

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2008-002704

11/14/2008

HON. EDWARD O. BURKE

CLERK OF THE COURT  
L. Nixon  
Deputy

MARICOPA COUNTY LIBERTARIAN PARTY    MICHAEL KIELSKY

v.

HELEN PURCELL, et al.

COLLEEN CONNOR

RHONDA L BARNES  
WILLIAM S GATES

MINUTE ENTRY

The court has had the issues raised in connection with Plaintiff, The Maricopa County Libertarian Party's Second Amended Petition for Writ of Mandamus and Writ of Injunction under advisement and, having heard the testimony of the witnesses and the arguments of counsel, issues the following ruling.

Findings of Fact

1. Plaintiff is a political party that is entitled to continued representation on the state ballot and is therefore entitled to participate in the hand count validation of electronically counted ballots required by A.R.S. § 16-602(C)(1).
2. Plaintiff contends that the hand count conducted by the Maricopa County Director of Elections was invalid for the following reasons:
  - A. Plaintiff was excluded from the random selection of the precincts and races to be counted.

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- B. The random selection of the precincts and the races to be counted was done before the complete count of the ballots from all the precincts in violation of A.R.S. § 16-602(C) (1).
  - C. The random selection of the precincts and the races to be counted was done in the reverse order in violation of A.R.S. § 16-602(C) (1) and (2).
  - D. The hand count was not performed at the central counting center as required by A.R.S. § 16-602(C) (1).
  - E. The ballots from the precincts selected were not kept under video surveillance during the hand count process.
3. Plaintiff seeks the following relief:
- A. An injunction invalidating the hand count;
  - B. An injunction ordering Maricopa County to accept those individuals designated by Plaintiff as its election board members;
  - C. An injunction ordering Maricopa County to require participation by those persons designated by Plaintiff in the precinct and race selections;
  - D. An injunction ordering Maricopa County to not begin the precinct and race selections until all ballots have been counted;
  - E. An injunction ordering Maricopa County to conduct the hand count again;
  - F. Awarding Plaintiff its attorneys' fees and costs.
4. On August of 2008, the Elections Department conducted a meeting of political party chairmen to discuss the procedures to be followed during the 2008 general election. Representatives from the Democratic, Green and Republican parties attended. Although invited, Plaintiff sent no representative to the meeting. The procedures included how to designate the parties' representatives for the hand count which were a designation in person by the party chairman on the date of the hand count or by a letter signed by the party chairman.
5. Plaintiff designated observers for the hand count but did not submit a signed letter designating a representative for the selection of the precincts and races for the hand count nor did the chairman appear in person to either participate or orally designate a representative. There was testimony that a letter had been prepared but the witness admitted that Plaintiff's chairman had not signed the letter and it was not offered in evidence.
6. Plaintiff objected to not being included in the precinct and race selection processes; the selection of the precincts and races before all the ballots had been counted; and

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the removal of the ballots to be hand counted to the Sheriff's Training Facility. Plaintiff's objections were not allowed by the Elections Department.

7. The hand count was conducted over a period of two days in the Sheriff's Training Facility, which, based on the testimony presented, the court finds was a secure facility although it did not have video cameras.
8. One of Plaintiff's observers, Edward T. Villejas, attended the hand count. The first day he arrived 5-10 minutes late and all the spaces for the counters had been filled when he arrived. On the second day he was asked to participate in the count and did so for the entire day. He observed no irregularities in the hand count process during its two days.
9. James Marsh, another of Plaintiff's representatives, also observed the hand count and testified to no irregularities in the counting process itself.
10. In one group of the hand count there was a variance from the machine count of 1/100<sup>th</sup> and in the other a variance of 3/100ths, which validated the machine count.
11. The Director of Elections testified that the room in the central counting station would not accommodate the 92 counters and her staff for the hand count as the room only allowed 48 persons to be in it under the fire code.
12. She also testified that the Sheriff's Training Center had been used for the hand count for the past five elections and that not only was the Secretary of State's office aware of its use but its representatives had been present during some of these hand counts.
13. She also testified that she followed the Secretary of State's Manual (Exhibit 1, pp.3-4) in selecting the races to be counted before the precincts were selected because if the precincts are selected before the races you could end up with precincts in which the races that are later selected were not run.
14. The Secretary of State's Manual conflicts with A.R.S. § 16-602 (C) (1) and (2) in this regard.
15. She further testified that the precincts and races were selected before all the ballots were counted because ten precincts sent in data packs that could not be read and that in the press of time she proceeded before manually counting those precincts, even though it would only have taken two to three hours to have manually counted them and she was well within the 24 hour requirement to begin the hand count. Had one of

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the uncounted precincts been randomly selected she would have manually counted those ballots before the hand count.

