

**Trial Courts**

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October 27, 2010

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RE: Alaska Democratic Party v. Gail Fenumiai, et. al.

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

ALASKA DEMOCRATIC PARTY,

Plaintiff,

vs.

GAIL FENUMIAI, in her official capacity
as DIRECTOR OF THE DIVISION OF
ELECTIONS; and STATE OF ALASKA,
DIVISION OF ELECTIONS,

Defendants.

Case No. 3AN-10-11621CI

DECISION AND ORDER

I. INTRODUCTION

For the first time in the election history of the State of Alaska, the Division of Elections¹ has provided a list of the names, party affiliations, and the registration status of write-in candidates to each polling place in the state. The actions of the Division are in clear violation of an Alaska administrative regulation. Plaintiff Alaska Democratic Party and intervenor Alaska Republican Party have clearly shown that they will probably succeed on the merits of their claim.² Pursuant to Alaska R. Civ. P. 65,³ the court hereby

¹ The Director of the Division of Elections and the State of Alaska, Division of Elections, are referred to herein as the Division.

² Alaska Democratic Party is referred to herein as ADP. Alaska Republican Party is referred to herein as ARP. In the midst of a hotly contested general election campaign, ADP and ARP have joined forces remarkably to oppose the actions of the Division.

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grants a temporary restraining order enjoining the Division from allowing election workers and polling place workers to post write-in candidate names, to provide a list of write-in candidate names to voters, or to provide verbally the names of write-in candidates to voters at any place within 200 feet of a polling place for the November, 2010, general election.

II. FACTS AND PROCEEDINGS

On October 15, 2010, the Division surreptitiously sought approval from the Department of Justice for approval under the Voting Rights Act of 1965 to provide polling places with a list of write-in candidates for the November 2, 2010, general election.⁴ The list would include the name of the candidate, the candidate's party affiliation, and the write-in candidate's registration status with the Division.⁵ The Division had never before provided a list of write-in candidates in polling places.⁶

³ This Decision and Order is intended to comply with the requirements of Alaska R. Civ. P. 65(b) and (d).

⁴ Under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973(c), and 28 C.F.R. § 51.27, the State of Alaska is required to seek approval from the Department of Justice for all changes to its election procedures. *See* Ex. 1 of ADP's reply memorandum. The Division is also bound by a settlement agreement approved by the federal district court for the District of Alaska in *Nick v. State*, 3:07-cv-00098-TMB dealing with language assistance to Limited-English Proficient voters in the Bethel Census Area.

If, with forethought, the Division had decided to adopt a uniform standard of assistance to voters through use of a write-in candidate list, the Division should have followed the procedures of the Alaska Administrative Procedure Act, AS 44.62, by proposing a new regulation, taking public comment, and only then changing the law.

⁵ *See* Ex. 1 of ADP's reply memorandum.

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The Division implemented its write-in voting list plan without obtaining Department of Justice approval of the plan.⁷ As a result of a posting of the list at an absentee polling station in Homer, ADP learned by at least October 19, 2010, of the Division's actions.⁸ ADP demanded that the Division withdraw the lists from polling places because 6 AAC 25.070(b) prohibits information regarding a write-in candidate from being provided at a polling place or within 200 feet of any polling place.⁹ By letters dated October 20 and 22, 2010, the Division refused to remove the write-in candidate lists from polling places.¹⁰

On October 25, 2010, ADP filed a lawsuit against the Division to enjoin the Division's action in distributing write-in candidate lists to polling places. ADP requested a temporary restraining order against the Division. The court held a hearing on the TRO request on the afternoon of October 25, 2010. At the hearing, the court granted the requests of ADP and the Lisa Murkowski for U.S. Senate Committee¹¹ to intervene in the case. The court requested that the Division and the Committee file memoranda to

⁶ See Ex. 1 of ADP's reply memorandum at 2.

⁷ See Department of Justice letter dated October 26, 2010, and attached to Division counsel's letter of the same date to the court regarding supplemental authority.

⁸ See Ex. 3 to the complaint.

⁹ *Id.*

¹⁰ See Exs. 5 and 6 to the complaint.

¹¹ The Lisa Murkowski for U.S. Senate Committee is herein referred to as the Committee.

