

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

Randall Kowalke,

Plaintiff,

v.

David Eastman et al,

Defendant.

Case No. 3AN-22-07404CI

**Order Denying Division's Motion to Dismiss
for Failure to State a Claim**

The State of Alaska Division of Elections and Division Director Gail Fenumiai ("the Division") have filed a motion asking the court to dismiss Randall Kowalke's complaint for failing to state a claim upon which relief could be granted. The Division argues that Alaska law does not require it to investigate or decide whether a potential candidate is ineligible for public office under the Disqualification for Disloyalty clause in the Alaska Constitution, and that Kowalke has therefore failed to state a claim for relief. Kowalke responds that the Division is required by Alaska law to decide whether a candidate is ineligible for office due to alleged disloyalty. For the reasons explained in this Order, the Division's motion is denied.

I. Factual and Procedural Background

Representative David Eastman is running for election in House District 27.¹ After Representative Eastman filed his declaration of candidacy, Kowalke filed a complaint with the Division arguing that

¹ Representative Eastman previously represented House District 10. District boundaries were recently redrawn, and he is running for election in what is now House District 27.

Representative Eastman was ineligible for public office because of his membership in the Oath Keepers. Kowalke asserted that the Oath Keepers are an organization or association that advocates for the overthrow of the United States by force or violence, and so Representative Eastman is barred from holding public office by Article XII, § 4 of the Alaska Constitution and AS 24.05.060.

On June 20, 2022, the Division decided Kowalke's complaint. The Division stated that a "preponderance of the evidence [did] not show that Representative Eastman [was] ineligible."² In relevant part, the letter stated that the Division "was aware that Representative Eastman reportedly is a member of the Oath Keepers organization and attended the rally in Washington, D.C. on January 6, 2021. [The Division] does not have any specific information about these allegations in its possession. But even assuming these allegations are true, [The Division] has determined that they do not—without more—provide a basis to prevent Representative Eastman from running for state office."³

Kowalke filed this case on July 29, 2022. The first cause of action alleged that Representative Eastman "through his membership in the Oath Keepers," violated Article XII, § 4 of the Alaska Constitution, and he should therefore be barred by the court from public office. Relevant to this motion, the second cause of action alleged that Representative Eastman was barred from serving in the legislature by AS 24.05.060, and the Division therefore improperly determined that Representative Eastman was eligible for public office.⁴ Kowalke also attached to his complaint a copy of the Division's June 20, 2022 letter determining that Representative Eastman

² June 20, 2022 Letter from Division Director Fenumiai to Kowalke, attached to Plaintiff's Complaint as Exhibit 1.

³ *Id.*

⁴ See Complaint at 7 and 8.

was not ineligible for public office based upon the information available to the Division.

The Division filed a motion to dismiss the claim against it. The court heard argument on the Division's motion on September 9, 2022, and took the motion under advisement.

II. Legal Standard

A motion to dismiss for failure to state a claim upon which relief may be granted tests the legal sufficiency of the complaint's allegations.⁵ In determining the sufficiency of the stated claim, it is enough that the complaint set forth allegations of fact consistent with some enforceable cause of action on any possible theory.⁶ The court considers only well pled allegations, while ignoring unwarranted factual inferences and conclusions of law.⁷ Generally, such a motion is determined solely on the pleadings; however, the court may consider public record, including court files from other proceedings.⁸ The court may also consider attachments to the complaint.⁹ The court must construe the complaint in the light most favorable to the non-moving party and presume the pleading's allegations to be true.¹⁰ To survive a motion to dismiss, the complaint "need only allege a set of facts consistent with and appropriate to some enforceable cause of action."¹¹

⁵ See Civil Rule 12(b)(6) and *Dworkin v. First Nat. Bank of Fairbanks*, 444 P.2d 777, 779 (Alaska 1968).

⁶ *State v. Native Village of Curyung*, 151 P.3d, 396.

⁷ *Dworkin*, 444 P.2d at 779.

