



*State of New Jersey*  
OFFICE OF THE ATTORNEY GENERAL  
DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF LAW  
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PO Box 112  
TRENTON, NJ 08625-0112

CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

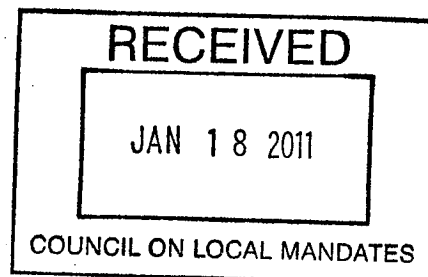
PAULA T. DOW  
*Attorney General*

ROBERT M. HANNA  
*Director*

January 18, 2011

VIA ELECTRONIC MAIL

Honorable Jack Tarditi, Chairman  
and the Council Members  
State of New Jersey  
Council on Local Mandates  
135 West Hanover Street, 4<sup>th</sup> Floor  
P.O. Box 627  
Trenton, NJ 08625-0627



Re: In the Matter of Complaint filed by the  
County of Atlantic (12-10)

Letter On Behalf of Department of State  
In Opposition to Preliminary Injunction

Dear Chairman Tarditi and Council Members:

Please accept this letter and exhibits on behalf of the Department of State and its Division of Elections (the "State") in opposition to the entry of any ruling enjoining seal-use protocol training pending the Council's consideration whether the training constitutes an impermissible unfunded State mandate. The Council is presently scheduled to consider this injunctive relief on February 22, 2011. For the reasons explained in this letter, the complaint filed by the Atlantic County Superintendent does not demonstrate that compliance with the training will result in



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"significant financial hardship" to the County. In addition, the training is required by Court order and, therefore, there is no substantial likelihood that a statute, rule or regulation has imposed an impermissible, unfunded State mandate. Thus, the Council should decline to enjoin the training pending its consideration of the complaint.

PLEADING SUMMARY

The Department of State opposes any ruling that enjoins mandatory seal-use protocol training while the Council considers the merits of the Superintendent's complaint because the complaint does not demonstrate, as it must under N.J.S.A. 52:13H-16, that a significant financial hardship to the County will result from compliance with the training. The Superintendent has suggested that the cost to the County to attend the training is only \$1625. Nor does the Superintendent's complaint demonstrate that there is a substantial likelihood that the required training is an impermissible, unfunded State mandate. The training at issue here has been ordered by a court and, therefore, no "statute, rule or regulation," as required by the Constitution and N.J.S.A. 52:13H-12, has imposed an impermissible, unfunded State mandate.

PROCEDURAL HISTORY  
AND  
STATEMENT OF FACTS

On December 3, 2010 John W. Mooney, Superintendent of Elections for Atlantic County ("Superintendent"), filed a complaint with the Council on Local Mandates (the "Council") alleging that a November 16, 2010 memorandum from Robert Giles, Director of the Division of Elections, is a "statute, rule or regulation" that does not authorize resources, other than the property tax, to offset direct expenditures for its implementation and, therefore, is an impermissible unfunded State mandate.<sup>1</sup>

The Superintendent claims in his complaint that the County has 13 part-time voting machine technicians who, unlike regular employees, must be compensated for time and travel to attend required training. The Superintendent suggests that the total cost for the 13 technicians to attend the day's training is \$1,625.00. He alleges that he asked the Division of Elections for reimbursement to the part-time technicians, and was denied. Complaint, II.3. The Superintendent did not ask the Council for

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<sup>1</sup> The Superintendent, acting alone, could not invoke the Council's jurisdiction. N.J.S.A. 52:13H-12. The procedural history of the Superintendent's complaint, which appears on the Council's website, indicates that Dennis Levison, the Atlantic County Executive, submitted a letter to the Council on December 22, 2010 "in support of the complaint," and that the Atlantic County Board of Chosen Freeholders was sent a copy of this letter.

injunctive relief, and he did not assert any imminent irreparable injury in the absence of injunctive relief. Complaint, II.5.

The Giles memorandum informed all County Superintendents and Boards of Election that the State is required by Superior Court order in Gusciora v. Corzine, MER-L-2691-04, to implement a seal-use protocol for security enhancements used on all voting machines in the 21 counties and that the "protocol must include training." See Exhibit A, Giles Memorandum. Consistent with the Court's order, the Giles memorandum provided that "any individual whose job duties encompass access to internal components of a voting machine is mandated to attend training." The memorandum then informed Superintendents and County Boards that classes will be held at the Ocean County Voting Technology Center in Lakewood, New Jersey and that affected individuals may choose from one of six different days between January 11 and 20, 2011. Giles also reminded County election officials that attendees will be subject to criminal background checks. Ibid.

The Court order in Gusciora, which requires the training that is the subject of the Giles memorandum, resolved a lawsuit brought by Assemblyman Reed Gusciora and others against Governor Corzine and Nina Wells, the Secretary of State at the time responsible to regulate elections and voting in New Jersey. See Exhibit B, March 8, 2010 Court order. The complaint in Gusciora alleged in essence that the direct recording electronic voting

machines used in New Jersey were inherently unreliable and susceptible to hacking. The plaintiffs claimed among other things that the State had not implemented security measures and could not assure the safe and accurate operation of its electronic machines, all in violation of the constitutional right to vote and statutory election law requirements. The complaint demanded initially that all electronic machines be retrofitted to provide a voter-verified paper audit trail and, later, that all electronic voting machines be replaced with optical scan voting systems.

