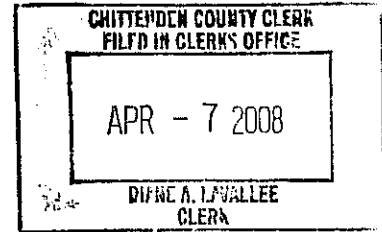


STATE OF VERMONT
CHITTENDEN COUNTY, SS.

CHITTENDEN SUPERIOR COURT
DOCKET NO. S0393-08 CnC

IN RE CONTEST OF MARCH 4, 2008
ELECTION, CITY OF BURLINGTON, WARD 7

DECISION AND ENTRY ORDER



Petitioner Jean O'Sullivan's motion for reconsideration, and for amendment of the court's judgment of dismissal herein, VRCP 59(e), is **denied**.

First, Leopold is the proverbial red herring in this entire matter. The court relied entirely on the testimony of Ben Pacy, to conclude that the election procedure violations which did occur here, were not infected by, or the result of any "culpable intent" on Mr. Pacy's part, nor by any involvement of Mr. Leopold. See *Putter v. Montpelier Public School System*, 166 Vt. 463, 468 (1997) (cits. omitted; emphasis added). Mr. Pacy in his extensive testimony, and detailed account of what occurred was appropriately chagrined but absolutely forthright, and entirely credible. A long-time City Parks Department employee, only recently promoted to the position of Assistant City Clerk, he was suddenly faced with a situation for which he had been inadequately, and wholly unprepared; his perception, and understanding that he was required to resolve the ballot "discrepancy" which seemed apparent to him – albeit mistaken – was a good faith mistake committed under exigent circumstances. He did not consult with, nor was he influenced in any way by Leopold. Mr. Pacy had no intent to cause any harm to the election results, or election process. Whether Leopold was credible, or not, played no part in the court's ultimate decision, and it would serve no useful judicial purpose to re-open the evidence to explore *post hoc* matters arguably related thereto.

Second, there is still no evidence that Mr. Pacy did not in fact return all ballots, and other materials to the box each time after he broke the seal and opened it, and thus no evidence that the ultimate election result for the Ward 7 council race, as recounted by the City Council on 3/10/08, was affected. The court thinks it inappropriate, and declines to engraft onto the applicable legal principles here the so-called "safety statute presumptions" otherwise applicable in tort and negligence cases. *Cf., e.g., Barber v. LaFromboise*, 2006 VT 77, ¶ 21, 180 Vt. 150, 161-62. And, even if the court were to do so, the City would have met its burden of coming forward with evidence to rebut the "presumption" (whatever that might be in this context) through the testimony of Mr. Pacy.

Third, the court previously stated, and still declines to consider any further relief, or remedy as necessary or appropriate here, beyond the Petitioner's

primary request for a new Ward 7 election, even if arguably authorized under 17 V.S.A. §§ 2603 or 2617. To go beyond the specific remedies expressly allowed by the Legislature, where the election laws already supply highly detailed procedures to be followed, and to impose such restrictions only on the City of Burlington (but no other town or municipality), would present a substantial risk of judicial entanglement into the political process, and a substantial risk of improper encroachment on the required separation of powers. Cf. e.g., *Kennedy v. Chittenden*, 142 Vt. 397 (1983) (*per curiam*). The apparent post-election involvement of the Secretary of State, as alluded to in Petitioner's supplemental memorandum (the actual letter sent by the Secretary to the City was not included with the materials provided to the court), actually argues against re-opening this case, not in favor.

The court also perceives the City's continued reluctance to admit once-and-for-all that a violation (indeed, three separate violations) of 17 V.S.A. § 2590(c) did occur, and that the City Charter provides no safe harbor, as nothing more than overly cautious lawyering, if not unnecessary spin control, given both the political context and the possibility (however slight) of criminal charges for real election fraud. The court is not persuaded that any other remedy is necessary going forward, even absent the jurisprudential hurdles which are paramount, because the court is fairly confident that behind closed doors the City, and its attorneys understand completely the court's findings and conclusions, as well as the apparently confirmatory letter from the Secretary of State.

Fourth, and finally, the court is perfectly capable of deciding for itself when its "dignity" has been improperly "affront[ed]," without the assistance of counsel in that regard. The court simply did not rely, at all, on whether the City Attorney's office, or Leopold, or anyone – clearly, Mr. Pacy did not – had, or had not consulted with the Secretary of State, whether before, during or after the precipitating events, as to the propriety of opening the ballot box, or on any representations(s) to that effect. If anyone truly feels an alleged violation of the Code of Professional Ethics must be pursued, that is for someone else to decide, but it had no bearing on the court's decision, and is no grounds to re-open it.

IT IS SO ORDERED, at Montpelier, Vermont, this 7th day of April, 2008.


Dennis R. Pearson, Presiding Judge (2d)