

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-Plaintiff,

-against-

**AFFIDAVIT in
Support of the Order
to Show Cause**

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,

06 CIV 0263 (GLS/RFT)

-Defendants

We, PETER S. KOSINSKI and STANLEY L. ZALEN, swear under penalty of perjury that the following is true and correct:

1. I, PETER S. KOSINSKI, am a Co-Executive Director for the New York State Board of Elections (“the State Board”). I have been employed by the State Board in various capacities since 1990.
2. I, STANLEY L. ZALEN, am a Co-Executive Director for the New York State Board of Elections (“the State Board”). I have been employed by the State Board in various capacities since 1974.
3. The State Board, as established pursuant to New York State Election Law section 3-100, is composed of four Commissioners. The commissioners are appointed by the governor as follows: two commissioners, one each recommended by the chairman of the state committee of each of the major political parties; and one each by the legislative leaders in each house of the legislature. Pursuant to New York State Election Law section 7-202, the State Board is charged with the responsibility of certifying that all voting machines

that are used in the state meet the requirements set out in statute and regulation.

4. We bring this motion by order to show cause in order to consolidate the determination of the Court with respect to the previously filed motion of the United States, docket number 134, which is returnable on December 20, 2007. The Court's ruling on that motion will directly affect the ability of the defendants State Board, Kosinski and Zalen to comply if the County Boards are not made parties to the action. As stated below, it is ultimately the county boards which must comply with order. Joining the county boards at this stage of the litigation will be necessary to allow the defendants to fully comply with any order of the Court.
5. If the Court grants the State Board defendants motion to join the county boards, the pleading would be amended to add all the county boards as part of this litigation. Attached as exhibit A is a current list of all the county boards.
6. The Court should also be aware that at the direction of the Second Circuit Court of Appeals, the Nassau County Board of Elections has moved to renew its motion to intervene. Docket # 144. The State Board defendants consent to the motion and support the intervention of the parties to this action.

Introduction

7. The State Board of Elections is investing enormous resources toward achieving HAVA compliance and has made great strides towards meeting that goal. It is in full compliance with HAVA's requirements for a statewide voter registration database. And it is taking every measure possible to ensure that the State will be in full compliance with HAVA's voting systems requirements, as well as with the greater protections mandated by New

York's Election Reform and Modernization Act. The State Board of Election's work requires coordination with the 58 separate county board of elections and we will be working with the County Boards to ensure HAVA compliance.

8. An essential part of the relief sought by the United States in its current motion to enforce the Courts June 2, 2006 order is meeting HAVA's requirement that there be a disabled accessible voting system in every polling place. In previous discussions with the United States Department of Justice, the Board of Elections developed a strategy to comply with both HAVA and New York State law to provide a voting system which is accessible to voters with disabilities in every polling place in time for the 2008 elections. The Board of Elections continues to take the steps necessary to accomplish this. We cannot commit that every county board of elections will be able to carry out the plan developed by the State Board. Given the realities of the situation, and the State's fundamental responsibility to ensure that elections are orderly and smooth, the Board of Elections has assured the Department of Justice that it will achieve this full HAVA compliance as quickly as possible.

Procedural History

9. On March 1, 2006, the United States Department of Justice commenced this lawsuit in the United States District Court for the Northern District of New York to compel the State Board to implement the voting system and statewide voter registration database requirements of HAVA. On March 23, 2006, the District Court granted an application by the Justice Department to require the State Board to submit a plan for complying with HAVA in time for the September, 2006 elections. The Plan was filed with the Court on

April 10, 2006, with a supplement filed on April 20, 2006. On April 28, 2006, the Justice Department responded to the Plan. After gathering responses to the proposed plan from the County Boards of Elections, and after having discussions with the State Board, the Justice Department recognized that full compliance with HAVA with regard to the voting machines was not practicable for 2006. The Justice Department asked the District Court to order that the State achieve compliance, to the best extent possible, by providing voting machines accessible to voters with disabilities. On June 2, 2006, this Court issued a preliminary injunction setting forth deadlines for an interim plan for the State to achieve compliance with HAVA, requiring the placement of at least one disability-accessible voting machine in each County for the 2006 elections. All counties had at least one such device and in some instances some counties had multiple devices. In the end, the Court ordered the State to achieve full compliance with HAVA by September, 2007.

