

STATE OF CONNECTICUT
STATE ELECTIONS ENFORCEMENT COMMISSION

Complaint of Dorianne Smith, Naugatuck

File No. 2007-385

FINDINGS AND CONCLUSIONS

Complainant brings this complaint pursuant to Connecticut General Statutes § 9-7b and avers that “the handling of the voting machines by LHS staff members constitutes violations of Connecticut Statute 9, the Secretary of the State’s instructions, [the Help America Vote Act] (“H.A.V.A.”) and “voting machine security protocols.” The Complaint is approximately 70 pages long and also contains a compact disc. The majority of the Complaint contains the Complainant’s concerns regarding the adequacy of and compliance with the security protocols issued by Secretary of the State concerning the use of the Marksense Voting Machines in the 2006 and 2007 elections. The Complainant does not, however, identify an alleged violation of any general statute when expressing those concerns. Notably, as of March 17, 2008, the Complainant indicated that she would be amending the Complaint. She never filed said amendment.

After an investigation of the complaint, the following Findings and Conclusions are made:

1. After the enactment of the the Help America Vote Act of 2002 (HAVA), P.L. 107-252, Connecticut elected to utilize Marksense Voting Tabulators rather than a lever voting system.
2. In November of 2006, twenty five municipalities were selected to use the Marksense Voting Tabulators (also known as the optical scan voting system) in that year’s November election. Ten municipalities out of the 65 that comprise the 2nd Congressional District were selected to use those tabulators. One of those towns was Montville, Connecticut.
3. After the election, a close vote recanvass was automatically triggered throughout the 2nd District when Joe Courtney defeated Rob Simmons by less than 1% of the vote. As such, ten of the towns that utilized the new voting system for the election also participated in the recanvass of the nearly 250,000 votes cast during that election.
4. The Complainant asserts that in Montville, a staff member of LHS Associates, Inc. (“LHS”) switched a memory card prior to the recanvass. LHS provides the municipalities with and programs the memory cards used in the optical scan machines.
5. During the 2006 election, LHS Associates Inc. also provided technical support to those municipalities utilizing the optical scan voting system.
6. The Complainant asserts that Lorraine Elliot, the moderator of a polling place in Montville, Connecticut, informed her that both memory cards that they had planned to use for the recanvass in Montville did not work properly. As such, LHS provided a third memory card. That card was programmed for the Montville election; the election officials performed a test vote on the card and it worked fine.
7. LHS President John Silvestro admitted that some memory card switches did take place during the 2006 election. However, Mr. Silvestro further stated that some states do allow

LHS to replace a malfunctioning memory card after the polling place officials run a pre-election logic and accuracy test on that card. He added that, as a consequence, LHS employees working in Connecticut at the recanvass may have confused Connecticut's protocols with those of other states.

8. The general statutes in effect in November of 2006 concerning the administration of that election addressed the lever machine voting system, not the optical scan voting system. As such, there was no statutory provision that expressly prohibited the removal and replacement of a memory card prior to the start of a recanvass.
9. It is therefore concluded that no violation of the general statutes occurred in connection with the allegations set forth in the Complaint regarding the "memory card switch."
10. In addition, the Regulations of Connecticut State Agencies applicable in 2006 provided in relevant part as follows:

Section 9-242a-16. Machine Tenders and Machine Malfunction: "If the machine jams or malfunctions, the machine tender shall summon the moderator before any corrective action [is] taken. . . . The machine shall not be opened unless one election official from an opposing political party is present. . . . The Secretary of the State shall prescribe the procedure to substitute a machine for the malfunctioning machine. ***The Secretary of State may prescribe that the memory card be removed from a malfunctioning machine to a perfect machine to enable the records of both machines to be added together on the memory card. . . .***" [Emphasis added.]

Section 9-242a-28. Recanvass: "***The technician shall be required to bring with him sufficient ballot boxes, new memory cards for each voting district and test ballots prepared in the manner prescribed by the Secretary of the State. . . . The new memory card shall be installed in the tabulator,*** the tabulator shall be installed on an empty ballot box, the test ballots shall be test voted in the manner prescribed by the Secretary of the State and a record shall be made. . . . The recanvass officials of opposing political parties shall examine all ballots which were machine counted on election day to determine whether the markings for the office being recanvassed are sufficiently clear to be read by the machine. If two recanvass officials opposing political parties agree that such ballots are sufficiently clear to be read by the machine, such ballots shall be processed through the machine." [Emphasis added].

11. The aforementioned regulations also do not prohibit expressly the removal and replacement of a memory card prior to a recanvass. As such, even if we assume, *arguendo*, that the Commission has the authority to enforce the regulations adopted by the Secretary of the State in accordance with Connecticut General Statutes § 9-242a, the Commission concludes that the memory card replacement at issue did not violate those regulations.
12. As an aside, we note that the statutes relating to the voting machines and a close vote recanvass remain largely unchanged. Public Act 07-194 made minor changes (i.e., the "voting machines" was changed to "voting tabulator" in certain statutes), but they are not uniform throughout Title 9. In addition, the regulations cited herein have since been amended but do not address the issue raised by the Complainant.
13. The election day protocols issued by the Office of the Secretary of the State in September of 2007 did, however, make clear that if a memory card fails, the election officials are to use the

backup card initially provided and if that fails, the ballots are to be hand counted. Notably, the Commission does not have the authority to investigate or enforce alleged violations of written instructions provided by the Secretary of the State to elections officials that do not also implicate a violation of any provision of the general statutes relating to any election. See General Statutes §§ 9-3 and 9-7b.

14. The Commission therefore concludes that the evidence in the present case does not establish a violation of any statute in effect in November of 2006 pertaining to the set up and use of the voting machines during an election or recanvass.
15. Pursuant to General Statutes § 9-7b, the Commission previously had full authority to investigate and enforce procedures regarding the lever voting machines which were codified in statute. With Connecticut's transition to the optical scan voting system, the Commission's ability to investigate and enforce protocols issued by the Secretary of the State concerning that system has been severely limited, as illustrated by this case, because a number of such protocols exist not in statute but in the regulations issued by the Secretary of the State, a separate entity from the Commission.
16. Accordingly, the Commission intends to seek a legislative solution to remedy this gap in its authority so it can continue to function as a guardian of the integrity of Connecticut's election process.

ORDER

The following Order is recommended on the basis of the aforementioned findings:

The complaint is hereby dismissed.

Adopted this 17th day of December, 2008 at Hartford, Connecticut.



Stephen F. Cashman,
Chairman

By Order of the Commission