

STATE OF CONNECTICUT
STATE ELECTIONS ENFORCEMENT COMMISSION

In the Matter of a Complaint by
Irene M. Curtis, East Hampton

File No. 2007-407

AGREEMENT CONTAINING CONSENT ORDER FOR VIOLATIONS OF
CONNECTICUT GENERAL STATUTES §§ 9-308 AND 9-311a

This agreement, by and between David Simko (hereinafter, the "Respondent") and the authorized representative of the State Elections Enforcement Commission is entered into in accordance with section 9-7b-54 of the Regulations of Connecticut State Agencies and Connecticut General Statutes § 4-177 (c). In accordance herewith, the parties agree that:

1. On November 6, 2007, a municipal election was held in the Town of East Hampton. Notably, this was the first election in which the Town of East Hampton utilized the new optical scan voting machines that had been approved by the Office of the Secretary of the State pursuant to Connecticut General Statutes § 9-242a. The election was held in a single polling place. The Respondent was the Moderator and thus, Head Moderator during that election.
2. The Complainant, a resident of East Hampton, challenges the results of that election. She alleges that state election laws were violated during the canvass and recanvass and, as a consequence, the results of the election are erroneous. The Complainant claims that there were four different results for the election which she asserts resulted from the errors that allegedly occurred after the polls were closed on the night of the election and during the first, second, and third counts of the recanvass. She also appears to allege that the different results may have resulted from improprieties on the part of some or all of the election officials. Notably, however, no election contest was filed pursuant to General Statutes § 9-328. Finally, she asserts that the Chatham Party chairperson and candidates did not receive proper notice of the recanvass.
3. In addition to other municipal offices, at stake in that election were seven Town Council seats. Fourteen candidates appeared on the ballot for those seats; four Republican candidates (Theodore Hintz, William Devine, Thomas Cordeiro, Melissa Engel), five Democratic candidates (Terry Concannon, John Tuttle, Christopher Goff, Matthew Walton, Alan Hurst), and five Chatham Party candidates (Susan Weintraub, Patience Anderson, Kyle Dostaler, Alison Walck, Scott Minnick). Prior to that election, the Town Council consisted of five Chatham Party members (Walck, Derek Johnson, Robert Berlin, Dostaler, Minnick) and two Republican Party members (Engel, Devine).
4. After the election, Engle (R), Devine (R), Tuttle (D), Goff (D), Minnick (C), Cordeiro (R), and Weintraub (C) were elected to the Town Council.

5. The election at issue was held in the gymnasium at East Hampton High School. The gymnasium could be accessed through two sets of doors. Shortly after the polls were closed, the public was directed to stand outside of the gymnasium so that the election officials could canvass the votes and finalize the election results.
6. Over 200 members of the public remained to hear the election results. The two doors to the gymnasium remained open but police officers were stationed at each door to prevent the public from entering the room. As such, the canvass was not done in the plain view of all members of the public.
7. General Statutes § 9-308 requires that:

[t]he room in which such canvass is made shall be clearly lighted and such canvass shall be made in plain view of the public. No person or persons, during the canvass, shall close or cause to be closed the main entrance to the room in which such canvass is conducted, in such manner as to prevent ingress or egress thereby.
8. The requirement that the canvass be conducted in the plain view of the public helps to ensure the integrity of and confidence in the electoral process; particularly when a new system such as an optical scan voting system is utilized.
9. In the present case, Respondent Simko caused the public to be removed from the gymnasium during the canvass of the votes and asked police officers to prevent the public from entering the gymnasium. The Commission concludes that by doing so, he violated General Statutes § 9-308.
10. The Commission understands, however, that this was the first time that the Respondent conducted an election night canvass in connection with the new optical scan voting system. That canvass is very different and much more involved from the canvass that was conducted previously under the lever machine voting system. For example, it requires the election officials to collect and organize numerous paper ballots, to conduct overrides on the voting machines, to print the machine tabulated results, and, at times, requires that ballots be hand counted. As a consequence, it demands a great deal of attention and concentration on the part of election officials. In addition, the Commission is aware that, due to the acoustics in the gymnasium, it may have been difficult for the election officials conducting the canvass to hear one another if the public was allowed to remain in the gymnasium during that canvass.
11. While the Commission understands that those conditions contributed to the Respondent's decision to keep the public out of the gymnasium until the final results were read, those conditions do not excuse the Respondent's violation of the law.
12. The Respondent maintains that, given the aforementioned conditions, his decision to ask the public to stand outside of the gymnasium was not done to intentionally deceive the public but rather was a good faith effort to ensure that the election night canvass was

conducted properly and without distraction. The Commission has found no evidence to the contrary.

