

**STATE OF CONNECTICUT**  
**STATE ELECTIONS ENFORCEMENT COMMISSION**

Complaint of John Bromer, Easton, et al.

File No. 2013-155-157, 159-161, 181

**FINDINGS AND CONCLUSIONS**

The Complainants filed these complaints pursuant to General Statutes § 9-7b. In summary, as the allegations relate to the Commission's jurisdiction, the Complainants allege various procedural irregularities concerning the November 5, 2013 municipal election in the Town of Easton. Such irregularities were the subject of a court action pursuant to General Statutes § 9-328. This litigation resulted in a court ordered recount, which confirmed the outcome of the election.

After an investigation of the complaint, the Commission makes the following findings and conclusions:

1. In summary, insofar as the allegations are within the jurisdiction of the Commission, the matters were largely addressed by the resolution of the court action filed pursuant to § 9-328, which resulted in a court ordered recount. See *Buckley v. Town of Easton*, CV-13-6039323-S, 2013 WL 6912822 (Conn. Super. Nov. 25, 2013).
2. While the total number of votes differed slightly, the recount served to confirm the outcome of the election. The relevant court memorandum of decision and order to recount as well as the order confirming the outcome of the recount are attached hereto as Attachment A and Attachment B respectively.
3. The Commission further notes that its investigation has independently confirmed that there is no evidence indicating any impropriety actually occurred regarding access to the voting tabulator or ballots and that, in fact, no one other than the appropriate individuals had access to the area where the voting tabulator or ballots were located.
4. The Respondent has been fully cooperative with the investigation.
5. General Statutes § 9-3 provides:

The Secretary of the State, by virtue of the office, shall be the Commissioner of Elections of the state, with such powers and duties relating to the conduct of elections as are prescribed by law and, unless otherwise provided by state statute, the secretary's regulations, declaratory rulings, instructions and

opinions, if in written form, shall be presumed as correctly interpreting and effectuating the administration of elections and primaries under this title, except for chapter 155, provided nothing in this section shall be construed to alter the right of appeal provided under the provisions of chapter 54.


6. According to page F-3 of the Moderator's Handbook for Elections and Primaries (moderator's handbook), "[w]hen hand counting a ballot, voter intent controls and two election officials from opposing parties of factions must agree on the voter's intent." See *Buckley*, 2013 WL 6912822, at \*7.
7. Nevertheless, there was general good faith confusion regarding the above obligation for factional representation. Specifically, at that time, it was generally unclear how to recognize a "faction" as opposed to merely multiple write-in candidates. It also remains unclear how to identify any appropriate "election official" from such a faction (e.g., from a list submitted by such faction).
8. With no list of recognize representatives of the faction available, the Town of Easton's election officials appear to have made a good faith effort to permit an individual they believed to be associated with such candidates to observe the counting and examination of the ballots.
9. In light of General Statutes § 9-3, the Commission defers to the Secretary of the State for any further clarification through written instruction material regarding the above issues and in light of the associated litigation.

**ORDER**

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

That no further action be taken.

Adopted this 16<sup>th</sup> day of July, 2014 at Hartford, Connecticut.

  
Anthony J. Castagno, Chairman  
By Order of the Commission

DOCKET NO. CV-13-6039323-S : SUPERIOR COURT  
 VALERIE J. BUCKLEY : JUDICIAL DISTRICT OF FAIRFIELD  
 V. : AT BRIDGEPORT  
 TOWN OF EASTON, ET AL. : NOVEMBER 25, 2013

**MEMORANDUM OF DECISION**

I

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This is a case of first impression. The primary issue, which has yet to be addressed by any Connecticut court, involves the use of certain voting tabulator machines, which are now required to be used in all elections held in any municipality in the State. Before the court is a challenge to the November 5, 2013 municipal election results from the election held in the Town of Easton (town). The plaintiff, Valerie Buckley, lost the election for first selectman by fifty votes according to the certified election results. The plaintiff's complaint<sup>1</sup> alleges various discrepancies, erroneous

