

The Honorable John E. Bridges
Monday, May 2, 2005
8:30 a.m.

Siri A Woods
Chelan County Clerk

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CHELAN

Timothy Borders, et al.,

Petitioners,

v.

King County and Dean Logan, its Director of
Records, Elections and Licensing Services, et al.,

Respondents.

v.

Washington State Democratic Central
Committee,

Intervenor-Respondent,

v.

Libertarian Party of Washington State et al.,

Intervenor-Respondents.

No. 05-2-00027-3

**RESPONSE TO WASHINGTON
STATE DEMOCRATIC
CENTRAL COMMITTEE'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT ON
PETITIONERS' "BELATED"
CLAIM OF NON-CITIZEN
VOTERS**

I. INTRODUCTION

The Washington State Democratic Central Committee ("WSDCC") has filed a motion and about 70 pages of supporting material to ensure that the votes of two unquestionably illegal voters are excluded from this election contest (and included in the election vote tally). Petitioners have no interest in keeping people on their list of illegal voters under RCW 29A.68.020(5) that the court determines should have been challenged

1 in advance, pursuant to its February 4 oral opinion, and were not. Thus, in the interest of
2 streamlining these proceedings, Petitioners do not oppose excluding those two votes from
3 the tally of illegal votes litigated in this contest action on the grounds that they were not
4 previously challenged. As explained below, however, Petitioners dispute WSDCC's claim
5 that the initial Petition and Affidavits of Electors did not sufficiently plead this kind of
6 illegal vote. Petitioners further note that WSDCC's arguments about the importance of
7 complete and timely pleading in this contest action support Petitioners' earlier-filed motion
8 to exclude claims WSDCC apparently intends to pursue regarding alleged offsetting errors
9 and illegal votes that WSDCC has never plead.

10 II. ANALYSIS

11 There is no question that the two votes that are the subject of the WSDCC's motion
12 are illegal votes. Article VI, Section 1 of the Washington Constitution provides:

13 QUALIFICATIONS OF ELECTORS. All persons of the
14 age of eighteen years or over who are *citizens of the United*
15 *States* and who have lived in the state, county, and precinct
16 thirty days immediately preceding the election at which they
offer to vote, except those disqualified by Article VI,
section 3 of this Constitution, shall be entitled to vote at all
elections.

17 (emphasis added).

18 That non-citizens are not entitled to vote is fundamental.

19
20 Citizenship is the status accorded those persons entitled to
participate in the act of governing The critical attribute
21 which distinguishes the citizen from the alien is that the
citizen possesses political rights. . . . These political rights
22 include the right to vote, to hold elective office and to serve
as a juror.

23 *Herriott v. Seattle*, 81 Wn.2d 48, 61-62 (1972). *Accord Sugarman v. Dougall*, 413 U.S.
24 634, 649 (1973) ("implicit in many of this Court's voting rights decisions is the notion that
25 citizenship is a permissible criterion for limiting such rights") (citations omitted).
26

1 Following the November 2004 election, Chun Chen and Ming Anderson, two
2 resident aliens, voluntarily stepped forward and identified themselves as having cast votes
3 for Governor notwithstanding the fact that they were not entitled to vote. *See* Draft
4 Transcript of Deposition of Dean Logan, Director of King County Records, Elections, and
5 Licensing Services Division at pp. 200-01, attached as Ex. A to Declaration of Harry
6 Korrell. Petitioners, therefore, included these individuals in their list of votes by persons
7 not entitled to vote. *See* Responses and Objections to Washington State Democratic
8 Central Committee's Second Interrogatories and Third Requests for Production to
9 Petitioner Rossi for Governor Campaign, Ex. B at 34 (Ex. C to Declaration of William C.
10 Rava).

11 WSDCC contends that the votes of these individuals should be excluded from the
12 contest and included in the tally of lawful votes notwithstanding the fact that they were not
13 entitled to vote. WSDCC raises two arguments, addressed in turn below.