13. The Respondent also vehemently denies that he witnessed, was aware of, or engaged in any form of election fraud and the Commission has not uncovered any evidence to the contrary. In fact, the Commission has not uncovered any evidence of fraud in connection with the Election Day results. Nevertheless, the Respondent's failure to conduct the canvass in plain view of the public does constitute a violation of General Statutes § 9-308.
14. As noted above, as a result of the November 6, 2007 election, only two Chatham Party members won seats on the Council (Weintraub and Minnick). The initial results of that election (election night results) showed that 19 votes separated candidates Weintraub and Concannon. Of the seven candidates that won seats on the Council, Weintraub had the least amount of votes (1201). The candidate with the next highest number of votes was Concannon (1182). Concannon did not win a seat on the Council.
15. Pursuant to General Statutes § 9-311a, a "close-vote" recount was therefore required for Town Council offices because Weintraub and Concannon were within twenty votes of each other. If, however, Concannon provided a written waiver to the municipal clerk, that recanvass was not required. In the present case, Concannon did not provide said waiver.
16. Accordingly, on Saturday, November 10, 2007, a "close-vote" recanvass was held in the Town Council room at East Hampton's Town Hall. The Respondent admits that the recanvass was confusing. It was the first time a recanvass of paper ballots was being conducted and the election officials were not sure how to best organize the ballots so as to ensure an efficient and accurate hand count. Nothing in the general statutes provides the process that is required to be used during the hand count.
17. Respondent Simko maintains that they attempted to follow the Recanvass Manual that was provided by the Secretary of the State's Office. That manual does not tell the election officials how to organize the hand count. By all accounts, the method chosen by the election officials for the November 10, 2007 recanvass (i.e., organize the ballots into batches of party line votes and non-party line votes, tally each batch and then total those tallies at the end) did not work well and the results did not make sense.
18. As a consequence, Respondent Simko contacted Attorney Michael Kozik, Managing Attorney of the Legislation and Elections Administration Division of the Office of the Secretary of the State to ask him how to proceed. Attorney Kozik instructed Respondent Simko to get everyone together again and figure out what went wrong. As such, on Respondent Simko elected to perform a second count of the ballots that were utilized on election night on Monday, November 12, 2007.
19. Respondent admits that during that count, the ballots were separated into batches of approximately 100 ballots each. Notably, a few batches contained far less than 100

ballots and a few batches contained more than 100 ballots. Those ballots were canvassed and recorded in public using the read and tick method. After each batch was read, a tally sheet was completed in public to recorded the number of votes for each candidate from that batch of ballots. After each batch was canvassed and recorded, those tally sheets were brought into the Registrars office and the numbers were entered into a computer spreadsheet. After all the tallies were entered and added to the absentee ballot count from the November 10, 2007 count, the final tally of all votes was announced publicly.

20. Respondent Simko represents that on Tuesday, November 13, 2007, he was reviewing the final results of the second count of the recanvass and began to question whether a batch of ballots was not tallied. He went to Town Hall and he and Margaret Jacobson, the Republican Registrar of Voters, inspected the ballot envelopes again and realized that one of the envelopes that had been pre-marked "absentee ballots" contained election night ballots that they did not count on November 12, 2007. Thereafter, Respondent Simko maintains that he called Attorney Kozik and Attorney Kozik instructed him to count only those ballots and add them to the tallies from the previous day. Those ballots had been counted during the first count of the recanvass and during the election night canvass.
21. The results from November 6th, 10th, 12th, and 13th counts did not match. This concerned the Complainant and several members of the public and contributed, in part, to the filing of the Complaint. The Commission conducted its own recanvass and concludes that while there were differences with the results, there appears to be a reasonable explanation for the differences between the election night results, the results reached on November 13th, and the Commission's recanvass results. The main reason for the difference appears to have been the fact that ballots that were treated as write-in ballots by the tabulator were run twice on election night because the election officials were not sure if they were counted the first time. If those ballots had not been run twice, the difference between the election night results, the Commission's recanvass results, and East Hampton's recanvass results would be minimal. Minimal differences between a machine count and a hand count is not out of the ordinary.
22. Furthermore, the Commission's recanvass established that the results of the election did not change. As such, the Commission concludes that the candidates that won seats on the Town Council on Election Day, are in fact the candidates that won the election.
23. The Commission also concludes that while tabulation errors clearly occurred during each ballot count, no evidence has been uncovered that supports any direct or indirect allegation that the Respondent, or any other election official, was adding fraudulent ballots to the recanvass or purposely omitting ballots from the recanvass process to manipulate the results of the election. To the contrary, the evidence strongly suggests that no fraud occurred during the recanvass process.
24. The Respondent did, however, commit a procedural violation with respect to the recanvass. The law regarding the close-vote recanvass procedures is set forth in General

Statutes § 9-311a. Unfortunately, those procedures still contemplate a lever voting system. There are portions of those provisions, however, that remain applicable to the optical scan voting system utilized in East Hampton.

25. General Statutes § 9-311a provides the following in relevant part:

When a canvass is to be held . . . the moderator . . . shall proceed forthwith to cause a canvass of such returns of the office in question in the same manner as is provided in said section 9-311. In addition to the notice required under section 9-311, the moderator shall before such canvass is made give notice in writing of the time when, and place where, such canvass is to be made to each candidate for a municipal office which qualifies for an automatic canvass under this section.

