



U.S. ELECTION ASSISTANCE COMMISSION
1335 East West Highway – Suite 4300
Silver Spring, MD 20910

TALLY VOTE MATTER

DATE & TIME OF TRANSMITTAL: May 19, 2017, 5:00pm

BALLOT DEADLINE: May 24, 2017, 5:00pm

COMMISSIONERS: HICKS, MASTERSON AND MCCORMICK

SUBJECT: Recommendation to approve the adoption and submission of the memo entitled "Interpretation of the 2015 Organizational Management Policy Statement and Response to the Order of the District Court in League of Women Voters et al. v. Newby et al."

☒

I approve the recommendation.

☐

I disapprove the recommendation.

☐

I object to the recommendation.

☐

I am recused from voting.

COMMENTS: _____

DATE: 05/24/17

SIGNATURE: Matthew V. McCormick

A definite vote is required. All ballots must be signed and dated. Please return **ONLY THE BALLOT** to the Executive Director. Please return the ballot no later than date and time shown above.

From Brian D. Newby, Executive Director



U.S. ELECTION ASSISTANCE COMMISSION
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COMMISSIONERS: HICKS, MASTERSON AND MCCORMICK

SUBJECT: Recommendation to approve the adoption and submission of the memo entitled "Interpretation of the 2015 Organizational Management Policy Statement and Response to the Order of the District Court in League of Women Voters et al. v. Newby et al."

- (x) I approve the recommendation.
- () I disapprove the recommendation.
- () I object to the recommendation.
- () I am recused from voting.

COMMENTS: I would have included the proposed policies and iterations of, that the commissioners have circulated, so that the Court could be informed of where each commissioner stands and the scope of the issues that separate them from an agreement on a policy to process state-specific instruction requests.

Ching A. McCon...

DATE: 5/22/2017 **SIGNATURE:** _____

Signature added by Clifford Tatum CD20

A definite vote is required. All ballots must be signed and dated. Please return **ONLY THE BALLOT** to the Executive Director. Please return the ballot no later than date and time shown above.

From Brian D. Newby, Executive Director

Re: Interpretation of 2015 Policy

Christy McCormick

Sun 5/21/2017 4:49 PM

To: Cliff Tatum <CTatum@eac.gov>; Matthew Masterson <MMasterson@eac.gov>; Thomas Hicks <THicks@eac.gov>;

📎 1 attachments (32 KB)

Interpretation Memo Ballot.cam.docx;

I approve the recommendation memo with the comments provided on my tally ballot. I authorize use of my electronic signature for purposes of this ballot.

Thanks very much,

Christy

From: Cliff Tatum

Sent: Friday, May 19, 2017 6:01 PM

To: Matthew Masterson; Thomas Hicks; Christy McCormick

Subject: Interpretation of 2015 Policy

Commissioners,

Please find attached the Interpretation Memo, a tally vote ballot and a certification of the tally vote for Matt's Signature. As Christy is out of the country, I have included additional time for the ballot to be reviewed and returned for certification. If there are any last minute changes to the memo that need to be made before you vote on it, please communicate the same to all, so that we all can see the proposed change and so that I can make any changes before the vote.

Thank you

Cliff



U.S. ELECTION ASSISTANCE COMMISSION
1335 East West Highway - Suite 4300
Silver Spring, MD 20910

TALLY VOTE MATTER

DATE & TIME OF TRANSMITTAL: May 31, 2017, 12:30pm

BALLOT DEADLINE: June 1, 2017, 12:30pm

COMMISSIONERS: HICKS, MASTERSON AND MCCORMICK

SUBJECT: Recommendation to approve the adoption and submission of the memo entitled "Interpretation of the 2015 Organizational Management Policy Statement and Response to the Order of the District Court in League of Women Voters et al. v. Newby et al."

- () I approve the recommendation.
- (X) I disapprove the recommendation.
- () I object to the recommendation.
- () I am recused from voting.

COMMENTS: See attached position statement for disapproval of the interpretation memo; I approve the submission of the tally vote and memo to the court.

DATE: 6/1/2017 **SIGNATURE:** John Hicks

A definite vote is required. All ballots must be signed and dated. Please return **ONLY THE BALLOT** to the Executive Director. Please return the ballot no later than date and time shown above.

