

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

Randall Kowalke,)
)
 Plaintiff,)
 v.)
)
 David Eastman,)
)
 Defendant.)
 _____)

Case No. 3AN-22-07404 CI

Order Denying Division's Motion for Summary Judgment

Defendants the Division of Elections and Division Director Gail Fenumiai ("the Division") have filed a motion asking the court to grant summary judgment in their favor. The Division argues that there is no evidence showing that it violated a statute or regulation when it determined based on the record before it that Representative Eastman was qualified to run for public office. The Division goes on to argue that the legislature has specified the manner in which elections are contested and allowing the case to proceed is contrary to the law. Kowalke opposes. He argues that his claim was properly brought and that there is a genuine dispute of fact as to whether the Division properly followed its regulations when it denied Kowalke's eligibility complaint. The court denies the Division's motion because Kowalke filed a timely eligibility complaint, and this action is properly before the court as an agency appeal. There are also genuine issues of material fact that preclude summary judgment.

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 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 Division filed a motion to dismiss the claim against it, arguing that it was not required to assess whether a candidate was disqualified from public office under Article XII, § 4 of the Alaska

¹ Pursuant to the preliminary injunction issued in this case, the Division has not certified the results of the general election for House District 27.

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

Constitution. The court denied the Division's motion to dismiss, holding that the Division was required by statute and regulation to assess whether a candidate was eligible for public office based upon the Alaska Constitution, including Article XII, § 4. The court set a trial date and the parties proceeded with discovery. The Division has now moved for summary judgment.

II. Analysis

Summary judgment may be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.⁴ "If a prima facie case is established by the movant, then the nonmoving party must set forth specific facts showing that admissible evidence could be produced that reasonably tends to dispute or contradict the moving party's evidence in order to demonstrate the existence of a dispute of material fact and prevent entry of summary judgment."⁵ "The party opposing summary judgment need not produce all of its evidence but instead must only show the existence of a genuine factual dispute."⁶ "In rendering its summary judgment determination, the court should examine the pleadings, affidavits, and discovery answers to ascertain whether any genuine issues of material fact exist."⁷ "Any admissible evidence in favor of the nonmoving party concerning a material fact is sufficient to render summary judgment inappropriate."⁸

³ *Id.*

⁴ Alaska R. Civ. P. 56.

⁵ *Greywolf v. Carroll*, 151 P.3d 1234, 1241 (Alaska 2007).

⁶ *Meyer v. State, Dep't of Revenue, Child Support Enft Div. ex rel. N.G.T.*, 994 P.2d 365, 367 (Alaska 1999).

⁷ *Id.*

⁸ *Greywolf* at 1241.

- a. Kowalke's claim against the Division is properly viewed as an administrative appeal of the Division's denial of his timely eligibility complaint.

The Division argues that the legislature has created specific legal proceedings for how a candidate's qualifications may be challenged and that claims not specifically provided for in statute cannot be brought to court. While the Division largely focuses its argument on election contests, there are several other statutorily created actions that may be brought. Prior to an election, the Division determines the qualifications of a candidate and "any person" may question that determination.⁹ If a complaint is filed, a party may bring an administrative appeal following a final determination by the Division.¹⁰ And following an election, an election contest may be brought that is heard by the courts.¹¹ The courts may also hear a recount appeal.¹² Title 15 therefore provides for several legal mechanisms through which the Division's actions may be challenged in court.

In this case, Kowalke timely filed an eligibility complaint. The Division issued a decision denying that complaint. Kowalke then filed this suit, challenging the Division's denial. This action is therefore most properly viewed as an administrative appeal under AS 22.10.020(d).¹³ Under that statute, the superior court has jurisdiction to hear an appeal of an agency's final decision—

⁹ AS 15.25.042.

¹⁰ AS 22.10.020(d).

¹¹ AS 15.20.540–560.

¹² AS 15.20.510.

¹³ The hearing on an agency appeal "shall be on the record unless the superior court, in its discretion, grants a trial de novo, in whole or in part." AS 22.10.020(d).

such as the eligibility complaint denial in this case. Further, the court has discretion to order a trial de novo rather than rely upon the agency's record. Holding a trial in this matter is appropriate for two reasons. First, Kowalke has also properly stated a claim against Representative Eastman and a trial is necessary to resolve that claim. Deciding both claims based upon the evidence presented in a trial provides a better record, promotes judicial economy, and avoids the potential for disparate factual findings caused by separate factual records. Second, the Division has convincingly argued that it lacked the resources, such as subpoena power or the power to take testimony, to fully assess whether Kowalke's complaint was valid. A trial is therefore appropriate to determine whether the Division's denial was proper.

The Division argues that it is entitled to summary judgment because it properly followed its regulations when it denied Kowalke's complaint. Kowalke responds that the Division could have looked to other sources of information when deciding his complaint and that its failure to do so made its decision arbitrary. Kowalke points to the fact that the Division had a copy of the United States' indictment against Stewart Rhodes in its possession because another complaint challenging Representative Eastman's eligibility had included that document. Kowalke also argues that public records existed that showed that multiple oath keepers had been convicted on multiple charges including seditious conspiracy. Kowalke further argues that, if the court does treat his claim as an appeal with a trial de novo, the Division's decision was arbitrary and there is sufficient evidence to create a genuine dispute as to whether the Oath Keepers

are an organization that advocates the overthrow by force of the United States government.¹⁴

In response to the motions for summary judgment filed by both defendants, Kowalke has provided the court with hundreds of pages of exhibits. These include opinions from the two experts that Kowalke plans to call at trial, newspaper articles, and indictments and convictions of various members of the Oath Keepers. Kowalke also asked the court to take judicial notice that the Oath Keepers' founder, Stewart Rhodes, was convicted on charges of seditious conspiracy in relation to the events on January 6, 2021. The evidence submitted is sufficient to create a genuine dispute of fact as to whether the Oath Keepers are an organization that has advocated for concrete action designed to overthrow by force the United States government. The Division's motion for summary judgment will therefore be denied.

