



CITIZENS UNION of the CITY OF NEW YORK

Policy Position and Legal Analysis on Reporting of Unofficial Election Results by the Board of Elections in the City of New York

July 17, 2012

Summary of Position

Citizens Union believes that the New York City Board of Elections has the current legal authority to adopt new needed procedures that would simplify and automate the process of producing unofficial vote tallies on election night.

With this memo, the New York City good government organization whose mission is to make democracy work for all New Yorkers outlines both the public policy arguments and legal analysis for such action and urges the Board at its meeting on Tuesday, July 17th to adopt new administrative procedures that would end the current outdated and inefficient process of “cut and add” and permit the board to use portable memory devices to tally quickly unofficial results the night of an election. Having in place a quicker and more accurate process would allow the media to report the preliminary election results made by New York voters earlier in the day.

A Public Policy Imperative

The legal question as to the Board’s authority to develop new procedures is driven by a public policy imperative. As several Commissioners acknowledged at the July 10, 2012 meeting, the current paper-based system employed by the Board to report unofficial results is not working effectively and is in need of change. This view is widely held by advocates, editorial boards, elected officials and election experts.

Under the existing process, the Board reports unofficial election results in poll sites with multiple election districts through a manual, labor-intensive “cut and add” method. Poll workers print the tabulated results tape from scanners, cut the tape by election district, compile together results for each election district by contest, add up the total votes received by each candidate, and enter the information on the return of canvass sheet. The return of canvass sheet is then provided to the police at the poll site, transported to the precinct in which the poll site resides, and entered manually by the police in precinct computers so the results are made available to the Associated Press, which, in turn, makes the outcome of races known to other media and the public.

During the June 26th primary in the 13th congressional district specifically, the unofficial results reported through this flawed process by the Board on election night gave the false impression that the incumbent, Representative Charles Rangel, had easily defeated his opponents, including his closest competitor, State Senator Adriano Espaillat. Rangel was reported to have defeated Espaillat by 20 percentage points on the night of the election, causing Espaillat to concede and Rangel to declare himself the victor.¹ On Wednesday afternoon, the day after the election, with 100 percent of precincts reporting results, the Board indicated that Rangel had won by over 2300 votes, 45.7 to 39.1 percent.² In subsequent days, the margin of victory narrowed to as little as 802 votes, or 1.96 percent.³ The margin of victory was ultimately determined to be 990 votes.⁴

While the Rangel- Espaillat race is the most visible and recent example of the shortcoming of the current election night tally system, the 2010 general election unofficial results also differed greatly from those that were ultimately certified. In December of 2010, 195,055 more votes were part of the certified results than the unofficial reporting on election night, or 17 percent more than the total votes initially reported in all contests.⁵ That differential was exclusive of uncounted paper ballots, including absentee ballots, and only measured the variance caused by inaccurate reporting due to the current “cut and add” process of tallying election night results.

The great disparity between unofficial and official results creates uncertainty for candidates and the public, puts in question the integrity of our election system to count quickly and accurately needed votes on election night, and undermines public confidence in our democracy. In the Rangel- Espaillat race in particular, the inaccurate unofficial results caused Espaillat to concede the race on election night when he would likely not have otherwise, prematurely making him the loser in the eyes of the public. Our concern is not for Espaillat’s candidacy but rather for the integrity of the process in ensuring a fair playing field for all candidates.

A different, more automated procedure for tallying unofficial votes is essential to ensuring greater accuracy of the unofficial results. While unofficial results are preliminary, as they do not include paper ballots and have not been fully vetted, a more accurate count could help to instill more public confidence in the results and the Board itself. As is the practice in other counties, the City Board could have reported results more quickly and accurately by having the portable memory devices (also known as “chips”) removed from the electronic scanners and transported to a central location for uploading, with this electronic tally then reported to the press.

