

3/17/08

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MARK BANFIELD, <i>et al.</i> ,	:	
	:	
Petitioners,	:	
	:	
v.	:	
	:	
PEDRO CORTÉS,	:	Docket No. 442 M.D. 2006
	:	
Respondent.	:	

**ANSWER OF RESPONDENT PEDRO A. CORTÉS, SECRETARY OF THE
COMMONWEALTH, TO PETITIONERS' FEBRUARY 22, 2008 MOTION TO
DISSOLVE STAY OF PROCEEDINGS AND
TO SET A DISCOVERY AND TRIAL SCHEDULE**

AND NOW comes Respondent Pedro A. Cortés, Secretary of the Commonwealth, to answer the Motion to Dissolve Stay of Proceedings and to Set a Discovery and Trial Schedule (“Motion to Dissolve Stay”) filed by Petitioners in this matter. As further set forth in the accompanying Memorandum in Opposition to Petitioners’ February 22, 2008 Motion to Dissolve Stay of Proceedings, which is incorporated herein, the Court should decline Petitioners’ invitation to lift the properly-entered stay of these proceedings.

In response to the averments made in the Motion to Dissolve Stay, Secretary Cortés answers as follows:

1. Admitted in part, denied in part. It is admitted only that Petitioners filed this litigation in August 2006. The remaining statements in paragraph 1 are denied because they comprise legal conclusions and purport to characterize the contents of the Petition for Review, which speaks for itself. By way of further response, the Secretary denies, to the extent Petitioners imply, that he has failed to comply with the Pennsylvania Election Code in any

respect in certifying the Direct Recording Electronic (“DRE”) voting systems at issue in this case.

2. Admitted in part, denied in part. It is admitted only that on April 12, 2007, this Court overruled the Secretary’s Preliminary Objections in an order of the same date. (“April 12 Order”). The remaining averments are denied. The Court’s Opinion and the April 12 Order, which are reported at Banfield v. Cortés, 922 A.2d 36 (Pa. Commw. Ct. 2007), speak for themselves; and the Secretary denies their characterizations and summary by Petitioners. By way of further response, the Court has made no findings of fact in this matter and necessarily premised its decision to overrule the Secretary’s Preliminary Objections on the assumption that the facts pleaded in the Petition for Review are true.

3. Admitted in part, denied in part. It is admitted that this Court, in an April 30, 2007 per curiam order, granted the Secretary’s application to amend the Court’s April 12, 2007 Order, and denied the Secretary’s application for stay of proceedings (“April 30 Order”). The remaining averments are denied. By way of further response, in the April 30 Order, in which the Court granted the Secretary’s Application to Amend the April 12 Order – over the objections of the Petitioners – the Court found, in the language of 42 Pa. C.S. § 702(b), that its April 12 Order “involves a controlling question of law as to which there is substantial ground for difference of opinion” and as to which “[a]n immediate appeal from [that] order may materially advance the ultimate termination of the matter.” (April 30 Order.) By way of further response on May 8, 2007, the Secretary filed an Unopposed Application for a Stay of Proceedings in this Court, requesting a stay of proceedings consistent with the parties’ agreement, which is memorialized in a May 4, 2007 letter attached to the Unopposed Application for a Stay. (A copy of the May 4, 2007 letter from Alan C. Promer, Esquire, one of the counsel for the Secretary, to

Marian K. Schneider, Esquire, one of the counsel for Petitioners, is attached hereto as Exhibit A (“May 4 Letter Agreement”). This Court granted the unopposed application for a stay of proceedings on May 11, 2007. The stay of proceedings entered by this Court obviated any need for the Secretary to seek a stay of proceedings or supersedeas from the Supreme Court under 42 Pa.C.S. § 702(c) and Pa. R.A.P. 1313, and therefore the Secretary would be unfairly prejudiced were this Court now to dissolve the stay on which the Secretary has relied as he continuously meets his legal obligations to administer elections in the Commonwealth. It is specifically denied that the Secretary filed a Petition for Review with the Pennsylvania Supreme Court on May 12, 2007. To the contrary, on May 10, 2007, the Secretary filed with the Supreme Court a Petition for Permission to Appeal, which Petitioners opposed on May 24, 2007 in an Opposition to the Petition for Permission to Appeal. The Secretary’s Petition is still pending before the Supreme Court at Docket No. 70 MM 2007. By way of further response, on January 25, 2008, Petitioners filed a “Motion to Dissolve Voluntary Stay of Proceedings and for an Expedited Hearing” (“January 2008 Motion to Dissolve”), in which Petitioners requested that this Court dissolve the stay to hear Petitioners’ accompanying motion for a preliminary injunction. In seeking to dissolve the stay, Petitioners pointed to the Secretary’s de-certification of the WINvote system by Advanced Voting Systems (“AVS”) (*id.* ¶ 8), recent reports from Ohio and California (*id.* ¶ 3) and the pending Spring Primary (*id.* ¶ 15). By order dated February 8, 2008, this Court denied Petitioners’ Motion for a Preliminary Injunction. (See Order, dated February 8, 2008.)

