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STATE OF WASHINGTON

NO. 39995-4-II

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ROBERT EDELMAN, a Washington citizen,

Appellant,

v.

SECRETARY OF STATE,

Respondent.

BRIEF OF RESPONDENT

ROBERT M. MCKENNA
Attorney General

SPENCER W. DANIELS
Assistant Attorney General
WSBA No. 6831
PO Box 40108
Olympia, WA 98504-0108
(360) 753-6238

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I. INTRODUCTION

This is a judicial review, under the Administrative Procedure Act, of a decision by the Secretary of State. The Appellant, Robert Edelman, complained that two of the Secretary's elections procedures violated the federal Help America Vote Act (HAVA). Mr. Edelman's complaint was considered by an independent administrative law judge, by the Secretary's designee, and by the Thurston County Superior Court, all of whom concluded Mr. Edelman had not established a violation of HAVA. The Secretary of State urges this Court to conclude likewise.

II. STATEMENT OF ISSUES

This appeal raises the following issues:

1. County elections officials who receive voter registration applications from 17-year-olds who will not be 18 by the next election hold, or "pend," these applications until the applicant is eligible to vote. Does the practice of "pending" such applications violate the federal Help America Vote Act?

2. At the time of Mr. Edelman's complaint, the mail-in voter registration application used by Washington State to register voters for both state and federal elections did not include a statement that if the applicant checked "no" to the question, will the applicant be 18 years of age on or before election day, the applicant should not complete the

registration form. Did not having this statement on the mail-in registration form violate the Help America Vote Act?

III. COUNTERSTATEMENT OF FACTS

A. Procedural History

This appeal arises from a complaint filed with the Secretary of State by the Appellant, Robert Edelman. The complaint was filed under HAVA, 42 U.S.C. §§ 15301-15545. HAVA requires each state to establish and maintain state-based administrative complaint procedures that meet certain requirements. 42 U.S.C. § 15512. In Washington State, the Secretary of State has adopted these complaint procedures in WAC 434-263.

WAC 434-263-020 provides that “[a]ny person who believes that there is a violation of [HAVA] . . . may file a complaint with the secretary under this chapter.” The complaint must be filed “no later than thirty days after the certification of the election at issue.” WAC 434-263-020(4). This complaint process “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 WAC 434-263 may not include invalidation, cancellation, or delay of any primary or election). Rather, if any violation of HAVA is found, any remedies awarded “shall be directed

to the improvement of processes or procedures governed by Title III [of HAVA] and must be consistent with state law.” WAC 434-263-060(2).

Under the Secretary’s rules for processing HAVA complaints, such complaints “shall be treated as brief adjudicative proceedings” under the state APA, RCW 34.05. WAC 434-263-030. The procedures for a brief adjudicative proceeding under the APA are set out in RCW 34.05.482-.494, and the Secretary’s rules are consistent with these procedures. In a brief adjudicative proceeding, the presiding officer gives each party an opportunity to explain the party’s view of the matter and may base the determination on written submissions and documents. WAC 434-263-050(2). An evidentiary hearing is not required unless a party or the presiding officer requests one, which did not occur in Mr. Edelman’s case.

The presiding officer is to issue a written initial decision. WAC 434-263-060(1). The initial decision may be appealed to a reviewing officer for final decision. WAC 434-263-070.

In this case, Mr. Edelman filed his complaint on June 13, 2008. Administrative Record (AR) 0001-0009.¹ Thus, under the Secretary’s rule, WAC 434-263-020(4), Mr. Edelman could complain of matters that might affect the then upcoming 2008 state primary and general elections

¹ The certified AR is paginated, per the Thurston County Superior Court local rules.

but not any matters that might have affected prior elections, since any such prior elections would have been certified more than 30 days before the complaint was filed.

The Secretary scheduled the matter for a brief adjudicative hearing and arranged for an administrative law judge (ALJ) from the Office of Administrative Hearings, a state agency completely separate from the Secretary of State, to act as presiding officer. The ALJ received declarations and other information from the parties, written statements of positions from the parties, and heard oral argument of counsel. The ALJ issued an initial decision, in which she entered findings of fact, conclusions of law, and dismissed Mr. Edelman's complaint. AR 0951-0960 (copy attached to this brief).

Mr. Edelman appealed to the Secretary, AR 0961-0963, who designated the Director of Elections, Nixon Handy, as reviewing officer. AR 1035-0136.² The reviewing officer admitted some additional information submitted by Mr. Edelman and received additional briefing. In his final order, the reviewing officer adopted the ALJ's findings of fact and conclusions of law, with some modifications, and, like the ALJ, concluded that Mr. Edelman had not established a violation of HAVA.

² At the administrative level, Mr. Edelman objected to Elections Director Handy acting as the reviewing officer. He did not pursue that objection to superior court (CP 43) or to this Court. Brief of Appellant at 8, n.3.

AR 1091-1104 (copy attached to this brief). However, the reviewing officer did direct the Elections Division of the Secretary of State review some of the Secretary's procedures to determine whether, as a matter of policy, any of the procedures should be modified to improve the election process.³

Mr. Edelman then sought judicial review of the final order by the Thurston County Superior Court under the APA. CP 14-37. The superior court affirmed the agency's order. CP 99-100. Mr. Edelman then appealed to this Court. CP 6-10.

B. Facts Regarding Practice of "Pending" Voter Registration Applications from Applicants Under Age 18⁴

1. Overview of HAVA Requirements

HAVA requires each state to implement "a single, uniform, official, centralized, interactive computerized statewide voter registration

³ Like Mr. Edelman here, the Secretary has confined his discussion of the facts to the situation existing at the time of the final administrative order and does not discuss any events, including changes to the Secretary's procedures or forms, that have occurred since.

⁴ In his brief to this Court, Mr. Edelman sets forth his version of the facts as if he was asking this Court to make its own findings of facts. However, this is a judicial review under the APA. Accordingly, with respect to the facts, the proper focus is whether there is substantial evidence in the record to support any challenged findings of fact made by the agency, with unchallenged findings of fact being verities on appeal. Since the facts looked at are those of the highest level of the administrative body, and since here the reviewing officer adopted the findings by the ALJ (with some additional findings of his own), the Secretary will cite to the ALJ's findings unless otherwise indicated. This brief will indicate whether Mr. Edelman challenged the finding or conclusion in his brief to this Court.

list.” 42 U.S.C. § 15483(a)(1)(A).⁵ HAVA requires each state to have: “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.” 42 U.S.C. § 15483(a)(4)(A) (emphasis added). HAVA also provides that voter registration information is to be electronically entered into the statewide list “on an expedited basis.” 42 U.S.C. § 15483(a)(1)(A)(vi).

2. Overview of State Voter Registration Procedures

In his complaint to the Secretary of State, Mr. Edelman alleged that the practice of Washington state counties to “pend” voter registration applications from 17-year-old applicants who will not be 18 by the next election violates HAVA, 42 U.S.C. § 15483(a). To understand this aspect of Mr. Edelman’s complaint, it is helpful to review some provisions of the Washington state election statutes as the statutes existed at the time of Mr. Edelman’s complaint.⁶

The Washington Constitution requires individuals to be at least 18 years of age to vote in elections. Wash. Const. art. VI, § 1.⁷ The

⁵ A copy of 42 U.S.C. § 15483 is attached to this brief.

