

Grievance Statistics

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|--|-----------|
| Total Number of Complaints Filed with IED on Grievance Form | 63 |
| Grievance Forms Broken Down By County | |
| Madison | 27 |
| Starke | 16 |
| Marion | 8 |
| Orange | 4 |
| Lake | 2 |
| Dearborn | 1 |
| Howard | 1 |
| Monroe | 1 |
| Montgomery | 1 |
| Posey | 1 |
| Pulaski | 1 |
| Grievance Forms Filed With IED By Year | |
| 2003 | 0 |
| 2004 | 0 |
| 2005 | 0 |
| 2006 | 3 |
| 2007 | 54 |
| 2008 | 6 |
| Grievance Forms By Type of Complaint | |
| Voting system problem | 21 |
| Fraud (including illegal voting) | 16 |
| Wrongfully rejected absentee ballot | 7 |
| Poll worker instructions/misconduct | 8 |
| Polling place not open | 4 |
| Illegal electioneering/disclaimer violations | 3 |
| Voter registration problem where voter moved | 1 |
| Dual lucrative office | 1 |
| Open door law | 1 |
| Candidates posting political signs in violation of Co. ordinance | 1 |
| Voter rude to poll worker | 1 |
| Grievances Investigated | 51 |
| Grievances Investigated and Reported to Commission | 25 |
| Grievances Referred Back to IED by Commission | 25 |



STATE OF INDIANA

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Indiana Election Division Grievance Report

JK
PP
From: J. Bradley King and Pamela Potesta,
Co-Directors, Indiana Election Division

Re: Grievances filed by Truddie Evans, Marvin McCloud, Sharon Perry, Debbie Nunn, Lelia Kelley, Roosevelt Wilkerson, Doris Jean Wilkerson, Dannie Hopkins, Vikki Barron, Todd Barron, Jannette Stith, Tom Watson, David Jordan, Phyllis Warner, Roslyn Warner, and Bradley Warner.

Date: July 30, 2008

Background: Administrative Complaint Process

As required by the federal Help America Vote Act of 2002 ("HAVA"), Indiana adopted an administrative complaint process to address allegations of violations of Title III of HAVA. 42 U.S.C. 15512; IC 3-6-4.5; 42 U.S.C. 15481 through 15485. Among other things, Title III of HAVA required Indiana to provide at least one accessible voting system in each polling place, a statewide voter registration system, and provisional voting.

The administrative complaint process for alleged violations of Title III of HAVA ("HAVA Grievances") involves the participation of two separate governmental entities—the Indiana Election Division ("Division") and the Indiana Election Commission ("Commission"). The Division is a bi-partisan agency that acts through two Co-Directors who have co-equal authority. One Co-Director is nominated by the state chairman of each of the two major parties in Indiana, the Indiana Democratic and Republican Parties. The candidates nominated by their respective state chairmen are appointed by the Governor. The Commission is a bi-partisan entity that consists of four members. Two Commission members are nominated by the state chairman of the Indiana Democratic and Republican Parties. The nominated candidates are also appointed by the Governor.

To assist in the implementation of the administrative complaint process, the Division developed a form titled Election Fraud and Accessibility Grievance Form ("Grievance" or "Grievance form"). This Grievance form is posted on the Division's website and made available to the general public.

The current version of the Grievance form indicates that an individual submitting a Grievance may set forth either: 1) a Title III HAVA violation; or 2) an allegation of election "fraud."

A Grievance form that contains allegations of election fraud is not subject to the same administrative complaint process required by state and federal law for HAVA Grievances. However, election fraud allegations were made a part of the Grievance form for two reasons. First, the Division did not want to deter complaints from individuals that might have difficulty distinguishing between a HAVA violation and election fraud. Second, by providing a means that allows individuals to submit allegations of election fraud the Division will be able to, at a minimum, document the allegations of election fraud and, where appropriate, provide assistance or referral to other law enforcement agencies or officials depending upon the specific allegations and the evidence supporting the allegations.

However, at the same time, the Division recognizes that submission of Grievance form that makes allegations of election fraud is not a substitute for criminal remedies that fall within the jurisdiction of a county or federal prosecutor. County prosecuting attorneys and federal prosecutors (U.S. Attorneys) have sole jurisdiction with respect to election fraud crimes.

Nor is the Grievance procedure a substitute for candidates and parties who may file an election contest or recount. The only way a candidate can request a recount or contest an election is to file the appropriate action with a local court or the State Recount Commission, depending upon the office involved.

Initially, the Division will review a HAVA Grievance form to make a determination as to whether the Grievance has been properly submitted and whether the Grievance states a Title III HAVA violation. In performing this task the Division is required to assume all facts as set forth on the Grievance form are true.

If the Division determines that the Grievance does not state a Title III HAVA violation the Division shall publish an order of dismissal in the Indiana Register and provide a copy of the order of dismissal by certified mail to: (1) the person who filed the Grievance; (2) the person alleged to have committed the violation in the Grievance; (3) the members of the Indiana Election Commission ("Commission"); and (4) the Indiana Attorney General.

