

**BEFORE THE STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS**

ROBERT EDELMAN,

Complainant,

v.

SECRETARY OF STATE,

Respondent.

DOCKET NO. 2008-SOS-0001

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2008, I served a copy of the Statement of Position of Secretary of State, Elections Division and Exhibits A through G, on all parties or their counsel of record via first class mail, postage prepaid, and electronic copy as follows:

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DATED this 8th day of August, 2008, at Olympia, WA.



COURTNEY AMIDON
Legal Assistant

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STATEMENT OF POSITION OF
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I. INTRODUCTION

This matter comes before the Presiding Officer based on a complaint filed by Robert Edelman under the federal Help America Vote Act. Pursuant to the rules of the Secretary of State, the complaint is processed as a brief adjudicative hearing under the state administrative procedure act, RCW 34.05 ("APA"). The Secretary of State, Elections Division submits this statement of position in response to Mr. Edelman's complaint.

II. RELEVANT STATUTES AND RULES

A. Help America Vote Act of 2002 (HAVA)

This matter involves the federal Help America Vote Act of 2002 ("HAVA").¹ Section 303 of HAVA sets forth certain requirements regarding computerized statewide voter registration lists and for voters who register by mail. 42 U.S.C. § 15483 (copy attached to this

¹ 42 U.S.C. §§ 15301-15545.

1 response for reference). Section 303 requires each state to implement “a single, uniform,
2 official, centralized, interactive computerized statewide voter registration list.”
3 *Id.* § 15483(a)(1)(A). The section requires each state to have: “A system of file maintenance
4 that makes a reasonable effort to remove registrants who are ineligible to vote from the
5 official list of eligible voters.” *Id.* § 15483(a)(4)(A). The requirements of Section 303
6 became effective on January 1, 2006. *See* 42 U.S.C. § 15483(d)(1)(B) and (2)(B).²

7 Another section of HAVA, Section 402, is entitled “Establishment of State-Based
8 Administrative Complaint Procedures to Remedy Grievances.” 42 U.S.C. § 15512. This
9 section of HAVA requires the state to establish and maintain State-based administrative
10 complaint procedures that meet certain requirements. *Id.* § 15512(a)(1) and (2). The state
11 procedure must allow “any person who believes that there is a violation of any provision of
12 title III (including a violation which has occurred, is or about to occur) [to] file a complaint.
13 *Id.* § 15512(a)(2)(B). In Washington, the Secretary of State has adopted state-based
14 administrative complaint procedures to comply with HAVA Section 402 in
15 chapter 434-263 WAC.

16 **B. Chapter 434-263 WAC and Brief Adjudicative Proceedings**

17 WAC 434-263-020 provides that “[a]ny person who believes that there is a violation of
18 Title III [of HAVA] . . . may file a complaint with the secretary under this chapter.” The
19 complaint must be filed “no later than thirty days after the certification of the election at issue.”
20 WAC 434-263-020(4).³

21 Through counsel, Mr. Edelman filed his complaint on June 13, 2008. Pursuant to
22 WAC 434-263-040(2), on July 8, 2008, the Secretary acknowledged receipt of the complaint
23

24 ² These sections allow states to obtain an extension of the effective date from January 2004 to January
25 2006 upon certification that such an extension is needed for good cause. Washington State submitted a
certification and obtained such an extension.

26 ³ The complaint process under chapter 434-263 WAC “may not be used for the purpose of contesting the
results of any primary or election.” WAC 434-263-005. *See also* WAC 434-263-060(2) (remedies under chapter
434-263 WAC may not include invalidation, cancellation, or delay of any primary or election).

1 and advised Mr. Edelman that it would be processed as a brief adjudicative hearing.
2 Complaints filed under chapter 434-263 “shall be treated as brief adjudicative proceedings.”
3 WAC 434-263-030. The Secretary scheduled the matter for a brief adjudicative proceeding,
4 WAC 434-263-040(1)(d), and designated an administrative law judge as presiding officer.
5 WAC 434-263-050(1)(e).