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<sup>1</sup> The operative complaint is the second amended complaint filed on November 19, 2013. The plaintiff filed her original complaint on November 13, 2013. That complaint named as defendants the town of Easton and the following town officials: the election moderator, Cheryl Everett, the democratic registrar of voters, Ronald Kowalski, and the republican registrar of voters, Krista Kot. The complaint also named as defendants the plaintiff's opponent for the office of first selectman, Adam Dunphy, and the republican candidate for the office of selectman, Scott Centrella. Thereafter, on November 14, 2013, pursuant to § 9-328, the court, *Bellis, J.*, issued an order to show cause to the defendants which also directed the plaintiff to provide notice to, inter alia, the

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rulings by election officials, and mistakes in the counting of ballots. Her primary contention, however, is that many, if not all, of the 246 ballots identified by the tabulator as “blank” contained write-in votes that should have been but were not examined for voter intent because the voting tabulator used by the town separated those ballots into a bin that was separate from other ballots that were examined for voter intent. Pursuant to General Statutes § 9-328,<sup>2</sup> the plaintiff requests

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Secretary of the State and the State Elections Enforcement Commission. On November 15, 2013, the court, *Bellis J.*, ordered that the complaint be amended to state the interest of the town and also to join the town clerk as a party. The plaintiff complied with both orders, filing her first amended complaint on November 15, 2013. In response to the defendants’ request to revise, the plaintiff filed a second amended complaint on November 19, 2013, which made clarifications as to the identity of the town clerk and the fact that Dunsby and Centrella were sued in their official capacities. Except where necessary, the court refers to all the defendants collectively as “the defendants.”

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Section 9-328 provides in relevant part: “Any elector or candidate claiming to have been aggrieved by any ruling of any election official in connection with an election for any municipal office or a primary for justice of the peace, or any elector or candidate claiming that there has been a mistake in the count of votes cast for any such office at such election . . . may bring a complaint to any judge of the Superior Court for relief therefrom. . . . If such complaint is made subsequent to such election . . . it shall be brought not later than fourteen days after such election . . . to any judge of the Superior Court, in which [she] shall set out the claimed errors of the election official [or] the claimed errors in the count . . . . Such judge shall forthwith order a hearing to be had upon such complaint, upon a day not more than five nor less than three days from the making of such order, and shall cause notice of not less than three nor more than five days to be given to any candidate or candidates whose election or nomination may be affected by the decision upon such hearing, to such election official, the Secretary of the State, the State Elections Enforcement Commission and to any other party or parties whom such judge deems proper parties thereto, of the time and place for the hearing upon such complaint. Such judge shall, on the day fixed for such hearing and without unnecessary delay, proceed to hear the parties. If sufficient reason is shown, [she] may order any voting tabulators to be unlocked or any ballot boxes to be opened and a recount of the votes cast, including absentee ballots, to be made. Such judge shall thereupon, if [she] finds any error in the rulings of the election official or any mistake in the count of the votes,

that the court order a recanvass, or, in the alternative, a new election.

The court held a bench trial beginning on November 18, 2013. The parties filed briefs on November 21, 2013. At the trial, the court heard testimony from Cheryl Everett, plaintiff's expert, Michael DiMassa, Valerie Buckley, Ronald Kowalski, and from the Office of the Secretary of State, Director of Elections Peggy Reeves and Staff Attorney Ted Bromley.

From the testimony and evidence presented at trial, the court finds the following facts. Prior to the election, the plaintiff and three others unsuccessfully attempted to gain access to the ballot as candidates under a "reserved party designation." See *Buckley v. Secretary of State*, Superior Court, judicial district of Fairfield, Docket No. CV-13-6038400-S (October 7, 2013, *Bellis, J.*). In that case, which was also brought pursuant to § 9-328, this court concluded, following the credible testimony of Bromley, that General Statutes § 9-3 grants the Secretary of the State, in her capacity as Commissioner of Elections, the authority to interpret the strictures of

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certify the result of [her] finding or decision to the Secretary of the State before the tenth day succeeding the conclusion of the hearing. Such judge may order a new election or primary or a change in the existing election schedule. Such certificate of such judge of [her] finding or decision shall be final and conclusive upon all questions relating to errors in the ruling of such election officials, to the correctness of such count, and, for the purposes of this section only, such claimed violations, and shall operate to correct the returns of the moderators or presiding officers, so as to conform to such finding or decision, except that this section shall not affect the right of appeal to the Supreme Court and it shall not prevent such judge from reserving such questions of law for the advice of the Supreme Court as provided in section 9-325. Such judge may, if necessary, issue [her] writ of mandamus, requiring the adverse party and those under [that party] to deliver to the complainant the appurtenances of such office, and shall cause his finding and decree to be entered on the records of the Superior Court in the proper judicial district."

