

BEFORE THE MARYLAND STATE BOARD OF ELECTIONS

Joyce Ludwig

and

Liberty Rucker

Complainants

v.

Maryland State Board of Elections

Respondent

FINAL DETERMINATION

Statement of the Case

On December 30, 2004 Complainant Liberty Rucker filed with Linda H. Lamone, the State Administrator of Elections, an administrative complaint against the State Board of Elections alleging a violation of Section 301 of the Help America Vote Act of 2003. On January 3, 2005, Complainant Joyce Ludwig filed a similar complaint. Both complaints allege that voters reported to the Complainants that a voting machine malfunctioned, causing votes to be cast incorrectly or without the ability to review and change votes. These complaints were consolidated for the purposes of a hearing.

A hearing was held on January 21, 2005 at 9:00 a.m. before Linda B. Pierson, the hearing officer designated by the State Administrator, at the offices of the State Board of Elections. The Complainants represented themselves, and Nikki B. Trella, Esquire, represented the State Board of Elections.

This administrative procedure is governed by Chapter 33.01.05 of the Code of Maryland Regulations (COMAR). The purpose of the administrative complaint procedure is to provide a fair hearing and a speedy determination outside of the judicial system for an individual who asserts that an election official has violated the provisions of the Election Law Article relating to provisional ballots or that there has been a violation of Title III of the Help America Vote Act of 2002.

Issue

The issue is whether the voting system failed to meet the requirements of the Help America Vote Act in that the electronic voting equipment in a polling place

failed to allow voters the ability to change a selection on the ballot prior to the voter casting the ballot.

Findings of Fact

Having considered the testimony and evidence and having observed the witnesses; I find, by a preponderance of the evidence, the following facts.

1. The Complainants, Joyce Ludwig and Liberty Rucker, were assigned by TrueVoteMD to act as poll watchers at polling places in Prince George's County.
2. Voter Rosanne Bangura at C. Elizabeth Rieg Special Center in Bowie, Maryland, precinct 07-08, complained to Ms. Ludwig, in Ms. Ludwig's capacity as a poll watcher at this polling location, that she was unable to change an incorrect selection on a voting machine at this polling location.
3. Ms. Bangura was offered the opportunity by an election official to cancel and recast her vote, but the voter declined.
4. Voter Helen Walker at Perrywood/Kettering Elementary School in Upper Marlboro, Maryland, precinct 03-04, reported to Ms. Rucker, in her capacity as poll watcher at this polling location, that the voting machine on which she voted selected a candidate for which the voter did not intend to vote, and the vote was cast prematurely without her approval. The voter was not offered any opportunity to correct the vote or cast another ballot.
5. Voter Mamie Burse at Perrywood/Kettering Elementary School in Upper Marlboro, Maryland reported to Ms. Rucker, in her capacity as poll watcher at this polling location, that the voting machine on which she voted cast her ballot prematurely without giving her the opportunity to review her ballot. An election judge at this polling location told the voter that there was nothing he could do to rectify this situation.
6. The software used on all AccuVoteTS voting machines in Maryland is copied from one master of the software. A software defect that would have caused the problems encountered by voter Rosanne Bangura at precinct 07-08 or voters Helen Walker and Mamie Burse at precinct 03-04 would have been encountered by each voter on Election Day.
7. The voting machine software was tested in standardized User Acceptance Testing on July 1, 2004, and no defect which would result in the problem encountered by voter Rosanne Bangura at precinct 07-08 or voters Helen Walker and Mamie Burse at precinct 03-04 was encountered during that testing.
(Respondent's Exhibit No. 1)

8. The Logic & Accuracy Testing performed on October 11, 2004 and October 14, 2004 on the voting machines used in precincts 03-04 and 07-08 in Prince George's County did not reveal any calibration problem or other defect of the screens of the voting machines which could have caused the problems encountered by the voters identified by the Complainants. (Respondent's Exhibits No. 3 and No. 4)

9. Pierre Muller-Fils, System Analyst for the Prince George's County Board of Elections, reviewed the Logic and Accuracy Test results from the voting equipment at precincts 03-04 and 07-08, and the test results indicated no problem with the voting equipment. Such problems would have been reported on forms provided during the testing procedures. (Respondent's Exhibit No. 2)

10. Pierre Muller-Fils, System Analyst for the Prince George's County Board of Elections, reviewed the Voting Unit Technician's Troubleshooting Report Form for polling places in Prince George's County and determined that there were no Voting Unit Technician's Troubleshooting Report Forms from precincts 03-04 or 07-08. (Respondent's Exhibit No. 2) Voting Unit Technicians are instructed to report such problems.