⁸ *Nizinski v. Currington*, 517 P.2d 754, 756 (Alaska 1974) (internal citation omitted).

⁹ *Larson v. State, Dep't of Corr.*, 284 P.3d 1, 7 (Alaska 2012).

¹⁰ *Valdez Fisheries Development Ass'n, Inc. v. Alyeska Pipeline Service Co.*, 45 P.3d 657, 664 (Alaska 2002) (citing *Kollodge v. State*, 757 P.2d 1024, 1026 (Alaska 1998)).

¹¹ *Guerrero v. Alaska Hous. Fin. Corp.*, 6 P.3d 250, 254 (Alaska 2000).

III. Constitutional, Statutory and Regulatory Background

Whether a person is qualified to hold public office in Alaska is defined by the Alaska Constitution. Article II, § 2 delineates the necessary “qualifications” to serve in the state legislature;¹² article II, § 5 specifies conditions that count as “disqualifications” from serving;¹³ and article XII, § 4, titled “Disqualification for Disloyalty”, bars a person from any public office who aids or belongs to any party or organization or association which advocates for the overthrow by force or violence of the government of the United States or of the State.¹⁴

The Division of Elections is tasked with administering elections in Alaska and determining whether persons are eligible for public office. State law mandates that, “The director shall provide general administrative supervision over the conduct of state elections, and may adopt regulations under AS 44.62 (Administrative Procedure Act) necessary for the administration of state elections.”¹⁵ When a person seeks to become a candidate for public office in a primary election, the person files a declaration of candidacy with the Division providing information set out in

¹² “A member of the legislature shall be a qualified voter who has been a resident of Alaska for at least three years and of the district from which elected for at least one year, immediately preceding his filing for office. A senator shall be at least twenty-five years of age and a representative at least twenty-one years of age.” Alaska Const. art. II, § 2.

¹³ “No legislator may hold any other office or position of profit under the United States or the State. During the term for which elected and for one year thereafter, no legislator may be nominated, elected, or appointed to any other office or position of profit which has been created, or the salary or emoluments of which have been increased, while he was a member. This section shall not prevent any person from seeking or holding the office of governor, secretary of state, or member of Congress. This section shall not apply to employment by or election to a constitutional convention.” Alaska Const. art. II, § 5.

¹⁴ “No person who advocates, or who aids or belongs to any party or organization or association which advocates, the overthrow by force or violence of the government of the United States or of the State shall be qualified to hold any public office of trust or profit under this constitution.” Alaska Const. art. XII, § 4.

¹⁵ AS 15.15.010.

statute.¹⁶ This includes information relevant to whether the person is qualified to serve in public office such as whether they are a citizen, where they reside, and their age.¹⁷

Alaska law further requires that, "If the director receives a complaint regarding the eligibility of a candidate for a particular office, the director shall determine eligibility under regulations adopted by the director."¹⁸ To implement the statutory mandate to determine a candidate's eligibility following a complaint, the Division adopted 6 AAC 25.260. That regulation states that the Division "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."¹⁹ After receiving a complaint, "the director will review any evidence relevant to the issues identified in the complaint which is in the custody of the division, including the candidate's registration record or declaration of candidacy, and including, in the discretion of the director, any other document of public record on file with the state."²⁰ Upon completing that review, the director then determines whether, by a preponderance of the evidence, the information contained in the public record "supports or does not support the eligibility of the candidate."²¹ Despite the above, "Nothing in [6 AAC 25.260] limits the authority of the director to evaluate a candidate's eligibility for office."²²

IV. Discussion

The Division argues that "AS 24.05.060 does not give [it] the power or duty to investigate whether a candidate has engaged in disloyal conduct

¹⁶ AS 15.25.030.

¹⁷ *Id.*

¹⁸ AS 15.25.042(a).

¹⁹ 6 AAC 25.260(c).

²⁰ 6 AAC 25.260(d).

