

State of Wisconsin\Government Accountability Board

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JUDGE THOMAS CANE
Chair

KEVIN J. KENNEDY
Director and General Counsel

October 6, 2008

Susan Edman, Executive Director
City of Milwaukee Board of Election Commissioners
Room 501, City Hall
200 East Wells Street
Milwaukee, WI 53202

Request for Formal Opinion of the Government Accountability Board Relative to "HAVA Checks" and Special Registration Deputies

Dear Ms. Edman:

This letter is in response to your inquiry that our office received on October 3, 2008, and that is excerpted or summarized below, to wit:

We seek your formal legal opinion on two election issues relating to the upcoming presidential election. First, as you know, pursuant to Wis. Stat. § 6.48, in the City of Milwaukee any individual may challenge the registration of any elector on the Wednesday before the election. A challenge may also be made at the polling place on Election Day. Our question is whether, in the opinion of the Government Accountability Board (GAB), the fact of a "HAVA mismatch" is sufficient grounds to disqualify an elector and remove his or her name from the voter list.

Our second question relates to special registration deputies. Just this week, we were provided with a copy of the April 3, 2008 memo to GAB staff written by GAB Legal Counsel George Dunst, in which he concludes that, despite the language of Wis. Stat. § 6.26, any individual who has been convicted of a felony and who has not been pardoned is not eligible to act as an election official. Election officials, according to the memo, include special registration deputies.

We seek your formal legal opinion as to whether the fact that an elector has been registered by an SRD who is an unpardoned felon, although a qualified elector, would invalidate that elector's registration.

With respect to your first question – "whether, in the opinion of the Government Accountability Board (G.A.B.), the fact of a 'HAVA mismatch' is sufficient grounds to disqualify an elector and remove his or her name from the voter list" – the Board's answer is an unqualified no.

A HAVA mismatch occurs when voter information entered in the Statewide Voter Registration System (SVRS) is compared with similar information in the driver record files maintained by the Wisconsin Department of Transportation or information maintained by the Social Security Administration and information related to the voter's name, date of birth,

drivers license or social security number does not match in whole or part. A mismatch is not sufficient grounds to disqualify an elector and remove his or her name from the voter list, or provide a basis for a challenge to the elector's ballot at a polling place, or to challenge an elector's registration under § 6.48, Stats.

Because no provision in the Help America Vote Act, nor in subchapter II of Chapter 6 of the Wisconsin statutes (governing voter registration), directs or authorizes the Board to change a voter's status from eligible to ineligible because of the failure of the voter's registration data to match comparable data in other designated data bases, the question becomes whether a mismatch constitutes cause to challenge an elector's voting eligibility under Wisconsin's statutes and the Board's challenge rule.

Wisconsin's statute governing challenges by an elector to the voting eligibility of another elector is § 6.925, Stats., reading in pertinent part as follows:

6.925 Elector making challenge in person. Any elector may challenge for cause any person offering to vote whom the elector knows or suspects is not a qualified elector. If a person is challenged as unqualified by an elector, one of the inspectors may administer the oath or affirmation to the challenged elector under s. 6.92 and ask the challenged elector the questions under that section which are appropriate to test the elector's qualifications. In addition, one of the inspectors shall administer the following oath or affirmation to the challenging elector: "You do solemnly swear (or affirm) that you will fully and truly answer all questions put to you regarding the challenged person's place of residence and qualifications as an elector of this election"; and shall then ask questions which are appropriate as determined by the board, by rule, to test the qualifications of the challenged elector. . . .
(Emphasis supplied)

Pursuant to that statute, the Elections Board (now Government Accountability Board) adopted a rule, chapter EIBd 9 (now chapter GAB 9), to administer challenges to ballots (voter eligibility) at Wisconsin elections. GAB 9.02, Wis. Adm. Code, is the subsection of the Board's rule that establishes the six criteria that are a basis for "cause" to challenge an elector's eligibility to vote at a Wisconsin election, and reads as follows:

GAB 9.02 Elector making challenge in person.

Any elector may challenge for cause any person offering to vote whom the elector knows or suspects is not a qualified elector. Any elector who abuses the right to challenge under s. 6.925, Stats., may be subject to sanctions available to inspectors under s. 7.41 (3), Stats. An elector has cause to challenge a person as being unqualified to vote if the challenging elector knows or suspects that any one of the following criteria apply to the person being challenged: 1) the person is not a citizen of the United States; 2) the person is not at least 18 years of age; 3) the person has not resided in the election district for at least 10 days; 4) the person has a felony conviction and has not been restored to civil rights; 5) the person has been adjudicated incompetent; 6) the person has voted previously in the same election.

(Emphasis supplied)

Each of the six criteria constituting cause for a challenge to a voter's eligibility under the rule are derived from Wisconsin's statutes establishing qualification (and disqualification) to vote in a Wisconsin election, §§ 6.02, 6.03, Stats.

6.02 Qualifications, general.

(1) Every U.S. citizen age 18 or older who has resided in an election district or ward for 10 days before any election where the citizen offers to vote is an eligible elector.

