STATE OF NEW YORK
NEW YORK STATE BOARD OF ELECTIONS

In the Matter of:

ROBERT J. McFEELEY,

Complainant,

-v-

HAVA Complaint
No. 08-01
Determination

COMMISSIONERS OF THE NEW YORK
CITY BOARD OF ELECTIONS, AND
EXECUTIVE DIRECTOR MARCUS CEDERQVIST

Respondent.

BACKGROUND

With the passage of the Help America Vote Act, ("HAVA"), Public Law 107-252, 42USC §15301et sec, Congress required that each state establish a Computerized Statewide Voter Registration List (42 USC §15483) on a state level, interactive in nature and centralized. In 2006, The United States Department of Justice, dissatisfied with the pace of New York's implementation of HAVA generally, brought an action in the United States District Court for the Northern District of New York, seeking, *inter alia*, New York's compliance with the federal requirement of a centralized voter registration data base (See, *United States of American vs. New York State Board of Elections, et al.*, 06-CV-0263). On June 2, 2006, the United States District Court (Sharpe., J.) issued a Remedial Order in that action ordering, *inter alia*, that the State Board of Elections file with the Court a detailed schedule for development and implementation

of the NYSVoter permanent statewide voter registration list. The Court further ordered the State Board of Elections to file proposed implementation regulations for review by the Department of Justice and the approval of the Court.

Separate and apart from the provisions of HAVA and the related provisions of New York State Law promulgated to carry out such provisions of HAVA, there existed prior to HAVA provisions of both federal and state law relative to the processing of voter registration records and maintenance of the list of eligible voters in each county of New York State, including the processing of duplicate registrations. Key among these provisions are the National Voter Registration Act of 1993 (NVRA) and the related provisions of state law enacted to comply with the federal mandates of NVRA. Title III of HAVA, and its requirements relative to NYSVoter, requires that the State Board and local boards of elections continue to carry out the applicable provisions of NVRA relative to determining a voter's eligibility to remain on the statewide voter registration list, including the processing of duplicate registrations, the same as were previously mandated.

The creation of the NYSVoter list was delegated to the State Board of Elections by the Legislature in Chapter 24 of the Laws of 2005 (Election Law §5-614), as was the task of promulgating administrative regulations with respect to the creation of the system and its maintenance. See Election Law §5-614(1), which provides that there shall be one official record of the registration of each voter, that such record shall be maintained in an interactive, statewide, computerized, voter registration list, that such statewide voter registration list shall constitute the

official list of voters for the state of New York, and that such list shall be in the custody of the state board of elections and administered and maintained by the State Board of Elections, subject to rules and regulations promulgated by the State Board of Elections. Furthermore, local boards of elections are mandated to comply with all the rules and regulations promulgated by the State Board of Elections pursuant to this statute.

The statewide voter registration list serves as the official voter registration list for the conduct of all elections in the state which are administered by local boards of elections (Election Law §5-614(3)(h).

The list maintenance required of the State Board and the local boards of elections must be conducted to ensure that the name of each registered voter appears in the statewide voter registration list; only names of persons who are not registered or who are not eligible to vote are removed from such list; and that the prior registrations of duplicate names are removed from such list (§5-614(12)(b)).

Pursuant to §5-614(14), NYSVoter shall ensure that voter registration records in the State are accurate and are updated regularly, including a system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters, as provided for by the Election Law.

Additionally, Congress required that states provide an administrative complaint procedure whereby citizens could grieve alleged violations of the various state and/or local government obligations under Title III of HAVA, including the obligations to develop, maintain and verify the accuracy of such statewide voter database (42 USC §15512)

The Legislature also provided, in its 2005 implementation of HAVA, that any person might bring a challenge against any board of elections to compel the removal of an ineligible voter from the list of eligible voters or to compel the correction of a registration record in the case of a voter wrongfully canceled or removed from the statewide, single, official voter registration list (Election Law §5-614{10}).

In furtherance of its obligations under 42 USC §15512 and Election Law §5-614, the New York State Board of Elections promulgated 9 NYCRR Part 6216 ("Help America Vote Act Administrative Complaint Procedure").

