

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Docket No. 372 CD 2024

PA Fair Elections, Heather Honey, and Stacey Redfield,
Petitioners,

v.

Pennsylvania Department of State and Secretary of the Commonwealth Al Schmidt;
Northampton County Northampton County Election Commission Board,
Northampton County Executive Lamont McClure, and Northampton County
Registrar Christopher Communi,
Respondents.

On Appeal from Final Determination of Office of General Counsel Hearing
Officer Steven R. Kovatis in the Department of State Bureau of Commissions,
Elections and Legislation Title III of HAVA Complaint entered on February 20,
2024, Case No. 2023-002

Petitioners' Reply Brief

Dated: October 9, 2024

Elizabeth A. Nielsen, Pa No. 335131
Erick G. Kaardal, MN No. 229647*
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, MN 55402
Telephone: 612-341-1074
Email: nielsen@mklaw.com
Email: kaardal@mklaw.com

**admitted pro hac vice*

Karen DiSalvo, PA No. 80309
Mohrman, Kaardal & Erickson, P.A.
Election Research Institute
1451 Quentin Road, Suite 232
Lebanon, PA 17042
Telephone: (717) 281-1776
Email: kd@election-institute.com

*Counsel for Petitioners Heather Honey, PA
Fair Elections, and Stacey Redfield.*

TABLE OF CONTENTS

TABLE OF CITATIONS ii

I. Reply Argument 1

 A. HAVA Administrative Complaint is proper when complainants believe there is a violation of HAVA, which includes failure to meet requirements for manual audit capacity..... 3

 B. PA Fair Elections requested relief the OCG could grant under HAVA and Pennsylvania law. 4

Conclusion..... 7

Certificate of Compliance..... 8

Use of AI Technology Certification..... 9

Certificate of Service 10

RETRIEVEDFROMDEMOCRACYDOCKET.COM

TABLE OF CITATIONS

	Page(s)
Cases	
<i>Kuznik v. Westmoreland Cnty. Bd. of Comm'rs</i> , 588 Pa. 95 (Pa. 2006).....	3
Statutes	
25 P.S. § 1206.2.....	4
25 P.S. § 3046.2.....	4
25 P.S. § 3046.2(c)(3).....	4
52 U.S.C. § 20901	1
52 U.S.C. § 21081(a)(1)(A)	5
52 U.S.C. § 21081(a)(2)	1, 2, 5
52 U.S.C § 21112	3, 4
52 U.S.C § 21112(a)(2)(B).....	2
52 U.S.C § 21112(a)(2)(E).....	4

RETRIEVEDFROMDEMOCRACYDOCKET.COM

I. Reply Argument

Petitioners' Complaint, R.1a–R.14a, alleged the voting system used in Northampton County, specifically the EVXL component of that system, though it was selected for use by officials in that county, and allowed for use by state election officials, fails to meet the requirements of the Help America Vote Act (HAVA)¹ in 52 U.S.C. § 21081(a)(2) because it does not produce a permanent paper record with a reliable manual audit capacity, which HAVA requires:

(2) Audit capacity

(A) In general

The voting system shall produce a record with an audit capacity for such system.

(B) Manual audit capacity

(i) The voting system shall produce a permanent paper record with a manual audit capacity for such system.

¹ Acronym Reference Guide

There are numerous acronyms used through the records of the OGC proceedings and in the briefs. For ease of reference, PA Fair Elections supplies the following table with used acronyms and definitions:

Acronym	Definition
HAVA	Help America Vote Act, 52 U.S.C. § 20901 et seq.
OCG	Office of General Counsel
DoS	Department of State
DRE	Direct Recording Electronic (type of voting system)
ES&S	Election Systems & Software (Northampton County voting system vendor)
EVS	Electronic Voting System
EVXL	ExpressVote XL (the specific voting machines by ES&S used in Northampton County)
FEC	Federal Election Commission
VVPAT	Voter Verifiable Paper Audit Trail
VVSG	Voluntary Voting System Guidelines

(ii) The voting system shall provide the voter with an opportunity to change the ballot or correct any error before the permanent paper record is produced.

(iii) The paper record produced under subparagraph (A) shall be available as an official record for any recount conducted with respect to any election in which the system is used.