(2) Any U.S. citizen age 18 or older who moves within this state later than 10 days before an election shall vote at his or her previous ward or election district if the person is otherwise qualified. If the elector can comply with the 10-day residence requirement at the new address and is otherwise qualified, he or she may vote in the new ward or election district.

6.03 Disqualification of electors.

(1) The following persons shall not be allowed to vote in any election and any attempt to vote shall be rejected:

(a) Any person who is incapable of understanding the objective of the elective process or who is under guardianship, unless the court has determined that the person is competent to exercise the right to vote;

(b) Any person convicted of treason, felony or bribery, unless the person's right to vote is restored through a pardon or under s. 304.078 (3).

(2) No person shall be allowed to vote in any election in which the person has made or become interested, directly or indirectly, in any bet or wager depending upon the result of the election.

(3) No person may be denied the right to register to vote or the right to vote by reason that the person is alleged to be incapable of understanding the objective of the elective process unless the person has been adjudicated incompetent in this state

Under this statute, a mismatch is not one of the criteria for being qualified to vote or for being disqualified to vote. Consequently, a mismatch was not made one of the criteria for challenging an elector's eligibility to vote under the Board's rule, GAB 9.02. Therefore, a mismatch is not the basis for a challenge to an elector's ballot at any polling place in Wisconsin or for a challenge to an elector's registration under § 6.48, Stats.

The Government Accountability Board, in determining that it will only require HAVA checks beginning on August 6, 2008, also declined to direct clerks to make any change in a voter's eligibility status because of a mismatch¹. The Board found that the failure of two databases to match information with respect to a particular voter does not necessarily mean that that voter is not eligible to vote in Wisconsin or even that that voter is not eligible to vote from the address shown in the state voter registration database. A mismatch only means that data in two or more systems do not match. There are many possible reasons why the data in two different systems do not match besides the reason that the voter has changed his or her residence to a location outside of the municipality, or is otherwise ineligible to vote. Data entry error (in either system) and voter application error are two common, prevalent reasons. In fact, the non-reliability of data matches as a basis for potentially disenfranchising a voter may explain why neither Congress nor the Wisconsin Legislature specifically provided that a

¹ Under § 6.325, Stats., "No person may be disqualified as an elector unless the municipal clerk, board of election commissioners or a challenging elector under s.6.48 demonstrates beyond a reasonable doubt that the person does not qualify as an elector or is not properly registered."

mismatch requires that the appropriate election official shall change the elector's registration from eligible to ineligible status, which action either Congress or the Legislature could have taken in its applicable legislation.

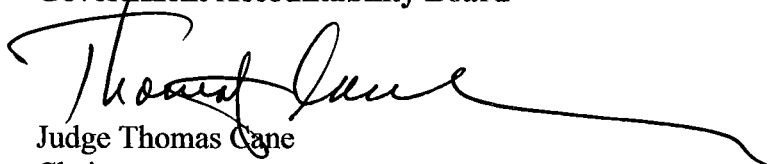
The Board's response to your second question – "whether the fact that an elector has been registered by an SRD who is an unpardoned felon, although a qualified elector, would invalidate that elector's registration" – is also an unqualified no. The fact that an elector has been registered by a special registration deputy (SRD) who is an unpardoned felon will not, of itself, invalidate that elector's registration. If the elector is a qualified elector who has duly completed a registration application, that registration is unaffected by the special registration deputy's lack of qualification. The special registration deputy is considered to be a de facto election official acting under the "color of office" or "color of law." Under doctrine established in those circumstances, the validity of actions taken by a person who has been duly appointed to an office, acting under the authority of that office, is unaffected by the ineligibility of the officeholder to that office. A more common example of this doctrine would be the validity of votes cast by an elected or appointed official who is later found to have been ineligible to hold his or her office (including at the time the vote was cast). Those votes are still valid notwithstanding that ineligibility.

Because the special registration deputy, in the circumstances of your request, was duly appointed under the belief that he or she was entitled to hold the office, that person is considered a de facto officer, which is defined in 43 Am Jur, Public Officer, Sec. 471, pp 225, 226, as follows:

A person is a de facto officer where the duties of the office are exercised . . . (2) under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like; (3) under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public; (4) under color of an election or an appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such.

In general, "the acts of a de facto officer are valid as to third persons and the public and third persons are entitled to rely on the actions of de facto officers without the necessity of investigating their title." American Jurisprudence 2nd Ed., "Public Officers and Employees" at s.243, citing cases; and "The de facto officer doctrine confers validity upon acts performed by a person acting under the color of official title, even though it is later discovered that the legality of that person's appointment is deficient." (*Ryder v. United States* 515 U. S. 177,132 L Ed 2d 136, 115 S. Ct. 2031, 1995)

Government Accountability Board



Judge Thomas Cane
Chairperson

CAPTION:

The fact information in a voter's registration records do not match similar information in other databases is not sufficient grounds to disqualify an elector and remove his or her name from the voter list and does not provide a basis for a challenge to the elector's ballot under § 6.925, Stats., or under chapter GAB 9, Wis. Adm. Code, or to the elector's registration under § 6.48, Stats. The fact that an individual has been registered by a special registration deputy who, although a qualified elector, is an unpardoned felon, does not invalidate that individual's registration.