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Attorneys for Plaintiff Randall Kowalke

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

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

Case No. 3AN-22-07404 CI

**PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN
OPPOSITION TO STATE'S MOTION TO DISMISS**

Randall Kowalke, through the Northern Justice Project, LLC opposes the State of Alaska Division of Elections' and Division Director Gail Fenumiai's (hereinafter, collectively, "the Division") motion to dismiss. In the Division's opinion, there is no Alaska statute or regulation that requires it to ensure that a candidate is eligible for

PLAINTIFF'S MEMORANDUM OF POINTS IN OPPOSITION
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an election including when the issue of eligibility concerns the Alaska Constitution, article XII, section 4. As set forth below, the Division is wrong.

RELEVANT FACTUAL BACKGROUND

David Eastman is a member of the Oath Keepers.¹ This group advocates for and is involved in revolutionary activity against the United States government.²

The Alaska Constitution provides that you are not eligible for office if you are a member of a group that advocates for or is involved in revolutionary activity against the United States government.³

On June 10, 2022, the plaintiff filed a complaint with the Division alleging that Eastman was ineligible to run for office because he was a member of a group that advocates for and is involved in revolutionary activity against the United States government.⁴

Ten days later, on June 20, 2022, the Division rejected that complaint stating that, based on its review of the information, it found Eastman eligible to run for office.⁵

¹ David Eastman, [Here I stand, I can do no other, so help me God](https://davideastman.org/articles/here-i-stand-i-can-do-no-other-so-help-me-god/), (Jan. 30, 2022), <https://davideastman.org/articles/here-i-stand-i-can-do-no-other-so-help-me-god/>.

² Affidavit of Matthew Kriner, pages 3-5.

³ Alaska Constitution art. XII, § 4.

⁴ Exhibit 2, Kowalke Eligibility Complaint Letter to the Division (attached to Affidavit of Randall Kowalke).

⁵ Exhibit 1 (attached to Complaint).

On July 29, 2022, the plaintiff filed this lawsuit.⁶ The Division now claims that it has no legal duty or authority to determine whether someone is ineligible for office when the issue of eligibility concerns the Alaska Constitution, article XII, section 4.⁷

LEGAL STANDARD

Motions to dismiss under Alaska Civil Rule 12(b)(6) are “viewed with disfavor and should rarely be granted” while “a complaint must be liberally construed.”⁸

To survive a motion to dismiss, a complaint “need only allege a set of facts consistent with and appropriate to some enforceable cause of action.” A complaint should not be dismissed “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim” that would entitle him to some form of relief, even if the plaintiff requests a type of relief he is not entitled to obtain.⁹

In *Guerrero v. Alaska Housing Finance Corporation*, the Alaska Supreme Court held that dismissal of the public corporation under Rule 12(b)(6) was an error because the complaint adequately established *some* level of duty of care and it was too procedurally early in the case to exclude the factual possibilities that the corporation had *some* duty of care.¹⁰ Alaska has liberal rules of pleading and “requires only that a complaint contain ‘(1) a short and plain statement of the claim showing that the pleader is entitled

⁶ The Division notes that this lawsuit is not an administrative appeal. Motion to Dismiss page 13. The Division is correct. The Division’s June 2022 denial letter said it was a final decision and gave no deadline to appeal as required under Alaska Appellate Rule 602 for administrative appeals. Consequently it was proper to file this complaint, and not as an administrative appeal.

⁷ Motion to Dismiss.

⁸ *Larson v. State*, 284 P.3d 1, 4 (Alaska 2012).

⁹ *Id.* at 6 (quoting *Guerrero v. Alaska Housing Finance Corp.*, 6 P.3d 250, 253-54 (Alaska 2000)).

¹⁰ *Guerrero v. Alaska Housing Fin. Corp.*, 6 P.3d 250, 257-58 (Alaska 2000).

to relief, and (2) a demand for judgment for the relief to which he deems himself entitled.”¹¹

ARGUMENT AND AUTHORITIES

The Division’s regulations contradict the argument which it is now making to this Court; they explicitly say that the Division will review “candidate qualifications established by the United States Constitution, the Alaska Constitution, or the Alaska Statutes.”¹² The only qualifications carved out and excluded from this review are issues under the Alaska Public Offices Commission under Alaska Statute 15.13.¹³ Since the Alaska Constitution’s disqualification for disloyalty section and the statute establishing that as a factor for ineligibility are not included within the explicitly excluded umbrella of Alaska Statute 15.13,¹⁴ the Division has not only the authority to review eligibility under that basis, but the duty to do so.