⁶ In 2009, the Legislature revised and recodified some of the elections statutes. Laws of 2009, ch. 369. This brief will cite to the statutes as they existed at the time of Mr. Edelman’s HAVA complaint.

⁷ 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

Constitution itself does not use the terms “registering to vote” or “registered voter.” Thus, the Constitution does not state that an individual must be 18 to register to vote, only that the individual must be 18 at the time of the election.

State statutes deal with voter registration. At the time of Mr. Edelman’s complaint, RCW 29A.08.210 provided:

Application, required information, warning.

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

....

(3) The applicant’s date of birth;

....

(10) A check box allowing the applicant to confirm that he or she is at least eighteen years of age;⁸

....

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

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

Oath of applicant.

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

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.”

⁸ In 2009, this was amended to read: “A check box allowing the applicant to confirm that he or she is at least eighteen years of age or will be eighteen years of age by the next election.” Laws of 2009, ch. 369, § 16, codified as RCW 29A.08.210(9) (underlined language added by 2009 act).

“I declare that the facts on this voter 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 have lived at this address for thirty days immediately before the next election at which I vote, *and I will be at least eighteen years old when I vote.*”

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

The voter registration application in effect at the time of Mr. Edelman’s HAVA complaint (AR 0945) asked the applicant: “Will you be at least 18 years of age or older before Election Day? [Check yes or no.]” The application also asked for date of birth. The application contained a voter declaration: “By signing this document, I hereby assert, under penalty of perjury, that I am legally eligible to vote. . . . I declare that the facts on this registration form are true; . . . I will be at least eighteen years old when I vote.” *See* ALJ’s Finding of Fact 3.3 (unchallenged) (AR 0952).

Thus, the state’s voter registration application gave effect to article VI, section 1 of the Constitution and RCW 29A.08.230 by allowing an applicant to submit an application before the applicant is 18 but

providing in the application that the applicant will not vote until after he or she is 18.

In this respect, the application implemented another provision of the state voter registration statutes. RCW 29A.08.140 provided that, in general, an individual must register to vote no later than thirty days prior to the election.⁹ The statute stated, in part:

No person 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 and appears on the official statewide voter registration list.

If an applicant had to be 18 in order to even submit a voter registration application, applicants whose 18th birthday fell within the 30 days prior to the next election would be unable to register to vote because of RCW 29A.08.140. Yet such individuals are guaranteed a right to vote by article VI, section 1 of the State Constitution.

In sum, Washington law does not require an individual to be 18 when the individual submits a voter registration application, only that the individual will be 18 by the date of the next election.

This brings us to the next complicating factor. A 17-year-old voter registration applicant may not know when the next election is. In some instances this is easy to understand. A 17-year-old might submit a voter

⁹ Former RCW 29A.08.145 allowed for late registration in person at the county auditor's office no later than the 15th day before an election.

registration application in the early summer, thinking that the next election is the general election in November, not recognizing that there is a primary election in August.

However, the situation is even more complicated. Not only might the applicant not know when the next election is, but also the election officials themselves might not know when the next election is. Or more precisely, the elections officials would know on what dates an election *might* take place but, at certain times, might not know *whether* an election will take place on any of those dates. At the time Mr. Edelman filed his complaint, state statutes provided that a special election might occur on specified dates in February, March, April, or May. However, jurisdictions that can pass a resolution for a special election were required to give county auditors only 54 days' notice of intent to hold a special election.¹⁰

In 2008, the year in which Mr. Edelman filed his HAVA complaint, the timeline was:

Special election date:	February 19
Resolution due to county by:	December 30, 2007
Special election date:	March 11
Resolution due to county by:	January 29
Special election date:	April 22
Resolution due to county by:	March 1

¹⁰ In a 2009 act, the Legislature began reducing the number of special election dates and also reduced the number of days' prior notice that a jurisdiction holding special elections must give to the county. Laws of 2009, ch. 413.

Special election date:	May 20
Resolution due to county by:	March 29
Primary election date:	August 19
Resolutions due to county by:	May 27
General election date:	November 4
Resolutions due to county by:	August 12 ¹¹

Thus, depending on when the 17-year-old becomes 18 and when he or she submits the voter registration application, it may not even be possible to determine whether or not the applicant is eligible to be registered as a voter because it may not be possible to determine when the next election is.¹²

3. Practice of “Pending” Voter Registration Applications from Underage Voters

Under state statute, and to comply with HAVA, Washington established a centralized statewide voter registration database, maintained by the Secretary of State. Former RCW 29A.08.651. The statewide voter registration database “is the official list of eligible voters for all elections.” RCW 29A.08.105(1). However, the initial processing of voter registration

¹¹ See Laws of 2006, ch. 344, § 2 (RCW 29A.04.321 prior to 2009 amendments).

¹² Beyond this, even if there is a special election for certain jurisdictions within a county, this might not be a county-wide election. Thus, it might also be necessary to determine if the applicant resides in the jurisdiction for which the special election is being held.

applications is done by the county auditors.¹³ *See* ALJ’s Finding of Fact 3.4 (unchallenged) (AR 0952).

When a county receives a voter registration application submitted by an applicant who is 17 and who will not be 18 by the date of the next election, the practice of county auditors is to hold, or “pend,” the application. Counties pend such applications in one of two ways. Some counties pend the applications by physically placing them in a drawer and checking them on a periodic basis to identify those applicants who will reach age 18 by the next election. Other counties use their electronic election management system to pend the applications, again monitoring for those applicants who will reach age 18 by election day.¹⁴ *See* ALJ’s Finding of Fact 3.5 (unchallenged) (AR 0953).

When the county ascertains that the applicant will be 18 by the next election, the County submits this information into the statewide voter database and places the applicant in “active status.” “Active status” means a designation assigned to voters with complete voter registration records signifying that the voter is eligible to vote.”

¹³ This is true whether the voter registration application is submitted to the county directly or submitted first to the Secretary of State for transmittal to the county. *See* WAC 434-324-260.

¹⁴ At the time of Mr. Edelman’s complaint, counties in Washington State used one of four different election management systems, at each county’s choice. In two of these systems the system could 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). AR 0450-0453.

WAC 434-324-005(1). *See* ALJ's Finding of Fact 3.6 (unchallenged) (AR 0953).

In his HAVA complaint and in the documents he submitted to the ALJ and to the reviewing officer, Mr. Edelman took the position that the practice of "pending" voter registration applications had allowed large numbers of ineligible underage voters to be placed in active status on the statewide voter database. However, when the numbers are properly considered, only a handful of underage voters ever got on the statewide voter database and even fewer cast ballots.

