

MINUTES

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2 The State Board of Elections Board Meeting was held on Monday, September 23,
3 2013. The meeting was held in the General Assembly Building, Room C, in Richmond,
4 Virginia. In attendance, representing the State Board of Elections (SBE) was Charles
5 Judd, Chair; Kimberly Bowers, Vice Chair; Donald Palmer, Secretary; Joshua Lief;
6 Senior Assistant Attorney General & SBE Counsel; Justin Riemer, Deputy Secretary;
7 Nikki Sheridan, Confidential Policy Advisor; Chris Piper, Election Services Manager;
8 and Susan Lee, Election Uniformity Manager; Myron McClees, SBE Policy Analyst.
9 Chairman Judd called the meeting to order at 10:00a.m.

10 The first order of business was the approval of the SBE Board Minutes from the
11 August 13, 2013 and August 23, 2013 Board Meetings. Chairman Judd stated that each
12 set of Board Meeting Minutes would be addressed separately. Chairman Judd asked if
13 Board Members had any additions or corrections to the August 13, 2013 Board Minutes.
14 Joshua Lief, SBE Counsel stated that an insertion of the word “local” between the word
15 “sued” and “election” on line 131 was required. Vice Chair Bowers noted that the
16 minutes reflected the changes submitted at the August 23, 2013 Board Meeting.
17 Chairman Judd moved *that the August 13, 2013 Minutes be approved with the noted*
18 *changes*. Vice Chair Bowers seconded the motion and the Board unanimously approved
19 the Minutes. Chairman Judd asked if Board Members had any additions or corrections to
20 the August 23, 2013 Board Minutes. Mr. Lief stated on line 328 the word “expressed”
21 needed to be changed to the word “express”. Chairman Judd moved *that the August 23,*
22 *2013 Minutes be approved with the noted changes*. Vice Chair Bowers seconded the
23 motion and the Board unanimously approved the Minutes.

24 The second order of business was the Secretary’s Report delivered by Secretary
25 Palmer. Secretary Palmer informed the Board that the Request for Information (RFI) for
26 SB1256 has been completed and the voter identification workgroup has met several
27 times. Secretary Palmer stated the RFP for implementation infrastructure was released on
28 September 11, 2013 and SBE anticipates a close date of October 31, 2013. Secretary
29 Palmer stated that in 2012, the SBE Information Services Division was recognized as a
30 finalist in the IT as an Efficiency Driver, Government to Citizen Category for the new

31 campaign finance disclosure system, COMET. This year, the SBE Information Services
32 Division was awarded the Governor's Technology Award in the IT as an Efficiency
33 Driver, Government to Citizen Category for the new online voter registration system that
34 launched in July, 2013. Secretary Palmer recognized Matt Davis, Information
35 Technology Manager, and his team for this accomplishment. Secretary Palmer
36 recognized Susan Lee, Election Uniformity Manager, and her team for the work
37 completed with the online officer of election training and noted that 44 localities have
38 participated and that most of the Commonwealth has initiated a service for the training of
39 their officers of election. Secretary Palmer stated that the Commonwealth met the 45-day
40 absentee ballot deadline and SBE has launched a new service with 45 localities for our
41 military and overseas voters. The system is called Live Ballot and was developed by
42 Democracy Live in partnership with Microsoft. Secretary Palmer stated that localities can
43 direct their UOCOVA voters to a live online ballot site where voters access and mark
44 their ballot. The voter then returns the printed completed ballot via email to the locality
45 for counting. Secretary Palmer stated that this service became available as a result of a
46 grant from the Federal Voting Assistance Program (FVAP) within the Department of
47 Defense (DOD). Secretary Palmer stated that a secondary service to the Live Ballot will
48 be a sample ballot that will be interactive statewide for all the citizens of the
49 Commonwealth and this will be launched before the election in November, 2013.
50 Chairman Judd inquired if there were any questions for Secretary Palmer. Chairman Judd
51 inquired if the envelope printed for the new system, Live Ballot, was the Envelope B?
52 Secretary Palmer stated that the envelope is provided by FVAP and is similar to Envelope
53 B. Chairman Judd asked if the ballot stays secure. Secretary Palmer replied: "Yes".