If the Division determines, assuming all facts stated on the Grievance form to be true, that the Grievance states a violation of Title III of HAVA then the Division shall conduct an investigation. The Division may consolidate several Grievances if the Division determines that it would be convenient or efficient to do so.

If the Division initiates an investigation then, after the completion of its investigation, the Division shall submit its findings regarding the alleged Title III HAVA violation to the Commission. The Commission will consider the Division's findings and issue a written report that the Division will send by certified mail to the following: (1) the person who filed the Grievance; (2) the person alleged to have committed the violation as set forth in the Grievance; (3) the attorney general; and (4) the individual members of the Commission.

After the Commission issues its report the Grievance is closed unless the Commission is required to conduct a hearing on the Grievance. The Commission shall conduct a hearing on the Grievance if the Grievance alleged a Title III HAVA violation and a hearing is requested either by: 1) the person filing a complaint; or 2) a member of the Commission. This request for hearing must be filed with the Election Division not later than noon seven (7) days after the report prepared by the Election Division is mailed. After the Commission's hearing the Commission shall: (1) affirm the report; (2) amend the report; or (3) refer the matter to the Election Division for further investigation and submission of a subsequent report to the Commission.

A person entitled to file a Grievance with the Election Division may file a Grievance with the county election board in the county where the person resides. However, if the county election board is notified at any time that the person who filed a complaint with the county election board has filed a complaint with the Election Division regarding the same matter, the county election board shall dismiss the complaint filed with the board.

Grievances Related to 2007 Municipal Primary in Madison County

The Division received several grievances from persons who reside Madison County involving the May 8, 2007 municipal primary conducted in Anderson, Indiana. Pursuant to IC 3-6-4.5-12 the Division has consolidated these Grievances. These Grievances are listed below into two groups and the spread sheet, attached hereto and incorporated herein as Exhibit A, identifies information about each Grievance. The first group consists following Madison County Grievances:

Grievances filed with the Election Division by Theron E. Vaughn, David L. Gardner, Donna. M. Sloss, Rebecca Crumes, Lonzo Brown, Christine P. Brown, Triniadale Stewart, and Jerusha B. Youngblood.

The Division provided a copy of these Grievances to the members of the Madison County Election Board by letter dated July 1, 2007.

The second group of Grievances filed by persons who reside in Madison County consist of the following:

Grievances filed by Jennifer Adams, Truddie Evans, Marvin McCloud, Sharon Perry, Debbie Nunn, Lelia Kelley, Roosevelt Wilkerson, Doris Jean Wilkerson, Dannie Hopkins, Vikki Barron, Todd Barron, Jannette Stith, Tom Watson, David Jordan, Phyllis Warner, Roslyn Warner, and Bradley Warner.

The Election Division provided a copy of these Grievances to the members of the Madison County Election Board by letter dated September 10, 2007.

The allegations set forth in these Grievances can be summarized into the following basic types:

1. Voters who expressed concern about whether their votes counted, including voters who expressed a concern about not being able to review their candidate selections for the city council at-large race on a review screen.
2. Voters who expressed concern about being told by precinct election officials that they could not cast votes for less than three at-large candidates for the city council at-large race; and
3. Voters who complained that their absentee ballot was not counted.

Initial Determination on Grievances by the Election Division

The Election Division's Co-Directors did not immediately dismiss any of the Grievances listed above. The Grievances were submitted on the proper form and were submitted under oath. Since many of the allegations involved the alleged malfunctioning of voting systems the Co-Directors determined that an investigation would be necessary to determine whether or not the Grievances involved Title III HAVA violation.

Election Division Investigation and Analysis

1. Voting System Functionality: Counting Votes, Undervoting, and Reviewing Candidate Selections

With respect to the allegations described in paragraphs numbered 1 above, the Division requested that the Madison County Election Board make the voting systems used in the May 8, 2007 municipal primary in Anderson available for inspection and testing. After an exchange of correspondence with the Madison County Election Board (attached hereto and incorporated herein by reference as Exhibit B) voting systems located in precincts where persons who filed a Grievance about the operation of the voting system voted were identified. The following described precincts (associated with the name of each person who filed a Grievance about the operation of the voting system) were made available by the Madison County Election Board for examination and testing by the Co-Directors of the Division on October 11, 2007:

| <u>Ward (District)</u> | <u>Complainant</u> | <u>Precinct</u> |
|------------------------|--------------------------|-----------------|
| Ward 3 | David Gardner | 3-1 |
| | Debbie Nunn | 3-8 |
| Ward 4 | Sharon Perry | 4-2 |
| | Donna Sloss | 4-2 |
| | Trinidadale Stewart | 4-3 |
| | Christine Brown | 4-3 |
| | Lonzo Brown | 4-3 |
| | Rebecca Crumes | 4-4 |
| | Truddie W. Evans. | 4-4 |
| | Jannette Mansfield Stith | 4-4 |
| | Doris Jean Wilkerson | 4-4 |
| | Roosevelt Wilkerson | 4-4 |
| Ward 5 | Jennifer Adams | 5-3 |
| | Todd L. Barron | 5-3 |
| | Vikki Barron | 5-3 |
| | Theron Vaughn | 5-4 |
| Ward 6 | Lelia Kelly | 6-6 |
| | Jerusha Youngblood | 6-4 |

