

OP. NO. 05-050

ELECTIONS: ABSENTEE VOTING.

No conflict between federal Voting Rights Act of 1965 and specific requirement for completion of voter statement on absentee ballot; federal act would not preempt Commonwealth from requiring such statement. Authority for State Board of Elections to adopt standards and instructions for use by local election officials to determine what constitutes error or omission in completion of such statement.

The Honorable Jean R. Jensen
Secretary, State Board of Elections
August 1, 2005

Issues Presented

You inquire regarding § 24.2-706, which pertains to the statement of the voter required by the General Assembly on the absentee ballot oath envelope (the "voter statement"). You first inquire whether the provisions of the federal Voting Rights Act of 1965,¹ specifically 42 U.S.C.A. § 1971(a)(2)(B), apply to the completion of the voter statement. If so, you ask whether the federal Act supercedes the specific requirements contained in §§ 24.2-706 and 24.2-707. Finally, you ask whether the State Board of Elections has the authority to adopt standards and instructions for use by local election officials in determining what constitutes an error or omission in completion of the voter statement that is not material in determining whether an individual is qualified to vote in an election.

Response

It is my opinion that 42 U.S.C.A. § 1971(a)(2)(B) does not conflict with the specific requirement of completion of the voter statement required by § 24.2-706 and would not preempt the Commonwealth from requiring such a statement. It is further my opinion that the State Board of Elections has the authority to adopt standards and instructions for use by local election officials in determining what constitutes an error or omission in completion of the voter statement that is not material in determining whether an individual is qualified to vote in an election.

Background

You advise that the staff of the State Board of Elections has conducted an analysis following the November 2004 general election. The analysis has identified varying reasons for rejections of absentee ballots by local election officials. You relate that the analysis reveals that the failure of voters to fully complete the voter statement required by § 24.2-706 is the primary reason for the rejection of absentee ballots. You observe that § 24.2-706 requires the voter to complete the following statement that appears on the absentee ballot envelope:

"Statement of Voter."

"I do hereby state, subject to felony penalties for making false statements pursuant to § 24.2-1016, that my **FULL NAME** is (last, first, middle); that I am now or have been at some time since last November's general election a legal resident of (**STATE YOUR LEGAL RESIDENCE IN VIRGINIA** including the house number, street name or rural route address, city, zip code); that I received the enclosed ballot(s) upon application to the registrar of such county or city; that I opened the envelope marked 'ballot within' and marked the ballot(s) in the presence of the witness, without assistance or knowledge on the part of anyone as to the manner in which I marked it (or I am returning the form required to report how I was assisted); that I then sealed the ballot(s) in this envelope; and that I have not voted and will not vote in this election at any other time or place.

Signature of Voter

Date.....

Signature of witness"

You further advise that when this statutory statement is not completed exactly as the statute requires, local election officials are required to void the ballot pursuant to § 24.2-707, which provides, in part, that the "(f)ailure to follow the procedures set forth above shall render the applicant's ballot void." You relate that the staff analysis has revealed that the errors or omissions frequently include that the voter: (1) has not listed the names specifically in the order of last, first and middle name; (2) has listed a middle initial or maiden name, instead of the full middle name; (3) has omitted the street identifier, such as the term road or street when filling in the legal residence; or (4) has omitted the date of the signature of the voter.

You further relate that 42 U.S.C.A. § 1971(a) provides, in part, that:

(2) No person acting under color of law shall—

....

(B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election[.]

You believe that this federal statute may provide broader discretion to determine whether absentee ballots should be rejected for omitting the date signed, the voter's full middle name as it was listed upon registration, or the street designation on the voter statement. You relate that the dilemma faced by the staff of the State Board of Elections lies in the interpretation of §§ 24.2-706 and 24.2-707, which require strict compliance regarding completion of the voter statement.

You note that § 24.2-706 pertaining to the application for an absentee ballot mirrors the language of the federal Voting Rights Act and provides, in part, that:

In reviewing the application for an absentee ballot, the general registrar and electoral board shall not reject the application of any individual because of an error or omission on any record or paper relating to the application, if such error or omission is not material in determining whether such individual is qualified to vote absentee.

