



STATE BOARD OF ELECTIONS
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July 28, 2008

VIA Electronic Mail & U.S. Mail

Commissioner Rosemary Rodriguez, Chair
State Plan Guidelines Comments
U.S. Election Assistance Commission
1225 New York Ave., NW, Suite 1100
Washington, D.C. 20005

Re: ***Proposed Guidelines of HAVA Section 254(a) (11): Material Changes in the Administration of HAVA State Plans***

Dear Commissioner Rodriguez:

On behalf of the North Carolina State Board of Elections State Board of Elections, I am submitting a comment on the proposed Guidelines of HAVA Section 254(a) (11): Material Changes in the Administration of HAVA State Plans (Proposed Guidelines), discussed at the June 19, 2008, meeting of the Election Assistance Commission (EAC). We have been informed that this matter is currently open for public comment until 4 p.m. on August 11, 2008.

North Carolina concurs with Commissioner Hunter's concerns over sections (3), (4), and (5) of the Proposed Guidelines as she set out in the June 19, 2008, meeting.

Because HAVA did not mandate that the EAC was created to be an agency with the function of "approving" State Plans as contemplated by the Common Rule, 41 CFR 105-71 (aka the Common Rule) should not be applied in the administration of HAVA. It is very clear that HAVA's statutory language is in contrast to the language of the Common Rule. The duties of the EAC as it relates to State Plans are limited to publishing each State Plan according to Sec. 255(b) and to carrying out duties relating to election assistance in providing information and training on the management of payments and grants according to Sec. 202(4).

With permission of the Kentucky State Board of Elections, we would like to restate and adopt as our own contentions the following paragraphs in quotes taken from Kentucky's earlier comments sent to the EAC on this matter.

“Section 105-71-103(a) (of the Common Rule) states that

Section 105-71.100 through 105-71.152 of this subpart apply to all grants and subgrants to governments, except where *inconsistent* with Federal statutes or with regulations authorized in accordance with the exception provision of 105-71.105. (emphasis added)

The provisions of the Common Rule apply to grants and subgrants listed in Section 103 or grants or subgrants, which have enabling statutes that are consistent with the provisions of the Common Rule. Further, federal awarding agencies that have the authority to approve or disapprove of a State’s plan for implementation of the grant or subgrant may use the provisions of the Common Rule to regulate such State Plans.

Sec. 105-71.102 defines “prior approval” to mean “documentation evidencing consent prior to incurring specific costs.” The language in the Proposed Guidelines lifts heavily from the language in Sections 105-71.111 and 105-71.130 of the Common Rule. Section 105-71.130 repeatedly refers to the notion of “prior approval” before a state may make budgetary changes or programmatic changes to the State’s proposed use of a federal grant. HAVA, however, invests no such authority in the EAC to provide prior approval to a State’s use of HAVA funds. As such, sections (3), (4) and (5) of the Proposed Guidelines are outside of the EAC’s authority to levy upon the states.

As to the Proposed Guidelines’ sections (1) and (2), these guidelines are superfluous. HAVA Sections 253 and 254 provide specific guidance for the implementation of a State Plan. Any congressional revision to Sections 253 and 254 would necessarily require each state to amend their State Plans without unnecessary guidance from the EAC. The same argument holds true for a new or revised State law, organization, or policy affecting HAVA implementation—if such a change occurs, it is unnecessary for the EAC to dictate that a state’s Plan be revised. Section 253(c) expressly states

the specific choices on the methods of complying with the elements of a State plan *shall be left to the discretion of the State*. (emphasis added).

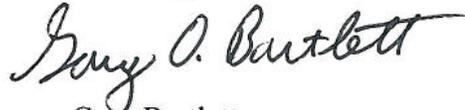
In no event does HAVA allow the EAC to provide “prior approval” for a State’s implementation of HAVA nor does it provide that the EAC can provide such mandatory guidance as is contemplated in the Proposed Guidelines.”

The North Carolina State Board of Elections views the Proposed Guidelines as being outside the limited authority given by HAVA to the EAC. This agency recalls the conferences and meetings of 2003 and 2004 where Congressional staffers who had worked on HAVA and the first set of EAC Commissioners accurately noted the fact that the EAC’s purpose was advisory and acting as a clearinghouse. Recent attempts by the EAC to become a regulatory agency with enforcement powers against the states have no legal basis and do not reflect a public policy need.

North Carolina would request the Board members to not support the Proposed Guidelines and remove the draft from consideration. We join with Kentucky to further request that any EAC vote on the Proposed Guidelines be done at an open public meeting of the Agency in accordance with the provisions of the Sunshine Act.

If you have any questions or concerns about my comments provided, please contact me. My phone is (919) 715-1827 and my e-mail is gary.bartlett@ncmail.net.

Sincerely,

A handwritten signature in black ink that reads "Gary O. Bartlett". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Gary Bartlett
Executive Director