

INDIANA ELECTION COMMISSION

ORDER

WHEREAS, a complaint or grievance was filed by Gregory Allen Meyer with the Election Division of the Office of the Secretary of State of Indiana ("the Election Division") pursuant to [IC 3-6-4.5](#) (administrative complaints concerning the uniform and nondiscriminatory election technology and administrative requirements under Title III of the Help America Vote Act of 2002 [HAVA]) and designated as "Grievance 2009-17"; and

WHEREAS, pursuant to [IC 3-6-4.5](#), the Co-Directors of the Election Division ("the Co-Directors") must make an initial determination to determine whether, even if the facts set forth in the complaint or grievance are assumed to be true, there is a violation of Title III of HAVA;

THEREFORE, THE CO-DIRECTORS MAKE THE FOLLOWING FINDINGS:**A. Filing of Grievance**

1. Gregory Allen Meyer filed an Election Fraud and Accessibility Grievance Form ("Grievance") with the Election Division of the Office of the Secretary of State of Indiana ("the Election Division") pursuant to [IC 3-6-4.5](#) (administrative complaints concerning the uniform and nondiscriminatory election technology and administrative requirements under Title III of the Help America Vote Act of 2002 [HAVA]) on August 24, 2009.
2. The Grievance alleges, among other things, that "DRE/Electronic voting systems" were not provided for absentee voting in the 2008 general election in Marion County. Specifically, the Grievance states that such voting systems were not provided at the "J. Everett Light Center" which is identified in the Grievance as an "Absentee/Early Voting/Satellite" facility,
3. The Grievance alleges that this failure to provide electronic voting systems violated the "civil rights" of Mr. Meyer as well as the "ADA."

B. Grievance Process Explained

1. As required by the federal Help America Vote Act of 2002 ("HAVA"), Indiana adopted an administrative complaint process to address allegations of violations of Title III of HAVA. 42 U.S.C. § 15512; [IC 3-6-4.5](#); 42 U.S.C. §§ 15481 - 15485. Among other things, Title III of HAVA requires Indiana to provide at least one accessible voting system in each polling place, a statewide voter registration system, and provisional voting.
2. The administrative complaint process for alleged violations of Title III of HAVA potentially involves the participation of two separate governmental entities- the Election Division and the Indiana Election Commission ("Commission"). The Election Division is a bi-partisan agency that acts through two Co-Directors who have co-equal authority. One Co-Director is nominated by the state chairman of each of the two major parties in Indiana, the Indiana Democratic and Republican Parties. The candidates nominated by their respective state chairmen are appointed by the Governor. The Commission is a bi-partisan entity that consists of four members. Two Commission members are nominated by the state chairman of the Indiana Democratic and Republican Parties. The nominated candidates are also appointed by the Governor.
3. Once a Grievance is filed, the Election Division is required to review the Grievance and make a determination as to whether the Grievance has been properly submitted and whether the Grievance states a Title III HAVA violation. In making a determination of whether the Grievance states a Title III HAVA violation, the Division is required to assume all facts as set forth in the Grievance are true.
4. If the Election Division determines that the Grievance does not state a Title III HAVA violation it must publish an order of dismissal in the Indiana Register and provide a copy of the order of dismissal by certified mail to: (1) the person who filed the Grievance; (2) the person alleged to have committed the violation in the Grievance; (3) the members of the Indiana Election Commission ("Commission"); and (4) the Indiana Attorney General.
5. If the Election Division determines that the Grievance states a violation of Title III of HAVA, then it shall conduct an investigation. If the Election Division initiates an investigation then, after the completion of its investigation, the Election Division shall submit its findings regarding the alleged Title III HAVA violation to the Commission for further proceedings.

