

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MARK BANFIELD, et al., :
 :
 : **Petitioners,** :
 :
 : **v.** : **Docket No. 442 M.D. 2006**
 :
 : **PEDRO CORTÉS,** :
 :
 : **Respondent.** :

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MEMORANDUM OF RESPONDENT, PEDRO A. CORTÉS, SECRETARY OF THE COMMONWEALTH, IN SUPPORT OF NONPARTY PREMIER ELECTION SYSTEMS' MOTION TO QUASH SUBPOENA AND FOR A PROTECTIVE ORDER

Respondent Pedro A. Cortés, Secretary of the Commonwealth (“Secretary” or “Respondent”), submits this memorandum in order to bring emphasis to two points that support granting the relief that Premier Election Systems (“Premier”) seeks with respect to the subpoena issued to it by Petitioners in its Motion to Quash Subpoena and for a Protective Order (“Motion”). *First*, the scope of inquiry in this case, as authorized by this Court in its opinion overruling Respondent’s preliminary objections, does not warrant discovery such as extended inspections of voting systems and production of sensitive source code, because this action more properly focuses on the Secretary’s conduct in reviewing those voting systems. *Second*, the risks to elections integrity in the Commonwealth presented by disclosure of source code outweighs the nonexistent or limited need Petitioners may have for access to voting systems for inspection or to source code in this case.

A. The Scope Of This Case Does Not Warrant The Discovery At Issue

This case centers on the Secretary's course of action in certifying voting systems. As the Court noted in its April 12, 2007 opinion, "Essentially, Electors allege that the Secretary has used inadequate examination procedures in certifying DREs" *Banfield v. Cortés*, 922 A.2d 36, 41 (Pa. Commw. Ct. 2007). In allowing such mandamus-styled claims to proceed, the Court stated that the Petition could be read as alleging that the Secretary's "decisions . . . were arbitrary or based on a mistaken view of the law." *Id.* at 42.

With respect to the allegation that the Secretary's decisions in certifying voting systems were "arbitrary," Petitioners will need to prove that the Secretary's actions are lacking in any reason. An examination of the concept of the term "arbitrary" in various legal contexts shows the limited nature of a review for arbitrary action.

In analyzing government action in the context of rulemaking and subsequent application of a rule, the Pennsylvania Supreme Court has stated:

To demonstrate that the agency has exceeded its administrative authority, it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or lack of wisdom in exercising agency power is not equivalent to abuse. What has been ordered must appear to be so entirely at odds with fundamental principles *as to be the expression of a whim rather than an exercise of judgment.*"

Tire Jockey Service, Inc. v. Department of Environmental Protection, 591 Pa. 73, 108–109, 915 A.2d 1165, 1186 (2007) (emphasis added, internal quotation omitted); *see also A.G. Cullen Const., Inc. v. State System of Higher Educ.*, 898 A.2d 1145, 1164 (Pa. Commw. Ct. 2006) (construing arbitrary as "determined by impulse or whim" in connection with attorneys' fees provision of the Commonwealth Procurement Code) (citing *Webster's II New College Dictionary* 57, 1229 (2001)). Similarly, this Court upheld a decision of a township's fire code board of appeals to require installation of a sprinkler system, stating the decision was to be

upheld “unless found to be arbitrary and capricious, or *unsupportable on any rational basis, because there is no evidence upon which the action may be logically based.*” *Morelli v. Fire Code Bd. of Appeals*, 126 Pa. Commw. 202, 205, 559 A.2d 90, 92 (1989) (emphasis added).¹

As amply demonstrated by the foregoing authority, the focus of an inquiry into the purported arbitrariness of the Secretary’s action will be properly on his examination activities and the basis for his decisions with respect to these voting systems. Therefore, this Court can determine whether or not the Secretary acted arbitrarily without permitting Petitioners an extended period of inspection of the voting systems at issue or a review of the systems’ source code.

Turning to whether the Secretary’s view of the law is mistaken, this Court can determine the soundness of the Secretary’s legal interpretation by looking at the applicable law itself and the Secretary’s certification decisions and activities. More to the point, to make such a case, Petitioners do not need to review the source code or put the systems in a room with their experts for three months.