General Statutes § 9-453o (b)<sup>3</sup> as mandatory and that it was appropriate for the court to defer to that interpretation of § 9-453o (b). *Id.* Following that ruling, and because she was unable to appear as a named candidate on the ballot, the plaintiff launched a write-in campaign for the office of first selectman. The plaintiff was the only registered write-in candidate for that office.

As required of every municipality in Connecticut; see General Statutes § 9-238; the town used an electronic tabulator machine to count the votes cast in the election. The statutory and regulatory scheme is strict as to the specific manufacturing requirements for the tabulators. The memory cards for the tabulators are sent to the towns by "LHS", and the machines are serviced and pre-tested pursuant to the Secretary of State's written requirements. To vote using a tabulator machine, a voter first must first complete his or her paper ballot by hand, using a black or blue pen or pencil. Official ballots and absentee ballots are the same, with certain exceptions that are discussed below. Both ballots consist of a series of columns and rows. The rows list candidates according to their political party. The final row on the ballot is designated "WRITE-IN VOTES".

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Section 9-453o (b) provides the procedures and requirements through which an individual may have his or her name placed on a ballot under a "reserved party designation." A reserved party designation is a creature of statute, and is designed to allow a new political party to appear on a ballot under a specified and reserved party name. The name is reserved because the new party is not considered a "minor party" or a "major party," both of which are defined by statute, until a candidate for the reserved party has won a certain percentage of the vote in a given election. When that percentage is obtained, the reserved party becomes a minor or major party as the case may be, at which point in time it is subject to comprehensive statutory provisions. Valerie Buckley was not permitted to appear on the ballot under her chosen reserved party designation due to her not complying with all of the strictures of § 9-453o (b), a statute the Secretary of the State interpreted to be absolutely mandatory.

The columns, in turn, correspond to the twelve races for the various municipal offices, beginning with the office of first selectman.

On the reverse side of the ballot are instructions directing voters to cast their votes by filling in the ovals that appear next to the name of the candidate of the voter's choosing. Specifically, section I instructs the voter as follows: "I. **TO MARK THIS BALLOT.** Completely fill in each appropriate oval as shown." A picture of a filled in oval follows. Section I then directs the voter to "[u]se a black or blue pen or pencil." Finally, section I instructs voters to "[v]ote for candidates individually. Do not mark the party names in any way." Section II provides in part: "**TO VOTE FOR CANDIDATES.** In most cases, only one mark or write-in vote is allowable in each column (that is, for each office). **A. TO VOTE FOR CANDIDATES ON THE BALLOT.** Completely fill in the oval above the name of each candidate for whom you wish to vote." Pertaining to write in candidates, which is covered in section II B, the instructions on the ballot state: "**TO WRITE IN A VOTE** for a registered write-in candidate for a particular office, use the write-in row spaces provided for this purpose. The space you use for writing in a person's name as a candidate must be directly below the column headed with the title of the office to which you wish this person elected. It will have the same number as shown in the column-heading for that office. See example in III below." Immediately following this sentence, the official ballots, but not the absentee ballots, contain the statement: "Be sure to also completely fill in the appropriate oval."<sup>4</sup>

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In addition, official and absentee ballots differ in the following ways. First, the ballots



Next, section III of the instructions on both ballots the official and absentee contains a visual example, which shows, inter alia, a write-in row with three boxes. In the first box, the words "WRITE-IN VOTES" appear. In the second box, "Name of Candidate" appears in a cursive font, with a filled-in oval above it. The third box contains a box with an oval that is not filled in, and with no writing.

After completing a ballot, the voter must deposit the ballot into the electronic tabulator. This is done by inserting the ballot into a slot, at which point the tabulator attempts to detect which ovals are filled in. The tabulator records the vote for each race, and then deposits the ballot into one of two bins. If any ovals designated as write-in ovals are filled in for any of the twelve races, the tabulator is programmed to deposit the ballot into the "write-in" bin so that the ballot may be examined manually following the close of the polls. The tabulators are not programmed to recognize the presence or absence of handwriting. The tabulator machine is programmed to deposit ballots on which no write-in ovals are filled in, and at least one oval corresponding to a named candidate is filled in, into the "regular bin."<sup>5</sup> Because the machine is programmed only to detect

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appear to be different colors. Second, absentee ballots contained additional instructions under the heading "FOR ABSENTEE BALLOTS ONLY," which explain how to return the ballot via the mail. Third, absentee ballots contain a second set of the instructions in Spanish.