Plaintiff provided a statement establishing this claim and a request for relief in his Complaint. It would be error to dismiss the Division under Rule 12(b)(6).

A. The Division Has the Duty to Determine and Enforce Candidate Eligibility, Including Questions of Disqualification for Disloyalty.

1. The Division’s Own Regulations Require a Broad Review of Constitutional and Statutory Eligibility Requirements.

As the Division admits, it is required to assess a candidate’s eligibility.¹⁵

¹¹ *Shooshanian v. Wagner*, 672 P.2d 455, 465 (Alaska 1983).

¹² 6 AAC 25.260(c).

¹³ 6 AAC 25.260(c).

¹⁴ Alaska Constitution art. XII, § 4 and AS 25.05.060.

¹⁵ AS 15.25.042; Motion to Dismiss page 12.

Eligibility is determined by the director under the adopted regulations.¹⁶ 6 AAC 25.260 is the regulation outlining the director's process for reviewing eligibility complaints.

This regulation outlines the scope of eligibility factors the director will review:

The director will review only those issues in the complaint related to candidate qualifications established by the United States Constitution, **the Alaska Constitution, or the Alaska Statutes**. Grounds cited in the complaint other than those related to candidate qualifications established by law or grounds related to issues under the authority of the Alaska Public Offices Commission under AS 15.13 will not be considered by the director under this section.¹⁷

As the regulation explicitly states, the director will review issues of eligibility established in the Alaska Constitution or the Alaska Statutes. The Alaska Constitution's Disqualification for Disloyalty is both flagged as an eligibility criteria in the Alaska Constitution *and* in Alaska Statute.¹⁸

The disqualification for disloyalty is outlined in the Constitution and in Title 24 of the Alaska Statutes, just like the other eligibility criteria that the Division enforces. Eligibility requirements related to age and residency of legislators are stated in the Alaska Constitution article II, section 2. Additionally these eligibility requirements are outlined in Alaska Statute 24.05.030 as "Qualifications of members," shortly preceding the section on "Disqualifications" of members under Alaska Statute 24.05.060.

Both the qualifications and disqualifications for legislators can be enforced by

¹⁶ AS 15.25.042(a).

¹⁷ 6 AAC 25.260(c) (emphasis added).

¹⁸ Alaska Constitution art. XII, § 4 and AS 25.05.060 ("A person is not qualified for membership in the legislature who is disqualified to hold public office under the provisions of art. XII, § 4, Constitution of the State of Alaska, and as it may be implemented by law.").

either the Division at the time of an election or by the legislative house following an election. Under Title 24 it states that “[e]ach house is the judge of the election and qualifications of its members and may expel a member with the concurrence of two-thirds of its members.”¹⁹ While this provision provides the legislature with that authority to remove an ineligible individual from office, it does not somehow relieve the Division from its responsibility to remove an ineligible individual at the time of the election. Otherwise the Division would have no authority to review *any* eligibility criteria for candidates, including issues of age and residence. But no one is disputing that the Division has the authority to review eligibility and determine when candidates are ineligible to run.²⁰

And the Division’s regulations make clear the narrow scope of what they are *not* to review when determining eligibility. 6 AAC 25.260(c) explicitly excludes from the Division’s review any complaint not based on legally-established qualifications and any complaint based “on grounds related to issues under the authority of the Alaska Public Offices Commission under AS 15.13.” If the Division were not to review any other eligibility criteria outlined in either the federal Constitution, Alaska Constitution, or Alaska Statutes, it would also explicitly state those exclusions. Instead, the regulation states a broad range of responsibility to review eligibility requirements under all of

¹⁹ AS 24.05.070.