Applicable Authorities and Discussion

Congress has designed the Voting Rights Act² "to banish the blight of racial discrimination in voting. The Act [contains] stringent ... remedies for voting discrimination where it persists on a pervasive scale, and in addition the statute strengthens existing remedies for pockets of voting discrimination elsewhere in the country."³ The Supreme Court of the United States has declared that Congress intended the Voting Rights Act requirements to apply to virtually any alteration in laws affecting elections, however minor.⁴ The Voting Rights Act is aimed at all state regulations that have the effect of denying citizens their right to vote because of their race.⁵

The overriding goal of statutory interpretation is to "ascertain and give effect to legislative intent."⁶ In addition, the reading of the entire statutory provision as a whole influences the proper construction of any apparently ambiguous individual provisions.⁷ "[F]ull force and effect must [then] be given to every provision of statutory law."⁸

Section 24.2-706 begins with the phrase "[o]n receipt of an application for an absentee ballot," and provides further that:

If the application has been properly completed and signed and the applicant is a registered voter of the precinct in which he offers to vote, the electoral board shall immediately send to the applicant by mail, obtaining a certificate of mailing, or deliver to him in person in the office of the secretary or registrar, the following items and nothing else[.]

Sections 24.2-701 through 24.2-705.2 set forth the statutory provisions pertaining to the application by a qualified voter for absentee ballots. Section 24.2-707 contains the following procedures by which a voter actually casts an absentee ballot: (1) a voter who receives his ballot by mail may return his marked ballot by mail or deliver it personally to the electoral board or the general registrar; and (2) a voter who applies for an absentee ballot in person at a time when the printed ballots are available may follow the same procedure or may cast his ballot at the time of application in the office of the general registrar or secretary of the electoral board. Section 24.2-707 contains detailed requirements for marking the absentee ballot, refolding the absentee ballot, sealing the absentee ballot envelope, and signing the statement printed on the absentee ballot envelope in the presence of a witness.

Section 1971(a)(1) of Title 42 of the Code of the United States guarantees that "[a]ll citizens of the United States who are otherwise qualified by law to vote ... shall be entitled and allowed to vote at all ... elections, without distinction of race,

color, or previous condition of servitude; any constitution, law, custom, usage, or regulation ... to the contrary notwithstanding." This federal law prevents persons from being denied the right to vote in any election on specified grounds. The statutory provision also forbids state and local government officials from denying any person "the right ... to vote ... because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting."⁹ The term "requisite" means "required by the nature of things or by circumstances or by the end in view; essential, indispensable, necessary."¹⁰

Using the familiar principle of statutory construction, *noscitur a sociis*,¹¹ the phrase "requisite to voting"¹² must also be construed with reference to the words with which it is used.¹³ Like the words "any record or paper relating to any application, registration"¹⁴ found with this phrase, "other act requisite to voting,"¹⁵ must be construed to mean the acts in the process required to be followed, which generally is referred to as voter registration, all of which occur prior to the time one actually casts a vote by use of a ballot. The context of the phrase "other act requisite to voting" clearly refers to every action that is taken leading up to the actual casting of a vote by means of marking a ballot.

The language of § 24.2-706 to which you refer pertains to the act of casting an absentee ballot and not to the application process to vote by absentee ballot or any process that must be followed prior to actually casting an absentee ballot. Therefore, it is important to focus on the fact that your questions are directed to the actual process of casting a vote by use of an absentee ballot, as opposed to the process of making application to vote or any other "act requisite to voting."

Section 5 of the Voting Rights Act of 1965, as amended,¹⁶ which is applicable to the Commonwealth, requires that prior to the implementation of any change in state election laws or voting practices or procedures be submitted to the United States Department of Justice for review and evaluation of its potential impact on minority voters. This review is commonly referred to as "§ 5 preclearance."¹⁷ Section 24.2-706 has been reviewed by the United States Department of Justice in each of the past five years and no objection has been imposed by the Attorney General of the United States as a result of each review.¹⁸ Accordingly, I must conclude that the Attorney General of the United States does not believe there is a conflict between § 24.2-706 and 42 U.S.C.A. § 1971(a)(2)(B).