In a 207-page opinion issued on February 1, 2010, Judge Linda Feinberg did not find any constitutional or statutory violation associated with the State's use of the electronic voting machines and, instead, found that the electronic voting machines have not been hacked and that they are safe, accurate and reliable. See Exhibit C, Excerpts from Court's Opinion, at pp. 171, 194.<sup>2</sup> However, the Court observed that "there are serious issues that remain to be addressed." Exhibit C, at p. 172. As the Court found, the State does not have an adequate inspection protocol for the tamper-evident seals and locks, Id. at p. 172, and "the State must take steps to require election officials to .... adopt a uniform seal-use inspection protocol and to provide inspectors of

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<sup>2</sup> Because of its length, only the relevant excerpts of the Court's opinion are attached to this letter. A complete copy of the opinion is available, and will be provided upon the Council's request.

the machines with adequate training." Exhibit C, at pp. 172-73.

Thus, the Court ordered the State to develop a seal-use protocol that includes a "training curriculum and standardized procedures for the recording of serial numbers and maintenance of appropriate serial number records." *Id.*, at p. 206. To carry out its opinion the Court entered an order on March 8, 2010 that, among other things, mandated that the State

shall develop a seal-use protocol for tamper-evident seals on the State's voting machines, and such protocols shall include a training curriculum and standardized procedures for the recording of seal serial numbers and maintenance of appropriate serial number records. (emphasis supplied).

Exhibit B, at p.3. In addition to these orders requiring training, the Court also made several recommendations to enhance voting machine security or safety, including one that the State require all election office employees, vendors and consultants with access to voting machines be subject to criminal and security background checks. *Id.*, at p.4.

#### ARGUMENT

THE COUNCIL SHOULD DECLINE TO ENJOIN SEAL-USE PROTOCOL TRAINING BECAUSE THE TRAINING DOES NOT RESULT IN A SIGNIFICANT FINANCIAL HARDSHIP TO THE COUNTY AND THERE IS NO LIKELIHOOD THAT THE TRAINING ORDERED BY THE COURT IS AN IMPERMISSIBLE, UNFUNDED STATE MANDATE.

The Council has authority to issue a preliminary ruling enjoining enforcement of a statute, rule or regulation, while a

complaint is pending for consideration, but only when the claimant demonstrates that

significant financial hardship to the county, municipality or school district would result from compliance and there is a substantial likelihood that the statute or the rule or regulation is, in fact, a impermissible, unfunded State mandate.

N.J.S.A. 52:13H-16. The Superintendent's complaint does not demonstrate either a significant financial hardship to the County or a substantial likelihood that a statute, rule, or regulation imposes an impermissible, unfunded State mandate. Hence, the Council should not enter any ruling that enjoins the court-ordered seal-use protocol training. To be sure, the Superintendent himself has not requested any injunctive relief. See Complaint, at II. 5.

Of critical importance, the Superintendent alleges that only 13 part-time employees are affected and that the required training in January 2011, which is the only training at issue here, is estimated to cost the County a total of only \$1,625.<sup>3</sup> This expenditure cannot plausibly be characterized as a "significant financial hardship" to the County. For this reason alone, the

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<sup>3</sup> The Council's January 7, 2011 Order Enjoining Enforcement applies literally to "any individual" with access to the internal components of a voting machine. However, the Superintendent does not claim that any regular or full-time employees are affected or that they cannot be required to attend training without compensation. Therefore, the January 7 Order, properly construed, enjoins enforcement only against the part-time employees referred to in the Superintendent's complaint.

Superintendent's complaint does not satisfy the Council's standards for preliminary injunctive relief and, thus, the court-ordered training should not be enjoined while the complaint is pending for the Council's consideration.

So too, the Superintendent's complaint does not demonstrate a substantial likelihood on the merits that the training is an impermissible, unfunded State mandate. After all, the Giles memorandum is neither a "statute, rule or regulation" and, therefore, the complaint fails to state a claim that the Council is authorized to consider. N.J.S.A. 52:13H-2 and -12a (Council's jurisdiction limited to review of a statute, rule or regulation).

Indeed, the Giles memorandum is based on an order by the Superior Court of New Jersey and does nothing more than follow the Court's clear and unmistakable orders requiring the State to develop a seal-use protocol and to provide training to appropriate County elections staff, like the part-time employees here, who are intimately involved with voting machine security and safety. Clearly, any expenditures resulting from this court-ordered training are not the product of a "statute, rule or regulation" as required by the Constitution and N.J.S.A. 52:13H-12a.<sup>4</sup>

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<sup>4</sup> To be sure, the unfunded expenditures alleged here are the result of the County's arrangements with its part-time employees to pay them for their time and travel, not the Court's order. As pointed out earlier, the Superintendent does not claim that his



The Council's memorandum decision and order in In the Matter of the Complaint filed by Township of Branchburg is instructive.<sup>5</sup> There, Branchburg alleged in its complaint to the Council that the Appellate Division's holding in a case involving copying fees under the Open Public Records Act (OPRA) constituted an impermissible, unfunded State mandate. The court had limited the fees a public agency like Branchburg could charge a requestor to the "actual cost" to the agency for duplication. In dismissing the complaint, the Council reasoned that Branchburg had not relied on a statute, rule or regulation as required by the Constitution and, instead, had complained about the court's decision. In these circumstances, the Council determined that "the complaint must be dismissed because it fails to place the statute [OPRA] squarely before us as the Constitution requires."

Similarly, in the present case, the Gusciora Court required the Department of State to deliver seal-use protocol training and, like the claimant in Branchburg, the Superintendent has not placed a "statute, rule or regulation" before the Council. Surely, the source for the Superintendent's complaint in this case is the Court's Order requiring the training, not the Giles

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regular staff is subject to an unfunded mandate.

