

STATE OF CONNECTICUT
STATE ELECTIONS ENFORCEMENT COMMISSION

In the Matter of a Complaint by Luther Weeks, Glastonbury

File No. 2018-066

FINDINGS AND CONCLUSIONS

The Complainant alleged here that the Office of the Secretary of the State failed to follow the prescriptions in General Statutes § 9-320f concerning the post-primary auditing of the August 2018 party primaries for state offices.¹

Background

1. On or about August 14, 2018, party primaries were held across the state.
2. For the Democratic Party nominations, primaries were held for the offices of Governor, Lieutenant Governor, Treasurer, Attorney General, one congressional district, six state senate districts, ten state representative districts, two judge of probate districts, and for two towns' registrar of voters.
3. For the Republican Party nominations, primaries were held for the offices of Governor, Lieutenant Governor, Treasurer, Attorney General, Comptroller, United States Congress, one congressional district, three state senate districts, four state representative districts, and for one town's registrar of voters.
4. On or about August 23, 2018 at 11:30am, Deputy Secretary of the State Scott Bates performed a random drawing of the districts and offices that would be subject to a post-election audit.
5. At the drawing Deputy Secretary Bates randomly selected 36 polling locations and 10 alternate polling locations from the 717 polling locations utilized in the August 14, 2018 party primaries, representing just over 5% of the total.

¹ The following are the Commission's findings and conclusions based on those portions of the Complainant's statement of complaint which the Commission could reasonably construe as alleging facts amounting to a specific violation of those laws within the Commission's jurisdiction. Any statements within the Complaint not addressed herein either did not specifically allege a violation or alleged facts which if proven true would not have amounted to a violation within the Commission's jurisdiction.

6. Additionally Deputy Secretary Bates randomly selected three Democratic Party races and three Republican Party races subject to audit.
7. For the Democratic Party, Deputy Secretary Bates selected the races for Governor, Treasurer, and Attorney General.
8. For the Republican Party, Deputy Secretary Bates selected the races for Lieutenant Governor, Comptroller, and Attorney General.

Allegation

9. The Complainant here alleges specifically that “[Deputy] Secretary Bates violated [General Statutes §] 9-320f in that he also selected three races for audit in each party’s primary and also selected only one party primary to audit in each selected district.”
10. The Complainant alleges that the selection of offices to audit should have been the purview of the municipal clerks in the towns containing the 36 polling locations and cites General Statutes § 9-320f (b) (4) for his argument.

11. The Complainant further alleges that

since there were legally two separate primaries a full 5% of districts must be audited in each primary. Not all races in each district were subject to selection for the audit, since Deputy [Secretary] Bates only drew from statewide offices. Offices excluded from selection include U.S. Representative 5th District, several CT House and Senate Races. This also violates the Secretary's Official Audit procedures. And is inconsistent with past practices of the Secretary of the State for primary elections, based on my recall, and review of data from the August 2014 Primary.

Law

12. General Statutes § 9-320f provides, pertinent part:

(a) Not earlier than the fifteenth day after any election or primary and not later than two business days before the canvass of votes by the Secretary of the State, Treasurer and Comptroller, for any federal or state election or primary, or by the town clerk for any municipal election or primary, the registrars of voters shall conduct a manual

audit or, for an election or primary held on or after January 1, 2016, an electronic audit authorized under section 9-320g of the votes recorded in not less than five per cent of the voting districts in the state, district or municipality, whichever is applicable. Such manual or electronic audit shall be noticed in advance and be open to public observation. Any election official who participates in the administration and conduct of an audit pursuant to this section shall be compensated by the municipality at the standard rate of pay established by such municipality for elections or primaries, as the case may be.

(b) The voting districts subject to an audit described in subsection (a) of this section shall be selected in a random drawing by the Secretary of the State and such selection process shall be open to the public. The offices subject to an audit pursuant to this section shall be, (1) in the case of an election where the office of presidential elector is on the ballot, all offices required to be audited by federal law, plus one additional office selected in a random drawing by the Secretary of the State, but in no case less than three offices, (2) in the case of an election where the office of Governor is on the ballot, all offices required to be audited by federal law, plus one additional office selected in a random drawing by the Secretary of the State, but in no case less than three offices, (3) in the case of a municipal election, three offices or twenty per cent of the number of offices on the ballot, whichever is greater, selected at random by the municipal clerk, and (4) in the case of a primary election, all offices required to be audited by federal law, plus one additional office, if any, but in no event less than twenty per cent of the offices on the ballot, selected in a random drawing by the municipal clerk. (Emphasis added.)

