

STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
Location: Portland
Docket No.: BCD-AP-16-05

ROBERT GREENLAW, et al.,)
)
)
 Petitioners,)
)
 v.)
)
 SECRETARY OF STATE MATTHEW)
 DUNLAP,)
)
 Respondent.)
)

**ORDER ON PETITION FOR REVIEW
OF AGENCY ACTION**

Petitioners challenge the Secretary of State’s Determination of the Validity of a Petition for Initiated Legislation Entitled: “An Act to Allow Slot Machines or a Casino in York County” (the “Determination”) as unconstitutional, lacking competent supporting evidence, arbitrary and capricious. The Secretary of State opposes and moves to dismiss the Petition. For the reasons discussed below, the Court affirms the Secretary of State’s Determination and denies Petitioners’ appeal.

I. Background

A number of Maine citizens began collecting signatures in 2015 to trigger a statewide referendum on a Direct Petition for Initiated Legislation entitled, “An Act to Allow Slot Machines or a Casino in York County” (the “Casino Petition”). These citizens received approval to circulate petitions in support thereof until June 8, 2017, but had to file completed petitions with the Secretary of State by February 1, 2016 in order for the Casino Petition to be eligible for placement on the November 2016 ballot. On February 1, 2016, approximately 28,667 petitions

containing 91,294 signatures were submitted to the Secretary of State in support of the Casino Petition. (Record Document (“R. Doc.”) 1, Determination ¶ 3.) On that same day, the Secretary of State received two additional citizen initiative petitions, and was already in the process of reviewing two other citizen initiative petitions.¹ (Flynn Aff. ¶ 5.) In order to complete a full

¹ The citizen initiative petitions before the Secretary of State were:

Citizen Initiative Petitions

Date Submitted

Deadline for Secretary of State Determination

Number of Petition Forms

Total Number of Signatures

Raise Minimum Wage

1/14/2016

2/16/2016

13,212

86,438

Background Checks for Gun Sales

1/19/2016

2/18/2016

19,986

84,602

Advance Public K-12 Education

2/1/2016

3/2/2016

19,832

88,242

Legalize Marijuana

2/1/2016

3/2/2016

20,671

99,229

Casino Petition

2/1/2016

3/2/2016

28,667

91,294

Total

102,368

review, the Elections Division of the Secretary of State recruited additional staff from the Division of Corporations, UCC & Commissions, and elsewhere within the Department of the Secretary of State.² (*Id.* ¶ 7.) The staff assisting with the review process were provided written instructions to guide and coordinate their review. (*Id.* ¶ 18; *see also* R. Doc. 20.)

In order for the Casino Petition to be placed before the voters on the November 2016 ballot there must be at least 61,123 valid signatures in support thereof. (R. Doc. 1, Determination ¶ 3); *see also* Me. Const. art. IV, pt. 3, §18(2). On March 2, 2016, the Secretary of State issued the Determination, which found 55,776 signatures submitted in support of the Casino Petition were invalid. (R. Doc. 1, Determination ¶ 3.) This left a maximum of 35,518 valid signatures, 25,605 signatures short of the requisite 61,123.³ (*See id.*) The Secretary of State determined, in pertinent part, that:

35,526 signatures are invalid because the circulator's signature on the circulator's oath or the signature of the notary listed as having administered the oath did not match the signature on file and it could not be determined that the signature was made by that person. (OATSIG) 14,267 of the signatures in this category are also invalid for one or more of the other reasons listed below, primarily for the same reasons listed in paragraphs B and C below.

449,805

² Julie Flynn, the Deputy Secretary of State in charge of the Bureau of Corporations, Elections, and Commissions, asserts that since the Secretary of State's office developed the review process currently in place, it has not received more than three citizen initiative petition filings to review simultaneously, let alone within the same 30-day period. (*Id.* ¶ 6.)

³ The Determination notes that the 33,518 signatures determined valid are subject to further checking for duplicates. (*Id.* ¶ 3.)

(*Id.* ¶ 2(A).) If the Secretary of State erred in his “OATSIG” determination and all of the signatures invalidated solely for that reason are valid, the Casino Petition would still be 7,346 signatures short of the number necessary for placement on the November 2016 ballot.⁴

On March 11, 2016, Petitioners filed the present action challenging the Secretary of State’s March 2, 2016 Determination. Petitioners seek judicial review of the Determination pursuant to 21-A M.R.S. § 905 and further allege that the Determination violated their rights under the Maine and U.S. Constitutions. The administrative record was filed with the Court on March 25, 2016. Petitioners filed their appellate brief on March 30, 2016, the Secretary of State filed his brief on April 4, 2016, and Petitioners replied the following day. Due to time constraints, the Court did not hold oral argument. *See Lindemann v. Comm'n on Governmental Ethics & Election Practices*, 2008 ME 187, ¶ 26, 961 A.2d 538 (“The plain language of the Rule gives the court the prerogative to schedule, or not schedule, oral argument on 80C appeals”).

