

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

ASSOCIATION OF COMMUNITY)
ORGANIZATIONS FOR REFORM)
NOW, et al.)
)
Plaintiffs,)
)
vs.)
)
DEBORAH SCOTT, et al.,)
)
Defendants.)

Case No. 2:08CV04084 NKL

**DEFENDANT ST. LOUIS CITY ELECTION BOARD’S MEMORANDUM OF
LAW IN SUPPORT OF ITS MOTION TO COMPEL JOINDER OF THE
SECRETARY OF STATE AS AN ADDITIONAL PARTY DEFENDANT**

Defendants St. Louis City Board of Election Commissioners and Scott Leiendecker, Mary Wheeler-Jones, Carol A. Wilson, Eileen M. McCann, Jack Lary and Clarence E. Dula, in their official capacity (jointly referred to as “Defendant St. Louis City Election Board”), state the following in support of their Motion to Compel Joinder of the Secretary of State as an Additional Party Defendant.

I. PRELIMINARY STATEMENT

Plaintiffs Dionne O’Neal and the Association of Community Organizations for Reform Now (hereinafter referred to as “ACORN”) have sued Deborah E. Scott as Director of the Missouri Department of Public Social Services, Janel Luck as the Director of the Family Support Division, the St. Louis City Board of Elections, the Kansas City Board of Elections and the Jackson County Board of Elections for alleged violations of the National Voter Registration Act (hereinafter referred to as “NVRA”). However, Plaintiffs did not sue the Secretary of State who is charged with promulgating rules to

ensure the State's compliance with the NVRA. Plaintiffs have generally alleged in their Complaint that the Defendants violated and continue to violate the NVRA by failing to provide voter information and registration opportunities and assistance required by Section 7 of the NVRA. More specifically, Plaintiffs sought injunctive relief against all of the Defendants for the alleged violations of Missouri's public assistance offices of the Department of Social Services failures to comply with their obligations to distribute mail voter registration forms, to assist recipients in completing these forms, and accepting voter registration forms and transmitting them to election officials.

The Secretary of State clearly has an interest in this lawsuit as the Secretary of State has the responsibility for the coordination of state responsibilities under the NVRA, the ability to promulgate rules to ensure compliance with the NVRA, and to provide voter registration applications to all offices in the State that provide public assistance. Plaintiffs' Complaint directly attacks the efforts of the Secretary of State in complying with the NVRA without providing the Secretary of State an opportunity to defend herself against these allegations.

II. BACKGROUND OF THE NATIONAL VOTER REGISTRATION ACT IN MISSOURI

In 1993 Congress enacted the National Voter Registration Act (hereinafter referred to as "NVRA"), which governs voter registration for federal elections. 42 U.S.C. § 1973gg-2 to § 1973gg-9. The NVRA provides, in relevant part, that each State must designate all offices in the State that provide public assistance as mandatory voter registration agencies. Additionally, each State must also designate as mandatory voter registration agencies all offices in the State that provide State-funded programs primarily

engaged in providing services to persons with disabilities. 42 U.S.C. § 1973gg-5(a)(2)(A)&(B).

In addition to the services typically provided, these public assistance/disability service offices which are designated as mandatory voter registration agencies, are required to: (1) distribute voter registration applications to applicants; (2) offer applicants assistance in completing the forms unless the applicants refuse such assistance; and (3) accept completed forms for transmittal to the appropriate State election official. 42 U.S.C. § 1973gg-5(a)(4)(A). The voter registration applications must be distributed with each application for public assistance and/or disability services and with each recertification, renewal, or change-of-address form relating to such services or assistance unless the applicant, in writing, declines to register to vote. 42 U.S.C. § 1973gg-5(a)(6)(A).

While the NVRA mandates these obligations and duties on the public assistance agencies, the NVRA does not address how each state's public assistance agency is required to implement these requirements. The obligation to establish and implement practices and procedures that comply with the NVRA is left to each state. As such, each state is required to designate a state officer or employee as the chief state election official to be responsible for coordination of state responsibilities under the NVRA. 42 U.S.C. § 1973gg-8. Missouri has designated the Secretary of State as the chief election official to coordinate NVRA responsibilities for Missouri. § 115.136(1). Further, the Secretary of State is charged with promulgating rules to ensure the State's compliance with the NVRA. Mo.Rev.Stat. § 115.136(6). The NVRA places no obligations or duties on local

election authorities to oversee a public assistance agency's implementation or compliance with the NVRA.