The Madison County Circuit Court Clerk advised the Election Division that a total of thirty-six (36) Election Systems & Software, Inc. (ES&S) iVotronic voting system units were used in the above-identified precincts and that the board would preserve these units with the programming as it existed in the 2007 municipal primary. The Madison County Election Board made voting systems in these precincts available for inspection and testing at the Madison County Highway Garage in Anderson, Indiana on October 11, 2007.

On October 11, 2007 the Co-Directors of the Indiana Election Division met with the members of the Madison County Election Board at the Madison County Highway Garage. A Madison County Sheriff's Deputy was also present. State Police Officer John Kelley attended at the request of the Division to videotape portions of the examination and testing. Notice of the testing was provided to the persons in Madison County who filed a Grievance. At least one of the persons who filed a Grievance, Rebecca Crumes, attended the examination and testing. A representative of ES&S was also present to assist in setting up and monitoring the examination and test of the iVotronic voting system.

The purpose of the examination was to examine and test the voting system units in a particular precinct in a manner suggested by any Grievance related voting system units used in that precinct during the 2007 municipal primary in Anderson.

Precinct 4-4: Votes Cast and Tabulated for City Council At-Large

The machines in precinct 4-4 were tested first to determine if votes were being tabulating correctly by the voting system units used in that precinct. The Co-Directors cast votes recorded under "Voter 1" and "Voter 2" in Table 1 below. Prior to casting votes a "zero" tape was run on all the machines examined in the precinct to determine that the machine had no votes prior to those votes cast by the Co-Directors.

The specific election tested on the iVotronic voting system units was the race for Anderson City Council. Five candidates competed for 3 at-large seats in the 2007 municipal primary. The ballot instructions as they appeared on the voting system units advised the voter that the voter could vote for "for not more than 3 candidates" in this race. The last names of the five candidates are as follows: Bibbs, Ferguson, Dixon, Chamberlain and Eicks.

Since both Co-Directors were recording votes on 4 different iVotronic units in Precinct 4-4 it was a *possible* for a total of 24 votes to be cast in this race on these four units (2 Co-Directors x 3 candidates maximum x 4 iVotronic units). Since the iVotronic produces results of both votes cast and "undervotes" (votes that could have been cast but were not). The iVotronics in Precinct 4-4 were tested to determine if votes were being recorded accurately. The result of the vote recording functionality test is summarized in Table 1 below.

Table 1: Precinct 4-4: Votes Cast and Tabulated for City Council At-Large

| Serial Number of iVotronic Unit | Begin Tally | Votes Entered | Tally for precinct 4-4 |
|--|-------------|--|---|
| 5131247 | 0 tape | Voter 1: 1 for Bibbs Voter 2: 1 for Bibbs and 1 for Ferguson | |
| 5143694 | 0 tape | Voter 1: 1 for Bibbs Voter 2: 1 for Bibbs and 1 for Dixon | |
| 5143825 | 0 tape | Voter 1: 1 for Bibbs Voter 2: 1 for Bibbs and 1 for Chamberlain | |
| 5144199 | 0 tape | Voter 1: 1 for Bibbs Voter 2: 1 for Bibbs and 1 for Eicks | |
| Precinct tabulation for Precinct 4-4 for the office of city council at large | | | 8 votes for Bibbs 1 vote for Chamberlain 1 vote for Dixon 1 Vote for Ferguson 1 Vote for Eicks <u>12</u> Undervotes 24 total votes and undervotes |

Based upon the test results summarized above the Co-Directors determined that the machines for Precinct 4-4 accurately recorded votes cast by the Co-Directors on October 11, 2007.

Precinct 4-2: Votes Cast and Tabulated for City Council At-Large

Since a Grievance related to precinct 4-2 indicated a concern about whether votes in the precinct were tabulated correctly the iVotronic voting system units used in this precinct during the 2007 municipal primary were tested to determine if votes were being recorded accurately. The result of the vote recording functionality test is summarized in Table 2 below.

