

STATE OF CONNECTICUT
STATE ELECTIONS ENFORCEMENT COMMISSION

In the Matter of a Complaint by Elizabeth Rival, Berlin

File No. 2018-108

FINDINGS AND CONCLUSIONS

The Complainant alleged that during November 6, 2018 general election, she was misinformed by polling place officials at the Griswold elementary school polling place in Berlin about the unavailability of a voting device equipped for individuals with disabilities at her polling place, and alternately, that such device was set up in a way as to potentially violate a voter's right to privacy.

Law

1. Section 9-242a-11 of the Regulations of Connecticut State Agencies sets out certain criteria for the organization of polling places and requires that "[a]t least one voting booth in each voting district shall be accessible to persons with disabilities[.]"
2. General Statutes § 9-247 further requires that all tabulators, including AVS machines, be tested and functional by the open of polls and reads::

The registrars of voters shall, before the day of the election, cause test ballots to be inserted in each tabulator to ensure that each tabulator is prepared and read and cause each other voting system approved by the Secretary of the State for use in the election, *including, but not limited to, voting devices equipped for individuals with disabilities that comply with the provisions of the Help America Vote Act, P.L. 107-25, as amended from time to time*, to be put in order in every way and set and adjust the same so that it shall be ready for use in voting when delivered at the polling place. Such registrars of voters shall cause each voting system to be in order and set and adjusted, to be delivered at the polling place, together with all necessary furniture and appliances that go with the same, at the room where the election is to be held, and to be tested and operable not later than one hour prior to the opening of the polling place.

3. General Statutes § 9-236b provides, pertinent part:

(a) The Secretary of the State shall provide each municipality with sufficient quantities of a poster size copy, at least eighteen by twenty-four inches, of a Voter's Bill of Rights, which shall be posted conspicuously at each polling place. The text of the Voter's Bill of Rights shall be:

“VOTER'S BILL OF RIGHTS

Every registered voter in this state has the right to:

- (1) Inspect a sample ballot before voting;
- (2) Receive instructions concerning how to operate voting equipment, on sample voting equipment before voting;
- (3) Cast a ballot if the voter is in line when the polls are closing;
- (4) Ask for and receive assistance in voting, including assistance in languages other than English where required by federal or state law;
- (5) Vote free from coercion or intimidation by election officials or any other person;
- (6) Cast a ballot using voting equipment that accurately counts all votes;
- (7) Vote by provisional ballot if the individual registered to vote and the individual's name is not on the voter list;
- (8) Be informed of the process for restoring the individual's right to vote if the individual was incarcerated for a felony conviction; and
- (9) Vote independently and in privacy at a polling place, regardless of physical disability.**

If any of your rights have been violated, you have the right to file an official complaint with the State Elections Enforcement Commission at (toll-free telephone number) or the United States Department of Justice at (toll-free telephone number). In

addition, before leaving the polling place you may notify the moderator of the violation.”

Background

4. At all times relevant to the instant Complaint, the Complainant was a registered voter in the village of Kensington in the Town of Berlin, who’s regular polling place is located at the Griswold Elementary School.
5. At all times relevant to the instant Complaint, Edward Janik was the moderator at the Griswold Elementary School polling place.

Allegations

6. Specifically, the Complainant, who is visually impaired and cannot execute a traditional ballot without assistance, alleged that when she arrived at her polling place on or about on November 6, 2018, she asked the official checker if she could utilize the alternative voting system (“AVS”) and she was told that the machine was not functioning properly.
7. The Complainant asserted that after being told that the AVS machine was not functioning, she executed her ballot with the assistance of her husband.
8. The Complainant asserted that on her way to insert her ballot into the tabulator, a second polling place worker informed her that the AVS machine was indeed functioning.
9. Additionally, Complainant asserted that her husband observed the AVS machine set up near a high-traffic exit door and seemed to be arranged in such a way that the AVS laptop screen would be visible to “any and all passing by”

Investigation

10. The investigation here revealed that on the date in question, the Secretary of the State’s office received a call, possibly from the Complainant, and sent a representative, Attorney P. Jo Anne Burgh, to the Griswold School to make inquiries.
11. Attorney Burgh reported to Commission investigators that she visited the Griswold School polling place sometime around noon on the date in question.