4. Denied as stated. By way of further response, the Secretary’s May 8, 2007 Unopposed Application for Stay of Proceedings and this Court’s May 11, 2007 Order speak for themselves. By way of further response, in accordance with the terms of the parties’ May 4

Letter Agreement, the Secretary has produced over 4,000 pages of documents, first by producing 3,744 pages of documents on June 29, 2007, and then, in keeping with notions of good faith, by producing an additional 410 pages of documents on January 17, 2008. Moreover, in the May 4 Letter Agreement, the parties agreed to stay these proceedings pending the Supreme Court's full disposition of the Secretary's interlocutory appeal efforts:

Also under our agreement, all proceedings in the case in the Commonwealth Court are stayed pending the disposition of the Secretary's interlocutory appeal efforts before the Pennsylvania Supreme Court. This stay is effective immediately and lasts until the Supreme Court concludes its consideration of the Secretary's soon-to-be-filed Petition for Permission to Appeal, and, if that Petition is granted, through the Pennsylvania Supreme Court's disposition of the appeal.

(May 4 Letter Agreement, at 2.)

5. Admitted in part, denied in part. It is admitted that the Supreme Court has not announced any decision and that it is not known when the Supreme Court will render a decision or otherwise act on the Petition for Permission to Appeal, which remains pending at No. 70 MM 2007. The Secretary is without sufficient knowledge to know if the Supreme Court has made any "determination" with respect to the pending Petition for Permission to Appeal, and therefore the Secretary denies the averments to the extent they suggest otherwise. It is further denied that the Secretary filed a "petition for review."

6. Admitted in part, denied in part. It is admitted only that California and Ohio conducted evaluations of certain versions of certain DREs. The remaining averments are denied. By way of further response, those states also conducted evaluations of, and expressed concerns regarding, non-DRE voting systems akin to those that Petitioners would have this Court force over fifty Pennsylvania counties to procure and use. It is denied that four of the six DRE systems certified by the Secretary for use in Pennsylvania elections were examined in the other

states, as version numbers of these systems may differ. By way of further response, neither Ohio nor California reviewed the AVC Advantage voting system manufactured by Sequoia Voting Systems, Inc., and the ELECTronic 1242 voting system manufactured by Danaher Controls, Inc., which are two systems certified and used in Pennsylvania.

7. Admitted in part, denied in part. It is specifically denied that the DRE voting system manufactured by AVS – the WINvote system – had “the flaws alleged by Petitioners” with respect to the Pennsylvania Election Code. To the contrary, in August 2007, after the WINvote’s successful use in the 2006 General Primary, the 2006 General Election and the 2007 Municipal Primary, the Secretary was compelled to suspend use of the WINvote due to an error in version 2.0.3 relating to so-called “cross-filed” candidates running in municipal elections, i.e., November elections held in odd-numbered years. Specifically, WINvote version 2.0.3 included a software error that improperly permitted a voter in a November election to cast more than one vote for a single candidate, listed as the nominee of more than one political party, in elections for offices as to which a voter is permitted to vote for more than one candidate, such as school board. This could be accomplished on the WINvote system by the voter selecting the name of one candidate twice – once where the candidate was listed as the nominee of one political party, and again where the candidate is shown as the nominee of another party for the same office. This software error could permit improper double voting only in Pennsylvania “municipal elections,” i.e., November elections held in odd-numbered years. The WINvote was never used in an election in which the “cross-filing” issue could have arisen, as it was not certified until February 2006 and was suspended for use in advance of the November 2007 Municipal Election. AVS intended to fix the specific error in the next version of the software, version 2.0.4. However, the Secretary required that the new version of the WINvote could be

