

**SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF SAN DIEGO  
CENTRAL  
MINUTE ORDER**

Date: 01/22/2008 Time: 09:30:00 AM Dept: C-67  
Judicial Officer Presiding: Judge Patricia A. Y. Cowett  
Clerk: Patricia Burke-Jennings

Bailiff/Court Attendant: N/A  
ERM:  
Reporter: , Not Reported

Case Init. Date: 12/18/2007

Case No: 37-2007-00084017-CU-WM-CTL Case Title: County of San Diego vs. Bowen

Case Category: Civil - Unlimited Case Type: Writ of Mandate

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Event Type: Motion Hearing (Civil)  
Moving Party: County of San Diego  
Causal Document & Date Filed: Notice of Motion and Supporting Declarations, 12/21/2007

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**Appearances:**

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The parties are not present nor represented by counsel.

The Court, having taken the above-entitled matter under submission on 01/17/2008 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

Petitioners County of San Diego and Deborah Seiler, in her official capacity as the Registrar of Voters for the County of San Diego, and Intervenors County of Kern, County of Riverside and County of San Bernardino and their respective Registrar of Voters' Request for Issuance of a Writ of Mandate is denied.

Respondent contends, and Petitioners do not disagree, the Post-Election Manual Tally ("PEMT") requirements are quasi-legislative. (Opposition 12:2-3; Reply 10:1-2.) A writ of mandate is an appropriate method to review quasi-legislative action. (Dominey v. Dept. of Personnel Admin. (1988) 205 Cal.App3d, 729, 736.) In reviewing quasi-legislative acts, the standard of review is as follows:

"[I]n reviewing the legality of a regulation adopted pursuant to a delegation of legislative power, the judicial function is limited to determining whether the regulation (1) is " within the scope of the authority conferred" [citation] and (2) is "reasonably necessary to effectuate the purpose of the statute" [citation]. [Citation.] 'These issues do not present a matter for the independent judgment of an appellate tribunal; rather, both come to this court freighted with [a] strong presumption of regularity ....' [Citation.] Our inquiry necessarily is confined to the question whether the classification is 'arbitrary, capricious or [without] reasonable or rational basis. [Citations Omitted].'" (Yamaha Corporation of America v. State Bd. of Equalization (1998) 19 Cal.4th 1, 11.)

Thus, the court must first evaluate whether the PEMT requirements are within the scope of the legislative power conferred. Next, the court must evaluate whether the regulations are reasonably necessary to effectuate the purpose of the statute or, alternatively, if the regulations are arbitrary and capricious.

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Petitioners challenge herein only the PEMT requirement specifying they must perform a 10% Manual Tally of randomly selected precincts for any contest where the margin of victory is less than one half of one percent (0.5%). Petitioners argue the Legislature has already established post-election manual tally requirements (1% vs. 10%). Consequently, a question that must be decided is: Does the 10% Manual Tally requirement imposed by Debra Bowen, the Secretary of State (hereinafter "SOS"), exceed her authority? This court finds that this PEMT requirement does not exceed her authority. The SOS has the authority to implement specifications and regulations governing voting machines pursuant to Elections Code Sections 19201, 19205 and 19222. This authority does not appear to be diminished by any of the following: (1) none of the provisions of the Elections Code expressly provide for nor expressly prohibit this PEMT requirement; (2) Petitioners have not met their burden to establish that there is a "conflict" between the 1% manual tally specified by the Elections Codes and the 10% Manual Tally mandated by the PEMT Requirement as both can be accomplished; and (3) there is nothing express in the statutes which precludes the SOS from implementing requirements, in addition to those already specified by the Legislature, in conformance with the duties delegated to the SOS under the Elections Code.

Petitioners have argued that the SOS does not have the authority to issue conditions confirming the accuracy of the elections. Petitioners contend the 10% manual tally requirement is beyond the scope of any power expressly authorized by the Legislature. However, the SOS has been delegated the express duty, by the Legislature, to insure voting machines operate effectively as set forth in various Election Codes cited above. Specifically, Election Code § 19205 states:

The Secretary of State shall establish the specifications for and the regulations governing voting machines, voting devices, vote tabulating devices, and any software used for each, including the programs and procedures for vote tabulating and testing. The criteria for establishing the specifications and regulations shall include, but not be limited to, the following:

