

BEFORE THE MARYLAND STATE BOARD OF ELECTIONS

JEFFREY F. LISS,

Complainant,

v.

MONTGOMERY COUNTY BOARD OF
ELECTIONS,

and

MARGARET A. JURGENSEN,
Election Director,

Respondents.

FINAL DETERMINATION

Statement of the Case

On March 29, 2004, the Complainant filed with Linda H. Lamone, the State Administrator of Elections, an administrative complaint against the Montgomery County Board of Elections and Margaret A. Jurgensen, the Election Director for the Montgomery County Board of Elections, and requested a hearing on the record. He alleged that two malfunctions occurred on the voting unit on which he voted (also referred to as “voting unit #2”) in the Primary Election held on March 2, 2004. First, he alleged that the ballot on the voting unit did not include the United States Senate contest. Second, he alleged that the “Review Ballot” function did not perform properly.

After relaying a verbal complaint on Election Day to the election judges and the Election Director of Montgomery County, the Complainant was issued a provisional ballot application and cast a provisional ballot. The Montgomery County Board of Elections, serving as the Local Board of Canvassers, unanimously rejected his provisional ballot. The Complainant requested, among other procedural matters, that the Montgomery County Board of Elections be directed to accept his provisional ballot application for the 2004 Primary Election, count his provisional ballot in the final election tally, and correct all final election tallies.

A hearing was held on April 19, 2004, before Nikki B. Trella, the hearing officer designated by the State Administrator, at the offices of the State Board of Elections, 151 West Street, Suite 200, Annapolis, Maryland. The Complainant represented himself, and the Respondents were represented by Kevin Karpinski, Esq., Counsel to the Montgomery County Board of Elections.¹

Written briefs and memoranda were filed by both the Complainant and Respondents by Tuesday, May 4, 2004. Without the specific authorization of the hearing officer, the Complainant filed correspondence on May 7, 2004, in response to Respondent's memorandum, to which the Respondent filed a reply letter on May 14, 2004. In fairness to both parties, these letters were accepted into the record and represented the parties' final submissions.

¹ The complaint against Margaret Jurgensen, Election Director for the Montgomery County Board of Elections, is dismissed. The complaint is challenging an action of the Montgomery County Board of Elections and the proposed remedy would be a directive to the Montgomery County Board of Elections. Ms. Jurgensen is not a member of the Montgomery County Board of Elections.

This administrative complaint is governed by Chapter 33.01.05 of the Code of Maryland Regulations (COMAR).

Issue

The issue is whether the Montgomery County Board of Elections properly rejected the Complainant's provisional ballot during its canvassing of the 2004 Presidential Primary Election.

Findings of Fact

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

1. The Complainant voted on voting unit #2 in Montgomery County Precinct 07-06 in the Democratic Primary Election on March 2, 2004.
2. It was not until after pressing the "Cast Ballot" button and leaving the voting unit that the Complainant realized that he did not recall seeing the U.S. Senate contest on his ballot.
3. The Complainant did not notify an election judge or voting unit technician that the U.S. Senate contest did not appear on his ballot or that the "Review Ballot" function did not perform properly until after he had pressed the "Cast Ballot" button and left the voting unit.
4. With the approval of the Election Director for Montgomery County, the Complainant was issued and cast a provisional ballot.

5. The Montgomery County Board of Canvassers rejected the Complainant's provisional ballot because the Complainant voted on the Diebold AccuVote-TS voting unit and there was no evidence that the voting unit malfunctioned.
6. On the voting unit, candidate names are arranged in a two-column format.
7. The voting unit used by the Complainant performed properly during the pre-election logic and accuracy testing, during voting on Election Day, and during post-election testing and demonstration of the unit.
8. In the 2004 Primary Election, Democratic voters were eligible to vote for President of the United States; U.S. Senate; U.S. House of Representatives; Judges of the Circuit Court; male and female delegates to the Democratic convention; and the Board of Education.
9. For a Democratic voter with the ballot in "normal" display, the candidates for the President of the United States would appear in the left column of the screen. Candidates for the U.S. Senate would appear in the upper, right column, with the candidates for the U.S. House of Representatives appearing in the right column under the candidates for U.S. Senate.
10. For a Democratic voter with the ballot in "magnified" display, the candidates for the President of the United States would appear in the left column and continue to the right column. Candidates for U.S. Senate and U.S. House of Representatives would appear on the next screen, with the U.S. Senate candidates appearing in the left column, and the House candidates appearing under the U.S. Senate candidates in the left column and continuing to the right column.