²⁰ Motion to Dismiss page 9, 12.

these laws.²¹

2. The Division Must Review Eligibility Complaints, No Matter Their Complexity.

The Division reviews a wide range of factors when determining a candidate's eligibility for an election. These are not all black and white determinations. And while none — including the Constitution's disqualification for disloyalty — require judgment to be passed on one's politics, the Division misrepresents the simplicity of some eligibility reviews in an attempt to distance itself from its responsibility to review disloyalty disqualifications.²²

For example, the Division claims it lacks the ability to make decisions that may be “uncertain or politically fraught” or that require additional “procedures and resources necessary to perform such a factual investigation,” but they readily accept their responsibility to review residency requirements.²³ The rules for determining the residence of a voter are outlined in Alaska Statute 15.05.020. Upon a challenge of one's eligibility²⁴ due to residency the Division may have to review many factors: the civil or military service of a candidate or their spouse, whether the candidate is a student at

²¹ To the degree the Division seeks to make a policy argument about why it is poorly suited to review certain eligibility criteria (*see* Motion to Dismiss pages 7-8), that is irrelevant to what the law in fact requires.

²² *See* Motion to Dismiss page 8.

²³ Motion to Dismiss page 8. Residency requirements for legislative candidates are established in Alaska's Constitution Article II, § 2.

²⁴ The challenge to residency eligibility is brought through the same means Mr. Kowalke brought his challenge due to disloyalty — the Division's process as outlined in AS 15.25.042 and 6 AAC 25.260.

an institution of learning, whether the candidate was in an institution or asylum at public expense, whether the candidate was confined in public prison, whether the candidate was engaged in the navigation of waters of Alaska or the United States or the high seas, whether the candidate was residing upon an Indian or military reservation, or whether the candidate was residing in the Alaska Pioneers' Home or the Alaska Veterans' Home.²⁵ Additionally the Division would have to make an "uncertain or politically fraught call" about whether a "person has the intention to return" or has "the intent to remain in another place."²⁶ The same issues with the Division's self-imposed brevity of an eligibility complaint (200 words) and the Division's self-imposed limitations in what documents the Director may review in determining eligibility²⁷ could all impede an adequate review of a candidate's true residency.

That said, there are also times residency could be challenged and have a very clear and simple determination. The fact that this determination may be more challenging in some circumstances versus others does not mean the Division can abdicate its responsibility to review those more complex eligibility complaints.

The same is true of eligibility complaints related to violation of the Alaska Constitution's Disqualification for Disloyalty clause. There may be simple cases where a candidate has a clear public record establishing advocacy for the violent overthrow of the federal or State government, such as a criminal conviction for sedition. There may

²⁵ AS 15.05.020(1).

²⁶ AS 15.05.020(2)-(5).

²⁷ See Motion to Dismiss page 11; 6 AAC 25.260(d).

be other cases that are more complex and require further inquiry. Again, just as with residency eligibility, the Division does not have the discretion to eschew complex complaints.

3. Alaska Statute 24.05.060 Establishes Compliance With the Alaska Constitution's Disloyalty Provision As a Prerequisite for Eligibility.

Mr. Kowalke's complaint states the two relevant eligibility definitions pertaining to Mr. Eastman's ineligibility: article XII, section 4 of the Alaska Constitution and Alaska Statute 24.05.060. The Division and Mr. Kowalke are both clear that the Division has the responsibility to review eligibility complaints as that is both referenced in the Complaint²⁸ and outlined in detail in the Complaint's Exhibit 1, the Director's determination letter.

The Director's determination letter explicitly cites to Alaska Statute 15.25.042 and 6 AAC 25.260, in addition to citing the eligibility definition as found in Alaska Statute 24.05.060 and the Alaska Constitution's Disqualification for Disloyalty. Because the statute and constitutional provision regarding disloyalty are the bases for plaintiff's claims, the Complaint states them explicitly. Taken in sum, this establishes a claim entitled to relief.

CONCLUSION

The Division is a necessary and indispensable party to this case: this Court cannot order the Division to remove Eastman from the ballot if the Division is not even a party before this Court. As importantly, the Division has a duty to ensure that the

²⁸ Complaint pages 7-8.

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candidates it places on the ballot are eligible. The Division's Motion to Dismiss should be denied.

DATED this 29th day of August, 2022

NORTHERN JUSTICE PROJECT, LLC
Attorneys for Plaintiff

By: /s/ Savannah Fletcher

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CERTIFICATE OF SERVICE

I hereby certify that on this date a true and correct copy of the foregoing document and proposed order were served via EMAIL at or before 1:30 pm on:

Lael Harrison and Thomas Flynn
State of Alaska, Department of Law
Lael.harrison@alaska.gov
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Courtesy copy emailed to: nomi.saxton@alaska.gov

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s/Savannah Fletcher
Signature

August 29, 2022
Date