<sup>5</sup> This decision can be found on the Council's website under "Council Decisions" at [http://www.state.nj.us/local\\_mandates/decisions/8-12-10\\_Branchburg-Township-Memorandum](http://www.state.nj.us/local_mandates/decisions/8-12-10_Branchburg-Township-Memorandum).

memorandum which merely implements the Court's order.<sup>6</sup> Hence, the Superintendent's complaint does not demonstrate a substantial likelihood that the training at issue constitutes an impermissible, unfunded State mandate and, as a result, cannot support an injunction under N.J.S.A. 52:13H-16.

In sum, the Superintendent's complaint does not satisfy either of the two statutory standards, each of which must be met before the Council can enter an injunction. The complaint alleges a total cost of \$1625 to the County for part-time employees to attend the training. This expenditure certainly is not a "significant financial hardship" to the County. Nor is there a substantial likelihood that a "statute, rule or regulation" is the source of the training requirement; instead, the Court in Gusciora has ordered the training. Therefore, the Council should decline to

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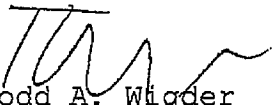
<sup>6</sup> To the extent that the complaint can be read as a direct challenge to the Giles memorandum, rather than the training ordered by the Gusciora court, neither the Superintendent nor the County Executive can raise that challenge before this Council. The Council has jurisdiction over laws, rules and regulations; it has no jurisdiction with respect to State agency action. N.J.S.A. 52:13-1; see also N.J. Const. Art. VI, §5, ¶4 (providing for review by Superior Court in lieu of prerogative writs "on terms and in manner provided by the Rules of the Supreme Court"); N.J. Court Rules 2:2-3(a) (allocates review of "final decisions or actions of any State administrative agency or office" to Appellate Division); Infinity broad Corp. v. New Jersey Meadowlands Comm'r, 187 N.J. 212, 224 (2006) (reaffirming that "save for condemnation or inverse condemnation actions, appeals from state agency action in the Appellate Division"). The Giles memorandum, if considered independent of the Gusciora court order, is unquestionably State agency action that can be reviewed only in the Appellate Division.

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enter a ruling that enjoins the court-ordered training while the Commission considers the complaint.

Respectfully submitted,

PAULA T. DOW  
ATTORNEY GENERAL STATE OF NEW JERSEY

  
Todd A. Wigder  
Deputy Attorney General  
Todd.Wigder@dol.lps.state.nj.us

fsl

c: John W. Mooney,  
Atlantic County Superintendent of Elections  
Robert F. Giles, Director  
Division of Elections, Department of State

## Exhibit A



STATE OF NEW JERSEY  
DEPARTMENT OF STATE  
TRENTON, NJ 08625  
(609) 984-1900

CHRIS CHRISTIE  
Governor

LT. GOVERNOR KIM GUADAGNO  
Secretary of State

**MEMORANDUM**

TO: County Boards of Election  
County Superintendents of Elections

FROM: Robert F. Giles, Director *R.F.*

DATE: November 16, 2010

SUBJECT: Seal-Use Protocol Training and Anticipated Sequoia AVC Advantage  
Firmware Upgrade

As you have been advised, by way of the March 8, 2010 Order in the matter of Gusciora, et al. v. Corzine, et al., the State is required to implement a seal-use protocol for the security enhancements used on all voting machines in the 21 counties. This protocol must include training, which will be conducted as follows. First, any individual whose job duties encompass access to the internal components of a voting machine is mandated to attend training. This requirement applies to any individual employed by a county, whether on a full-time or part-time basis, and it also applies to any individual employed by a vendor who is contracted for voting machine purposes. To be clear, even if an individual is hired only for the day of an election to perform voting machine duties, that person is subject to training. There will be no exceptions to this requirement. Any person who is not so trained cannot perform any voting machine duties that require or may entail access to the internal components of the voting machines. This requirement does not apply to district board workers.

The classes will be held at the Ocean County Voting Technology Center, 110 Lehigh Avenue, Lakewood, New Jersey. The class dates are as follows: January 11, 12, 13, 18, 19 and 20. Each class will be limited to 20 attendees and choice of class will be honored on a first-come/first-serve basis. Please notify the affected individuals in your office to send an email or fax to Madeline Rodriguez of the Division of Elections to provide the following information: name, home address, telephone number, email address and class preferences. The fax number is (609)777-1280 and the email address is Madeline.Rodriguez@sos.state.nj.us. You are further reminded that all attendees will be subject to criminal background checks.

The training will encompass the security enhancements that are currently on the voting machines throughout the State: Avante, ES&S, Sequoia AVC Advantage and Edge. For the counties with the Sequoia AVC Advantage the training will also include future enhancements that will be used after the anticipated installment of new firmware. On that point, you are advised that Dominion Voting Systems, which recently purchased the rights to the Sequoia AVC Advantage voting machine, has recently proposed the development of new firmware, 9.0K to address the following concerns: the primary election "option switch issue"; the ability to overwrite the audio firmware with no warning or evidence which was the basis for the claim that "viruses can propagate the audio firmware"; "between voter switch module test mode" issue which was claimed to possibly cause voters to think they voted on a machine that was not activated; the buffer overrun error in the communication to the audio subsystem; the return-oriented programming attack; and improve how the random number generator works. In addition, Dominion is also working towards making WinEDS 4.0 available as part of this upgrade. Assuming these upgrades are implemented, it is anticipated that installation will commence after the June 2011 primary election, and to be completed by September 2011. Each affected county will be responsible for installation of the new firmware, including all associated labor and budget requirements. Upon installation of the new firmware, the new security enhancements and computerized asset tracking system will be put in place in the affected counties.