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support their positions by noon on October 26, 2010. The court required that ADP and ARP file replies by 4:30 p.m. on October 26, 2010. All parties filed the required legal memoranda.

On October 26, 2010, the Alaska Federation of Natives¹² moved to intervene in the case. While the court has not yet acted on AFN's motion, it has reviewed and considered AFN's memorandum in support of the Division's position. Also on October 26, 2010, the Department of Justice provided conditional approval of the format for the write-in candidate list proposed by the Division on October 15, 2010.

III. APPLICABLE LEGAL STANDARDS

A. ADP must demonstrate probable success on the merits.

The showing required to obtain a TRO or a preliminary injunction depends on the nature of the threatened injury and the ability to adequately protect the defendant from harm should the plaintiff's position prove unavailing. If the plaintiff faces the danger of "irreparable harm" and if the opposing party is adequately protected, then the court applies a "balance of hardships" approach and the plaintiff must demonstrate "serious and substantial questions going to the merits of the case."¹³ However, if the plaintiff's threatened harm is less than irreparable or if the opposing party cannot be adequately

¹² The Alaska Federation of Natives is referred to herein as AFN.

¹³ *State v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005).

protected, then the plaintiff must meet a heightened standard and make a “clear showing of probable success on the merits.”¹⁴

In this case ADP must demonstrate a clear showing of probable success on the merits. Thousands of early votes have already been cast under the Division’s disputed write-in procedure. Although those votes are not at issue here, the court recognizes the potential impact that injunctive relief could have both prospectively and retrospectively. The Division has a legitimate interest in administering a consistent and uniform election and in maintaining confidence in the validity of every vote cast. This interest cannot be guaranteed by a bond. ADP was quick to acknowledge as much at the TRO hearing. Accordingly, ADP must demonstrate a clear showing of probable success on the merits.¹⁵

B. The court reviews the Division’s interpretation of its own regulation for reasonableness.

The Division’s determination that its regulations permit the distribution of write-in candidate lists to those in need of assistance is entitled to deference. The Supreme Court has held that an agency’s interpretation of its own regulations is subject to review under the “reasonable and not arbitrary standard,” noting that a “deferential standard of review properly recognizes that the agency is best able to discern its intent in promulgating the

¹⁴ *Id.*

¹⁵ Because the court finds that the Division’s interest cannot be adequately protected, it need not determine whether ADP is threatened with irreparable harm. *Metcalfe*, 110 P.3d at 979 n.9.

regulation at issue.”¹⁶ However, that deference is not without limitation. The Supreme Court has also recognized that “[a]lthough an administrative agency’s interpretation of its own rules is entitled to great weight, the ultimate resolution of a regulation’s meaning is a question for the court.”¹⁷ While the court should defer to an agency’s interpretation, it cannot affirm that interpretation if it is meritless.¹⁸

Accordingly, ADP will be entitled to a TRO only if it makes a clear showing of probable success in demonstrating that the actions of the Division are based on an unreasonable and arbitrary interpretation of its regulations. The court finds that ADP has made such a showing by demonstrating that the Division’s distribution of lists of write-in candidate names clearly violates its own administrative regulation.

IV. DISCUSSION

A. The Division’s actions violate 6 AAC 25.070(b).

Through the Division, the State of Alaska has adopted an applicable administrative regulation known as 6 AAC 25.070(b). The regulation provides as follows: “Information regarding a write-in candidate may not be discussed, exhibited, or provided at the polling place, or within 200 feet of any entrance to the polling place, on election day.” For this general election, the Division has initiated a procedure of placing in each

¹⁶ *State v. Valley Hospital Association, Inc.*, 116 P.3d 580, 585 n.4 (Alaska 2005), quoting *Strosh’s I/M v. Fairbanks N. Star Borough*, 12 P.3d 1180, 1183 (Alaska 2000).

¹⁷ *State v. Merriouns*, 894 P.2d 623, 627 (Alaska 1995), quoting *Borkowski v. Snowden*, 665 P.2d 22, 27 (Alaska 1983).

¹⁸ *Merriouns*, 894 P.2d at 627.