On April 18, 2008 Robert J. McFeeley ("Complainant") availed himself of his rights under 9NYCRR Part 6216 by means of a HAVA Formal Complaint received by the New York State Board of Elections ("State Board") on April 21, 2008 (Hearing Exhibit 1). That complaint asserted a violation of HAVA §303(a)(2)(B)(iii), the obligation to ensure that "...duplicate names are eliminated from the computerized list" (Ex. 1, p. 3). The complaint referenced as Attachment A a list of purported duplicate voters in Richmond County, one of the counties within the jurisdiction of the New York City Board of Elections ("City Board"). The complaint further

asserted a violation of HAVA §303(a)(4)(A), the obligation to implement a systematic file maintenance procedure which makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters (Ex. 1, p. 4). That allegation was supported by Attachments B and C and a CD.

The relief sought by the Complainant was threefold:

1) Compliance with the law;

2) Removal of all duplicate names from the voter rolls; and

3) Removal of voters who do not live at addresses listed by the BOE. (Ex. 1, p. 4)

On April 24, 2008, the State Board issued a Notice of Acceptance of the Complaint to Complaint (Ex. 3) and on that date the time, 90 days, within which a determination must be issued by the State Board began to run pursuant to 9 NYCRR §6216.2(c)(4). On May 5, 2008, the State Board received Proof of Service of the Complaint upon the City Board (Ex. 2) indicating that the Complaint had been sent to the City Board by Certified Mail on April 29, 2008, and received by the City Board on April 30, 2008, in accordance with the time frames set forth in 9 NYCRR §6216.2(c)(4).

On May 13, 2008, the City Board submitted its Response to the Petition (Ex. 4) which Response was received by the State Board on May 14, 2008. The Response indicated that it was also sent to Complainant (Ex. 4, p.5) pursuant to 9 NYCRR §6216.2(c)(4). The Response of the City Board denied each and every allegation contained in the Complaint (Ex. 4, p. 2) and asserted that the City Board conducted its list maintenance functions in accordance with the provisions of

Article 5 of the New York State Elections Law, specifically §§5-210, 5-213, 5-400, 5-402, 5-403 and 5-404. It further referenced Election Law §5-614(4) which it asserted mandates:

> Adding, changing, canceling or removing voter registration records shall only be conducted local boards of elections as provided by this chapter.

The City Board's Response further asserted that 9 NYCRR §6217.5(3) requires that all voter registration activity must be done by a bipartisan team of workers to assure fairness and that all such actions be signed by two staff persons of opposite parties. The City Board's Response further asserted that it had requested confirmation from the State Board of "each county's Board of Elections compliance with the foregoing provisions" and that to date the City Board had not received such written confirmation from the State Board (Ex. 4, p. 2).[1] The City Board's Response continued:

> Accordingly, the Commissioners of Elections in the City of New York have directed this Board's staff to process any potential duplicate voters in accordance with the provision of §5-402 of the Election Law.[2] With the completion activities relating to the February 5, 2008 Presidential Primary, that process is underway. (Ex. 4, p. 3)

The City Board further asserted that in New York City the construction or rehabilitation of buildings does not and should not affect a voter's registration while such voter is temporarily relocated with an intent to return (Ex. 4, p. 3). The Response of the City Board also referenced Election Law §§10-106(1) and 11-200 relating to military and Special Federal Voters

[1]During the Hearing, in response to a question from the Hearing Panel, Counsel for the City Board acknowledged that the State Board had sent the City Board a letter on September 25, 2007, responding to their early correspondence requesting clarification and telling the City Board that to the best of their knowledge the counties are following the proper procedures and setting up by bipartisan teams (Tr. p. 91).

[2]§5-402 entitled, "Cancellation of registration; generally, notice to voter" provides, *inter alia*, that the board of election shall cancel the registration of a voter when he is no longer qualified to vote or as required herein (Para.1); that whenever the board has "reason to believe that a registered voter is no longer qualified to vote, it shall

respectively. The City Board asserted that a "homeless" person need only indicate a cognizable location as his/her permanent residence to be eligible to register and vote (Ex. 4, p. 3). The City Board asserted that it did conduct mail checks in accordance with §4-117 (Ex. 4, p. 4).[3]

On May 22, 2008, a "Response to the NYC Board of Elections Response" was received from Complainant by the State Board (Ex. 5) but no Proof of Service of same was provided by Complainant.[4] The Complainant's Response included additional documentation, specifically a list of purportedly duplicate voters which he had provided the City Board some 4 years ago (Ex. 5, p. 1 and Attachment D to Ex. 5).