Response

13. The Secretary of the State responded in full to the allegations here and asserted that her office's interpretation of General Statutes § 9-320f differs from the interpretation that the Complainant put forward in his Complaint.

14. In turn, she addressed first the Complainant's allegation in Paragraph 9, above, as follows, in full:

The Secretary of the State has consistently interpreted Connecticut General Statutes §9-320f since the inception of the audit program in Connecticut in 2007. While Mr. Weeks asserts that we have "violated the Secretary's Official Audit procedures" and state statute, we disagree.

If we review the audits of primaries held in even numbered years since 2008, our interpretation of the audit selection procedures has been consistent. As discussed above, when there are a variety of different offices on the ballot, and/or a primary is not held in every town, our office has selected the polling locations subject to audit and then has required the clerk of each chosen municipality to select the races subject to audit. This not only makes practical sense, as each clerk knows what office appears on their primary ballot, but it also makes administrative sense because otherwise a mini-audit drawing would have to be conducted for each town because each town has a different ballot. This situation happens for every municipal primary and has also happened in 2008 and 2016, when only state senate and state representative races were subject to primary and not every town participated in a primary.

Mr. Weeks seems intensely focused on subsection (b)(4) of § 9-320f which states, "in the case of a primary election, all offices required to be audited by federal law, plus one additional office, if any, but in no event less than twenty per cent of the offices on the ballot, selected in a random drawing by the municipal clerk." While we understand that this language can be read to support Mr. Weeks' position, we do not believe that his position reflects the intention of this statute. In point of fact, this office had the primary responsibility for drafting the original legislative proposal for what would become Connecticut General Statutes § 9-320f, and we can affirmatively state that the intention of adding (b)(4) was to address a situation where there is no consistency of races on a primary ballot. In that case, the municipal clerk would clearly be in the best position to select the races subject to audit. However, when we look at the largely homogenous ballots for the primary in 2018 that was certainly not the case.

Consistent with this interpretation, our office selected both the polling locations and the offices subject to audit for the August 14, 2018 primary because all municipalities and all districts in the state participated in a

primary and had a stunning degree of consistency in races on the ballots statewide.

Finally, it must be acknowledged that the procedural details of conducting an audit of a dual statewide primary of this magnitude is one of first impression, however, the use of ballot consistency as a factor to determine whether this office or the municipal clerk chooses the offices to be audited is not. Our office has remained consistent with our interpretation and use of the town clerk to select the races subject to audit. In 2012, for example, our office instructed each town to audit all federal races on the ballot. Our rationale for this decision was that both parties had the offices of both US Senate and Representative in Congress on the ballot. As a contrast, in 2010 and 2014, our office selected the polling locations subject to audit, but required the town clerk to select the offices because of the lack of consistency of the offices on the primary ballots throughout the state.

15. Next, the Secretary addressed the Complainant's allegations in Paragraph 10, above, as follows, in full:

This statement is simply incorrect. Connecticut General Statutes § 9-320f states; "an audit shall be conducted of the votes recorded in not less than five per cent of the voting districts in the state, district or municipality, whichever is applicable." Five percent of 717 polling locations used on August 14, 2018 is thirty-six (36).

16. Next, the Secretary addressed the Complainant's allegations in Paragraph 11, above, as follows, in full:

We have attached our audit procedures from [April 2010 and August 2016] for your review. As you can see, they have changed, and will continue to change, as our understanding of the efficacy and efficiency of audit procedures continues to evolve. Specifically, you will note in our earlier versions of the handbook the lack of a description regarding the town clerk's duty to select offices subject to audit. This was intentional. Depending on the audit and the type of races on the ballot, our office may prescribe the offices. In our view, primaries with consistent offices on the ballot are administered much more like an election than a primary and thus the audit selection process is conducted much more like an election than a primary.