In Missouri, the NVRA was implemented via the enactment of HB 1411 which amended Missouri's statutory scheme and incorporated the provisions of the NVRA into state law. The portions of the bill relevant herein are Section 115.136, which outlines the duties of the Secretary of State, and Section 115.162, which outlines the responsibilities of the county Department of Social Services Offices.

Section 115.136, places the following specific responsibilities on the Secretary of State relative to the subject of this suit:

"1. The secretary of state shall be the chief state election official responsible for the coordination of state responsibilities under the National Voter Registration Act of 1993.

2. The secretary of state shall be responsible for the transmission of requested data from the election authorities to the Federal Election Commission.

3. The secretary of state shall supply each election authority with a list of all public assistance agencies and armed forces recruitment offices that are designated as voter registration sites within the jurisdiction of the election.

4. The secretary of state shall consult with the Federal Election Commission in the formation of a national mail voter registration application form.

5. The secretary of state shall be responsible for the transmission to the appropriate election authority of the notification by the United States attorney of the conviction of a Missouri citizen for a federal felony offense.

6. The secretary of state may promulgate rules only to ensure state compliance with the National Voter Registration Act of 1993.

7. Any person who is aggrieved by a violation of the National Voter Registration Act may provide written notice of the violation to the secretary of state and may bring a civil action pursuant to the process prescribed by section 11 of the National Voter Registration Act of 1993."

In accordance with her duties under these statutes, the Secretary of State, in February, 2007, published the National Voter Registration Act – 1993; Implementation Guide for Missouri Public Assistance Agencies.

Section 115.162, places specific duties on certain agencies which are designed to ensure that the NVRA is fully implemented in Missouri. Section 115.162 affirmatively places the duty to provide voter registration forms to those receiving public assistance from the county Department of Social Services offices. These forms are to be provided to the state agencies by the Secretary of State, not the local election authorities. Section 115.162 places the following specific responsibilities on all state offices providing public assistance:

"1. A voter registration application shall be provided by the secretary of state in all offices of the state that provide public assistance, all offices that provide state-funded programs primarily engaged in providing services to persons with disabilities, and other offices as directed by the governor. In addition all armed forces recruitment offices shall be considered a voter registration agency.

2. At each voter registration agency, the following services shall be made available:

(1) Assistance to applicants in completing voter registration application forms, unless the applicant refuses such assistance;

(2) Acceptance of completed voter registration application forms for transmittal to the election authority located in the same county or any city not within a county, or if there is more than one election authority within the county, to the election authority nearest to the office of the agency. The election authority receiving the application forms shall review the applications and forward any applications pertaining to a different election authority to that election authority;

(3) Voter registration sites shall transmit voter registration application forms to the appropriate election authority not later than five business days after the form is completed by the applicant;

(4) If a voter registration agency provides services to a person with a disability at the person's home, the agency shall provide the

services provided in this section at the person's home.

3. An applicant declining to register in any agency shall be noted in a declination section incorporated into the voter registration form used by the agency. No information relating to a declination to register to vote in connection with an application made at a voter registration agency may be used for any purpose other than voter registration."

Under this statutory scheme, the Secretary of State has the responsibility for the coordination of state responsibilities under the NVRA, the ability to promulgate rules to ensure compliance with the NVRA, and the obligation to provide voter registration applications to all offices in the State that provide public assistance. Mo.Rev.Stat. §§ 115.136(1), 115,136(6) and 115.162(1). Under this statutory scheme, all offices in the State which provide public assistance shall provide assistance with the completion of voter registration forms and forward the voter registration forms to the appropriate election authority. Mo. Rev. Stat. § 115.162.

No provision of the NVRA or Missouri's Revised Statutes require the individual election boards to engage in any of the conduct Plaintiffs allege they have failed to do under the NVRA including, implementing a program for registering voters at designated agencies and implementing a training program or insuring State agencies' compliance with their responsibilities under the NVRA. However, the Secretary of State, who does have the obligation and responsibility to insure the State's compliance with the NVRA, and has implemented training programs in reference to the NVRA has been omitted as a party to this lawsuit.