11. The Complainant voted for a candidate for the President of the United States and a candidate for the U.S. House of Representatives.
12. The voting unit on which the Complainant voted in the 2004 Primary Election did not malfunction.
13. The Complainant was provided the opportunity to vote for a Democratic candidate for U.S. Senate on the voting unit.
14. The “Review Ballot” function on the voting unit on which the Complaint voted performed as it was intended to perform.

Conclusion of Law

Pursuant to § 11-303(d)(2)(iii) of the Election Law Article of the Annotated Code of Maryland, the local board is required to reject a provisional ballot if an individual casts more than one ballot for the same election. Since the Complainant cast a ballot on the voting unit, the local board properly rejected his provisional ballot.

Discussion

Part I

Before turning to the substance of the complaint, I will first address several procedural issues. The purpose of the administrative complaint procedure is to provide a fair hearing and a speedy determination outside of the judicial system to an individual who asserts that an election official has violated the Election Law Article as it relates to provisional ballots or believes that there is or has been a violation of Title III of the Help America Vote Act of 2002.

Although a complainant may be filing a complaint based upon an action of a local board of elections, the administrative complaint process does not serve as an appeal of the decision of the local board of elections; it is a process designed to elicit testimony and evidence to enable the hearing officer to determine whether a violation of State law relating to provisional ballots or Title III of the Help America Vote Act of 2002 has occurred and, where appropriate, to provide a remedy. The fact that the administrative process allows parties to the complaint, as well as interested members of the public, to present testimony and evidence and does not limit the substance of the testimony to information previously presented to the local board of elections clearly establishes that this process is not an appeal.

In many ways, the hearing officer is serving in the same capacity as a trial court would serve in a mandamus-type case brought in the judicial system. When a decision of an election official is challenged in such a case, the trial court is not limited to the evidence before the election official when the decision at issue was made. The judge has the ability to consider a broader set of facts in order to make the appropriate ruling. Similarly, the hearing officer may accept any relevant evidence and consider it when making a final determination whether there has been a State law violation relating to provisional ballots or a Title III violation. Because the administrative complaint process is not an appeal and the deliberation of a canvassing board is not an exhaustive review, the parties to a complaint are not limited to the testimony and evidence available to the respondent at the time the alleged violation occurred. Accordingly, the hearing officer may consider any offered and relevant evidence or testimony in making a final determination. To limit testimony or evidence to that which was available to the respondent at the time the alleged violation occurred could have unintended consequences. Under the

Respondent's theory, the inability of an election official to adequately investigate an informal complaint and prepare for a canvassing decision would subsequently limit the testimony provided during the administrative complaint procedure. This would not be an optimal outcome and would violate the purpose of the administrative complaint procedure.

Although members of the public are encouraged to observe and understand the public canvassing processes, there is no statutory right for a voter to participate in the canvassing process. With the approval of a local board, a voter may be allowed to participate in the canvassing process. The failure to attend and present evidence during canvassing, however, does not preclude an individual who believes that a violation of State law relating to provisional ballots or Title III has occurred from filing a complaint under the administrative complaint procedure and presenting any relevant evidence to support the complaint. In fact, it is extremely unlikely and unreasonable to expect that the Complainant or any complainant, in the short time between Election Day and the canvassing of provisional ballots, could have presented testimony as was presented during this process.

For the reasons described above, I have accepted all of the evidence and testimony presented by both the Complainant and the Respondent and will weigh that evidence in making my decision.

Part II

In light of the evidence presented at the hearing and in subsequent filings, as well as by taking judicial notice of how the voting system functions and of published research on the

subject of “no votes,” the preponderance of the evidence does not support the Complainant’s allegation that the voting unit on which he voted malfunctioned. Specifically, the preponderance of the evidence does not show that the U.S. Senate contest did not appear on his ballot or that the “Review Ballot” function did not perform properly. As a result, I have determined that the Montgomery County Board of Elections acted in strict accordance with §11-303(d)(2)(iii) by rejecting the Complainant’s provisional ballot cast in the 2004 Primary Election.