Thank you for your anticipated cooperation and please do not hesitate to contact this office if you have any questions.

c: Assistant Attorney General Donna Kelly  
County Clerks

## Exhibit B

PAULA T...DOW  
ACTING ATTORNEY GENERAL OF NEW JERSEY  
R.J. Hughes Justice Complex  
25 Market Street  
P.O. Box 112  
Trenton, New Jersey 08625  
Attorney for Defendants

By: Leslie M. Gore  
Assistant Attorney General  
(609) 984-9504

CLERK OF SUPERIOR COURT  
SUPERIOR COURT OF N.J.  
MERCER COUNTY  
RECEIVED AND FILED

**A True Copy**

*Sue Regan*

MAR 08 2010

*Sue Regan*

**SUE REGAN**  
Deputy Clerk of Superior Court

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION - MERCER COUNTY

DOCKET NO. MER-L-2691-04

ASSEMBLYMAN REED GUSCIORA, :  
STEPHANIE HARRIS, COALITION :  
FOR PEACE ACTION, and :  
NEW JERSEY PEACE ACTION, :

Plaintiffs, :

v. :

JON S. CORZINE, GOVERNOR OF :  
THE STATE OF NEW JERSEY (in :  
his official capacity) and :  
NINA MITCHELL WELLS, :  
SECRETARY OF STATE OF THE :  
STATE OF NEW JERSEY (in her :  
official capacity), :

Defendants. :

Civil Action

ORDER

This matter, having come before the Court by way of a  
Complaint in Lieu of Prerogative Writ, in the presence of the Rutgers  
Constitutional Litigation Clinic (Penny Venetis, Esq., appearing);



Patton Boggs, Esqs. (John McGahren, Esq. and Caroline Bartlett, Esq., appearing), attorneys for plaintiffs; and Paula T. Dow, Acting Attorney General, attorney for defendants (Assistant Attorney General Leslie Gore, Assistant Attorney General Donna Kelly, Deputy Attorney General Brian G. Flanagan, Deputy Attorney General Victor DiFrancesco and Deputy Attorney General Jason Postelnik, appearing); and Beattie Padova, LLC (Arthur Charagis, Esq., George A. Campion, Esq., and Annalisa Siracusa, appearing), attorneys for Sequoia Voting Systems (having participated on a limited basis); and the Court having considered all the testimony, exhibits, expert reports, and other evidence adduced at trial; proposed Findings of Fact and Conclusions of Law, and all other papers submitted by the parties and having found that the Sequoia AVC Advantage satisfies applicable State statutory and constitutional provisions, as fully set forth in the Court's Opinion of February 1, 2010;

IT IS on this 8th day of March, 2010,

ORDERED that judgment be entered ~~in favor of Defendants and~~ *as follows:*  
~~as to the Plaintiffs;~~ and it is,

~~THE COURT~~ ORDERED that the Title 19 Voting Machine Committee be reconstituted to include two "mechanic experts" who, have an understanding of computer system operations, as well as software and hardware architecture; and it is,

FURTHER ORDERED that, within 120 days of the Court's Opinion, the reconstituted Title 19 Committee shall conduct a full certification examination of the Sequoia AVC Advantage DRE system as currently configured and issue a report to the Secretary of State as to whether to recommend continued use of the Sequoia AVC Advantage in this State. Whereupon the Secretary of State shall have 60 days from the receipt of the report from the newly constituted Title 19 Committee to render a final decision on this matter; and it is,

FURTHER ORDERED that both hardening and anti-virus software applications be installed on all computer systems in the State that are used for election management purposes, within 120 days of the Court's Opinion; and it is,

FURTHER ORDERED that the State shall develop a seal-use protocol for the tamper-evident seals on the State's voting machines, and that such protocol shall include a training curriculum and standardized procedures for the recording of seal serial numbers and

*the State shall submit the seal use protocol within 120 days of this order*  
maintenance of appropriate serial number records; and it is,

FURTHER ORDERED that the State shall advise the County Clerks that computers utilized for election-related duties shall at no time be connected to the Internet (emphasis added), and it is,

*within 60 days of this order*  
FURTHER ORDERED that each County Clerk shall conduct an examination of the means in which election data is transmitted to his

or her office after an election. Once this information is collected, the State shall assist the counties in developing action plans to ensure the integrity of the transmittal of voting data between the municipal clerks' offices and the County Clerk. In the event a county does not provide a plan, results cartridges in that county shall be personally delivered to the County Clerk for tabulation; and it is,

RECOMMENDED that the State require election office employees as well as any vendors and consultants with access to voting machines be subject to criminal and security background checks; and it is,

FURTHER RECOMMENDED that access to the voting machines by outside consultants and vendors be done under the strict supervision and control of the county election offices; and it is,

FURTHER RECOMMENDED that the State, County, and Municipal election representatives be directed to undertake an examination of the current procedures regarding the storage, transportation or return of the voting machines to the warehouses and to make recommendations to guard against potential voting machine tampering; and it is,

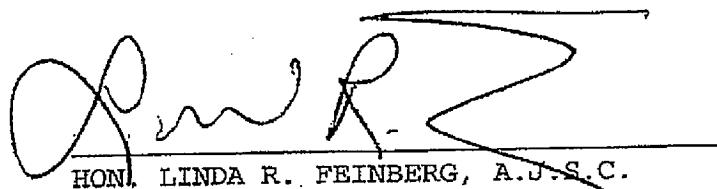
FURTHER RECOMMENDED that the State develop and implement Statewide training and training materials for county clerks, boards

of election, superintendents of elections, technicians, warehouse personnel, and district board workers. Part of that training must include protocols for the chain of custody and maintenance of election records and documentation, including, but not limited to, authorization slips, poll books, results cartridges, seals and serial numbers, emergency ballots, provisional ballots, mail-in ballots, military and overseas ballots, ballot bags, voting machine tapes and printouts; and it is,

FURTHER RECOMMENDED that the Secretary of State develop auditing criteria to verify election results and to ensure adherence to protocols in all municipal, county, state, and federal elections.