From Brian D. Newby, Executive Director

Position Statement
of
Commissioner Thomas Hicks

June 1, 2017

On the Matter Regarding EAC Tally Vote dated June 1, 2017:

**Recommendation to approve the adoption and submission of the memo entitled
Interpretation of the 2015 Organizational Management Policy Statement and Response to the
Order of the District Court in League of Women Voters et al. v. Newby et al.**

On May 19, 2017, EAC Chairman Matthew Masterson proposed, via a Tally Vote, that the EAC approve a recommendation to approve the adoption and submission of the memo entitled Interpretation of the 2015 Organizational Management Policy Statement and Response to the Order of the District Court in League of Women Voters et al. v. Newby et al. The Interpretation Memo responds to the District Court's Order and Memorandum remanding the above-referenced case back to the EAC for the limited purposes of providing an interpretation of the EAC's 2015 Organizational Management Policy Statement and responding to several questions the Court included in its "Order and Memorandum." Because of the importance of this interpretation and the significance of the same, I am providing this position statement to explain my disapproval of certain portions of the interpretation, which has led me to disapprove the Interpretation memo recommendation.

I disapprove of the Interpretation memo for the following reasons:

Section One:

The Interpretation memo indicates in section one that the action taken by the Executive Director was not ultra vires because the Commissioners agreed at a February 24, 2015 EAC Public meeting to adopt the 2015 Organizational Management Policy. I agree that the 2015 Organizational Management Policy provides the Executive Director with authority to continue maintenance of the NVRA form; however, that expression of authority was limited to the Executive Director continuing those activities consistent with federal statute, regulation, and EAC policies and precedent as established by the agency. There was no dissent made to my above statement.

I believe that the Executive Director's decision was not consistent with agency precedent and in violation of NVRA. I do not believe the Executive Director has authority to reverse precedent or approve an action inconsistent with policy and precedent without express consent of at least three of the Commissioners. The past decisions of the agency are clear and consistent. A documentary proof-of-citizenship requirement (DPC) is not allowed as part of the federal mail voter registration form, including the state-specific instructions, which are part of the form. I

believe that the 2015 Organizational Management Policy approved unanimously by this commission requires the Executive Director to reject or disapprove any state's request on DPC.

Therefore I am unable to vote favorably for Section One.

Section Five:

I agree that deadlocked votes of the Commission do not establish policy nor can they change EAC regulations, policies, guidelines, advisories or procedural actions. However, deadlocked votes also effectively continue an existing policy, procedure or decision that has been established.

I disagree with the premise set forth "that in the event of a deadlocked vote the Executive Director can continue moving the agency forward." This premise in affect gives the Executive Director more authority than the Commissioners. The 2015 document designates the Executive Director with authority to continue maintenance of the NVRA form "consistent with the Commissioners' past directives" as stated before and agreed to unanimously. There was no dissent to the statement, "The Executive Director will still be able to manage the daily functions of the agency consistent with federal statutes, regulations and the EAC policies, answer questions from stakeholders regarding the application of NVRA and HAVA consistent with EAC policies and guidelines, and advisory and policies as set by the Commissioners."

Therefore I am unable to vote favorably for Section Five.

I concur with Sections two, three and four of the Interpretation Memo.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Thomas Hicks", is written over a horizontal line.

Commissioner Thomas Hicks

June 1, 2017

BEFORE THE ELECTION ASSISTANCE COMMISSION

In re:)
)
Recommendation to approve the Adoption)
And submission of the memo entitled)
Interpretation of the 2015 Organizational)
Management Policy Statement and Response to)
the Order of the District Court in the League of)
Women Voters et al. v. Newby et al.)
)

CERTIFICATION

I, Matthew V. Masterson, Chair of the U.S. Election Assistance Commission, do hereby certify that on June 1, 2017, the Commissioners voted on the above referenced matter. This matter proposed that the Commission approve the "Interpretation Memo of the 2015 Organizational Management Policy Statement and Respond to the Order of the District Court in League of Women Voters et al. v. Newby et al." This matter also proposed to submit the Interpretation Memo and Response to the District Court. An extension for the submission of the ballot was granted to Commissioner Hicks. All ballots were timely submitted.

After review of the ballots, I certify that the measure to approve the Interpretation Memo fails, having not achieved the requisite 3 votes required by law. Commissioners Masterson and McCormick voted affirmatively, and Commissioner Hicks opposed the Interpretation Memo.

Attest:

6/1/17
Date

Matthew V. Masterson
Matthew V. Masterson
Chair



U.S. ELECTION ASSISTANCE COMMISSION
1225 New York Ave. NW – Suite 1100
Washington, DC 20005

MEMORANDUM

To: United States District Court Judge Richard J. Leon

From: Commissioners Masterson, Hicks and McCormick

Date: June 1, 2017

Re: Interpretation of the 2015 Organizational Management Policy and Response to Order of the District Court in League of Women Voters et al. v. Newby et al.

