UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 3:08cv709

JEAN CUNNINGHAM, *et al.*,

Defendants.

MEMORANDUM IN OPPOSITION TO MOTION FOR PERMANENT RELIEF

The defendants, Jean Cunningham, Nancy Rodrigues, and Harold Pyon, being the members of the Commonwealth of Virginia State Board of Elections, sued in their official capacity, the Commonwealth of Virginia State Board of Elections, and the Commonwealth of Virginia (collectively, the "Defendants"), oppose the Plaintiff's Motion for Permanent Relief for the reasons set forth herein.

I. Facts

A. Procedural History

On October 15, 2009, the Court entered its Final Order granting the Plaintiff's Motion for Summary Judgment and for Declaratory Relief. *See* October 15, 2009 Final Order, Document 58. That Order required that certain absentee ballots from the 2008 General Election which had not been counted towards the final election results be counted and certified by the Defendants. The Court deferred to the Parties the decision as to how to go about counting and certifying those ballots. Thereafter, the Parties reached agreement as to how those ballots should be counted and certified. *See* Document 59, Joint Statement of the Parties. The ballots in question were then counted and certified in

accordance with the Parties' agreed-upon procedures. *See* Document 62, Notice of Re-Certification of Election Results. The Final Order also deferred to the Parties "the determination as to the appropriate way in which to ensure Virginia's compliance with UOCAVA in future federal elections."

B. 2010 Virginia Legislative Initiatives

The instant lawsuit was filed pursuant to Virginia's statutory electoral scheme as in effect during the 2008 General Election. *See* Complaint in Intervention, *passim*. That statutory scheme has now been substantially modified. During the 2010 General Assembly Session, Chapters 449 and 538 were enacted as amendments to Virginia's electoral laws. Both Chapters were signed into law by Gov. McDonnell on April 11, 2010. *See* Exhibits 1 and 2 hereto, Virginia Acts of Assembly – 2010 Session, Chapters 449 and 538, respectively.

Among the important changes to Virginia's election laws accomplished by these new Chapters are the following:

a. Once absentee ballots are available, a general registrar must process them within three days. Chapter 449; Va. Code § 24.2-706 (para. 5).

b. Absentee ballots must be ready at least 45 days before federal, state and local elections. Chapter 449; Va. Code § 24.2-612.

c. The Federal Write-In Ballot is expanded for use in all Virginia elections. Chapter 449; Va. Code § 24.2-702.1.

d. UOCAVA voters who submit timely applications but whose ballots are not timely mailed and are thus received late, will nevertheless have their ballots counted. Chapter 449; Va. Code § 24.2-709(B)(iii).

e. UOCAVA voters may receive electoral information by electronic transmission regardless of whether they are currently residing outside Virginia. Chapter 449; Va. Code § 24.2-706 (para. 5).

f. Not later than five days after absentee ballots are made available, each electoral board shall report in writing to the State Board whether it has complied with the applicable deadline. Chapter 449; Va. Code § 24.2-612.

g. It is now a Class 1 misdemeanor for an electoral official to fail to perform his duty to comply with Virginia's absentee ballot procedures through willful neglect with malicious intent. Chapter 538; Va. Code § 24.2-706 (para. 5).

C. FVAP Survey on Legislative Initiatives

The Federal Voting Assistance Program ("FVAP") recently sent to State Election Officials around the nation a "report card" rating the 2009-2010 Legislative Initiatives by the States dealing with the enforcement of UOCAVA. As the Court is aware, the Plaintiff relied heavily on FVAP's determinations in its dispositive motion. *See* Document 47, Plaintiff's Motion for Summary Judgment, at pp. 4-5 and Exhibit K (Declaration of FVAP Director Robert H. Carey Jr.).

FVAP's survey of Legislative Initiatives assigned numerical values to certain performance criteria with respect to State election laws. *See* Exhibit 3, May 3, 2010 e-mail from FVAP Acting Deputy Director Paul Mendez, along with two attachments: (i) 2009-2010 Legislative Initiatives; and (ii) State-by-State Success Index. Among the States' performance criteria evaluated by FVAP were the following factors, each of which was assigned a numerical weight:

a. 45 Day Transit Time

b. Electronic Transmission of ballots

c. Provision for a Federal Write-in Ballot ("FWAB")

d. Provision for Late Registration

e. Provision for Emergency Authority

f. Elimination of Requirement for Notary/Witness for absentee ballots

g. Provision for voters who never resided in the United States

See Exhibit 3, 2009-2010 Legislative Initiatives, Table 5, State Scoring – Initiatives and Weights.

FVAP assigned States separate numerical ratings for: (i) their uniformed services score; and (ii) their overseas non-military citizens score. FVAP referred to the average of these two scores as a particular State's "Total UOCAVA" score. FVAP classified States with a Total UOCAVA score of 75% or higher as "Successful." FVAP rated States with a Total UOCAVA score of 50% to 74.9% as "Partially Successful," and those with scores below 50% as "Not Successful."