A Hearing was held on June 25, 2008, pursuant to a Notice of Hearing dated June 16, 2008 before the Hearing Panel (Ex. 6) pursuant to 9 NYCRR §6216.2(d).

The Hearing was held so that the respective parties might have an opportunity to present documentary evidence and testimony in support of their respective positions (9 NYCRR §6216.2{8}) to assist the Hearing Panel in determining the validity of the Complaint.

EVIDENCE ADDUCED AT THE HEARING

The Hearing testimony of the Complainant was rather brief as he merely referenced the various attachments to his Complaint which were made part of the record. His testimony can not be

---

before cancelling his registration, notify him, ...by first call forwardable mail to the address from which he was last registered that he may contest this claim within 14 days (Para. 2).

[3]The "mail check" requirement to be performed annually not less than 65 nor more than 70 days before the General Election.

[4]9 NYCRR §6216.2 does not provide for such a pleading.

reasonably interpreted as adversarial as he acknowledged that it was not an adversarial proceeding and that he was "offering, hopefully, some solutions" (Transcript of Proceedings of June 16, 2008, pp. 9-10). Complainant further made it clear that he was not representing the Voter Assistance Commission of which he is a member (Tr. pp. 10-11). He offered an anecdotal comment that in his work for the Staten Island Borough President over the years he had seen a good percentage of mail generated using the voter registration data base returned as undeliverable by the Post Office (Tr. pp. 13-14). It was this phenomenon which sparked his interest in determining whether there was "dead wood" in the New York City voter registration rolls (Tr. pp. 13-14). He succinctly stated a key purpose of the HAVA mandated statewide database:

> The Help America Vote Act, also known as HAVA, requires that duplicate names be removed from the Board of Elections database and rolls. It is my understanding that the purpose of this –sorry– of this law is to find duplicate voter registrations when a voter moves from one jurisdiction to another by creating a centralized state-wide database. (Tr. p. 14)

Complainant's Exhibits were essentially lists of potential duplicate voter listings which he created to demonstrate his point from the Richmond County rolls. Attachment A was a list of potential duplicates within one household. It was created using a query sort by address and date of birth with all twins manually eliminated (Tr. p. 15). Some of the purportedly duplicate voters with the same address are listed as members of two parties at the same time (Tr. p. 15). The most prevalent issue is women who have a name change which is not picked up by the Board of Elections (Tr. p. 15). Presumably Cynthia Kosnik born March 17, 1971, and residing at 98 Bay Street, and Cynthia Trocchio born March 17, 1971, residing at the same address, would be an example of this, which names appear on Page 1 of Attachment A. Attachment A also includes

names of individuals with the same birth date at the same address listed twice with two separate dates of registration.

Complainant also testified that the City Board relies *solely* on an August mail check for cleaning up its database, but the mail check card process is ineffective if a family is still living at the address as the child who has moved is not removed from the rolls (Tr. p.15).
Counsel for the City Board argued, but did not produce any evidence in support of such arguments that in addition to the mail check procedure, when the City Board receives information through the NYSVoter system that a voter is registered in another county it sends a notice of intent to cancel (Tr. p. 78). No testimony or documentary evidence was offered by the City Board to refute the Complaint during the Hearing, or in the days following when the record was held open for such evidence. Counsel for the City Board represented that in recent days some 37,000 notices of intent to cancel had been mailed, but there was no testimony to that effect nor was there any competent evidence produced that the voters not responding to the notices to cancel allegedly sent had, in fact, been placed upon inactive status as required by 9 NYCRR §6217.7(5) upon failing to respond.[5] Similarly there was no evidence produced of any compliance with 9 NYCRR 6217.7(5)'s requirement of cancellation in so far as voters whose identity was not in doubt. The record contains only a claim that the City Board is complying with 9 NYCRR §6217.7(5), in so far as the City Board is not willing to rely upon the NYSVoter