17. Finally, the Secretary concluded:

Pursuant to our authority in Connecticut General Statutes § 9-3, the Office of the Secretary of the State has interpreted the proper procedure for selecting the races subject to audit under Connecticut General Statutes § 9-320f. Further, we have demonstrated that this interpretation has remained consistent since its inception. We have involved the municipal clerk in selecting the offices subject to audit when no ballot consistency exists in order to more effectively administer the audit process. When dual statewide primaries have existed, as in 2012, our office selected the offices subject to audit. In 2018, we remained consistent in our interpretation, and past practice, by selecting both the polling locations and offices subject to audit.

Mr. Weeks only furthers our interpretation when he asserts that local officials did not audit the proper offices in 2014 and that the number of offices subject to audit were inconsistent across the state. This is precisely the lesson learned and the process that we seek to avoid by not only selecting the polling locations, but also the offices subject to audit, when such a selection is possible because of ballot consistency.

It is important to remember that our audit law does not audit the election. Our audit law simply seeks to ensure that our voting machines were not subject to a malicious attack. Randomly selecting districts and offices (by the town clerk or Secretary of the State) accomplishes this task and still provides the appropriate amount of deterrence. For these reasons, Mr. Week's complaint should be dismissed.

Analysis

18. As an initial matter, the Commission makes note of General Statutes § 9-3, which reads, in pertinent part:

(a) 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, and any order issued under subsection (b) of this section, shall be presumed as correctly interpreting and effectuating the administration of elections and primaries under this title, except for chapters 155 to 158, inclusive, and shall be executed, carried out or implemented, as the case may be, provided nothing in this section shall be construed to alter the right of appeal provided under the provisions of chapter 54. Any such written instruction or opinion shall be labeled as an instruction or opinion issued pursuant to this section, as applicable, and any such instruction or opinion shall cite any authority that is discussed in such instruction or opinion. . . . (Emphasis added.)

19. The Commission has consistently applied a presumption of accuracy where, as here, the Secretary, as Commissioner of Elections, has issued a written legal opinion on an area of Title 9 within her purview.
20. The Secretary asserts here that in her opinion, when dual statewide primaries are on the ballot, her interpretation of General Statutes § 9-320f is that the Secretary of State's Office is charged with selecting the offices subject to audit among such primaries. Only when no ballot consistency exists do the municipal clerks select the offices subject to audit in this instance.
21. The Secretary further asserts that this interpretation is consistent with past practice, as well as her audit procedures, past and present.
22. Finally, the Secretary asserts that the Complainant is incorrect when he alleges that the selection of 5% of the districts should be applied separately for each party holding primaries.
23. Turning to the main question here, considering the Secretary's thorough analysis in response to this Complaint as a whole in light of General Statutes § 9-3, the Commission does not believe grounds exist to override the general presumption of accuracy afforded the Secretary's written interpretations of Title 9 statutes within her purview, such as General Statutes § 9-320f here. As such, the Commission supports the Secretary's interpretation and this matter should be dismissed.
24. That said, while the 5% rule appears to be clear on its face, by dismissing this matter the Commission does not conclude that the Complaint's interpretation of who selects the offices to be unreasonable. A reasonable reading of General Statutes § 9-320f (a) could

easily lead the average reader to conclude that in all primary audits—municipal and state—the municipal clerk selects the offices.

25. Moreover, the Secretary's latest Audit Procedure Manual, submitted in response to this Complaint, does not present the "dual statewide primaries" interpretation that the Secretary articulated in response to this matter. Page 3 of the August 2016 Manual, the latest version available, contains what is largely a restatement of the unclear statutory provisions at issue in this matter.
26. As such, while the Commission is dismissing this matter for the above reasons, the Commission strongly recommends that the Secretary revise its audit manual in line with the written opinion submitted here.


ORDER

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

That the matter is dismissed.

That the Commission's recommendation is referred to the Secretary of State for consideration under General Statutes § 9-3.

Adopted this 21st day of August, 2019 at Hartford, Connecticut.



Anthony J. Castagno, Chair
By Order of the Commission