

STEPHEN N. ABRAMS

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IN THE

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COURT OF APPEALS

v.

*

OF MARYLAND

LINDA H. LAMONE, *et al.*

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Case No. 142

*

SEPTEMBER TERM, 2005

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MOTION TO MODIFY ORDER

Respondents Linda H. Lamone, the State Administrator of Elections, and the State Board of Elections (“State Board”), through their undersigned attorneys, pursuant to Rule 8-605, hereby move to modify that portion of this Court’s Order dated August 25, 2006, which provides that the circuit court enter an order directing that “the name of Thomas Perez be removed from the ballot at the September 2006 primary election.”

For the reasons presented herein, and as previously explained in the State Board’s brief, *see* Brief of Respondents at 11-12, the State Board advises that it is impossible to remove Mr. Perez’s name from the ballot by September 12, the date of the primary election, because there is simply not enough time in the fifteen days remaining before the primary for the 24 local boards of elections to prepare an entirely new ballot. The State Board requests that the Court modify its Order to require the State Board to provide direction to the local boards to: 1) conspicuously post notices in each polling location informing voters of the Court’s order regarding Mr. Perez’s lack of qualifications for the office of Attorney General and that any votes cast for Mr. Perez will not be counted; and 2) provide the same standard

of notice to voters who will be using paper ballots.

1. Mr. Abrams does not object to the relief sought in this motion. An attempt was made to obtain the consent of Mr. Perez but his counsel could not be reached.

2. Section 9-208 of the Election Law Article provides that if there is “an error or a change in circumstances” requiring a change in ballots after they have been prepared *and* “[i]f there is sufficient time,” the ballots are to be reprinted. If there is *not* sufficient time, local boards of elections are required to provide notification to voters of the change or correction and also to “take all reasonable steps to notify all candidates on the ballot and any other persons whom the local board[s] consider[] appropriate.” Md. Code Ann., Elec. Law § 9-208(b)(3), (c).

3. Voters in Maryland who appear in person at their ward or precinct on election day vote on a Direct Recording Electronic (DRE) voting unit. Voters who cast an absentee ballot use Optical Scan (OS) printed paper ballots.

4. Each of the 19,000 DRE voting units must be loaded with a data memory card particular to one of the 572 ballot formats used in the State and must be prepared and tested. This preparation requires a number of steps to insure the security and accuracy of each unit. The ballots are proofread by State Board staff and then sent to the local elections boards for proofing, and posted for five days for public review and comment. Audio ballots are recorded to permit access for the visually impaired voter. Moreover, each of the units must, by regulation, undergo “preelection logic and accuracy testing,” which must be completed

10 days before the election. COMAR 33.10.02.14-15. In addition, public demonstration of the logic and accuracy testing must be held at least 10 days before an election. *See* COMAR 33.10.02.16. After the public demonstration, each unit is sealed with tamper tape. Much of this work had already been completed as of August 25, the date of this Court's Order.

5. To remove Mr. Perez's name from the ballot would require that the entire process be repeated, including reprogramming the State Board data base for each county, generating new ballot styles for each county, and allowing time for state and local election officials to proof the ballot styles (a process that usually takes two weeks); unloading and unsealing all units; taking out the data cards; erasing the data on the cards; burning a new data base on each card; conducting logic and accuracy ("L & A") testing on each unit; sealing each with tamper tape; and delivering each to the polling places. Each of these steps is time-consuming. For example, the Baltimore County Board of Elections estimates that it would take 3 days to erase the data on the cards and another 3½ days to burn new cards; Baltimore City estimates the erase and burn process will take 5 days. These steps would occur at the same time that local election officials are packing election day supplies for the polling places, entering last minute voter registration submissions in order to update the precinct registers and working with election judges.

6. L & A testing is the most time-consuming of the preparation steps. Montgomery (3126 units), Prince George's (2593 units), Baltimore (2658 units), Anne Arundel (1752 units), Howard (1021 units), and Harford (838 units) counties and Baltimore

City (1932 units), estimate they would need to conduct L & A testing for 24 hours a day until September 12 to try to complete the tests on each machine, and there are an insufficient number of employees to do so for every unit. Moreover, the units are currently scheduled to be delivered to the polling places a week before the election as a result of existing commercial shipping contracts. Attempting to complete this process under such circumstances presents significant hurdles to assuring that sufficient machines will be available to make voting practical and possible.

7. Absentee and provisional ballots present a different problem. By statute, absentee ballots must be identical to the ballot used in the absentee voter's polling place. Md. Code Ann., Elec. Law § 9-213. Absentee ballots are printed on paper and tabulated using an optical scan (OS) reader. Approximately 250,000 Democratic absentee and provisional ballots have been printed with Mr. Perez's name listed as a candidate. The company with which the State Board has contracted for printing advises that under the most optimistic schedule, new absentee ballots would not arrive until election day. The OS reader cannot be reprogrammed to ignore Mr. Perez's name without creating errors. Thus, absentee ballots with Perez's name on them will have to be used or else no absentee voting will take place.

8. Approximately 16,000 Democratic absentee ballots have already been mailed. The State Board proposes to notify these voters by mail of the Court's order regarding Mr. Perez's lack of qualifications for the office of Attorney General and that any votes cast for

Mr. Perez will not be counted, and to include a similar notice to accompany absentee ballots mailed from this point forward.

WHEREFORE, the State Board requests that the Court modify its order to permit the relief sought.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 28th day of August 2006, a copy of the foregoing Motion to Modify Order was sent by facsimile and email and served by first-class mail on:

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