

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS & ST. JOHN**

GOVERNMENT OF THE VIRGIN ISLANDS,	)	
	)	
Plaintiff,	)	
	)	CASE NO. ST-18-CV-717
-vs-	)	
	)	
ARTURO WATLINGTON, in his capacity	)	ACTION FOR DECLATORY
as CHAIRMAN OF THE BOARD OF	)	JUDGMENT AND INJUNCTIVE
ELECTIONS and THE BOARD OF	)	
ELECTIONS,	)	
	)	
Defendants.	)	

TEMPORARY RESTRAINING ORDER

THIS MATTER is before the Court on the Government of the Virgin Islands' Emergency Motion for Temporary Restraining Order and Preliminary Injunction and Memorandum of Law in Support of Emergency Motion for Temporary Restraining Order and Preliminary Injunction, which were filed on November 13, 2018. The Government seeks entry of a temporary retaining order and preliminary injunction restraining and enjoining all Defendants from registering new voters between November 13, 2018 and November 25, 2018. Because Virgin Islands law is clear on the time period during which new electors or voters may be registered, the Government's Motion will be granted with respect to its request for a Temporary Restraining Order.

With respect to temporary restraining orders, Rule 65 of the Virgin Islands Rules of Civil Procedure provides in pertinent part:

(b) **TEMPORARY RESTRAINING ORDER.**

(1) **Issuing Without Notice.** The court shall consider and rule upon an application for a temporary restraining order as soon as practicable, and may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) **Contents; Expiration.** Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk of court's office and entered in the record. The order expires at the time after entry - not to exceed 14 days - that the court sets, unless before that time the court, for good cause, extends it for a like period or the

adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

The instant case has its genesis in the U. S. Virgin Islands general election which occurred on November 6, 2018.¹ As a result of the November 6, 2018 general election, none of the candidates running for Governor and Lieutenant Governor received a majority of the votes cast by the people who were qualified to vote. In accordance with §11 of the Revised Organic Act of 1954, the Board of Elections (“BOE”) scheduled a runoff election on November 20, 2018.

The Court makes the following findings of fact:

1. On November 9, 2018, the members of the Board of Elections met to formulate policies for the runoff election for the office of Governor and Lieutenant Governor.²
2. One of the items on the agenda addressed voter registration and the allowance of new registrants (those registered between November 13 through November 16, 2018), to vote in the runoff election.³
3. Raymond J. Williams, Vice Chairman of the Virgin Islands Board of Elections, made a motion to suspend registration of new voters until after the runoff election.⁴
4. Williams’ motion was ruled out of order by Chairman Arturo Watlington.⁵
5. At the November 9, 2018 meeting, Board Member Lisa Moorhead read into the record her motion made at the BOE meeting held on July 12, 2018.⁶
6. At the July 12, 2018 BOE meeting, Moorhead made the following motion: “I move that the St. Croix staff, in the person of Mr. Alexandre or whomever the supervisor deems appropriate, look for a location where St. Croix board members can register people between the general election and the run-off.”⁷ There was a discussion that if persons show up to register between November 11 to November 19, 2018, that they would be registered to vote. After discussion and a vote, Moorhead’s Motion passed at the July 12, 2018 BOE meeting.⁸
7. Moorhead’s Motion did not expressly provide that persons who registered to vote between the general election and the runoff election, would be eligible to vote in the

¹ <https://www.vivote.gov/elections/2018-general-election>.

² Pl.’s Compl. Ex. 1 Williams Aff. ¶ 4.

³ Pl.’s Compl. Ex. 1 Williams Aff. ¶ 5.

⁴ Pl.’s Compl. Ex. 1 Williams Aff. ¶ 6.

⁵ Pl.’s Compl. Ex. 1 Williams Aff. ¶ 7.

⁶ Pl.’s Compl. Ex. 1 Williams Aff. ¶ 9.

⁷ Pl.’s Compl. Transcript of July 12, 2018 BOE meeting pages 15-16.