¹ Michael Powell, “Election Board Sets New High in Dysfunction,” *The New York Times*. July 3, 2012. Available at: <http://www.nytimes.com/2012/07/03/nyregion/nyc-election-board-showed-dysfunction-in-primary.html>

² Charles Mahtesian, “Rangel Results Still Unsettled,” *Politico*. June 28, 2012. Available at: <http://www.politico.com/blogs/charlie-mahtesian/2012/06/rangel-results-still-unsettled-127509.html>

³ Ken Lovett, “New York State Sen. Adriano Espaillat is on verge of conceding 13th congressional race to Rep. Charles Rangel,” *The New York Daily News*. July 9, 2012. Available at: <http://www.nydailynews.com/new-york/new-york-state-sen-adriano-espaillat-verge-conceding-rep-charles-rangel-article-1.1110293>

⁴ *Ibid.*

⁵ Sam Roberts, “Recount finds 195,000 Votes Were Missed on Election Night,” *The New York Times*, December 2, 2010. Available at: <http://www.nytimes.com/2010/12/03/nyregion/03votes.html>

The Legal Rationale for the Board to Act Administratively

The question is whether the Board has the legal authority to implement a new vote tallying procedure administratively. Our review of state election law indicates that the Board of Elections does have the discretion to create a more automated process which would entail the removal of portable memory devices from ballot scanners followed by the uploading and transmission of this data which will report the unofficial vote tally after the polls close on election night.

Section 9-126 of the Election Law establishes the procedures for the return of canvass as it pertains to the delivery of the results to the police and the unofficial tally of election results. Subsection 1 lays out the procedures for cities and Nassau County. It specifies that following the completion of the return of canvass, the chairman of the board of inspectors provides to the police officer on duty at the poll site a statement conveying the results of election contests and any referenda on the ballot. The officer stationed at the poll site then conveys the results to the commanding officer at the police precinct where the poll site is located who, in turn, delivers it to the commanding officer of the police department of the city who makes the results known to the press. In the City of New York, two copies of the statement of results are made, one of which is taken to the police station en route to police headquarters to be made available to the press, and the other of which is transmitted to the board of elections by the next day.

While subsection 1 of section 9-126 provides the legal rationale for the Board's current procedures, an alternative approach is provided for all counties in subsection 3 of section 9-126. It states:

“The board of elections of counties in which voting machines which have removable electronic or computerized devices which record the total of the votes cast on such machines are used, may establish procedures by which such devices may be used after the close of the polls to provide the unofficial tally of results required by this section.”

Paragraph b of subdivision 3 further provides for installation of machines which record and transmit vote totals to the boards of elections or directly to the press at town or city halls, police stations, sheriff's offices or other public buildings.

Counsel to the Board has argued that the latitude to create alternative procedures to report unofficial results provided to the boards under subsection 3 does not apply to the Board of Elections in the City of New York because subdivision 1 specifically identifies a different process for New York City and Nassau County. Counsel has stated that the principles of statutory construction dictate that a specific provision trumps a general one, and the identification of New York City in subdivision 1 therefore prohibits the board from employing the procedures laid out in subdivision 3.

While this principle may be true generally, it cannot be the case as it pertains to section 9-126. In addition to subdivision 1 of 9-126, subdivision 2 also specifies different procedures for election districts outside of a city and the county of Nassau for the delivery of the results to the police and the unofficial tally of election results. By Counsel's reasoning, not only would the specific identification of Nassau county and cities, including New York City, in subdivision 1 prohibit the application of subdivision 3 to

those localities but this reasoning would also prohibit its application to subdivision 2, which also specifies procedures for election districts other than Nassau county and outside of cities. That would negate the application of subdivision 3 to any election district in any county or city in the state because of the subordinate general reference to “the board of elections of counties in which voting machines which have removable electronic or computerized devices” in subdivision 3. Clearly the intent of the legislature could not have been to write a provision that would not apply to any boards of elections because the preceding provisions were more specific in the identification of those counties than subdivision 3 is.

The more relevant and applicable principle of statutory construction is that when a conflict exists between two differing provisions of law, a more recently passed law trumps a more dated provision. Subdivision 3 was written after subdivision 1, the latter envisioning delivery of results via telegraph, thereby making clear that it was intended to provide a more modern alternative for providing unofficial results for cities and Nassau county that were reporting results under the traditional manner prescribed by subsection 1 in addition to those election districts not in cities or Nassau county in subdivision 2.

