

STATE OF RHODE ISLAND
SUPREME COURT

| | | |
|--|---|----------|
| CARLOS TOBON, | : | |
| | : | |
| Petitioner, | : | |
| | : | |
| v. | : | |
| | : | |
| RHODE ISLAND BOARD OF ELECTIONS, | : | C.A. No. |
| and FRANK J. REGO, | : | |
| FLORENCE G. GORMLEY, | : | |
| RICHARD H. PIERCE, | : | |
| MARTIN E. JOYCE, JR., and | : | |
| WILLIAM E. WEST, | : | |
| in their official capacity as Commissioners, and | : | |
| WILLIAM SAN BENTO, Jr. | : | |
| | : | |
| Respondents | : | |

PETITION FOR WRIT OF CERTIORARI

The solitary reason for this Petition is to ensure the accuracy of the results of the Representative District 58 Democratic Primary. To date, the count from election night and three separate recounts by the Rhode Island Board of Elections (“BOE”) have generated four different results – despite using the same electronic ballot reader for tabulation of mail ballots. The third recount resulted in Respondent William San Bento having a one vote advantage over Petitioner Carlos Tobon.

There was also at least one ballot cast at the Nathaniel Greene polling place for which there is not a corresponding ballot application, so that there is no way to ascertain whether a legitimately registered voter cast that ballot or not. Moreover, disquieting questions have arisen regarding the manner with which certain mail ballots have been treated that post-date the BOE recounts and the administrative hearing regarding those recounts.

Given these facts, which are undisputed, no one can plausibly maintain any confidence in the accuracy of the official results of this Primary. Petitioner Carol Tobon therefore seeks

immediate relief in the form of an Order from this Court compelling the Board of Elections to conduct a review of the qualification of all voters who cast mail and provisional ballots, and to conduct a manual recount of all precinct, mail and provisional ballots cast in the Representative District 58 Democratic Primary.

Background

The facts in support of this Petition are not in dispute.

a. Four Separate Counts Produced Four Different Results.

The Representative District 58 Democratic Primary (the “Primary”) was held on Tuesday, September 11, 2012. The results for the Primary on election day were:

| | |
|-----------|------|
| San Bento | 543 |
| Tobon | 540 |
| Total | 1083 |

(BOE Tr., p. 51 & Ex. 1).¹

Tobon timely requested a recount, which the Board of Elections held on September 17, 2012. That recount was accomplished through the use of BOE electronic ballot readers at BOE headquarters. For mail ballots, BOE used its “IV-C” high speed ballot reader. (*Id.*, p. 32). This recount included three provisional ballots (included within the mail ballots) that were not counted on election day. (*Id.*, p. 47). The results of the first recount were:

| | |
|-----------|------|
| San Bento | 543 |
| Tobon | 543 |
| Total | 1086 |

(*Id.*, p. 44).

It should be noted that the addition of the three provisional ballots does not account for the three vote addition to Tobon’s total on this recount. Rather, Robert Rapoza (“Rapoza”), BOE Director of Elections, testified inconsistently at the administrative hearing in this matter that

¹ Tobon has filed the original transcript of the BOE hearing on his request for a manual recount simultaneously with the Petition.

Tobon received two out of the three provisional votes, and later testified that one ballot was cast for each candidate, with the third ballot apparently not containing a vote for either. (*Compare id.*, p. 49 *with id.*, p 57). BOE documents also reflect differing results – a print-out of the BOE database shows that each candidate received one provisional vote, (*see id.*, Ex. 2), whereas the BOE “Recount Results” tabulation shows that Tobon received two votes from provisional ballots, and San Bento received one. (*See id.*, Ex. 1). Moreover, as discussed to follow, the first recount was missing one mail ballot that was included in the election day count.

BOE discovered that the first recount was flawed, in that BOE had logged a total of 50 mail ballots, and yet only counted 49 mail ballots in the first recount. (*Id.*, p. 35). BOE staff members apparently located the missing mail ballot, (*id.*, 36), although the administrative record is unclear as to where this ballot was found, how BOE maintained its chain of custody regarding this ballot, or how it determined that the “found” ballot was, in fact, the same as the “missing” ballot.