⁸ Pl.’s Compl. Tr. 17-19.

runoff election. Discussion did include some board members expressing the position that if an individual is registered to vote after the general election, then he or she would be eligible to vote in the runoff election.⁹

8. During the November 9, 2018 BOE meeting, Moorhead reiterated that her motion only addressed registration and not the ability to vote during a runoff election.¹⁰
9. On November 9, 2018, Williams, on behalf of the St. Croix members of the BOE, asked the Attorney General of the Virgin Islands for an opinion on whether the BOE can resume the registration of voters during the period prior to the runoff election and whether those newly registered voters were eligible to vote in the runoff election.
10. On November 10, 2018, the Attorney General of the Virgin Islands issued an Advisory Letter to the members of the BOE in which he opined that “[a] run-off election is a continuation of a general election and only those individuals who were registered and qualified to vote in the November 6th election are qualified to vote in the run-off.”¹¹
11. On November 11, 2018, in response to the email transmitting the Advisory Letter from Attorney General Claude Walker, Watlington sent an email to members of the BOE, the Supervisor of Elections and others stating: “The Ag has no influence or power over me. No law quoted. Other than the fear Mapp will be affected by new voters. Those of u who agree with him hurry to Court please.”¹²

As stated by the Government, “[f]ollowing the issuance of the Attorney General’s Advisor Letter to the Board, it became apparent through at least one email—disseminated to the rest of the Board members as well as the Attorney General and certain members of the Department—that registration of new voters between now and the run-off election would still take place, despite the clear language of 18 V.I.C. § 94(c) and the legal advice provided by the Office of the Attorney General.”¹³

In addition to the requirements of V.I. R. Civ. P. 65(b), the Court must consider “four factors in deciding a motion for temporary restraining order and preliminary injunction: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.”¹⁴

⁹ Pl.’s Compl. Ex. 2 Tr. 3-4.

¹⁰ Pl.’s Compl. Ex. 1 Williams Aff. ¶ 10.

¹¹ Pl.’s Compl. Ex 3.

¹² Pl.’s Compl. Ex. 4.

¹³ Pl.’s Mem. of Law in Support of Emer. Mot. for Temp. Restraining Order and Prelim. Inj. 2-3.

¹⁴ *VI Taxi Ass’n v. W. Indian Co.*, No. ST-16-CV-551, 2016 WL 5468370, at *2 (V.I. Super. Sept. 28, 2016).

1. The Government Has Shown a Reasonable Probability of Success on the Merits.

The Government seeks to enjoin the Defendants to comply with 18 V.I.C. § 94(a). In this regard, the Court finds that the Government has a reasonable probability of success on the merits. At issue is the interpretation of the term “election” and the term “runoff election”. At issue is the interpretation of 94(a) of Title 18 of the Virgin Island Code which provides:

The offices of each board of elections shall be open for the examination and registration of electors every day from 8:00 o'clock a.m. to 5:00 o'clock p.m., except Saturday, Sunday, legal holidays and except during the period of 30 days immediately preceding and five days immediately following each election.

Following the first rule of statutory construction, which is to determine whether the language at issue has a plain and unambiguous meaning, the Court finds that the term election as used in section 94(a) is plain and unambiguous. The Virgin Islands Code defines “election” as “any general or primary election, unless otherwise specified or indicated as in the term ‘primaries and elections’ where the intention is to refer to primary elections and general elections”.¹⁵ The Virgin Islands Code does not specifically define a “runoff” election, however, the mandate on when to conduct a runoff election starts with the Revised Organic Act of 1954. While the Revised Organic Act does serve as a de facto constitution for the Virgin Islands, it is simultaneously a federal statute adopted by Congress.¹⁶ Therefore, to determine what Congress meant when it included the phrase “runoff election” in section 11, “the appropriate inquiry is to apply the rules of statutory construction to determine what Congress intended at the time it enacted this provision.”¹⁷ There is no specific statute addressing what Congress meant by a runoff election in 1954. However, federal statutes addressing registration and voting do not distinguish between a general election and a runoff election for purposes of voting.¹⁸ This is consistent with basic rules of grammar that “general”, “primary” and “runoff” all modify the term election.