²¹ *Id.*

that disqualifies him from office.”²³ According to the Division, nothing in Title 24 or the Alaska Constitution grants the Division the power to apply AS 24.05.060. The Division focuses its argument on that statute because Kowalke’s complaint specifically alleges that the Division’s decision was inconsistent with that law. Kowalke responds that his claim against the Division includes an allegation that the Division failed to properly consider the Disqualification for Disloyalty clause as well as the relevant statutes and regulations related to the conduct of elections.

For purposes of deciding this motion to dismiss, the court must construe the complaint broadly.²⁴ At oral argument, Kowalke emphasized that the claim brought against the Division incorporated the entirety of the complaint as well as the attachment.²⁵ Counsel for Kowalke also pointed to paragraph 27 of the complaint, which alleged that the Division failed to uphold the Disqualification for Disloyalty clause in addition to AS 24.05.060. Furthermore, the text of AS 24.05.060 explicitly incorporates the “provisions of art. XII, § 4.” Indeed, the Division recognized the broad scope of Kowalke’s argument in its motion to dismiss, which addressed more than just AS 24.05.060. “[T]he main purpose of the complaint is to provide notice to the opposing party of the nature of the claim being asserted.”²⁶ Kowalke’s complaint has done so. And the Division’s arguments regarding the relevant statutory and constitutional provisions show that it was provided adequate notice of Kowalke’s claims.²⁷ Therefore, the court interprets the claim brought against the Division to

²² 6 AAC 25.260(j).

²³ Motion to Dismiss at 5.

²⁴ *Larson*, 284 P.3d at 6.

²⁵ See Complaint at 7, ¶ 1.

²⁶ *Martin v. Mears*, 602 P.2d 421, 427 (Alaska 1979).

²⁷ *Martin*, 602 P.2d at 427 (“The comprehensiveness of the motion to dismiss which Mears filed in lieu of an answer makes it clear that Mears was fully apprised of the nature of the claim for specific performance made by Martin.”).

allege that the Division failed to properly analyze whether Representative Eastman is barred by the Disqualification for Disloyalty clause as well as the relevant statutes and regulations related to how elections are administered.²⁸

The Division argues that it does not have a role in applying the Disqualification for Disloyalty clause when a person declares their candidacy for public office. At oral argument, Representative Eastman further argued that the Division had no role in enforcing the Disqualification for Disloyalty clause, and that it was only the voters who should decide whether a candidate was barred from office by that provision. However, state law clearly mandates that, "If the director receives a complaint regarding the eligibility of a candidate for a particular office, the director *shall* determine eligibility under regulations adopted by the director."²⁹ And the Division's regulation acknowledges that "eligibility" complaints include challenges based upon the Alaska Constitution.³⁰ The Division is therefore required by state law and its own regulation to determine whether a person is qualified for service in the legislature based upon the qualifications and disqualifications for office set out in the Alaska Constitution—including whether the person is ineligible under the Disqualification for Disloyalty clause.

The Division further argues that it is not empowered to decide that a candidate is ineligible because AS 24.05.070 gives the legislature the power to expel members who do not meet the qualifications to serve. However, the fact that the legislature can expel already-elected legislators does not relieve the Division of the obligation created by AS 15.25.060 (also enacted by the legislature) and 6 AAC 25.260 to decide whether a

²⁸ See Complaint at page 6, ¶ 27; pages 7-8, ¶¶ 1-5; and Exhibit 1.

²⁹ AS 15.25.042(a) (emphasis added).

³⁰ 6 AAC 25.260(a).

candidate is qualified to hold public office. Furthermore, the two determinations focus on separate classes of persons; the legislature's power to remove is directed at persons already elected and the Division's power to decide whether a person is qualified is directed at candidates. Thus, the fact that the legislature can expel a member is irrelevant to whether the Division has the power to enforce the Disqualification for Disloyalty clause.