- (a) The machine or device and its software shall be suitable for the purpose for which it is intended.
- (b) The system shall preserve the secrecy of the ballot.
- (c) The system shall be safe from fraud or manipulation.  
[Emphasis Added]

Election Code § 19222 also provides:

The Secretary of State shall review voting systems periodically to determine if they are defective, obsolete, or otherwise unacceptable. The Secretary of State has the right to withdraw his or her approval previously granted under this chapter of any voting system or part of a voting system should it be defective or prove unacceptable after such review. Six months' notice shall be given before withdrawing approval unless the Secretary of State for good cause shown makes a determination that a shorter notice period is necessary. Any withdrawal by the Secretary of State of his or her previous approval of a voting system or part of a voting system shall not be effective as to any election conducted within six months of that withdrawal.

[Emphasis Added]

Therefore, if the SOS discovers, as she has (Ex. "E" pg. 65), serious security flaws in a voting machine, the SOS has an express obligation to remedy the situation.

The next issue for the court to consider is whether the PEMT requirements are arbitrary and capricious. The determination of whether a regulation is arbitrary and capricious is based upon the evidence considered by the administrative agency. (*Shappell Industries, Inc. v. Governing Board of Milpitas Unified School Dist.* (1991) 1 Cal.App.4th 218, 233 [Citations Omitted].) A review of the evidence presented to the court verifies that the Secretary of State considered a comprehensive review of the

Diebold voting system. (Finley Dec. ¶¶12-21, Ex. E.) The review revealed several security flaws in the Diebold system. At the hearing, it was represented similar reviews verified that there are also security flaws with respect to the Hart and Sequoia systems. Accordingly, based on the totality of the evidence considered by the SOS, the court finds it was reasonable and necessary, to ensure the validity of the vote and to ensure the systems are free from fraud or manipulation, for the SOS to impose the 10% Manual Tally as recommended by the Post Election Audit Standards Working Group. (Bretschneider ¶ 19.) Therefore, the SOS's actions implementing the PEMT requirements in question are not arbitrary and capricious.

The final issue is whether 10% Manual Tally requirement constitutes regulation which must be promulgated after compliance with the Administrative Procedures Act ("APA"). The APA establishes the procedures by which state agencies may adopt regulations. It provides that no "state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation ..., unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." (Govt. Code §11340.5.)

The APA generally applies to any "quasi-legislative power conferred by any statute." (Govt. Code §11346.) The term "regulation" is defined very broadly. (Govt. Code §11342.600.)

A two prong test has been developed to determine if a regulation is subject to the APA: (1) the agency must intend its rule to apply generally, rather than in a specific case; and (2) the rule must "implement, interpret, or make specific the law enforced or administered by the agency or govern the agency's procedure. (Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal.4th 557, 571.) With regard to the first prong, the rule need not apply universally, but to a certain class, kind or order. (Roth v. Dept. of Veterans Affairs (1976) 110 Cal.App.3d 622, 630.)

Here, the SOS issued a separate set of conditions for recertification to each individual vendor. It is mere happenstance that the 10% Manual Tally requirement was imposed as to each of the systems involved here. (Ex. 5, 6 and 8; Finley Dec. ¶24.) Thus, the SOS did not intend the requirement apply generally, but rather that it apply to each specific type of voting machine where necessary. Accordingly, the Court finds that the conditional certification and PEMT requirements are not subject to the APA.

This court's conclusion is consistent with the ruling in American Association of People with Disabilities v. Shelley (2004) 324 F.Supp.2d 1120 ("AAPD"). In AAPD, the District Court held provisional certification of voting machines was not subject to the APA. (Id. at 1130.) In that ruling, the court stated:

Plaintiffs' argument that the Secretary's Directives are in violation of the Administrative Procedures Act ("APA") is not well taken. The Directives were issued, as previously observed, under the authority of the Elections Code, which authorizes the Secretary, at §19222, to withdraw approval of previously certified voting systems. As explained above, in connection with Plaintiffs' sixth claim, the Secretary was not adopting a new policy, the execution of which would require the adoption and approval of regulations in compliance with the Administrative Procedures Act. He was simply carrying out his responsibilities under laws and regulations already in force. (Id.)

The court declines to rule on Petitioners' request for a declaratory judgment. Resolution of this issue must be determined via a summary judgment motion or trial.

Attorney Barry directed to forward a copy (via fax) of this minute order to all counsel.

**Dated: January 22, 2008**

  
Honorable Patricia Y. Cowett