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It appears that the tabulator would direct ballots into the regular bin when an oval designated to a write-in candidate was only partially filled in as the tabulator machine does not recognize any marking that does not completely and sufficiently darken the oval. The tabulator will also direct write-in votes into the regular bin where the write-in name is correctly filled in, but the corresponding oval was not filled in.

whether ovals have been filled in and do not detect the presence or absence of handwriting, a vote on which the voter had written a candidate's name, but failed to darken the corresponding bubble, would be marked as "blank" by the tabulator with respect to the particular race, and would be deposited into the regular bin UNLESS the voter happened to fill in the oval for another write-in race.<sup>6</sup> In the present case, 246 ballots, approximately 10.5% of the total number of ballots, were counted as "blank" with respect to the race for first selectman. Thus, according to the tabulator, "blank" ballots are not only ballots which are truly blank, but may include ballots where voters intent to vote for a write-in candidate was clearly evidenced by the voters writing in the name of the candidate but where the corresponding oval was not sufficiently darkened.

In addition to the two bins inside the tabulator machine, the polling place contained a third bin, external to the machine, called an "auxiliary bin." Ballots that were either "abandoned"<sup>7</sup> by voters, or which were rejected by the tabulator machine and not corrected by a voter prior to his

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Thus, if a voter had written in a candidate's name but failed to darken the corresponding bubble, the ballot would only be diverted into the write-in the ballot for hand counting if the voter happened to darken a write-in bubble somewhere else on the ballot.

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An abandoned ballot is one that is discarded by the voter before it is completed and inserted into the tabulator. To ensure that duplicate ballots are not produced, the moderator's handbook directs moderators to refuse to issue a second ballot to any voter who has not returned the first ballot he or she received and requires the moderator's report to account for all abandoned or "spoiled" ballots.

or her departure, were placed into the auxiliary bin to be examined later.<sup>8</sup> For example, if no ovals were darkened anywhere on the ballot but a write-in name was written in, the ballot should be rejected by the tabulator. If not corrected by the voter, it should go in the auxiliary bin where it would be hand counted to determine voter intent. The same ballot, however, if it had an oval darkened for even one named candidate, would be diverted by the tabulator machine into the regular bin and the write in vote would not be counted.

Everett is the moderator for the town and has moderated at least six elections in her tenure in that role.<sup>9</sup> At 8:00 p.m. on the night of the election, Everett saw to it that the polls were closed. 2,235 registered voters went to the polling place on election day and cast a ballot by inserting it into the machine tabulator, 119 voters voted by absentee ballot, and 8 persons registered on election day and completed their ballots in the registrar's office. Following the closing of the polls, the ballots from the auxiliary bin were fed into the tabulator machine; any ballots that were not accepted by

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If a ballot contained no filled-in ovals for any of the twelve races, or contained a greater number of filled in ovals in a race than the number of candidates for which a voter may vote, the machine should reject the ballot, giving the voter an opportunity to correct the mistake. If, however, the ballot contained too few ovals darkened, or no ovals darkened, for a particular race, the ballot would be accepted, the corresponding races marked "blank," and the ballot deposited in the regular bin, even if a write-in candidate's name had been hand written into the space provided. Voters in Connecticut do enjoy the right to submit a ballot that is blank for one or all of the races of a given election.

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The court found Everett's testimony to be highly credible and that she in all times acted in good faith during the night of the election. The same is true of all individuals who presented testimony before the court, including DiMassa, Kowalski, Valerie Buckley, Reeves, and Bromley.

the machine were set aside to be hand counted. If the ballots were accepted by the tabulator, the tabulator was programmed to divert them into the regular bin or write-in bin in accordance with the machine's programming. The machine was then locked and a tabulator tape, which is an unofficial report of the votes counted by the tabulator, was produced by the machine. For first selectmen, the tabulator tape reported a count of 1055 votes for Adam Dunsby, 1038 write-in votes, and 246 "blank" votes for that office. Everett directed that a copy of the tabulator tape be posted on a wall in the canvassing room so as to be visible to the public.<sup>10</sup>

