



U.S. Department of Justice

Civil Rights Division

Voting Section – Room 7254 NWB
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

February 19, 2008

Honorable Gary L. Sharpe
United States District Court
for the Northern District of New York
James T. Foley U.S. Courthouse
445 Broadway, Room 441
Albany, NY 12207

Re: *United States v. New York State Board of Elections, et al.*
Civil Action No. 06-CV-0263 (GLS)

Dear Judge Sharpe:

We write concerning a matter of non-compliance with this Court's January 16, 2008 Supplemental Remedial Order (Docket #188).

Pursuant to the January 16 Order, the defendant New York State Board of Elections (SBOE) is required, among other things, to implement its Plan B for ballot marking devices (BMD) accessible to persons with disabilities according to a specific schedule. Under the schedule, each county board of elections in the State was to advise the SBOE by February 8, 2008, of its ranked choices for ballot marking devices. For any county board of elections that did not submit such choices to the SBOE, the SBOE was required to make a choice for that county by February 18, 2008. The SBOE is required to issue purchase orders for BMDs on behalf of all counties by February 29, 2008.

As of February 8, 2008, all but one county board of elections in the State had submitted its choice of BMD to the SBOE. The Erie County Board of Elections advised the SBOE by that date that its two Commissioners had split on voting for a BMD choice, with one commissioner voting for a Dominion/Sequoia optical scan BMD and the other commissioner voting for an ES&S Automark optical scan BMD.

On February 15, 2008, the SBOE met in a public meeting to vote on the Erie County BMD choice, which counsel for the United States viewed via webcast. Present at this meeting were the two Erie County Commissioners (one in person and one by phone), both of whom made professional and rational presentations to the SBOE concerning the reasons for their respective BMD choice. At the end of this presentation, the three of the four SBOE Commissioners who

were present, following brief statements, voted on the BMD choice for Erie County. Commissioner Kellner voted for the Dominion/Sequoia BMD. Commissioners Walsh and Donohue voted for the ES&S Automark BMD. The SBOE vote was thus split and, under State law, with 3 Board votes needed for such action, no effective choice was made by the SBOE. It was clear from the comments of the SBOE members that they were aware that their conflicting votes placed them in noncompliance with this Court's orders. The Court and the United States have been notified of this split and lack of decision by the Board through its Status Report filing of February 15, 2008 (Docket #203).

The SBOE's inability to choose a BMD for Erie County places it in noncompliance with the Court's January 16 supplemental order. The United States moves hereby for immediate relief to ensure compliance and prevent any delay in the remedial process.

The United States does not take any position with regard to which BMD is better suited for use by Erie County to comply with the mandates of this Court's Orders. Both machines are optical scan BMDs. Both machines appear to provide accessibility to voters with disabilities, and counsel for the United States has inspected both machines recently at the office of the SBOE in Albany. As indicated above, the reasoning behind the differing choices of the two Erie County Commissioners appears cogent and thoughtful. A choice of either BMD would appear to meet the intent and purpose of HAVA and this Court's Remedial Orders.

At this point, the Court would appear to have several options open to it. First, the Court could find the SBOE in contempt of the Court's Orders and order relief in the form of monetary fines until compliance is achieved or order appointment of a Special Master to make the Erie County choice upon default of the SBOE. Both of these options find support in federal case law, including within the Second Circuit. See, e.g., United States v. City of Yonkers, 856 F. 2d 444, 457-60 (2d Cir. 1988), cert. denied, 489 U.S. 1065 (1989) (contempt fines for city); Perfect Fit Indus. v. Acme Quilting Co., 673 F.2d 53, 57 (2d Cir. 1982) (fines; court has "broad discretion to design a remedy that will bring about compliance."); Matter of Dickinson, 763 F.2d 84, 88 (2d Cir. 1985) (fines); United States v. Yonkers Board of Education, 29 F.3d 40, 44 (2d Cir. 1994), cert. denied, 515 U.S. 1157 (1995) (special master; district court justified in conclusion that "effective desegregation requires a more centralized control in a single individual immune to the political pressures which have compromised [Yonkers'] most recent efforts at compliance."); Ruiz v. Estelle, 679 F.2d 1115, 1161(5th Cir. 1982) (noncompliance with a previous order of a district court is a sufficiently exceptional circumstance to justify the appointment of a special master).

Second, at this point, however, given the fact that all county boards of elections in the State, with the exception of Erie County, have made a choice of BMD, and the remedial process appears otherwise to be moving forward according to schedule, the United States believes that this Court should exercise its inherent equitable authority to order the BMD choice for Erie County consistent with the vote of the majority of the SBOE commissioners present at the February 15, 2008, meeting, in favor of the ES&S Automark BMD. Ensuring compliance with a prior order of this Court is an "equitable goal which a court is empowered to pursue even absent a finding of contempt. See Berger v. Heckler, 771 F. 2d 1556, 1569 (2d Cir. 1985); United

States v. Visa U.S.A., Inc., No. 98-Civ-7076, 2007 WL 1741885, at **15-16 (S.D.N.Y. June 15, 2007). Although, as indicated above, such a vote was not effective under State law, as this Court has made clear, State law cannot stand in the way of compliance with federal law, and the majority SBOE vote would provide a neutral and reasoned basis for this Court to order such relief. Of course, even without a majority Board decision, or a clear Board majority vote in defiance of this Court's Orders, federal law must prevail.

Pursuant to Paragraph 6 of the Supplemental Remedial Order, we ask for an immediate conference with the Court, by phone if possible to avoid delay given counsel for the United States' presence in Washington, to consider this issue. Of course, we remain ready to proceed as the Court directs.

Thank you for your consideration of this request.

Sincerely,

/s/

Brian F. Heffernan
Attorney, Voting Section
Bar No. 513721

cc: All Counsel