In his HAVA complaint, Mr. Edelman asserted that he found 16,085 underage registrations from January 2000 through March 2008, which figure he reasserts before this Court. AR 0003; Brief of Appellant at 4, 11-12. However, as the Secretary of State's staff pointed out to Mr. Edelman in communications with him months before he filed his HAVA complaint, many of these apparent underage registrations reflected various data entry errors by the counties and did not actually show registration of ineligible underage voters. AR 0937-0938, AR 0448.¹⁵

¹⁵ For example, a disproportionately large number of these registrations came from Pend Orielle County, which has a small population base. As the Secretary of State's staff noted to Mr. Edelman, if these records were accurate, some of these individuals "started voting at ten and voted up to seventeen times before they were registered." Accordingly, the likely explanation was "a systemic problem with the voting history data in [Pend Orielle County]." AR 0937. Other system or data entry errors were detected in King County and other counties. AR 0937.

Aside from data entry errors by individual counties, most, if not all, of the remainder of these purported ineligible underage voters stem from a provision of the state's elections statutes. Pursuant to RCW 29A.08.110 when a voter registration application is determined to be complete, "the applicant is considered to be registered to vote as of the original date of mailing or date of delivery, whichever is applicable." Thus, when the county places the applicant in active status in the statewide voter database, the date shown as the "registration date" should be the date the voter registration application was mailed or received.¹⁶ When counties pend the applications, this results in the applicant appearing to have been registered as a voter prior to being eligible to vote. However, this does not mean that the applicant was activated as a voter prior to his being 18 in time for the next election or that he was actually allowed to vote prior to being 18.¹⁷ As the ALJ found:

When the applicant is put in active status, the registration date that shows on the VRDB (Voter Registration Database) is the date the voter registration form is mailed

¹⁶ There is one exception to this. Counties must ascertain whether a voter has registered the requisite amount of time prior to the election specified by statute, which is normally 30 days. However, state law also 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.

¹⁷ Again, the Secretary of State's staff explained all this to Mr. Edelman months before he filed his HAVA complaint. AR 0938.

or received. Accordingly, it might appear from a review of the database that the voter registered too early.

ALJ's Finding of Fact 3.7 (challenged) (AR 0953). Further:

. . . 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. . . .

ALJ's Finding of Fact 3.11 (challenged) (AR 0953).

In sum, the record does not establish that large numbers of ineligible underage voters were actually placed in active voter status, let alone voted.¹⁸

Besides the reasons set forth above for discounting Mr. Edelman's assertions regarding the number of ineligible underage voters, two other reasons exist why his numbers should not be considered in connection with his HAVA complaint. First, HAVA did not become applicable to Washington State until January 2006. See 42 U.S.C. § 15483(d)(1)(B); AR 0434.¹⁹ Accordingly, information that pre-dates January 2006 could not be the basis for a complaint that the Secretary of State violated

¹⁸ Mr. Edelman points to an apparent instance of a 16-year-old casting a vote in 2006. Brief of Appellant at 33. That individual, Rachel Jones, appears to have cast a vote in February 2006 at age 16 and again in November 2006 at age 17. AR 0930. However, the voter listed her address as Orton Hall, Pullman, which is a dormitory on the campus of Washington State University. This suggests this may have been a data entry error as to the person's date of birth.

¹⁹ Mr. Edelman does not dispute this as the effective date for HAVA in Washington State. Brief of Appellant at 22, n.8.

HAVA.²⁰ Second, the rules adopted by the Secretary for filing HAVA complaints provide that a complaint must be filed no later than 30 days after the certification of the election at issue. WAC 434-263-020(4). While under this rule Mr. Edelman could complain that the State is not in compliance with HAVA for the then upcoming 2008 primary and general elections, he could not complain about irregularities in the voter database used for elections held before he filed his complaint on June 13, 2008.

Mr. Edelman points to other numbers of alleged underage voters. Brief of Appellant at 22. However, these numbers were responded to and explained by the Secretary of State in the administrative proceedings. AR 0459.

With regard to the number of underage voters who voted after the State had a statewide voter database as required by HAVA, the ALJ found only a few such voters:

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 elections²¹ in

²⁰ Mr. Edelman contends that between January 2000 and February 2008, 127 votes were cast by probable underage voters. AR 0004, AR 0927-0930. However, of these 127 votes, only 17 of these were after January 2006, when HAVA became effective in Washington. Of these 17, three were in February 2006, which were likely based on ballots mailed out before the statewide voter database was established.

²¹ Note that the reference to “the 2008 elections” refers to the 2008 Presidential Primary, not to the 2008 state primary or general elections, which had not been held at the time of the decision of the ALJ.

Washington state before they turned 18.²² Exhibit 3, p. 4
[AR 0930], Exhibit 8, p. 2. [AR 0948] . . .

ALJ's Finding of Fact 3.9 (challenged) (AR 0953).

**4. Secretary of State's Practices with Respect to
Monitoring Statewide Voter Registration Database**

As part of its statutory responsibilities under both HAVA and state law, the Secretary of State monitors actions by the counties of placing individuals in active voter status on the statewide voter registration database. State statute required the Secretary to review the database at least quarterly. Former RCW 29A.08.125(2); former RCW 29A.08.651(14). The Secretary actually reviewed the database more often than that and notified counties whenever they appeared to have activated a voter who will not be 18 by the next election. Under the Secretary's rules, if "at any time" the Secretary finds that a voter does not meet the qualifications to vote, the Secretary will refer the matter to the county for appropriate action. WAC 434-324-113. *See* ALJ's Finding of Fact 3.8 (unchallenged) (AR 953).

Mr. Edelman contended that the Secretary of State's procedures for reviewing the statewide voter database were inadequate. The ALJ found otherwise. With respect to the four underage voters in the 2008

²² Out of 1,386,701 ballots cast. AR 0436. Mr. Edelman does not dispute this number.

Presidential Primary (the most recent election prior to the filing of Mr. Edelman's complaint), the ALJ found:

. . . David Motz, the Voter Services Manager, has investigated the four 2008 ballots. He has been provided with an explanation of how they occurred, and is actively working with the counties to prevent any reoccurrence. Exhibit G, p. 2. [AR 0459]

ALJ's Finding of Fact 3.9 (challenged) (AR 0953). The ALJ's finding in this regard was based on a sworn declaration by Voter Services Manager Motz that was unrefuted. AR 0459.²³

Voter Services Manager Motz also stated that as of the date of his declaration, August 8, 2008: "My present practice is to review, or have my staff review, the county entries into the statewide voter database for underage voters daily." AR 0459.²⁴ This statement is also unrefuted.²⁵

²³ As discussed earlier, under the Secretary's rules, unless the complainant requests a hearing (which Mr. Edelman did not), HAVA complaints are processed as brief adjudicative hearings under the APA. Under this process the ALJ can make findings based on written submissions of the parties, without an evidentiary hearing.

²⁴ The problem that generated the four votes from underage voters in the February 19, 2008, Presidential Primary was that Voter Services Manager Motz sent the notification to the counties alerting them of underage voters too late. As he conceded: "My mistake was that I sent the e-mail too late. In order to be completely effective, I should have sent it before the ballots went to print." AR 1058. Having learned that lesson, the Mr. Motz later began daily reviews of the statewide voter registration database as stated in his declaration of August 8, 2008.