The second recount related to only mail ballots, which were again read by the high speed reader. The results of the second recount were:

| | |
|-----------|------|
| San Bento | 545 |
| Tobon | 543 |
| Total | 1088 |

(*Id.*, p. 44). San Bento gained two votes through re-reading 49 mail ballots and adding an additional “found” mail ballot. In other words, a change of two votes was generated from the addition of one ballot to the pool of mail ballots, meaning that the reader interpreted one other ballot in a manner different from the first recount.

For reasons unstated on the administrative record, BOE then conducted a third recount of the mail ballots. The results of third recount were:

| | |
|-----------|------|
| San Bento | 544 |
| Tobon | 543 |
| Total | 1087 |

(*Id.*, pp. 49-50). Reading the same 50 mail ballots that were included in the second recount, San Bento lost one vote.

In sum, the four tabulations of votes resulted in the following disparate results:

| | <u>Election Day</u> | <u>1st Recount</u> | <u>2nd Recount</u> | <u>3rd Recount</u> |
|-----------|---------------------|-------------------------------|-------------------------------|-------------------------------|
| San Bento | 543 | 543 | 545 | 544 |
| Tobon | 540 | 543 | 543 | 543 |
| Total | 1083 | 1086 | 1088 | 1087 |

These variations are attributable, in part, to the differing results for mail ballots that the speed reader generated:

| | <u>Election Day</u> | <u>1st Recount</u> | <u>2nd Recount</u> | <u>3rd Recount</u> | <u>With Prov. Ballots</u> |
|--------------------------|---------------------|-------------------------------|-------------------------------|-------------------------------|---------------------------|
| San Bento | 27 | 26 | 28 | 27 | 28 |
| Tobon | 18 | 18 | 18 | 18 | 19 |
| Over-votes | 0 | 0 | 0 | 0 | 0 |
| Under-votes ² | 5 | 5 | 4 | 5 | 5 |
| Total | 50 | 49 | 50 | 50 | 52 |

(*Id.*, Exs. 1 & 2). The last column reflects the BOE computer print-out of the BOE database of mail ballots with the provisional ballots included. (*Id.*, pp. 56-57 & Ex. 2). The administrative record reflects that three provisional ballots contained votes for this Primary, (*id.*, p. 49 & Ex. A), but does not contain any explanation as to why the BOE database only includes two of those ballots.

The third recount of mail ballots and inclusion of provisional ballots do not explain fully the difference between the results on election day and in the third recount. Rather, Tobon's vote total also increased because the recount of precinct ballots resulted in an additional vote for him

² An over-vote is where a ballot contains more votes than is allowed for a specific office. In this case, an over-vote would exist where a voter marked a vote for both San Bento and Tobon. An undervote is generally where a voter has not marked any candidate for a specific office. An over-vote or under-vote results in a "no vote." (*Id.* at 39).

from Precinct # 2606. (*Id.*, Ex. 1). The results of the third recount, consequently, are not identical to the results from election day.

Tobon requested a manual recount of all ballots, including precinct, mail and provisional ballots. The BOE held a hearing on that request on September 19, 2012. At that hearing, Rapoza acknowledged that the electronic readers inconsistently read ballot markings:

Attorney Marcaccio: And based upon your experience, could you share with us what would account for a change in the votes on the ballots being sent into the same machine?

A. *Without looking at the ballots?*

Q. Well –

Commissioner Gormley: Just general reasons why it –

A. These ballots have gone through the machine numerous times, and there may have been a mark in the pathway that was not picked up on the second reread but was picked up on the fourth reread or vice versa.

Q. Now, when you say the pathway, are you talking about the blank between the head and the tail of the arrow?

A. Yes, I am.

(*Id.*, pp. 41-42 (emphasis added)). In other words, the best way with which to determine whether the machine read the ballot correctly is by “looking at the ballots.”

The BOE denied Tobon’s request for a manual recount. BOE’s position was that a manual recount was not necessary based on its inaccurate conclusion that “the last recount is exactly the same as what was done on election night.” (*Id.*, p. 80). One commissioner acknowledged the inconsistent performance of electronic ballot readers -- “Sometimes they read. Sometimes they don’t.” – but incongruously found that the disparate results that the electronic readers produce were not error. (*Id.*, 83). Another commissioner, apparently resigned to the fact that a machine reader would never provide fully accurate results, stated that “I think that we have

reached as much certainty on the numbers as we will ever reach.” (*Id.*, p. 85). At bottom, BOE’s position is that error built into the system through the use of undisputedly inaccurate electronic ballot readers is acceptable.

b. One Ballot Was Cast By An Unknown Voter.