This interpretation is consistent with Title 18, chapter 29 governing disclosure and limitations of campaign contributions, defines election as “any primary, special, run-off, or general election or any territorial committee meeting, caucus, or convention with the authority to nominate or appoint a person to an elective office.”¹⁹

¹⁵ 18 V.I.C. § 1.

¹⁶ *de O'Neal v. Gov't of Virgin Islands*, 68 V.I. 619, 624 (V.I. 2018) (citations omitted).

¹⁷ *Id.* at 624 citing *Bryan v. Fawkes*, 61 V.I. 201, 230–31 (V.I. 2014) (collecting cases)

¹⁸ See Title 52 U.S.C. § 20302 (Each state shall permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office).

¹⁹ 18 V.I.C. § 902

Further, runoff election is defined as one “held after a general election, in which the two candidates who received the most votes — neither of whom received a majority — run against each other so that the winner can be determined.”²⁰ This Court finds that the runoff election scheduled to be held on November 20, 2018, is an election for the purposes of section 94(a).

Based upon the foregoing, the Court finds that the Government has a reasonable probability of success on the merits.

2. With Respect to the Motion for a Temporary Restraining Order, the Government Has Met its Burden that the Government or the Public Will Suffer Irreparable Harm by Denial of the Relief.

As argued by the Government, the integrity of the elections in the Virgin Islands is paramount to insuring the legitimacy of our elected leaders. Of equal import is the public confidence in the election process. The Court finds that permitting the BOE to conduct voter registration in violation of the law will mislead voters and may ultimately lead to later disqualification of voters registered in violation of section 94(a). These considerations weight in favor of granting the requested injunctive relief.

The lawful way for the BOE to implement its policy of enfranchising as many eligible persons as possible is to have the law amended or changed to permit registration of voters between the general election and runoff election, up to and including election day registration. This need to update and revise Virgin Islands elections laws has been expressed in the past:

The history of the Virgin Islands Election System is one that is replete with legal challenges. More often than not, the Court finds itself in the position of having to steer the election system of the Virgin Islands into safe harbors that protect the integrity of the election system and the intent of the voters. These challenges have gone back to the days of David Hamilton Jackson. Rather than the Virgin Islands Legislature updating and revising the Election Code in its entirety, the judicial branch has had to interpret the Election Code when matters have come before it on a piecemeal basis. The matter currently before this Court is no different.²¹

3. Likelihood of Immediate and Irreparable Harm to the Defendants.

The Court finds no evidence that the BOE will be harmed by the granting of the temporary restraining order. In fact, denial of the motion for a temporary restraining order will have a negative impact on the operations of the Office of the Supervisor of Elections. At the July 12, 2018

²⁰ BLACK'S LAW DICTIONARY (10th ed. 2014).

²¹ *O'Reilly v. Bd. of Elections*, 61 V.I. 118, 127 (Super. Ct. of V.I. 2014), No. SX-14-CV-461, 2014 WL 7366580, at *4 (V.I. Super. Dec. 24, 2014), *aff'd* on other grounds sub nom. *Hansen v. O'Reilly*, 62, V.I. 494 (V.I. 2015).

meeting, the Supervisor of Elections pointed out that during the 14-day window between the general election and the runoff the staff is preparing for runoff.²² “Staffing is a concern.”²³ The Office of the Supervisor of Elections has limited staff.²⁴ During the 14-day window between the general election and the runoff election “we’ll either register or we’ll try to conduct Early Voting. The last time we tried to do Early Voting and that’s the issue. You can’t do both”²⁵ and “[w]e can’t do registration and Early Voting in the same office. It becomes an issue.”²⁶

Therefore, the Court finds there is little likelihood of immediate and irreparable harm to the Defendants if the motion for a temporary injunction is granted.