²⁵ Mr. Edelman argues that the Secretary's practices in reviewing the statewide voter registration database "*are* woefully inadequate," referencing the four underage voters in the February 19, 2008, Presidential Primary. Brief of Appellant at 29-30 (emphasis added). This is misleading. As stated in Mr. Motz's unrefuted declaration, the Secretary's practices at the time the matter was submitted to the ALJ in August 2008 were different from those in place months earlier when the 2008 Presidential Primary occurred.

The ALJ found that the Secretary of State's procedures did not violate HAVA. The ALJ found:

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 procedure 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 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.

ALJ's Finding of Fact 3.11 (challenged) (AR 0953).

Further, the ALJ found:

The evidence also shows that the Secretary of State is removing underage registrants from the VRDB [voter registration database] 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.

ALJ's Finding of Fact 3.12 (unchallenged) (AR 0953).

From these findings, the ALJ concluded that Mr. Edelman had failed to establish a violation of HAVA due to the practice of "pending" voter applications. Mr. Edelman contended that the practice of "pending" violated HAVA in two respects. First, Mr. Edelman contended that HAVA requires the Secretary of State to maintain an accurate voter database and that the practice of "pending" violates this by allowing ineligible voters into the database. His position was that county elections

officials or the Secretary should simply decline to accept or return applications from such individuals and tell them to reapply later.

The ALJ rejected Mr. Edelman's claims in this regard. The ALJ concluded:

I conclude that the Complainant has not shown a violation of HAVA with respect to allowing counties to accept registrations from [sic] from underage applicants, and then pend these for processing until the applicant will be 18 by the next election. There is no evidence that his 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.

ALJ's Conclusion of Law 4.3 (challenged) (AR 0957). The ALJ concluded further:

Moreover, HAVA required 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 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.

ALJ's Conclusion of Law 4.4 (challenged) (AR 0957).

The second basis for Mr. Edelman's complaint regarding the practice of pending voter registration applications was that the practice violated a provision in HAVA that provides:

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.

42 U.S.C. § 15483(a)(1)(A)(vi). *See* ALJ's Conclusion of Law 4.5 (unchallenged) (AR 0957).

The ALJ rejected Mr. Edelman's claim, concluding:

I reject the Complainant argument, because HAVA only requires registration of applicants who are eligible and who submit complete applications. . . . 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.

ALJ's Conclusion of Law 4.6 (challenged) (AR 0957).

In his review of the ALJ's order, the reviewing officer noted the state's policy "to encourage every eligible person to register to vote and to participate fully in all elections" RCW 29A.04.205. Final Determination Conclusion of Law 29 (unchallenged) (AR 1101). The reviewing officer noted: "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." *Id.* The reviewing officer concluded:

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.

Final Determination Conclusion of Law 30 (unchallenged) (emphasis in original and footnote omitted) (AR 1101).

While affirming the conclusion that Mr. Edelman had failed to establish that the practice of “pending” violated HAVA, the reviewing officer directed the Elections Division of the Secretary of State to develop “carefully written practices and procedures” by January 5, 2009. Final Determination Conclusion of Law 34 (unchallenged) (AR 1101-1102).

C. Facts Regarding Mail-In Voter Registration Application

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

The mail voter registration form developed under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1977gg-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.” . . .

The Washington State mail-in voter registration form used at the time of Mr. Edelman’s complaint included the questions about citizenship and age set forth in the HAVA statute and a box to check “yes” or “no.” The voter registration form asked the applicant: “Will you be at least 18 years of age or older before Election Day? [Check yes or no.]” The form also asked for date of birth. The form contained a voter declaration: “By signing this document, I hereby assert, under penalty of perjury, that I am legally eligible to vote . . . I declare that the facts on this registration form are true; . . . I will be at least 18 years old when I vote.” The form also contained a voter declaration in which the applicant must assert that he or she is legally eligible to vote, including that “I will be at least eighteen years old when I vote.” However, the form did not include the statement, if you checked “no” to either question, do not complete this form.

Washington decided not to include the statement about “do not complete this form” based on input it received from the United States Election Assistance Commission. *See* 42 U.S.C. §§ 15321, 15322. The Election Assistance Commission adopts voluntary guidance to assist states

in meeting the requirements of HAVA. 42 U.S.C. § 15501.²⁶ In 2004, the

Commission advised the states as follows:

HAVA requires that the federal mail-in registration form include check-off boxes for citizenship and being 18 years of age by Election Day. If either the “yes” box or the “no” box is checked, the state is required to notify the applicant of the incomplete form with sufficient time to allow completion of the form. This subsection is “subject to state law,” so the 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.*

AR 0455 (emphasis added). This remained the Election Assistance Commission’s position at the time of hearing on Mr. Edelman’s complaint. AR 0456.

The Secretary of State interpreted this advice to mean (1) the State’s mail-in registration form did not need to have check-off boxes (although the form does include these); (2) the form does not need to be rejected (or the applicant notified that the form is incomplete) if the applicant did not check the “yes” box for age (or citizenship), so long as the form has a voter’s declaration to this effect that the applicant did sign. Since the official federal advice is that the state form does not in fact require that applicants check either the “yes” or “no” box as to age (or

²⁶ Mr. Edelman himself notes that HAVA established the Election Assistance Commission to assist in the administration of federal elections. Brief of Appellant at 13.

citizenship), it follows, therefore, that the provision about, “do not complete this form if you checked ‘no’ to either question,” did not need to be included in the form. On September 21, 2004, the Secretary of State, with the concurrence of its assigned Assistant Attorney General, issued a written memo to Washington county election officials to this effect. AR 0457. *See* AR 0454-0455.

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

. . . 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. . . .

ALJ’s Conclusion of Law 4.8 (challenged) (AR 0958).

On review, the reviewing officer concluded that the ALJ’s legal conclusion was correct. However, the reviewing officer further concluded that the Secretary should review, as a matter of policy, whether the mail-in voter registration application should be modified. Final Determination, Conclusion of Law 33 (unchallenged) (AR 1102).

IV. STANDARD OF REVIEW

Judicial review of an agency’s final order is governed by the APA, RCW 34.05.510. The function of the Court is to review the decisions of

the agency under the APA, not to try the case *de novo*. *Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). The APA requires the court to affirm the agency's final order unless the petitioner can demonstrate its invalidity. RCW 34.05.570(1)(a), (b); RCW 34.05.570(3).

“The validity of agency action shall be determined in accordance with the standards of review provided in [the APA]” RCW 34.05.570(1)(b). In reviewing an agency order arising out of an adjudicative proceeding, the court shall grant relief only if it determines that one or more of the enumerated statutory bases for relief are established. *See Heidgerken v. Dep't of Nat. Res.*, 99 Wn. App. 380, 384, 993 P.2d 934 (2000). Only two of the statutory bases are asserted by Mr. Edelman in this appeal:

The Court shall grant relief from an agency order in an adjudicative proceeding only if it determines that: . . .

