

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA**

FLORIDA STATE CONFERENCE OF THE
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE
(NAACP), as an organization and representative
of its members; *et al.*,

Civil No. 4:07cv402 SPM/WCS

vs.

KURT S. BROWNING, in his official capacity as
Secretary of State for the State of Florida,

Defendant.

**PLAINTIFFS' OPPOSITION TO DEFENDANT'S
MOTION FOR PROTECTIVE ORDER**

It is undisputed that the Hillsborough Supervisor of Elections: (i) was unable to provide testimony on a number of topics for which he was designated to testify upon; (ii) specifically identified two of his employees that had the requisite knowledge; and (iii) offered to have those employees testify in his stead on those matters. Despite this, the Secretary objects to Plaintiffs deposing those employees and, instead, insists that Plaintiffs should be denied legitimate, relevant and necessary discovery. Accordingly, and for the reasons stated below, the Secretary's motion for protective order should be denied in its entirety.

Plaintiffs subpoenaed Buddy Johnson, the Hillsborough Supervisor of Elections, to be deposed on November 23, from 3:00 - 4:30 p.m., November 24, from 3:00 - 4:30 p.m., and, if necessary, on November 25, from 9:00 am - 12:00 p.m. Ex. A.

In coordinating the deposition, undersigned counsel specifically requested that the Supervisor's counsel identify "which topics, as raised by the document request, Supervisor Johnson can provide testimony; [and] to the extent Supervisor Johnson cannot speak to issues raised by the document request, identify the employee(s) that we must depose in order to obtain the requested testimony." Supervisor's counsel responded that "Mr. Johnson will speak to the issues raised by the document request." Ex. B. Based upon that representation, Plaintiffs proceeded with the deposition of the Supervisor per the subpoena.

During the course of the Supervisor's deposition it became clear, however, that the Supervisor either lacked the requisite knowledge or was otherwise unable to testify about a multitude of topics relating to this lawsuit -- particularly, the implementation and effect of Subsection 6; for example:

- a. How the information manually input into Hillsborough County databases are transmitted to the state. Ex. C at 31:8-20.¹
- b. The amount of time that it takes employees to input the information on the applications into the database. Ex. C at 34:5-8.
- c. The content of the training for employees who do data entry. Ex. C at 37:23-38:1.
- d. How long it takes Hillsborough County to receive notice from the state that the application could not be verified. Ex. C at 35:13-18.

¹ Exhibit C consists of true and correct copies of excerpts from the unofficial or "rough" transcript of the deposition transcript of Buddy Johnson. The final, official transcript was not available as of this filing. The transcript is cited "Pg. #: line #".

- e. Whether the state tells Hillsborough County the specific reason that an application is unable to be matched or verified. Ex. C at 39:12-43:16.
- f. The type of feedback received from the Florida Voter Registration System (“FVRS”) with respect to applications that could not be verified. Ex. C at 42:23-43:10.
- g. Which types of verification errors are the most commonly experienced by Hillsborough County. Ex. C at 45:2-46:1.
- h. Whether any people in Hillsborough County have cast provisional ballots as a result of verification issues. Ex. C at 46:13-23.
- i. What his staff’s processes are for notifying voters are after receiving feedback from the State that their information is not verified. Ex. C at 46:24-48:13, 49:20-25.
- j. Whether notices of failed verification are sent to voters in both English and Spanish. Ex. C at 50:7-11.
- k. The content of the letters that are sent to people whose information has not been verified by the State, including whether his office has drafted a letter or there is a letter produced by a computer system to address this situation. Ex. C at 50:17-51:5, 57:15-20.
- l. The total number of non-verified applications that have been returned to Hillsborough County by the FVRS since 2006. Ex. C at 58:2-6.
- m. Whether certain types of differences in data, such as a nickname and a full name, will produce a failed match. Ex. C at 58:21-60:9.
- n. Whether someone who corrects information on an application and is able to produce a match after book closing date but prior to the election will cast a regular or provisional ballot. Ex. C at 61:13-19.
- o. How a poll worker would know that a person has not been matched or verified when he or she shows up to vote on Election Day, and whether that person’s name would appear in the register. Ex. C at 75:19-77:23.
- p. Whether there was a separate list maintained at the polls of individuals who have not been able to be matched or verified, or whether there was a notation next to a person’s name in the regular register. Ex. C at 77:25-78:13.
- q. What a poll worker would say to someone whose identity has not been matched or verified when they show up at the polls on Election Day. Ex. C at 79:10-82:18.
- r. Whether a poll worker would know the reason that a person failed to be verified or matched based on the information at the polls on Election Day. Ex. C at 85:3-15.