C. Analysis and Findings on Grievance

1. As indicated above, the Election Division's initial task is to review a HAVA Grievance and make a determination as to whether the Grievance has been properly submitted and whether, assuming all facts stated in the Grievance are true, the Grievance states a Title III HAVA violation.
2. The Election Division finds that the Grievance was properly submitted. Mr. Meyer filed his Grievance with the Election Division on the form provided by the Election Division and the Grievance was written, signed, and sworn to before an individual authorized to administer an oath all as required by [IC 3-6-4.5-7](#).
3. With respect to whether the Grievance states a Title III HAVA violation, the Co-Directors would initially note that Mr. Meyer alleges a violation of "civil rights" and the "ADA." The Election Division interprets the reference to the ADA as a reference to the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. ("ADA") However, the Election Division has no jurisdiction with respect to claims brought under the ADA or general allegations that a person's "civil rights" have been violated.
4. Under the Grievance procedure set forth in [IC 3-6-4.5](#), the Election Division has jurisdiction to consider allegations regarding violations of Title III of HAVA. However, the Election Division finds that it is not necessary for the Grievance to set forth the exact **legal** basis for the Grievance to invoke the jurisdiction of the Election Division. Instead, the Election Division will read the Grievance liberally and determine whether the **factual** allegations contained therein, assuming the truth of those allegations, state a Title III HAVA violation.
5. After reviewing the factual allegations in the Grievance filed by Mr. Meyer, and assuming the truth of those allegations, the Election Division finds that the factual allegations require an interpretation of Section 301(a)(3) of Title III of HAVA (42 U.S.C. § 15481(a)(3)) to determine whether or not the Grievance states a violation of Title III of HAVA. This section of HAVA states, in relevant part:

"Accessibility for individuals with disabilities.—The voting system shall--

(A) be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters;

(B) satisfy the requirement of subparagraph (A) through the use of at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities **at each polling place**; and

(C) if purchased with funds made available under title II on or after January 1, 2007, meet the voting system standards for disability access (as outlined in this paragraph).
(emphasis added)."

The above section, to put it simply, requires Indiana to equip each polling place with at least one direct record electronic voting system or other voting system equipped for individuals with disabilities that provides these individuals "the same opportunity for access and participation (including privacy and independence) as for other voters."

6. Indiana incorporated this federal law requirement into the state law provision set forth in [IC 3-11-15-13.3](#) which provides, in relevant part, as follows:

(c) As provided by 42 U.S.C. 15481, to be used in an election in Indiana, a voting system must be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.

(d) As provided by 42 U.S.C. 15481, an election board conducting an election satisfies the requirements of subsection (c) if the election board provides at least one (1) electronic voting system or other voting system equipped for individuals with disabilities **at each polling place**. (emphasis added)

7. The Election Division finds that the key to interpreting the above state and federal laws as they apply to the Grievance filed by Mr. Meyer is with respect to the definition of the word "polling place."

The Election Division has reviewed the provisions of federal HAVA and finds that HAVA does not define the term "polling place" in specific section in HAVA that sets forth this voting system accessibility requirement, section 301(a)(3) of Title III of HAVA (42 U.S.C. § 15481(a)(3)). Nor is "polling place" defined in any other provision of HAVA.

8. The Election Division also reviewed how polling places are defined and treated under Indiana law as well as how Indiana law addresses the use of electronic voting systems in absentee voting.

The Election Division finds that Indiana law appears to clearly distinguish between polling places, where voters cast a ballot on election day, and in-person absentee voting in the office of the circuit court clerk or at a satellite facility. For example, the "polls" are open from 6:00 a.m. to 6:00 p.m. on a single day, election day. [IC 3-11-8-8](#); [IC 3-5-2-18](#) In contrast, in-person absentee voting occurs "not more than twenty-nine (29) days nor later than noon the day before election day." [IC 3-11-10-26](#)

Likewise, voting that occurs on election day in a polling place is done before precinct election officers (Inspector, two judges, two clerks, and two sheriffs) pursuant to, among other statutes, [IC 3-6-6](#), [IC 3-11-8](#), [3-11-11](#), [IC 3-11-13](#) and [IC 3-11-14](#). In contrast, in-person absentee voting in the clerk's office or a satellite facility occurs before an absentee voter board. [IC 3-11-10-26](#)