Further clouding the Representative District 58 Democratic Primary, one ballot at the Nathaniel Greene polling place (Precinct # 2064) was cast by an unknown voter. Specifically, the number of ballots cast at that polling place exceeds the number of ballot applications. Kenneth McGill of the Pawtucket Board of Canvassers testified that only 284 ballot applications were collected for the Primary at this polling place, one less than the total number of 285 ballots cast. (*Id.*, p. 58).³

The BOE thereafter conducted an audit of all of the precincts at which primary elections were held. The results of that audit reconfirmed McGill’s testimony, namely that one vote was cast for which there is no coordinate ballot application. Raymond Marcaccio, BOE counsel, confirmed this fact in an e-mail dated September 27, 2012, which is attached hereto as Tab A.

As a result of the absence of a ballot application for this unknown voter, it is impossible to tell whether the person casting this extra ballot was qualified to vote in the Primary or not.

BOE did not substantively consider this issue. One commissioner stated that “I’m concerned about the issue of the application, but haven’t heard any testimony on that yet,” to which Tobon’s lawyer responded “I’d be more than willing to tender that.” (*Id.*, p. 89). BOE nonetheless moved to an immediate vote on Tobon’s protest and request for manual recount, which it denied.

³ Petitioner marked the “Official Election Certificate” for Precinct # 2604 as Exhibit 1 for Identification Only, but never moved to make this document a full exhibit at the administrative hearing. That document shows that Precinct # 2604 received 600 ballots, of which 315 were not used or voided, leaving 285 ballots that were used. The failure to submit this document as a full exhibit is inconsequential, as the parties agree that one additional ballot was cast at this polling place for which there is no ballot application. *See, e.g.* Tab A.

c. Significant Issues Regarding Treatment Of Mail Ballots Exist.

Disquieting issues have arisen since the BOE administrative hearing regarding the treatment of mail ballots. Specifically, BOE counted the mail ballot of Lelly Jaramillo, despite the fact that Ms. Jaramillo is a registered Republican who failed to disaffiliate in time to vote in the Democratic primary. Additionally, Mattar Sosseh's ballot was voided by BOE because he was registered in Woonsocket. Mr. Sosseh filed a change of address form with the Pawtucket Board of Canvassers, but because his first and last names were transposed on his Pawtucket application, his name was not removed from the Woonsocket voter rolls. In fairness, there is no administrative record regarding these discrepancies because they were not discovered until after the September 19, 2012 administrative hearing. Nonetheless, Tobon's understanding is that the BOE does not dispute the facts recited herein.

Standard of Review

A common law Petition for Writ of Certiorari is the correct avenue to seek redress from decisions of the BOE. *See, e.g. Buonanno v. DiStefano*, 430 A.2d 765, 767 (R.I. 1981); *see also Van Daa, v. DiPrete*, 560 A.2d 953, 954 (R.I. 1989).

"[T]his Court's review on writ of certiorari" is "to examin[e] the record to determine if an error of law has been committed." *Crowe Countryside Realty Associates, Co., LLC v. Novare Engineers, Inc.*, 891 A.2d 838, 840 (R.I. 2006) (quoting *State v. Santiago*, 799 A.2d 285, 287 (R.I. 2002)). "Questions of law ... are not binding upon the [C]ourt and may be reviewed to determine what the law is and its applicability to the facts." *State v. Faria*, 947 A.2d 863, 867 (R.I. 2008) (quoting *Hometown Properties, Inc. v. Rhode Island Department of Environmental Management*, 592 A.2d 841, 843 (R.I. 1991)).

Here, where the facts are undisputed, the only issue is whether BOE correctly applied the law to those facts.

