

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

RANDALL KOWALKE,	)
	)
Plaintiff,	)
	)
v.	)
	)
DAVID EASTMAN, STATE OF	)
ALASKA, DIVISION OF	)
ELECTIONS, and GAIL FENUMIAI	)
in her official capacity as Director of	)
Elections,	)
	)
Defendants.	)

Case No. 3AN-22-07404 CI

**STATE DEFENDANTS’ MOTION FOR RECONSIDERATION**  
**Alaska Rule of Civil Procedure 77(k)(1)(i)&(ii)**

The Division moves this Court to reconsider its order denying the Division’s Motion to Dismiss because the Court’s order creates a vague, unworkable cause of action against the Division that undercuts the orderly and stable conduct of elections.

In its Motion to Dismiss, the Division argued that Mr. Kowalke’s complaint did not allege the Division did anything wrong, and the Court seems to agree. The Court writes: “Regardless of whether the Division correctly or incorrectly determined that Representative Eastman was eligible for office based upon the information in the public record, Kowalke has alleged sufficient facts to support a claim that would entitle him to relief.” Order at 10-11. The Court also agreed that the Division lacks authority to subpoena witnesses or evidence, or administer oaths, and therefore had no power to conduct an investigation into Rep. Eastman’s qualification for office beyond review of its own records and public records. Order at 8. Mr. Kowalke’s complaint does not allege,

and the Court's order does not suggest, that the Division had a legal duty to do anything differently in assessing Rep. Eastman's eligibility to appear on the ballot.

But even though neither Mr. Kowalke's complaint nor this Court's order identified anything that the Division allegedly did wrong, or any statutory or regulatory command that the Division allegedly violated, the Court nonetheless concluded that the complaint adequately states a cause of action against the Division. The Court thus appears to have concluded that a cause of action lies directly against the Division under AS 24.05.060 and/or Article XII, Section 4 of the Alaska Constitution whenever a plaintiff alleges that a candidate is ineligible for office, even if the Division has followed its own statutes and regulations in placing the candidate's name on the ballot.

Further, the Court's order seems to find that this cause of action exists independently of the process created in AS 15.25.042 and 6 AAC 25.260.<sup>1</sup> The Court's reasoning suggests that Mr. Kowalke could have brought this lawsuit even if he had never filed an administrative complaint under 6 AAC 25.260—and therefore that anyone can sue the Division to challenge a candidate's eligibility at any time. Under this reasoning, the Division's liability turns only on the empirical question of whether or not Rep. Eastman is actually qualified to hold office, and there is *nothing* that the Division could have done to avoid potential liability.<sup>2</sup> The Division must simply stand by while the

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<sup>1</sup> The Court noted that the cause of action was not an agency appeal. Order at 12.

<sup>2</sup> As noted at the oral argument, the Division is not omniscient. And yet this Court's order seems to hold it to that standard.

plaintiff litigates against the challenged candidate,<sup>3</sup> await the Court’s holding on the candidate’s eligibility,<sup>4</sup> and then implement whatever relief the Court sees fit to order, at any time and at (potentially great) public expense.<sup>5</sup>

While this avoids the problem of placing the Division in the role of loyalty police, it creates serious uncertainty in the orderly administration of elections. Alaska Statute 15.25.042 and 6 AAC 25.260 are designed to allow the Division to address complaints regarding a candidate’s eligibility *before* ballots are printed for the *primary* election. After the primary election, a nominated candidate’s qualifications may be challenged in an election contest.<sup>6</sup> Post-primary election contests are designed to be resolved before the general election.<sup>7</sup> The cut-off date for changing names on the general election ballot is 64 days before the general election.<sup>8</sup> After that point, even if a candidate voluntarily withdraws, the ballots will remain unchanged.<sup>9</sup> Once again, after the general election, an

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<sup>3</sup> In this case the plaintiff also sued the candidate, but from this Court’s order it is not clear that would be required for this cause of action to lie against the Division.

<sup>4</sup> The Court’s order seems to suggest that this cause of action would exist under *any* constitutional provision regarding whether a person is qualified or disqualified from holding office, as the Court held that the terms “disqualification” “qualification” and “eligibility” are interchangeable for this purpose. Order at 11.

<sup>5</sup> And the successful plaintiff could then potentially attempt to recover full attorneys’ fees from the State on the grounds that they prevailed on a Constitutional claim under AS 09.60.010(c), despite the Division having done nothing wrong and not having taken a position on the plaintiff’s claim against the candidate.

<sup>6</sup> AS 15.20.540(2).

<sup>7</sup> AS 15.20.550.

<sup>8</sup> AS 15.25.100(c).

<sup>9</sup> 6 AAC 25.210.

elected candidate's qualifications may be challenged in an election contest, designed to be resolved before a candidate is seated.<sup>10</sup> If the election contest is successful, the court may order a new election<sup>11</sup> or order the Division to issue a new election certificate reflecting the judgment of the court.<sup>12</sup> After the election is certified, the Division plays no further part in who serves in public office until the next election established by law.

The Court's order appears to recognize a direct cause of action against the Division based on candidate ineligibility that would negate all of that. It seems to impose some form of strict liability on the Division such that any time a court finds a candidate ineligible for office, the Division may be ordered to make it right at public expense. It opens the courthouse doors to plaintiffs who would otherwise have missed statutory deadlines to file administrative complaints or election contests.<sup>13</sup> And there is no way for the Division to insulate itself against this liability, as following its statutes and regulations appears to be insufficient. This will cast uncertainty over the Division's orderly process for formulating, printing, and distributing ballots and certifying elections.

The Court should therefore reconsider its ruling in light of the greater scheme of Title 15 and the orderly administration of elections. Upon reconsideration, this Court

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<sup>10</sup> AS 15.20.550.

<sup>11</sup> *Boucher v. Bomhoff*, 495 P.2d 77, 83 (Alaska 1972).

<sup>12</sup> AS 15.20.560.

<sup>13</sup> Additionally, AS 15.20.540 provides that an election contest may be filed only by a defeated candidate or ten qualified voters, but the Court's new-found cause of action would vitiate those provisions and allow any individual to sue the Division.

should hold that no cause of action against the Division exists on the allegations made in Mr. Kowalke's complaint.

Finally, the Division takes issue with this Court's assertion that "deciding to find a particular candidate is eligible is just as 'partisan' as deciding that a candidate is ineligible." That overstates the Division's action here. According to its governing statutes and regulations, the Division reviewed the information in its possession and, based on that record, did not find grounds to remove Rep. Eastman from the ballot.<sup>14</sup> For the Division to remove Rep. Eastman based on bare allegations, preemptively taking a choice away from voters, would have far more "partisan" impact than allowing voters to decide.

The Division recognizes that this case is being litigated under a very tight schedule, and that it may be misinterpreting the Court's order. If the Division has misunderstood the Court's intent, the Division requests that this Court grant reconsideration to clarify the Court's meaning.

DATED September 14, 2022.

TREG R. TAYLOR  
ATTORNEY GENERAL

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<sup>14</sup> Exhibit 1 to Complaint.