(d) The agency has erroneously interpreted or applied the law; [or]

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court; . . .

RCW 34.05.570(3)(d), (e).²⁷ *See* Brief of Appellant at 10.

²⁷ RCW 34.05.570(1)(d) states that the court may grant relief only if the person seeking relief has been “substantially” prejudiced by the agency action complained of. While there may be some cases in which a person has been prejudiced but not “substantially” prejudiced by the agency action, at the superior court level the Secretary of State expressly disavowed any argument that Mr. Edelman does not meet this

When findings of fact are challenged on judicial review, the challenging party has the burden of establishing that the facts are not supported by substantial evidence. RCW 34.05.570(3)(e). Under the “substantial evidence” test, the findings of fact must be upheld if there is evidence in the record in “sufficient quantum to persuade a fair-minded person of the truth of the declared premise.” *Heinmiller v. Dep’t of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995). *See also Callecod v. Washington State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510, *review denied*, 132 Wn.2d 1004 (1997); *Valentine v. Dep’t of Licensing*, 77 Wn. App. 838, 847, 894 P.2d 1352 (1995). This is so even if the reviewing court would form a different conclusion from its own reading of the record. *Callecod*, 84 Wn. App. at 676; *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371-72, 859 P.2d 610 (1993).

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

requirement. CP 68. Accordingly, Mr. Edelman’s discussion of this issue in his brief to this Court is unnecessary. Brief of Appellant at 37-39.

V. ARGUMENT

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

1. Any Disputed Findings of Fact with Respect to This Issue Are Supported by Substantial Evidence

No factual dispute exists with respect to the counties’ practice of “pending” voter registration applications from applicants who will not be 18 by the next election. The two areas of factual dispute related to pending are, first, the extent to which ineligible underage applicants were placed on the voter database or were able to cast votes, and, second, what procedures the Secretary of State had in place with respect to the placement of underage voters on the database.

With respect to the number of ineligible underage voters that were placed on the statewide voter database, the findings of fact by the ALJ and adopted by the reviewing officer are supported by substantial evidence in the record. As discussed above, the large number of apparent ineligible underage registered voters in the years 2000-2008 asserted by Mr. Edelman is explained by system or data entry errors by the counties and by the provision in Washington state statute that the registration date is to be listed as the date the application is mailed or received. Likewise, other purported numbers of ineligible underage voters asserted by

Mr. Edelman have been explained by documents or sworn declarations by Election Division staff in the record. While Mr. Edelman may continue to disagree with the explanation for these numbers, the findings are supported by substantial evidence, and the Court should reject Mr. Edelman's challenge to these findings.²⁸

The findings of fact regarding the Secretary's procedures in place at the time Mr. Edelman's complaint was being considered are also supported by substantial evidence in the record. Voter Services Manager David Motz stated that as of August 2008 his staff was checking county entries into the statewide voter database for underage voters on a daily basis. This statement is unrefuted by Mr. Edelman. Substantial evidence in the record supports the ALJ's finding of fact that the Secretary of State's procedures were intended to not allow ineligible applicants into the database and that such procedures were largely successful.²⁹

²⁸ Mr. Edelman argues that the Secretary did not provide supporting data for its statements about the numbers. Brief of Appellant at 22-23, 24, 26. However, this ignores the nature of the APA brief adjudicative hearing format under which Mr. Edelman's complaint was processed. Under the brief adjudicative hearing format, the parties submit written submissions, without a formal evidentiary hearing. The information placed into the record by the Secretary is at least as formal as the information placed into the record by Mr. Edelman.

²⁹ Mr. Edelman argues that, despite his requesting them, the Secretary could not provide any written procedures. Brief of Appellant at 29. That there were no written procedures (beyond the WAC rules) at the time of Mr. Edelman's request does not mean that there were no procedures. The Voter Services Manager submitted a declaration regarding the procedures he was following as of August 2008. Moreover, the direction by the reviewing officer to the Elections Division to develop written procedures came after Mr. Edelman's request. AR 1102.

2. HAVA Does Not Require the Secretary of State to Have Procedures That Eliminate Any Possibility of Placing an Ineligible Underage Voter Into the Database; HAVA Requires Only That the Secretary Make a Reasonable Effort to Remove Ineligible Voters

The principal legal dispute between Mr. Edelman and the Secretary of State is whether HAVA requires the Secretary to have procedures in place that eliminate *any* possibility of an ineligible underage voter being placed into the voter database.

HAVA expressly provides that the methods of implementation of the act are left to the discretion of the states. 42 U.S.C. § 15485. Accordingly, Mr. Edelman must find some language in HAVA that prohibits the practice of “pending” voter registration applications.

Mr. Edelman argues that HAVA requires states to put into place procedures that avoid any possibility of an ineligible underage voter being placed into the statewide voter database. He bases this on following language in HAVA:

(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:

42 U.S.C. § 15483(a)(4).

However, this section immediately continues with specific requirements for the state election system:

- (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.

42 U.S.C. § 15483(a)(4)(A), (B) (emphasis added).

As indicated by the specific language, the primary concern of this section is removing ineligible registrants from the database, not placing ineligible voters on the list to begin with. This is supported by other provisions of HAVA, which emphasize the rights of those voters proposed to be removed from the voter list because of purported ineligibility. *See* 42 U.S.C. § 15483(a)(2).

Mr. Edelman also cites 42 U.S.C. § 15483(a)(1)(A). Again, nothing in that section expressly requires the state to prevent the initial registration of ineligible voters, let alone expressly prohibits the practice of “pending” applications. In short, Mr. Edelman has not pointed to any provision of HAVA that by its terms prohibits “pending” voter registration applications.³⁰

³⁰ The Secretary is not arguing that HAVA is somehow intended to allow the registration of ineligible voters. However, nothing in the general comments in the Congressional Record cited by Mr. Edelman, nor any case law he cites are specific

42 U.S.C. § 15483(a)(4)(A) requires that the state make a “reasonable effort” to remove ineligible registrants, not that its efforts be perfect. Even if one were to read into HAVA some requirement regarding initial registration of voters, no reason exists for such a requirement to be any more stringent than the express requirement on states regarding removal of ineligible registrants, namely, that a state make a “reasonable effort” in this regard. *See* 42 U.S.C. § 15483(a)(4)(A). The Secretary of State here has made a reasonable effort to prevent ineligible underage individuals from being placed on the voter database.³¹

Nor does HAVA’s provision that voter registration information is to be entered into the statewide database “on an expedited basis,” 42 U.S.C. § 15483(a)(1)(A)(vi), preclude the practice of “pending” applications from underage applicants. That provision is obviously intended to insure that *eligible* voters not lose their ability to vote because of any delay in entering their information into the statewide database.

Thus, Mr. Edelman has not shown that any language in HAVA expressly prohibits the practice of “pending” applications. However, even

enough to preclude the State’s practice of “pending.” If anything, the overall concern in the case he cites, *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, 671 F. Supp. 2d 575 (D.N.J. 2009), is the unwarranted removal of eligible voters from the rolls and intimidation of new potential voters.