This is why Nassau County, acting under the same subdivision in law as New York City, has proceeded to report unofficial results in the manner prescribed by subdivision 3, resulting in more accurate and timely unofficial results without a legal challenge being filed. In Nassau County, the Chair of the Board of Inspectors provides a “databag” to police officers at 8 or 9 designated drop-off spots at police precincts. The databag includes the return of canvass sheets for the poll sites, as well as the portable memory sticks. The police then bring the databags to the central board of elections office. The central board office uses the portable memory devices to tally the election results which are provided to the press and on the board’s website.

The Board has also twice acknowledged the applicability of 9-126(3) to New York City. During the general election in November 2011, it conducted a pilot program in Queens in which the police transported the portable memory devices to the Board’s headquarters to upload the data containing the unofficial results. While the pilot was unsuccessful in getting out the results faster on account of police officers being made responsible for too many trips from the poll sites carrying portable memory devices and other materials, it was presumably done under the legal authority granted in 9-126(3).

Furthermore, in the Board’s 2012 [*Recommended Revisions in the New York State Election Law*](#)⁶ prepared by its Office of General Counsel, the Board proposes changes to subdivision 3 paragraphs a-d in section 9-126 to, “to authorize police or peace officers designated by the Police Commissioner of the City of New York to process the portable memory devices received from the poll sites and use them to provide the unofficial tally of results on election night.” There is no suggestion in these recommendations to amend subdivision 3 to clarify that it applies generally to New York City. Instead the Board suggests clarifying in statute that police or peace officers officers named by the police commissioner in the City of New York may remove and deliver portable memory devices. This recommendation implicitly

⁶ Board of Elections in the City of New York, *Recommended Revisions in the New York State Election Law, 2012*, pgs. 14-16. Available at:

<http://vote.nyc.ny.us/pdf/documents/boe/MessageToVoters/RecommendedRevisionsInTheNYSElectionLaw2012.pdf>

acknowledges that the City has the authority provided for in subdivision 3 for reporting the unofficial tallies but is seeking to maintain the role of the police in the alternative process.

While it is our view that the process for reporting unofficial tallies can be automated by following the procedures in 9-126(3), we also believe the return of canvass can also be simplified by simply affixing the tabulated results tape to the return of canvass rather than doing the “cut and add” approach. The law only requires that the inspectors, after printing the ballot scanner tabulated results tape and announcing the results on the tape affix the tape to the return of canvass for that ballot scanner or election district. This could be done through a consolidated return of canvass for all election districts whose votes are cast on all scanners at a particular poll site. There is nothing that prohibits this in state election law. The return of canvass is completed pursuant to section 9-120 which reads, “Upon completing the canvass, the inspectors shall prepare their returns of the canvass. They shall use therefor the printed form supplied to them and, at an election which was not conducted on a voting machine which produces a printed or photographic record, they shall carefully insert thereon, in ink, the appropriate names, words and figures according to the directions printed in the form provided by this chapter.” This language does not prevent consolidation of results from election districts at one poll site on one return of canvass sheet.

It would have been helpful to clarify state law through the passage of Assemblyman Brian Kavanagh’s election night closing bill, A10175B. The Assemblymember’s tireless work during the legislative session, coupled with the Board’s engagement, nearly resulted in a law that would have made clearer the Board’s legal authority in this area. While the ideal was not achieved, we should not let that legislative shortcoming prohibit action by the Board to simplify the return of canvass as possible administratively and automate the reporting of unofficial results.

Conclusion

Citizens Union believes the Board has the legal authority to change its reporting of election results and we believe the Board should take action today to move forward administratively and enact these needed changes before the fall elections. Failure to do so would subject the Board to further scrutiny and public head scratching for not having sought an appropriately simple and efficient way to conduct elections and tabulate unofficial results using available 21st century technology.