6 The presiding officer is to give each party an opportunity to explain the party’s view of
7 the matter and may base the determination upon written submissions and documents.
8 WAC 434-263-050(2). A hearing is not required unless a party or the presiding officer
9 requests a hearing on the record within 10 days after the filing of the complaint (which Mr.
10 Edelman did not do).

11 The presiding officer is to issue a written initial decision. WAC 434-263-060(1). If a
12 violation of 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.” *Id.* The
14 rules provide for further administrative review by a reviewing officer. WAC 434-263-070.

15 **III. SECRETARY OF STATE’S POSITION ON ISSUES RAISED IN EDELMAN’S**
16 **COMPLAINT**

17 Mr. Edelman’s complaint raises three contentions regarding voting by individuals who
18 are not yet 18 years of age. Specifically, Mr. Edelman contends (1) that the State “has allowed
19 county election officials to add ineligible underage voters to the official state Voter
20 Registration Database as active voters”; (2) that the State “has allowed county election officials
21 to delay entry of registration information into the state Voter Registration Database”; and (3)
22 that the State “has failed to include a required statement on its official mail-in voter registration
23 form.” Complaint p. 1.⁴ Mr. Edelman alleges that based on these purported deficiencies the
24 State will be in violation of Section 303 of HAVA for the primary and general election of
25 2008. Complaint p. 1. Mr. Edelman has submitted nine exhibits in support of his complaint.

26 ⁴ The Complaint does not have page numbers on it.

1 **A. Response Regarding Underage Voters on Voter Registration Database.**

2 Before responding to Mr. Edelman’s specific concerns and exhibits, we will review the
3 legal provisions and processing procedures in Washington State relating to voter registration
4 by individuals who are not yet age 18. A person who has applied or is applying to become a
5 registered voter in Washington State is called an “applicant.” WAC 434-324-005(2).

6 The Washington Constitution requires individuals to be 18 or older to vote in elections.
7 Wash. Const. art. VI, § 1.⁵ The Constitution itself does not use the terms “registering to vote”
8 or “registered voter.” Thus, the Constitution does not state that an individual must be 18 to
9 register to vote, only that the individual be 18 at the time of the election.

10 State statutes deal with voter registration. RCW 29A.08.210 provides:

11 **Application, required information, warning.**

12 An applicant for voter registration shall complete an application
13 providing the following information concerning his or her qualifications as a
14 voter in this state:

14 (3) The applicant’s date of birth;

15

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

18

19 (15) The oath required by RCW 29A.08.230 and a space for the
20 applicant’s signature;

21 The statute referenced in RCW 29A.08.210(15), RCW 28A.08.230, provides:

22 **Oath of applicant.**

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

24 “I declare that the facts on this voter registration form are true. I am a
25 citizen of the United States. I am not presently denied my civil rights as a result

26 ⁵ Article VI, section 1 reads: “QUALIFICATIONS OF ELECTORS. All persons of the age of 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 of being convicted of a felony. I have lived at this address for thirty days
2 immediately before the next election at which I vote, *and I will be at least
eighteen years old when I vote.*"

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

7 The voter registration form issued by the Secretary of State (Exhibit 7) asks the
8 applicant: "Will you be at least 18 years of age or older before Election Day? [Check yes or
9 no.]" (Exhibit 7 block 1.) The form also asks for date of birth. (Exhibit 7 block 3.) The form
10 contains a voter declaration: "By signing this document, I hereby assert, under penalty of
11 perjury, that I am legally eligible to vote. . . . I declare that the facts on this registration form are
12 true; . . . I will be at least eighteen years old when I vote." (Exhibit 7 block 11.) Thus, the
13 state's official voter registration form gives effect to article VI, section 1 of the Constitution
14 and RCW 29A.08.230 by allowing an applicant to submit a voter registration form before the
15 applicant is 18 but providing in the form that the applicant will not vote until after he or she is
16 18.