12. Attorney Burgh stated that her notes reflected that she spoke with Mr. Janik, who told her that the AVS machine had been set up around approximately 8:30 or 9:00am and that he was not aware of any complaints of individuals being unable to use the machine.
13. She reported that Mr. Janik told her that one sight-impaired individual, who appears to have been the Complainant here, came to the polling place with her seeing eye dog and husband and that her husband assisted her in executing her ballot.
14. She reported that she spoke with assistant moderator Gloria Janik, who reported that the AVS machine was actually tested at approximately 6:00am, initially had some error messages, but was up and running shortly thereafter, before any voters needed to utilize it.
15. Attorney Burgh recalled Ms. Janik stating that she and polling place official Pam Roe were “wrapping up” finishing setting up the machine when the polls opened.
16. Attorney Burgh recalled that Ms. Roe confirmed that the machine was set up in the manner and at the time that Ms. Janik stated.
17. Attorney Burgh recalled that she reported back the Secretary of the State that she observed what appeared to be a functioning AVS system.
18. The investigation here confirmed via the “Accessible Voting System Start-Up Report” that the AVS system at the Griswold Elementary School was started up at 5:29am, before the opening of polls.
19. The investigation also confirmed that the AVS machine table was located against a wall in the gymnasium between the entrance to the polling place and the exit to the polling place.
20. The checkers tables were located in the middle of the room and the voting booths were located on the wall perpendicular to the AVS machine.
21. The tabulator was located on the same wall as the AVS machine, approximately 7-11 feet away and just by the door.
22. The path from the voting booths to the tabulator to the exit would not necessarily take a voter by the AVS machine, but the more diagonal path from the entrance to the checker’s table could potentially take a voter behind or nearly behind any voter seated at the AVS machine.

Response

23. The Respondent moderator, Mr. Janik, was very cooperative and detailed in his response to the instant Complaint.
24. Mr. Janik asserted that he is very familiar with the Complainant and recalled specifically her arrival on that day.
25. Mr. Janik recalled that he greeted the Complainant and her husband (and her guide dog) and verified her ID under General Statutes § 9-261 and when he asked for her husband's ID, the Complainant informed him that he was only there to assist her in filling out her ballot.
26. Mr. Janik asserted that while he does not recall having any discussion about the AVS machine, as a long time moderator, he was very familiar with Ms. Rival's history of voting
27. Mr. Janik recalled that he remembered the Complainant voted for many years using the AVS system on her own, but that in recent elections that practice changed to bringing in her husband to assist her.
28. In addressing the Complainant's concern regarding the location of the AVS machine, Mr. Janik asserted that normally the AVS machine is located on the opposite wall of the gym, by the bleachers, far away from any foot traffic, but that because the bleachers were deployed on that day, he had to relocate it to its position between the entrance and exit doors due to the location of an outlet in that area.
29. Mr. Janik asserted that while the location was not ideal, the laptop was not located in any regular foot traffic pattern such that other voters would be directly behind someone utilizing the machine.

Analysis

30. Turning to the first question, as an initial matter, the Commission concludes that the investigation did not reveal facts sufficient to conclude that it was more probable than not that the AVS machine was not *mechanically* functional at the open of polls on the date in question.
31. The AVS report printout from 5:30am and the statements from Mrs. Janik and Ms. Roe support a finding that it was more likely than not that the machine had been set up.

32. However, the Commission has consistently held up that a mechanically functional voting machine is only actually “put in order in every way” and “ready to use” if the polling place officials are able to make it available for the voters.
33. The Commission has held that even if the machinery itself is functional, if the staff is unable to operate the voting device due to the staff’s own lack of knowledge, then the requirements of § 9-247 are deemed not to have been met. See In the Matter of a Referral by the Secretary of the State, File No. 2016-043 (Alternative Voting System machine deemed inoperable due to staff member’s inability to locate access code); In the Matter of a Complaint by Melissa A. Rickard, Windsor, File No. 2012-196 (Moderator unable to operate otherwise functional AVS due to lack of training: “A mechanically functioning voting system without a human operator that can use it is as good as having no machine at all. Cited in Secretary of State, supra).
34. Here, the issue is indistinguishable from the polling place workers being unable to operate the machine. If a polling place worker is turning voters away from the AVS machine, even under a genuine misunderstanding, it is as good as having no machine at all.
35. And, the facts here do appear to support a finding that there was some confusion over whether and at what time the AVS machine was functioning. Not only did both the Complainant and her husband state that she was told that the machine was not working, the statements taken by Attorney Burgh support that even between Mr. and Mrs. Janik there was not a uniform understanding of the status of the machine.
36. As such, it is more likely than not that the Complainant asked about the AVS machine and that there was confusion at the checkers table that led her to vote as she had been recently, with her husband as her official assister.¹
37. Comparing this matter to other similar matters, such as Secretary of State and Rickard, supra, the Commission also finds that due the unique circumstances here, it need not take any further action.
38. Prior matters in which the Commission has taken action such as civil penalties, against elections officials for AVS matters, the voter was either forced to utilize assistance from a third party against their preference (See, e.g., In the Matter of a Complaint by Linda Kuja, Montville, File No. 2017-080A and 2017-082B) and/or experienced a significant delay due to either the failure to set up the machine, or the failure of the election official to correctly