Everett also directed, in accordance with law, that the write-in bin be opened and the votes therein counted by hand in order to determine for whom the votes were cast.<sup>11</sup> As the number of write-in votes was significant and much higher than Everett had expected, with an equal stack of

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The plaintiff argues that the moderator violated General Statutes § 9-309 by not posting the tabulator tape herself because, by doing so, she did not announce the election results herself. This argument misconstrues the requirements of the statute. Section 9-309 requires an announcement of the total number of write-in votes cast for each candidate, which cannot occur until after a hand-count of the write-in ballots is completed. In addition, the statute distinguishes between the results contained on the tabulator tape, and the results which are to be announced aloud by the moderator once the canvass is complete. Thus the statute contemplates that the official results are those that are announced aloud.

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The plaintiff claimed in the complaint that the first counting may be characterized as a "recount," which the statute refers to as a "re-canvass," on the theory that the 1038 write in votes on the tabulator tape is within 20 votes of the 1055 votes for Dunsby, and that General Statutes § 9-311a entitled the plaintiff to a recount. This claim has no merit, however, because initial numbers on the tabulator tape do not represent an official count of votes. Instead, the official count is not completed until *after* the write-in votes have been physically examined to determine voter intent.

regular votes and write-in votes, she then put together a second team of counters. Although the tabulator tape showed only a 17 vote differential between Dunsby and written-in names, and the paper ballots looked evenly split, the plaintiff was not afforded a representative counter even when Everett formed the second team of counters after the polls were closed. Thus, there were two teams of counters, consisting of one democrat and one republican each. Each write-in ballot was examined by two counters. If both counters agreed as to the intent of the voter, the vote would be counted accordingly. There was no evidence of any disputes between the counters regarding any write-in ballot, and as such, Everett was not called upon to rule on any such disputes that night. Everett agreed that since the plaintiff did not have a representative as a counter, there was no way for the plaintiff to challenge, for example, a write-in vote that was rejected. As discussed below, after the hand count, the plaintiff received 944 of the 1038 write-in votes counted by the tabulator.

In accordance with her understanding of voter intent, Everett directed the counters to count a vote for Valerie Buckley even if the corresponding oval was not filled in, as long as the writing could be interpreted to indicate a vote for the plaintiff. Although Everett could not recall precisely how many times this occurred, such a vote was tabulated in favor of the plaintiff on at least one occasion. This same procedure was followed for all other ballots that were hand counted.

The hand counted write-in ballots totaled 944 votes for the plaintiff. Everett attributed this reduction to the fact that a portion of the 1038 votes that were counted by the tabulator as write-ins in the first selectman race did not evidence an intent to vote for the plaintiff. It is not clear from the record whether any of the 94 write-in ballots that were not counted for the plaintiff contained

writing that was ambiguous, or whether any of these ballots had the ovals filled in but no write-in name indicated at all, and without a representative counter, the plaintiff could not post a challenge.

At first, Everett mistakenly certified the total vote for the plaintiff as 944. The next day, after adding in the absentee and same day registration ballots, Everett certified that Valerie Buckley received a total of 1007 votes. Dunsby's final total was certified by Everett to be 1057, leaving a 50 vote spread.

At some point during the canvass, some of those present at the counting became animated and requested that the regular bin be opened to examine the 246 "blank" votes. Ultimately, Kowalski contacted the Secretary of the State's office and was advised by Reeves that under no circumstances could the regular bin be opened, which he reported to Everett. The bin was not opened and no examination of the "blank ballots" has been made to date.

In addition to her phone call with Kowalski, on the night of November 5, 2013, Reeves received a call from Kot. On the morning of November 6, 2013, Reeves again received calls from Kowalski and Kot. Reeves indicated that it was the Secretary of the State's position that the blank ballots in the regular bin could not be looked at or hand-counted prior to transferring the ballots into the ballot transfer case, and that once transferred, the regular bin could not be opened absent a recanvass. Reeves also testified that it was the position of the Secretary of the State that when hand counting ballots, a write-in vote could not be counted without the corresponding darkened oval, except on a recanvass, and that this was because a recanvass calls for a higher standard. Reeves testified that the use of the tabulator is to preserve the integrity and security of the vote and

not for convenience or efficiency.

