

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION

Jeanne C. White, Resident Taxpayer, : NO. 2024-21813
Registered Voter of Montgomery County :
Robert Mancini, PA Resident Taxpayer, :
Registered Voter of PA, Individually :
: :
vs. :
: :
MONTGOMERY COUNTY :

HAAZ. J.

October 16, 2024

MEMORANDUM

Petitioners, Robert Mancini, Eddie Moye and Jeanne C. White, filed a pro se Complaint against Montgomery County on September 13, 2024.¹ On September 20, 2024, Petitioners filed an Application for Emergency Relief and Seeking Preliminary Injunction claiming no resident or voter in Montgomery County could be confident in the results of the 2024 general election because Montgomery County is violating federal law set forth in the Help America Vote Act (HAVA) (§24 and §25).² Specifically, Petitioners allege that Montgomery County has not met Pennsylvania Department of State Conditions for Use of the Dominion Democracy Suite 5.5A Electronic Voting System and will not conduct a federal election pursuant to the requirements of 52 U.S.C. 21081(a)(5) (§21).

¹Jeanne White is allegedly a registered voter residing in North Wales, Robert Mancini is allegedly a registered voter residing in Media (Delaware County) and Eddie Moye is a registered voter residing in Norristown and a candidate for the Pennsylvania House of Representatives, District 70. Compl. ¶1-3.

²HAVA established a new federal agency, the Election Assistance Commission (“EAC”), 52 U.S.C. §20921, which is charged with, *inter alia*, developing and adopting a set of “voluntary voting system guidelines,” *Id.* §20961-20962; accrediting voting system testing laboratories, *Id.*, §20971(b); and “provid[ing] for the testing, certification, decertification and recertification of voting system hardware and software by [those] laboratories,” *Id.* §20971(a)(1).

Petitioners are seeking the following relief:

- a) Staying the use of the Dominion Democracy Suite 5.5A Electronic Voting until the issues raised herein have been judicially determined.
- b) Staying the use of the Dominion Democracy Suite 5.5A Electronic Voting System until the system has completed an Error Rates Test at a Voting System Laboratory accredited by the EAC.
- c) Voiding Logic and Accuracy Test Results performed prior to a Secure Trust Build Validation on every piece of Dominion Election equipment – including central server located at One Montgomery Plaza in Norristown, PA; in-person precinct scanners, ballot marking devices and ePoll books stored at 1006 West Washington Street, Norristown, PA; and County scanners located at Health and Human Services building in Norristown, PA and every piece of software used on the systems in all 429 precincts of Montgomery County, the system used to count the mail-in ballots and the system used to tabulate all of the ballots.
- d) Directing Respondent to take all reasonable steps possible to notify the public candidates, voters, taxpayers, residents and the Pennsylvania Department of State of the existence of this litigation and the deficiency of the Respondent in the election process.
- e) Entering such other relief as this Court deems just and proper. (Application, ¶¶33-37)

Petitioners presented the following evidence in support of their request for injunctive relief at an evidentiary hearing on October 9, 2024. Ed Moye testified that he was a successful write-in candidate in the 2024 primary as the Republican party nominee to represent the 70th Pennsylvania legislative district. He does not claim any expertise in voting or election administration. He has no evidence that any election results from 2019 to the present in Montgomery County were inaccurate.

Josiah Kuenzi testified that he has a certification in cyber security from CISSP which is recommended for cyber security professionals.³ He has no expertise in election system security or election administration procedures. The gravamen of Mr. Kuenzi's testimony is that hash codes should be used to verify the integrity of software and that the Pennsylvania Department of State's own conditions of use require counties to perform a "trusted build validation" to ensure the accuracy of their electronic voting systems. On rebuttal, Mr. Kuenzi testified that a "trusted build validation" is part of election preparation and post-election activities which is necessary to ensure software has not been corrupted or altered. He acknowledged there is no definition of the term "trusted build validation" or "hash code" by the Pennsylvania Department of State. Petitioners did not produce any other testimonial evidence.⁴

Respondent, Montgomery County, presented two witnesses at the hearing. Frances Dean testified that he is the Director of Elections for Montgomery County Voter Services. His job is to administer elections in Montgomery County. He reports to the Montgomery County Board of Elections. He oversees a staff of 25 full-time staff members and 30 part-time staff members at each election.

³ The qualification that a witness has expertise in a particular area rests with the sound discretion of the trial court. *Nobles v. Staples, Inc.*, 150 A.3d 110, 113 (Pa. Super. 2016). Petitioners did not seek a court determination that Mr. Kuenzi was qualified as an expert in any subject notwithstanding his own testimony regarding a certification he obtained from CISSP (an undefined organization). Mr. Kuenzi never rendered a professional opinion within a reasonable degree of certainty in his supposed field of expertise. See Pa.R.E. 702.