54 The next order of business was the Legal Report delivered by Joshua Lief, SBE
55 Counsel. Mr. Lief stated that at the last Board Meeting he was asked to address the issue
56 of express advocacy in connection with an alleged campaign finance violation. Mr. Lief
57 stated that he was asked to conduct additional research on this subject matter. Mr. Lief
58 stated that the Minutes from that Board Meeting accurately reflect what he had conveyed
59 at the last meeting. Mr. Lief stated that the law is clear in Virginia and for this election
60 cycle that express advocacy is the "magic words" test. The Federal Election Commission
61 utilizes a two part test and in addition to magic words utilizes the concept on influencing

62 an election. Mr. Lief stated that there is a little bit of ambiguity on the SBE website and
63 after this election cycle we may want to look at changing this because the express
64 advocacy definition on the SBE website talks about both influencing and magic words
65 which may cause confusion. Mr. Lief stated that he understands that Secretary Palmer
66 and Mr. Piper have given campaigns guidance that the magic words were needed in
67 Virginia. Mr. Lief asked if there were any questions. Chairman Judd asked if the magic
68 words, which mean specific words, that are used to trigger the application of express
69 advocacy are those words code or is that developed by staff interpretation. Mr. Lief
70 replied: “neither, I would say that is plain language; vote for, do not vote for, opposed,
71 and send him home”. Mr. Lief stated that it has to be expressly advocating for the
72 candidate and it really is up to the SBE staff to decide on a case by case basis. Chairman
73 Judd stated that he agreed that changes should not occur to the SBE website between now
74 and November 5, 2013. Mr. Lief then recommended to the Board that the complaint
75 which generated this discussion be dismissed. Chairman Judd stated that it is the advice
76 of legal counsel to dismiss the complaint that was heard at the August 23, 2013 Board
77 Meeting. Vice Chair Bower moved *that we dismiss the complaint that was brought before*
78 *the Board in the last meeting regarding express advocacy*. Secretary Palmer seconded the
79 motion and Chairman Judd inquired if there were any comments.

80 Mr. Dave Webster approached the podium. Mr. Webster stated that he was the
81 individual who filed the complaint. Mr. Webster stated that he complained that a
82 Democratic Party of Virginia ad ran without the correct disclosure. Mr. Webster stated
83 that he submitted an affidavit signed by Delegate Tom Rush stating that he did not recall
84 the magic words standard being discussed when the bill was being considered and
85 Virginia can adopt the definition of express advocacy apart from the magic word
86 standard. Mr. Webster stated that on the federal level that in addition to the magic words
87 test and reasonable interpretation standard that reads that express advocacy has an
88 unambiguous electoral portion for which reasonable minds could not debate that the
89 materials were designed to elect or defeat one or more clearly identifiable candidates. Mr.
90 Webster stated that he supported delaying any changes until after the November, 2013
91 election. Chairman Judd inquired if there were any other public comments.

92 Mr. James Manship, Sr., Investigative Journalist, approached the podium. Mr.
93 Manship asked what other complaints are currently before SBE Board Members and how
94 a citizen can find out about those complaints so they could attend future meetings to
95 speak on the complaints. Secretary Palmer stated that all complaints are posted as part of
96 the SBE Agenda which can be viewed on Regulatory Town Hall. Mr. Piper stated that as
97 soon as a complaint is received by SBE it becomes FOIAble and if a citizen was to ask
98 for a copy of the complaint and the evidence SBE would provide the requested
99 information. Chairman Judd inquired if there were any other public comments and there
100 were none. The Board unanimously carried the motion.

101 The next order of business was the Ballot Position Drawing for the Powhatan
102 County Clerk Special Election on February 4, 2014. Chris Piper, Election Services
103 Manager, explained the process. Vice Chair Bowers drew the first position of the
104 Democratic Party and Secretary Palmer drew the second position of Republican Party.
105 Chairman Judd declared that the ballot order had been determined with the Democratic
106 candidate listed first and the Republican candidate listed second.

