



OKLAHOMA STATE ELECTION BOARD

January 23, 2023

Re: Investigation into Complaint No. 2023-01

Dear Secretary Ziriaux,

Pursuant to OAC 230:35-9-24, you asked that I investigate the allegations contained in Complaint 2023-01. In consultation with assigned counsel from the Office of the Attorney General, AAG Bailey Warren, we present the following summary of the investigation in this matter.

The Complainant sets forth the following alleged Complaints and Violations:

Complaints:

1) Denials of Cast Vote Record requests which according to NIST were created to audit the voting machines and 2) evidence that they are being deleted and 3) not being provided for recounts. 4) Evidence our voting systems do not comply with the Federal Election Commission Voting System Standards.

Violations:

42 USC 15481 Sec. 301 VOTING SYSTEM STANDARDS (a) Requirements (2) Audit Capacity (A) In General- The voting system shall produce a record with an audit capacity for such system.

42 USC 15481 Sec. 301 VOTING SYSTEM STANDARDS (a) Requirements (2) Audit Capacity (B) Manual Audit Capacity- (iii) The paper record produced under subparagraph (A) shall be available as an official record for any recount conducted with respect to any election in which the system is used.

42 USC 15481 Sec. 301 VOTING SYSTEM STANDARDS (a) Requirements (5) Error Rates -The error rate of the voting system in counting ballots (determined by taking into account only those error rates which are attributable to the voting system and not attributable to an act of the voter) shall comply with the error rate standards established under section 3.2.1 of the voting systems standards issued by the Federal Election Commission which are in effect on the date of the enactment of this Act.

42 USC 15481 Sec. 301 VOTING SYSTEM STANDARDS (d) Effective Date- Each state and jurisdiction shall be required to comply with the requirements of this section on and after January 1, 2006.

Applicable Law:

Complainant incorrectly cites the United States Code references, which have been transferred to 52 USC 21081. However, it appears the language the Complainant references remained the same, and are a part of Title III of the Help America Vote Act of 2002. *See* [https://uscode.house.gov/view.xhtml?req=\(title:52%20section:21081%20edition:prelim\)%20OR%20\(granuleid:USC-prelim-title52-section21081\)&f=treesort&num=0&edition=prelim](https://uscode.house.gov/view.xhtml?req=(title:52%20section:21081%20edition:prelim)%20OR%20(granuleid:USC-prelim-title52-section21081)&f=treesort&num=0&edition=prelim).

See also the EAC's Voting System Standards from 2002: https://www.eac.gov/sites/default/files/eac_assets/1/28/Voting_System_Standards_Volume_I.pdf

The relevant section referenced in HAVA, Section 3.2.1 of the Voting System Standards issued by the Federal Election Commission in 2002, are as follows:

“For each processing function indicated above, the system shall achieve a target error rate of no more than one in 10,000,000 ballot positions, with a maximum acceptable error rate in the test process of one in 500,000 ballot positions.”

Investigation:

In conducting the investigation into this complaint, we reviewed the Complaint, the language of the applicable Oklahoma Administrative Code, the Oklahoma Statutes, the United States Code, the Help America Vote Act of 2002, and the exhibits presented by the Complainant to the State Election Board on January 19, 2023. Pertinent questions were drafted for the Assistant Secretary of the State Election Board, and Mr. Clark answered those questions in the attached affidavit.

Summary:

None of the materials presented by the Complainant as proposed evidence appear to prove a violation of Title III of HAVA. In general, HAVA requires that a state's voting system provide individuals with the ability to vote in a private and independent manner. More specifically, as cited by the Complainant and as it relates to this complaint, a(2) requires that a state's voting system have the capability of producing a “permanent paper record with a manual audit capacity” which must be “available as an official record for any recount conducted with respect to any election in which the system is used.” Oklahoma's voting system does produce such a paper record with a manual audit capacity. The system utilizes paper ballots, which are generated specifically by and for Oklahoma's voting system for each election conducted in this state. Those paper records, the hand-marked ballots (or ballots substituted for ATI ballot records¹) are made available for all manual recounts and

¹ In Oklahoma, a voter who has visual or physical disabilities can utilize an Audio Tactile Interface (ATI) device to cast an audio ballot. In those circumstances, a record of such audio ballot is retrieved and printed from the election results storage device. The printed cast vote record report is sealed in an envelope and handed over to the Sheriff along with the other voted ballots to be secured as required by law. OAC 230:35-3-85.4. In the event of a recount or audit, the county election board uses the printed cast vote record of the ATI ballot to mark a substitute

post-election tabulation audits conducted by the county election boards. The Oklahoma Legislature has put in place strict chain of custody requirements for the preservation and maintenance of those paper records (ballots) so that recounts or post-election audits can be conducted to ensure the accuracy of the election and the voting system. *See for example* 26 O.S. Sections 7-134, 8-110, 14-115.4, 14-125, and 7-116.1.