The United States Supreme Court repeatedly has recognized the legitimate interest of the states in keeping elections fair, honest, and orderly.¹⁹ The Court has also recognized that the states have a legitimate and compelling interest in preventing election fraud and preserving the integrity of the election process.²⁰ A "State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions."²¹ The specific interest of the Commonwealth in preventing election fraud has been recognized by the federal court system.²² The General Assembly clearly intends that § 24.2-706 preserve the integrity of the absentee voting process in every election and prevent possible voter fraud by requiring the voter statement. It is my opinion that in addressing the integrity of the absentee voting process and preventing possible voter fraud, the voter statement required by § 24.2-706 protects a legitimate and compelling interest of the Commonwealth that is applied on a nondiscriminatory basis.

A federal law, such as 42 U.S.C.A. § 1971, preempts or supplants a conflicting state law, by virtue of the supremacy clause of the Constitution of the United States.²³ The preemption of state law by federal law may occur by express

statutory language or other clear indication that Congress intends to legislate exclusively in the area.²⁴ Even if Congress does not intend the enactment of a federal statutory scheme to preempt state law in the area, congressional enactments in the same field override state laws with which they conflict.²⁵

The intent of Congress in adopting the Voting Rights Act clearly preempts the states' power to restrict registration and voting. There is, however, no inherent conflict between 42 U.S.C.A. § 1971(a)(2)(B) and § 24.2-706. Therefore, 42 U.S.C.A. § 1971(a)(2)(B) does not preempt the specific requirements of §§ 24.2-706 and 24.2-707 that absentee ballots be voided for certain errors or omissions.

The fundamental objective of the State Board of Elections is to provide overall supervision and coordination of election activities throughout the Commonwealth, and to obtain uniformity in local election practices and proceedings and legality and purity in all elections.²⁶ In considering the detailed procedures in Title 24.2 for casting and counting absentee ballots,²⁷ it is clear that the General Assembly has given wide discretion to the Board to carry out its administrative responsibilities with regard to such ballots. As in other instances that require interpretation of election laws, any decision of the Board in performing its statutory duty, i.e. the counting of absentee ballots, will be entitled to great weight.²⁸ Accordingly, it is my opinion that the Board has the authority to adopt necessary standards and instructions for use by local election officials to determine what constitutes an error or omission in completion of the voter statement that is not material in determining whether such individual is qualified to vote in such election.

Conclusion

Accordingly, it is my opinion that 42 U.S.C.A. § 1971(a)(2)(B) does not conflict with the specific requirement of completion of the voter statement required by § 24.2-706 and would not preempt the Commonwealth from requiring such a statement. It is further my opinion that the State Board of Elections has the authority to adopt standards and instructions for use by local election officials in determining what constitutes an error or omission in completion of the voter statement that is not material in determining whether an individual is qualified to vote in an election.

¹ See 42 U.S.C.A. §§ 1971 through 1974(e) (West 2003 & Supp. 2005).

² See *supra* note 1.

³ *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

⁴ See *Allen v. State Bd. of Elections*, 393 U.S. 544, 566-69 (1969); see also, *Dougherty County v. White*, 439 U.S. 32, 37 (1978).

⁵ See *Allen*, 393 U.S. at 565.

⁶ See *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); see also *Vollin v. Arlington Co. Electoral Bd.*, 216 Va. 674, 678-79, 222 S.E.2d 793, 797 (1976); 1990 Op. Va. Att'y Gen. 155, 155 and opinions cited therein.

⁷Nat'l Mar. Union v. City of Norfolk, 202 Va. 672, 682, 119 S.E.2d 307, 314 (1961); see also *Vollin*, 216 Va. at 679, 222 S.E.2d at 797.

⁸County of Fairfax v. City of Alexandria, 193 Va. 82, 92, 68 S.E.2d 101, 107 (1951).

