

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER DOCKET
DOCKET NO. BCD-AP-20-02

DELBERT A. REED,

Petitioner

v.

MATTHEW DUNLAP, in his capacity of
Secretary of State for the State of Maine,

Respondent

and

MAINERS FOR LOCAL POWER PAC,
NextEra ENERGY RESOURCES, LLC,
INDUSTRIAL ENERGY CONSUMER
GROUP, and MAINE STATE CHAMBER
OF COMMERCE,

Intervenors

**ORDER ON PETITIONER’S SECOND
MOTION TO TAKE ADDITIONAL
EVIDENCE**

Before the Court is Petitioner Delbert Reed’s second motion to take additional evidence in support of his challenge to the Respondent Secretary of State’s determination of the validity of petitions supporting the Citizen Initiative entitled “Resolve, To Reject the New England Clean Energy Connect Transmission Project” (“the petition”). This matter was previously remanded to the Secretary of State for the purpose of allowing the Secretary to take additional evidence. As ordered, upon remand, the Secretary took additional evidence concerning the activities of nine notaries public¹ and one petition circulator.² On April 1, 2020, the Secretary issued an Amended Determination that 2,052 petition signatures previously counted as valid in his March 4th decision

¹ The notaries are Melissa Letarte, Jacob Kiesman, Victoria Tapley, Christina Potter, David McGovern Sr., Michael Underhill, Wesley Ryan Hucky, Leah Flumerfelt, and Brittany Skidmore.

² The petition circulator is Megan St. Peter.

must be invalidated due the conduct of three³ of the nine notaries, and that 174 signatures previously counted as valid must be invalidated due to the conduct of the petition circulator.

Citing 5 M.R.S. § 11006(1)(A), Reed now moves for the taking of further evidence before the Superior Court. Section 11006(1)(A) states:

Judicial review shall be confined to the record upon which the agency decision was based, except as otherwise provided by this section.

A. In the case of the failure or refusal of an agency to act or of alleged irregularities in procedure before the agency which are not adequately revealed in the record, evidence thereon may be taken and determination made by the reviewing court.

Reed argues that the Secretary failed to conduct an adequate investigation into potential fraud in the petition drive and that this failure amounts to a failure or refusal to act under section 11006.

The Court disagrees. This is not a situation where the Secretary has failed or refused to act. As this Court has previously noted, the Secretary has “plenary power to investigate and determine the validity of petitions.” *Maine Taxpayers Action Network v. Sec’y of State*, 2002 ME 64, n. 8, 795 A.2d 75 (citing *Opinion of the Justices*, 116 Me. 557, 580-82, 103 A. 761, 771-72 (1917)). Here, the Secretary has upon remand once again utilized this power to investigate the validity of the petitions. Importantly, the investigation included consideration of evidence submitted by Reed. Although Reed may disagree with the Secretary’s decision that the evidence presented to him did not warrant a “full-scale investigation of potential fraud” this does not change the fact that the Secretary’s decision was itself an act, and not a refusal to act. *See Lingley v. Me. Workers’ Comp. Bd.*, 2003 ME 32, ¶ 9, 819 A.2d 327. Consequently, there has been no “failure or refusal to act” as that phrase is defined under Maine law which would permit this Court to take additional evidence

³ The three notaries are David McGovern Sr., Michael Underhill, and Brittany Skidmore.

and make its determination based upon evidence other than what is in the record that has been compiled after the second review and investigation by the Secretary.

Further, the Court also notes that Reed has not made a *prima facie* showing of “alleged irregularities in procedure.” *Carl L. Cutler Co. v. State Purchasing Agent*, 472 A.2d 913, 918 (Me. 1984). The phrase – “irregularities in procedure” – is to be distinguished from the evidence of fraud that the Secretary did address upon remand. Reed has not pointed to any irregularity or defect in the procedure used by the Secretary after remand, and it appears that the Secretary used the same procedure that he has used in multiple other investigations or reviews of petitions in citizens initiatives. Reed was afforded the opportunity to present evidence to the Secretary and it appears that the only evidence that was not pursued or addressed by the Secretary, was not sufficiently identified by the Petitioner until after the Secretary issued his Amended Determination.⁴

The Court would note that this Order does not address the merits of any argument the Petitioner and other Intervenors may make in further briefing, as the two orders issued to date address only the adequacy and legality of the Record that the parties and the Court must rely upon in further proceedings. Nothing in this decision will affect the Petitioner’s ability to challenge whether there is sufficient competent evidence in the Record to support the Amended Determination made by the Secretary, whether the Secretary abused his discretion in coming to

⁴ For reasons not clear to the Court, Petitioner did not disclose to the Secretary the name of the individual who allegedly had information that an individual organizer for Revolution Field Strategies was aware of Ms. St. Peter’s activities in relation to two forged signatures that were invalidated at the municipal level before this legal challenge began. The name was disclosed to the Court in a teleconference on April 1, 2020 after the Amended Determination was filed with the Court. Petitioner was offered the opportunity by the Court to supplement the record with an affidavit from this individual, but was advised by counsel for Petitioner that it was unclear whether the individual would cooperate with counsel.

that determination, or to make any legal argument entitling Petitioner to a remedy under the Maine Administrative Procedures Act or Rule 80 C of the Maine Rules of Civil Procedure.

The entry is:

Petitioner Delbert Reed's Second Motion to Take Additional Evidence is DENIED.

The clerk is directed to incorporate this order into the docket by reference. M.R. Civ. P. 79(a).

Date: 04/03/2020

**_____/S_____
M. Michaela Murphy
Justice, Business and Consumer Court**