This Court shall retain jurisdiction, for a limited period of time, to ensure compliance with the above-listed items. *of 181 days of the signing of this order.*

A copy of this Order shall be served upon the parties or their counsel within 10 days from the date of this Order by counsel for the State.

  
HON. LINDA R. FEINBERG, A.J.S.C.

## Exhibit C

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE  
COMMITTEE ON OPINIONS

ASSEMBLYMAN REED GUSCIORA,  
STEPHANIE HARRIS, COALITION  
FOR PEACE ACTION, and NEW  
JERSEY PEACE ACTION,

Plaintiffs,

v.

JON S. CORZINE, GOVERNOR  
OF THE STATE OF NEW JERSEY,  
(in his official capacity)  
and NINA MITCHELL WELLS,  
SECRETARY OF STATE OF THE  
STATE OF NEW JERSEY (in her  
official capacity),

Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION-MERCER COUNTY

DOCKET No.:MER-L-2691-04

CIVIL ACTION  
OPINION

Decided: February 1, 2010

Penny M. Venetis, for the plaintiffs (Rutgers Constitutional  
Litigation Clinic, attorneys; Ms. Venetis, on the brief).

John McGahren and Caroline F. Bartlett, for the plaintiffs (Patton  
Boggs, attorneys; Mr. McGahren and Ms. Bartlett, on the brief).

Paula T. Dow, Acting Attorney General, for the defendants (Leslie M.  
Gore, Assistant Attorney General; Donna J. Kelly, Assistant Attorney  
General; Jason S. Postelnik, Deputy Attorney General; Brian G.  
Flanagan, Deputy Attorney General; and Victor N. DiFrancesco, Jr.,  
Deputy Attorney General, attorneys; Ms. Gore, Ms. Kelly and Mr.  
Postelnik, on the brief).

Arthur Chagaris, George A. Campion and Annalisa Siracusa for Sequoia  
Voting Systems (participated in a limited capacity); (Beattie  
Padovano, attorneys).

FEINBERG, A.J.S.C.

I.

BACKGROUND

On October 19, 2004, Mercer County Assemblyman Reed Gusciora; Stephanie Harris, a registered voter in Mercer County; and two citizens' organizations – the Coalition for Peace Action and New Jersey Peace Action (collectively "plaintiffs"), filed a complaint in lieu of prerogative writs and order to show cause seeking to restrain the use of direct recording electronic ("DRE") voting machines in this State. The complaint named former Governor James E. McGreevey and former Attorney General Peter C. Harvey as the State's Chief Election Official, in their official capacities ("defendants" or "State").<sup>1</sup>

Since the inception of this litigation over five years ago, this court has addressed a myriad of procedural and substantive issues set forth in numerous written and oral opinions. These have arisen in the context of: (1) multiple orders to show cause seeking temporary restraints; (2) a remand from the Appellate Division directing the court to conduct a hearing regarding the feasibility of the State meeting the statutory deadline to implement a DRE with a voter verified paper audit trail ("VVPAT")<sup>2</sup>; (3) the request, as part of the remand hearing, for the court to determine the criteria to be applied if the State sought a waiver; (4) a decision by the Appellate Division directing the Law Division to monitor compliance with the statutory mandate that the State satisfy the requirement that each voting machine produce a VVPAT; and (5) a trial that commenced on January 27, 2009 and ended on May 11, 2009, that focused on the AVC Advantage ("AVC") made by Sequoia Voting Systems ("Sequoia").<sup>3</sup>

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<sup>1</sup> Counsel for the parties, in their trial summations, list the parties as former Governor Jon C. Corzine and former Secretary of State Nina Mitchell Wells. There is, however, no order in the court's file or on the Automated Civil Case Management system to establish that the complaint was formally amended.

<sup>2</sup> The remand hearing addressed ten voting machines manufactured by three different companies: (1) Sequoia Edge; (2) Sequoia Edge/VVPAT; (3) Sequoia AVC Advantage; (4) Sequoia AVC Advantage/VVPAT; (5) ES&S iVotronic; (6) ES&S iVotronic-RTAL; (7) ES&S RTAL with a cut-and-drop system; (8) ES&S Precinct Based Optical Scanner; (9) AVANTE Vote-Trakker EVC 308-SPR; and (10) AVANTE Vote-Trakker EVC 308-FF.

<sup>3</sup> The Sequoia Edge, made by Sequoia, is used in one county. With the Sequoia Edge the voter is required to go through multiple pages to view all of the different contests and candidates. The AVC, a full-face

During four and one-half years of the pre-trial phase of the litigation, the court had the opportunity to review certifications from election officials throughout the State. At trial, the witnesses included private citizens, State and County election officials, members of the Title 19 Committee, N.J.S.A. 19:48-2, and well-known computer science experts. Without exception, each of the trial witnesses has contributed to the court's understanding and appreciation of how voters in this State cast their votes. The attorneys in this case were well-prepared and dedicated significant time and energy to present their respective positions. I am grateful to have had the opportunity to have these fine men and woman appear before me.