[5]Counsel's offer to be sworn was declined in view of the advocate-witness rule, which requires an attorney to withdraw from a case "if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client" (New York Code of Professional Responsibility DR 5-102 [A]; 22 NYCRR 1200.21(a)).(Tr. pp.72-73). Had a competent witness offered such testimony, it would be entitled to the presumption of regularity as well. However, nowhere in this record is there any evidence that the notices allegedly sent were in fact processed by the City Board.

information as being accurate. Therefore it is allegedly sending out notices to cancel under 9 NYCRR §6217.7 (5), without differentiating between the treatment of voters who are identified as the same voter in both the "to" and "from" counties and voters for whom such a determination can not be made based upon the NYSVoter information, in derogation of the second sentence of 9 NYCRR §6217.7 (5).

Complainant also testified that an example of voters being registered from vacant buildings was Markham Gardens which, prior to its being torn down, had 248 registered voters. In March of 2007, before the demolition permits were issued, some 58 people were listed on the rolls from that address, and in November, after the mail check, 55 names were still on the rolls with 5 people voting from that address. Complainant testified that at the time of the August mail check the houses listed on the address did not exist (Tr. pp. 18-19). In further support of his Complaint as to the City Board's failure to maintain its voter rolls, Complainant testified that he had a list of 13, 908 voters who had not voted since 1996 (Tr. p.25).

Attached to Complainant's Response to the Response of the City Board was a document labeled as Attachment D, which was marked at the Hearing as Exhibit 5 initially, and then that exhibit was withdrawn upon objection from the City Board. Subsequently it was offered as Complainant's Exhibit 6, as an updated list of voters who originally appeared on Attachment A to the Complaint (Ex. 1) and received into evidence subject to the City Board's right to respond to same by Friday, June 27, 2008 (Tr. pp. 159-160). Complainant described the document as an update of the list he had provided the City Board in 2004, but he did not indicate in what way it

was updated. Complainant indicated that it showed a number of duplicate voters which remained four years after he first gave notice to the City Board of the duplicate voter problem (Tr. pp. 59-60). The City Board did not exercise its right to respond to that exhibit by June 27th, and offered no refutation other than the comments of Counsel that the Voter Assistance Commission, of which Complainant is a member, took no action with respect to formally forwarding the list to the City Board (Tr. pp. 60-61).

Complainant also offered Complainant's Exhibit 1 which is a New York City voter notice with respect to the 2007 election in the various languages required by §203 of the Voting Rights Act of 1965, which he offered by way of a suggestion that it would be more effective to communicate with the voter in the language in which he registered rather than in a form in many languages. Given the federal law and the need for pre-clearance from the Department of Justice in portions of New York City, Counsel for the City Board properly responded to such suggestion (Tr. pp. 65-67). In any event, such relief is beyond the jurisdiction of this Hearing Panel.

Complainant also offered various exhibits addressed to the issue of voters no longer residing at a residence and the failure of the City Board to remove them (Complainant's Exhibits 2 through 4) which were objected to by Counsel for the City Board on a variety of grounds and received for such probative value as the Hearing Panel might deem appropriate (Tr. Pp. 35, 45 and 48). In the *voir dire* as to Complainant's Exhibit 3, Counsel for the City Board objected upon the grounds, *inter alia,* that "we don't know if he is a voter or not. This could be someone who has moved and been cancelled" (Tr. pp. 35-36). This exhibit concerned one Eric Alini whom it was alleged in