The Division also points out that it lacks the resources to investigate whether a particular candidate has violated the disloyalty clause. By way of contrast, AS 15.13.045 empowers the Alaska Public Offices Commission to "issue subpoenas, administer oaths, hold hearings, and conduct investigations." The Division lacks these powers, and so the Division's point is a fair one. But as set out above, the Division is statutorily required to assess whether a candidate is barred by the Disqualification for Disloyalty clause regardless of whether it has the power to conduct more thorough investigations.

On top of this, the Division argues that to require it to decide on the eligibility of a candidate based upon an allegation of disloyalty would run counter to its mandate to remain impartial. AS 15.10.105(b) explicitly states that it "is essential that the nonpartisan nature, integrity, credibility, and impartiality of the administration of elections be maintained." To ensure this, the Division Director and her staff are, among other restrictions, prohibited from joining, supporting, or otherwise supporting partisan political organizations, holding public office, contributing to ballot propositions, or voicing support for candidates.³¹ The Division argues that requiring it to decide whether a person is barred from holding public office because of alleged disloyalty would significantly impair the public's perception of its neutrality. Kowalke responds, and the court agrees, that

any complaint which contests a candidate's eligibility for office will necessarily be viewed as "partisan," but that does not relieve the Division of the duty to make that decision. On top of that, the Division considered and decided that very subject in this case. In its June 20, 2022 letter to Kowalke, the Division explicitly cited art. XII, § 4 and AS 24.05.060—recognizing their interrelated nature—and found that, "To the extent these constitutional provisions apply, a preponderance of the evidence does not show that Representative Eastman is ineligible."³² In as much as any decision can be viewed as "partisan", deciding to find a particular candidate is eligible is just as "partisan" as deciding that a candidate is ineligible. The Division has therefore already made the very determination it now argues that it should not be required to make.

The Division separately argues that Kowalke has failed to state a claim because it properly conducted its review of Kowalke's complaint. According to the Division's interpretation, its review following an administrative complaint is designed to verify the qualifications that can be readily determined from state records. These include citizenship, age and residency. The Division asserts that 6 AAC 25.260(d) limits its review to documents contained in public records.³³ The Division argues most explicitly in its reply brief that this subsection "limits" its investigation to documents available in the public record and so material outside the public record would "not be proper material for the Division to consider" when

³¹ AS 15.10.105(b)(1).

³² See June 20, 2022 letter attached as Exhibit 1 to the Complaint.

³³ 6 AAC 25.260(d) reads, "Upon receipt of a complaint, the director will review any evidence relevant to the issues identified in the complaint which is in the custody of the division, including the candidate's registration record or declaration of candidacy, and including, in the discretion of the director, any other document of public record on file with the state. Based on the review of the public documents, the director will determine whether a preponderance of evidence supports or does not support the eligibility of the candidate."

deciding the complaint.³⁴ Thus, the Division argues that given the information before it based upon the allegations presented and the available information in the public record, the record did not show by a preponderance of the evidence that Eastman was ineligible to hold public office.

An agency's interpretation of its own regulation is given "a deferential standard of review" because "the agency is best able to discern its intent in promulgating the regulation at issue."³⁵ Kowalke points out that the Division's own regulation requires it to consider more than just age, citizenship and residency. Instead, 6 AAC 25.260(c) specifically states that, "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." Thus, as state more fully above, the Division is required to consider *all* requirements listed in the regulation, including the disloyalty clause in art. XII, § 4. And, as pointed out above, the Division did in fact decide that the information provided did not show by a preponderance of the evidence that Representative Eastman was barred from public office by the Disqualification for Disloyalty clause. Kowalke also argues that the Division's narrow reading of its authority in 6 AAC 25.260(d) simply cannot be squared with the plain language in 6 AAC 25.260(j), which explicitly states that, "Nothing in this section limits the authority of the director to evaluate a candidate's eligibility for office." While it would appear that there is no way to give effect to that section while simultaneously applying the Division's limited view of its authority in subpart (d), the court does not need to decide this issue in order to address the motion to dismiss. As explained above, regardless of whether the Division correctly or incorrectly determined that

³⁴ Division's Reply Brief at 5.