³¹ Mr. Edelman argues that the recent move to all mail-in ballots makes avoiding registering ineligible voters even more critical. Brief of Appellant at 19. However, he offers no proof that an ineligible underage voter would have been any more likely to have been detected at a live polling site.

if some of the passages from HAVA that he relies on could be read as impliedly supporting his position, practical and policy reasons exist why his position should not be adopted.

Mr. Edelman contends that the only proper course under HAVA is for county elections officials to reject or mail back voter registration applications from individuals who will not be 18 by the next election and either to simply tell them to submit an application later, or to keep a list of rejected applicants and to notify them when they are eligible to apply. Brief of Appellant at 34.

Mr. Edelman's solution is fraught with practical and possibly legal problems. First, as discussed above, at times even the county election official might not know whether a certain applicant is eligible or not because the election official may not know when the next election will be. Mr. Edelman's proposal could have the effect of causing applicants who are in fact eligible to be rejected. At a minimum, as to these applications, the county election official has no practical choice but to hold onto, i.e., "pend," them until the official can ascertain whether or not the applicant is eligible.

Second, it is unlikely that counties have the staff or the financial resources to keep track of those applicants whom they have turned away as being too young or to notify them that they are now eligible to apply to

register. The current practice of “pending” applications from underage applicants and checking them periodically to see if the applicant should be added to the active voter list is relatively easy. By contrast, Mr. Edelman’s suggestion would require the county to (1) record the name, age, and address of the rejected applicant, (2) return the application to the applicant, (3) review the list of rejected applicants on some regular basis and determine which have or are about to become eligible, (4) notify the rejected applicant that he or she can now reapply, and (5) verify and process the resubmitted application. Such a process would be time-consuming, expensive, and far more complicated than the present practice of “pending” applications. Mr. Edelman’s solution is simply not practical.³²

Besides these practical problems, however, there is an overriding public policy concern with Mr. Edelman’s approach. Telling young individuals that their voter application is being rejected and to apply later is likely to lead to confusion, discouragement, and ultimately to some individuals reapplying at a date that causes them to miss some elections or

³² As an alternative, Mr. Edelman proposes “add[ing] automatic controls to the voter registration list so that no underage registration can be given active status.” Brief of Appellant at 20. Aside from not showing that the statewide database technology can be modified in this manner, the problem remains of how to determine on an automatic basis when an applicant has become eligible.

not reapplying at all.³³ As stated by the reviewing officer in the Final Determination here: “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.” AR 1101. As the reviewing officer noted: “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.” AR 1101.

For these reasons, the Court should uphold the determination that Mr. Edelman had failed to prove that the practice of “pending” voter registration applications violated any of the provisions of HAVA.

B. The Mail-In Voter Registration Application Used at the Time of Mr. Edelman’s Complaint Did Not Violate HAVA

The mail-in voter registration application form used by Washington State at the time of Mr. Edelman’s complaint did not violate HAVA. No factual dispute exists with regard to this aspect of Mr. Edelman’s complaint. It is undisputed that the states received direction from the Election Assistance Commission, which had the

³³ Mr. Edelman responds that there is no evidence to support the assertion that rejecting their applications will discourage young would-be voters. Of course, with the present practice of “pending” applications, the applications are not rejected and thus there would be no empirical evidence of how this affects young people. However, the Court can take judicial notice of the behavior of people. 29 Am. Jur. 2d *Evidence* § 56 (2008). This includes voters. See *State ex rel. Spokane Cy. v. Clausen*, 110 Wash. 112, 116, 158 P. 23 (1920).

responsibility of providing guidance regarding the provisions of HAVA, and that this led the Secretary of State to conclude that the mail-in voter registration application form did not need to state, “do not complete this form if you checked ‘no’ to either question [including the question about age].”

Mr. Edelman argues that the Secretary is misreading the guidance from the Election Assistance Commission, that the Commission was drawing a distinction between the requirements under HAVA for *federal* voter registration forms and the requirements of state law for *state* voter registration forms.³⁴ Brief of Appellant at 36-37. But this is not what the advisory from the Commission said. The Commission stated:

HAVA requires that the federal mail-in registration form include check-off boxes for citizenship and being 18 years of age by Election Day. . . . This subsection [of HAVA] is “subject to state law,” so the 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.*

AR 0455 (emphasis added).

³⁴ Washington State uses the same voter registration application for both federal and state registration. As Mr. Edelman himself notes, state statute requires that the state form be in compliance with the federal laws. See RCW 29A.08.220. Brief of Appellant at 36-37.

The reference to “subject to state law” comes from HAVA section 42 U.S.C. § 15483(b)(4)(B). That section reads:

(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.) Thus, this is not dealing with state forms for state elections, as Mr. Edelman contends, but rather with voter registration forms for federal elections. Indeed, HAVA itself applies only to the states insofar as they are conducting elections for federal office. *See* 42 U.S.C. §§ 15481, 15482.³⁵

Mr. Edelman argues that the guidance from the Election Assistance Commission does not deal with whether registration forms have to have check-off boxes. However, the guidance clearly says that HAVA does not require check-off boxes. If check-off boxes are not required, then it follows that the statement regarding what the applicant is to do if he checked “no” does not have to be included. Put another way, if HAVA in fact required the statement, if you checked no, do not complete this form,

³⁵ As a practical matter, of course, most if not all states use the same procedures for their state elections as for federal elections to avoid having to have two separate elections procedures.

then the check-off boxes could not have been omitted, as the Commission advised they could be.

For these reasons, the Final Determination by the reviewing officer was correct in concluding that Mr. Edelman had failed to prove that the Mail-in Voter Registration Form then used by Washington State was not in compliance with HAVA.

C. Even if He Were to Prevail on One or Both Issues, Mr. Edelman Is Not Entitled to Attorneys' Fees Under the Equal Access to Justice Act Because the Secretary's Actions Were Substantially Justified

Mr. Edelman seeks attorneys' fees under the state Equal Access to Justice Act (EAJA), RCW 4.84.340-.360. Brief of Appellant at 39-40. Even if he were to prevail on one or both of his issues, Mr. Edelman is not entitled to attorneys' fees under the EAJA because the Secretary's actions were substantially justified.³⁶

³⁶ There may be additional reasons why Mr. Edelman would not be entitled to attorneys' fees under the EAJA. Mr. Edelman contends that he is a "qualified party" under RCW 4.84.340(5)(a) as an individual whose net worth is less than a million dollars. However, it is not clear that Mr. Edelman is the real party in interest in this case. The HAVA complaint to the Secretary of State was transmitted on letterhead of the Evergreen Freedom Foundation under the signature of Jonathan Bechtle, who identifies himself as legal counsel for the Foundation. The document identifies Mr. Edelman as "a senior research analyst for the Evergreen Freedom Foundation," and requests that all correspondence be directed to attention of the attorney for the Foundation. AR 0001. Mr. Edelman continued to be represented by in-house counsel for the Foundation at the superior court and Court of Appeals levels. The Brief of Appellant to this Court is signed Evergreen Freedom Foundation/counsel/attorneys for appellant. Brief of Appellant at 40. In light of this, it appears that the real party in interest may be the Evergreen Freedom Foundation, not Mr. Edelman. If this is the case, then the Foundation would have to qualify as a "qualified party" under the EAJA. Alternatively, if Mr. Edelman is deemed