II. Standard of Review

According to the Maine Revised Statutes, an action brought seeking review of the determination of the Secretary of State on Direct Initiative Petitions “must be conducted in accordance with the Maine Rules of Civil Procedure, Rule 80C, except as modified by this section.” 21-A M.R.S. § 905(2) (2015). In *Palesky v. Sec’y of State*, the Law Court interpreted

⁴ This is because 61,123 valid signatures are required to qualify for the ballot. The Secretary of State, subject to further reduction due to duplication, determined that 35,518 signatures in support of the Casino Petition were valid. Thus, the Casino Petition needs an additional 25,605 signatures to qualify for the November 2016 ballot. The Secretary of State invalidated 18,529 signatures solely due to OATSIG and an additional 14,627 signatures for OATSIG and other reasons. If the 18,529 signatures invalidated solely for OATSIG were improperly invalidated, the Casino Petition would still be 7,346 signatures short.

the modifications presented in section 905 to expedite the timing of the appeal. 1998 ME 103, ¶ 5, 711 A.2d 129. Section 905 does not require “a full de novo trial.” *Id.* ¶ 6.

When reviewing a determination on a direct action petition made by the Secretary of State, the Court’s review is “deferential and limited.” *Watts v. Bd. of Env’tl. Prot.*, 2014 ME 91, ¶ 5, 97 A.3d 115. The Court only reviews adjudicatory decisions “for abuse of discretion, errors of law, or findings not supported by the substantial evidence in the record.” *Wyman v. Town of Phippsburg*, 2009 ME 77, ¶ 8, 976 A.2d 985. The Court will “not vacate an agency’s decision unless it: violates the Constitution or statutes; exceeds the agency’s authority; is procedurally unlawful; is arbitrary or capricious; constitutes an abuse of discretion; is affected by bias or an error of law; or is unsupported by the evidence in the record.” *Kroeger v. Dep’t of Env’tl. Prot.*, 2005 ME 50, ¶ 7, 870 A.2d 566.

The party attempting to vacate the agency's decision bears the burden of persuasion. *Town of Jay v. Androscoggin Energy, LLC*, 2003 ME 64, ¶ 10, 822 A.2d 1114. If the agency's decision was committed to the reasonable discretion of the agency, the party appealing has the burden of demonstrating that the agency abused its discretion in reaching the decision. *See Sager v. Town of Bowdoinham*, 2004 ME 40, ¶ 11, 845 A.2d 567. "An abuse of discretion may be found where an appellant demonstrates that the decision maker exceeded the bounds of the reasonable choices available to it, considering the facts and circumstances of the particular case and the governing law." *Id.* Ultimately, the petitioner must prove that “no competent evidence” supports the agency's decision. *Seider v. Bd. of Examiners of Psychologists*, 2000 ME 206, ¶ 9, 762 A.2d 551 (citing *Bischoff v. Bd. of Trustees*, 661 A.2d 167, 170 (Me. 1995)); *see also Gulick v. Bd. of Env’tl Prot.*, 452 A.2d 1202, 1208 (“reviewing court must determine whether the

administrative record contains competent and substantial evidence which supports the result reached”) (quotation omitted). The mere fact that there is “[i]nconsistent evidence will not render an agency decision unsupported.” *Seider*, 2000 ME 206, ¶ 9, 762 A.2d 551.

III. Analysis

Petitioners argue that: 1) the Secretary of State erred by invalidated 18,259 signatures based solely on OATSIG because he “was incompetent to disqualify those signatures on the grounds that they did not appear consistent with the official signatures of the notary public commission documents on these notaries;” and 2) the procedure followed by the Secretary of State “was so fatally flawed as to compromise the entire Determination process[.]” (Pet. Reply Br. 3.) Petitioners recognize that even if they prevailed on their first argument, the Casino Petition would still be 7,346 signatures short of the number necessary for placement on the November 2016 ballot because 14,267 of the 35,526 invalidated for OATSIG were also invalidated for “one or more of the other reasons” listed in the Determination. (Pet. Br. 5.) Acknowledging this shortfall, Petitioners raise four arguments in support of their request to invalidate the entire Determination.

First, Petitioners claim that the Elections Division staff of the Secretary of State did not bring in enough assistance from other divisions to carry out a proper review and did not adequately train and supervise the individuals brought in from other divisions. (*Id.* at 15.) Second, Petitioners argue that the Secretary of State deprived them of their ability to meaningfully evaluate his review process by deleting the so-called “Original Casino Master List,” which identified signatures invalidated due to OATSIG, as well as other grounds, in a searchable excel spreadsheet. (*Id.* at 15-16.) They assert that the “Casino Master List” they were

provided—which only identifies signatures invalidated for OATSIG without listing additional grounds for invalidation where applicable (R. Doc. 2)—and the digital image reports of the Original Casino Master List—which identify signatures invalidated due to OATSIG, as well as additional other reasons, but are pdfs and not searchable (R. Docs. 7A-7E)—made it impossible for them to adequately review the Secretary of State’s Determination in the short time-period permitted by statute.