Judge Richard J. Leon of the United States District Court for the District of Columbia (hereinafter, the “District Court”) has remanded League of Women Voters et al. v. Newby et al., to the Election Assistance Commission (hereinafter, the “EAC” or “Agency”) for the limited purpose of providing the Agency’s interpretation of the 2015 Roles and Responsibilities as it relates to the Executive Director’s authority to issue a decision on State Specific Instructions requests from the States of Kansas, Georgia, and Alabama, respectively.

The Order and Memorandum and Opinion from the District Court asked the ultimate question of whether the Executive Director’s actions were *ultra vires* as argued by the Plaintiffs, but the District Court’s opinion also asks a series of questions related to the delegation of authority from the EAC Commissioners to the Executive Director and a series of questions regarding the status of agency action when the Commissioners are unable to avoid a “deadlock vote” on a question of policy or agency action.

We have reviewed the District Court’s order, and identified a list of questions the Court has asked the Commission in order to resolve identified ambiguities.

The Court’s questions:

- 1) Was the Executive Director’s action [in approving the modifications to state specific instructions] *ultra vires* (conducted without the authority to do so)? (p. 8 of the Court’s Memorandum)

No, Executive Director Newby’s action was not *ultra vires*. At a public meeting held on February 24, 2015, the Commissioners unanimously adopted the 2015

Organizational Management Policy that delegates maintenance of the Federal Form to the Executive Director of the Commission.

The transcript of that public meeting provides at page 74 a statement by Commissioner Hicks that the Commissioners agree that this document¹ continues to instruct the Executive Director to continue maintaining the Federal Form consistent with the Commissioners' past directives, unless and until such directions were counter made should the agency find itself again without a quorum.

The transcript further provides,

The Executive Director will still be able to manage the daily functions of the agency consistent with federal statute, regulation and the EAC policies, answer questions from stakeholders regarding the application of NVRA and HAVA consistent with the EAC policies and guidelines and advice and policies as set by the Commissioners.

On February 2, 2016, just after Executive Director Newby issued his decision granting Kansas, Georgia, and Alabama's requests to update the Commission's website for their state specific instructions to the National Voter Registration Form, Commissioner Hicks issued the following statement on the decision:

The Executive Director of the United States Election Assistance Commission (EAC) issued letters to the state of Kansas, Georgia, and Alabama granting the states' request to amend the state instructions to the federal voter registration form, a decision that contradicts policy and precedent previously established by this Commission. The Executive Director unilaterally moved to alter the federal voter registration form to reflect those states' proof of citizenship requirements though [sic] a proposed change to the form beyond a simple change of election office address or phone number. Any material change to the form should be at the guidance of the agency's Commissioners following a notice and public comment period. In fact, the Commission's vote in early spring affirmed that agency staff does not have the authority to make policy decisions and further clarifying the role of the Executive Director in its Organizational Management Policy Statement by stating that the Executive Director in consultation with the Commissioners, may only "(1) prepare policy recommendations for commissioners approval, (2) implement policies once made, and (3) take responsibility for administrative matters." The Commission has addressed this matter several times over the last decade and voted to decline requests to add conflicting language to the federal voter registration form. As such, I believe that this decision constitutes a change of policy, which can only be made following official adoption by at least three

¹ 2015 Organizational Management Policy

Commissioners. Therefore, I ask that the letters be withdrawn. I will also ask that the Commission review this matter in a public forum to consider the acceptance or reject [sic] of the instructions.²

Commissioners McCormick and Masterson continue to agree with Commissioner Hicks' statement at the February 24, 2015 public meeting adopting the 2015 Organizational Management Policy, that the Executive Director had the authority "to continue maintaining the Federal Form consistent with the Commissioners' past directives . . . ," that the previous decisions made by the former Executive Director and Acting Executive Director on state proof of citizenship laws did not constitute policy made by the Commissioners nor precedent established by the Commissioners, given the differing requests and supporting documentation, and that Executive Director Newby did not act *ultra vires*; however unlike Commissioner Hicks, McCormick and Masterson do not believe that the decisions made by the former Executive Director and Acting Executive Director constitute precedent of the Agency.

2) May the EAC rule upon States' requests only through a vote of the Commissioners? (p.9 of the Court's Memorandum)

No. Consistent with the answer to question #1 and past practice of the Commission and the Federal Election Commission before it, when it was tasked with maintaining the Federal Form, this authority could be delegated to the Executive Director and/or staff.