4. The Public Interest Factor Weighs Heavily in Favor of the Government.

Because the laws and issues at hand involve the integrity, stability and efficiencies of the operations of the Virgin Islands election system and process, the factor of irreparable harm is entwined with the public interest. The public interest is served by the enforcement of the law. As pointed out by the Government, members of the Board of Elections are not above the law. While the record is clear that the BOE wishes to register as many voters as possible, the ends do not justify the means. There is no higher interest or principle than adherence to the rule of law. In this regard, the Court finds that the public interest weighs heavily in the issuance of a temporary restraining order directing the BOE to comply with section 94(a).

After weighing the foregoing factors, the Court finds the likelihood of immediate and irreparable harm to the Defendants is, indeed, slight when compared to the voters’ confidence in the integrity and operations of the election system of the Virgin Islands and the resulting confusion. The lawful way for the BOE to implement its policy of enfranchising as many eligible persons as possible is to have the law amended or changes to permit registration of voters between the general election and runoff election, up to and including election day registration. By pursuing a course of action based upon how it thinks the laws should be, the BOE will be causing more harm than good.

The Attorney’s Certificate filed with the Complaint and Motion satisfies the notice requirement. In addition, a return of service executed by the Virgin Islands Deputy Marshal shows that the Board of Election was served in care of its Chairman Arturo Watlington.

Finally, the Government of the Virgin Islands is exempt for the requirement of posting a bond.

²² Pl. Compl. Ex. 2 Tr. at page 2.

²³ Pl. Compl. Ex. 2 Tr. at page 6.

²⁴ Pl. Compl. Ex. 2 Tr. at page 6.

²⁵ Pl. Compl. Ex. 2 Tr. at page 6.

²⁶ Pl. Compl. Ex. 2 Tr. at page 7.

Finding that all of the factors weigh in favor of granting the Government's Motion for a Temporary Restraining Order, it is hereby

ORDERED that the Government of the Virgin Islands' Motion for Temporary Restraining Order is **GRANTED**; and it is further

ORDERED that Defendant Arturo Watlington, in his capacity as Chairman and as a member of the Board of Elections, is **ENJOINED, RESTRAINED AND PROHIBITED** from examining and registering new voters or electors until five (5) days after the November 20, 2018 runoff election; and it further

ORDERED that the Virgin Islands Board of Elections is **ENJOINED, RESTRAINED AND PROHIBITED** from examining and registering new voters or electors until five (5) days after the November 20, 2018 runoff election; and it further

ORDERED that Defendant Arturo Watlington, in his capacity as Chairman and as a member of the Board of Elections, is **ENJOINED, RESTRAINED AND PROHIBITED** from permitting any person who was not registered as an elector or voter thirty (30) days before the November 6, 2018 general election from voting in the November 20, 2018 runoff election; and it is further

ORDERED that the Virgin Islands Board of Elections is **ENJOINED, RESTRAINED AND PROHIBITED** from permitting any person who was not registered as an elector or voter thirty (30) days before the November 6, 2018 general election from voting in the November 20, 2018 runoff election; and it is further

ORDERED that a copy of this Temporary Restraining Order shall be personally served on Chairman Arturo Watlington, Vice Chairman Raymond L. Williams, Board Members Alecia Wells, Lisa Moorhead, Lydia Hendricks, Maurice A. Donovan, Jr., Barbara McIntosh, Glenn Webster, Ephiphane Joseph, Jevon O. Williams, Ivy Moses, Max Schanfarber, Harriet Mercer, Adelbert M. Bryan, Supervisor of Elections Caroline Fawkes, and a copy directed to Assistant Attorney General Ariel M. Smith, Virgin Islands Department of Justice.

Dated: November 14, 2018
Time: at 10:10 a.m.


DENISE M. FRANCOIS
Judge of the Superior Court of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court

BY: _____
DONNA D. DONOVAN
Court Clerk Supervisor _____ / _____ / _____