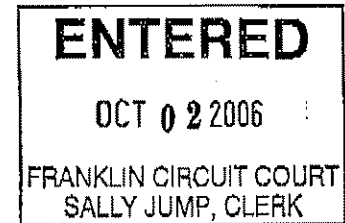


COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
CIVIL BRANCH
II DIVISION



COMMONWEALTH OF KENTUCKY
ATTORNEY GENERAL GREGORY STUMBO

PETITIONER

V.

Case No. 06-CI-610

COMMONWEALTH OF KENTUCKY
STATE BOARD OF ELECTIONS

RESPONDENTS

and

COMMONWEALTH OF KENTUCKY
SECRETARY OF STATE

ORDER DENYING INJUNCTION AND GRANTING

PARTIAL SUMMARY JUDGMENT

This case is before the Court on Petitioner and Respondents' reciprocal Motions for Summary Judgment.

Facts

The facts in this case are not in dispute. In August of 2005, the Executive Director of the State Board of Elections, Sara Ball Johnson, began discussing the possibility of participating in a "state data match" (or, "pilot project") with South Carolina and Tennessee. These states were motivated by a desire to clean up their voter rolls by identifying individuals who were registered to vote in more than one state. Kentucky, South Carolina, and Tennessee were advantageously situated to work with each other because they shared both geographical proximity and were among only five states that used a nine-digit social security number to distinguish among unique voters. The idea behind the "pilot project" would be to use various fields in a computer program,

among them the nine-digit social security number, to compare voters on the three states' voter rolls and isolate those individuals who were registered in more than one state. The states reached no agreement as to what each state would do with the information the matching program produced.

Secretary Grayson informed the State Board of Elections of the August conference call and the "proposal to participate in a matching of voter registration data with Tennessee and South Carolina." September 20, 2005 State Board of Elections Meeting Minutes. No member of the Board moved for a formal vote, and no formal vote was taken on the proposal.

In the months following the meeting, representatives from Kentucky sent formatted voter data to representatives in South Carolina. The South Carolina Secretary of State's office used a program to "match" the Kentucky voter rolls with those of Tennessee and South Carolina. After running the program, the South Carolina computer programmers sent two files back to Kentucky containing the voters who were registered in both Kentucky and either Tennessee or South Carolina. In February of 2006, Secretary Grayson updated the Board of Elections on the progress of the voter matching program. The record reflects that the board members were in collective agreement about participating and, again, no member moved for a formal vote.

In April of 2006, Kentucky, using the information provided by South Carolina, had identified those people on the voter rolls who were registered more recently in either South Carolina or Tennessee. On April 10th and 11th, the Secretary of State's office removed 2,110 voters who were registered in both Kentucky and South Carolina and 5,995 who were registered in Kentucky and Tennessee. These voters were placed in a

"year-to-date" file available to county clerks to help clarify a voter's status during election day challenges. Ms. Johnson reported the voters' removal at the April 18th, 2006 meeting of the State Board of Elections. No notice was given to these voters prior to the May 16th primary.

After the Secretary of State's office issued a press release touting the pilot project as a way of maintaining better voter rolls, the Attorney General's office filed an Open Records Request for all records pertaining to this program. Upon receipt of the records, this suit, seeking a Declaration of Rights and a Permanent Injunction, was filed. The Secretary of State's office sent notice to the 8,105 removed voters in August.

Applicable Law

Petitioners are seeking a permanent injunction enjoining the Secretary of State and the State Board of Elections to restore the voters removed from the rolls as a result of the pilot project. They seek another injunction prohibiting the Secretary and the Board from conducting a purge of voters due to a change of residence without following the statutory requirements of KRS 116.112. They also seek a declaration of rights. Both parties have moved for summary judgment.