What’s more, the information that the Secretary has disclosed in response to Petitioners’ discovery in this manner should be more than sufficient for Petitioners to try to show whether the Secretary’s certification decisions are based on a mistaken view of the law or are otherwise arbitrary. Specifically, besides producing 13,482 pages of material in response to Petitioners’ discovery requests, and responding to Petitioners’ interrogatories, the Secretary has provided to Petitioners 45 disks of video recordings, consisting of countless hours of the voting system

¹ The federal courts have noted that an arbitrary action of an administrative agency is one that is made “without any rational basis.” *Temple University v. Associated Hospital Serv. of Philadelphia*, 361 F. Supp. 263, 270 (E.D. Pa. 1973) (analyzing the term in light of the federal Administrative Procedures Act).

examinations themselves.² Thus, the quantity and quality of these discovery materials — including final and draft reports of the Secretary’s voting system examiners — renders needless the discovery sought by Petitioners that is the subject of Premier’s Motion.

B. The Limited Value of the Source Code to Petitioners in This Case Is Outweighed By the Risk of Dissemination of the Source Code and Extended Access to the Voting System

As the Commonwealth’s chief elections officer, including through his role to ensure the integrity of elections in the Commonwealth, the Secretary takes very seriously the risks to voting system security posed by disclosure of sensitive information. As such, the Secretary underscores the position outlined in the Memorandum of Movant Premier, and in the attached Affidavit of Talbot Iredale, that access to the source code of the voting systems used in the Commonwealth’s elections could facilitate tampering with these systems, including through a compromise of the systems’ passwords and programming. *See* Premier Memorandum at ¶ 12; Iredale Affidavit at ¶ 9. Thus, the Secretary sees no need to risk that this litigation become the vehicle through which the harms to the voting process that both the Secretary and Petitioners hope to avoid instead materialize.

Lastly, the Secretary is also not persuaded that there can be an implementation of a protective order that would adequately secure this sensitive information; the information simply ought not to be purposefully disseminated to the Petitioners, their counsel, or their experts.³

² Even though this Memorandum is for the narrow purpose of supporting Premier’s Motion, the Secretary makes clear that he has acted properly at all times, and that these discovery materials strengthen his contention that he properly certified the voting systems at issue in this action.

³ The Secretary does not mean to disparage the integrity of Petitioners, their counsel or their experts. Rather, because protective orders can be violated, even inadvertently, and such violations often cannot be easily cured, the Secretary maintains it is contrary to the interests of the voting public to provide any source code, from any source, to the Petitioners.

CONCLUSION

In sum, the discovery at issue in Premier's Motion points this case in a direction this Court need not go, specifically, toward a very protracted trial⁴ in which every minute, technical detail of the voting systems is, in essence, reexamined, with this Court sitting in the place of the Secretary and his voting system examiners to determine if the decisions and actions of the Secretary were wise. Respectfully, those are not the standards by which this case ought to be adjudicated. Nor should the discovery in this case become a vehicle for the scholarly endeavors of Petitioners' experts.⁵ Whether the Secretary's certification decisions are based on a mistaken view of the law or are arbitrary, as alleged, does not require that Petitioners and/or their experts be given extended access to the voting systems or to the "source code used to create the executable software" in any of the voting systems at issue in this case. Affidavit of Talbot Iredale, attached as Exhibit 6 to Premier's Memorandum, at ¶ 2. This is particularly so given the grave and very real risks such discovery poses to the security of elections in the Commonwealth.

⁴ There are six voting systems currently in use in Pennsylvania at issue in this litigation. Premier is the vendor of one of those systems. Petitioners have sought access to each of the other systems and each such system's source code.

⁵ Petitioners have circulated to counsel for the voting systems vendors and the Secretary a draft protective order that explicitly preserves the ability of Petitioners' experts to publish their findings so long as they do not disclose confidential material.

For the foregoing reasons, the Secretary respectfully urges this Court to grant Premier's motion to quash and for a protective order.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL & PUDLIN

Dated: October 2, 2009

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CERTIFICATE OF SERVICE

I, Alan C. Promer, hereby certify that on October 2, 2009, I caused true and correct copies of the foregoing Memorandum of Respondent, Pedro Cortés, Secretary of The Commonwealth, In Support of Nonparty Premier Election Systems' Motion to Quash Subpoena and For a Protective Order, to be served by the method indicated below, on the following:

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