16. Finally, she testified that the County's interpretation of the law regarding video camera surveillance applied only to the custody of ballots in the central counting center and not to the hand count itself.

Conclusions of Law

1. When there is a conflict between an election statute and a regulation of the Secretary of State interpreting that statute the statute governs. Martens v. Industrial Com'n of Arizona, 211 Ariz. 319, 322, 121 P.3d 186 (App. 2005).
2. A.R.S. §16-602(C) requires that the parties randomly select the precincts before the races are selected. Although this can result in impracticalities when a race is selected that is not run in one or more of the precincts selected, the court finds that the County violated this provision of the statute. It is up to the legislature to rewrite the statute if it is impractical, not the court or the county.
3. Plaintiff was not entitled to have a representative participate in the selection of the races and precincts to be hand-counted because its chairman did not designate a representative in writing or orally on the day in question.
4. A. R. S. §16-602(C) requires the hand count to be performed at the central counting center.
5. A.R.S. §16-621(D) requires that the custody of all ballots remain under the scrutiny of a video camera at all times that they are in a tabulation room in the counting center, including during the hand count.
6. There is no provision of law that provides for a recount of the hand count of ballots required by A. R. S. §16-602(C).
7. The County's failure to strictly comply with the statutes in this case does not require the court to exercise its equitable power to order a recount.

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Discussion

In Barrera v. Superior Court, 117 Ariz. 528, 573 P.2d 928 (App. 1977) our Court of Appeals pointed out that a recount did not exist at common law and the granting of such a right is in the discretion of the legislature. The legislature has not provided for a recount of the hand count required by A. R. S. §16-602(C).

The court presumes, but does not decide, that if it found blatant misconduct or fraud that affected the outcome of one or more of the elections its equitable powers would allow it to order a recount but that is not the case here. Plaintiff produced no evidence of any fraud, misconduct or irregularity that affected the outcome of any contest. Plaintiff's request for a recount to assure the electorate that there was honesty and transparency in the process without proof of any irregularity is precisely what the court rejected in Barrera.

As to the specific irregularities alleged by Plaintiff the court finds first that while the statute requires the precincts to be randomly selected before the races are selected, it makes more sense practically for the races to be selected first as the Secretary of State's manual directs. The alleged violation of the statute is legally de minimus at best and not something that requires a recount.

Second, the Elections Department randomly selected the precincts and races before the ballots from the ten precincts with technical problems were counted which violated the statute and which the elections director admitted in hindsight probably should not have been done. Because the department was prepared to count the ballots in any of the ten precincts had they been randomly selected and none was the court finds no reason to force the county to repeat the process.

Third, the Elections Department was faced with a quandary in regard to where the hand count should take place. The Election Department violated the statute by conducting the hand count at a place other than the central counting station. If the legislature meant to allow remote counting stations to be used for the hand count, it could easily have pluralized the term "counting center." However, if the hand count had been conducted at the central counting station, the fire code would have been violated, arguably placing lives in danger. The court is satisfied with the steps the Election Department took to assure the security and integrity of the process in using the Sheriff's Training Department. This is a situation the legislature could address at least for the two largest counties in the state, or Maricopa County could find a larger facility to designate as its central counting station. The court finds nothing in the procedure used to justify a recount.

Finally, A.R.S. §16-621(D) requires that the custody of all ballots remain under the scrutiny of a video camera at all times that they are in a tabulation room in the counting center.

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When ballots are taken out of the central counting station to be hand counted the court finds that they are required to be under video surveillance, because they are still in the custody of the Director of Elections. Because the ballots were sealed in shrink wrap, followed to the Sheriff's Training Center by one of Plaintiff's representatives, sealed in a room that was not unsealed until representatives of the political parties were present, were counted in the presence of the political parties including Plaintiff, and no irregularity with regard to them has been shown this is not a reason to order a recount.

All the parties agree that the integrity and transparency of the election process is paramount. An election department must strive to comply as closely as possible with the statutes that pertain to its duties. The court finds that in a county the size of Maricopa perfect compliance with the statutory electoral scheme, while desirable, is not possible due to time, space, the practicalities of the electoral process and the number of persons involved.

Plaintiff has argued that while perhaps none of the statutory violations standing alone requires a recount, taken together they cast sufficient doubt on the integrity of the process to require a recount. The court disagrees. It must be remembered that the hand count was of ballots that had already been mechanically counted and recorded. The hand count is done to validate the machine count. It did that overwhelmingly. Because the court finds that the irregularities Plaintiff complains of had absolutely no effect on the outcome of any contested race there are no grounds upon which to order a recount and to do so in these circumstances would be exalting form over substance.

Plaintiff's Second Amended Petition For Writ of Mandamus and Writ of Injunction is DENIED and judgment shall be entered for the Defendants.