

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' REPLY TO PLAINTIFF'S OPPOSITION  
TO STATE DEFENDANTS' MOTION TO DISMISS**

Like his Complaint, Mr. Kowalke's opposition to the Division's Motion to Dismiss does not allege that the Division actually violated any of its governing laws or regulations. At most, the opposition argues that a Division regulation, 6 AAC 25.260—not cited in the Complaint—imposes a duty on the Division to determine whether a candidate is disqualified by Article XII, Section 4 of the Alaska Constitution when it receives an administrative complaint. But neither Mr. Kowalke's Complaint nor his opposition allege that the Division violated 6 AAC 25.260 in processing his administrative complaint, nor do they claim that 6 AAC 25.260 compelled the Division to remove Rep. Eastman from the ballot. Thus, Mr. Kowalke has not stated a claim against the Division on which his requested relief may be granted, and this Court should dismiss the Division from the lawsuit under Alaska Rule of Civil Procedure 12(b)(6).

Mr. Kowalke’s opposition to the Division’s Motion to Dismiss, unlike his Complaint, relies on 6 AAC 25.260 as the source of the Division’s alleged duty to investigate whether candidates are disqualified from holding office for disloyalty under Article XII, Section 4 of the Alaska Constitution.<sup>1</sup> Mr. Kowalke looks specifically to that regulation’s language stating: “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.” Mr. Kowalke’s opposition does not engage with the Division’s point that the regulation’s use of the word *qualifications*—that is, basic eligibility for office—does not encompass *disqualifications*, which are listed separately in the constitution and statute.<sup>2</sup> Article XII, Section 4 of the Alaska Constitution is entitled “*Disqualification* for disloyalty,” and AS 24.05.060 is entitled “*Disqualifications*.” (Emphasis added).

Instead of engaging with this textual point, Mr. Kowalke focuses on the Division’s policy arguments in support of its position, specifically that 6 AAC 25.260 is not designed for conducting inquiries into candidates’ political loyalties or associations, and that conducting such inquiries could jeopardize the public’s perception of the Division’s political neutrality.<sup>3</sup> Mr. Kowalke argues that 6 AAC 25.260 at times requires the Division to make complex decisions regarding a candidate’s residency.<sup>4</sup>

---

<sup>1</sup> Opposition at 4-6.

<sup>2</sup> Motion to Dismiss at 5-6, 11-12.

<sup>3</sup> Motion to Dismiss at 8, 12, 15.

<sup>4</sup> Opposition at 7-8.

But investigating a candidate’s residency is neither particularly complex nor inherently political.

Mr. Kowalke’s opposition misrepresents the standards regarding candidate residency. The opposition cites only the standards for determining *voter* residency, and omits the final, most important rule: voters presumably reside at the addresses in their registration records.<sup>5</sup> And additional rules apply to *candidate* residency: a candidate must not only meet the voter residency requirements, but must also be physically present and maintain a habitation in the district.<sup>6</sup> These typically are not difficult factual determinations.<sup>7</sup> They certainly do not implicate candidates’ political views.

Determining residency is not at all analogous to investigating whether a candidate for public office supports the violent overthrow of the United States government.

But more importantly, the statutes governing voter and candidate residency are found in Title 15 of the Alaska Statutes and provide clear and specific instruction to the Division regarding how to determine residency, and they list specific information for the Division to consider.<sup>8</sup> By contrast, the disqualification statute cited in Mr. Kowalke’s Complaint—AS 24.05.060—is found in a different title of the Alaska

---

<sup>5</sup> AS 15.05.020(8).

<sup>6</sup> AS 15.25.043.

<sup>7</sup> Furthermore, if a candidate registered to vote in the last year in a district other than the district the candidate seeks to represent, the inquiry is even easier, requiring clear and convincing evidence to find the candidate an eligible resident. AS 15.25.042(c).

<sup>8</sup> See AS 15.05.020; AS 15.25.043.

Statutes and does not address elections or the Division at all. Past Alaska Supreme Court cases regarding whether the Division properly placed a candidate on the ballot have all addressed requirements for candidacy found in Title 15.<sup>9</sup>

Furthermore, Mr. Kowalke cannot re-frame his claim against the Division to rely on 6 AAC 25.260 without addressing the deferential standards of interpretation of administrative regulations. This Court should defer to the Division's reasonable interpretation of its own regulations and the statutes governing its operations. Where an agency interprets its own regulation, "a deferential standard of review properly recognizes that the agency is best able to discern its intent in promulgating the regulation at issue."<sup>10</sup> Specifically in the context of elections, the Alaska Supreme Court has explained that "a statutory construction adopted by those responsible for administering a statute should not be overruled in the absence of weighty reasons."<sup>11</sup> In *State v. Jeffery*, the Court upheld the Division's "reasonable interpretation of the constitutional and statutory requirements."<sup>12</sup> Mr. Kowalke cannot avoid the standards

---

<sup>9</sup> See, e.g., *State v. Jeffery*, 170 P.3d 226 (Alaska 2007) (addressing whether judicial retention candidates met deadlines set in AS 15.35.070 and AS 15.35.110); *Falke v. State*, 717 P.2d 369 (Alaska 1986) (addressing whether candidate met deadlines set in AS 15.25.040); *Silides v. Thomas*, 559 P.2d 80 (Alaska 1977) (addressing whether candidates met deadlines set in AS 15.13.060).

