • I will be at least eighteen years old when I vote.

Exhibit 7.

3.4 Washington State has established a centralized voter registration list ("State VRDB") maintained by the Secretary of State. However, the initial processing of voter registration forms is done by county auditors. Counties sometimes receive applications from individuals who are not eligible to vote because they will not turn 18 before the next election day. The Secretary of State has allowed counties to accept those applications, but not process them until the applicant reaches the

required age.

3.5 Counties use different systems to alert them about applications from underage applicants that should be processed because the applicant has reached the required age. One system is to simply put the applications in a 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.

3.6 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", meaning the applicant is eligible to vote (assuming there is no other impediment, such as a felony history).

3.7 When the applicant is put in active status, the registration date that shows on the VRDB is the date the voter registration form 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.

3.8 The Secretary of State reviews the VRDB and notifies counties when they appear to have activated a voter who will not be 18 by the next election.

3.9 Thirteen individuals voted in 2006 elections in Washington state before they turned 18. There were no underage voters in 2007. Four individuals voted in 2008 elections in Washington state before they turned 18. Exhibit 3, p. 4; Exhibit 8, p. 2. David Motz, the Voter Services Manager, has investigated the four 2008 ballots. He has been provided an explanation of how they occurred, and is actively working with the counties to prevent any reoccurrence. Exhibit G, p. 2.

3.10 The Complainant asserts that the Secretary of State should require counties to return applications to applicants when the applicant will not turn 18 by the next election.

3.11 I find that the evidence does not support a finding that the Secretary of State has a policy or procedure that allows counties to register underage persons, resulting in underage voters. The procedures used by the counties is to *not* allow processing of applications of underage applicants, but instead to "pend" (defer action on) the applications. 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. The fact that there were no actual underage votes in 2007, and only four in 2008, is strong evidence that the current policies are working to prevent underage registration and voting.

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

working.

B. Facts Relating to whether the Secretary of State is allowing county auditors to delay applications from underage voters.

3.13 As discussed above, the Secretary of State is, in fact, allowing counties to delay entry of applications from underage voters. The counties are delaying until the applicants will turn 18 by the next election.

C. Facts Relating to Mail-In Voter Registration Form.

3.14 The Mail-In Voter Registration Form, quoted above, does not state after the yes and no boxes (regarding whether the applicant is a US citizen and will be 18 on or before the next election date): "If you checked 'no' in response to either of these questions, do not complete this form."

3.15 The U.S. Election Assistance Commission (EAC) has issued an advisory that the requirement in HAVA that requires the state to notify an applicant of an incomplete form if neither the "yes" nor the "no" box is check is subject to state law. "This subsection is 'subject to state law,' so the state may choose to honor the affirmation fo citizenship and age that goes with the signing of the registration form and register a person who did not check the "yes" box. ***HAVA does not require states to redesign their state voter registration forms to include check-off boxes***." Exhibit F. In reliance on this advice, the Secretary of State has not changed the Mail-In Voter Registration Form to add the language, "If you checked 'no' in response to either of these questions, do not complete this form."

4 CONCLUSIONS OF LAW

4.1 This hearing is governed by Washington Administrative Code (WAC) Chapter 434-263. 434-263-030 provides:

> **Adoption of brief adjudicative proceedings.**
>
> All complaints filed pursuant to this chapter shall be treated as brief adjudicative proceedings, and the secretary adopts RCW 34.05.482 through 34.05.494 to govern such proceedings. The secretary has determined that the interests involved in such complaints do not warrant the procedures of RCW 34.05.413 through 34.05.479. . . .

I have jurisdiction in this matter based on WAC 434-263-050(1)(e).

A. Conclusions Regarding Allegation that the Secretary of State is allowing counties to register underage persons, resulting in underage voters, in Violation of HAVA.

4.2 Help America Vote Act (HAVA), 42 U.S.C. § 15483, provides in relevant part:

> **Computerized statewide voter registration list requirements and requirements for voters who register by mail**
>
> (a) Computerized statewide voter registration list requirements
>
> (1) Implementation
>
> (A) In general
>
> Except as provided in subparagraph (B), each State, acting through the chief State election official, shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State (in this subsection referred to as the "computerized list"), and includes the following:
>
> (i) The computerized list shall serve as the single system for storing and managing the official list of registered voters throughout the State.
>
> (ii) The computerized list contains the name and registration information of every legally registered voter in the State.
>
> . . .
>
> (vi) ***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.***
>
> (vii) The chief State election official shall provide such support as may be required so that local election officials are able to enter information as described in

clause (vi).