Third, Petitioners contend that the Casino Master List the Secretary of State provided is an inadmissible summary because the deleted Original Casino Master List provided the underlying “raw data” on which the summary is premised. As a result, Petitioners contend the Casino Master List should not be admitted into evidence and the Determination should be vacated due to a lack of supporting evidence. Fourth, Petitioners contend that their initial review has shown a number of errors committed by the Secretary of State’s staff resulting in: 1) the improper invalidation of at least eight voter signatures due to their alleged failure to register as voters; 2) the improper invalidation of at least 882 signatures based on the mistaken belief that the circulators were not registered voters at the time they circulated petitions; and 3) the improper invalidation of 229 signatures based on the circulator not being registered to vote in the municipality of which he or she claims to be a resident.

Here, Petitioners have not met their burden to prove that the Secretary of State’s Determination was not supported by substantial evidence or that the procedure followed by the Secretary of State was so flawed as to invalidate the entire Determination. While it is undisputed that the Secretary of State’s office undertook a tremendous amount of work in a short period of time, Petitioners have not met their burden to prove that the staff employed by the Secretary of

State's office were so improperly trained and/or supervised that the entire Determination should be thrown out. To the contrary, the record evidence indicates the staff were provided detailed written instructions (Flynn Aff. ¶ 8; R. Doc. 20), and assisted in carrying out a thorough review (Flynn Aff. ¶¶ 8-14).

Furthermore, Petitioners' arguments that the deletion of the "Original Casino Master List" deprived them of their ability to meaningfully review the Secretary of State's decision making process, and rendered the Determination unsupported by substantial evidence, are meritless. While the Casino Master List provided by the Secretary of State does not indicate which signatures were invalidated for other grounds in addition to OATSIG (*see* R. Doc. 2.), the Secretary of State provided that missing information in pdf form (*see* R. Doc. 7A-7E). Although it could be considered the "best practice," there is no statutory or constitutional requirement that the Secretary of State provide all of the data supporting its direct initiative determinations in a format easily searchable by computer. Similarly, Petitioners' argument that the Casino Master List and pdfs showing all of the reasons for invalidating the OATSIG signatures are inadmissible summaries is specious. The "raw data" supporting the admission of those documents are the 28,667 petitions submitted in support of the Casino Petition, not the Original Casino Master List.⁵

Finally, even assuming that Petitioners' additional evidence challenging the invalidation of an additional 1,119 signatures were admitted and found credible,⁶ it would not require remand, reversal, or a finding that the Secretary of State's Determination was unsupported by

⁵ The reason(s) why the Secretary of State invalidated signatures on any given petition are shown in the bottom right-hand corner of each petition.

⁶ The Secretary of State has challenged the validity of Petitioners' additional evidence and offered additional evidence of its own in support.

substantial evidence. As discussed above, in the event that the Court determined the Secretary of State erred by invalidating signatures due to OATSIG, the Casino Petition would still be 7,346 signatures short of the number needed to qualify for placement on the November 2016 ballot. Therefore, even if the additional evidence submitted by Petitioners were accepted and the Court agreed that the 1,119 additional signatures were improperly invalidated, the Casino Petition would still need an additional 6,227 signatures to qualify for certification. Contrary to Petitioners' argument, the fact that they identified additional signatures which they claim were improperly invalidated does not require an invalidation of the entire Determination. Petitioners bear the burden of proof in the present action and cannot satisfy that burden by pointing to a number of alleged errors and asking the Court to extrapolate from those errors that more must exist. *See e.g. Town of Jay*, 2003 ME 64, ¶ 11, 845 A.2d 567. Furthermore, while Petitioners imply that they could find an additional 6,227 improperly invalidated signatures if given more time, this grant of additional time is not contemplated by the governing framework. Indeed, it is implicitly precluded. *See* 21-A M.R.S.A. § 905(2) (requiring actions challenging the Secretary of State's determination of a direct initiative to be filed in the Superior Court within 10 days of the Secretary of State's decision and providing the Superior Court 40 days from the date of the Secretary of State's decision to rule on the challenge).

Accordingly, the Court concludes that the procedure followed by the Secretary of State does not require the reversal or invalidation of the entire Determination. Therefore, even if Petitioners prevailed in their argument that the Secretary of State improperly invalidated 18,259 signatures solely due to OATSIG, the record provides competent and substantial evidence to support the Determination's invalidation of the Casino Petition for failing to submit a sufficient

number of valid signatures. As a result, the Court does not, and need not, address the merits of Petitioners' OATSIG argument. While Petitioners assert that a ruling on the OATSIG issue would provide helpful guidance in the event the Casino Petition is submitted for inclusion on the November 2017 ballot, the Court declines to do so, and restricts its review to that which is necessary to resolving the present appeal.

IV. Conclusion

For the reasons discussed above, the Court denies Petitioners' appeal and affirms the Secretary of State's March 2, 2016 Determination.

Pursuant to M.R. Civ. P. 79(a), the Clerk is hereby directed to incorporate this Order by reference in the docket.

Dated: April 7, 2016

s/ J. Murphy
Michaela Murphy
Justice, Business & Consumer Court