Table 2: Precinct 4-2: Votes Cast and Tabulated for City Council At-Large

| Serial Number of iVotronic Unit | Begin Tally | Votes Entered | Tally for precinct 4-2 |
|--|-------------|--|---|
| 5144286 | 0 tape | Voter 1: 1 vote each for Republican Party candidates Pelligrino, Smith and Wilkerson Voter 2: 1 vote each for Democratic Party Bibbs, Chamberlin, and Dixon | |
| 5144759 | 0 tape | Same as above | |
| 5145148 | 0 tape | Same as above | |
| 5129735 | 0 tape | Same as above | |
| Precinct tabulation for Precinct 4-2 for the office of city council at large | | | 4 votes for Pelligrino 4 votes for Smith 4 votes for Wilkerson 4 votes for Bibbs 4 votes for Chamberlin 4 votes for Dixon 24 total votes and undervotes |

Based upon the test results summarized above the Co-Directors determined that the machines for Precinct 4-2 accurately recorded votes cast by the Co-Directors on October 11, 2007.

Precincts 5-4, 6-4 and 6-6: Testing Whether Undervotes Tabulated for City Council At-Large

Grievances related to precincts 5-4, 6-4 and 6-6 indicated a concern about whether votes cast in the city council at-large race were tabulated where the voter chose to indicate votes for less than the maximum number of 3 candidates in the city council at-large race.

Below is a Table 3 which contains the serial numbers of the iVotronic units examined in precincts 5-4, 6-4 and 6-6.

Table 3: 5-4, 6-4 and 6-6: Serial Numbers of Voting System Units Tested for Undervote

| Precinct 5-4 | Precinct 6-4 | Precinct 6-6* |
|--------------|--------------|---------------|
| 5144063 | 5121428 | 5143625 |
| 5121738 | 5144436 | 5143044 |
| 5145126 | 5144067 | 5143906 |
| 5144554 | 5142064 | 5125037 |

* Documentation presented by the Madison County Election Board indicated that iVotronic voting system unit, serial number 5129357, was taken out of service in precinct 6-6. The precinct tape shows two cancelled ballots on the unit. Documentation also shows that the number of signatures of voters in the pollbook in the precinct equaled the number of ballots cast on the units used in the precinct. The unit with serial number 5129357, however, was not available for inspection or testing on October 11, 2007.

The Co-Directors tested the voting system units in these precincts to determine if they would accept undervotes. In precinct 5-4, Co-Director Potesta voted for less than 3 candidates in the city council at-large race on each unit identified above and the units accepted and tabulated those votes. Co-Director King voted for less than 3 candidates in the city council at-large race on each unit identified above and the units accepted and tabulated these votes. In precincts 6-4 and 6-6 Co-Director Potesta indicated votes for 2 candidates of the Democratic Party on each unit in the city council at-large race and Co-Director King indicated votes for 2 candidates of the Republican Party on each unit in the city council at-large race. The tabulation of these votes for the two precincts demonstrated that the units properly recorded and tabulated the votes cast by the Co-Directors.

Based upon the test results summarized above the Co-Directors determined that the machines for precinct 5-4, 6-4 and 6-6 accurately recorded votes cast by the Co-Directors on October 11, 2007 even though the votes cast in the city council at-large race was less than the maximum of 3 candidates.

Precincts 4-3, 5-3, 3-1: Review Screen Observations

The Co-Directors also examined the iVotronic voting system units for Precinct 4-3, 5-3, and 3-1 to determine whether the units provided a method for reviewing voting selections prior to casting a ballot. For purposes of this report, a description of the voting process using an iVotronic voting system unit can be broken down into two stages. First, a voter navigates through the various offices on the ballot and indicates votes by touching a rectangle in each race where a candidate's name is listed. If a ballot has multiple pages a voter is required to touch the area of the screen that says "Next" in the lower right corner of the screen to navigate forward through the ballot and "Previous Page" in the lower left corner to return to a previous page of the ballot. Second, once a voter is finished

indicating candidate selections in all the races the voter is taken to a review screen. To cast a vote for the candidates indicated on the ballot the voter must press a flashing red "Vote" button at the top of the unit from the review screen.

In the first stage of voting on units in these precincts, the Co-Directors observed that there was an indication on the screen of the voting system unit (highlighted in yellow on the screen and an "X" in the box to the right of the candidate's name) that indicated that they had made a selection of a candidate as they touched the screen in the area where the candidate's name was listed. Once the Co-Directors had completed making candidate selections in all races, but before casting the vote, the Co-Directors observed that the iVotronic units displayed a *review screen*. This review screen summarized the votes each Co-Director cast for each candidate in each contest *except for the votes that were cast in the at-large city council contest*.

Below is a Table 3 which contains the serial numbers of the iVotronic units examined in precincts 4-3, 5-3, 3-1.