³⁵ *Rose v. Com. Fisheries Entry Comm'n*, 647 P.2d 154, 161 (Alaska 1982).

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. The court will therefore not decide whether the agency's interpretation of 6 AAC 25.260 is reasonable.

Finally, the Division argues that there is a distinction between determining "eligibility" for office under AS 15.25.042 and "disqualification" under art. XII, §4. But this is a distinction that carries no legal significance. The "eligibility" requirements that the Division acknowledges it must evaluate arise out of the "qualifications" clause in art. II, § 2. And whether stated as being a "qualification" or a "disqualification", the criteria to hold public office defined by the Alaska Constitution carry equal legal force. And the Division is required by 6 AAC 25.260 to consider whether a candidate is able to hold office as defined by the Alaska Constitution, not just a portion of that document. Thus, the words "eligible/ineligible" should be read to be fully interchangeable with the words "qualified/disqualified." The Division's argument that it is only required to decide whether a person is "eligible" for office but not whether they are "disqualified" is therefore not convincing.

Turning now to the crux of the motion to dismiss, Kowalke's complaint alleges that the Division improperly determined that Eastman was eligible for office. A "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."³⁶ In making this determination, the court is required to assume that the allegations in the complaint are true,³⁷ namely that Representative

³⁶ *Schaible v. Fairbanks Med. & Surgical Clinic, Inc.*, 531 P.2d 1252, 1257 (Alaska 1975)

³⁷ *Valdez Fisheries Development Ass'n, Inc. v. Alyeska Pipeline Service Co.*, 45 P.3d 657, 664 (Alaska 2002) (citing *Kollodge v. State*, 757 P.2d 1024, 1026 (Alaska 1998)).

Eastman is a member of the Oath Keepers and that the organization advocates for the overthrow by force of the United States. Having made these allegations, Kowalke seeks declaratory and injunctive relief against the Division. Kowalke's counsel was emphatic at oral argument that he does not seek appellate review of the agency's decision. Instead, Kowalke asks the court to "find that Eastman is not eligible to run for legislative office."³⁸ Kowalke could have filed an appeal under Appellate Rule 601, but he has not. Therefore, the court will analyze Kowalke's claim not as an agency appeal, but as an original action seeking declaratory and injunctive relief against the Division. Viewing the complaint in this light as required by law, Kowalke has stated a claim against the Division because if Representative Eastman is barred from office by the Disqualification for Disloyalty clause then the Division is required by statute to enforce that prohibition. The motion to dismiss will therefore be denied.

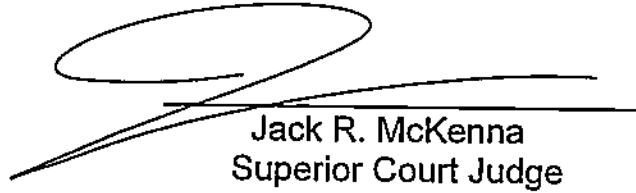
V. Conclusion

The Division is required by state law to administer elections. As part of that duty, AS 15.25.042(a) requires the Division to determine whether a person is eligible for office when their qualifications are challenged. In doing so, the Division is required to consider, as it did in this case, whether the candidate is barred by the Disqualification for Disloyalty clause. Kowalke has alleged sufficient facts in his complaint to support a claim that Representative Eastman is barred from office by that clause and that the Division should therefore be ordered to remove his name from the ballot. The Division's motion to dismiss for failure to state a claim³⁹ is therefore DENIED.

³⁸ Complaint at 8.

³⁹ Case Motion #1.

DONE this 12th day of September, 2022, at Anchorage,
Alaska.



Jack R. McKenna
Superior Court Judge

I certify that on 9/12/2022
a copy of the above was mailed to
each of the following at their
addresses of record:

S Fletcher, J Davis,
J Miller, T Flynn, L Harrison

C. Ferntheil
Judicial Assistant