⁴Petitioners introduced three documents into evidence - Analysis of the Atrim, Michigan November 2020 Election Incident (P-1), the Commonwealth of Pennsylvania, Department of State Report Concerning the Examination Results of Dominion Voting Systems Democracy Suite 5.5A with Imagecast X Ballot Marking Device (ICX-BMD), Imagecast Precinct Optical Scanner (ICP), Imagecast Central Station (ICC) and Democracy Suite EMS (EMS) (P-2), and the Pennsylvania Department of State Directive on Logic and Accuracy Testing dated March 7, 2024 (P-3).

Montgomery County implemented the Dominion Democracy Suite 5.5A electronic voting system in March or April of 2019 after the EAC certified that system. Montgomery County performed an “acceptance test” of the Dominion voting system upon delivery in 2019. Mr. Dean testified that Montgomery County performs a trusted build validation as part of its election preparation and post-election activities utilizing the vendor supply methods of validation and verification of voter system integrity through its logic and accuracy testing.

Montgomery County has used the Dominion Democracy Suite 5.5A in ten (10) successive primary and general elections since the spring of 2019. The error rate of the Dominion Democracy Suite 5.5A electronic voting system based on two post-election audits conducted in every primary and general election since 2019 was “zero.”⁵

Mr. Dean testified that the Department of State considers Montgomery County’s processes to be compliant with its accuracy and testing requirements. He testified that Montgomery County uses a different method than hash codes to ensure that trusted build validation is compliant with the Department of State conditions. Mr. Dean believes Montgomery County’s Dominion Democracy Suite 5.5A electronic voting system is compliant with state and federal statutes.

Mr. Dean further testified that the relief Petitioners are seeking would be “extremely difficult” for Montgomery County to implement, would result in a less accurate vote count than the current system and would require thousands of hours of training for hundreds of newly hired staff to hand count approximately 500,000 votes before election day (November 5, 2024).

⁵ Montgomery County conducts post-election “risk limiting audits” and a “two percent audits” to test the accuracy of the electronic voting system compared with the paper ballots actually scanned into the voting scanners. Mr. Dean testified there has been zero evidence of any electronic voting system error in the twenty post-election audits since purchasing and implementing the Dominion Democracy Suite 5-5A electronic voting system in 2019.

Jonathan Marks also testified for Respondent. He is the current Deputy Secretary for Elections and Commissions at the Pennsylvania Department of State and has held that position since 2019. His responsibilities include overseeing the state Bureau of Elections and providing guidance and support to County Boards of Elections throughout the state. He confirmed that Montgomery County completed “acceptance testing” after acquiring the Dominion Democracy Suite 5.5A electronic voting machines in 2019. Mr. Marks testified that Montgomery County’s practice of performing trusted build validation as part of its logic and accuracy testing satisfied the State Department’s requirements. He testified counties are required to perform two post-election audits (risk limiting audits and two percent audits) to ensure the accuracy of the election results. He is not aware of any instance where the outcome of any election would have been different based upon post-election audits.

Mr. Marks testified that Pennsylvania counties may properly rely on certifications of voting systems performed by the EAC and the Pennsylvania Department of State.⁶

LEGAL DISCUSSION

The Pennsylvania Election Code has permitted and regulated the use of electronic voting systems in Pennsylvania elections since 1980; see Act of July 11, 1980, P.L. 600. The General Assembly updated the requirements governing such systems following the enactment of HAVA; see Act of December 9, 2002, P.L. 1246. Since 2002, to be eligible for use in Pennsylvania, an

⁶ Respondent, Montgomery County, offered seven exhibits into evidence. An email and checklist relating to the “acceptance test” performed by Montgomery County in 2019 (P-1); the signed Acceptance sign-off document of the “acceptance test” dated March 13, 2019 (P-2); an email dated April 22, 2019 relating to the “acceptance test” (P-3); a copy of 25 P.S. §3031.10 (P-4); The Pennsylvania Department of State Directive on Logic and Accuracy Testing dated March 7, 2024 (P-5). The Department of State Report Concerning Results of Dominion Voting Systems dated January 17, 2019 by Acting Secretary of the Commonwealth, Kathy Boockvar (D-6) (same as P-2); and a photo of Logic and Accuracy Acceptance test for November 5, 2024 (P-7).

electronic voting system must be tested and certified by both the EAC and the Secretary of the Commonwealth. See 25 P.S. §3031.5(a); *Banfield v. Cortes*, 110 A.3d 155, 159 (Pa. 2015).