⁹42 U.S.C.A. § 1971(a)(2)(B) (West 2003).

¹⁰Webster's Third New International Dictionary Of The English Language Unabridged 1929 (1993). Because the term "requisite" is not defined in this statute, it must be given its common, ordinary meaning. See, e.g., *Anderson v. Commonwealth*, 182 Va. 560, 565, 29 S.E.2d 838, 840 (1944) (noting that words "listed or assessed" have well recognized meaning and are commonly used to express thought that personal property is to be placed on tangible person property roll for taxation purposes).

¹¹"The meaning of a word ... takes color and expression from the purport of the entire phrase of which it is a part, and it must be construed so as to harmonize with the context as a whole." *Kohlberg v. Va. Real Estate Comm'n*, 212 Va. 237, 239, 183 S.E.2d 170, 172 (1971). "[I]t is known by its associates." *Black's Law Dictionary* 1087 (8th ed. 2004) (noting Latin derivation of *noscitur a sociis*).

¹²42 U.S.C.A. § 1971(a)(2)(B).

¹³*Students for Animals v. Univ. of Va.*, 12 Va. Cir. 247, 249 (1988).

¹⁴42 U.S.C.A. § 1971(a)(2)(B).

¹⁵*Id.*

¹⁶See 42 U.S.C.A. § 1973c (1994) (West 2003).

¹⁷See 28 C.F.R. § 51.13 (2004) (listing examples of changes affecting voting which must meet § 5 preclearance requirement). Section 51.13(e) requires preclearance for "[a]ny change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, ... reapportionment ...)."

¹⁸By letters dated June 24, 2004, May 2, 2003, July 1, 2002, June 15, 2001 and June 21, 2000, the Attorney General did not interpose any objection to the provisions of this statutory provision (copies on file with this Office).

¹⁹See, e.g.; *Storer v. Brown*, 415 U.S. 724, 730 (1974); *Bullock v. Carter*, 405 U.S. 134, 144-45 (1972).

²⁰See *Anderson v. Celebrezze*, 460 U.S. 780, 788-79 (1983); *Richardson v. Ramirez*, 418 U.S. 24, 79 (1974) (Marshall, J., dissenting).

²¹*Anderson*, 460 U.S. at 788.

²²*Howlette v. City of Richmond*, 485 F. Supp. 17 (E.D. Va.), *aff'd*, 580 F.2d 704 (4th Cir. 1978).

²³Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210-11 (1824).

²⁴See Op. Va. Att'y Gen.: 1984-1985 at 280, 282; 1973-1974 at 284, 285.

²⁵See Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977).

²⁶See Va. Code Ann. § 24.2-103(A) (LexisNexis Supp. 2005); see also 1983-1984 Op. Va. Att'y Gen. 152, 153.

²⁷See tit. 24.2, ch. 7, §§ 24.2-700 to 24.2-713 (LexisNexis Repl. Vol. 2003 & Supp. 2005); see also 1 H. & S. Docs., *Report of the Election Laws Study Commission to the Governor and the General Assembly of Virginia*, H. Doc. No. 14, at 2-3, 9-10, 103-10 (1969 Extra Sess.) (reporting on revisions from Title 24 to Title 24.1).

²⁸See Forst v. Rockingham Poultry Mktg. Coop., 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981) (noting that long standing construction of statute by Tax Commissioner is entitled to great weight); *Dep't of Taxation v. Prog. Comty. Club*, 215 Va. 732, 739, 213 S.E.2d 759, 763 (1975) (noting that construction of statute by state official charged with its administration is entitled to great weight); 1993 Op. Va. Att'y Gen. 226, 227 (noting that interpretation given to statute by state agency charged with its administration is entitled to great weight). This rule of statutory construction is particularly persuasive in construing individual statutes that constitute parts of a complex statutory scheme, such as the voting system established in Title 24.2. In such an instance, deference to a decision of the agency charged by the General Assembly with the statewide administration of such a system is appropriate unless the decision clearly is wrong.

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