52 U.S.C. § 21081(a)(2).

The Office of General Counsel (OGC) held a hearing, but failed to apply the law (HAVA) to the facts, as supported by the evidence brought by Complainants (now Petitioners) PA Fair Elections and Stacey Redfield.² HAVA administrative complaints contemplate violations of HAVA that have occurred, are occurring, or will occur. 52 U.S.C § 21112(a)(2)(B). The November 7, 2023 municipal elections exposed that the paper record produced by the EVXL component of the voting system used in Northampton County is not reliable for a manual audit because the machine is designed to be capable of mismatching the text-readable paper record from the actual vote selection and from the barcode which is actually used to tabulate the vote. The ES&S EVXL component has design flaws that allow the printed barcode and the printed text to contain different information and thereby has demonstrated that it is susceptible to errors that make a manual paper audit impossible.

The Northampton County Defendants (Northampton County, Northampton County Election Commission Board, Northampton County Executive Lamont

² Petitioners PA Fair Elections with their Officer Heather Honey and Stacey Redfield were acting *pro se* before the OGC in the administrative complaint process.

McClure and Northampton County Registrar Christopher Commini) largely incorporated the factual findings and decision of the OGC in lieu of additional argumentation. Northampton Def. Br. PA Fair Elections addressed the errors of those findings and the determination more fully in their principal brief. Here, therefore, the main focus of PA Fair Elections' in this brief is to reply to the Department of State.

A. HAVA Administrative Complaint is proper when complainants believe there is a violation of HAVA, which includes failure to meet requirements for manual audit capacity.

There are relatively few sources of caselaw authority beyond the text of HAVA itself regarding HAVA administrative complaints, for which the decisions are often unpublished, and not included in legal databases, such as Westlaw. *See* Department Br. at 2, 14, 28. However, it is natural that there is no abundance of authorities to cite when dealing with issues of first impression. PA Fair Elections already discussed relevant cases related to HAVA and discarding voting machine systems for HAVA-noncompliance were raised in PA Fair Elections' principal brief. *E.g.*, Petitioner's Br. at 21 (citing *Kuznik v. Westmoreland Cnty. Bd. of Comm'rs*, 588 Pa. 95 (Pa. 2006)(deciding HAVA preempted continuing use of lever voting machines in all Pennsylvania elections, given need for a single system). Therefore, Petitioners focus on the statutory text.

HAVA in 52 U.S.C § 21112 mandates states to have an administrative complaint process for any person to file a complaint if they believe violations of Title

III of HAVA itself, “including a violation which has occurred, is occurring, or is about to occur.” HAVA also requires in § 21112(a)(2)(E) that “At the request of the complainant, there shall be a hearing on the record.” Pennsylvania’s HAVA complaint process is outlined in state law in the election code at § 1206.2 and 25 P.S. § 3046.2, which states that the complainant “shall” have an opportunity for an informal hearing. 25 P.S. § 3046.2(c)(3) (describing the requirement when a complaint pertains to the Department of State for hearing by the OGC). As to any issues with admissibility of evidence during that informal hearing, had the OGC decision come out the other way, the Department (and County) defendants would be welcome to attack any evidentiary allowances to resolve their objections on appeal. As it is, the OGC allowed the record to be made by Complainant-Petitioners. Yet, as outlined in the bulk of the argument in Petitioner’s Principal Brief, the OGC erred in its interpretation of HAVA’s requirements when applied to the evidence.

B. PA Fair Elections requested relief the OCG could grant under HAVA and Pennsylvania law.

HAVA’s administrative complaint process requirements for relief in 52 U.S.C. § 21112 only provides that if the State determines there is a violation, “the State **shall** provide the appropriate remedy.” (emphasis added). As the codified version of Pennsylvania’s HAVA administrative procedure says, the OGC “shall issue a final determination and remedial plan if necessary.” Ultimately, whatever relief is possible through a HAVA administrative complaint is based on (1) a determination

that a HAVA violation has occurred, is occurring, or will occur, and (2) a remedial plan.

Petitioners did ask for declaratory relief related to the November 7, 2023, which was a municipal election, for failing to provide a voter-verifiable manual auditable paper record (HAVA in 52 U.S.C. § 21081(a)(2)). *E.g.*, R.4a, 13a. Contrary to what the OGC stated, in its conclusions of law regarding voter verifiable paper record of their vote, if a voter cannot verify that a vote stored in an illegible barcode reflects their actual vote-intent, while the text of the paper record is mismatched as the EVXL is proven to be able to do, then HAVA's requirements are not met. Petitioner's Br. at 27–27; App. A Final Determination at 6–7 (citing (HAVA in 52 U.S.C. § 21081(a)(1)(A))), *id.* at 11.