III. REQUIRED JOINDER OF PARTIES UNDER RULE 19(A)

Civil Rule 19(a) provides that:

(1) (Required Party). A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among the existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

The relief requested by the Plaintiffs in this matter cannot be fully granted in the absence of the Secretary of State. Further, the Secretary of State clearly claims an interest in the subject-matter of this action and, as a practical matter, without being joined in this action would not have an opportunity to defend herself against Plaintiffs' allegations of non-compliance with the NVRA. Additionally, because the Secretary of State has the responsibility for creating and implementing rules regarding the requirements of the NVRA in reference to voter registration of those receiving public assistance, her absence in this matter may cause inconsistent obligations on the public assistance agencies and the local election authorities.

A. Nature of the Secretary of State's Interest in the Issues Presented

Missouri has fully implemented the provisions of the NVRA, including Section 7. Under Missouri law, the responsibility for implementing those provisions regarding voter registration of those receiving public assistance falls squarely upon the Department of Social Services and the Secretary of State. Mo.Rev.Stat. § 115.136(1). Under the facts as alleged herein, Plaintiffs' allegations that specific county offices are not complying with

their duties under state and federal law directly relates to the Secretary of State's responsibilities for creating and implementing rules regarding the requirements of the NVRA.

Plaintiffs have alleged that the Department of Social Services, through a subunit, the Family Support Division, have failed, and continue to fail, to provide the voter registration opportunities mandated by Section 7 of the NVRA. Plaintiffs' Complaint, Para. 31. Specifically, Plaintiffs allege that Plaintiff O'Neal was not asked by any employee of the Department of Social Services if she was registered to vote or if she wanted to apply to register to vote; she was not given any document that asked if she was registered to vote, whether she needed to update her voter registration for her current address, or whether she would like to apply to register to vote at the DSS office that day. Plaintiffs' Complaint, Para. 41. No specific allegation is made in reference to the three named local election authorities and no evidence was produced in reference to the three local election authorities at the preliminary hearing of this matter.

As set forth above, in Missouri, the NVRA was implemented via the enactment of HB 1411 which amended Missouri's statutory scheme and incorporated the provisions of the NVRA into state law. The portions of the bill relevant herein are Section 115.136, which outlines the duties of the Secretary of State, and Section 115.162, which outlines the responsibilities of the county Department of Social Services Offices.

Section 115.136, places the following specific responsibilities on the Secretary of State relative to the subject of this suit:

"1. The secretary of state shall be the chief state election official responsible for the coordination of state responsibilities under the National Voter Registration Act of 1993.

2. The secretary of state shall be responsible for the transmission of requested data from the election authorities to the Federal Election Commission.

3. The secretary of state shall supply each election authority with a list of all public assistance agencies and armed forces recruitment offices that are designated as voter registration sites within the jurisdiction of the election.

4. The secretary of state shall consult with the Federal Election Commission in the formation of a national mail voter registration application form.

5. The secretary of state shall be responsible for the transmission to the appropriate election authority of the notification by the United States attorney of the conviction of a Missouri citizen for a federal felony offense.

6. The secretary of state may promulgate rules only to ensure state compliance with the National Voter Registration Act of 1993.

7. Any person who is aggrieved by a violation of the National Voter Registration Act may provide written notice of the violation to the secretary of state and may bring a civil action pursuant to the process prescribed by section 11 of the National Voter Registration Act of 1993." (Emphasis added).

In accordance with her duties under these statutes, the Secretary of State published the National Voter Registration Act – 1993; Implementation Guide for Missouri Public Assistance Agencies. The Secretary of State's action clearly indicates the Secretary of State's authority and obligation to coordinate and promulgate rules to implement the NVRA in reference to state public assistance agencies.

Section 115.162, places a number of specific duties on designated agencies that are designed to insure that the NVRA is fully implemented. Section 115.162 affirmatively places the duty to provide voter registration forms to those receiving public assistance on the county Department of Social Services offices. Section 115.162 places the following specific responsibilities on all state office providing public assistance:

"1. A voter registration application shall be provided by the secretary of state in all offices of the state that provide public assistance, all offices that provide state-funded programs primarily engaged in providing services to persons

with disabilities, and other offices as directed by the governor. In addition all armed forces recruitment offices shall be considered a voter registration agency.