While the Complainant alleges that the U.S. Senate contest did not appear on his ballot, his own complaint and testimony indicate that he is less than certain that the contest did not appear. In paragraph 8 of the complaint, the Complainant acknowledges that it is “perfectly possible” that he might have simply missed the U.S. Senate contest on the ballot. He does not suggest that his ballot did not present the contests for President and U.S. House of Representatives, contests that would have appeared on the same ballot screen as the contest for U.S. Senate. He also affirms in paragraph 6 of the complaint that when he “left the school building, he noticed a sign for U.S. Senate candidate Barbara Mikulski, which reminded him that, *to the best of his recollection*, he had not seen any part of the ballot in which he was asked to vote for that race and therefore did not do so.” (Emphasis added.) Similarly, the Complainant, in his testimony at the hearing, stated that he was “confident” (not certain or sure) that the U.S. Senate contest did not appear on his ballot. (Transcript, p. 12.) The Complainant – with his own words and as the only eyewitness – does not allege *with certainty* that the U.S. Senate contest and the Democratic candidates for this contest did not appear on his ballot.

In support of his allegations that the voting unit malfunctioned, the Complainant offered a variety of affidavits and other evidence to demonstrate that he was not afforded the opportunity to vote for a Democratic candidate for the U.S. Senate. As evidence that the voting unit on which the Complainant voted malfunctioned, he submitted affidavits from the Assistant Chief Judge in Precinct 07-06 and three academics, as well as a copy of his editorial published in the Washington Post on March 7, 2004, and correspondence from U.S. Senator Mikulski in support of his complaint.

The Complainant relies upon the Election Day notes from the Assistant Chief Judge for Montgomery County Precinct 07-06 as evidence that two other individuals experienced a malfunction similar to the one reported by the Complainant. (Complainant's Ex. 5.) The notes represent a summary of the conversation the Assistant Chief Judge had with the Complainant. In fact, her notes are far from clear. While she does note that two other voters had the "same" malfunction as the Complainant, but on different voting units, information about the other voting units is vague. According to her affidavit, these vague notations are the result of her not having personal knowledge of the other complaints. (Respondent's Ex. 10.) After detailing the Complainant's experience and generally noting the comments from the two other voters, she proceeds to summarize the three complaints as "fluctuating screens." (Complainant's Ex. 5.)

In affidavits submitted by the Respondents, none of the election judges assigned to the Complainant's precinct – including the Assistant Chief Judge whose notes the Complainant submitted into the record – recalled any other voters complaining of a missing contest on the ballot or the failure of the "Review Ballot" function to perform properly. (Respondent's Ex. 10.)

These affidavits, along with the vagueness of the notes in the Assistant Chief Judge's Election Day log, do not provide sufficient support for the Complainant's allegation that the voting unit on which he voted malfunctioned. In contradiction of Complainant's allegation, voting unit #2 was used without incident for the rest of the day and recorded 84 votes cast for a candidate for the U.S. Senate.

In addition to the election judges' recollections that no other voter complained of a malfunction similar to the one alleged by the Complainant, the technician assigned to the precinct also did not recall any other voter with a similar complaint. The technician was able to recall that there were malfunctions on two other voting units. These malfunctions, which Mr. Robinson referred to as "fluctuating screens," were quickly resolved by plugging each voting unit directly into the power source. (Respondent's Ex. 10, Robinson Affidavit at ¶ 6, Transcript p. 102.) The "fluctuating screen" malfunction, as described by Mr. Robinson, was a distinctly different type of malfunction than that alleged by the Complainant. In the case of the "fluctuating screen," there was no suggestion that the entire ballot did not appear. Instead, the complaint was one of an unstable (as opposed to an incomplete) display. (Transcript, p. 102.)

As further evidence that the specific malfunction alleged by the Complainant occurred, he also notes that there were other complaints identified by a member of the Montgomery County Board of Elections and the State Board of Elections' Election Day Call Log concerning different voting units. The fact that other, different malfunctions may have occurred on other voting units cannot serve as evidence that the specific malfunction alleged by the Complainant occurred.

In support of the conclusion that voting unit #2 performed properly when the Complainant was voting is the testimony provided by Patrick Green, Director of Research and Development for Diebold, Inc. (Respondent's Ex. G.) According to his affidavit, the ballot is loaded in its entirety, not by individual contest. (Respondent's Ex. G at ¶ 5.) As a result, it is not possible for one contest not to appear. In other words, according to Mr. Green, either the entire ballot is loaded for the voter or none of the ballot is loaded.

After reviewing the Complainant's post-hearing memorandum, it appears possible that the Complainant received a voter access card encoded for a magnified ballot. In his affidavit, he states that he "*distinctly* recalls that on the screen for the Presidential primary, candidates appeared in two columns." (Emphasis added.) (Complainant's Ex. A at ¶ 4.) In light of this statement, I requested that the Democratic ballot for precinct 07-06 be loaded on a voting unit and presented as a magnified ballot. Therefore, I take judicial notice of the fact that, when viewed as a magnified ballot, the Democratic candidates for U.S. President appeared in two columns.