Bromley testified to the Secretary of State's position that write-in votes should not count if the corresponding oval has not been darkened for those ballots directed by the tabulator machine into the regular bin. He also testified that it was appropriate to count any write-in vote with an attendant filled-in oval as long as the ballot was properly in front of a manual hand-counter, regardless of whether the ballot was a regular ballot or absentee ballot. Bromley testified that while it is appropriate to quickly review an absentee ballot prior to scanning it in the machine, and set aside any ballots with problems to be hand counted, it was inconsistent with the regulations for a moderator to review the ballots in the regular bin to confirm that they were properly sorted by the tabulator prior to locking them in the ballot transfer case.

The following additional facts are relevant to a resolution of the present dispute. The plaintiff presented compelling expert testimony from DiMassa, the assistant Democratic registrar of voters for the town of West Haven and the head moderator for West Haven's November 5, 2013 election. West Haven is a larger municipality than Easton, containing ten voting precincts, whereas Easton contains one. Consequently, there were ten moderators that reported to DiMassa, one for each voting precinct. Given the strong write-in candidate there and DiMassa's concerns about the tabulators, DiMassa, the West Haven town registrars, and his moderators conducted a series of meetings prior to the election to develop a plan for addressing any issues that might arise. In addition, an email was sent to Bromley inquiring whether write-in votes that did not include a

darkened oval on an absentee ballot should be counted.<sup>12</sup> Bromley responded in the affirmative.

The moderator of the absentee ballots in West Haven had reported to DiMassa that when counting the absentee ballots, a number of ballots had the name filled in without the corresponding oval filled in. Accordingly, at the close of the polls DiMassa instructed his moderators to flip through the ballots in the regular bin, if the bin hadn't already been sealed, to ensure that there were no write-in ballots in that bin. After learning from his moderators that there were a significant number of write-in votes in the regular bins and registered-candidate votes in the write-in bins, as well as over-votes, determining that the 2-3% of "blank" ballots for the highest office in West Haven as registered by the tabulator was a significant discrepancy, and concerned with the bubble issue for the write in candidates on the absentee ballot, DiMassa ordered a recanvass as he could not, as head moderator, otherwise guarantee the accuracy of his totals. The recount altered the vote totals by 20-30 votes in either direction in every district, and cut the spread between the candidates, which had been approximately 168 votes, in half, bringing it to approximately 80 votes.

DiMassa testified that although the machines were properly serviced, in his opinion, the "arm" of the tabulator malfunctioned and misdirected ballots. The court accepts this testimony. In fact, marked as full exhibits at the hearing were handwritten letters from seven of his moderators, mentioning, inter alia, arm malfunction, misdirected ballots, and regular ballots found

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The email stated: "Dear Ted: If there is a hand counted AB [absentee] ballot with the write-in candidate's name written in but the oval is not colored in, would the vote count?" Bromley responded: "Yes."



in the write-in bin. He testified further that the primary duty of a moderator is to ensure the accuracy of the election results, and that it is the moderator's decision whether to order a re-canvass.

## II

### LEGAL STANDARD AND APPLICABLE LAW

Section 9-328, the statute under which the plaintiff seeks relief, is best discussed in three parts: what is required of the party bringing the action; what is required of the court when it receives the action; and what actions the court may take after hearing the matter.

First, § 9-328 sets forth the following requirements for bringing an action: "Any elector or candidate claiming to have been aggrieved by any ruling of any election official in connection with an election for any municipal office . . . or any elector or candidate claiming that there has been a mistake in the count of votes cast for any such office at such election . . . may bring a complaint to any judge of the Superior Court for relief therefrom. . . ." To be aggrieved by a ruling of an election official, the alleged conduct "must involve some act or conduct by the official that (1) decides a question presented to the official, or (2) interprets some statute, regulation or other authoritative legal requirement, applicable to the election process." *Bortner v. Woodbridge*, 250 Conn. 241, 268, 736 A.2d 104 (1999). Our Supreme Court, in *Caruso v. Bridgeport*, 285 Conn. 618, 647, 941 A.2d 266 (2008) (applying the test to § 9-329a), stated that "the test we adopted in

*Bortner* . . . is broad enough to include conduct that comes within the scope of a mandatory statute governing the election process, even if the election official has not issued a ruling in any formal sense. When an election statute mandates certain procedures, and the election official has failed to apply or to follow those procedures, such conduct implicitly constitutes an incorrect interpretation of the requirements of the statute and, therefore, is a ruling.” (Citation omitted.) Our Supreme Court has stated that “[e]rroneous rulings by election officials do not . . . constitute the only predicate for a judicial order for a new election [or recount] under § 9-328. The other predicate is that there was a ‘mistake in the count of the votes.’” *Bortner v. Woodbridge*, 250 Conn. 241, 271, 736 A.2d 104 (1999).

