No. 237

In the Matter of Craig M. Johnson,

Appellant-Respondent,

v.

Jack M. Martins,

Respondent-Appellant,

Nassau County Board of Elections,

Respondent.

In the Matter of Jay Jacobs, &c.,

Appellant,

Joseph Mondello, &c.,

Respondent,

v.

Nassau County Board of Elections,

Respondent.

Steven R. Schlesinger, for appellant-respondent Johnson and appellant Jacobs.

Peter A. Bee, for respondent-appellant.

John Ciampoli, for respondent Nassau County Board of Elections.

PER CURIAM:

Under the Elections Reform and Modernization Act of 2005 (L 2005, ch 181), adopted in order to implement New York's new regime of voting by the use of electronic scanning machines, mandated by the federal Help America Vote Act of 2002 (42 USC §

15481), voters scan marked electronic ballots into a ballot scanner and wait for notice that the ballot has been received. In addition, in order to ensure that verifiable results are maintained, the ballot machines are required to retain the paper ballots or produce a voter verified permanent paper record which must be preserved to allow for a manual audit (see Election Law § 7-202 [1][j]).

The machine count of votes for the office of State Senate in the Seventh Senatorial District, showed the Republican candidate, Jack M. Martins, leading the Democratic candidate, Craig M. Johnson, by 415 votes -- a margin of 0.5% out of the approximately 85,000 votes. Pursuant to Election Law § 9-211, the Board of Elections conducted a mandatory audit of 3% of the County's voting machines (including 7 of the 249 machines in the Seventh Senatorial District).

The results of the audit revealed some discrepancies. As found by the trial court herein, there were three types of errors: 1) one machine reflected more ballots than were in the ballot box (neither the trial court nor the parties suggested that this affected the margin separating the candidates); 2) two machines reflected less ballots than were in the ballot box (one machine had two additional ballots for Johnson and one machine had one additional ballot for Johnson); and 3) one machine had an even count, but the machine counted an undervote that was not seen upon the audit, resulting in one additional vote for

Martins. Thus, the net change resulting from the discrepancies discovered in the 3% audit was two votes in Johnson's favor. There is no evidence that these discrepancies were the result of any misconduct.

In these proceedings, commenced in part seeking to obtain a manual audit of the district-wide election results under Election Law § 16-113, Johnson and the Chair of the Nassau County Democratic Committee claim that the audit demonstrated an error rate of 0.12%, in excess of the 0.1% discrepancy rate in the regulations implementing Election Law § 9-211.* Therefore, Johnson argues that a manual audit of all ballots was required.

Supreme Court found that the discrepancies, when projected to a full audit (9 NYCRR § 6210.18 [h]), would not affect the outcome of the election and denied the request for a manual audit of all ballots. The court certified Martins as the winner of the race by a margin of 451 votes. The Appellate Division upheld this aspect of the determination, finding no improvident exercise of discretion under Election Law § 16-113 -- the statute which sets forth the circumstances under which Supreme Court "may direct a manual audit of the voter verifiable

* As relevant here, the regulation provides that "an expanded audit will be required if . . . [a]ny one or more discrepancies between the confirming manual counts . . . and the original machine or system electronic counts, which taken together, would alter the vote share of any candidate . . . by one tenth of one percent (0.1%) or more of the hand counted votes for respective contests . . ." (9 NYCRR § 6210.18 [e][1][i]).

audit records." The Appellate Division granted "the aggrieved parties" leave to appeal to this Court and certified a question for our review: "[w]as the decision and order of this Court properly made?"

We agree with the Appellate Division that the statute grants Supreme Court discretionary authority to order a manual audit. In order for a denial of a manual audit under either subdivision of Election Law § 16-113 to be deemed an abuse of discretion as a matter of law, the record must demonstrate the existence of a material discrepancy likely to impact upon the result of the election, or flagrant irregularities in the election process. The regulations recognize that some level of discrepancy is inevitable. That mere fact begs the question as to the degree of the discrepancy requiring a manual audit. The statute allows Supreme Court to direct a manual audit where the evidence shows a discrepancy indicating "a substantial possibility" that the result of the election could change (see Election Law § 16-113 [2]). There is no such legal error where, as here, the discrepancy rate is significantly below the margin of victory, such that there is no substantial likelihood that the result of the election would be altered by the conduct of a full manual audit. Moreover, there is no evidence that the discrepancies arose from any flagrant irregularity in the election process. Therefore, on this record, this Court is without the power to disturb the discretionary determination

below.

Inasmuch as a recount is not required by law, and as the approximately 70 individual ballots otherwise being contested could not have an actual impact on the election result, we decline to review the parties' remaining contentions on these cross appeals, as their arguments pertaining to these ballots are academic.

Accordingly, the order of the Appellate Division, insofar as it denied the portion of the petitions seeking a manual audit, should be affirmed, without costs. The certified question should not be answered upon the ground that it is unnecessary.

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Order, insofar as it denied the portion of the petitions seeking a manual audit, affirmed, without costs, and certified question not answered upon the ground that it is unnecessary. Opinion Per Curiam. Chief Judge Lippman and Judges Ciparick, Graffeo, Smith, Pigott and Jones concur. Judge Read took no part.

Decided December 20, 2010