Contrary to the Complainant's conclusion, the "wrapping" of the candidates for the Presidential primary election is not evidence that the voting unit malfunctioned; it is evidence that the voter was viewing a magnified ballot. While the Complainant stated in oral testimony that he did not require magnification and he did not request it (Transcript, p. 11.), the election judge must have mistakenly programmed his voter access card for a magnified ballot, which would have caused the "wrapping" of the candidates' names. If the Complainant's ballot was

magnified, the U.S. Senate and U.S. House of Representatives contests would have appeared together on the same ballot page, one page after the ballot page with the contest for U.S. President. The Complainant does not suggest that he was not presented with the race for U.S. House of Representatives. In fact, he states the name of the U.S. House of Representatives candidate for whom he voted. (Complainant's Post-Hearing Brief, p. 14.)

The Complainant submitted two affidavits from Dr. David Dill, Professor of Computer Science and Electrical Engineering at Stanford University, and an unsworn statement from Dr. Aviel Rubin, Professor of Computer Science and Technical Director of the Information Security Institute at Johns Hopkins University. (Complainant's Ex. 2, 3, B.) Without addressing the validity of their substantive statements, both of these academics proffer that the malfunction alleged by the Complainant *could* have occurred. However, Drs. Dill and Rubin did not and obviously could not affirmatively state that the malfunction *did* occur or provide expert testimony on the likelihood of their occurring. While providing hypothetical support for the Complainant's allegations, the affidavits provided by Drs. Dill and Rubin do not provide first-hand or persuasive evidence that the malfunction alleged by the Complainant occurred.

The Complainant offers his editorial as contemporaneous evidence of his voting experience, since it was dictated to his secretary immediately upon his departure from the polling place. (Complainant's Ex. 4; Transcript, p. 14.) Although the Complainant did not mention the alleged "Review Ballot" malfunction in the editorial, this omission does not preclude the Complainant from offering testimony and evidence to prove this malfunction occurred. While the Complainant's editorial was dictated shortly after leaving the polling place, it was not

dictated at the same time as his voting experience. His editorial is based upon what he *recalled* seeing on his ballot.

The evidentiary value of the editorial is further lessened because, in it, the Complainant again acknowledges that it “was certainly possible” that he missed the U.S. Senate contest. (The Complainant subsequently disputes this conclusion, based upon an apparent confirmation of the malfunction by a technician. As I discussed earlier, the technician disputed the Complainant’s recollection of the diagnosis, and the Assistant Chief Judge did not have personal knowledge that the reported malfunctions on other voting units were similar to the malfunction alleged by the Complainant.)

The Complainant also introduced correspondence from U.S. Senator Barbara Mikulski that mentioned complaints received by the Senator from other voters with the same voting unit malfunction as alleged by the Complainant. (Complainant’s Ex. 6.) Even if these anecdotal, unsworn complaints relayed to a third party could serve as evidence of the malfunction alleged by the Complainant, I am not persuaded that they are compelling. The claim made by these voters, that Senator Mikulski was not on the ballot, is not based on what they saw at the time they were voting, but rather on what they remember seeing (or not seeing). In most cases, they do not claim to have realized that a specific contest did not appear until several days after the election and after reading the Complainant’s editorial.

The Complainant also noted that all of the printed ballot images without votes cast for the U.S. Senate contest were grouped together when submitted as evidence. (Complainant’s Post-

Hearing Brief, p. 13.) In light of this grouping, he provided expert testimony that, based upon the likelihood that the six ballot images were voted in sequential order, a voting unit malfunction occurred. This testimony may have been persuasive had Mr. Green not testified that, to preserve ballot secrecy, ballot images are not printed “in order.” (Transcript, p. 69.) Further, the Respondent confirms that the ballot images were not printed in sequential order in correspondence dated May 13, 2004, in which it is explained that the staff of the Montgomery County Board of Elections grouped together the six printed ballot images without votes cast for U.S. Senate.

Both parties to the complaint provided statistics showing the number of “blank votes” or “no votes”² for Precinct 07-06 and voting unit #2 in Precinct 07-06. (Transcript, pp. 46-48; Respondent’s Ex. 9.) Respondents also provided “blank votes” for other Montgomery County precincts with voter demographics similar to the demographics of Precinct 07-06. (Respondent’s Ex. 9.) After reviewing the statistics, I conclude that the analyses do not show, by a preponderance of the evidence, that the voting unit used by the Complainant malfunctioned. In fact, while the “no vote” rate for voting unit #2 in Precinct 07-06 is higher than the rate for the other voting units in the same precinct, it is well within the range of normal “no votes” recorded in other Montgomery County precincts with similar voter demographics. (Respondent’s Ex. 9.)

