



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
302 North Office Building
Harrisburg, PA 17120

PEDRO A. CORTÉS
Secretary of the Commonwealth

Telephone: (717) 787-8727
Fax: (717) 787-1734
Website: www.dos.state.pa.us

February 23, 2006

Dear County Board of Elections and Election Officials:

As you know, Judge Dan Pellegrini of the Commonwealth Court of Pennsylvania recently decided the case of *Mary Beth Kuznik, et al. v. Westmoreland County Board of Commissioners, et al.*, No. 18 M.D. 2006. In his order, Judge Pellegrini prohibited Westmoreland County from purchasing new electronic voting systems without first securing permission from the voters by a referendum. The Commonwealth immediately appealed that order to the Supreme Court of Pennsylvania, which has agreed to address this matter expeditiously. The appeal operates as a stay of Judge Pellegrini's order and, therefore, no county is legally precluded from purchasing HAVA-compliant voting machines as a result of this case.

There is also a new and more recent development that might affect your decisionmaking in the procurement of new electronic voting systems. In a letter dated February 21, 2006, the U.S. Department of Justice (DOJ) served notice that it intends to seek a federal court order requiring full compliance with section 301 of the Help America Vote Act (HAVA), including particularly the explicit requirement that each polling place in the Commonwealth have an accessible voting system in place for use in the May 16, 2006 General Primary. A copy of the DOJ letter is attached. You should also note in the DOJ letter a specific reference to the deadline imposed by section 102 of HAVA – the May 16 General Primary – for States and their affected counties to replace their lever voting machines and punch card voting systems.

We recognize that the Commonwealth Court order has caused confusion and frustration in many county boards of elections in their earnest and continuing efforts to comply with the requirements of HAVA for the replacement or alteration of voting systems by the May 16, 2006 General Primary. Though the enforcement action that DOJ announced this week might add to the confusion and frustration, it also offers clarification of the federal government's position.

Without regard to the issues surrounding the *Kuznik* case, the DOJ notice confirms that the voting system standards mandated by section 301 of HAVA, including the requirements respecting accessibility for voters with disabilities, must be met. At the very least, counties must be prepared to do all that they can to ensure that there is at least one voting machine or device in every polling place that complies with the HAVA mandate (HAVA § 301(a)(3)) respecting accessibility of the voting system to voters with disabilities. *See* 42 U.S.C. § 15481(a)(3).

Counties must meet this specific requirement of HAVA irrespective of the final ruling of the Pennsylvania Supreme Court in *Kuznik* regarding the referendum issue.

On the broader issue of replacing voting systems to comply with HAVA, the Department has consistently maintained that HAVA requires the replacement of voting systems that do not satisfy the HAVA manual audit capacity requirement. We have also taken the position that lever voting machines do not meet this HAVA requirement. Nothing in Judge Pellegrini's Memorandum Opinion and Order changes that legal conclusion. Furthermore, it appears both the U.S. Election Assistance Commission and the U.S. Department of Justice share this conclusion as well.

It has also consistently been the position of the Commonwealth that HAVA supersedes any state laws that hinder the Commonwealth's compliance with the mandates of federal law, including the requirements of the Pennsylvania Constitution and Election Code that voters must first approve the use of electronic voting systems. For this reason, the Commonwealth has aggressively defended the *Kuznik* lawsuit and has achieved expedited consideration of the Commonwealth's appeal to the Pennsylvania Supreme Court.

Before this litigation was filed, counties were making meaningful progress in efforts to meet their HAVA obligations for new voting systems. Unfortunately, the *Kuznik* lawsuit has impeded that progress. Counties are now asking whether they can purchase new voting systems, use new voting systems if they do purchase them, use new voting systems experimentally, and generally how they should prepare to conduct the General Primary Election on May 16, 2006, in the wake of the *Kuznik* decision.

Unfortunately, until there is a final determination by the court of last resort, *e.g.*, the Pennsylvania Supreme Court, of the *Kuznik* litigation, the Department is constrained from giving any specific direction or advice on any matters relating to or affected by the lawsuit. That said, we do believe that it is appropriate to share with you some general observations that we hope will provide some guidance while we wait for a final decision from the court.

First, the Commonwealth's legal team is pursuing aggressively every avenue of appeal to overturn the Commonwealth Court decision. These efforts are proceeding forthwith and expeditiously before the Pennsylvania Supreme Court.

Second, with respect to the *Kuznik* decision:

- (1) No county other than Westmoreland is a party to the case or bound by the injunction issued in that case.
- (2) As the opinion of a single judge of Commonwealth Court, Judge Pellegrini's opinion is not binding precedent on that court or any court.

(3) As an unpublished memorandum opinion, the rules of the Commonwealth Court prohibit judges, litigants and their legal counsel from even citing Judge Pellegrini's memorandum opinion in any other case.


(4) The Commonwealth's appeal and the appeal of the Westmoreland County Board of Elections and Board of Commissioners automatically stayed Judge Pellegrini's order even as to Westmoreland County.

In light of the possibility that the Supreme Court might reverse the *Kuznik* decision, the Department believes it would be appropriate for every county to be prepared to purchase HAVA-compliant voting systems that have been duly certified by the Commonwealth and to prepare to use HAVA-compliant systems in the May 16, 2006 General Primary Election. It would also be appropriate for every county to consult with all vendors with whom the county might have pending or anticipated agreements for the purchase of electronic voting systems. Counties should take steps to ensure that prospective vendors are able to timely deliver HAVA-compliant voting systems for use on May 16, 2006.