10. On the day before the 2007 General Election, November 5th, the United States filed a motion to enforce the Court's prior order of June 2, 2006 which mandated the New York State must come into compliance with the mandates of HAVA. That motion is returnable on December 20, 2007.

State and County Boards Have a Role in Setting Out New Voting Systems

11. There is a bifurcation of duties in this state between the the State Board and the county boards. The State Board certifies the voting systems for use. The county boards purchase, program and set the machine out, and provides workers to run the elections. Failure to include both State and County boards in this action compromises the ability for full relief.
12. The State Board of Elections has the responsibility to test all new voting equipment,

whether part of an interim solution or final implementation plan, to both the federal Election Assistance Commission's 2005 Voluntary Voting System Guidelines, and to the requirements of our own state law. The State Board is in the process of preparing to test and certify voting systems from which the list for county purchase will be based upon.

The State Board has consulted with numerous groups throughout this process including activists, community groups, disability groups, legislators, and our county board of elections in developing our plan to introduce new voting systems in New York. The State Board will continue this process as it moves forward.

13. Working with the State Board, the New York State Office of General Services ("OGS") is in the process of establishing purchase contracts with voting machine manufacturers. As discussed above, the State Board is also in the process of testing voting machines to certify that the voting machines meet all Federal and State regulations which is a required element of the contract.
14. In response to a Request for Proposals for both a full lever replacement system (Lot I) and a disabled accessible ballot marking device (Lot II) put out by the OGS, to date, three responses have been received, from Avante, ES&S and Premier/Diebold. All three have bid on both lots. Those responses will be evaluated and tested for compliance with the RFP by New York's new ITA, Systest. If they pass the state certification process, contracts for their purchase by the various counties in the state will go into effect. The State Board has reiterated its intention to have the County Boards order after the certification of new voting systems in accordance with Section 12 of Chapter 181 of the Laws of 2005.

15. While the State is responsible for establishing contracts for purchase of new voting systems, it is the county boards which have the task of selecting, and installing thousands of new voting systems throughout the state. The county boards are integral to the selection and purchase of new voting systems. Pursuant to State Law, each county board decides which machine(s) they wish to purchase and then provides a request to purchase along with a check representing their prorated share of the five percent match to the State. The largest portion of federal HAVA funds only provide 95 percent of the purchase price of voting systems. The county must pay for five percent.
16. If, for some reason, a County Board does not select a type of voting machine, the Election Law section 7-203(3) authorizes the State Board shall make the choice for the recalcitrant County Board.
17. Once the County Board purchases the voting machine they are charged with the responsibility of setting up the machines and hiring and training the poll workers and ensuring that the voting machine be delivered to the polling place for use. *See*, Election Law section 7-207 (4).
18. Implementation of HAVA in New York presents significant challenges because of the State's size and demographic diversity. New York's sixty-two counties, which bear the lion's share of work in implementing HAVA's voting systems requirements, include densely populated urban areas, like New York City, and largely rural regions in upstate New York. New York State has over 11 million registered voters with counties ranging in size from just over 5000 registered voters in Hamilton County, to over 4 million registered voters in New York City.

19. Selecting appropriate technologies that adequately accommodate disabled voters and meet multi-lingual needs for such diverse geographical areas and populations requires great care. Training poll workers and educating voters around the State requires developing entirely new curricula for new voting systems, training trainers. The county boards must ensure that 60,000 part-time poll workers truly understand how the new voting systems work and know what to do.
20. The State Board's goal has been to have new voting machines in place in time for the September, 2008 primary elections, in accordance with the Federal Court order and New York State Law. The schedule to complete the voting machine replacement project is constantly evolving in response to forces beyond the control of the State Board. This includes delays by voting machine vendors in bringing in machines that are ready to be tested, and the development of security testing protocols. The schedule for the County Boards to select voting machines has been altered more than once in order to allow the County Boards the opportunity to select a voting machine after certification is fully finished. The State Board Plan for replacement of voting machines was submitted to the Court on August 15, 2006, and supplemented on September 7, 2006 with a voting machine ordering date of October 31, 2006.