Under the EAJA, a qualified party that prevails in a judicial review of an agency action may be awarded fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. RCW 4.84.350(1). Substantially justified means justified to a degree that would satisfy a reasonable person. *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007). The burden is on the agency to show that its position is substantially justified. *Constr. Indus. Training Coun. v. WA State Apprenticeship and Training Coun.*, 96 Wn. App. 59, 68, 977 P.2d 655 (1999). The agency must show that its position has a reasonable basis in law and fact. *Silverstreak*, 159 Wn.2d at 892. The relevant factors in determining whether the agency was substantially justified are the strength of the factual and legal basis for the action. *Id.*

The arguments that Mr. Edelman advances as to why the Secretary's actions were not substantially justified are without merit. Mr. Edelman states: "The violations of HAVA resulted in thousands of improper voter registrations, not to mention numerous illegal votes by underage individuals." Brief of Appellant at 40. Aside from this statement not being factually correct, it is not the standard. The test is not what the result of the agency's action is, but whether the agency had a

to be the real party in interest, then the question arises whether he has in fact incurred any attorneys' fees.

reasonable basis in law and fact for the action at the time it took it. Mr. Edelman also states that the “Reviewing Officer admitted in several instances that Mr. Edelman’s requested remedies were advisable from a policy perspective.” Brief of Appellant at 40. This is an expansive reading of the Reviewing Officer’s decision, which directed the Elections Division to review whether its procedures *could* be improved and whether adding language to the mail-in voter registration form *might* be advisable. In any event, the threshold for an award of attorneys’ fees under the EAJA is that the agency’s position is determined to be legally incorrect, not that the agency might change its procedures as a policy matter.

The Secretary was substantially justified here. Nothing in HAVA expressly prohibits the practice of “pending” voter registration applications, and the Secretary’s determination that it was better to err on the side of not inadvertently excluding qualified voters by rejecting all applications out of hand is not unreasonable.

With respect to the mail-in voter registration form, the Secretary relied on guidance from the entity that is charged with advising the states on the meaning of HAVA. Furthermore, he relied on advice from the agency’s assigned Assistant Attorney General. *See Constr. Indus. Training Coun.*, 96 Wn. App. at 69 (reliance on advice of counsel a factor in determining whether action was substantially justified).

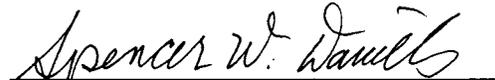
For these reasons, the Court should deny attorneys' fees under the EAJA even if it were to conclude that Mr. Edelman should prevail on one or both issues on the merits.

VI. CONCLUSION

For the reasons set forth above, the Secretary of State requests the Court to affirm the Final Determination of the reviewing officer in this matter.

RESPECTFULLY SUBMITTED this 3rd day of May, 2010.

ROBERT M. MCKENNA
Attorney General



SPENCER W. DANIELS
WSBA No. 6831
Assistant Attorney General
Attorneys for Respondent
Secretary of State

▼

Effective: October 29, 2002**United States Code Annotated Currentness****Title 42. The Public Health and Welfare****Chapter 146. Election Administration Improvement****▣ Subchapter III. Uniform and Nondiscriminatory Election Technology and Administration Requirements****▣ Part A. Requirements****→ § 15483. 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.
- (iii)** Under the computerized list, a unique identifier is assigned to each legally registered voter in the State.
- (iv)** The computerized list shall be coordinated with other agency databases within the State.
- (v)** Any election official in the State, including any local election official, may obtain immediate electronic access to the information contained in the computerized list.

(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.

(B) Exception

The requirement under subparagraph (A) shall not apply to a State in which, under a State law in effect continuously on and after October 29, 2002, there is no voter registration requirement for individuals in the State with respect to elections for Federal office.

(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 as follows:

(i) If an individual is to be removed from the computerized list, such individual shall be removed in accordance with the provisions of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), including subsections (a)(4), (c)(2), (d), and (e) of section 8 of such Act (42 U.S.C. 1973gg-6).

(ii) For purposes of removing names of ineligible voters from the official list of eligible voters--

(I) under section 8(a)(3)(B) of such Act (42 U.S.C. 1973gg-6(a)(3)(B)), the State shall coordinate the computerized list with State agency records on felony status; and

(II) by reason of the death of the registrant under section 8(a)(4)(A) of such Act (42 U.S.C. 1973gg-6(a)(4)(A)), the State shall coordinate the computerized list with State agency records on death.

(iii) Notwithstanding the preceding provisions of this subparagraph, if a State is described in section 4(b) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-2(b)), that State shall remove the names of ineligible voters from the computerized list in accordance with State law.

(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.

(3) Technological security of computerized list

The appropriate State or local official shall provide adequate technological security measures to prevent the unauthorized access to the computerized list established under this section.

(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. Under such system, consistent with the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

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

(5) Verification of voter registration information**(A) Requiring provision of certain information by applicants****(i) In general**

Except as provided in clause (ii), notwithstanding any other provision of law, an application for voter registration for an election for Federal office may not be accepted or processed by a State unless the application includes--

(I) in the case of an applicant who has been issued a current and valid driver's license, the applicant's driver's license number; or

(II) in the case of any other applicant (other than an applicant to whom clause (ii) applies), the last 4 digits of the applicant's social security number.

(ii) Special rule for applicants without driver's license or social security number

If an applicant for voter registration for an election for Federal office has not been issued a current and valid driver's license or a social security number, the State shall assign the applicant a number which will serve to identify the applicant for voter registration purposes. To the extent that the State has a computerized list in effect under this subsection and the list assigns unique identifying numbers to registrants, the number assigned under this clause shall be the unique identifying number assigned under the list.

(iii) Determination of validity of numbers provided

The State shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law.

(B) Requirements for State officials

(i) Sharing information in databases

The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.

(ii) Agreements with Commissioner of Social Security

The official responsible for the State motor vehicle authority shall enter into an agreement with the Commissioner of Social Security under section 405(r)(8) of this title (as added by subparagraph (C)).

(C) Omitted

(D) Special rule for certain States

In the case of a State which is permitted to use social security numbers, and provides for the use of social security numbers, on applications for voter registration, in accordance with section 7 of the Privacy Act of 1974 (5 U.S.C. 552a note), the provisions of this paragraph shall be

optional.

(b) Requirements for voters who register by mail

(1) In general

Notwithstanding section 6(c) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4(c)) and subject to paragraph (3), a State shall, in a uniform and nondiscriminatory manner, require an individual to meet the requirements of paragraph (2) if--

(A) the individual registered to vote in a jurisdiction by mail; and

(B)(i) the individual has not previously voted in an election for Federal office in the State; or

(ii) the individual has not previously voted in such an election in the jurisdiction and the jurisdiction is located in a State that does not have a computerized list that complies with the requirements of subsection (a) of this section.

