

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
-Plaintiff,
-against-

**Memorandum of Law
in Support of Motion
to Join the County
Boards**

NEW YORK STATE BOARD OF ELECTIONS,
PETER S. KOSINSKI and STANLEY L. ZALEN,
Co-Executive Directors of the New York State
Board of Elections in their official capacities;
and STATE of NEW YORK,

06 CIV 0263 (GLS/RFT)

-Defendants

Statement of the Case

On March 1, 2006, the United States Department of Justice commenced this lawsuit in the United States District Court for the Northern District of New York to compel the State Board to implement the voting system and statewide voter registration database requirements of HAVA. On March 23, 2006, the District Court granted an application by the Justice Department to require the State Board to submit a plan for complying with HAVA in time for the September, 2006 elections. The Plan was filed with the Court on April 10, 2006, with a supplement filed on April 20, 2006. On April 28, 2006, the Justice Department responded to the Plan. After gathering responses to the proposed plan from the County Boards of Elections, and after having discussions with the State Board, the Justice Department recognized that full compliance with HAVA with regard to the voting machines was not practicable for 2006. The Justice Department asked the District Court to order that the State achieve compliance, to the best extent possible, by providing voting machines accessible to voters with disabilities. On June 2, 2006, this Court issued a

preliminary injunction setting forth deadlines for an interim plan for the State to achieve compliance with HAVA, requiring the placement of at least one disability-accessible voting machine in each County for the 2006 elections. All counties had at least one such device and in some instances some counties had multiple devices. In the end, the Court ordered the State to achieve full compliance with HAVA by September, 2007.

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

Argument

The County Boards of Election are necessary parties to implement new voting systems.

Federal Rule of Civil Procedure Rule 19(a) provides that an absent party qualifies as "necessary"¹ to the litigation if:

(1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

¹“Though the Rule no longer describes such parties as "necessary," "necessary party" is a term of art whose meaning parallels Rule 19(a)'s requirements. See Black's Law Dictionary 928 (5th ed. 1979) (defining "necessary parties" as "those persons who must be joined in an action because, *inter alia*, complete relief cannot be given to those already parties without their joinder," and citing Fed. Rule Civ. Proc. 19(a)).” *Orff v United States*, 545 U.S. 596 at 602-603 (2005).

The party seeking to join additional parties under Rule 19 "has the burden of producing evidence showing the nature of the interest possessed by an absent party and that the protection of that interest will be impaired by the absence." *Citizen Band Potawatomi Indian Tribe v. Collier*, 17 F.3d 1292, 1293 (10th Cir. 1994), *quoted in Holland v. Fahnestock & Co.*, 210 F.R.D. 487, 495 (S.D.N.Y. 2002).

In this case the State Board of Elections is responsible for certifying that elections systems meet the standards set forth in state law and regulations. Election Law section 7-206. The State Board, in coordination with the Office for General Services is responsible for putting in place contracts allowing the County Boards to purchase the compliant voting systems. Election Law section 7-204; Chapter 181 of the Laws of 2005, section 12.

Defendants Kosinski and Zalen are the Co-Executive Directors of the State Board of Elections. Kosinski-Zalen Affidavit para. 1,2. They have no direct statutory authority to act to implement any voting system. Without the county boards, they are unable to meet the Court's prior order to implement HAVA in New York State.

While the State is responsible for establishing contracts for purchase of new voting systems, it is the county boards which have the task of selecting, and installing thousands of new voting systems throughout the state. The county boards are integral to the selection and purchase of new voting systems. Pursuant to State Law, each county board decides which machine(s) they wish to purchase and then provides a request to purchase along with a check representing their prorated share of the five percent match to the State. The largest portion of federal HAVA funds only provide 95 percent of the purchase price of voting systems. The county must pay for five percent. Kosinski-Zalen Affidavit para. 15.

If, for some reason, a County does not select a type of voting machine, the Election Law section 7-203(3) authorizes the State Board shall make the choice for the recalcitrant County. However it is the counties themselves which must set up the voting machines and staff the polling places with inspectors knowledgeable in their operation.

Conclusion

Because of the essential nature of the county board's role in implementing any new voting system, the State Board seeks to join all the county boards as parties to this action so that complete relief may be afforded.

Dated: December 14, 2007



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