## II.

### PRE-TRIAL PROCEDURAL HISTORY

As noted heretofore, when the complaint was filed plaintiffs sought to: (1) enjoin the use of DREs in the November 2004 general election; (2) require that all DREs be retrofitted to provide a VVPAT after the November election; (3) require all new DREs purchased in the State to be equipped with a VVPAT; and (4) grant reasonable attorney's fees and costs. R. 4:52-1 et seq.

The complaint, consisting of eighty-nine paragraphs, alleged the continued use of DREs violated: (1) the Constitutional requirement in N.J. Const. Art. II, ¶ 3(a) that every vote be counted; (2) the guarantee of Equal Protection in N.J. Const. Art. I, ¶ 1; (3) the statutory guidelines for recounts found in N.J.S.A. 19:28-1 et seq.; (4) the statutory requirement that each voter's intent be tabulated in accordance with N.J.S.A. 19:48-1(d) and (f) and N.J.S.A. 19:53A-3(b); (5) the statutory requirement that voting equipment be secure as mandated by N.J.S.A. 19:53A-3(g); and (6) the statutory requirement that votes be counted accurately under N.J.S.A. 19:48-1(h) and N.J.S.A. 19:53A-3(h).

On October 25, 2004, the State filed a cross-motion to dismiss. R. 4:6-2(e). In support of its application, the State filed approximately three hundred pages of certifications from forty-two election officials from counties around the State. This included County Clerks, Superintendents of Elections and

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machine, permits the voter to view the entire ballot on one surface. The full-face, in that respect, is similar to the former lever machine.



enhancements/modifications should be evaluated by a newly-constituted Title 19 Committee, or if the Legislature deems it appropriate, by a new entity to review voting systems.

D.

TRIAL FINDINGS

On January 27, 2009, when the trial commenced, the State had not implemented the VVPAT. Six weeks later on March 6, 2009, the statutory deadline was extended indefinitely. It is undisputed that the DRE voting system has been in use since as early as 1979. While this opinion will discuss important steps the State must take to address certain issues raised during trial, not one witness presented evidence that the AVC, outside of a controlled academic setting, has ever been hacked. In fact, other than the "option switch bug," the expert witnesses and county election officials agreed that, absent purposeful and criminal intrusion by an outsider or insider, the AVC records votes cast and produces accurate results.<sup>82</sup> N.J.S.A. 19:48-1 and N.J.S.A. 19:53A-3.

The court agrees with defendants that the claims regarding security risks of the AVC are not consistent with the State's over fifteen year record of successful elections using this voting system. The record is void of any evidence to establish that any election has ever been compromised due to the fraudulent manipulation of an AVC voting system. As noted by defendants, "if the mere physical or technological possibility of criminals to supersede government activity were to warrant strict scrutiny, then many regulatory decisions, both in and out of the election context would not survive constitutional review." Def. Br. at 17, citing DeShaney v. Winnebago Cty. Soc. Servs. Dept., 489 U.S. 189

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<sup>82</sup> The option switch problem occurred when a board worker pressed an inappropriate sequence of buttons on the option switch panel. This problem was discovered in the February 2008 primary. The problem, once identified, was corrected by placing a plastic shield over the operator panel. In the primary elections held since that time, no problems have been reported.

(1989)(holding that states are not constitutionally required to "protect the life, liberty and property of its citizens against invasion by private actors.).

Interestingly, absent the hypothetical situation of criminal access and the installation of fraudulent software, plaintiffs' own expert did not find any malicious software in the source code or any irregularities that would result in the AVC failing to count votes as cast.

While the AVC is not a perfect voting system and there are serious issues that remain to be addressed, based on the evidence adduced at trial, the court finds the following:

(1) No AVC has ever been demonstrated to have been hacked, other than in an academic setting, in this State or any other state.

(2) There has never been a demonstrated incident of an attempted attack or a verified attack of any AVC voting system in the United States since its use began at least as early as 1979.

(3) Replacement of the AVC ROM chip with a fraudulent ROM chip is not a realistic risk. The systematic one-by-one replacement of ROM chips by an intruder, or even an insider, would require mechanical and physical changes to each and every machine.

(4) It would be extremely unlikely that one could replace DRE firmware with fraudulent firmware while leaving no detectable evidence of that under real election conditions.<sup>83</sup>

(5) The tamper-evident seals and locks serve as a deterrent. While these seals may be visually inspected by election officials and their serial number checked against records upon the voting machines' return to the warehouse post-election, the State does not have an adequate inspection protocol.

(6) The new seals used in New Jersey will have serial numbers to aid in identifying tampering. The State must take steps to require election officials to: (1) check and record the serial numbers; (2) adopt a uniform seal-use inspection protocol; and (3) provide inspectors with

<sup>83</sup> The three election representatives in charge of the handling and storage of the voting machines each outlined the measures taken to secure the voting machines. Given the alarm systems in place, limited password or key access, and precautions undertaken by the election representatives who testified, outsiders cannot realistically perpetrate such an attack at voting machine warehouses.

adequate training.