At the time Congress transferred the NVRA responsibilities from the FEC to the EAC,³ the acceptance and rejection of proposed changes to the State-Specific instructions was conducted by the FEC staff and was handled as purely administrative and did not require a vote of the Commissioners. As previously stated in the Administrative Record before the District Court, the FEC promulgated action to allow staff to make all changes to the State-Specific Instructions and to "notice" the commissioners by bulletin upon such changes being made. *See* FEC Record (Oct. 2000), AR00163; FEC Record (Aug. 2002), AR00168.

² The statement may be found here: <https://www.eac.gov/documents/2016/02/02/statement-by-thomas-hicks-on-nvra/>, last visited May 16, 2017.

³ Congress conveyed the delegation of authority under NVRA to the EAC through the Help America Vote Act, (hereinafter, "HAVA"), wherein Congress transferred all functions of the FEC's Office of the Election Administration to the EAC. 52 U.S.C. § 20901 et seq. formerly cited as 42 U.S.C. §§15531, 15532.

This administrative process continued under the EAC purview until litigation over a decision by the former Executive Director (and subsequently reviewed by the Commissioners, ending in a deadlocked vote) was threatened and ensued. Prior to litigation, the acceptance and rejection of State-Specific Instructions were handled specifically by EAC staff and treated as an administrative matter. Because the EAC Commissioners could not adopt a uniform procedure for the staff to process each individual State-Specific Instruction request regardless of the nature of the request, the former Executive Director made the decision to pass the individual requests to the former Commissioners for consideration and a vote on the requests in order to alleviate scrutiny of the staff. *See, e.g.*, AR00793-96 (Mar. 20, 2008).

In September 2008, the EAC adopted a roles and responsibilities policy to guide the operations of the office. *See* AR00209. The roles and responsibilities policy, entitled “The Roles and Responsibilities of the Commissioners and Executive Director of the U.S. Election Assistance Commission,” reserved high-level matters of policy for the Commissioners to decide and it delegated day-to-day operations to the Executive Director, with the Commissioners retaining oversight authority of the Executive Director. Pursuant to their authority, the Commissioners delegated to the Executive Director the ability to manage the day-to-day operations of the agency, which included the Federal Form maintenance process. The Commissioners retained as part of their responsibilities the decision-making authority over matters of agency strategic planning, objectives and policy, and executive operational matters. The 2015 Operational Management Policy did not alter that delegation.

- 3) If the Executive Director continued to possess the delegated authority to “maintain” the Federal Form under the 2015 Policy Statement, did this authority include the power to approve or reject requests related to changes to the state-specific instructions? (pp. 8-9, 15 of the Court’s Memorandum)

Yes. All three commissioners agree that this included requests related to changes to the State Specific Instructions, the established practice of the Commission, and the FEC. It was delegated by the Commission to the previous Executive Director and to the Acting Executive Director previously, and that has not changed.

- a. Does making determinations regarding modifications to the State-Specific Instructions amount to “tak[ing] responsibility for administrative matters” as the Executive Director is authorized to do (in the 2015 Policy Statement)? (p. 16 of the Court’s Memorandum)

Yes, however, see clarification in part ii directly below.

- b. Is approving and denying state instruction requests a policy implementation, an administrative task, or neither? (p.16, 18-19), and does approving, or denying, requests actually amount to “implement[ing] policies,” made by the Commissioners? (p.16)

It would be fair to say that the current Commissioners disagree on this point. Commissioner Hicks believes that a request may be either an administrative task or policy implementation depending on the nature of the request. (See Commissioner Hicks’ February 2, 2016, statement above.) His position is that changes to State-Specific Instructions may take the form of either “administrative” or “policy” classifications depending on the impact of the State-Specific Instruction. The changes to State Specific Instructions range from minute address changes (which Commissioner Hicks would classify as administrative) to legal requirements imposed by states and territories (which Commissioner Hicks believes would fall within the “policy” realm if it is determined to impact the “acceptance and use” aspects of the NVRA).