The Court grants summary judgment when no issues of material fact exist for which the law provides relief. CR 56.03. Only when it appears from the facts that the nonmoving party cannot produce evidence at trial in favor of a judgment on his behalf should summary judgment be granted. Steelevest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). The record must be viewed in light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. Id. "The inquiry should be whether, from the evidence of record, facts exist

which would make it possible for the non-moving party to prevail.” Welch v. Am. Publ’g Co. of Ky., 3 S.W.3d 724,730 (1999).

This Court “may make a binding declaration of rights” when the parties have presented an actual controversy to the Court. KRS 418.040. This rule requires only an “actual controversy,” thus, the most elemental requirements of justiciability are all the parties must show the Court. The parties in this case have satisfied the requirements of justiciability: the case is ripe and is not moot.

Analysis

Essentially, the Secretary of State and Attorney General disagree on what statute governs the Secretary and the State Board of Elections when they endeavor to “clean up” the voter rolls by matching interstate databases to identify those voters registered in more than one state. The Secretary of State and the Board believes the program is legal under KRS 116.0452 which authorizes removal of a registered voter “upon request of the voter.” KRS 116.0452. They argue that registering to vote in another state amounts to an implicit, if not explicit, “request” to be removed from Kentucky’s voter rolls. They cite to a U.S. House of Representatives Committee Report finding that “a ‘request’ by a registrant would include actions that result in the registrant being registered at a new address, such as registering in another jurisdiction....” Respondents’ Motion for Summary Judgment, p. 16.

The Attorney General, however, believes that this sort of matching program is governed by KRS 116.112, outlining the requirements for a “voter registration purge program.” KRS 116.112(1). This program is designed to provide the State Board of Elections another vehicle by which to maintain accurate voter rolls by helping “identify

voters whose addresses may have changed,” but also provides the voters with more notification of their imminent purgation from the voter rolls in their county. This program uses “the change-of-address information supplied by the United States Postal Service thorough its licensees or other sources” to identify those voters who may be inaccurately registered. The statute, however, prohibits removing a voter from a county’s voter rolls unless the Board first provides notice and the voter confirms in writing a change of address or fails to respond to the notice and then fails to vote in two general elections for federal office following notice. KRS 116.112(3) & (4). The Attorney General argues that the interstate database matching program constitutes “other sources” analogous to “information supplied by the USPS” and therefore the Board must provide voters with the notice protections outlined in KRS 116.112.

At the outset of our decision, it is important to note that we believe malicious or partisan intent motivated neither the State Board of Elections nor the Secretary of State. Rather, we believe all parties in this case are striving to carry out their various constitutional and statutory mandates. The State Board of Elections is statutorily required to supervise the registration and purgation of the voters within Kentucky. We believe the “pilot program” was an innovative way to work with other states to produce more accurate voter rolls. That innovation should be commended.

However, it is clear to this Court that the program was an effort to systematically purge voters from the registration rolls. We do not intend that to connote a nefarious intent, but rather to say that the Board and the Secretary created a system by which thousands of voters were removed from Kentucky’s election rolls. This was done through a process of matching data formatted in various ways using various computer

programs across various platforms. The resulting “match” was used to justify a voter’s purgation from Kentucky’s voter rolls. This “match” is not a “request of the voter,” as the Respondents argue. Rather, the “match” constitutes “other information” as used in KRS 116.112. This idea is clearly enunciated in the Amicus Curiae brief:

The information on which Kentucky relied was simply a list of matches that did not contain any specific request for removal of any specific voter. The program was carried out on the assumption that the names matched by running a computer program on separately compiled databases represent the same person, and therefore, a primary record must exist signed by that voter. The Respondents conclude then the match should be construed to be a request for removal from the voter registration list. To the contrary, the match only provides the inference of a request. It is not proof, much less the evidence of a request for removal.

These matches are, indeed, “inferences of a request.” No doubt, these inferences should be rigorously pursued by the Board and the Secretary, but these matches are “other information” and not a “request of the voter.” Therefore, the State Board of Elections and the Secretary of State must conduct future purges of voter rolls based on such database matching according to the dictates of KRS 116.112.