the exhibit no longer lived at 95 Driggs Street, Staten Island and had not lived there since 1986, and who currently resides at 4 Archer Road, Harrison, New York (Complainant's Ex. 3). In response to Counsel's objection, George Stanton, Director of Information Technology for the State Board, accessed the NYSVoter List to determine that Eric Alini was listed as a registered voter at that Staten Island address (Tr. p. 40). Mr. Stanton then checked the NYSVoter List to determine that Eric Alini was indeed also registered to vote at the Harrison address listed on Complainant's Exhibit 3 (Tr. pp. 39-45). Complainant testified that Eric Alini was part of the data roll that comprised Attachment A (Tr. p. 36) but a review of Attachment A does not reveal his name, nor is that surprising as Attachment A is a list of alleged duplicate voters at the same address within Richmond County. Complainant's Exhibit 4 is a purportedly a notarized statement from his father that Complainant's sister, Suzanne McFeeley Bock moved to Pennsylvania in 1998 and despite his reporting that to the City Board she continues to be listed on the voter rolls. As it is not a document which would cause the City Board to have removed her name from the voter rolls, and no proof was offered that any such document was sent to the City Board by anyone having first hand knowledge of the facts, the exhibit is of little probative value, as is Complainant's Exhibit 3.

Perhaps the most probative portion of the Hearing was the admission by Counsel for the City Board that the City Board had reaffirmed the position taken in its Response to the Complaint at its meeting on June 15, 2008 (Tr. p. 68). Essentially that response is that in the absence of positive confirmation, in a form acceptable to the City Board, from the State Board that each county's Board of Elections was in compliance with the bipartisan registration requirements of 9

NYCRR Part 6217, the City Board would process any potential duplicate voters in accordance with §5-402 of the Election Law. That section predates HAVA and the creation of a statewide unified data base of registered voters, and involves the process of sending out "a notice of intent to cancel to any potential voter who we may suspect may not be eligible" (Tr., p. 71). When asked as to what the City Board was doing upon receiving information through the NYSVoter system that a voter had registered in another county, Counsel replied:

> We're sending a notice of intent to cancel to the new voter at the New York City address since we have not been able to receive assurances that other boards of election or the State Board is monitoring compliance with the State Board's rules.
>
> (Tr., p.78)

When asked how the City Board overcame the presumption of regularity with respect to the data entry process of other Boards of Elections, Counsel for the City Board replied:

> The fact is is that when we've written to the State Board and asked for confirmation, we were told we should assume that everybody is following the procedures, and, as you know, when you assume, there's the potential to make an ass of both you and me, and the Board has not decided to disenfranchise voters in the City of New York based on a system that is relatively new, untested and we're not sure if it's accurate.
>
> (Tr., p.78)

When again asked by the Hearing Panel as to overcoming the presumption of regularity, the response was:

> Again, based on communications to the State Board in their response, which they have not provided positive confirmation, that each board is in compliance with the requirements of a bipartisan check -- a data entry and check when they do the voter registration activity, including electronic signature.
>
> (Tr., p. 80)

The Hearing Panel, in an attempt to determine the extent of the City Board's use of NYSVoter, continued:

> HEARING OFFICER COLLINS: I'm sorry, I'm not making myself -- forgive me. At times I'm not clear. Do you have any information as to how frequently the New York City Board of Elections accesses the NYSVoter data to clean up duplicates, or are you telling me you don't use it because you don't find it to be viable?
>
> MR. RICHMAN: Oh, no. We are using that as the basis to generate the notice of intent to cancel, the NYSVoter duplicate list.
>
> (Tr., p. 81).

The record is clear that the City Board does not use the information from the NYSVoter data base as it is statutorily required to be used pursuant to Election Law §5-400(2)(d), wherein a notice from a board of elections or other voter registration officer or agency that the voter has registered to vote from an address outside such city or county is deemed to be a personal request from the voter to be removed from the list of registered voters. The use of the NYSVoter information by the City Board as inquiry notice or probable cause to act under §5-402(2) by the City Board is admitted as is noncompliance with §5-400(2) (Tr., pp. 88-90). This is made clear in the following colloquy:

> HEARING OFFICER COLLINS: Isn't that the purpose, Mr. Richman, of the NYSVoter system to expedite this and to make sure that the lists are clean and correct? Isn't that the purpose, and isn't your argument really that we don't have a level of comfort that the people entering the data in counties outside of the City of New York are doing it appropriately. Isn't that essentially your argument?
>
> MR. RICHMAN: The argument is that the materials Section 5-614 have not been complied with setting forth the statewide voter registration list. That the requirement at this point that it be administered in a bipartisan manner in accordance with rules adopted by the Board, that that -- the rules were adopted, that there's no assurance that those rules are being carried out.