- s. Whether the Notice of Rights indicating that provisional voters must present additional written evidence in order to have their votes counted of additional written evidence is also posted at the polls. Ex. C at 85:16-87:25.
- t. What poll workers can tell people about what type of information needs to be verified. Ex. A at 92:14-93:2.
- u. Whether a voter can submit a driver's license at the polls as "additional written evidence" or whether they need to bring it in to the offices of the Supervisor of Elections. Ex. C at 93:3-24.
- v. Whether written evidence is accepted via fax. Ex. C at 97:16-18.
- w. Whether the hours that a person could bring written evidence to the Supervisor of Elections were presented to the voter on Election Day. Ex. C at 97:19-98:19.

Despite being unable to provide the above testimony, Supervisor Johnson specifically and on numerous times identified Mr. Reed and Ms. Smith as being the Supervisor's employees most knowledgeable about these topics. *See, e.g.*, Ex. C at 31:21-32:11, 37:19-22, 39:5-8, 81:25-90:3, 82:24-83:7. In fact, Supervisor Johnson and his counsel made numerous offers during his deposition to allow Plaintiffs the opportunity to depose those two most knowledgeable employees. *See* Ex. C at 40:15-20, 44:4-8, 48:5-13, 63:1-18, 97:11-15.

Plaintiffs do not, as the Secretary suggests, seek to depose all 200 employees of the six Supervisors of Elections that they have subpoenaed in this case.² Plaintiffs do not seek to expand the number of county supervisors of elections subpoenaed, nor do they seek to broaden the scope of inquiry of those supervisors. Rather, they seek to obtain

² Plaintiffs have already completed depositions three of the six county depositions (Osceola, Orange, and Palm Beach) and have no intention to depose any additional employees in those counties. Plaintiffs hope and expect that the Miami-Dade and Broward County Supervisors of Elections will similarly be able to answer the questions posed upon the documents and topics requested.

undeniably discoverable information from two Hillsborough county employees identified by Supervisor Johnson and his counsel as the persons most knowledgeable on topics directly relevant to this case. Because Plaintiffs seek to depose additional county employees where the Supervisor is unable to answer relevant questions and identifies employees who can answer these questions, such depositions are neither duplicative nor unnecessary, nor do they subject the Secretary nor any of the supervisors to undue burden and expense (particularly where the Supervisor here volunteered to make his employees available for deposition).³

³ Plaintiffs attempted to schedule these depositions during the remaining time set aside for Mr. Johnson's deposition specifically for the purpose of avoiding burden to both Defendant and the County. Mr. Johnson was scheduled to be deposed in this matter on October 23 from 3 PM to 4:30 PM, October 24 from 3 PM to 4:30 PM, and October 25 from 9 AM- 11 AM, a total of 5 hours. Ex. A. Mr. Johnson was deposed for a total of 2 hours and 14 minutes, less than half of the time that had been allotted for his deposition, and significantly less than the seven hour limit imposed by Fed. R. Civ. P. 30(d)(2). Prior to the resumption of Mr. Johnson's deposition on October 24, counsel for Plaintiffs informed Supervisor's counsel and the Secretary's Counsel that, based on Mr. Johnson's inability to answer questions the previous day, Plaintiffs expected to finish the examination of Mr. Johnson prior to 4:30 PM that day. Plaintiffs offered to begin the deposition of Mr. Reed at that time, or at 9 AM the following day, both of which were time slots that had previously been reserved for Mr. Johnson's deposition by both Hillsborough County and Defendant. The time proposed was therefore neither an ambush nor harmful to Defendant, but an attempt to substitute a witness who was more capable of answering the questions in the time slot that was reserved for Mr. Johnson and whom had been indicated would be available to testify during those times. When Supervisor's counsel indicated that neither Mr. Reed nor Ms. Smith would be available on the afternoon of October 24 or the morning of October 25, Counsel for Plaintiffs asked Supervisor's counsel for an alternative date, and she proposed November 1. If that date is not convenient for the Secretary, Plaintiffs are amenable to rescheduling on a date that accommodates the schedules of all parties. Plaintiffs therefore respectfully request that the Court permit the depositions of Ms. Smith and Mr. Reed to proceed on November 1 or another mutually agreeable date.