(7) While insiders may pose a security risk, this is true with all voting systems; it is not a risk unique to the AVC or any other DRE or voting system.<sup>84</sup>

(8) The record demonstrates that the DRE is a complicated system. Thus, the creation of a Trojan horse – in which a voting machine outwardly appears to the user to be using the legitimate program, but is secretly doing other things unseen by the user – is not a trivial process.<sup>85</sup>

(9) The technical barriers to producing fraudulent firmware, and the necessary step of reverse engineering the source code, are substantial.<sup>86</sup>

(10) The notion that fraudulent firmware can continue to operate, as anticipated, for future elections, is completely unrealistic.<sup>87</sup>

11. Security vulnerabilities are present, to some degree, in every voting system. There is simply no such thing as a voting system that is impossible to manipulate.<sup>88</sup>

12. Viruses do not present a legitimate risk to the AVC. The notion that some kinds of fraudulent firmware can automatically propagate themselves from one AVC to another is purely hypothetical.

13. The viral mode theorized by plaintiffs' expert through the use of the daughterboard is fictional.<sup>89</sup>

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<sup>84</sup> As a result, this concern does not warrant banning the use of the AVC. This is particularly true where plaintiff offered no proof of any "insider" manipulation.

<sup>85</sup> Further, a hacker without the benefit of the source code would need to reverse engineer the ROM chip to create a fraudulent program in order to know what to change.

<sup>86</sup> It has taken world-renowned security experts substantial time to perpetrate such hacks in a laboratory setting.

<sup>87</sup> No one knows how each future election will be set-up and no one can anticipate changes in the law, changes in the outcome of ballot rotations affecting the election setup, changes in the ballot formation, changes in the demographics of the jurisdiction or changes in the rotations of machines in different jurisdictions.

<sup>88</sup> As a result, in evaluating the reasonableness of a particular voting system, the court cannot apply the "perfection" standard proposed by plaintiffs' experts. Rather, the appropriate standard is whether a particular voting system can be safely used under normal election conditions. This is the standard adopted in New Jersey and in other states.

<sup>89</sup> Even if this was possible, the theoretical attacks could only cause votes to be altered if they had been cast by an audio voter and could only affect the motherboard into believing the machine was in a state ready for voting, requiring it to be taken out of service. As reference, only four people voted by way of

case also presents the issue of the scientific reliability of the voting system used in this State. Here, unlike many cases that address novel issues of scientific reliability of new devices, the DRE has been in use for twenty years and the State has a comprehensive legislatively-defined process for the review and certification of voting machines. State v Chun, supra, 194 N.J. at 54; Romano v. Kimmelman, 96 N.J. 66 (1984). Title 19, more specifically, N.J.S.A. 19:48-1 and N.J.S.A. 19:53, outlines the statutory factors that must be met to certify voting systems. While the statute provides that a certified voting system is entitled to a conclusive presumption, this court has already held a rebuttable presumption applies.

In this case, the court finds that the voting rights are not severely restricted by the use of paperless voting machines. First, the court finds that, absent pre-meditated criminal activity, the voting systems in this State are safe, accurate and reliable. In the case at bar, Appel and his team examined the AVC under artificial laboratory conditions with unfettered access to two AVC machines and the source code, for a period of one month. Second, there is no evidence of tampering of an AVC in any election in this State, or any impermissible alteration of any vote. Instead, the record is replete with testimony from State and County election officials that, over the many years of use, not one election result in the State has been adversely affected.<sup>96</sup> As a result, the heightened scrutiny test does not apply.

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<sup>96</sup> The option switch bug has been remedied. The redundant memory capabilities of the AVC disclosed the error. The error was insufficient to have changed the results of the election.

V.

**SPECIFIC REQUIREMENTS OR RECOMMENDATIONS**

**1. HARDENING GUIDELINES ANTI-VIRUS SOFTWARE (REQUIRED)**

Chapter Eight of the Sequoia Voting Systems, Election Management System Manual, entitled "Additional Security Guidelines," dated March 5, 2008, identifies steps to take to ensure an election tabulation environment as free from outside contamination as possible. It specifically recommends that certain steps be taken.

This document is under seal. Therefore, the court will not disclose the specific recommendations. Based on the testimony adduced at trial, Sequoia recommends customers to install both hardening and anti-virus applications.<sup>99</sup> Additionally, customers are advised that laptops not be connected to the Internet or be used for any other purpose. The record reflects that New Jersey has not adopted any of the hardening guidelines and that anti-virus software, if installed, is done so sporadically.

According to Sequoia, hardening techniques and anti-virus software are available at little or no cost to the State.<sup>100</sup> This shall be completed on or before the 120 days set forth in the prior section.

**2. BACKGROUND CHECKS (RECOMMENDED)**

The integrity of our voting system depends on a system designed to protect voting machines against attack by intruders. During the trial, Clayton, Giles, Mahoney and Gentile described the manner in which voting machines are stored in the warehouse. The voting machine warehouses are located separate and apart from county administration offices in buildings that are either owned or rented by the county.

Without exception, the premises are locked and each employee utilizes a code to enter the building and/or activate or deactivate the alarm. During the evening and on the weekends, the buildings do not have security personnel on site. While these rudimentary security measures are most likely

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<sup>99</sup> The State's experts also recommend implementation of hardening and antivirus measures.

<sup>100</sup> The court also recommends that the results cartridges be encrypted in future systems.

adequate to preclude entry from an outside intruder, the most likely attack will occur through the actions of an employee, contract vendor, or consultant.