New York is Working with the Justice Department

21. In order to meet HAVA's requirement that there be a disabled accessible voting system in every polling place, in agreement with the United States Department of Justice and ordered by the Court, the State Board put in place a strategy to comply with both HAVA and New York State Law by providing a voting system which is accessible to all voters

with disabilities. As part of the agreement with the Justice Department, the State implemented a phased plan to comply with HAVA. The first phase was to provide disabled accessible ballot marking devices that were approved by the State Board and used by all counties in the State in the September, 2006 primary election and the November, 2006 general election and the September, 2007 primary election and the November, 2007 general election . The next phase is to complete the replacement of the lever voting machines in time for use as soon as practicable after a replacement system is certified by the State Board.

Conclusion

22. The wholesale replacement of the lever voting system in New York is a very complicated project involving a number of State agencies, private voting machine vendors as well as the county boards of election. From testing and certification, through purchase and ultimately deployment there are many steps that must be done. State Board must test and certify voting systems to the federal standards and the additional New York State statutory and regulatory standards. County Boards select a voting system from the list certified by the State Board. Those systems are purchased by the county board utilizing a statewide contract. The state statute requires that the State's main purchasing agent, the Office of General Services, attempt to aggregate the choices that the county boards make in order to get the best price for the voting system. Ultimately, the systems are delivered to the county boards who own and must operate the systems. The statute requires that State Board to test the voting systems when the county board accepts delivery to make sure that they function properly upon delivery, thereafter it is the county boards who must

implement their use. The county election workers must be trained to operate the equipment and the voting public must be educated on the use of the machines. Between elections the county boards must provide for the storage of the systems and the periodic testing required. In New York it is the county boards who arrange for polling places and who must now line up polling places which are environmentally friendly to electronic voting systems and their energy and climatic needs.

23. Affiants represent to the Court that no judicial direction as to the implementation of New York's HAVA obligations should be issued without the presence before the Court of the various County Boards of Elections and the New York City Board of Elections, to which fall the burden of administering elections in this state. The County Boards of Elections do not work for the State Board, their employees are not hired, fired or otherwise in the control of the State Board and they are not agents of the State Board for any legal purpose, rather they enjoy their own separate and distinct legal status.
24. Therefore, based on the integral nature of the county boards in the process and in light of all of the diligent steps that the State Board of Elections has taken and is now taking to test, certify and place on contract for purchase new voting systems, we would respectfully request that the Court join all the county boards as defendants in this action. The implementation of HAVA in New York is now entering its critical stage and to proceed without the front line soldiers, the county boards, makes little sense. They should be parties to the crafting of any implementation efforts as it will fall to them to carry out those efforts under the statutory scheme for voting in New York.

Dated: December 14, 2007



PETER S. KOSINSKI
Co-Executive Director
New York State Board of Elections

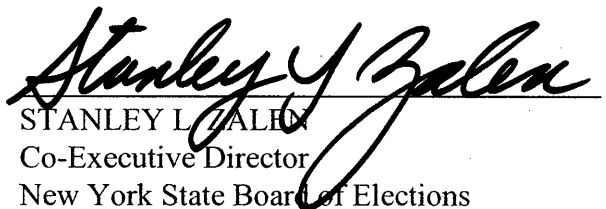
Sworn to before me this 14th day of December, 2007



NOTARY PUBLIC

Comm. Expires: 4/14/11

TODD VALENTINE
Notary Public, State of New York
County of Albany
No. 026A50703181
Term Expires April 14, 2011



STANLEY L. ZELÉN
Co-Executive Director
New York State Board of Elections

Sworn to before me this 14th day of December, 2007



NOTARY PUBLIC

Comm. Expires: 4/14/11

TODD VALENTINE
Notary Public, State of New York
County of Albany
No. 026A50703181
Term Expires April 14, 2011