107 The next order of business was the Optical Scan Trial for Brunswick County.
108 Susan Lee, Election Uniformity Manager, stated that Virginia election law provides for
109 the experimental use of certified voting systems at an election, with SBE approval. Ms.
110 Lee stated that Brunswick County is seeking permission to trial certified voting systems
111 in one precinct during the November 5, 2013 general election. Brunswick County plans
112 to use the Unisyn OVO optical scan machine in the Brunswick precinct. Ms. Lee reported
113 that the vendor has agreed to print the ballots, program the machines and provide training
114 and support. This trial will be used to evaluate the purchase of optical scan equipment for
115 Brunswick County. Secretary Palmer moved *that the Board approve the experimental use*
116 *of approved optical scan voting equipment in Brunswick County for the November 5,*
117 *2013 general election pursuant to the Code of Virginia.* Vice Chair Bowers seconded the
118 motion Chairman Judd inquired if there were any comments and there were none. The
119 Board unanimously carried the motion.

120 Ms. Lee notified the Board Members that on Friday, September 20, 2013 SBE
121 received a similar request from the Fairfax County Electoral Board. Ms. Lee stated that
122 the concern is that the time frame between now and the election are narrow and a Board

123 review of this request would be appreciated. Chairman Judd moved *that the request by*
124 *Fairfax County be added to the agenda for consideration.* Secretary Palmer seconded the
125 motion and the Board unanimously carried the motion.

126 The next order of business was the Optical Scan Trial for Fairfax County. Susan
127 Lee, Election Uniformity Manager, stated that Virginia election law provides for the
128 experimental use of certified voting systems at an election, with SBE approval. Ms. Lee
129 stated that Fairfax County is seeking permission to trial certified voting systems in three
130 precincts during the November 5, 2013 general election and to test equipment for
131 absentee voting in satellite locations. They plan to test three potential vendors' voting
132 equipment, Unisyn, ES&S and Hart Intercivic. The vendors have agreed to provide
133 precinct voting equipment with memory devices, ballot boxes and 2,500 ballots, as well
134 as support for pre-election logic and accuracy testing, training for election officials and
135 on-site support on Election Day. This trial will be used to evaluate the purchase of optical
136 scan equipment for Fairfax County. Vice Chair Bowers asked if one precinct would have
137 all three machines or would they have only one type of machine to test. Ms. Lee stated
138 that each precinct would be using a different machine type. Secretary Palmer moved *that*
139 *the Board approve the experimental use of approved optical scan voting equipment in*
140 *Fairfax County for the November 5, 2013 general election pursuant to the Code of*
141 *Virginia.* Vice Chair Bowers seconded the motion Chairman Judd inquired if there were
142 any comments and there were none. The Board unanimously carried the motion.

143 The next order of business was the complaint against Mike McHugh, presented by
144 Chris Piper, Election Services Manager. Mr. Piper stated that Mr. McHugh and his
145 attorney requested that the Board move the matter to the next Board Meeting. Mr. Piper
146 stated that this complaint was not a pressing pre-election issue and SBE staff
147 recommends accommodating this request. Chairman Judd stated that the Board Materials
148 prepared for this meeting reads that the staff recommends that the Board refer the matter
149 to Attorney for the Commonwealth in the County of Warren for further investigation.
150 Chairman Judd asked: "Would this action be appropriate and if so why are we even
151 discussing it at this level?" Mr. Piper replied: "We could remove the matter and staff
152 could refer the matter to the Commonwealth Attorney." Joshua Lief, SBE Counsel, stated
153 that since Mr. McHugh was contacted about this complaint he should be given the

154 opportunity to address the Board Members. Chairman Judd moved *to direct the staff to*
155 *move the complaint against Mike McHugh to the next meeting agenda.* Secretary Palmer
156 seconded the motion and the Board unanimously approved the motion.

157 Chairman Judd asked if there was any other business or public comment to come
158 before the Board. Carol Noggle, League of Women Voters of Virginia, approached the
159 podium. Ms. Noggle stated that the League of Women Voters of Virginia will be
160 participating in the photo identification group and would like to be notified of those
161 meeting dates. Ms. Noggle stated that the League has an online guide for this election
162 with the site name of Vote411. Ms. Noggle stated that the website provides voter
163 information on the statewide races. Ms. Noggle stated that the League is concerned about
164 the “so called” purging of 57,000 voters and there needs to be clarity on the maintenance
165 of those lists and we have been in touch with the electoral boards and general registrars in
166 Fairfax and Prince William Counties and we believe that they are following the correct
167 procedures. Ms. Noggle stated that there is inflammatory and incorrect information
168 circulating including an article in the Roanoke newspaper. Ms. Noggle stated that the
169 League of Women Voters would like to help ensure that the public has correct
170 information. Ms. Noggle stated that the League would be happy to pass along any
171 statement from the Board to our network. Chairman Judd stated that he has viewed the
172 Vote411 demonstration and that it is very impressive. Chairman Judd asked if there were
173 any other comments.