17 In this respect, the voter registration form implements another provision of the state
18 voter registration statutes. RCW 29A.08.140 provides that, in general, an individual must
19 register to vote no later than thirty days prior to the election.⁶ The statute states, in part: "No
20 person may vote at any primary, special election or general election in a precinct polling place
21 unless he or she has registered to vote at least thirty days before that primary or election and
22 appears on the official statewide voter registration list." *See also* WAC 434-324-075. If an
23 applicant had to be 18 in order to even submit a voter registration form, applicants whose 18th
24 birthday fell within the 30 days prior to the next election would be unable to register to vote

25 _____
26 ⁶ RCW 29A.08.145 allows for late registration in person at the county auditor's office no later than the
fifteenth day before an election.

1 because of RCW 29A.08.140. Yet such individuals are guaranteed a right to vote by article VI,
2 section 1 of the State Constitution.

3 Under state statute, and to comply with HAVA, Washington has established a
4 centralized statewide voter registration list ("State VRDB"), maintained by the Secretary of
5 State, which "is the official list of eligible voters for all elections". RCW 29A.08.105(1);
6 RCW 29A.08.651. However, the initial processing of voter registration forms is done by the
7 county auditors.⁷ To the best of the Secretary of State's knowledge, no county will accept a
8 voter registration form submitted by an applicant younger than 17. With respect to a form
9 submitted by an applicant who is 17 (and who will not be 18 by the date of the next election),
10 the county auditor will "pend" the form. "Pending status" means a voter registration record is
11 not yet complete, and the applicant is not yet a registered voter." WAC 434-324-005(15).
12 Counties pend such application forms in one of two ways. Some counties pend the form by
13 physically placing it in a drawer and check the pended forms on a regular basis to identify
14 those individuals who will reach age 18 by the next election. Other counties use their
15 electronic election management system to pend the forms, again monitoring for those
16 individuals who will reach age 18 by Election Day.⁸

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

23
24 ⁷ This is true whether the voter registration form is submitted to the county directly or submitted first to
the Secretary of State for transmittal to the county. *See* WAC 434-324-260.

25 ⁸ Counties in Washington State use one of four different election management systems, at the county's
26 choice. In two of these systems the system can generate a note to the county when the system detects an
individual who is not 18 (Votec system) or will not be 18 by Election Day (ES&S system). *See* Exhibit B, Exhibit
C.

1 When the county ascertains that the applicant will be 18 by the next election, the
2 County submits this information to the statewide voter database and places the applicant in
3 “active status.” “Active status’ means a designation assigned to voters with complete voter
4 registration records signifying that the voter is eligible to vote.” WAC 434-324-005(1).

5 Pursuant to RCW 29A.08.110 when a voter registration application is determined to be
6 complete, “the applicant is considered to be registered to vote as of the original date of mailing
7 or date of delivery, whichever is applicable.” Thus, when the county places the applicant in
8 active status in the statewide voter database, the date shown as the “registration date” should be
9 the date the voter registration form was mailed or received.⁹ However, this does not mean that
10 the applicant was activated as a voter prior to the individual’s being 18 in time for the next
11 election or that the individual was actually allowed to vote prior to being 18.

12 As part of its statutory responsibilities under both state law and HAVA, the Secretary
13 of State monitors actions by the counties of placing individuals in active voter status on the
14 statewide voter registration database and must review the database at least quarterly.
15 RCW 29A.08.125(2); RCW 29A.08.651(14). The Secretary of State actually reviews the
16 database more often than that and notifies counties whenever they appear to have activated a
17 voter who will not be 18 by the next election. If “at any time” the Secretary of State finds that
18 a voter does not meet the qualifications to vote, the Secretary will refer the matter to the county
19 auditor for appropriate action. WAC 434-324-113.