used in Pennsylvania elections only after examination and approval by both a federally-recognized independent testing authority and the Secretary of the Commonwealth. See 25 P.S. § 3031.5. Had the new version been so approved, version 2.0.4 of the WINVote could have been installed on the AVS systems that the three counties had purchased in 2006. However, on November 28, 2007, the Director of Testing and Certification for the U.S. Election Assistance Commission (EAC) terminated the testing of WINVote version 2.0.4. Based on the inability of AVS to obtain federal approval for a version of its WINVote system that would correct a software error in the certified version, see 25 P.S. § 3031.5(a) (requiring all voting systems to be approved by a “federally recognized independent testing authority”), the Secretary de-certified AVS WINVote 2.0.3 on December 28, 2007. The Secretary specifically denies any implication in the Petitioners’ averments in paragraph seven that the de-certification of the WINvote system in any way demonstrates that the Secretary has failed to follow and enforce the Election Code. It is admitted on information and belief that Northampton County, one of the three counties that had previously used the AVS WINVote system, has agreed to procure or is planning to procure a DRE voting system manufactured by Sequoia Voting Systems, Inc., which is certified for use in Pennsylvania. It is denied that Lackawanna County is currently planning to procure a DRE voting system. To the contrary, on information and belief, the Secretary avers that the Lackawanna County Board of Commissioners and Board of Elections decided on or about March 4, 2008, to procure a paper-based optical scan electronic voting system for use in all elections, beginning with the April 22, 2008 General Primary. It is admitted that six of the DRE voting systems, which the Secretary properly certified, will be used in elections in Pennsylvania in the April 2008 General Primary and the November 2008 General Election – as they have been used largely since the elections in the Commonwealth since 2006 – absent intervention by the Court.

By way of further response, the counties that use the DRE voting systems could, nevertheless, decide to procure alternative certified systems. It is also specifically denied, as a conclusion of law, that Petitioners are entitled to obtain their requested relief. To the contrary, Petitioners are not entitled to any relief. The Secretary properly certified the six DRE voting systems at issue in this action, and it is specifically denied that there has been a “flood of evidence” undermining this proper certification. It is also denied that 2008 is a particularly “important” election year, as the Secretary deems every election in every year to be important to his office, the Commonwealth, and its citizens. By way of further response, the Secretary notes that the November 2008 General Election is a Presidential election and, therefore, he reasonably anticipates increased voter turnout. The Secretary further responds that a General Election involving a Presidential race would not be the optimal time for over 50 counties of the Commonwealth to have their first experience with a new voting system with which poll workers and other local elections officials, as well as voters, are unfamiliar. Finally, this Court’s May 11, 2007 Order speaks for itself, and the Secretary denies Petitioners’ characterizations thereof.

8. Denied. The Secretary is not obligated to respond to Petitioners’ description of the relief they would seek if the Court lifts the stay. The Secretary denies as entirely speculative Petitioners’ assertion that the discovery and trial in this matter could be completed before July 2008. For example, the parties will need to complete discovery, engage in motion practice and litigate a complex trial involving review of the Secretary’s certifications of six DREs and related software. Therefore, it is further denied as an unsubstantiated forecast that, if this matter were to proceed to a trial on the merits, Petitioners would obtain relief that would result in an order by this Court that would require the counties to arrange to use non-DRE voting systems. Finally, it is specifically denied that any Pennsylvania county is currently using an

“illegal” DRE voting system. To the contrary, every DRE voting system currently certified for use in Pennsylvania has been properly certified by the Secretary in accordance with the Election Code. By way of further response, the Secretary notes that that all voting systems have imperfections, including the alternatives Petitioners favor.

WHEREFORE, Respondent Pedro A. Cortés, Secretary of the Commonwealth, respectfully requests this Court to deny Petitioners’ February 22, 2008 Motion to Dissolve Stay of Proceedings and to set a Discovery and Trial Schedule.

HANGLEY ARONCHICK SEGAL & PUDLIN

Dated: March 7, 2008

By: 

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VERIFICATION

I, Harry A. VanSickle, Commissioner of the Bureau of Commissions, Elections and Legislation of the Pennsylvania Department of State, hereby verify that the facts and allegations previously not of record and set forth in the foregoing Answer Of Respondent Pedro A. Cortés, Secretary Of The Commonwealth, To Motion To Dissolve Stay Of Proceedings and to Set a Discovery and Trial Schedule and in the accompanying Memorandum of Law in Opposition to Petitioners' February 22, 2008 Motion to Dissolve Stay of Proceedings are true and correct to the best of my personal knowledge, information and belief. I understand that the statements in the foregoing pleading are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

Dated: March 6 , 2008


Harry A. VanSickle