In the alternative, Kowalke argues that he is entitled to bring this action against the Division outside of either an eligibility complaint or an election contest. This court did hold in its decision denying the Division's motion to dismiss that Kowalke had properly stated a claim against the division without specifying which statutory provision authorized the claim. Kowalke continues to argue that the court should follow that ruling. There is some legal support for the proposition that a plaintiff may seek relief from the courts before or during an election outside of the statutes discussed above. In *Miller v. Treadwell*, the Alaska supreme court wrote that, "It may be that certain legal issues could

¹⁴ Representative Eastman no longer disputes that he is a member of the Oath
3AN-22-07404CI 6
RE
Order Denying Division's Motion for Summary Judgment

properly be brought to us pre-election or during an election with appropriate requests for declaratory and even injunctive relief.”¹⁵ The court distinguished these types of potential claims that could be brought prior to or during an election from those that must be brought later through an election contest.¹⁶ Thus, there is at least some support for Kowalke’s argument that declaratory and injunctive relief may be sought prior to the election. But the dicta from the *Miller* decision is not clear as to what types of claims may be brought prior to the election as original complaints for declaratory and injunctive relief or whether they may be brought against the Division. Without further guidance from the Alaska supreme court this case is therefore most properly viewed as an administrative appeal.

b. Kowalke’s claim against the Division is an administrative appeal of a timely eligibility complaint; it is not an untimely election contest.

The Division next argues that Kowalke’s complaint against the Division should be dismissed because an election contest is the proper way to challenge Representative Eastman’s qualifications for public office. The Division reasons that AS 15.20.540 sets out the process by which a candidate’s qualifications can be challenged. It points to the language quoted above in the *Miller* case to support its argument.¹⁷ In that case, a candidate filed a lawsuit in federal court following an election. The candidate did not file an election contest in state court. The Alaska supreme court emphasized that “the legislature has created two

Keepers.

¹⁵ 245 P.3d 867, 874–75 (Alaska 2010).

¹⁶ *Id.* (“But the legislature has created two specific legal proceedings for election challenges that would normally apply to many of the issues in this case—an election contest and a recount appeal.”).

¹⁷ 245 P.3d 867, 874–75 (Alaska 2010).

3AN-22-07404CI

RE

Order Denying Division’s Motion for Summary Judgment

specific legal proceedings for election challenges that would normally apply to many of the issues in this case—an election contest and a recount appeal.”¹⁸ The Division reasons that based upon the statutory structure and the language in *Miller*, “the only way to involve the Division and to seek re-certification of an election is through an election contest.”¹⁹

The problem with the Division's reasoning is that, as discussed above, the legislature has enacted more than one statutory provision allowing a party to challenge the Division's decisions. In this case, Kowalke filed a timely eligibility complaint prior to the primary election and that denial may properly be appealed to the superior court. Therefore, an election contest is not the only avenue to involve the Division.

The Division also points to another pending action in the Anchorage superior court for persuasive authority. *See Duke v. Division of Elections*, 3AN-22-08794CI. In that case, the plaintiffs filed an action against the Division arguing that a candidate did not meet the residency requirements to hold public office. The superior court dismissed that action without prejudice, holding that it should properly be brought as an election contest. But unlike this case, the plaintiffs in that action had not filed an eligibility complaint. They also brought their action after voting had already commenced for the general election. In this case, Kowalke filed his eligibility complaint prior to the primary election, and so a different statutory provision is implicated.

¹⁸ 245 P.3d at 874-75.

¹⁹ Division's Motion for Summary Judgment at 22, n.55.

- c. Both defendants argue that this suit has negative public policy implications, but it is not the court's role to decide on the wisdom of the Disqualification for Disloyalty clause or the procedures set out for enforcing it in the Alaska Statutes

The Division closes by arguing that sound public policy argues against enforcing the Disqualification for Disloyalty clause. Representative Eastman makes similar arguments in his Motion to Dismiss, urging the court to consider whether barring someone from office via that clause is advisable. However, it is not the court's place to decide on the wisdom of the disqualification for disloyalty clause, nor is it the court's role to make policy. Instead, when a claim is filed implicating constitutional and statutory provisions, the court must interpret and apply the Alaska Constitution as it was drafted by its framers and ratified by the people of this state. The court must also interpret and apply the statutes passed by the legislature and signed into law by the executive.

Here, the Alaska Constitution bars from office anyone who aids or belongs to an organization that advocates for the overthrow by force of the United States government. Alaska law grants the Division the responsibility to determine whether candidates for public office are eligible as set out by the United States Constitution, the Alaska Constitution, and the Alaska Statutes.²⁰ It is not the court's role to make public policy decisions or prescribe how the Division should review candidate eligibility. Nor can the court substitute its judgment for the properly enacted laws of this state. If the current state of the law is unwise or against public policy—a subject on which the court does not and cannot express

²⁰ AS 15.25.042 and 6 AAC 25.260(c).

an opinion—it is the role of the voters of Alaska, the legislature and the Division to change the relevant statutes and regulations.

III. Conclusion

For the reasons stated above, the Division's motion for summary judgment is denied.

DONE this 9th day of December, 2022, at Anchorage, Alaska.


Jack R. McKenna
Superior Court Judge

I certify that on 12/9/22
a copy of the above was mailed to
each of the following at their
addresses of record:
G Dudukjian, S Fletcher,
J Davis, Y Flynn, L Harrison,
C. Ferntheil J Miller
Judicial Assistant