

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mark Banfield, Sarah Beck, Joan
 Bergquist, Alan Brau, Lucia Dailey,
 Peter Deutsch, Constance Fewlass,
 Barbara Glassman, Marijo Highland,
 Janis Hobbs-Pellechio, Deborah
 Johnson, Andrew McDowell, James
 Michaels, J. Whyatt Mondesire,
 Mary Montresor, Rev. James Moore,
 Cathy Reed, Regina Schlitz,
 Alexander Sickert, Daniel Sleator,
 Susanna Staas, Stephen J. Strahs,
 Mary Vollero, Jeanne Zang,
Petitioners

v.

No. 442 M.D. 2006

Carol Aichele,
 Secretary of the Commonwealth,
Respondent

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
 JUDGE LEADBETTER**

FILED: October 1, 2013

The Secretary of the Commonwealth (Secretary) seeks summary relief on the six counts (out of ten) remaining undecided in the action by twenty-four individual voters,¹ who seek an order in mandamus directing the Secretary to de-

¹ Specifically, Petitioners are Mark Banfield, Sarah Beck, Joan Bergquist, Alan Brau, Lucia Dailey, Peter Deutsch, Constance Fewlass, Barbara Glassman, Marijo Highland, Janis Hobbs-Pellechio, Deborah Johnson, Andrew McDowell, James Michaels, J. Whyatt Mondesire, Mary
(Footnote continued on next page...)

certify specific electronic voting systems (DREs) currently used in some counties in the Commonwealth.² For the reasons that follow, the motion is granted.

This is the fourth time this case is before the court. Previously, we denied the Secretary's preliminary objections to the petition for review. *See Banfield v. Cortes (Banfield I)*, 922 A.2d 36 (Pa. Cmwlth. 2007) (en banc), permission to appeal denied by Supreme Court order dated December 16, 2008 (70 MM 2007). Thereafter, we also denied the Petitioners' motion for partial summary judgment on Counts I (DREs fail to provide a permanent physical record), IV (DREs fail to provide for a recount as required under the Pennsylvania Election Code³), VI (Secretary failed to perform a required reexamination of the DREs), IX (certification process violates the equal protection clause, Article I, § 26 of the Pennsylvania Constitution), and X (certification process violates the uniformity requirement in Article VII, § 6 of the Pennsylvania Constitution). *See Banfield v. Aichele (Banfield II)*, 51 A.3d 300 (Pa. Cmwlth. 2012) (en banc). Subsequently, based on the rationale underpinning the rulings in *Banfield II*, the court dismissed Counts I, IV, V, VI and, dismissed as moot Count VI inasmuch as the Secretary performed the reexamination sought therein. *See Banfield v. Aichele*, No. 442 M.D. 2006, Order filed January 29, 2013. Presently, the Secretary seeks summary relief on Count II (DREs susceptible to fraud), Count III (certification procedures

(continued...)

Montresor, Rev. James Moore, Cathy Reed, Regina Schlitz, Alexander Sickert, Daniel Sleator, Susanna Staas, Stephen J. Strahs, Mary Vollero and Jeanne Zang.

² The voting machines subject to this challenge are: the ELECTronic 1242, made by Danaher Industrial Controls; the AccuVote TSX, made by Diebold Election Systems, Inc. (now Dominion); the iVotronic, made by Elections Systems & Software, Inc.; the eSlate, made by Hart InterCivic, Inc.; the AVC Edge II and the AVC Advantage, made by Sequoia Voting Systems, Inc. (now Dominion).

³ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

inadequate), Count VII (testing procedures inadequate), Count VIII (likely failure to count all votes accurately in violation of Article I, § 5 of the Pennsylvania Constitution concerning free and equal elections), Counts IX and X (equal protection and uniformity violations of state constitution).⁴

In Counts II, III and VII, Petitioners seek relief based on failure to comply with certain requirements imposed under Section 1107-A of the Election Code, added by the Act of July 11, 1980, P.L. 600, 25 P.S. § 3031.7. The pertinent provisions of Section 1107-A direct:

No electronic voting system shall, upon examination or reexamination, be approved by the Secretary of the Commonwealth, or by any examiner appointed by him, unless it shall be established that such system, at the time of such examination or reexamination:

.....
(11) Is suitably designed for the purpose used, is constructed in a neat and workmanlike manner of durable material of good quality, is safely and efficiently useable