(viii) The computerized list shall serve as the official voter registration list for the conduct of all elections for Federal office in the State.

. . .

(2) Computerized list maintenance

(A) In general

The appropriate State or local election official shall perform list maintenance with respect to the computerized list on a regular basis . . .

(B) Conduct

The list maintenance performed under subparagraph (A) shall be conducted in a manner that ensures that—

(i) the name of each registered voter appears in the computerized list;

(ii) only voters who are not registered or who are not eligible to vote are removed from the computerized list; and

(iii) duplicate names are eliminated from the computerized list.

. . .

(4) Minimum standard for accuracy of State voter registration records

The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:

(A) 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. . . .

(B) Safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters. [Emphasis

added].

4.3 I conclude that the Complainant has not shown a violation of HAVA with respect to allowing counties to accept registrations form underage applicants, and then pend these for processing until the applicant will be 18 years old by the next election. There is no evidence that this procedure allows underage applicants to actually show up on the computerized database as registered voters. They should not appear on the database until after they have reached the required age. If, despite precautions put in place, some applicants slip through the cracks, there are processes to remove them from the database.

4.4 Moreover, HAVA requires only that the Secretary of State make a reasonable effort to *remove* registrants who are ineligible to vote. It does not discuss steps to prevent erroneous registration of underage voters, other than the 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.

B. Conclusions Regarding Allegation that the Secretary of State is allowing county auditors to delay applications from underage voters.

4.5 42 U.S.C. § 15483(a)(1)(A)(vi), quoted in context above, provides in relevant part:

> 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.

The Complainant argues that the process of allowing counties to pend applications from underage voters violates this provision.

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

B. Conclusions Regarding Mail-In Voter Registration Form.

4.7 42 U.S.C. § 15483(b)(4) provides in relevant part:

> Contents of mail-in registration form

(A) In general

The mail voter registration form developed under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg–4) shall include the following:

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

(ii) The question "Will you be 18 years of age on or before 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.

(iii) ***The statement "If you checked 'no' in response to either of these questions, do not complete this form.".***

. . .

(B) Incomplete forms

If an applicant for voter registration fails to answer the question included on the mail voter registration form pursuant to subparagraph (A)(i), the registrar shall notify the applicant of the failure and provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office (**subject to State law**). [Emphasis added].

4.8 The Complainant argues that the "subject to State law" language only relates to the section regarding providing the applicant the opportunity to complete an incomplete form in a timely manner. The placement of that 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 voter registration forms to include the check-off boxes. As the federal agency charged with guidance regarding HAVA, it is appropriate to defer to the EAC's interpretation. I find the EAC's interpretation to be reasonable. If the "subject to State law" language applies to the part of 42 U.S.C. § 15483(b)(4)(A) relating to check-off boxes, it logically also applies to the other requirements of 42 U.S.C. § 15483(b)(4)(A). The Complainant does not argue that the Mail-In Voter Registration form violates Washington state law.

4.9 In sum, the allegations in the Complaint are not supported by the evidence or the

relevant law.

5 ORDER

5.1 IT IS HEREBY ORDERED, That the Complaint is DISMISSED.

SERVED on the date of mailing.

Rebekah R. Ross
Administrative Law Judge
Office of Administrative Hearings

NOTICE TO THE PARTIES

Pursuant to WAC 434-263-070 and RCW 34.05.485, any aggrieved party may request an administrative review of this initial decision with the Secretary of State. If the Secretary does not receive a request, in writing, for an administrative review within twenty-one days of service of this initial decision, then this initial decision automatically becomes the final determination. If the parties have not requested an administrative review, the Secretary may review this adjudication on his own motion as provided by RCW 34.05.491. The reviewing officer shall give each party an opportunity to explain the party's view of the matter, but must render a final determination within ninety days after the original filing of the complaint unless the complainant consents to a longer period. The determination of the reviewing officer is final and no further administrative review is available. The final determination shall include notice that judicial review may be available.

Certificate of Service

I assert that true and exact copies of the Initial Decision were mailed to the following parties on the 19th day of August, 2008 at Olympia, Washington.

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