In addition, on election day a person may not electioneer within the "polls" or the "chute." In contrast, during in-person absentee voting a person may not electioneer "within an area in the office of the circuit court clerk or a satellite office of the circuit court clerk established under [IC 3-11-10-26.3](#) used by an absentee voter board to permit an individual to cast an absentee ballot." [IC 3-14-3-16](#)

9. More importantly, Indiana law **permits**, but does not **require**, a county to use an electronic voting system for in-person absentee voting. Specifically, [IC 3-11-10-26.2\(a\)](#) states that a county election board. . .of a county subject to [IC 3-11.5](#) may adopt a resolution to authorize the circuit court clerk to use an electronic voting system for voting by absentee ballot in the office of the circuit court clerk. . ." Prior to adopting a resolution to use an electronic voting system for in-person absentee voting the county election board must adopt a resolution to count all absentee ballots at a central location under [IC 3-11.5](#) rather than at the precinct.

10. Of significance is that, prior to 2003, Indiana did not permit the use of electronic voting systems for in-person absentee voting at all. In addition, at the time Indiana first began permitting the use of electronic voting systems for in-person absentee voting in 2003, federal HAVA had already been enacted. Therefore, in implementing HAVA, the Indiana General Assembly apparently did not view HAVA as **requiring** the use of electronic voting systems for in-person absentee voting.

The Election Division finds that Indiana law, including those provisions implementing federal HAVA, do not require the use of electronic voting systems for in-person absentee voting. Consistent with that finding, and assuming the facts in Mr. Meyer's Grievance to be true, it appears that the Marion County Election Board did not adopt resolutions under [IC 3-11-10-26.2](#) to become a county that counts absentee ballots at a central location and to use electronic voting systems for in-person absentee voting.

11. The Election Division further finds that the manner in which the Indiana General Assembly has implemented HAVA in Indiana and Indiana's laws regarding the use of electronic voting systems for in-person absentee voting are not inconsistent with the express language of HAVA. The Election Division is reluctant to make a finding that a clear state law that makes a county election board's use of electronic voting systems for in-person absentee voting optional rather than mandatory violates federal HAVA in the absence of express language in federal HAVA that contradicts state law. Therefore, based upon the foregoing analysis, the Election Division finds that the Grievance does not state a Title III HAVA violation.

12. The Election Division is aware that the General Assembly may amend current law to require all counties to use electronic voting systems for in-person absentee voting and, in fact, Senate Bill 14 proposed by Senator Miller during the 2009 regular session of the General Assembly, as amended, would have required the use of electronic voting systems for in-person absentee voting in all counties in Indiana. However, Senate Bill 14 did not pass the General Assembly and become law. There may be both good policy and legal reasons for the General Assembly to pass a law like Senate Bill 14 and the General Assembly will have an opportunity to do so during its 2010 session.

IT IS THEREFORE ORDERED:

SECTION 1. That Co-Directors having determined that the complaint or grievance filed by Gregory Allen Meyer with the Election Division (and designated as 2009-17) does not set forth a violation of Title III of HAVA, even if the facts set forth in the complaint or grievance are assumed to be true, hereby **DISMISS** the complaint or grievance.

SECTION 2. The Co-Directors note that the complaint or grievance, if true, may involve election fraud or other illegal acts with respect to the election process. The Election Division has documented this complaint or grievance and will, where appropriate, provide assistance or referral to other law enforcement agencies or officials depending upon the specific allegations and the evidence supporting the allegations.

SECTION 3. A copy of this Order shall be provided by certified mail to the person who filed the complaint or grievance; the person alleged to have committed the violation (if contact information was provided by the complainant); the members of the Indiana Election Commission; and the Attorney General.

SO ORDERED THIS 2nd DAY OF NOVEMBER, 2009, BY

THE INDIANA ELECTION DIVISION:

J. Bradley King
Co-Director, Indiana Election Division

Pamela Potesta
Co-Director, Indiana Election Division

Posted: 11/11/2009 by Legislative Services Agency
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