The pending litigation may be concluded at a date that is too late to obtain new voting systems for use in the primary election on May 16. If that were the case, it would be prudent to take whatever course of action county officials might otherwise have taken in the normal course of events but for the *Kuznik* lawsuit to ensure that nothing stands in the way of the rights of citizens to cast their ballots for candidates for all offices appearing on the primary ballot.

You may further discuss the status of this matter by contacting Elections Commissioner Harry VanSickle at any time. The Commissioner is fully apprised about this matter and would be the best source of information for you within the Department of State.

Sincerely,



Pedro A. Cortés

PAC:bjd
Enclosure

c: Harry A. VanSickle, Commissioner
Douglas E. Hill, Executive Director, CCAP



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

February 21, 2006

The Honorable Tom Corbett
Attorney General
Strawberry Square, 16th Floor
Harrisburg, Pennsylvania 17120

Albert H. Masland, Esq.
Chief Counsel
Department of State
One Penn Center
2601 North 3rd Street
Harrisburg, Pennsylvania 17110

R. Mark Gesalman, Esq.
County Solicitor
2 N. Main Street, Suite 103
Greensburg, Pennsylvania 15601

Dear Messrs. Corbett, Masland and Gesalman:

I have authorized the filing of a lawsuit on behalf of the United States against the Commonwealth of Pennsylvania, the Pennsylvania Secretary of the Commonwealth in his official capacity as head of the Department of State, and Westmoreland County, pursuant to Section 301 of the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15481. Section 401 of HAVA, 42 U.S.C. § 15511, authorizes the Attorney General to bring an action in federal district court for such declaratory and injunctive relief as is necessary to carry out the requirements of Title III of HAVA.

Section 301 of HAVA, which went into effect on January 1, 2006, sets forth standards for all states for each voting system used in an election for Federal office. Among other things, Section 301 requires that voting systems provide a mechanism for a voter to verify and, where necessary, correct his or her ballot, notify a voter of an overvote, produce a permanent paper record with a manual audit capacity, comply with federal error rate standards, and provide for accessibility for voters with disabilities or with alternative language needs. In particular, Section 301(a)(3)(A) requires that voting systems used in an election for Federal office "shall be accessible for individuals with disabilities ... in a manner that provides the same opportunity for

access and participation (including privacy and independence) as for other voters." 42 U.S.C. § 15481(a)(3)(A). States must comply with the accessibility requirements of Section 301(a)(3)(A) through use of "at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place." 42 U.S.C. § 15482(a)(3)(B).

As of the January 1, 2006, effective date of Section 301, numerous Pennsylvania counties continued to use voting systems which did not comply with HAVA, e.g., by not providing accessibility for voters with disabilities required by Section 301(a)(3). A number of these counties now appear to be in serious jeopardy of not having HAVA-compliant voting systems in each polling place by the time of the first election for Federal office in the Commonwealth on May 16, 2006. Accordingly, the Commonwealth is not in compliance with Section 301 of HAVA.

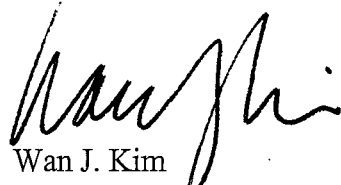
Further, we have noted the opinion of the Commonwealth Court of Pennsylvania enjoining Westmoreland County's use of HAVA-complaint electronic voting machines unless and until such machines are approved by in a referendum election. Kuznik v. Westmoreland County Bd. of Comm'rs, No. 18 M.D. (Pa. Commw. February 13, 2006). We believe the Court's opinion, which purports to require the County to employ a dual system involving paper ballots for elections for Federal office and lever machines for elections for state and local offices, would effectively preclude the County from complying with the accessibility requirements of Section 301(a)(3) of HAVA. Neither paper ballots, nor lever machines, provide accessibility for voters with disabilities in the manner required by Section 301(a)(3)(A) of HAVA, and the failure to provide for at least one accessible machine in each polling place for use in an election for Federal office violates Section 301(a)(3)(B) of HAVA. Where there is a conflict between federal and state law, the State is bound to resolve such conflict in favor of compliance with federal law.

Finally, we note that the Commonwealth has accepted nearly 23 million dollars in federal funds under Section 102 of HAVA, 42 U.S.C. § 15302, for replacement of its existing lever and punch card voting systems. Section 102 provides that failure to replace these systems by the time of the May 16, 2006 primary election for federal office will result in the Commonwealth losing the federal funds received under that replacement program, to the extent of the non-compliance.

We hope to resolve this matter through a negotiated consent decree rather than through costly and protracted litigation. We request that you contact us as soon as possible to indicate whether you are willing to enter into negotiations for a fair and equitable settlement of this matter that will remedy these violations. To that end, we are prepared to meet with you promptly to discuss terms of a possible consent decree to be filed along with the complaint. We will in any event file that complaint within 10 days.

Please contact trial attorney Richard Dellheim (202-305-1734) in our Voting Section, concerning your intentions or for any questions you may have. We look forward to working with you to resolve this matter promptly.

Sincerely,

A handwritten signature in black ink, appearing to read "Wan J. Kim". The signature is written in a cursive style with a large, sweeping initial "W".

Wan J. Kim
Assistant Attorney General

cc: Honorable Edward G. Rendell