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polling place in the State of Alaska a list containing the name, party affiliation, and registration status with the Division for write-in candidates. Information is knowledge. The Division's action in providing the write-in candidate list to each polling place and then instructing its polling workers to disseminate that knowledge to inquiring voters clearly provides voters with information regarding a write-in candidate. The Division's actions also clearly violate 6 AAC 25.070(b).

The Division's arguments that the knowledge that it has provided to voters about write-in candidates is not "information" as that term is used in the regulation is simply wrong. The court finds that the plain and clear meaning of the regulation is violated by the Division's actions.

The Division has an affirmative duty to follow the election regulations that it promulgates.¹⁹ The Division violated this affirmative duty by not following the plain meaning of 6 AAC 25.070(b).

The Division's interpretation of 6 ACC 25.070(b) is unreasonable and arbitrary. As such, the Division's interpretation is not entitled to deference.²⁰ Besides, an agency's new, last minute interpretation of a regulation is not entitled to deference.²¹ Even more

¹⁹ *Cf. Trustees for Alaska, Alaska Ctr. For the Env't v. Gorsuch*, 835 P.2d 1239, 1244 (Alaska 1992)("An agency is bound by the regulations it promulgates.").

²⁰ *Regulatory Comm'n of Alaska v. Tesoro Alaska Co.*, 178, P.3d 1159, 1163 (Alaska 2008).

²¹ *See Totemoff v. State*, 905 P.2d 954, 968 (Alaska 1995)(noting that a position announced by an agency during litigation is owed no deference).

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shocking is the Division's implementation of its "haste makes waste" write-in voting list determination without obtaining required Department of Justice approval of its actions.²²

The Division's write-in candidate list has another "haste makes waste" component. AS 15 25.105(c) states that a person who wishes to be a write-in candidate in the election can file a letter of intent "not later than five days before the general election." The general election is November 2, 2010. Thus the write-in candidate list can change up until October 28, 2010. Indeed, the list has already changed. The Division's list provided with the complaint as Exhibit 1 has already been revised by the Division.²³ Among other changes, there have been additions to the critical U.S. Senate write-in candidate list.

B. The applicable administrative regulation is not void as contended by the Committee.

Faced with the plain language of the Division's regulation, the Committee attempts to justify the Division's actions by arguing that 6 AAC 25.070(b) is invalid.²⁴ AS 15.15.010 provides that the director of elections may adopt regulations necessary for

²² The Department of Justice's October 26, 2010, tentative approval of the Division's write-in list decision is not in any way determinative of the outcome of this case. The Department's approval relates to compliance with provisions of the federal Voting Rights Act of 1965 not the proper interpretation of Alaska's election regulations.

²³ See Ex. B to the Division opposition memorandum.

²⁴ The Committee's memorandum at 9.

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the administration of state elections. The questioned regulation is clearly within the broad scope of authority delegated to the director.

The party challenging the validity of a regulation has the burden of proving invalidity.²⁵ The Committee has not met its burden to show that the Division's regulation is invalid. The questioned regulation is consistent with other election regulations and statutes. For example, AS 15.15.160 states that during the hours that the polls are open an election board member may not discuss any candidate while on duty. Likewise, 6 AAC 25.050(d) provides that instructions for indicating a write-in choice will be posted in each polling place.²⁶

C. The statutory obligation of the Division to provide assistance to voters in voting is not thwarted by the court's ruling.

The Division justifies its position by arguing that its actions fulfill its duties to aid a "qualified voter needing assistance in voting."²⁷ There are multiple problems with the Division's argument. First, the argument directly conflicts with 6 AAC 25.070(b). Wherever possible, statutes and regulations should be interpreted in a fashion consistent

²⁵ *Vail v. Coffman Engineers, Inc.*, 778 P.2d 211 (Alaska 1989).

²⁶ "Instructions" in 6 AAC 25.070(d) must mean something other than "information regarding a write-in candidate" as set forth in 6 AAC 25.070(b); otherwise the two regulations would be inconsistent. The court should strive to interpret regulations in a consistent fashion.

²⁷ AS 15.15.240.

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with each other. The Division's interpretation violates this canon of statutory construction.