The Secretary fails to identify any interest sufficient to deny the discovery sought here. Rather, he claims without support that the depositions and document requests impose disruptive burdens upon unspecified county elections officials and, that in his estimation, Plaintiffs have enough information by review of the documents produced and the depositions of other supervisors. As an initial matter, the Secretary has no standing to assert the interests of such non-parties. *Freedman v. Lincoln National Life Ins. Co.*, 2006 WL 12088018, at *1 (M.D. Fla. May 4, 2006) (noting “general rule that a party may not move for protective order to protect the interests of another” and denying motion where moving party failed to articulate “how its own interests would be impacted such that a protective order is necessary”) (internal quotations omitted). More importantly, none of the supervisors -- including the one subject of this motion -- has objected to any deposition nor to the production of any documents (save to the extent a confidentiality order was necessary).

Mr. Johnson was deposed for only 2 hours and 14 minutes—well under the 7 hours permitted by the Federal Rules. Allowing his employees to be deposed upon those issue for which he could not testify will not create any prejudice nor hardship, but will ensure Plaintiffs obtain the relevant discovery to which they are entitled.

CONCLUSION

For all of the foregoing reasons, the Secretary's motion for protective order should be denied in its entirety.

Dated: October 29, 2007.

GREENBERG TRAUIG, P.A.

s/Glenn T. Burhans, Jr.

GLENN T. BURHANS, JR.

FLA. BAR NO. 605867

101 EAST COLLEGE AVENUE

TALLAHASSEE, FLORIDA 32301

TEL. (850) 222-6891

FAX (850) 681-0207

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

ROBERT A. ATKINS

D. MARK CAVE

J. ADAM SKAGGS

1285 AVENUE OF THE AMERICAS

NEW YORK, NEW YORK 10019-6064

TEL. (212) 373-3000

FAX (212) 492-0289

BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW

JUSTIN LEVITT

MYRNA PÉREZ

161 AVENUE OF THE AMERICAS, 12TH FLOOR

NEW YORK, NEW YORK 10013

TEL. (212) 998-6730

FAX (212) 995-4550

ADVANCEMENT PROJECT

ELIZABETH S. WESTFALL

JENNIFER MARANZANO

1730 M. STREET, NW, SUITE 910

WASHINGTON, DC 20036

TEL. (202) 728-9557

FAX (202) 728-9558

PROJECT VOTE
BRIAN W. MELLOR
196 ADAMS STREET
DORCHESTER, MA 02122
TEL. (617) 282-3666
FAX (617) 436-4878

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a copy of the foregoing *Plaintiffs' Opposition to Defendant's Motion for Protective Order* was served via the Court's CM/ECF electronic filing system this day, October 29, 2007, upon the following counsel of record:

Peter Antonacci
Allen Winsor
Andy V. Bardos
GrayRobinson, P.A.
Post Office Box 11189
Tallahassee, Florida 32302-3189

Counsel for Defendant
Kurt Browning

GREENBERG TRAUIG, P.A.

s/Glenn T. Burhans, Jr.
GLENN T. BURHANS, JR.
FLA. BAR NO. 605867
101 EAST COLLEGE AVENUE
TALLAHASSEE, FLORIDA 32301
TEL. (850) 222-6891
FAX (850) 681-0207

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