Table 4: Precincts 4-3, 5-3 and 3-1: Serial Number of iVotronic Voting System Units

| Precinct 4-3 | Precinct 5-3 | Precinct 3-1 |
|--------------|--------------|--------------|
| 5144796 | 5132938 | 5142895 |
| 5122155 | 5144298 | 5144788 |
| 5144781 | 5145074 | 5144208 |
| 5144439 | 5143929 | |

If a Co-Director indicated a vote in a race on the ballot other than city council at-large the review screen would list the name of the office and the candidate selected in the race. In addition, the office of city council at-large was listed on the review page. However, where a Co-Director indicated a vote or votes for candidates in the city council at-large race the names of the candidate(s) voted for did not appear under the listing of the office on the review screen. Instead, if the a Co-Director had indicated a vote for 3 candidates in the city council at-large race then the review screen indicated simply that **"you have selected all for this contest"** under the title to the office. On the other hand, if a Co-Director had indicated a vote for less than 3 candidates in the city council at-large race (an "undervote") then the review screen simply indicated **"you have not selected all for this contest"** under the title to the office.

However, the Co-Directors observed that you could review individual candidate selections for the at-large city council race from the review page by either pressing the "Previous Page" (my notes say "Back Button" but online demonstrations of the system show "Previous Page") button in the lower left hand corner of the review screen or by touching the area of the review screen listing the office of city council at-large. Using either of these methods returned the Co-Director to the page of the ballot that listed the city council at-large race and that page showed the displayed the candidate selections that

the Co-Directors had indicated when they first went through the ballot and indicated votes.

The operation of the iVotronic voting system units in other precincts with voters who had filed Grievances with respect to the operation of the review screen was consistent. For purposes of this report the issue will be identified as the "review page issue" and will be described as such with respect to the examination and testing of iVotronic voting units in other precincts below.

The operation of the iVotronic voting system units in other precincts with voters who had filed Grievances with respect to the operation of the review screen was consistent. For purposes of this report the issue will be identified as the "review page issue" and will be described as such with respect to the examination and testing of iVotronic voting units in other precincts below.

Precincts 3-8: Listing of Ty Bibbs on the Democratic Ballot for City Council At-Large

Finally, one of the Grievances claimed that Ty Bibbs did not appear as a candidate on the ballot. The Co-Directors also examined an iVotronic voting system unit in precinct 3-8 (serial number 5144661) to determine if Ty Bibbs was listed as a candidate for the Democratic Party in the race for city council at-large and determined that Ty Bibbs was listed as a candidate for the Democratic Party for city council at-large.

2. Grievances that Complain that Precinct Election Workers Instructed Voters to Vote for at Least 3 Candidates in the City Council At-Large Race

The Madison County Grievances include voters who complain that precinct election officials told them that they were *required* to vote for three candidates for city council at-large. If true, this instruction would have been contrary to law.

In a primary "a voter *may* vote for as many candidates for each office as there are persons to be elected to that office at the general election." (emphasis added) IC 3-10-1-16. In the case of the Anderson municipal primary, while a voter *may* have voted up to three at-large candidates, *no voter was required by law* to cast the maximum of three votes. It was each voter's legal option to determine whether to cast a vote for no candidates, one candidate, two candidates, or three candidates in the city council at-large race.

As indicated above, the examination and testing conducted on October 11, 2007 by the Co-Directors indicated that the voting system units used in the relevant precincts (Precincts 5-4, 6-4 and 6-6) during the municipal election permitted the casting of less than three votes for city council at-large and these units properly tabulated these undervotes. In addition, the instructions on the ballot appeared to be consistent with state law. State law (IC 3-11-14-3.5(f)) requires the ballot to include "A statement reading substantially as follows ...placed immediately below the name of the office and above the name of the first candidate: 'Vote for not more than (insert the number of candidates

to be elected) candidate(s) for this office.” The voting system units examined on October 11, 2007 contained the instruction “Vote for not more than 3” below the name of the office and above the name of the first candidate as required by statute for the at-large race for city council.

If precinct election officials working in these precincts during the 2007 municipal primary in Anderson instructed voters that they were required to vote for no less than three candidates in the city council at-large race then that instruction would have been contrary to law and contrary to the instructions placed on the ballots on the voting system units in those precincts. And, if a voter relied and acted upon this erroneous instruction then it is possible that voters cast votes for candidates that they otherwise would not have absent the erroneous instruction. In other words, if these voters knew they could vote for only one or two at-large candidates then it is possible they would have done so. In an at-large race like the one in the Anderson municipal primary for city council at-large, where all at-large candidates compete against each other, this could have impacted the outcome of the election.

However, even if erroneous instructions were impacted the outcome of the municipal primary, the Grievance procedure is not substitute for the remedies already available under Indiana law. The most effective remedy to address this issue would have been for a losing candidate in the city council at-large race to file a verified petition for election contest in court pursuant to IC 3-12-8. This lawsuit would have had to been filed by noon fourteen days after the primary pursuant to IC 3-12-8-5.