Second, there is a critical difference between assistance in voting and assistance in who to vote for. The Division's list prompts voters on who to vote for; it doesn't provide assistance in actually voting. This distinction is critical. Voting assistance might include helping vision impaired or illiterate voters cast ballots. It might include assistance in spelling a name. On the other hand, providing voters with a list of write-in candidates smacks of electioneering at the polls, particularly where this form of electioneering is specifically prohibited by 6 AAC 25.070(b).

Third, the Division's assistance argument rings hollow in light of the Division's past practices. If it were important "assistance" for the Division to provide voters with lists of write-in candidates, then the Division has been asleep at the switch for the past 50 years. The Division first developed the need for a write-in candidate list 12 days ago.

AFN claims that Alaska natives who may not be proficient in English will be disadvantaged if the write-in list is thrown out. The problem with this argument is that the list is in English. It will do little to assist non-English speaking or limited English speaking voters.

D. Federal law does not require that the Division provide a list of write-in candidates to polling places.

The Committee argues that the United States Constitution and federal law require the Division to provide write-in candidate lists as part of its aid to voters in need of

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assistance.²⁸ Specifically, the Committee points to provisions the Voting Rights Act, the Voting Accessibility for the Elderly and Handicapped Act, and the Americans with Disabilities Act.²⁹ These acts variously require that states provide improved access, accommodation, and aid to those who need help in the voting process. What these acts do not require is a particular mode of assistance, let alone the provision of write-in candidate lists. The Committee illogically argues that “[b]ecause the list of candidates *could* assist the Division in providing that aid...a blanket prohibition on the list’s use...would also violate these acts.”³⁰ There are various tools that the Division can use to fulfill its obligation under federal law to aid voters. It simply does not follow that a regulation limiting the use of *one* of the tools prevents the Division from meeting its obligations and thus violates those laws.

The Committee’s constitutional argument is similarly misplaced. The Committee argues that prohibiting the use of candidate lists impermissibly burdens the constitutionally guaranteed right to vote for the candidate of one’s choice because it “would render it impossible for the Division to assist voters in certain situations.”³¹ It is not at all clear to the court under what circumstances a list of write-in candidates would

²⁸ See the Committee memorandum at 9-14.

²⁹ *Id.*

³⁰ *Id.* at 13–14 (emphasis added).

³¹ *Id.* at 10.

provide the only means of assisting a voter in need of aid. Unfortunately, the Committee does not elaborate on its argument.

The Division also points to a number of state jurisdictions that provide write-in candidate lists at their polling places as proof that candidate lists are not electioneering.³² The Division misses the point. None of the listed jurisdictions has a statute or regulation analogous to 6 AAC 25.070(b) that expressly prohibits providing write-in candidate information at polling places. The examples that the Division provides are thus not persuasive to this court.

E. ADP has demonstrated probable success on the merits of its claim.

For all of the foregoing reasons, ADP has demonstrated that it will likely prevail on the claim that the Division's nascent policy of providing write-in candidate lists at polling places violates state election regulations. Specifically, ADP has demonstrated that the clear language of 6 AAC 25.070(b) prohibits the Division from providing information about write-in candidates—including their names, party affiliations, and certification status—for distribution to voters at polling places. Further, ADP has demonstrated that the Division has already provided such information to early voters and intends to continue providing it throughout the general election. Finally, the Division's justification for its new policy is without merit because it based on an unreasonable and arbitrary interpretation of its own regulation. Even under the deferential standard that

³² See the Division's memorandum at 19 n.23.

this court is bound to apply, it would not likely uphold the Division's actions. Because ADP has demonstrated that it is likely to succeed on the merits, it is entitled to a TRO.

V. CONCLUSION

ADP is entitled to and is hereby granted a temporary restraining order enjoining the Division from disseminating and using lists of write-in candidates at all polling places in the State of Alaska relative to the November, 2010, general election.

DATED at Anchorage, Alaska this 27th day of October, 2010.

Frank A. Pfiffner

FRANK A. PFIFFNER
Superior Court Judge

I certify that on 10/27/10 a copy

signed and mailed of the above was mailed to each of the

following:

A.D. - M. Paton - 258-1978
K. Kirk - 278-4119
T. Daniel - 276-3108
S. Kendall - 277-4657
AFN - T. Daniels - 222-2199

D. Deaton

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