Argument

“The foundation of our ‘democratic process’ is the right of all qualified voters to cast their vote effectively.” *Ayers-Schaffner v. DiStefano*, 37 F.3d 726, 729 (R.I. 1994) (discussing Warwick School Committee election). As a result, “the overriding purpose of the election law is to give effect to the voter’s choice.” *Buonanno*, 430 A.2d at 770.

Most significantly in this case, “each valid vote should be counted.” *Id.* That undisputedly has not happened in this election. Rather, due to the acknowledged imprecision of the BOE electronic ballot readers, votes were recorded differently on different passes through the reader. Specifically, each count or recount of the ballots produced a different result – despite the fact that the exact same ballots were inserted into the readers (subject to limited exceptions explained above). The result is that certain ballots were counted as a vote during one count, but were recorded as an under-vote in another recount. (*See* BOE Tr., Ex. A). This issue arose with mail ballots throughout all three recounts, and with the ballots cast at Precinct # 2606. (*See id.*)

Adding to these difficulties, the results of provisional ballots are also at issue. It is entirely unclear from the contradictory BOE records and Rapoza’s testimony whether BOE counted two or three provisional ballots. (*See id.*, pp. 49 & 57 & Ex. 2).

The same issues attach with respect to the “phantom” voter at Precinct # 2604. Due to the lack of a ballot application, it is impossible to determine whether that ballot was submitted by a qualified voter, or by someone not qualified to vote in the Primary or under other circumstances that would invalidate this ballot.

Additionally, Tobon respectfully suggests that this Court should be concerned about apparent irregularities regarding the handling of certain mail ballots, outlined above, that should be subject of scrutiny by BOE.

Despite BOE's suggestions to the contrary, this Court does not impose the burden of absolute certainty on a person seeking to challenge elections results under the circumstances that present themselves here:

[O]ne cannot determine with absolute certainty what the result of the election would have been but for the malfunctioning of a voting machine. Thus, the contestant should not have to prove that the result would have been in fact different but for the malfunction. However, the contestant may not rely upon speculation to upset an election result. A happy balance is struck by requiring the contestant to show that the irregularities were sufficiently large in number that the probability that the result would be changed by a shift of or invalidation of the questioned votes.

Buonanno, 430 A.2d at 770.

Like *Buonanno*, no one can state with certitude what the results of this election would have been but for the mistakes that the electronic ballot machine made and but for the error in failing to ensure that the verifiable qualifications of all voters at Precinct # 2604 were preserved. The effects of these discrepancies in this Primary are manifest. But for any one of these problems, the likelihood is that the results of the Primary would have been different, given that the final tainted BOE tally shows a difference of one vote between the candidates.

Tobon consequently requests that this Court remand this matter to BOE with an Order that BOE shall conduct an audit of all mail and provisional ballots to determine the eligibility of voter submitting those ballots, and also that BOE shall conduct a manual recount of all precinct, mail and provisional ballots cast in this Primary.

This result is consistent with previous rulings of this Court in other elections cases wherein voting irregularities gave rise to questions regarding the accuracy of the election result. Specifically, this Court ordered BOE to conduct a manual recount of ballots in *Alves v. Rhode Island Board of Elections*, No. 08-233, and allowed access for a manual review of all ballots in *Larisa v. Rhode Island Board of Elections*, No. 06-328.

BOE's position appears to be that no further recount is necessary because the results of the third recount were the same as the results from election day. As a factual matter, that contention is not accurate, in that the BOE recount of precinct ballots differed from its election day count by one vote in Precinct # 2606. The mail ballot tabulation was consistent between election day and the third recount. However, BOE counted mail ballots four separate times (election day and three recounts). Those counts generated three separate, differing results. In other words, the best that BOE can show is that its mail ballot count was consistent fifty per cent (50%) of the time – hardly an acceptable demonstration that the official results of this Primary are accurate.

At the administrative hearing, one BOE commissioner suggested that a manual recount may be less accurate than the machine recount. In fairness, this contention appears to be baseless. BOE routinely reviews ballots “by hand” during recounts, including in this recount, where the record shows that BOE hand-reviewed twelve ballots. (*See* BOE Tr., Ex. A). Moreover, this Court has previously ordered manual recounts in similar circumstances. *E.g.*, *Alves v. Rhode Island Board of Elections*, No. 08-233. Otherwise, there would be no method with which to review the results of a faulty machine count.