If an election contest would have been filed, the petitioning candidate could have alleged that erroneous instructions from precinct election officials constituted a “deliberate act or series of actions occurred making it impossible to determine the candidate who received the highest number of votes cast in the election.” IC 3-12-8-2(5) If a candidate was able to prove this allegation in an election contest then the court having jurisdiction of the cast could have ordered a new election for city council. IC 3-12-8-17(d)

At this point in time, any erroneous instructions given by precinct election officials can be addressed by the county election board in several different ways. First, the county election board could conduct a proceeding pursuant to IC 3-6-5-31 to determine whether a violation of Title 3 has occurred and take “appropriate action” including referring the matter to... the appropriate prosecuting attorney. Depending upon the specific circumstances, a poll worker who “knowingly induces or persuades a voter to vote for a candidate” commits a class D felony. IC 3-14-3-17 In addition, a person who “fraudulently causes a voter at an election to vote for a person different from the one the voter intended to vote for...” commits a Class D felony. IC 3-14-2-21 Of course, these are criminal statutes and criminal statutes are read strictly (narrowly) against the state. We do not assume or suggest that this statute has been violated in this instance but mention these statutes only to illustrate the serious nature of advising voters to cast votes for candidates when they are not required to do so.

Second, the county election board has the option of proceeding under IC 3-6-6-35 to impose fine on a precinct election official if the board finds, by unanimous vote, that a precinct election official "knowingly, recklessly, or negligently fails to perform a duty as a precinct election officer required by this title..." Precinct judges are required to "assist and instruct voters when assistance is requested" and all precinct election officials are required to take an oath that they will discharge their duties "under the law." IC 3-6-6-30; IC 3-6-6-23(2).

Finally, and perhaps most appropriately, erroneous instructions given by precinct election officials can be addressed by the county election board by the provision of additional training and support to precinct election officials. That said, we must acknowledge the monumental task undertaken by local election officials and party officials in recruiting precinct election officials and training precinct election officials. This essentially volunteer workforce must attempt to learn a complex set of election laws and procedures for elections that occur, at most, twice during an election year. In addition, since the enactment of the new voting system requirements in federal HAVA many counties, including Madison County, have purchased new voting systems and precinct election officials have had to learn how to operate these new systems.

In any event, where precinct election officials provide erroneous information to voters or otherwise fail to act consistently with Indiana's election laws then the county election board, as the local officials most directly responsible for conducting the election, must address these issues through the provision of additional, or more effective, training and support. Whether that training and support is addressed county-wide in a systemic way, or focused specific precinct election officials, or both, must be left to the judgment of the county election board.

3. Grievances that Complain that Voter's Absentee Ballot was Not Counted

Several of the Madison County Grievance filers complain that their absentee ballot was not counted. Some of the individuals who filed a Grievance claimed that they, in fact, signed their own ballot envelope and feel that they were deprived of their right to vote when the County Election Board determined that the signatures on the absentee ballot envelope did not match the voter's signature on the absentee ballot application.

Some of the individuals who filed a Grievance also complain that they were not contacted and told that their absentee ballot had been rejected. In response to these allegations, Madison County Election Board members have indicated that the absentee ballots of those who filed a Grievance were rejected because the absentee ballot counters, or the county election board, made a determination that the signatures of the voter on the voter's absentee ballot applications did not correspond to the signature on the voter's absentee ballot envelope.

The Madison County Election Board adopted a resolution pursuant to IC 3-11.5 to count absentee ballots at a central location. In counties that count absentee ballots at a central location, the county election board examines the signature on ballot envelope with

absentee ballot application and any other signature on file when an absentee ballot is returned. If board unanimously finds that the signature on the absentee ballot envelope is genuine, the absentee ballots are placed in a separate bag or container for each precinct that is securely sealed and endorsed with name and title of circuit court clerk and bear the words: "This envelope contains an absentee ballot and must be opened only on election day under IC 3-11.5." IC 3-11.5-4-5. If the county election board determines the signature on the absentee ballot envelope is not genuine then the board writes the following on the absentee ballot envelope: "The county election board has rejected this ballot because the signature is not genuine." IC 3-11.5-4-4.

Once certified lists of absentee voters who have been entered into the pollbook in the precinct on election day are returned from a precinct to the county election board, absentee ballot counters located at the central location may begin to process and count absentee ballots in that precinct. In the course of processing the absentee ballots, the absentee ballot counters must compare the signature on the absentee ballot application with the signature upon the corresponding absentee ballot envelope. If the absentee ballot counters agree that the signature on the absentee ballot application do not correspond to the signature on the absentee ballot envelope, the counters may reject the absentee ballot. IC 3-11.5-4-11(3); IC 3-11.5-4-13(a)(2). If absentee ballot counters do not agree on whether or not the signatures correspond, the absentee ballot is forwarded to the county election board for decision. IC 3-11.5-4-13(e).