⁴ Summary relief in the form of a judgment in favor of the Secretary may be granted only in those cases “where the record clearly shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.” *P.J.S. v. Pa. State Ethics Comm’n*, 555 Pa. 149, 153, 723 A.2d 174, 176 (1999). Moreover, “[w]hen resolving a motion for summary judgment, the record must be viewed in the light most favorable to the opposing party, and all doubts as to the existence of a genuine issue of material fact must be resolved in favor of the nonmoving party.” *Id.*

Pursuant to Pa. R.A.P. 1532 this court may, upon application, enter summary relief “at any time after the filing of a petition for review” if the right of the applicant is clear. In the present case, the court ordered discovery to be completed by March 7, 2013. *See* Order dated January 29, 2013. Nonetheless, Petitioners have filed a motion to compel production of documents containing over 642 communications that Respondents redacted or withheld, which remains pending. *See* Motion to Compel the Production of Documents filed March 15, 2013. Having reviewed these documents in camera, it is apparent that the additional documents and information sought by Petitioners will not yield evidence that the machines fail to comply with the statutory requirements for accuracy and security.

in the conduct of elections and, with respect to the counting of ballots cast at each district, is suitably designed and equipped to be capable of absolute accuracy, which accuracy shall be demonstrated to the Secretary of the Commonwealth.

(12) Provides acceptable ballot security procedures and impoundment of ballots to prevent tampering with or substitution of any ballots or ballot cards.

(13) When properly operated, records correctly and computes and tabulates accurately every valid vote registered.

....

(16) If the voting system is of a type which provides for the computation and tabulation of votes at the district level, the district component of the automatic tabulating equipment shall include the following mechanisms or capabilities:

....

(iii) It shall be so constructed and controlled that, during the progress of voting, it shall preclude every person from . . . tampering with the tabulating element.

....

25 P.S. § 3031.7 (11) -(13), (16)(iii). In addition, subsection (17)(i) of 1107-A, 25 P.S. § 3031.7(17)(i), imposes the same tamper-proof requirement to systems that compute and tabulate votes at a central counting center. Essentially, Petitioners aver that the challenged DREs are not capable of the required accuracy and are not sufficiently tamper-proof, that the Secretary's testing procedures fail to ensure full compliance with all of the statutory requirements listed above and that the Secretary has failed in her duty to adopt adequate testing procedures.

In general, mandamus is available only to a plaintiff who establishes a clear legal right to compel the official performance of a ministerial act or mandatory duty and there is no other adequate remedy at law. *Banfield I*, 922 A.2d

at 42. In the present case, where mandamus is not sought based on the Secretary's failure to certify DREs as required under the Election Code but on the premise that she failed to properly exercise her discretion in the performance of this duty, Petitioners must establish that the Secretary performed her statutory duties arbitrarily, fraudulently or under a mistake of law. *Id.* The standard for affording mandamus relief does not encompass a review of the Secretary's discretion in how she performed her duties so as to impose the court's view as to how these duties should be performed. *Maxwell v. Bd. of Dirs. Sch. Dist. of Farrell*, 381 Pa. 561, 566, 112 A.2d 192, 195 (1955); *Chadwick v. Dauphin County Office of the Coroner*, 905 A.2d 600, 604 (Pa. Cmwlth. 2006). To a large degree, this inappropriate oversight is exactly what Petitioners seek.

In their brief, Petitioners characterize their cause of action as "a case about how closely the court will monitor the executive's performance of its duty - entrusted to it by the legislature - to ensure the integrity of elections." Petitioners' Brief in Opposition to Summary Relief at 23. While this court has recognized its responsibility to protect the Commonwealth's interest in the integrity of the election process, *In re Carlson*, 430 A.2d 1210, 1212 (Pa. Cmwlth. 1981), that does not mean that courts have broad authority to prescribe the best way for the Secretary to perform her duties. *See Banfield I*, 922 A.2d at 44 (domain of the judiciary is to interpret, construe and apply the law). In order to prevail in their quest to de-certify the challenged DREs, Petitioners must establish that the DRE voting systems actually fall short of the statutory requirements for accuracy and security from tampering. *See Davidowitz v. Philadelphia County*, 324 Pa. 17, 187 A. 585 (1936) (in a challenge to use of "voting machines" the court refused to enjoin their use absent a clear legislative or constitutional violation). To survive