While a “no vote” analysis can be used to suggest a voting unit or system malfunction, it does not by itself prove a malfunction. There are hundreds of reasons why a voter may fail to

² “Blank votes” or “no votes” represent the number of voters who did not have a vote for a specific contest recorded by the voting unit. With a Direct Recording Electronic voting system, this number represents the number of voters who “undervoted” a particular contest. This number is calculated by subtracting the total votes cast for a specific contest from the total voter turnout for that precinct. The difference is the number of “blank votes” or “no votes.”

cast a vote in a particular contest or in any contest. For example, a recent study of ballots from the 1996 and 2000 Indiana elections found that some voters went to the polls, checked in with the election judges, received a ballot, but did not vote for *any* single candidate contest. (*See* “Patterns of Roll-off in Presidential Elections: An Analysis of the Ballots,” Crawley, Gary L. *et al*, Ball State University, 2003.) When comparing “no votes,” there will always be a range of acceptable “no vote” rates, and it is important to recognize that a precinct or voting unit with a “no vote” rate slightly higher than the average or “normal” range does not automatically establish a voting unit or system malfunction. As long as the voting unit or precinct is within an acceptable range, a “no vote” analysis alone does not prove that a malfunction occurred. In this case, I find the “no vote” rate for the voting unit on which the Respondent voted in Montgomery County precinct 07-06 to be within the “normal” range.

Part III

The Complainant also alleged that the “Review Ballot” function did not perform properly. Specifically, the Complainant alleges that, after pressing the “Review Ballot” button, the voting unit “scrolled back, page-by-page, through his ballot” and that there was no “single screen showing the selections he had made.” (Complainant’s Petition at ¶ 5.)

According to Mr. Green, the Diebold AccuVote-TS voting unit provides each voter a summary page from which to review his or her ballot before casting the ballot. (Transcript, pp. 64-65.) The summary page includes a heading for each contest on the ballot and the name(s) of the candidate or question response selected by the voter. If the voter has not voted for a

candidate in a contest or selected a response to a ballot question, the heading on the summary screen will be another color. (Transcript, p. 65.)

When the summary screen appears, the voter has three options. First, the voter can select the “Review Ballot” button, which will take the voter to the previous ballot page and enable the voter to scroll back, page-by-page, through the ballot and make any changes. (Transcript, p. 66.) Second, the voter can select the heading for a contest, which will take the voter to the ballot page on which the contest selected can be viewed. (*Id.*) Third, the voter can select the “Cast Ballot” button, which will cast the voter’s ballot. (*Id.*) The only screen on which the “Review Ballot” and “Cast Ballot” options appear is the summary screen. (*Id.*)

After reviewing the evidence presented, I conclude that the review ballot function on the voting unit used by the Complainant performed as it was intended to perform. Because the “Review Ballot” button *only* appears on the summary page, the summary page must have been on the screen when the Complainant selected the “Review Ballot” button. Likewise, the “Cast Ballot” button *only* appears on the summary page. When the Complainant pressed the “Cast Ballot” button, the summary page must have been on the screen. The Complainant’s own description actually explains how the review ballot function is supposed to work, proving that it was performing properly. (Complainant’s Petition at ¶ 5.)

While it is unfortunate that the Complainant does not recall seeing the summary provided on the touchscreen, he stated that he pressed the “Review Ballot” button and the “Cast Ballot” button. (Complainant’s Petition at ¶¶ 5-6.) Since these buttons only appear on the summary

page, the summary page must have appeared. He also acknowledged that, when he pressed the “Review Ballot” button, the voting unit scrolled back, page-by-page, through the ballot. (*Id.*) This is the intended result when the “Review Ballot” button is pressed.

In reviewing the evidence presented, I do, however, recommend that the instructions on the summary screen be clarified. The instructions should make clear that the information on the summary screen provides a summary of the candidates and question responses selected by the voter and should provide an explanation of what a heading shaded red means, how to make a selection for an undervoted contest, and how to scroll back through the ballot.

Order

Based on my determination that the Complainant has not established a violation of Title III of the Help America Vote Act or the Election Law Article as it relates to provisional voting, it is therefore **ORDERED** that the Complainant’s administrative complaint filed on March 29, 2004, be **DISMISSED**.

Nikki B. Trella
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.