¹ Which is permissible pursuant to General Statutes § 9-264.

operate the machine (See, e.g., In the Matter of a Referral by the Secretary of the State, supra).

39. Here, the facts support that the Complainant came into the polling place with her husband prepared to execute her ballot using her husband's assistance. She even told Mr. Janik as she was getting her ID checked that her husband was not there to vote, but rather to assist her in executing her ballot.
40. The Complainant appeared to change her mind and was misinformed by the polling place official about the operation of the AVS machine, and simply went back to her originally intended method of voting. The Complainant experienced no delay and while she had every right to change her mind, she did end up voting in the manner she originally intended and had historically undertaken.
41. Moreover, it appears that even the softest follow-up inquiry with the moderator, Mr. Janik would have cleared up the issue and she would have been able to use the machine.
42. None of the above is to forgive the failure in the first instance to inform the Complainant that the AVS machine was available, but given the unique circumstances, no further action is necessary against the elections officials here.
43. Turning to the question of the location of the AVS machine, as an initial matter, the Commission notes that this is an issue of first impression for the Commission.
44. Moreover, the Commission notes that while in this particular instance, there is no evidence that any particular voter's privacy was compromised, the placement of this AVS machine had a greater than acceptable potential for jeopardizing a voter's privacy.
45. The AVS machines in place during the 2018 elections utilized a touch screen laptop, which displays the voter's selections and prints out the selections onto an official ballot that can be fed into a tabulator.
46. This was a change from the prior machines, which utilized a telephone, a keypad, and audio prompts, which then sent the user's selections to a nearby fax printer that printed out the user's ballot selections on a paper medium that could not be fed into the tabulator and had to be counted by hand.
47. Unlike the paper ballots or the keypads on the older AVS machines, the laptop screens on the new AVS machines are tipped up in such a way that anyone walking within a certain distance of a voter's back can see the selections on the screen.

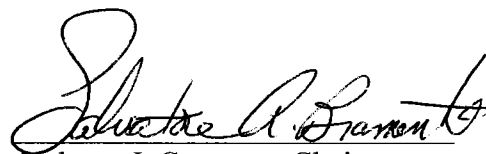
48. Moreover, the privacy screens utilized for voting booths, while providing some privacy from lateral positions, do not afford privacy from a person standing behind the voter.
49. As such, in order to preserve the privacy of voters utilizing these new AVS machines, the registrars and moderators need to take care that the machines are not set up in such a way that there would likely be foot traffic within the zone behind AVS machine that would put the laptop screen within a line of sight.
50. Here, while the moderator did appear to genuinely attempt to route the traffic patterns at this particular polling place to avoid having voters crossing directly behind the AVS machine, there did not appear to be any protections in place to prevent anyone from actually doing so.
51. A physical barrier, such as a rope or cones, should have been erected to protect the area behind the voter. Or, perhaps more simply, the table could have been turned so that the voter's back was to the wall.²
52. Accordingly, while the evidence did not turn up any actual instance of a particular voter's privacy being compromised, the moderator should take care in future elections to adjust the AVS machine accordingly.

² While this would have pushed the table out more into the room and potentially created a trip hazard of the power cables, such an issue could have been addressed with an application of gaffer's tape or some commercially available rubberized wire conduits.

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

No further action.

Adopted this 18th day of September, 2019 at Hartford, Connecticut.

A handwritten signature in cursive script, appearing to read "Salvatore A. Bramante".

~~Anthony J. Castagno, Chairperson~~

By Order of the Commission

Salvatore Bramante