

CALENDAR NUMBER 11

SAN DIEGO SUPERIOR COURT – DEPARTMENT 67  
JUDGE PATRICIA A.Y. COWETT  
LAW & MOTION CALENDAR, TENTATIVE RULINGS FOR January 17, 2008.

NOTICE TO COUNSEL:

The following “Tentative” rulings of the Court on the Motion calendared for hearing today for the assistance of counsel and the parties in preparing to address the Court in their matter.

The “Tentative” rulings set forth reflect the Court’s current view of the matter based upon the written argument and pleadings that the Court received.

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37-2007-00084017-CU-WM-CTL COUNTY OF SAN DIEGO VS. DEBRA BOWEN

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

Respondents contend, and Petitioner does not disagree, the PEMT requirements re 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:

We summarized this characteristic of quasi-legislative rules in *Wallace Berrie & Co. v. State Bd. of Equalization* (1985) 40 Cal.3d 60, 65 [219 Cal.Rptr. 142, 707 P.2d 204] (*Wallace Berrie*): “[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.’ (Culligan, *supra*, 17 Cal.3d at p. 93, fn. 4 [citations].)” *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. Secondly, the court evaluates whether the regulations are reasonably necessary to the effectuation of the statute or are arbitrary and capricious.

The first issue to be addressed with regard to whether the PEMT requirements exceed Bowen's authority is the 10% Manual Tally. Petitioners argue the Legislature has already established post-election manual tally requirements and defined the purpose. However, the requirements imposed by the Secretary of State ("SOS") do not directly exceed her authority. The SOS has the authority to implement specifications and regulations pursuant to Elections Code Sections 19201, 19205 and 19222. This is a situation where none of the Elections Code expressly provide for nor expressly prohibit the PEMT requirements. Petitioners have not met their burden establishing there is a conflict between the 1% manual tally specified by the Elections Codes and the 10% manual tally mandated by the PEMT Requirements. In addition, there is nothing in the statutes which precludes the SOS from instituting additional requirements. Thus, the court finds the requirements do not exceed the SOS's authority.

The next issue 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].) In this case, the Secretary of State considered a comprehensive review of the Diebold voting system. (Finley Dec. ¶¶12-21, Ex. E.) The review reveal several security breach issues with regard to the voting systems. The court assumes similar conclusions were reached with regard to the Hart and Sequoia voting systems. It is up to the SOS to ensure the voting machines are safe and secure. (Elections Code §§ 19201, 19205 and 19222.) The SOS instituted the 10% Manual Tally based upon the conclusions of Post Election Audit Standards Working Group. (Bretschneider ¶ 19.) Thus, based upon all the evidence, the SOS's actions implementing the PEMT requirements were not arbitrary and capricious.

The final issue is whether PEMT requirements constitute regulations and thus must

comply with the Administrative Procedures Act ("APA"). The APA establishes the procedures by which state agencies may adopt regulations and provides 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 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 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 PEMT requirements only apply to certain voting machines (Diebold, Hart and Sequoia systems), not to all voting machines. The SOS issued separate conditional certifications for each of the voting machines. (Ex. 5, 6 and 8.) This conclusion is also supported by the fact the PEMT requirements were not imposed on all voting machines, specifically excluding optical scanning machines. (Finley Dec. ¶24.) Thus, because the PEMT requirements do not apply to a class, they are not subject to the APA.

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