20 After activating the voter in the database, the County then sends the voter an
21 acknowledgment notice, usually a voter registration ID card. Twenty days prior to the next
22 election the County will send a ballot to all registered voters in the county. A return envelope
23

24 ⁹ There is one exception to this. Counties must ascertain whether a voter has registered the requisite
25 amount of time prior to the election specified by statute, which is normally 30 days. However, state law also
26 permits new voters to register no later than 15 days before the election. The systems used 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 is included with the ballot. The ballot return envelope contains a declaration that must be
2 signed by the voter, under penalty of perjury, stating that he or she is at least 18 years old.¹⁰

3 With this general explanation of the voter registration process, we turn to
4 Mr. Edelman's complaint and supporting exhibits. As we understand it, Mr. Edelman's
5 position is that the State and counties should not accept any voter registration applications from
6 applicants who will not be 18 by the next election. In this respect, Mr. Edelman's allegations
7 that counties are improperly placing underage individuals on the state voter registration
8 database and his allegation that counties are delaying entry of registration information into the
9 database are flip-sides of the same process. What Mr. Edelman is saying is that counties
10 should simply decline to accept or return an application from an individual who will not be 18
11 by the next election, rather than take the application and "pend" it, as presently done. Or
12 putting it the other way, he is contending that under HAVA there is an obligation on counties
13 to immediately process voter registration applications, so the practice of "pending" such forms
14 until the voter is older violates that obligation. *See* 42 U.S.C. §15483(a)(1)(A)(vi).

15 Mr. Edelman's complaints in this regard should be rejected. They are inconsistent with
16 state statutes; and his proposed remedy could deny some individuals their right to vote
17 guaranteed by the Washington Constitution. More to the point in this proceeding,
18 Mr. Edelman has not shown that the Secretary of State has violated HAVA. HAVA does not
19 require that the State be perfect. Rather, it requires that the state election official have in place
20 a system "that makes a *reasonable* effort to remove registrants who are ineligible to vote."
21 42 U.S.C. § 15483(a)(4)(A) (emphasis added). The State's efforts have been reasonable and
22 do not violate HAVA.

23 In support of this aspect of his complaint, Mr. Edelman has submitted several exhibits
24 that purport to show that large numbers of underage individuals have been registered as voters.

25 _____
26 ¹⁰ One of the four election management systems used by the counties (Votec system) can automatically
notify the County when a ballot is received from a voter who does not appear to be 18. *See* Exhibit B, Exhibit C.

1 See Exhibit 1, Exhibit 2, Exhibit 3, Exhibit 4, Exhibit 5, Exhibit 8, and Exhibit 9. As a
2 preliminary matter, some of this information should be excluded or not considered on the basis
3 that it is time-barred. The State was not required to have a statewide voter registration
4 database as required by HAVA until January 2006. See 42 U.S.C. § 15483(d)(1)(B).
5 Accordingly, information on Mr. Edelman's exhibits that pre-dates January 2006 could not be
6 the basis for a complaint that the State violated HAVA. In addition, the complaint rules
7 adopted by the Secretary of State pursuant to the requirements of HAVA provide that a
8 complaint must be filed "no later than thirty days after the certification of the election at issue."
9 WAC 434-263-020(4). While under this rule Mr. Edelman can complain that the State is not in
10 compliance with HAVA for the upcoming 2008 primary and general elections, he cannot
11 complain about irregularities in the voter database used for elections held years before he filed
12 his complaint on June 13, 2008.

13 Aside from this, the data on which Mr. Edelman relies does not support his complaint.
14 As noted above, by state law when a voter registration form is complete counties are to enter as
15 the registration date the date the voter registration form was mailed or received.
16 RCW 29A.08.110(2) (if application is complete, "the applicant is considered to be registered to
17 vote as of the original date of mailing or date of delivery"). Thus, most of what Mr. Edelman
18 characterizes as instances of underage individuals being registered as voters simply reflects
19 how the legislature has established the system and does not in fact show that underage
20 individuals were placed in active voter status or allowed to vote. As the Secretary of State staff
21 explained to Mr. Edelman in a December 18, 2007, e-mail: "[C]ounties enter the date they
22 received the application as the registration date. In other words, whether the county has either
23 held up the registration form or pended the registration record until the voter is eligible; the
24 registration date is still the date that the county received the application." Exhibit 5 at p. 5.
25 Indeed, Mr. Edelman's own prior communications with the Secretary of State indicate that he
26 was aware of RCW 29A.08.110. Exhibit 5 at p. 6.