If an absentee ballot is rejected, it is still possible for the voter to vote in the voter's precinct on election day pursuant to IC 3-11.5-4-21. However, to do so the voter must appear in person before the county election board not later than 5 p.m. on election day and obtain a certificate from the county election board stating that the voter's absentee ballot was rejected. The voter must present this certificate to the precinct election board before being permitted to vote in the precinct. IC 3-11.5-4-13(f)

The Co-Directors were provided a copy of the signatures on absentee ballot applications and absentee ballot envelopes of the persons who filed Grievances. The Co-Directors have examined this documentation. With respect to any Grievance that claims that an absentee ballot was wrongfully rejected the Co-Directors would note that comparison of signatures on absentee ballot applications and absentee ballot envelopes inevitably involves the application of judgment and the Co-Directors are not authorized to substitute their judgment for the judgment of those election officials authorized to make that comparison under law. In addition, it important to point out that this issue could have been raised and addressed in the course of a recount or contest action filed by a candidate who lost in the primary if the candidate had filed the appropriate lawsuit in court by noon fourteen days after the municipal primary.

With respect to any Grievance filer who complained that that it was wrongful for the Madison County Election Board to fail to notify them that their absentee ballot was rejected we note that there is no legal requirement that the board contact a voter whose absentee ballot has been rejected. However, it may be a best practice to provide the voter an opportunity to vote a replacement ballot if that courtesy is extended to each absentee

voter in a similar circumstance. On the other hand, it may also be appropriate for the board to conduct a hearing under IC 3-6-5-31 with respect to potential voting fraud and, if appropriate, refer the matter to the prosecuting attorney.

Election Division Findings and Conclusions

1. Voting System Functionality: Counting Votes, Undervoting, and Reviewing Candidate Selections

HAVA requires voting systems to count ballots accurately. Specifically, 42 U.S.C. 15481(a)(5) of HAVA states:

“The error rate of the voting system in counting ballots (determined by taking into account only those errors 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.”

The relevant voting system standards described above are the 2002 Federal Election Voting System Standards (FSS). Section 3.2.1 of the FSS states, with respect to direct record electronic systems (DRE) like the iVotronic used in Madison County, as follows:

“[The] acceptable error rate applies separately and distinctly to each of the following functions:

b. For all DRE systems:

- 1) Recording the voter selections of candidates and contests into voting data storage; and
- 2) Independently from voting data storage, recording voter selections of candidates and contests into ballot image storage.

For testing purposes, the acceptable error rate is defined using two parameters: the desired error rate to be achieved, and the maximum error rate that should be accepted by the test process. 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.”

The above standard is just one of the many standards that the iVotronic was tested against when it was reviewed by an Independent Testing Authority and certified for marketing, sale and use in Indiana. While the Co-Directors did not perform the level of testing that would be performed by an Independent Testing Authority during qualification testing during their October 11, 2007 examination, they did perform a practical test to determine whether the voting systems would permit a voter to cast an undervote and whether the

voting system accurately counted the votes that were cast by the Co-Directors on October 11, 2007. Based upon the examination and specific results as described above, the Co-Directors find that the voting system did not violate HAVA with respect to permitting votes to cast undervotes and with respect to accurately recording and counting all votes cast on the voting systems examined October 11, 2007.

With respect to allegations regarding the voting systems ballot review screen, the Co-Directors note that the relevant section of HAVA is 42 U.S.C. 15481(a)(1) which states, in relevant part:

“(1) IN GENERAL.—

(A) Except as provided in subparagraph (B), the voting system (including any lever voting system, optical scanning voting system, or direct recording electronic system) shall—

(i) **permit the voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted;**

(ii) **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 (including the opportunity to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error);**
(emphasis added)”

As explained above, during their examination the Co-Directors observed that the iVotronic screen properly indicated the candidates selected by each Co-Director on the initial screen that contained the specific race voted on. In addition, before continuing to a new ballot screen, a voter could change the candidate previously selected or could come back to a certain page at any time to review and change the candidates selected on that ballot page.

However, once votes were indicated in all of the races on the ballot, and before these votes were finally cast, the voting systems displayed a review screen that summarized the specific votes that had been cast in each race except for the votes that were cast in the at-large city council contest. The information provided on this review screen for the at-large city council contest simply indicated under the title of the office either “you have selected all for this contest” if three candidates had been selected or “you have not selected all for this contest” if the voter had selected less than three candidates in the race.

Practically speaking, given the final review screen displayed the specific votes cast in other races but only included this terse message with respect to the at-large city council race, it is not surprising voters expressed anxiety about whether their vote had been properly recorded and counted by the voting systems used in the 2007 municipal primary. In addition, there was no specific instruction advising the voter how to review the at-large city council votes nor was it intuitive to navigate from the review screen to the specific ballot page where the at-large city council race was displayed.

The allegations regarding this review screen, as confirmed by the Co-Directors in their examination, comes closer than any other allegations contained in the Madison County Grievances to stating a violation of HAVA. While the confusing nature of the review screen may not have technically violated HAVA it certainly compromised the ability of voters to "verify...the votes selected...before the ballot [was] cast and counted" and the voters ability to "to change the ballot or correct any error before the ballot is cast and counted."