Relatedly, BOE has raised the issue that the recount statute, R.I.G.L. § 17-19-37.1, only allows for a machine recount. That result is non-sensical where, as here, the machine count is undisputedly inaccurate. Moreover, that statutory section does not prohibit manual recounts. Rather, that statute allows for a candidate within a minimum margin of votes to seek successive recounts through the local board of canvassers and BOE. *See* R.I.G.L. § 17-19-37.1(1) & (3). If the results of those recounts leave the election within the minimum margin, the candidate “may request a recount of the votes cast at each precinct” R.I.G.L. § 17-19-37.1(3). Significantly, the statute expressly specifies that the recount at the board of canvassers must be by “re-feeding

of the computer ballots ... into the optical scan voting equipment,” and that BOE must conduct its initial recount “by re-reading the programmed memory device or devices ...,” whereas the statute does not mandate the method by which the follow-on precinct recount should be conducted, R.I.G.L. § 17-19-37.1(1) & (3), directly implying that BOE (and this Court) may use its discretion to determine an appropriate recount procedure.

BOE has also expressed concern that an Order compelling a manual recount in this election would serve as precedence in future cases, thereby potentially requiring a manual recount in a state-wide election. This concern is badly overstated. This Court has always reviewed potential election irregularities on a case-by-case basis. Most importantly, this Court has always endorsed or crafted remedies that directly address the specific voting irregularity at issue. For instance, in *Buonanno*, this Court endorsed a special election limited to those polling places whereat faulty voting machines had failed to record the vote correctly. 430 A.2d at 767, 771-72.

A full manual recount in this election is hardly onerous. The total number of ballots is 1168, so that a recount could be accomplished in half a day. (BOE Tr., Ex.A). However, consistent with *Buonanno*, a plausible remedy in this matter would be a manual recount of that segment of the ballots that are most problematic, namely the mail and provisional ballots and the precinct ballots from Precinct # 2606. Such a recount would likely involve 203 ballots (150 precinct ballots; 53 mail and provisional ballots). In the undersigned’s experience with other recounts at BOE, that recount would take an hour or less.

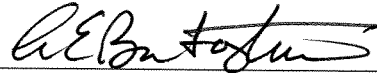
Conclusion

Allowing the results of an election to turn on the vagaries of imprecise electronic ballot readers and an unknown voter is entirely antithetical to constitutional norms requiring that each legitimate vote count. This Court should therefore grant Tobon’s Petition for Writ of Certiorari,

and order that BOE: (1) conduct an audit of all mail and provisional ballots to determine the qualification of each voter submitting those ballots; and (2) conduct a manual recount of all precinct, mail and provisional ballots, in the Representative District 58 Democratic Primary.

CARLOS TOBON

By his Attorney,



Armando E. Batastini (#6016)

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On Behalf of the Rhode Island ACLU

Dated: October 1, 2012

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of October, 2012, I served the within Petition via .pdf and first-class mail, postage prepaid to:

Raymond A. Marcaccio, Esq.
55 Dorrance Street, Suite 400
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TAB A

Ryone, MaryAnn

From: Ray Marcaccio <ram@om-rilaw.com>
Sent: Thursday, September 27, 2012 11:46 AM
To: Batastini, Armando
Cc: 'Robert Kando'
Subject: RE: Rep. Dist. 58

Hello Armand,

Just to follow up on our phone conversation, I contacted Bob Kando this morning immediately after you made your verbal request to be present at the audit. He informed me that the audit began first thing this morning and was completed shortly thereafter. An audit is performed for each of the 400 precincts that were used during the primary election. It was conducted by the Board staff and consisted of a comparison of the sealed unused ballot applications with the number of applications that were recorded for each precinct. I understand that after the audit was performed, there still remains one missing ballot application for one of the precincts.

Please let me know if you have any questions or need anything further.

Thank you,

Ray

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-----Original Message-----

From: Batastini, Armando [mailto:abatastini@nixonpeabody.com]
Sent: Thursday, September 27, 2012 10:29 AM
To: 'rkando@elections.ri.gov'; 'ram@om-rilaw.com'
Subject: Rep. Dist. 58

Bob and Ray --

Please find attached a letter that is being delivered this morning.