HEARING OFFICER COLLINS: Sir, there's a presumption of regularity, isn't there?

MR. RICHMAN: Not when the -- not when there's evidence been achieved by our Board that the laws are not following that.

HEARING OFFICER COLLINS: Thank you. Then put in a witness now who's going to give us the evidence that is sufficient to overcome the presumption of regularity. Put in that witness and we'll hear him, absolutely.

MR. RICHMAN: That's the policy statement of the City Board.

HEARING OFFICER COLLINS: No, no, no. That's a policy statement.

MR. RICHMAN: Right. Based on the information they received.

HEARING OFFICER COLLINS: We need empirical data. We need evidence, okay. Do you have evidence of that fact that you could give us?

MR. RICHMAN: Not here.

(Tr., pp 95-96)

The effect of the refusal to properly use the NYSVoter system was described in testimony from George Stanton:

HEARING OFFICER CARR: And as far as New York City's statements that they are updating the voter registration database, do you have any evidence that they –

MR. STANTON: They are not doing it via the NYSVoter website. They don't have users created on the NYSVoter website.

HEARING OFFICER CARR: I'm sorry, you would have to have a user created?

MR. STANTON: In order to log in and use the NYSVoter website and mark them duplicate or non-duplicate, which is the procedure that DOJ let us do which allows them, because if they mark them a duplicate, the statewide database -- or the statewide ID will follow them. It has to be done through the website. They have at this point not created any users to do that.

HEARING OFFICER CARR: And have all the other counties created user names to –

MR. STANTON: Absolutely. I've provided reports to all the counties on their status of the duplicate resolution on a regular basis. Most of them are down to single or double digits. New York City's keeps climbing.

(Tr., pp.108-109)

****

HEARING OFFICER COLLINS: Mr. Richman, what Mr. Stanton has just talked about, the duplicate resolution list that NYSVoter ends out, apparently New York City has not accessed it.

MR. RICHMAN: We -- we are updating our records, and my understanding, according to our MIS department, is we are re-syncing with the State database every day. So if people are added, they're added. If they're cancelled, they're cancelled.

MR. STANTON: You are synchronizing with the State database every day, which means if you are cancelling within your own system, they're getting cancelled, but they are not getting cancelled through the state system which is the mechanism by which the state voter ID will follow the voter to his new county if he registers, which is a mandate, as you know, of HAVA.[6]

HEARING OFFICER CARR: And what problem does that create?

MR. STANTON: It creates a problem that the same voter could be in, say, New York City as an inactive and another county as an active with two different ID.

(Tr., pp. 111-112)

In so far as relying upon the NYSVoter system is concerned, George Stanton testified that the system would provide the City Board, if properly accessed, with the following information as to any voter identified as a potential duplicate: county registration date, name, date of birth, gender, address, voter status, e-mail, telephone number, driver's license number, whether or not they've met their ID requirements or provided other ID and previous address, previous county and last election voted in if they're available. The system would also provide the voter's

signature from the registration card (Tr., pp. 141-142). Mr. Stanton also testified that the City Board had not created appropriate users to allow Board personnel to access this information as of the date of the Hearing (Tr., pp. 143-144).

ISSUE

1. Has the Complainant sustained his burden of proof with respect to the allegations in his formal complaint with respect to the Respondents?

FINDINGS OF FACT

1. The City Board has not created appropriate users to allow Board personnel to access the NYSVoter system fully and appropriately.
2. The City Board is not appropriately performing voter registration list maintenance upon receiving information from the NYSVoter system that a former New York City voter has registered in a new county. No notices of cancellation, pursuant to Election Law §5-402, were sent out prior to the 2008 Presidential Primary, and the record is barren of any evidence that any voter has been cancelled as a result of those notices.
3. The City Board's policy to ignore NYSVoter records that show registration in another county is in contravention of Election Law §§5-400(2)(d) and 5-614(8) and 9 NYCRR Part 6217. The City Board's policy improperly impedes the timely

[6]See 42 USC §15483(a)(1)(iii) which sets forth this requirement.

update of voter registration records in the City of New York and consequently, in NYSVoter.