Commissioners Masterson and McCormick do not agree with Commissioner Hicks’ February 2, 2016 statement that the Commission addressed the matter through policy making several times. The Commissioners did vote on the matter, but each time the vote failed to achieve three votes as required by the Help America Vote Act HAVA).⁴ HAVA provides: “Any action which the Commission is authorized to carry out under this Act may be carried out only with the approval of at least three of its members,” therefore the Commission has not created policy on this matter. The failed vote defaulted to the action of the previous Executive Director, of which the Commission did not approve nor disapprove. Moreover, no policy was ever passed altering the FEC’s policy that transferred to the EAC concerning the administrative nature of the requests. There is no EAC policy now, nor was there ever an FEC policy, defining that a “material change to the form should be at the guidance of the agency’s Commissioners following a notice and public comment period.” State-Specific Instruction requests have always been handled by the Executive Director and/or staff informally, and until the decision by Acting Executive Director Alice Miller, had never gone out for notice and public comment. None of the State-Specific Instructions requests since have gone out for notice and public comment either.

Further, Commissioner McCormick believes that the Commission has no authority to change any legal requirement passed by duly elected legislators of a state and that the responsibility of the Election Assistance Commission is to provide the voters with accurate State-Specific Instruction information so that the voters are not disenfranchised from any

⁴ 52 U.S.C. § 20928

part of their ballot for not meeting the state's requirements. Congress initially delegated limited regulatory authority under the NVRA to the Federal Election Commission (hereinafter, "the FEC") in Section 9(a). Section 9 is now codified as 52 U.S.C. § 20505, and was formerly cited as 42 U.S.C. § 1973gg-4(a) and (b) and 52 U.S.C. § 20508 was formerly cited as 42 U.S.C. § 1973gg-7(a). Section 9(a) included general instructions regarding the Federal Form and the Commission's role in "develop[ing] a mail voter registration application form for elections for Federal office;" (paragraph a.2) and submitting to the Congress a report assessing the impact of the NVRA every two years (paragraph a.3). The Commission is specifically granted authority under paragraph a.1 to "prescribe such regulations as are necessary to carry out paragraphs (2) and (3)." Section 9 (b) provided for contents to be included on the Federal Form. The Commission was not granted regulatory authority over Section 9(b). This limitation on the Election Assistance Commission's Rulemaking Authority was reconfirmed in the Help America Vote Act of 2002, Title II, Subtitle A, Part 1, Section 209, which states:

LIMITATION ON RULEMAKING AUTHORITY. The Commission shall not have any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government, except to the extent permitted under section 9(a) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-7(a)).

- 4) When Commissioners vote on State Specific Instruction requests does the decision to and the action of taking this vote change the action of making a decision on state instruction requests from an action that was not classified as "policy making" to one that is classified as "policy making" regardless of who is taking this action moving forward? (p.17)

No, not every vote of the Commission establishes policy. If the Commission is creating policy by a vote, then it will state so. As an example, a vote to change the contact address or telephone number of a state's voter registration office does not rise to the level of a policy classification simply because the Commissioners vote on it. Likewise, a vote to implement a state law change to the voting age requirement of a state to less than the minimum age of the federal law requirement does not rise to the level of a policy classification simply because the Commissioners voted on it. Votes that change State-Specific Instructions do not constitute nor invoke the need for an Agency determination as to whether the action has an impact on the agency's mission, goal or strategic objectives.

As explained above, the previous EAC commissioners voted on requests to the State-Specific Instructions at the request of the former Executive Director, not because there was a shift in the classification from "administrative" to "policy," but because the

denial of a request from Arizona by the Executive Director drew litigation. The Executive Director decided to ask the commissioners to vote on the requests in order to protect the staff and the Agency from allegations of partiality/impartiality, and arbitrary and capriciousness.

5) Do “deadlocked votes” of the Commission constitute “policymaking?”

The answer to this question is no. Per HAVA, at least three commissioner votes are needed to take action on behalf of the Agency. This is true as it relates to policy decisions considered by the Commission or as it relates to delegation of authority by the Commissioners to the Executive Director. An inability for the Commissioners to garner three votes means that an action cannot proceed. However, where the Commissioners have delegated authority to the Executive Director, an Executive Director decision can move the agency forward.

Such action by the Executive Director may be characterized as either day-today operations, administrative action, or implementing policy as established by the Commissioners. The Executive Director conducts initial agency action that may become final if the Commissioners are not able to reverse the action, by a required vote, but such action does not become policy, nor constitute policy or evolve into policy of the Agency.

Proposed Policy Directive

For the Court’s information, the Commissioners have endeavored to clarify the policy regarding the facilitation of State-Specific Instruction requests from the States. Individual Commissioners have developed and circulated proposals that aim to encompass the policy directives of NVRA, HAVA and the Organizational Management Policy, including an evaluation of whether or not the State-Specific Instruction request has an impact on the Agency’s mission, goals or objectives.