174 Lamont Kizzie, candidate for sheriff, approached the podium. Mr. Kizzie stated
175 that he received a letter stating that several advertisements were in violation of campaign
176 disclosure laws. Mr. Kizzie stated that he had a civil penalty imposed and stated that he
177 would comply with the complaints. Mr. Kizzie stated that he wanted the Board to
178 consider removing the penalties. Chairman Judd asked if Mr. Kizzie was notified of the
179 Board Meeting on August 23, 2013 when the complaint was being heard. Mr. Kizzie
180 replied: “Yes”. Chairman Judd stated that the reason the certified letter is sent is to make
181 sure the individual understands the urgency. Mr. Piper stated that he has copies of the
182 Kizzie complaint if they so desire to revisit the complaint. Chairman Judd stated that the
183 Board gave proper notice and Mr. Kizzie did not attend the Board Meeting. Vice Chair
184 Bowers stated that if people are not available for the Board Meeting we ask that they send

185 an email, traditional correspondence, and or appear in person. Vice Chair Bowers stated
186 that the Board understands that an individual may not be able to make the hearing but it is
187 difficult to go back and reverse the decision because we made the decision based on the
188 information that the Board was presented and it is important to be transparent as well as
189 uniform when the Board is making decisions. Chairman Judd stated that the Board
190 operates by motion. Chairman Judd asked: “Do we have a motion?” The Board Members
191 passed on delivering a motion. Chairman Judd stated that since there was not a motion
192 the Board would not reconsider the complaint or the penalty assessed. Chairman Judd
193 asked if there were any other comments.

194 Mr. James Manship, Sr., Investigative Journalist, approached the podium. Mr.
195 Manship stated that it appears that the Board operates as a quasi judicial function
196 amongst its’ other duties and in the judiciary function the person has 10 days to appeal a
197 decision. Chairman Judd stated that the Board has already addressed this issue.
198 Chairman Judd asked if there were any other comments and there were none.

199 Chairman Judd then moved *to close the meeting to discuss actual and probable*
200 *litigation matters and specific legal matters requiring the provision of legal advice by*
201 *legal counsel as authorized by § 2.2-3711(A)(7) of the Code of Virginia.* Secretary
202 Palmer seconded the motion and the Board unanimously carried the motion. Chairman
203 Judd directed Justin Riemer, Deputy Secretary; Nikki Sheridan, Confidential Policy
204 Advisor; Rose Mansfield, Executive Assistant and Wanda Judd, to remain with the Board
205 during the closed session. Secretary Palmer seconded the motion and the Board went into
206 Executive Session at 10:40a.m.

207 At 11:30a.m. Chairman Judd *moved to reconvene in open session and a roll call*
208 *vote was taken as required by § 2.2-3712(D) of the Code of Virginia, unanimously*
209 *certifying that during the closed meeting (i) only public business matters lawfully*
210 *exempted from open meeting requirements under this chapter, and (ii) only such public*
211 *business matters as were identified in the motion by which the closed meeting was*
212 *concerned were heard, were discussed or considered.* Secretary Palmer seconded the
213 motion and the Board unanimously approved the motion. Justin Riemer, Deputy
214 Secretary, performed the roll call and all Board Members were present.

215 Chairman Judd asked if there were any other comments and there were none.
216 Chairman Judd moved *to adjourn*. Secretary Palmer seconded the motion and the Board
217 approved the motion to adjourn. The meeting was adjourned at approximately 12:30a.m.

218 The Board shall reconvene on November 5, 2013 at 9:00a.m. in the Washington
219 Building, 1100 Bank Street, Richmond, Virginia, Room B27.

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Secretary

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Chair

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Vice-Chair

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