4. By reason of the failure of the City Board to appropriately use and rely upon the information available in the NYSVoter system, the number of duplicate voters in the City of New York voter registration rolls is increasing rather than decreasing.

5. The failure of the City Board to properly cancel voters through the NYSVoter database results in the potential that the voter's unique identifier does not follow the voter, in derogation of the NYSVoter system.

6. The City Board failed to produce any competent evidence to overcome the presumption of regularity of the NYSVoter records.

7. The City Board failed to produce any competent evidence of any meaningful voter registration list maintenance efforts.

CONCLUSIONS OF LAW

1. The Burden of Proof applied to all formal complaints shall be a preponderance of the evidence (9 NYCRR§6216.2{b}[4]).

2. There is a presumption of regularity which attaches to governmental actions, including election administration actions, and such actions are presumed to be valid unless proven otherwise ((*Matter of Georgian Motel Corp. v. New York State Liq. Auth.*, 206 A.D.2d 761, 762, 615 N.Y.S.2d 96 [1994],*lv. denied*84 N.Y.2d 811, 622 N.Y.S.2d 914, 647 N.E.2d 120 [1994]**(*cf*.** *Stringfellow's of N.Y.*

v. City of New York, 91 N.Y.2d 382, 395-396, 671 N.Y.S.2d 406, 694 N.E.2d 407 [1998])**;** Richardson on Evidence (Prince, 11th Ed), "§3-120 Regularity".

3. The presumption of regularity requires one challenging an official action to come forward with substantial evidence to refute the presumption **(**People v. Harris**,** 61 NY2d 9, 16). The City Board chose not to offer any evidence in support of its contention that other counties were improperly inputting voter registration information into the NYSVoter database, and in fact offered no credible excuse for the City Board's failure to comply with the statutory requirements of Election Law §5-400.

4. Separate and apart from any evidentiary considerations of the presumption of regularity, the City Board failed to produce one scintilla of admissible evidence to justify its violation of Election Law §§5-400 and 5-614(8), 9 NYCRR §6217.7(5) and 9 NYCRR §6217.8(4) although given ample opportunity to do so.

5. The preponderance of credible evidence establishes that the Complainant has met his burden of proof with respect to the failure of the City Board to meet its obligation under HAVA §303(a)(2)(B)(iii), to ensure that "...duplicate names are eliminated from the computerized list" (Ex. 1, p. 3), principally upon the admission of the City Board that it is not using the NYSVoter system in accordance with the statutory scheme created by the New York State Legislature and approved by the United States District Court for the Northern District of New York in its June 2, 2006 Remedial Order in *United States of America v. New York*

State Board of Elections, et al, 06-CV-0263) and the testimony of George Stanton confirming such lack of appropriate use.

6. Given the argument of the City Board as to the possibility of voters continuing to use an address under rehabilitation for voting purposes, as well as the various Federal Court decisions as to homeless voters, including the Second Circuit Decision in *Wit v. Berman*, 306 F.3d 1256, 1261 (C.A.2 {N.Y.},2002) it is not possible to sustain that portion of the Complaint as is based upon Attachment B in so far as the Complainant did not offer any explanatory evidence or affidavits supporting this claim other than the attachment itself. Additionally, the Complainant presented no evidence to overcome the presumption of regularity as it pertains to the management of the City Board's voter records.

   The fact that this portion of the Complaint is not sustained in no way undermines the seriousness of the balance to the improper maintenance claim.

7. In view of New York's system of permanent registration, it is not possible to sustain that portion of the Complainant as is based upon Attachment C, Voters Who Have Not Voted Since 1996, as Complainant failed to provide any evidence that the names in Attachment C are not duly registered voters who simply have chosen not to exercise their franchise in that time period.

8. The continued refusal of the City Board to act upon NYSVoter information in accordance with the NYSVoter system and to comply with 9 NYCRR §§6217.7 & 6217.8, which compliance is statutorily mandated in Election Law §5-614 (2),

jeopardizes the entire system without legal cause or justification and must be remedied forthwith.