Under the Election Code, the Secretary of State has the duty and power to “examine and reexamine” the electronic voting systems to be used in the Commonwealth. 25 P.S. §3031.5(b). The Secretary is tasked with determining “whether, in his opinion, the system so examined can be safely used by voters at elections...and meets all of the requirements [set forth in the Election Code].” 25 P.S. §3031.5(b).

Petitioners’ primary claim is that Montgomery County has not satisfied Condition of Certification K in the Secretary’s Certification Report for the Dominion Democracy Suite 5.5A which states “[j]urisdictions must also perform a trusted build validation as part of the election preparation activities and post-election canvass activities utilizing the vendor supplied methods of validation and verification of voting system integrity.” (quoting Condition of Certification K). Petitioners allege that the County has “[not] performed the Trusted Build Validation.” *Id.* ¶13.⁷

A court may grant a preliminary injunction only where the moving party establishes the following elements: (1) the relief is necessary to prevent irreparable harm to the movant; (2) the injunction would restore the parties to the status quo as it existed before the alleged wrongful act; (3) greater injury would result from a refusal to grant the injunction than from granting the

⁷ Petitioners also allege that, pursuant to 52 U.S.C. §21081(a)(5) of the Voluntary Voting System Guidelines, the Democracy Suite 5.5A should complete a test involving “1,576,501 ballots” as part of the EAC’s certification testing. Compl. ¶17-19. Petitioners assert that “[t]he EAC, the PA Department of State never performed a test that included the 1,576,501 ballots.” *Id.* ¶18. However, the cited portion of that document refers to a particular number of “ballot positions, “ i.e., “votes,” not a particular number of “ballots.” (A single ballot can provide for the casting of a significant number of distinct votes.)

Petitioners also contend that “commercial off-the-shelf software on the Dominion Democracy Suite 5.5A Voting System must be tested,” asserting that “[t]he presence of any other software than the secure trusted build violates the conditions set forth by the Pennsylvania Department of State and the [EAC].” Compl. ¶22. Petitioners failed to present evidence to prove that any software beyond that included within the scope of the certified system is present on Montgomery County’s voting system or the identity of which off-the-shelf software on the Democracy Suite 5-5A system should have been subjected to any further testing.

injunction; and (4) the movant's right to relief is clear. *Fischer v. Dept. of Public Welfare*, 439 A.2d 1172 (Pa. 1982). To establish a clear right to relief, the moving party must be able to show that he has a reasonable likelihood of success on the merits. Our Supreme Court addressed the "clear right" requirement as follows:

"Where the threat of immediate and irreparable harm to the petitioning party is evident, that the injunction does no more than restore the status quo and the greater injury would result by refusing the requested injunction than granting it, an injunction may properly be granted where substantial legal questions must be resolved to determine the rights of the respective parties." *Id* at 1174.

Here, the Petitioners have not satisfied any of the requirements for issuance of a preliminary injunction. First, they have not established a clear right to relief. Their claim that Montgomery County has not performed a trusted build validation is refuted by the testimony of both Mr. Dean or Mr. Marks. To the contrary, the evidence in this record establishes that trusted build validation is performed as part of the logic and accuracy test performed in every electronic voting machine in every election in Montgomery County. Two post-election audits performed by the County (risk limiting error test and the two percent test) have demonstrated zero errors attributable to the Dominion Democracy Suite 5.5A voting system since its purchase and implementation in 2019. The Pennsylvania Department of State has determined that Montgomery County is compliant with its testing and accuracy requirements.

Issuance of an injunction would not restore the parties to their status quo. It would do the opposite. An injunction would turn the administration of the election on its head. Petitioners' claim of irreparable harm to them is not supported by the evidence. Mr. Dean testified that granting Petitioners' request for an injunction and a hand count this short period before the elections would result in a less accurate, costly, and extremely difficult challenge of hiring and

training hundreds or thousands of people on very short notice. This would make no sense - particularly in the absence of any evidence of electronic voting inaccuracies in any of the past ten successive elections in Montgomery County using the Dominion electronic voting system.

Petitioners have failed to produce any evidence that Montgomery County has violated any federal or state law. Petitioners have failed to produce any evidence of any inaccuracies or errors in Montgomery County's use of the Dominion Democracy Suite 5.5A voting system. Petitioners have failed to produce any evidence that the testing procedures employed by Montgomery County are unlawful or inaccurate. The evidence produced in the hearing supports the opposite conclusion – that the Dominion Democracy Suite 5.5A Electronic Voting System has been extremely accurate in properly recording all votes in Montgomery County elections since its implementation.

Accordingly, the court will enter a corresponding Order denying Petitioners' application for preliminary injunctive relief.

BY THE COURT:



RICHARD P. HAAZ, J.

E-filed on 10/16/24
Copies sent via Prothonotary and Chambers
Emailed to Court Administration



Judicial Secretary