<sup>10</sup> *Rose v. Com. Fisheries Entry Comm'n*, 647 P.2d 154, 161 (Alaska 1982) (citing K. Davis, *Administrative Law Treatise* s 7.22, at 105-08 (2d ed., 1979)).

<sup>11</sup> *State v. Jeffery*, 170 P.3d 226, 230 (Alaska 2007).

<sup>12</sup> *Id.* at 232-33.

of judicial review of administrative agency actions simply by styling his Complaint as a stand-alone lawsuit instead of an administrative appeal.

Finally, even if Mr. Kowalke is correct that the language of 6 AAC 25.260 includes disqualification for disloyalty under Article XII, Section 4 of the Alaska Constitution, the Complaint still does not state a claim against the Division. Mr. Kowalke cannot and does not argue that 6 AAC 25.260 required the Division to remove Rep. Eastman from the ballot based on the record before it. The regulation limits the Division's investigation to relevant evidence "in the custody of the division... including, in the discretion of the director, any other document of public record on file with the state." Mr. Kowalke does not claim that any Division records or other public agency records exist that would have required the Division to substantiate his allegation that Rep. Eastman is disqualified from holding office. Instead, Mr. Kowalke's opposition cites a blog post and an affidavit from a private researcher in support of his factual allegations.<sup>13</sup> Neither of these documents were before the Division during the administrative process, nor are they proper material for the Division to consider under 6 AAC 25.260 even if they had been. So, even accepting for the sake of argument Mr. Kowalke's position that 6 AAC 25.260 required the Division to consider candidate *disqualification*, he fails to state a claim that the Division was required to find Rep. Eastman disqualified on the record before it.

---

<sup>13</sup> Opposition at 2.

The conclusion of Mr. Kowalke’s opposition offers a revealing insight into why Mr. Kowalke has sued the Division. He writes: “this Court cannot order the Division to remove Eastman from the ballot if the Division is not even a party before this Court.”<sup>14</sup> The party Mr. Kowalke is really suing is Rep. Eastman.<sup>15</sup> It appears Mr. Kowalke has sued the Division not because he believes the Division has violated any law, but because he wants the Division to enforce the ruling he seeks against Rep. Eastman. But a plaintiff cannot make a party a defendant just because the plaintiff wants the party to do something. The party must have breached some legal duty over which the plaintiff has standing to sue. Mr. Kowalke’s complaint fails to state a claim against the Division under either AS 24.05.060—the statute the complaint cites, which does not impose any legal duties on the Division—nor under 6 AAC 25.260, which the Division reasonably interpreted and applied to Mr. Kowalke’s administrative complaint.

Acting as enforcer of candidates’ loyalties is a politically fraught role that is not suitable for the non-partisan, apolitical Division. Finding that AS 24.05.060 or 6 AAC 25.260 give Mr. Kowalke a cause of action against the Division on these allegations could set highly detrimental precedent. To hold that a voter like Mr. Kowalke can force the Division to conduct a free-ranging investigation of a candidate’s loyalties simply by

---

<sup>14</sup> Opposition at 9.

<sup>15</sup> This is also clear in Mr. Kowalke’s recently filed Motion for Preliminary Injunction, which argues that he has a “high probability of success in establishing that Mr. Eastman has violated the Alaska Constitution’s disloyalty clause and is ineligible for public office” but does not address his probability of success in establishing any cause of action against the Division. Motion for Preliminary Injunction at 9.

filing an administrative complaint, and haul the Division into court to defend its actions if the Division denies the complaint, would place the Division in an extremely difficult position. Not only could it undermine the Division's mission of political neutrality to have to investigate such complaints, it would also be extremely difficult to investigate as a practical matter given the Division's lack of subpoena power, ability to administer oaths, or other fact-finding tools.

This Court should dismiss the Division and its Director from this lawsuit.

DATED September 6, 2022.

TREG R. TAYLOR  
ATTORNEY GENERAL

By: /s/ Lael Harrison  
Lael Harrison  
Alaska Bar No. 0811093

/s/ Thomas Flynn  
Thomas S. Flynn  
Alaska Bar No. 1910085  
Assistant Attorneys General