Before readers begin to believe this Court to be Luddites, we will reiterate that we believe database matching to be a necessary tool to maintain accurate voter registration information in our increasingly mobile world. However, the Court notes that at least 259 purged voters showed up to vote in Kentucky during the May primary. This indicates up to a 10% error rate in Kentucky’s first attempt to match interstate data with our voter rolls.¹ Petitioner’s Motion for Summary Judgment, p. 12. No doubt this alleged error rate will decrease as states gain increasing experience with database matching, but this Court believes that the notice provided by KRS 116.112 will drastically reduce the

¹ 8,105 voters purged x 0.31 voter turnout = 2,512.85. 2,512.85 ÷ 259 purged eligible voters = 10.3% error rate.

number of purgation errors before elections and confusion at the polls on Election Day. So, beyond being statutorily required because database matching information qualifies as "other information" under KRS 116.112, this Court approvingly notes that the notice the Respondents have agreed to provide in the future is a good idea.

As to the Petitioner's complaint that the Secretary of State acted without approval from the State Board of Elections, we find this argument to be without merit. Whether it would be *advisable* to seek a formal vote from the Board before proceeding to purge over 8,000 voters from Kentucky's rolls is not the issue. Rather, the question is whether a formal vote is necessary. It is not. KRS 61.805(3) defines "action taken" by a public agency to mean "a collective decision, a commitment or promise to make a positive or negative decision, or an actual vote by a majority of the members of the governmental body." Clearly, there are more ways than one for a committee to take action than by formal vote. The minutes of the State Board of Elections clearly reflect that the Board reached a "collective decision" to proceed with the interstate database matching program. Thus, the Secretary's actions were not an unconstitutional, *ultra vires* exercise of power. On this point, the Attorney General's Motion for Summary judgment fails.

In light of our holding that the purgation of voters based on the fruits of any interstate database matching efforts must comply with KRS 116.112, the question regarding what to do with the 8,105 already-purged voters remains. The Secretary of State and Board of Elections has done much by voluntarily notifying the purged voters in August of the Board's action. However, compliance with the dictates of KRS 116.112 requires the Board and the Secretary to take additional action. Based on our reading of KRS 116.112, after sending notice to the purged voters, the Board must place these

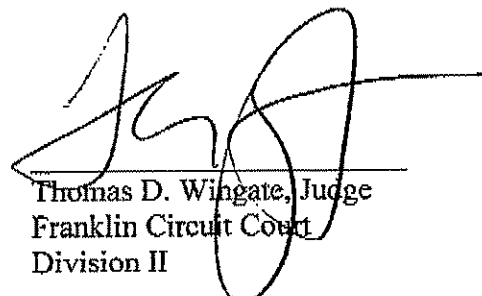
voters on an inactive list, pursuant to KRS 116.112(5) for at least two general elections for Federal office.

At this point, we believe an injunction ordering such compliance to be unnecessary. We believe the Board and Secretary will do what is necessary to act in accordance with our Declaration of Rights by Election Day. Furthermore, we believe a permanent injunction requiring the Board and Secretary's compliance with KRS 116.112 in the future would be not only unnecessary, but also patronizing, as we have full confidence that the Respondents will conform their future behavior to what the law requires now that the law regarding how to conduct a purgation of voters based on database matching has been clarified.

As stated above, the facts are not in dispute. No issue of material fact exists in this case. Thus, based our holding that KRS 116.112 governs the purgation of voters who have been "matched" through a database matching program, Petitioner's Motion for Summary Judgment is GRANTED in part and DENIED in part and Respondent's Motion for Summary Judgment is DENIED. The Petitioner's Motion for Permanent Injunction is DENIED.

This is a FINAL and APPEALABLE order and there is NO JUST CAUSE for delay.

SO ORDERED, this 2 day of October, 2006.



Thomas D. Wingate, Judge
Franklin Circuit Court
Division II

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