Discussion

The Complainants claim that voters reported to them, in the Complainants' capacity as poll watchers, that election equipment malfunctioned, resulting in the casting of votes that were not approved by the voters. Individuals alleging a violation of Title III of the Help America Vote Act of 2002 have the burden of establishing, by a preponderance of the evidence, that a violation occurred.

Sec. 301 (a)(1)(A)(ii) of HAVA requires that a voting system "provide the voter with the opportunity (in a private and independent manner) to change the ballot or correct any error before the ballot is cast and counted..."

Complainants allege that a software malfunction in the voting machine could have caused the problems identified by the voters who made complaints to Complainants. However, they produced no evidence of a software malfunction. In response to this allegation, Respondent presented testimony that if a software malfunction occurred, the malfunction would have occurred on every AccuVote-TS voting unit used in the State, since identical software is used in every voting unit. Respondent presented testimony that the User Acceptance Testing that occurred on July 1, 2004 would have identified any software malfunction and it identified none.

Respondent offered testimony that a voting unit with an incorrectly calibrated screen or other screen defect could have resulted in the voting unit malfunction identified by Complainants. SBE Technical Specialist Paul Aumayr further testified that a voting unit with an incorrectly calibrated screen or other screen

defect would not have successfully completed the Logic and Accuracy Testing, a pre-election test to ensure that the proper ballot is loaded and that the voting unit is accurately recording and tabulating votes. Voting units used in Prince George's County precincts 03-04 and 07-08 successfully completed Logic and Accuracy Testing.

Claimants Ludwig and Rucker introduced TrueVoteMDs' report entitled "When the Right to Vote Goes Wrong: Maryland Citizens Tell the Story of Election Day 2004" as evidence of voting system malfunctions. (Complainant Rucker's Exhibit 2) Additionally, Complainants timely submitted written documents subsequent to the hearing, consisting of unsworn statements provided to poll watchers at various polling sites in Maryland. These documents relate varied problems encountered by voters while voting on November 2, 2004, many of which were voting machine problems. These statements include statements by the three voters about whom Complainants testified at the hearing.

This case involves technical issues involving the interface of voters with voting machines. The statements supplied by the voters do not enable me to make a finding that a violation occurred, because the descriptions set forth in those statements do not establish that a machine malfunction occurred. The sequence of events recounted could equally have been the result of voter error as the result of machine malfunction. Moreover, the fact that these persons did not appear, and this that their testimony is hearsay, means that the fact finder is limited, at best, to the descriptions contained in the statements. Without the opportunity to question the persons who experienced problems with the voting machine, it is not possible to make a meaningful determination of whether or how these problems actually occurred. It is not possible to assess these accounts without being able to explore the specifics of what happened.

Respondents argue that, absent sufficient evidence of a specific voting machine malfunction, the only possible cause of these problems is voter error. I find that there is not enough evidence to make a finding of whether there was a machine problem or voter error.

Testimony and voter statements provided by Complainants indicate that at least two of the voters whose complaints form the basis of the Complaint made their problems known to election judges at the polling place, yet Respondent states that there is no record of any such complaints. While it is not part of the order in this case, I urge the Respondent to review the implementation of its procedures with respect to the training of polling place election officials regarding their responsibility to report appropriately problems encountered by voters at the polling place on Election Day.

ORDER

It is my determination that the Complainants have not established, by a preponderance of the evidence, that a violation of Title III of the Help America Vote Act of 2002 has occurred as it relates to the ability of voters to review or change their ballots before casting them.

It is therefore, ORDERED that the Complainant's Complaints, filed on December 30, 2004 and January 3, 2005, be dismissed.

Date

Linda B. Pierson
Hearing Officer

Appeal Rights

This is a final determination of the State Board of Elections and, under Regulation 33.01.05.08 of the Code of Maryland Regulations, may not be appealed in any State or federal court.