REMEDY

Pursuant to Election Law §5-208(3) a change of address received by a County Board of Elections received by August 20, 2008, must be processed in time for the inclusion of such voter information for the September Primary. Similarly, under Election Law §5-211(12) completed agency registration application forms received by such agencies prior to August 15, 2008, are to be transmitted by the voter registration agency to the various County Boards of Elections so that they are received no later than August 20, 2008, so that such new applicant may participate in the September Primary. Thus the Legislature has determined that twenty (20) days lead time is sufficient time within which to process new voter information by the various County Boards of Elections. Therefore, the New York City Board of Elections should be able to meet such a timetable for processing the voter information which it has received from NYSVoter and has previously ignored. However, as this Decision is effective July 22, 2008, and posted to the State Board of Elections website on that date, the New York City Board of Elections effectively has at least thirty (30) days notice of its need to process the information on the NYSVoter Registration List prior to printing of its polls books for the September Primary, assuming that it would not print the poll books before the date at which a Registration form received by it must be included.

The compliance with law that this Determination mandates will not result in the disenfranchisement of any voter, which is in contrast to the potential result of the drastic process

undertaken by the City Board to solely apply Election Law Section 5-402 in contravention of the NYSVoter process.[7]

---

[7]Pursuant to Part 6217.7 "Processing voters who move between counties", when NYSVoter provides "previous county" voter registration information for a new applicant that was provided by the applicant, the local board of elections that had the older registration upon determining that it is the same voter, shall cancel the voter record in their county and provide the required cancellation notice to the voter pursuant to Election Law section 5-402. In such cases where the 'from county' is unable to determine that the proposed duplicate records are from the same voter, after providing the required notice to the voter (Election Law Section 5-712), the 'from county' will inactive their voter record (Election Law Sections 5-213). As a practical matter, in each instance where the required notice is provided, a voter is afforded the opportunity to notify the board of their continued eligibility to vote in that county and have their voter status remain 'Active'. Furthermore, in the case of a voter being sent a required confirmation notice, even if the voter does not provide the county with notice of their continued eligibility within the applicable statutory timeframe, after receiving a confirmation notice, the voter would still be afforded the opportunity to cast a provisional "Affidavit" ballot pursuant to Election Law section 8-302(3){e}[ii}. This obviously would not be the case where a voter was cancelled pursuant to Election Law 5-402.

Pursuant to Part 6217.8 "Processing duplicate voters", when NYSVoter provides notification to any county that a voter is potentially registered to vote more than once based upon a match of an applicant's first name, last name and date of birth, the local board of elections containing the registration record of the earlier dated registration record, the 'from county', shall send such voter the confirmation notice prescribed by Election Law Section 5-712 and place such voter on inactive status pursuant to Election Law Section 5-213. As a practical matter, in each instance where the required confirmation notice is provided, a voter is afforded the opportunity to notify the board of their continued eligibility to vote in that county and have their voter status remain "active". Furthermore, even if the voter does not provide the county with notice of their continued eligibility within the applicable statutory timeframe, the voter would still be afforded the opportunity to cast a provisional "Affidavit" ballot pursuant to Election Law section 8-302(3){e}[ii}.

Simply put, the City Board is required to use and follow the NYSVoter Registration List and to maintain it in accordance with the law and 9 NYCRR Part 6217. The City Board's failure to create or establish "user names" raises serious questions as to its complying with the federal and state law and regulations (Record, pp. 108-9) and it is for that reason that New York City's duplicate voters list, "keeps climbing" (Record., p. 109).

DETERMINATION OF REMEDY

Accordingly, it is hereby directed that the New York City Board Of Elections comply with the requirements of Section 303 of the Help America Vote Act by using the interactive features of the NYS Voter System in accordance with 9 NYCRR Part 6217 and that on or before August 20, 2008, it engage in appropriate file maintenance procedures so that the poll books printed for the September 9, 2008, primary election contain updated information including the elimination of duplicate voters based upon information made available through the NYS Voter System. Further the City Board must, on an ongoing basis, engage in all registration file maintenance procedures set forth in the New York State Election Law, including the full use of the NYSVoter interactive system pursuant to 9 NYCRR Part 6217 so that the state wide data base of registered voters might comply with the requirements of Election Law §5-614, 42 USC §15483 and the Remedial Order of the Northern District of New York of June 2, 2006.

July 22, 2008