None of the witnesses were aware of any policy that required warehouse employees, contract vendors, or consultants to undergo criminal or security background checks. Given the importance of ensuring the safety and security of voting machines, election officials should require all new employees, vendors, and consultants to be subject to criminal background investigations. While this will not necessarily prevent an attack in all circumstances, requiring a criminal background check will help to protect the integrity of the process. As noted in the trial record, some of the counties utilize outside vendors or consultants to conduct Pre-LAT, upgrade software, installations, maintenance, or other tests. While performing these tasks, these individuals are oftentimes given unsupervised access. Clearly, election officials should require employees, vendors or consultants with access to voting machines to be subject to criminal and security background checks. Additionally, access by outside consultants and vendors should be done under strict supervision and control.

**3. TRANSPORTATION/DELIVERY/RETURN OF VOTING MACHINES  
(RECOMMENDED)**

The record reflects that in New Jersey, and many other states, voting machines are left unattended for weeks before the election and weeks after the election. The risk is not unique to the AVC voting system. This schedule results from the large number of polling places and the number of voting machines to be delivered to polling places.

Warehouse election representatives testified that voting machines are transported to polling places by third party vendors hired by the county. But for one of these counties, warehouse election personnel do not accompany the movers during the transportation and delivery of the machines. Furthermore, once the machines are delivered to the polling place, the warehouse is not advised by the movers or representatives from the polling places that the machines have been delivered.

According to warehouse representatives, delivery of voting machines to the polling places begins as early as two weeks before the election. The testimony and photographs produced by Felton disclosed

polling places left open during the day and sometimes into the evening. There are no security cameras and there are often signs that direct individuals to the place of the voting machines. As confirmed by Felton, an intruder can go undetected for long periods of time and have unrestricted access to the machines.

Since voting machines are left unattended in public places for several days, sometimes weeks, before and after each election, it is not difficult to gain unsupervised access to the voting machines. After the election, the voting machines remain at the polling places for up to two weeks before being returned to the warehouse. Importantly, there are no written or unwritten policies or protocols in place that govern the storage, transportation, or return of the voting machines to the warehouse.

While the court understands the difficulty in delivering the voting machines on the day of the election, voting machines should not be left in unsecured areas. Even though tamper-evident seals help remediate the risk associated with leaving voting machines unguarded, leaving machines unattended for several weeks is problematic. Still, having both these locks and seals means the intruder must know how to pick a lock without breaking it, and know how to break and replace a seal without leaving detectable evidence. Tamper-evident seals also generally have serial numbers on them, requiring the intruder to replace the seals with ones that have the identical numbers.

Based on this information, the court directs the State, County, and Municipal election representatives to undertake an examination of the current procedures and make recommendations to guard against potential voting machine tampering. One recommendation is that security cameras be required for any facility where voting machines are left prior to and after an election. The cost of these devices in today's market should be minimal. A cost-benefit analysis clearly weighs in favor of this kind of security equipment.

#### 4. SEALS AND SEAL-USE PROTOCOLS (REQUIRED)

For a system of tamper-evident seals to provide effective protection seals must be consistently installed, they must be truly tamper-evident, and they must be consistently inspected. While the new seals proposed by the State will provide enhanced security and protection against intruders, it is critical for the State to develop a seal protocol, in writing, and to provide appropriate training for individuals

charged with seal inspection. Without a seal-use protocol, use of tamper-evident seals significantly reduces their effectiveness.

The court directs the State to develop a seal-use protocol. This shall include a training curriculum and standardized procedures for the recording of serial numbers and maintenance of appropriate serial number records.

**5. INTERNET CONNECTION AND OTHER TRANSMISSION LINES (REQUIRED)**

As long as computers, dedicated to handling election matters, are connected to the Internet, the safety and security of our voting systems are in jeopardy. Therefore, if the State has not done so already, Clerks shall be advised that computers utilized for election-related duties shall at no time be connected to the Internet. (emphasis added.)

Each Clerk shall conduct an examination of the means in which election data is transmitted to the Clerk after an election. Once the information is collected, the State shall assist the counties in developing action plans to ensure the integrity of the transmittal of voting data between the Municipal Clerks' offices and the Clerk. If counties do not provide a plan, then and in that event, results cartridges shall be personally delivered to the Clerk for tabulation.

**6. TRAINING AND RECORD-KEEPING (RECOMMENDED)**

It is imperative for the State to develop and implement Statewide training and training materials for Clerks, Boards, Superintendents, technicians, warehouse personnel and poll workers. Part of that training must include protocols for the chain of custody and maintenance of election records and documentation, including, but not limited to, authorization slips, poll books, results cartridges, seals and serial numbers, emergency ballots, provisional ballots, mail-in, military and overseas ballots, ballot bags and machine tapes and printouts.

In addition, the Secretary of State should develop auditing criteria to verify election results and to ensure adherence to protocols in all municipal, county, state and federal elections.

**VI.**

**CONCLUSION**



Counsel for the State shall prepare an order consistent with this opinion. To ensure compliance with the items listed in the prior section, for a limited period of time, this court shall retain jurisdiction.

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Deputy Attorney General

IN THE MATTER OF COMPLAINT	)	COUNCIL ON LOCAL MANDATES
FILED BY		
THE COUNTY OF ATLANTIC	)	Docket No. 12-10
_____	)	<u>CERTIFICATE OF SERVICE</u>

CECILIA ASHBOCK, of full age, hereby certifies that:

1. I am employed with the Division of Law, Department of Law and Public Safety, State of New Jersey.

2. On January 18, 2011, at the direction of Todd A. Wigder, Deputy Attorney General, and on behalf of the Department of State and its Division of Elections, a letter and exhibits in opposition to preliminary injunction in the above-captioned matter was sent via electronic mail to:


Honorable Jack Tarditi  
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3. I certify the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

  
Cecilia Ashbock

Dated: January 18, 2011