26. General Statutes § 9-311(a) provides that the Moderator:

[b]efore such canvass is made, such moderator shall give notice, in writing, to the chairman of the town committee of each political party which nominated candidates for the election, and . . . of the time and place where such canvass is to be made; and each such chairman may send two representatives to be present at such canvass. Such representatives may observe, but no one other than a canvass official may take part in the canvass.

27. For the following reasons, the Commission concludes that the Respondent violated General Statutes § 9-311a by failing to comply with the notice requirements set forth therein.

28. As noted, the initial canvass was held on Saturday, November 10, 2007. The evidence establishes that the Chatham Party chairperson and candidate for Town Council, Patience Anderson, was notified of that canvass on Friday, November 9, 2007. This notice was not, however, in writing but rather, was done verbally. Respondent Simko informed Ms. Anderson of the canvass date, time, and location and asked her to inform the Chatham Party Town Council candidates of the canvass.

29. Respondent Simko also verbally notified Barbara Moore, the Democratic Party Committee chairperson, and Dave Balthazar, the Republican Party Committee assistant chairperson (the chairperson was could not be reached as she was out of town), prior to the canvass. Respondent admits, however, that he did not notice (verbally or writing) the candidates of the canvasses; instead, he asked the party chairpersons to do so.

30. Sandra Wieleba, the Town Clerk of East Hampton, maintains that any chairperson or candidate that appeared at the first canvass was provided with a written notice of that canvass when they appeared there. Even if we assume that this is true, not all party chairpersons and/or candidates were present at the November 10th canvass and thus, the requirements of General Statutes § 9-311a were not satisfied.

31. The Respondent further admits that he knew that the law required the notice to be in writing, and the evidence establishes that he even informed Ms. Anderson of that requirement; however, because of the timing of the recanvass (it was a weekend and the following Monday was a holiday) the Respondent thought the best and most efficient course of action was to notify verbally the Party Committee chairpersons. The evidence establishes that this decision was made in good faith and without with fraudulent intent.
32. The Respondent maintains that he discussed his decision to notify the candidates and chairpersons verbally, rather than in writing, with Attorney Kozik of the Office of the Secretary of the State. Respondent asserts that Attorney Kozik authorized him to do so. Attorney Kozik could not recall and thus confirm whether he gave said authorization to the Respondent.
33. Even if the evidence did establish that Attorney Kozik verbally authorized the departure from General Statutes § 9-311a, his verbal authorization would not excuse the Respondent's failure to give notice, *in writing*, to the chairman of the town committee of each political party which nominated candidates for the election, and to each candidate for Town Council of the time and place where such recanvass was to be held. Compare C.G.S. § 9-3 (stating that *written* instructions from the Office of the Secretary of the State are presumed as correctly interpreting laws concerning the administration of elections under Title 9 of the General Statutes). The Commission therefore concludes that the Respondent violated General Statutes § 9-311a by failing to provide written notice of the recanvass.
34. The Respondent admits all jurisdictional facts and agrees that this Agreement and Order shall have the same force and effect as a final decision and Order entered after a full hearing and shall become final when adopted by the Commission. The Respondent shall receive a copy hereof as provided in section 9-7b-56 of the Regulations of Connecticut State Agencies.
35. It is understood and agreed that this Agreement will be submitted to the Commission at its next meeting and, if it is not accepted by the Commission, it is withdrawn by the Respondent and may not be used as an admission in any subsequent hearing, if the same becomes necessary.
36. The Respondent waives:
- (a) Any further procedural steps;
 - (b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law, separately stated; and
 - (c) All rights to seek judicial review or otherwise to challenge or contest the validity of the Order entered into pursuant to this agreement.
37. Upon the Respondent's compliance with the Order hereinafter stated, the Commission shall not initiate any further proceedings against the Respondent with respect to this matter.

ORDER

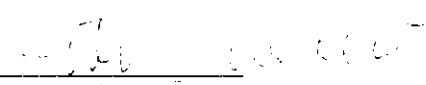
IT IS HEREBY ORDERED THAT the Respondent shall henceforth strictly comply with Connecticut General Statutes §§ 9-308 and 9-311a and shall pay a civil penalty of three hundred and fifty dollars (\$350.00) to Commission on or before April 9, 2008.

For the State of Connecticut

Dated:

4/2/08

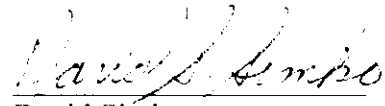
BY:


Joan M. Andrews, Esq.
Director of Legal Affairs and Enforcement,
and Authorized Representative
of the State Elections
Enforcement Commission
20 Trinity Street
Hartford, Connecticut


Dated:

4/2/2008

The Respondent,


David Simko
30 Long Hill Road
East Hampton, CT 06456

Adopted this 9th day of April, 2008 at Hartford, Connecticut by vote of the Commission.


Stephen Cashman, Chairman
By Order of the Commission