FVAP assigned Virginia's Legislative Initiatives a Total UOCAVA score of 76.5%, meaning that in FVAP's eyes, Virginia's Legislative Initiatives were "Successful," a standard realized by only fourteen of 51 other jurisdictions (the 50 States plus the District of Columbia). *See* Exhibit 3, p. 5 (unnumbered page 5), and Table 6, State-by-State Index. Moreover, just one day after FVAP advised the Defendants of their "Successful" Legislative Initiatives based on Virginia's 76.5% score, FVAP sent another e-mail to the Defendants advising that FVAP had updated Virginia's score. See Exhibit 4, May 4, 2010 e-mail from Kathleen McDonnell at FVAP to the Virginia State Board of

Elections. In that communication, FVAP reported that Virginia's updated Total UOCAVA score was 85.5%, a rating exceeded by only six of the 51 jurisdictions analyzed by FVAP. *See* Exhibit 3, Table 6 (only DE, IA, MS, NM, ND, and SC rated higher than Virginia).

II. Argument

The Plaintiff's Motion for Permanent Relief should be denied for two reasons:

A. Court's Order was a Final Order

First, the Court's October 15, 2009 Final Order is just that: a *final* order, ending the case. With regard to the specific point addressed by the Plaintiff in their latest motion – dealing with future UOCAVA compliance – the Court expressly deferred that issue to the parties. Had the Court intended to reserve jurisdiction over that issue, it would have so provided. It did not. Hence, because the Court's Final Order disposed of all of the issues of which the Court took cognizance, the Court should deny the Plaintiff's Motion for Permanent Relief.

B. Amendments to Federal Law and Virginia Law Make Relief Unnecessary

Second, the case at bar arose as the result of Virginia's treatment of certain absentee ballots from UOCAVA voters during the 2008 General Election. Necessarily, Virginia's election officials during that election were obliged to follow then-effective Virginia law, and then-effective federal law. Today, both Virginia law and federal law have substantially changed. Virginia's recent Legislative Initiatives were summarized above. As the Court is aware from earlier briefing in this matter, federal law was also substantially changed by enactment of amendments to UOCAVA, known as the Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123

Stat. 2195, 2318-2335 (2009) (the "MOVE" Act), which was signed into law on October 28, 2009, shortly after the Court's Final Order. The MOVE Act spurred States to adopt procedures designed to foster compliance with UOCAVA – which is precisely what Virginia did. Thus, the federal and State laws in effect today are substantially different from the laws in effect when this lawsuit was filed. The Plaintiff's Motion for Permanent Relief is predicated on a now-extinct statutory scheme which was substantially modified for the express purpose of complying with UOCAVA.

The Plaintiff's request that the Court require training for local electoral officials is unnecessary because Virginia law already requires such training. *See* Va. Code § 24.2-106 ("At least one member of the electoral board shall attend an annual training program provided by the State Board [of Elections]"). That training will of course include instruction in Virginia's recent Legislative Initiatives as well as UOCAVA. Similarly, the Plaintiff's request that the Court require the Defendants to contact the Plaintiff if local electoral officials fail to send out absentee ballots in timely fashion, in order "to establish an alternative plan that allows these [UOCAVA] voters sufficient time to vote by absentee ballot," is also unnecessary because Virginia law already provides a remedy for that situation. *See* Chapter 449, § 24.2-709(B)(iii) (late-received absentee ballots shall be counted if timely applied for but not sent to absentee voters 45 days before election). That subsection in effect codified this Court's holding in the case at bar, which required that Virginia count late-received UOCAVA ballots timely requested but not timely sent. Last, there is no need to impose a reporting requirement on the Defendants with regard to UOCAVA compliance because there is no reason to think that Virginia's electoral officials will not comply with UOCAVA or with Virginia's new Legislative Initiatives in

the future. *See, e.g., Blackwell v. Thomas*, 446 F.2d 443, 445-46 (4th Cir. 1973) (refusing to hypothesize that local officials will not comply with a law amended to correct a legal deficiency).

Finally, the Defendants' position in this litigation has all along been that UOCAVA did not prescribe a minimum number of days prior to a federal election for mailing absentee ballots to UOCAVA voters. The Court, however, held that UOCAVA did imply such a time deadline. *See* Memorandum Opinion, Document 57, pp. 10-13. That issue has now been conclusively resolved by the MOVE Act, which prescribes that States must mail absentee ballots at least 45 days before primary, general, and special elections for federal office. Thus, Virginia electoral officials are now for the first time operating under clear statutory (as well as judicial) guidance on that point, and should therefore be permitted to conduct the 2010 federal election and future federal elections under the new Legislative Initiatives and free from interference or oversight by the Plaintiff.

III. Conclusion

Because the Court's Final Order ended this case, there is no basis upon which to order relief as requested by the Plaintiff.

Moreover, and in any event, Virginia's 2010 Legislative Initiatives bespeak an obvious and sincere interest in complying with UOCAVA and the MOVE Act. FVAP rated Virginia's Initiatives as "Successful," a fact which militates strongly in favor of permitting Virginia's officials to administer federal elections free from federal control. Virginia requires training of electoral officials, and provides for counting UOCAVA

ballots that are timely requested but not timely sent. Accordingly, and for all of the reasons set forth above, the Court should deny the Plaintiff's Motion.

JEAN CUNNINGHAM, *et al.*

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Certificate of Service

I certify that on May 14, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to:

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