2. At each voter registration agency, the following services shall be made available:

(1) Assistance to applicants in completing voter registration application forms, unless the applicant refuses such assistance;

(2) Acceptance of completed voter registration application forms for transmittal to the election authority located in the same county or any city not within a county, or if there is more than one election authority within the county, to the election authority nearest to the office of the agency. The election authority receiving the application forms shall review the applications and forward any applications pertaining to a different election authority to that election authority;

(3) Voter registration sites shall transmit voter registration application forms to the appropriate election authority not later than five business days after the form is completed by the applicant;

(4) If a voter registration agency provides services to a person with a disability at the person's home, the agency shall provide the services provided in this section at the person's home.

3. An applicant declining to register in any agency shall be noted in a declination section incorporated into the voter registration form used by the agency. No information relating to a declination to register to vote in connection with an application made at a voter registration agency may be used for any purpose other than voter registration."

Under this statutory scheme, the Secretary of State has the responsibility for the coordination of the State's responsibilities under the NVRA, the ability to promulgate rules to ensure compliance with the NVRA, and to provide voter registration applications to all offices in the State that provide public assistance. Mo.Rev.Stat. §§ 115.136(1), 115,136(6) and 115.162(1). Additionally, all offices in the State which provide public assistance shall provide assistance with the completion of voter registration forms and

forward the voter registration forms to the appropriate election authority. Mo.Rev.Stat. § 115.162.

No provision of the NVRA or Missouri's Revised Statutes require the individual election boards to engage in any of the conduct Plaintiffs allege the State has failed to do under the NVRA including, implementing a program for registering voters at designated agencies and implementing a training program or insuring State agencies' compliance with their responsibilities under the NVRA. Not only do individual elections boards in the State of Missouri not have the responsibilities to engage in these acts, the elections boards in this State do not have the authority to engage in such activity.

Missouri's statutory scheme to implement the NVRA does not give any authority to local election officials to enforce the statutes against State agencies. Local election officials have no authority to insure compliance with the provisions of the NVRA. As set forth in Section 115.136, the Secretary of State is the chief election official designated to fulfill this role and promulgate rules to enforce the NVRA in reference to state public-assistance agencies, not the local election officials.

B. Authority of the Court to Join the Secretary of State.

Given the importance of the Secretary of State to the proper resolution of this case, Federal Rule of Civil Procedure 19(a) provides that the Court should require joinder of the of State's chief election official. The Secretary of State is subject to service of process and its joinder would not jeopardize this Court's subject matter jurisdiction. The Secretary of State clearly claims an interest in the enforcement of the NVRA and the State's election laws. Failure to join the Secretary of State would, as noted above, prohibit this Court from fully granting the relief Plaintiffs have requested. Additionally,

the Secretary of State clearly claims an interest in coordinating and promulgating rules to implement the NVRA and ensuring the State's compliance with the NVRA. Failure to join the Secretary of State would impede her ability to defend against Plaintiffs' allegations and would lend to the possibility of inconsistent obligations in her absence.

III. PERMISSIVE JOINDER UNDER RULE 20

Civil Rule 20(a)(2) provides in relevant part:

(2) Defendants. Persons --- as well as a vessel, cargo, or other property subject to admiralty process in rem --- may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

In the alternative, the Secretary of State should be joined as a defendant in this action in that the relief requested against the named defendants has a direct relation to the Secretary of State's obligations and duties under the NVRA and Missouri's Comprehensive Election Act of 1977, as amended. The factual support for permissive joinder has been set forth above and will not be restated herein.

IV. CONCLUSION

For the reasons discussed above, the Court should require the joinder of the Secretary of State to this action as a necessary party.

Respectfully submitted,

FRANKEL, RUBIN, BOND,
DUBIN, SIEGEL & KLEIN, P.C.

By s/Michael J. Payne

Michael J. Payne, #498816
231 S. Bemiston Avenue
Suite 1111
St. Louis, Missouri 63105-1914
(314) 725-8000
(314) 726-5837 (fax)
mpayne@frankelrubin.com

Attorney for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system to all parties this 30th day of September, 2008.

s/Michael J. Payne

Michael J. Payne, #498816