

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
CASE NO. 6:05-cv-997-ORL-28-DAB

THE NATIONAL FEDERATION OF THE BLIND,
THE NATIONAL FEDERATION OF THE BLIND
OF FLORIDA, KATHERYN DAVIS, JOHN DAVID
TOWNSEND, CHAD BUCKINS, PETER CERULLO,
AND RYAN MANN,

Plaintiffs,

vs.

VOLUSIA COUNTY, and
ANN McFALL, as Supervisor
of Elections of Volusia County

Defendants.

**DEFENDANT ANN McFALL'S RESPONSE TO PLAINTIFFS'
MOTION FOR A PRELIMINARY INJUNCTION AND
MEMORANDUM OF LAW IN SUPPORT THEREOF**

Defendant, Ann McFall, as Supervisor of Elections for Volusia County, (hereinafter referred to as "Supervisor of Elections McFall") by and through its undersigned attorney, hereby files this Response to Plaintiffs' Motion for Preliminary Injunction and states as follows:

STATEMENT OF FACTS

1. In 1994, Volusia County purchased the Diebold AccuVote optical scan system to tabulate and ascertain its election results. The Paul Craft, Chief of the Bureau of Voting Systems Certification within the Division of Elections confirmed that "Volusia County currently utilizes the Global Election Systems AccuVote Election System 2001B

(blended) as certified October 30, 2001.” See paragraph 6 of Paul Craft’s Affidavit attached as “Exhibit A.”

2. On February 21, 2002 the Volusia County Council approved a measure to purchase 194 touch screen units to allow voters with disabilities to cast a ballot without additional assistance. Former Supervisor of Elections for Volusia County Deanie Lowe proposed the measure and was provided authority to negotiate a contract with Diebold. In an attachment to the Council item, prepared by the Supervisor of Elections Office, it was represented to the Council that such purchase “would be a sole source purchase, since Global Elections System (now Diebold) is the only vendor that produces a touch-screen-with-audible-ballot unit that can interface with our Accu-Vote optical scan system.” See page 3 of Council Agenda Item for February 21, 2002 and Supporting Documentation attached as “Exhibit B.”

3. On May 24, 2002 as approved by Governor Jeb Bush, Chapter 2002-281, Laws of Florida was enacted creating section 101.56062, Florida Statutes. Section 21 of the legislation provides that the effective date will be as follows:

Except as otherwise expressly provided in this act, this act shall take effect one year after the legislature adopts the general appropriations act specifically appropriating to the Department of State, for distribution to the counties, \$8.7 million or such other amounts as it determines and appropriates for the specific purpose of funding this act.

4. The editor’s notes to section 101.56062, Florida Statutes, as published in 2002 states that:

Line item 2871I of the 2004-2005 General Appropriations Act appropriates \$11.6 million for distribution to the counties for one disability-compliant machine per polling place. For purposes of the effect of ch. 2002-281, 1 year after adoption of this appropriation would be July

1, 2005.

5. On February 24, 2004, at the offices of the Division of Elections, a demonstration of the AutoMark voting terminal was provided to elections officials. See paragraph 9 of Paul Craft's Affidavit attached as "Exhibit A." The demonstration had neither an evidentiary value nor any effect for purposes of certification. *Id.* However, Paul Craft placed officials from Vogue Elections Systems, which distributes the AutoMark system, on notice as to the requirements for certification of their product in the State of Florida. *Id.*

6. In contrast to the Diebold touch screen system that actually records the electors vote so that it may later be tabulated along with all other votes cast on the terminal, the AutoMark system merely marks a ballot. Said ballot is then fed into the optical scanners for tabulation along with all other votes cast in that polling location.

7. On May 6, 2004, the Volusia County Council approved a measure to rescind its negotiation for the purchase of the Diebold touch screen products and allow Staff to pursue the purchase of the AutoMark system. See page 1 of Council Agenda Item for May 6, 2004 and Supporting Documentation attached as "Exhibit C." According to the Agenda Item Summary, Diebold had failed to gain certification on two occasions but was confident that it would pass Florida's strict criteria by the end of May 2004. *Id.* On that date the AutoMark system had still not been submitted for certification with the State of Florida.

8. On October 6, 2004 the Florida Division of Elections, received an application for the "Automark Voter-Assist Terminal" from Automark Technical

Systems, LLC. See paragraph 11 of Paul Craft's Affidavit attached as "Exhibit A." The application would later be deemed to be incomplete and despite supplemental filings the application remains incomplete. *Id.*

9. On October 14, 2004 Diebold Election Systems, Inc. received certification of their "blended" system which employs the use of the optical scanners along with their touch screen machines. See paragraph 8b. of Paul Craft's Affidavit attached as "Exhibit A."

10. On January 31, 2005, the Florida Division of Elections, received three applications from Elections Systems and Software (ES&S) that used AutoMark technology. See paragraph 12 of Paul Craft's Affidavit attached as "Exhibit A." Two of the three applications were to blend the AutoMark with the Diebold optical scanners.