Petitioners also requested relief that would have included not renewing contracts for the EVXL machine that had proven during the November 7, 2023 election to be capable of printing a paper record that differed from the barcode and different from the electronic vote counted. R.14a. Petitioners do not know if an OGC (or Court-issued) remedial plan would accomplish that relief by issuing a remedial plan that would be *identical* to their requested relief. However, the Department distracts from the OGC's authority to create a remedial plan by suggests that petitioners asked too much as requested relief in their administrative complaint. Department Br. at 27–30; *see* R.13a-14a. If the OGC had agreed with PA Fair Elections—that the same EVXL machines continue to be machines capable of

producing a discrepancy between the printed text of candidates selected and the votes counted by the machine will violate HAVA, some remedial plan to require Northampton County to change to a different machine may have been necessary. Of course, the ultimate relief or remedial plan when a HAVA violation is found is up to judge, here the OGC. The full scope of the OGC's authority in a remedial plan (for example, whether it could *require* voting system or component de-certification) is another question from that which needs to be answered this appeal, because the OGC did not issue that remedial plan.

PA Fair Elections as Complainants detailed a potential remedial plan in their requested relief in their Complaint, R.13a–14a, and continue now to ask this Court to find the OGC failed to interpret the portion of the HAVA statute, and to determine a HAVA violation based on the evidence presented.

As Petitioners raised in their Principal Brief at 29–32 and before the OGC below, this Court has previously ruled that concerns about this type of discrepancy were speculative, however, the evidence presented below demonstrated those concerns are no longer speculative. The discrepancy between the paper record and vote occurred and could occur in a federal election, for example, the one about to occur on November 5, 2024. Whether the discrepancy is a result of the design flaw that allows for “programming errors” or a result of the design flaw itself is not the issue. The evidence presented and the admissions of the Respondents confirm that

the discrepancy occurred and thus that the EVXL falls short of producing a reliable, voter-verifiable manual audit paper record.

CONCLUSION

For the foregoing reasons and the reasons cited in their principal brief, Petitioners request this Court expeditiously reverse the decision and order of the OGC and issue a finding, order, or determination, for example, including determination of a HAVA violation with other relief (such as a remedial plan) as this Court finds appropriate.

Date: October 9, 2024

/s/Elizabeth A. Nielsen

Elizabeth A. Nielsen, Pa No. 335131

Erick G. Kaardal, MN No. 229647*

Mohrman, Kaardal & Erickson, P.A.

150 South Fifth Street, Suite 3100

Minneapolis, MN 55402

Telephone: 612-341-1074

Email: nielsen@mklaw.com

Email: kaardal@mklaw.com

**admitted pro hac vice*

Karen DiSalvo, PA No. 80309

Mohrman, Kaardal & Erickson, P.A.

Election Research Institute

1451 Quentin Road, Suite 232

Lebanon, PA 17042

Telephone: (717) 281-1776

Email: kd@election-institute.com

*Counsel for Petitioners Heather Honey, PA
Fair Elections, and Stacey Redfield.*

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Brief submitted herein contains 1,571 words and complies with the type/volume limitations of the Pennsylvania Rules of Appellate Procedure 2135. This Brief was prepared using a proportionally spaced typeface of 14-point. The word count is stated in reliance on Microsoft Word 2016, the word processing system used to prepare this Brief.

Date: October 9, 2024

/s/Elizabeth A. Nielsen

Elizabeth A. Nielsen, Pa No. 335131
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, MN 55402
Telephone: 612-341-1074
Email: nielsen@mklaw.com

RETRIEVED FROM DEMOCRATIC DOCUMENTS

USE OF AI TECHNOLOGY CERTIFICATION

Counsel attests that appropriate steps to verify whether AI technology systems have been used in preparation of this submission and if so, appropriate steps were taken, to the best of counsel's ability, to verify the truthfulness and accuracy of facts and citations of that content before submission to this Court. This submission did rely upon the ordinary or customary research tools and other available research sources such as, but not limited to, Westlaw or Lexis.

Date: October 9, 2024

/s/Elizabeth A. Nielsen

Elizabeth A. Nielsen, Pa No. 335131
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, MN 55402
Telephone: 612-341-1074
Email: nielsen@mklaw.com

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2024, I electronically filed the foregoing document with the Commonwealth Court of Pennsylvania by using the PACfile system. I certify that all participants in the case are registered PACfile users and that service will be accomplished by the PACfile system.

Date: October 9, 2024

/s/Elizabeth A. Nielsen

Elizabeth A. Nielsen, Pa No. 335131
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, MN 55402
Telephone: 612-341-1074
Email: nielsen@mklaw.com

RETRIEVEDFROMDEMOCRACYDOCKET.COM