Once the complaint is filed, § 9-328 requires the following of the court: “Such judge shall forthwith order a hearing to be had upon such complaint, upon a day not more than five nor less than three days from the making of such order, and shall cause notice of not less than three nor more than five days to be given to any candidate or candidates whose election or nomination may be affected by the decision upon such hearing, to such election official, the Secretary of the State, the State Elections Enforcement Commission and to any other party or parties whom such judge deems proper parties thereto, of the time and place for the hearing upon such complaint. Such judge shall, on the day fixed for such hearing and without unnecessary delay, proceed to hear the parties.”

§ 9-328 states that after the hearing the court may take the following actions: “If sufficient reason is shown, he may order any voting tabulators to be unlocked or any ballot boxes to be

opened and a recount of the votes cast, including absentee ballots, to be made. Such judge shall thereupon, if he finds any error in the rulings of the election official or any mistake in the count of the votes, certify the result of his finding or decision to the Secretary of the State before the tenth day succeeding the conclusion of the hearing. Such judge may order a new election or primary or a change in the existing election schedule. Such certificate of such judge of his finding or decision shall be final and conclusive upon all questions relating to errors in the ruling of such election officials, to the correctness of such count, and, for the purposes of this section only, such claimed violations, and shall operate to correct the returns of the moderators or presiding officers, so as to conform to such finding or decision, except that this section shall not affect the right of appeal to the Supreme Court and it shall not prevent such judge from reserving such questions of law for the advice of the Supreme Court as provided in section 9-325. Such judge may, if necessary, issue his writ of mandamus, requiring the adverse party and those under him to deliver to the complainant the appurtenances of such office, and shall cause his finding and decree to be entered on the records of the Superior Court in the proper judicial district.”

With respect to “sufficient reason” to order a new election, our Supreme Court has stated the following: “[I]n order for a court to overturn the results of an election and order a new election pursuant to § 9-328, the court must be persuaded that: (1) there were substantial violations of the requirements of the statute . . . and (2) as a result of those violations, the reliability of the result of the election is seriously in doubt.” *Bortner v. Woodbridge*, supra, 250 Conn. 258. But where only

a recount is sought, rather than a new election, the standard is less clear. Nevertheless, at minimum, there must appear to be a reasonable likelihood that a recount will change the result of the election. See 29 C.J.S. Elections § 488, p. 435 (2005). In any event, it is appropriate for the court to either consider a series of erroneous rulings, or to focus on a single erroneous ruling, as the case may be. *Caruso v. Bridgeport*, 285 Conn. 652. The appropriate inquiry does not entail an abstract calculation of the number or seriousness of each individual ruling or error but, rather, whether the plaintiff can establish causation between one or many injuries and an uncertain election result. See *id.* Our Supreme Court has warned, however that courts are not bound to “tolerate the wholesale flouting of the election laws by elections officials or a systematic failure of the election process.” (internal quotation marks omitted). *Id.*, 653.

### III

#### LAW AND ANALYSIS

##### A

#### Denial of Representation During Hand Counting of Ballots

The plaintiff claims that, as a registered write-in candidate, she was improperly denied the right to representation in counting votes. According to page F-3 of the Moderator’s Handbook for Elections and Primaries (moderator’s handbook), “[w]hen hand counting a ballot, voter intent controls and two election officials from opposing parties or factions must agree on the voter’s

intent.” Under the plaintiff’s interpretation of that provision, she should have been afforded a representative because she belongs to an opposing “faction,” and Everett erred in assigning one republican and one democrat to perform any manual counting of votes, rather than one republican and one individual representing the plaintiff’s “faction.”

As this court recognized in *Buckley v. Secretary of State*, supra, Superior Court, Docket No. CV-13-6038400-S, § 9-3 provides: “The Secretary of the State, by virtue of the office, shall be the Commissioner of Elections of the state, with such powers and duties relating to the conduct of elections as are prescribed by law and, unless otherwise provided by state statute, the secretary’s regulations, declaratory rulings, instructions and opinions, if in written form, shall be presumed as correctly interpreting and effectuating the administration of elections . . . .” The moderator’s handbook for example, would be considered an instruction in written form promulgated by the Secretary of State.