11. On March 10, 2005, the Volusia Council Council considered a request from Supervisor of Elections McFall to rescind the Council's motion of May 6, 2004 and begin negotiating a contract with Diebold for the purchase of their touch screen terminals. See page 1 of Council Agenda Item for March 10, 2005 and Supporting Documentation attached as "Exhibit D." No action was taken by the Council but they were put on notice that the Diebold system was certified by the Florida Division of Elections while the AutoMark system had still not obtained certification. *Id* at page 2. The council was also informed that it was unlikely that AutoMark would have completed the requirements for state certification by July 1, 2005. *Id.*

12. On April 7, 2005, the Council considered two motions of significance. First it approved Budget Resolution to accept a Voting Systems Assistance Grant as

distributed by the Florida Department of State to counties in need of assistance to purchase disability accessible systems and specifically for the purchase of equipment to meet the requirements of section 101.56062, Florida Statutes. See Exhibit B of the Second Declaration of Deanie Lowe filed July 8, 2005 (Doc. 12). The amount of the grant is for \$699,883.22. *Id.* The provisions of this grant also require Volusia County to return any funds that are not used by January 1, 2006.

14. Secondly, at the Volusia County Council meeting of April 7, 2005, the Supervisor of Elections was granted the authority to negotiate a contract with Diebold for the purchase of touch screen terminals. See Exhibit A of the Second Declaration of Deanie Lowe filed July 8, 2005 (Doc. 12). As of April 7, 2005, Diebold was the only provider of accessible equipment that could be used in conjunction with Volusia's existing AccuVote optical scanners. Therefore, the Council did not have to undertake the competitive bid process as required in Section 101.293, Florida Statutes and was able to pursue negotiations for a sole-source purchase with the only vendor that sold equipment certified to produce equipment in compliance with the requirements of section 101.56062, Florida Statutes. *Id.*

15. On June 6, 2005 the Council was presented with a fair and valid contract for the purchase of the Diebold touch screen terminals to be incorporated into a "blended" system with Volusia County's existing AccuVote optical scanners. See Exhibit C of the Second Declaration of Deanie Lowe filed July 8, 2005 (Doc. 12). The elections system as submitted was certified by the Division of Elections. However, the Volusia County Council chose not to approve the measure by a 4-3 vote. The only available

vendor for compliance was rejected.

16. On June 16, 2005 the matter was re-considered by the Volusia County Council but no vote was taken.

17. On June 24, 2005, a supplemental filing was submitted by Elections Systems and Software (ES&S) for two of the original applications submitted on January 31, 2005. See paragraph 12 of Paul Craft's Affidavit attached as "Exhibit A." Again, these two applications are seeking certification for a "blended" system with the Diebold AccuVote optical scanners.

18. On June 29, 2005 the proposed Diebold contract was again rejected by a 4-3 vote of the Volusia County Council. See Exhibit D of the Second Declaration of Deanie Lowe filed July 8, 2005 (Doc. 12).

19. On July 8, 2005, the two applications ES&S applications previously resubmitted on June 24, 2005 were deemed complete. See paragraph 12 of Paul Craft's Affidavit attached as "Exhibit A." However, the systems as submitted must now undergo certification testing. To date, no certification testing has been scheduled for these two applications.

20. Supervisor of Elections McFall has indicated that July 29, 2005 is the final date for her office to properly and successfully conduct the October 11 municipal elections using the required disability accessible touch screen terminals. See Exhibit E of the Second Declaration of Deanie Lowe filed July 8, 2005 (Doc. 12).

21. Pursuant to Dave Byrd a representative for Diebold, Inc. July 15, 2005 is the deadline for Diebold to receive a fully executed contract and be able to deliver the

touch screen machines and training by July 29, 2005. See paragraph 5 of Declaration of Dave Byrd filed July 8, 2005 (Doc. 12).

22. The next regularly scheduled Volusia County Council meeting is July 28, 2005.

23. The first set of elections in Volusia County are the municipal elections scheduled to be held on October 11, 2005.

MEMORANDUM OF LAW

Supervisor McFall is seeking to join the Plaintiffs for the limited purpose of obtaining either declaratory relief or preliminary injunctive relief in order to satisfy her Constitutional obligations as a duly elected public official. As such, based on the foregoing issues of law she is compelled to seek relief from this Court and demands such timely relief.

A. Supervisor of Elections McFall is a duly elected official with sworn duties and responsibilities

There is no dispute that Supervisor of Elections Ann McFall (hereinafter “Supervisor McFall”) has been elected as the Supervisor of Elections for Volusia County. As an officer of the state, Supervisor McFall is required to undertake the oath as prescribed in Section 5, Article II of the Florida Constitution. See Section 98.015, F.S. Said oath states as follows:

"I do solemnly swear (or affirm) that I will support, protect, and defend the Constitution and Government of the United States and of the State of Florida; that I am duly qualified to hold office under the Constitution of the state; and that I will well and faithfully perform the duties of (title of office) on which I am now

about to enter. So help me God."