the present motion for summary judgment in favor of the Secretary, the record must contain some evidence that would support such a finding. *See Young v. Dep't of Transp.*, 560 Pa. 373, 376, 744 A.2d 1276, 1277 (2000). In this case, where the subject of inquiry, i.e., the workings of electronic voting systems, is outside the skill and knowledge of the ordinary layman, Petitioners cannot prevail in their cause of action without supportive expert opinion. *Id.* at 376, 744 A.2d at 1278. Petitioners have come forward with no evidence that the challenged machines fail to accurately record votes when properly used. Rather, review of the expert reports discloses that Petitioners can establish no more than that a possibility exists that the challenged DREs could in theory be subject to tampering or human error. But in this regard the challenged systems do not differ from any other voting system.

On behalf of Petitioners, Dr. Daniel Lopresti, a Professor and Chair of the Department of Computer Science and Engineering at Lehigh University, opined that the Secretary's certification process was inadequate in that it failed to give sufficient attention to security vulnerabilities identified in three studies that are well known in the field. Specifically, Lopresti points to the program tampering accomplished during a laboratory challenge conducted at Princeton University, known as the "Hursti exploit," the detailed source code and penetration testing that revealed security vulnerabilities in California's "Top to Bottom Review," and similar vulnerabilities demonstrated in Ohio's "EVEREST study." Petitioners' Exh. 18 in Opposition to Summary Relief, Lopresti Report at 6-8. These studies demonstrate vulnerabilities, worthy perhaps of consideration in the evolution of technological improvements, but the possibility that tampering can produce inaccuracy does not render the DREs incapable of the absolute accuracy required under the Election Code. Capability and vulnerability are not mutually exclusive

characteristics, i.e., capable of accuracy does not mean invulnerable to tampering. Furthermore, the fact that these studies uncovered vulnerability does not establish the presence of unacceptable security procedures. Testing machine vulnerabilities does not fully test security procedures that encompass not only tamper-proofing built into the electronics but also measures to check and cross-check human activity in the conduct of elections.

Similarly, Petitioners' expert, Dr. Douglas W. Jones, a Professor at the University of Iowa, opined that the challenged DREs' software is a "systematic source of security vulnerabilities" rendering the DREs not suitably designed for the purpose used and not constructed in a workmanlike manner. Petitioners' Exh. 22 in Opposition to Summary Relief, Jones Report at ¶¶ 29 – 40. Jones's expert report, while noting specific vulnerabilities identified in the California and Ohio studies, does not conclude that the machines are incapable of doing what they are designed to do – count and tabulate votes. Vulnerability to tampering or manipulation exists now and has existed since voting began. In his report, Jones recognized that:

Secure voting is very difficult, whether done using manual, mechanical or electronic means. While the algorithms involved are trivial, requiring nothing more than a sum, for each candidate or ballot position, of the number of votes, the distributed nature of the computation and the number of participants pose immense problems. Elections involve an appreciable fraction of the entire national population as participants, and the history of election fraud includes examples that were perpetrated by every class of participant, from voter to polling place election judge to election administrator to voting system maintenance technician.

Jones Report at ¶ 18. Indeed, even paper ballots can be destroyed or altered if those with access to the voting and tabulation process are intent on fraudulent manipulation of results, perhaps even more easily than electronic machines since

no technical expertise is required. Since voting will always be vulnerable to fraud, a mere possibility of a security breach is not alone sufficient to warrant overriding the Secretary's determination to certify the systems. While the expert reports call attention to perceived problems, they do not establish that the machines used successfully for many elections are necessarily fatally flawed.

Furthermore, the identification of certain vulnerabilities discovered in tests conducted in California or Ohio does not establish that the Secretary's testing was fatally defective. There is not a dispute here as to whether the DREs are imperfect; the challenged DREs, as well as the electronic voting systems the Petitioners point to as preferable, are imperfect. There is also no dispute that testing procedures are not, and cannot be, perfect. However, the present cause of action fails nonetheless because the experts have failed to establish that the Secretary's testing procedures and the DREs that she certified create more than a mere possibility of error in recording and tabulating votes. If the mere possibility of such error were considered sufficient to bar use of a voting system then we would be left with none.