However, even though the voter could not accomplish these review and correction tasks easily, or with confidence, the Co-Directors observed that a voter could review individual candidate selections for the at-large city council race from the review screen by either pressing the "Previous Page" button in the lower left hand corner of the review screen or by touching the area of the review screen listing the office of city council at-large. Either of these methods returned the Co-Director to the page of the ballot that listed the city council at-large race which displayed the specific candidate selections of the Co-Directors in that race. In addition, while on this page, a voter's candidate selections could be changed. For these reasons, the Co-Directors find that the voting system's review screen did not result in a violation of HAVA.

However, even though the voter could go back through the ballot and change his vote in the at-large city council race, the voter always returned to the final summary page. And, again, the fact that the summary page displayed specific selections in all races but the at-large city council race could understandably undermine a reasonable voter's confidence that the voting system properly recorded and tabulated votes.

During the October 11, 2007 examination of the voting systems, members of the county election board acknowledged to the Co-Directors that they were aware that their voting systems were operating in the above-described manner and they conceded that the review screen was not desirable. However, they also indicated that a change in the review screen would have required a change to the voting systems programming which, at the time the problem was discovered, would have posed serious risks to the election. In addition, board members assured the Co-Director that the voting system review screen could be set to list all selections a voter made and that the board would be addressed this issue in the fall so that the review screens for the fall municipal election would display all candidate selections made by each voter.

Although the Co-Directors do not fully understand the dilemma faced by the Madison County Election Board when the problem with the review screen was discovered by the board, they do acknowledge that local election officials sometimes have to make a bad choice in order to avoid making a worse choice. However, given the conclusion that the review screen problem did not result in a HAVA violation, the Co-Directors did not inquire further into all the circumstances that led up to the board's decision.

2. Grievances that Complain that Precinct Election Workers Instructed Voters to Vote for at Least 3 Candidates in the City Council At-Large Race

The Co-Directors have reviewed HAVA to determine whether the allegations involving erroneous instructions from precinct election workers constituted a violation of HAVA. The Co-Directors conclude that, assuming the allegations are true, the fact that precinct election workers provided voters erroneous instructions regarding a voter's obligation to vote for at least three candidates in the at-large city council race does not indicate a violation of HAVA.

To be sure, instructing voters that they must vote for at least three at-large candidates was **contrary to law**. And, as we indicated in the forgoing discussion, these allegations could have formed the basis of an election contest. The Grievance procedure is simply not a substitute for the more direct and appropriate election contest remedy.

Notwithstanding our discussion about possible criminal violations, or proceedings that could lead to fines imposed on precinct election workers, we think the most appropriate action with respect to erroneous instructions from precinct election officials are actions that can be taken by the Madison County Election Board. Among the actions the board should consider include identification of the precincts involved, written communication to precinct election officials in these precincts that the instructions were and are contrary to law, and additional training and support to precinct election officials directed at avoiding erroneous instructions in future elections.

3. Grievances that Complain that Voter's Absentee Ballot was Not Counted

The Co-Directors have reviewed HAVA to determine whether the allegations involving the rejection of absentee ballots or the failure to notify voters whose absentee ballots were rejected would, if true, constitute a violation of HAVA. The Co-Directors conclude that these allegations do not state a violation of HAVA.

With respect to any Grievance that claims that an absentee ballot was wrongfully rejected the Co-Directors would again note that comparison of signatures on absentee ballot applications with signatures on absentee ballot envelopes inevitably involves the application of judgment and the Co-Directors are not authorized to substitute their judgment for the judgment of those election officials authorized to make that comparison under law. In addition, it is important to point out that the wrongful rejection of absentee ballots would be an issue that could have been raised and addressed in the course of a recount or contest action filed by a candidate who lost in the primary.

With respect to any Grievance filer who complained that that it was wrongful for the Madison County Election Board to fail to notify them that their absentee ballot was rejected the Co-Directors simply repeat that there is **no legal requirement** that the board contact a voter whose absentee ballot has been rejected. Again, contacting voters in this situation may be a best practice so that the voter has an opportunity to vote a replacement

ballot. However, if that courtesy is extended to one voter, it must be extended to all voters in a uniform nondiscriminatory manner.

POSSIBLE ACTION BY THE INDIANA ELECTION COMMISSION:

The Commission may take several actions concerning this Report under IC 3-6-4.5.

After concluding any hearing conducted on these Grievances, the Commission shall affirm the report; amend the report; or refer the matter to the Election Division for further investigation and submission of a subsequent report to the Commission.

If the Commission determines, based on the evidence presented, that there is no violation of Title III of HAVA, then the Commission shall dismiss the complaint and publish the order dismissing the matter in the Indiana Register.

If the Commission determines that there is a violation of any provision of Title III of HAVA, the Commission shall determine and provide the appropriate remedy if authorized by law to do so. If providing the remedy would require additional or amended Indiana legislation, the Commission shall notify the Census Data Advisory Committee and provide recommendations regarding the form and content of this legislation.