It appears the Complainant attempts to conflate the federal requirement that a state's voting system maintain a paper record with the idea that so-called "Cast Vote Records" (CVRs) must be that paper record. **Neither the Oklahoma statutes nor the Help America Vote Act make any mention of "Cast Vote Records" let alone their requirement to be created, maintained or used as part of the audit process.** Put simply, absent those records of ATI ballots, CVRs are not the paper record of an election in Oklahoma.

Numerous entities and individuals across the country attempted to obtain these so-called CVRs from state and local election officials following the 2020 election as an effort to attempt to prove baseless theories about election fraud. In Oklahoma, a joint determination made by Secretary Ziriak and the State's CIO in consultation with the Oklahoma Attorney General, concluded, among other things, that to the extent that CVR's exist, they "must be kept confidential" because their disclosure "could reasonably be expected to be useful to persons with intent to interfere with the conduct of an election, voter registration or other election processes." Therefore, as it relates to Complainant's first allegation, it is true that she (along with all other requestors of the same information) were in fact denied access to CVR's in Oklahoma. *Even if* CVRs were maintained as a part of Oklahoma's voting system, individuals such as the Complainant would not be given access to such records under Oklahoma law, nor are they required to be provided to individuals under the requirements of HAVA. A similar argument can be made for the allegation that CVRs are being deleted. The State and county election boards follow retention policies set forth in both state and federal law as it relates to the maintenance of the records of elections. *See for example* 26 O.S. Section 14-132, 3-126, 3-127, 7-116.1, 7-117, 7-134 and 52 U.S. Code Section 20701. Again, there is no specific Title III HAVA requirement in which Complainant could point to that would require Oklahoma election officials to follow a different retention schedule than that prescribed by the previously cited laws. (*See also* the recent ruling in *Ratley v. Ziriak et al.*, in which the Supreme Court unanimously denied relief to litigants who sought, among other things, to prohibit the destruction/deletion of all election records from the 2020, 2021, and 2022 elections and attempted to have the court permanently enjoin the state from using our voting system.)

Next, CVRs are not utilized for recounts in Oklahoma because the actual hand-marked paper ballots are used according to the law. *See* 26 O.S. Section 8-112 *et seq.* No part of the policies or procedures spelled out in Oklahoma law or Administrative Code contemplate the use of a CVR to conduct the recount or audit, except for reports from ATI ballots which also requires the hand-marking of a paper ballot so that the recount can be conducted. *See* OAC 230:35-3-85.1.

ballot to be inserted in the voting device or hand-counted as the case may be. 230:35-3-85.1. While Complainant does not specifically mention subsection a(3) of Title III of HAVA, Oklahoma's ATI device is designed to meet those accessibility requirements for individuals with disabilities to vote privately and independently.

Finally, the Complaint alleges that Oklahoma's voting system does not meet the error rate standards established under section 3.2.1 of the voting systems standards issued by the Federal Election Commission which were in effect on the date of the enactment of HAVA (2002). However, not only does one of her own exhibits (3F2) appear to confirm this allegation to be inaccurate, but more importantly, independent testing facilities confirmed that the error rate of the voting system Oklahoma purchased from Hart Intercivic does meet the standard - nearly one in 10,000,000 ballot positions - as required by HAVA in 2002. Further, numerous recounts and post-election audits conducted in this state continue to confirm the accuracy of the voting system in Oklahoma even considering those errors attributable to an act of the voter.

Conclusion:

Complaint 2023-01 should be dismissed. The alleged complaints set forth by the Complainant do not take into account the way Oklahoma's voting system functions, tabulates votes, produces election results, retains records, or the process by which recounts and post-election audits are conducted. As summarized above, Oklahoma's voting system creates auditable paper records utilizing a hand-marked paper ballot which is scanned and tabulated by an optical scanning device and uploaded to the State Election Board for election night results. CVRs are NOT the paper records which are maintained in order to audit or recount elections conducted in this state. While other states' systems, particularly ones who do not utilize paper ballots but instead use an electronic device to cast their votes, may need to retain something like a CVR in order to comply with the requirements of HAVA, Oklahoma does not. Oklahoma's voting system meets the requirements of references Complainant made to Title III of HAVA and continues to produce accurate and reliable results as evidenced by recent recounts and audits.

This constitutes a preliminary investigation into the above-mentioned allegations of violations of Title III of HAVA as it relates to Complaint 2023-01. Should additional investigation be necessary after further context or testimony is provided at the hearing on this matter, please let us know.

Sincerely,



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