Courts confronted with similar challenges based on the possibility of vote miscount have reached similar conclusions. As the court in *Weber v. Shelley*, 347 F.3d 1101 (9th Cir. 2003), observed:

No balloting system is perfect. Traditional paper ballots, as became evident during the 2000 presidential election, are prone to over-votes, under-votes, hanging chads, and other mechanical and human errors that may thwart voter intent. . . . The unfortunate reality is that the possibility of electoral fraud can never be *completely* eliminated, no matter which type of ballot is used.

Id. at 1106 – 7 (emphasis in original). In *Wexler v. Anderson*, 452 F.3d 1226 (11th Cir. 2006), the court indicated that *likelihood or probability* of vote miscount, *not*

its mere possibility, is required to trigger strict scrutiny of state recount procedures, stating that:

Plaintiffs' fundamental error is one of perspective. By adopting the perspective of the residual voter [i.e., a voter who upon a recount will have his paper or optical scan ballot examined manually for voter intent], they avoided the question that is of constitutional dimension: Are voters in touchscreen counties less likely to cast an effective vote than voters in optical scan counties?

. . . .

[I]f voters in touchscreen counties are burdened at all, that burden is the mere possibility that should they cast residual ballots, those ballots will receive a different, and allegedly inferior, type of review in the event of a manual recount.

Id. at 1231-32. In *Hennings v. Grafton*, 523 F.2d 861 (7th Cir. 1975), the court opined that, “[T]he failure of election officials to take statutorily prescribed steps to diminish what was at most a theoretical possibility that devices might be tampered with . . . fall[s] far short of constitutional infractions.” *Id.* at 864. This court is firmly persuaded that more than a mere possibility of inaccuracy or insecurity is required to justify the relief Petitioners seek.

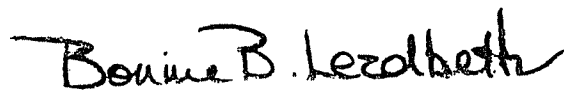
Further, Counts VIII,⁵ IX⁶ and X⁷ allege that the inadequate testing and improper certification of the DREs allows for the use of systems that fail to

⁵ Count VIII alleges that certification of the challenged DREs “create the risk that persons for whom the majority of voters have not cast their ballots will be declared the election winners and will take office, in contravention of the very essence of our democracy.” Petition for Review at 32, ¶ 134. Petitioners maintain that this transgresses the guaranty in Article I, § 5 of the Pennsylvania Constitution that: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”

⁶ Count IX alleges that certification of the challenged DREs “threatens Petitioners’ fundamental right to vote because the voting systems’ defects and security flaws create the risk that Petitioners, together with other Pennsylvania voters, have their votes rendered meaningless or, worse yet, deemed cast for a candidate for whom they did not vote.” Petition for Review at 33, ¶ 138. Petitioners assert that this interference with the right to vote violates the guaranty in (Footnote continued on next page...)

ensure that votes will be honestly captured and counted as cast, thus interfering with the Petitioners' fundamental right to vote and discriminating against those forced to use the challenged DREs. Petitioners' Brief in Opposition to Summary Relief at 47. These constitutional challenges, based as they are on the premise that the challenged DREs are so inaccurate and insecure as to infringe on the right to vote and the requirement for uniform election regulation, cannot survive inasmuch as Petitioners are unable to prove their starting premise.

Accordingly, the Secretary's application for summary relief is granted.



BONNIE BRIGANCE LEADBETTER,
Judge

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Article I, § 26 of the Pennsylvania Constitution that: "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right."

⁷ Count X alleges that: "Because the likelihood of an inaccurate tally that cannot be audited is greater in counties using the certified DRE voting systems than in counties that use systems that permit independent recounts upon an allegation of error or fraud, the use of the certified DRE voting systems threatens to create an imbalance in the weight given to the votes in the various counties, thereby depriving all Pennsylvania citizens, including Petitioners of the uniformity rights and equal protection rights secured under the Pennsylvania Constitution." Petition for Review at 35, ¶ 144. Petitioners assert that this violates the prescription in Article VII, § 6 that: "All laws regulating the holding of elections by the citizens . . . shall be uniform throughout the state."

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Secretary of the Commonwealth,
Respondent

ORDER

AND NOW, this 1st day of October, 2013, Respondent's Application for Summary Relief is granted. Judgment in favor of the Respondent shall be entered on Counts II, III, VII, VIII, IX and X of the Petition for Review.

Bonnie B. Leadbetter

BONNIE BRIGANCE LEADBETTER,
Judge