The question, then, is whether the plaintiff, a registered Republican running against a Republican as a registered write in candidate, should have been afforded the opportunity to be represented in the counting process by someone other than a democrat or a republican. It was undisputed that the plaintiff, through the court, had previously attempted, unsuccessfully, to reserve the Easton Coalition as a reserved party designation. Black’s Law Dictionary (9th Ed. 2009) defines faction as: “[a] number of citizens, whether a majority or a minority, who are united and motivated by a common impulse or interest that is adverse to the rights of others or to the

permanent or aggregate interests of the community.” The plaintiff and her supporters would fit this definition as their interests are adverse to those Republicans supporting Dunsby; that is, she and her supporters can be considered a faction within the Republican party. Although the provision in the moderator’s handbook can be construed as permitting the assignment of counters from *any* two opposing parties, notwithstanding the parties or factions running in any particular election, a better reading of the handbook would afford representation for a candidate who is not the major party nominee when hand counting ballots, would be consistent with the spirit and the intent of handbook, and would avoid an affiliation imbalance among those election officials discerning voter intent on ballots. In the present case, the plaintiff was not given representation even when a second team of hand counters was formed after the polls closed, when Everett saw the even stacks of ballots and realized the strength of the write in votes for the plaintiff. The court is also persuaded by the only expert testimony offered on this issue, that of DiMassa, who testified that the plaintiff should have been given representation so that she would be in a position to challenge any ballots counted by hand. Accordingly, the court finds that the Republican Registrar of Voters erred in ruling that the plaintiff could not have a representative present for the hand counting of ballots.

## B

### Unauthorized Individuals Near Canvass Tables

The plaintiff further claims that Dunsby improperly entered an unauthorized area during the canvass. General Statutes § 9-308 provides: “[t]he room in which ][the] 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, but, during such canvass, no person other than the election officials shall be permitted to be in the area where the voting tabulator is located." During the canvass, Everett caused a railing to be erected between the public and the election officials, such that the canvass would be visible to the public while simultaneously preventing unauthorized persons from gaining access to the ballots or voting tabulator. Everett herself was not involved in the counting and was at a different table than those on which the counting was proceeding.

At some point during the count, Dunsby crossed the railing and knelt at the table at which Everett was situated in order to ask her a question. The plaintiff and Derek Buckley also, at one point, crossed the railing to ask a question of Everett. At no point did any of the three come into proximity with the actual counting tables; however, Everett admitted that their crossing the railing was improper and that they were unauthorized individuals. DiMassa also offered his opinion that, although there was no doubt in his mind from his review of the evidence that no impropriety occurred, permitting any unauthorized individual into the counting area ran the risk of giving the appearance of impropriety, which could dilute voter confidence in the election results. The court need not determine whether this unauthorized access was technically a ruling of an election official, because the court finds that despite the error, there is no evidence suggesting that any impropriety

actually occurred, or that the election results were affected in any way. Nevertheless, this error does highlight the importance of affording the plaintiff an observer, so that she may have a better opportunity to determine whether an impropriety *might* have occurred.

C

Ballots Not Reviewed/Accounted For

The plaintiff further claims that, amongst the 127 absentee and same day registration ballots, there are 11 ballots that were counted by the tabulator machine as "blank" for the race for first selectman, and thus not reviewed for voter intent, and an additional 10 ballots that are entirely unaccounted for. Specifically, the plaintiff's claim is as follows: The canvass of the 127 absentee and same day registration ballots, as reported by the moderator's return, indicates that 66 votes went to the plaintiff and 37 votes went to Dunsby. Three ballots were rejected by the tabulator as uncountable, and were not counted. Eleven ballots were counted by the tabulator as blank and were not manually reviewed for voter intent. At the same time, the moderator's report states that a total of 124 absentee and same day registration votes were tabulated, either by hand or by machine, and 3 were rejected. The moderator's report does not specifically account for the 10 votes that are not included in the totals for Dunsby, the plaintiff, blanks, and rejected ballots. The defendant argues that these 10 votes represent hand-counted votes that contained no vote for first selectman and were thus "blank."