14 First, WSDCC contends (wrongly) that "[n]either the Election Contest Petition nor
15 any of the affidavits or declarations filed in support of the Petition made any claim about
16 illegal ballots cast by non-citizens." WSDCC Motion at 3. In fact, both the Petition and
17 the Affidavit of Chris Vance alleged with sufficient certainty:

18 (a) that election officials employed "procedures that
19 resulted in the counting of votes far in excess of the number
20 of lawfully registered electors," Petition § VI.A.1; Vance
Affidavit ¶ 5.a;

21 (b) that "many, potentially thousands, more votes were
22 counted than were cast by lawfully registered voters,"
Petition § VI.B.1; Vance Affidavit ¶ 6.a;

23 (c) that "illegitimate, invalid and/or illegal votes were
cast," Petition § VI.B.9; Vance Affidavit ¶ 6.j; and

24 (d) that "a sufficient number of illegitimate, invalid
25 and/or illegal votes has been given to Ms. Gregoire that, if
26 taken from her, would reduce the number of her legal votes
below the number of votes given to Mr. Rossi." Petition
§ VI.B.10; Vance Affidavit ¶ 6.j.

1 Votes by non-citizens are certainly not votes by persons who are “lawfully registered
2 electors.” See Wash. Const. Art. VI, § 1. They are, rather, “illegitimate, invalid and/or
3 illegal votes.” See *Gold Bar Citizens for Good Government v. Whalen*, 99 Wn.2d 724,
4 729-30 (1983); *Foulkes v. Hays*, 85 Wn.2d 629, 634-35 (1979) (“the term ‘illegal votes’
5 has been held to refer not to fraudulently altered ballots, but to votes ‘cast by persons not
6 privileged to vote’”). The Petition and the Vance Affidavit provided sufficient notice
7 that Petitioners were challenging votes cast by persons not entitled to vote, including the
8 non-citizens who are the subject of this Motion.

9 While WSDCC is wrong that Petitioners did not adequately plead illegal votes,
10 they may be right regarding the importance of the pleading requirements in the civil rules
11 and the contest statute. WSDCC’s position is similar to and supports that taken by
12 Petitioners in their motion to exclude WSDCC’s evidence of offsetting errors and illegal
13 votes, in part on the grounds that WSDCC has failed to file any pleading at all, even though
14 the civil rules require such a pleading by an intervenor. See Petitioners’ Motion in Limine
15 to Exclude Evidence Concerning Previously Rejected Ballots and other “Offsetting Errors”
16 at pp. 8 - 10.

17 WSDCC’s second argument is that Petitioners may not use the votes of non-
18 citizens voters as illegal votes in the election contest if the voters were not challenged prior
19 to or on the day of the election. WSDCC Motion at 4-5. WSDCC relies on this Court’s
20 February 4 oral opinion “that to the extent that petitioners are attacking votes on grounds
21 of voter eligibility or qualifications to vote, the petitioners must first establish that each
22 voter was challenged prior to or on the day of the November 2nd, 2004 general election,”
23 pursuant to RCW 29A.08.810-820. Verbatim Report of Proceedings, Court’s Oral
24 Decision at 21-22.

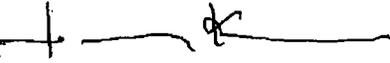
25 RCW 29A.08.810-820 address situations in which a voter’s entitlement to vote is
26 challenged by a third person. Arguably, those sections do not apply to the situation

1 presented here, in which persons who are not entitled to vote raise voluntarily – and admit
2 – the impropriety of their votes. Nonetheless, for purposes of this Motion and these two
3 voters, Petitioners do not contest that, based on the court’s February 4 decision, these two
4 illegal votes should be excluded from Petitioners’ list of illegal votes under RCW
5 29A.68.020(5).



6
7 Respectfully submitted this 20th day of April, 2005.

8 Davis Wright Tremaine LLP
9 Attorneys for Petitioners

10 By 
11 _____
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