(2) Requirements

(A) In general

An individual meets the requirements of this paragraph if the individual--

(i) in the case of an individual who votes in person--

(I) presents to the appropriate State or local election official a current and valid photo identification; or

(II) presents to the appropriate State or local election official a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter; or

(ii) in the case of an individual who votes by mail, submits with the ballot--

(I) a copy of a current and valid photo identification; or

(II) a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.

(B) Fail-safe voting

(i) In person

An individual who desires to vote in person, but who does not meet the requirements of subparagraph (A)(i), may cast a provisional ballot under section 15482(a) of this title.

(ii) By mail

An individual who desires to vote by mail but who does not meet the requirements of subparagraph (A)(ii) may cast such a ballot by mail and the ballot shall be counted as a provisional ballot in accordance with section 15482(a) of this title.

(3) Inapplicability

Paragraph (1) shall not apply in the case of a person--

(A) who registers to vote by mail under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4) and submits as part of such registration either--

(i) a copy of a current and valid photo identification; or

(ii) a copy of a current utility bill, bank statement, government check, paycheck, or government document that shows the name and address of the voter;

(B)(i) who registers to vote by mail under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4) and submits with such registration either--

(I) a driver's license number; or

(II) at least the last 4 digits of the individual's social security number; and

(ii) with respect to whom a State or local election official matches the information submitted under clause (i) with an existing State identification record bearing the same number, name and date of birth as provided in such registration; or

(C) who is--

(i) entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act (42 U.S.C. 1973ff-1 et seq.);

(ii) provided the right to vote otherwise than in person under section 1973ee-1(b)(2)(B)(ii) of this title; or

(iii) entitled to vote otherwise than in person under any other Federal law.

(4) 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.”

(iv) A statement informing the individual that if the form is submitted by mail and the individual is registering for the first time, the appropriate information required under this section must be submitted with the mail-in registration form in order to avoid the additional identification requirements upon voting for the first time.

(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).

(5) Construction

Nothing in this subsection shall be construed to require a State that was not required to comply with a provision of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.) before October 29, 2002 to comply with such a provision after such date.

(c) Permitted use of last 4 digits of social security numbers

The last 4 digits of a social security number described in subsections (a)(5)(A)(i)(II) and (b)(3)(B)(i)(II) of this section shall not be considered to be a social security number for purposes of section 7 of the Privacy Act of 1974 (5 U.S.C. 552a note).

(d) Effective date

(1) Computerized Statewide voter registration list requirements

(A) In general

Except as provided in subparagraph (B), each State and jurisdiction shall be required to comply with the requirements of subsection (a) of this section on and after January 1, 2004.

(B) Waiver

If a State or jurisdiction certifies to the Commission not later than January 1, 2004, that the State or jurisdiction will not meet the deadline described in subparagraph (A) for good cause and includes in the certification the reasons for the failure to meet such deadline, subparagraph (A) shall apply to the State or jurisdiction as if the reference in such subparagraph to "January 1, 2004" were a reference to "January 1, 2006".

(2) Requirement for voters who register by mail

(A) In general

Each State and jurisdiction shall be required to comply with the requirements of subsection (b) of this section on and after January 1, 2004, and shall be prepared to receive registration materials submitted by individuals described in subparagraph (B) on and after the date described in such subparagraph.

(B) Applicability with respect to individuals

The provisions of subsection (b) of this section shall apply to any individual who registers to vote on or after January 1, 2003.

CREDIT(S)

(Pub.L. 107-252, Title III, § 303, Oct. 29, 2002, 116 Stat. 1708.)

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

In Re:

Docket No. 2008-SOS-0001

ROBERT EDELMAN,

INITIAL DECISION

Complainant

v.

SECRETARY OF STATE,

Respondent

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 **Complainant¹:** 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

¹In 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).

Error (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.

Error (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.

Error (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 checked is subject to state law. "This subsection is 'subject to state law,' so the 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. **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 from 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.

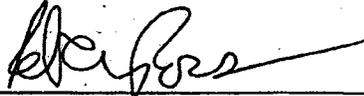
4.9 In sum, the allegations in the Complaint are not supported by the evidence or the

relevant law.

5 ORDER

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

SERVED on the date of mailing.



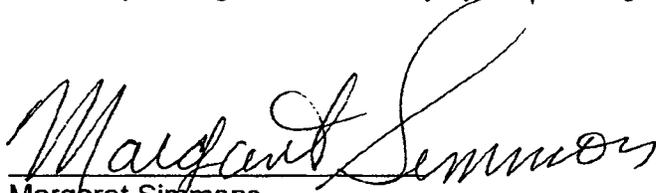
Rebekah R. Ross
Administrative Law Judge
Office of Administrative Hearings

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.


Margaret Simmons
Legal Secretary

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

Spencer Daniels
Assistant Attorney General
7141 Clearwater Dr SW
PO Box 40108
Olympia, WA 98504-0108

Shane Hamlin
Assistant Director of Elections
Office of the Secretary of State
PO Box 40229
Olympia, WA 98504-0229

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.

Error 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.

Error

- 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).

Error (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.

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

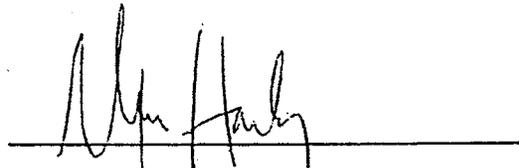
33. I conclude that there is at least possible merit — as a matter of policy, not legal requirement — to the contention that the voter registration form should include the statement set forth in 42 U.S.C. § 15483(b)(4)(A)(iii). I accordingly modify the Initial Decision by instructing the staff of the 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 ³³~~32~~ and ³⁴~~33~~ 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:

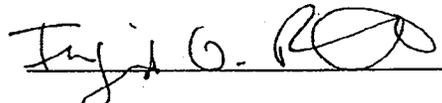
Robert Edelman
c/o Jonathan Bechtle, J.D.
Evergreen Freedom Foundation
PO Box 552
Olympia, WA 98507
JBechtle@effwa.org

Spencer Daniels
Assistant Attorney General
PO Box 40108
Olympia, WA 98504-0108
SpencerD@atg.wa.gov

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

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STATE OF WASHINGTON

NO. 39995-4-II

BY _____
DEPUTY

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ROBERT EDELMAN, a Washington
citizen,

Appellant,

v.

SECRETARY OF STATE,

Respondent.

CERTIFICATE OF
SERVICE

I hereby certify that on May 3, 2010, I served a copy of the Brief
of Respondent on all parties or their counsel of record via first class mail,
postage prepaid, as follows:

Michael J. Reitz
Jonathan D. Bechtle
Evergreen Freedom Foundation
2403 Pacific Avenue SE
Olympia, WA 98507

DATED this 3rd day of May, 2010, at Olympia, Washington.


HEIDI MARTINEZ
Legal Assistant