In addition, as the department head for elections in Volusia County, she is "responsible for the administration of elections in accordance with federal, state and county laws and shall perform related duties as required." Section 2-138, Volusia County Code.

B. Section 101.56062, Florida Statutes is Constitutional and Valid

To date no Volusia County Council member or other interested party has argued that that Section 101.56062, Florida Statutes are unconstitutional or invalid. The time allowed for Counties to comply between the effective date of the law, 2002 and the required implementation date July 1, 2005 is more than sufficient. In addition, funding for the majority of this mandate has been provided by the state in a timely manner. Therefore, there is no valid reason why the law should not be applied to all Florida counties without exception.

C. Volusia County's Current Elections System Does Not Comport with Section 101.56062, Florida Statutes

It is undisputed that the current election system which only employs optical scanners does not comport with the requirements of current law. Furthermore, pursuant to the Division of Elections own expert only 6 systems currently exist that meet the requirements. See paragraph 8 of Paul Craft's Affidavit attached as "Exhibit A." Of those six only two systems employ the Diebold AccuVote optical scanners currently owned by Volusia County. See paragraph 15 of Paul Craft's Affidavit attached as "Exhibit A."

This is not to say that the purchase of the Diebold touch screens is the only available option, it is simply the most feasible economic option chosen by Volusia

County's Council since it did not require that all existing equipment be replaced. What is also clear is that the AutoMark system has still not begun certification testing which means that the only current system that can use the Diebold AccuVote optical scanners, is the one certified with the Diebold touch screens.

D. Section 101.293, Florida Statutes Requires Competitive Sealed Bids

Ironically, the Volusia County Council has sought to delay in making their final decision pending the certification of the AutoMark system. However, if granted certification, this would then require the Council to consider both eligible vendors, Diebold and AccuMark because of the requirements of Section 101.293, Florida Statutes which state that the purchase of such equipment should be made through a competitive sealed bid process unless there is but one sole-source provider.

E. Section 104.0515, Florida Statutes, Provides Criminal Penalties for Failure to Abide By the Elections Code

Because Section 101.294, F.S., states that "No governing body shall purchase or cause to be purchased any voting equipment unless such equipment has been certified for use in this state by the Department of State" the use of any other elections system is illegal. Section 104.0515, F.S., strictly prohibits any person acting under color of law to "apply any standard, practice, or procedure different from the standards, practices or procedures applied under law to other individuals within the same political subdivision who have been found to be qualified to vote." Subsection (5) of this statute provides that any person in violation of these provisions is guilty of a felony of the third degree. Electors in Volusia County face tremendous uncertainty as to whether their votes will be counted for any state or federal election in which all other counties are in compliance.

Therefore, a decision to reject the contract has forced the Supervisor of Elections to either completely disregard state law and commit a possible felony by using the existing elections system, or, alternatively, she may refuse to conduct elections in Volusia County which is a violation of her sworn duties and responsibilities.

CONCLUSION

Supervisor of Elections McFall understands that the Volusia County Council has a well expressed interest in having every vote made on a paper ballot. However, the technology and elections system they seek to use is just not available as of today. In fact, the only option that is both economically feasible and can be purchased in time for the Supervisor to comport with all necessary deadlines fir the municipal elections in the fall of 2005 is the purchase of the Diebold systems touch screen terminals.

The Supervisor's ability to comport with the law is directly linked to the Council's exclusive authority to purchase the necessary voting equipment and therefore she should not be subject to injunctive relief. However, Supervisor of Elections McFall is requesting that this court enter a declaratory judgment on whether Volusia County must comply with Section 101.56062 or alternatively preliminary injunctive relief to allow the Supervisor to contract for the purchase of the necessary equipment from Diebold.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2005, a copy by electronic mail was sent to the attorneys below via the Clerk of the Court's CM/ECF electronic filing system: Miguel M. De la O, (Counsel for the Plaintiffs), 3001 S.W. 3rd Avenue, Miami, Florida 33129, (305.285.5555) (delao@delao-marko.com); David Young, Esq., (Counsel for Volusia County), Akerman Senterfitt, 255 S Orange Ave, 17th Floor, Orlando Florida 32801-3445 (407.843.6610) (david.young@akerman.com); David V. Kornreich, Esq., (Counsel for Volusia County), Akerman Senterfitt, 255 S Orange Ave, 17th Floor, Orlando Florida 32801-3445 (407.843.6610) (dkornreich@akerman.com), Daniel Eckert, Esq., (Counsel for Volusia County), County Attorney's Office, 123 W. Indiana Avenue, Deland, Florida 32720-4615 (386.736.5990) (deckert@co.volusia.fl.us).