

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

KATHRYN DODGE,

Appellant,

vs.

LT. GOVERNOR KEVIN MEYER, et al.,

Appellees,

vs.

BARTON LEBON and ALASKA
REPUBLICAN PARTY,

Intervenors.

Trial Court Case 3AN-18-1RA
Supreme Court No. S-17301

**ORDER RECOMMENDING DIRECTOR'S DECISION ON HOUSE
DISTRICT 1 RECOUNT BE AFFIRMED**

Appellant Kathryn Dodge is a candidate for State Representative District 1. She filed this recount appeal in the Alaska Superior Court, challenging the Director of the Division of Election's Certification of the November 6, 2018 General Election for the Office of State Representative District 1. Appellant challenges the Director's recount decision on four ballots. The Alaska Supreme Court appointed this court as a special master to the election appeal. Thereafter, Intervenors Barton LeBon and the Alaska Republican Party filed a cross appeal. Intervenors identify another five ballots for the court to review in addition to those identified by Appellant.

Procedural History

On December 10, 2018, this court set a briefing schedule and scheduled an evidentiary hearing. After the parties submitted initial and responsive briefs, this court held the evidentiary hearing on December 20, 2018. At the hearing, this court heard testimony from Dodge, Elaine Lawrence, and Robert Beconovich. The parties submitted six exhibits for the record.¹ This court considered the testimony, exhibits, and the record submitted to the Court. This court issued its recommendations on the record, which it has memorialized in this written recommendation.

The Evidentiary Hearing

The primary goal of the hearing was to allow each party to create the evidentiary record they felt was necessary for the ultimate determination of this appeal. All evidence offered by the parties was accepted for consideration by this court. Parties were allowed to make evidentiary objections and the court ruled on those objections. The court instituted this process to assist weighing the evidence. No evidence was excluded even if an objection was sustained. Exhibit 1001, the affidavit of Dr. Odom, was not formally admitted into evidence because it contains hearsay and no exception to the hearsay rule would allow for its admission.² Even though that exhibit would not be admitted into a hearing where the rules of evidence applied, it was still given evidentiary value by this

¹ Exhibit 1001, Affidavit of Dr. David Odom (not admitted); Exhibit 1002, Example Alaska Permanent Fund Dividend Application (admitted); Exhibit 2000, Example Opt-Out Notice of Voter Registration Update (admitted); Exhibit 2001, Spreadsheet showing names of voters the Division sent to a vendor for the vendor to mail opt-out notices (admitted); Exhibit 3000, Letter from Josie Bahnke, former Director of the Division of Election, to Stacey C. Stone (August 10, 2018) (admitted).

² Evidence Rules 801, 802, 803 and 804.

court in that the written statement is sufficient pursuant to AS 15.05.020 to declare voter residency.

Discussion

A. Over- and under-votes

This court heard argument on four challenges to the Director's decisions on whether to count particular ballots based on their markings: 1) Appellant challenges a ballot she argues the Director improperly excluded as an over-vote,³ 2) Intervenors challenge a ballot they argue the Director improperly counted for Dodge,⁴ 3) Intervenors challenge a ballot they argue the Director improperly excluded as an under-vote,⁵ and 4) Intervenor challenged another ballot they argued the Director improperly excluded as an under-vote.⁶ This court recommends all four of the Director's decisions be upheld.

1) Appellant Over-Vote Challenge

Appellant challenges the Director's decision not to count a ballot on which the voter filled in both the oval for Dodge⁷ and the oval for LeBon and also made an "X" through the oval for LeBon.⁸ This court finds that the oval for each candidate was filled in, indicating a deliberate and purposeful effort by the voter to mark the ballot. The "X" was also a deliberate mark; it is two overlapping slashes centered over LeBon's oval. Appellant argues the "X" is intended to cross out the vote for LeBon. Intervenors argue

³ STATE 001-005.

⁴ STATE 133-134

⁵ STATE 127-129.

⁶ STATE 130-132.

⁷ This court considered the oval to the immediate left of the candidate's name as the oval provided for that candidate—in other words, the oval "for" a candidate.

⁸ STATE 001-005.

the “X” indicates an affirmative vote for LeBon. This court finds that either argument is equally plausible. The Director could not reasonably determine between the two possibilities of the voter’s intent.

Alternatively, “X” is considered an affirmative mark under AS 15.15.360. The only other conclusion is for the vote to count for LeBon because the “X” is centered within the provided oval.

This court recommends the Director’s decision be affirmed because the ballot does not show the clear intent of the voter.

2) Intervenors Over-Vote Challenge

Intervenors challenge a ballot the Director counted for Dodge on which the voter completely filled in the oval for Dodge, but also made a mark on the upper edge of the oval for LeBon.⁹ The ballot shows markings for four different candidates, each with their oval darkened in a unique way—the voter darkened the oval with a series of three horizontal lines. In contrast, the oval for LeBon shows only a mark on the upper edge. The markings on the ballot show the voter’s intent for a chosen candidate by the three horizontal lines. The mark on LeBon’s oval is inconsistent with the voter’s chosen pattern to darken an oval.

This court recommends affirming the Director’s decision because there is substantial evidence to conclude the voter’s intent was to vote for Dodge.

⁹ STATE 133–134.

3) Intervenors Under-Vote Challenge

Intervenors challenge a ballot the Director excluded as under-voted where the voter made no marks in any of the ovals provided for the House District 1 candidates.¹⁰ On the first page of the ballot, each candidate has their party designation in parenthesis to the right of their name (e.g. (R) or (D)). The oval, in which to mark the voter's choice of candidate, is to the left of the candidate's name. On the first page the voter marked the area to the right of the candidate's name over the candidate's party designation. All provided ovals on the first page are devoid of any marking. On the second page of the ballot, the voter filled in one oval each for three of the four election questions. On the fourth question on the second page, the voter left both ovals blank.

The markings on the first page are not clear as to the voter's intent. The voter may have intended the markings as a vote for the candidate whose name is to the left of the markings. The markings could have been notes for the voter who was undecided on whether or not to enter a vote on any of the four different election questions on the first page. As the voter reviewed the first page, he or she may have been undecided and simply marked to the right of the name as a reminder of whom they may want or not want to vote for if they were to cast a vote on each particular election question. The markings on the second page clearly show that the voter understood that filling in the oval indicated an affirmative choice. The blank ovals on the second page also show that the voter understood that he or she could decide not to cast a vote on an election question.

¹⁰ STATE 127-129.

Because the markings on the first page are not definitive, no voter intent can clearly be determined.

Alternatively, AS 15.15.360(a)(5) creates a mandatory requirement that the oval for the chosen candidate be marked either inside or touching the oval.¹¹ As on the second page, no mark in or on the oval means no vote.

This court recommends upholding the Director's decision to exclude the ballot.

4) Intervenors Second Under-Vote Challenge

Intervenors challenge a ballot the Director excluded as under-voted where the voter made no marks in any of the ovals provided.¹² The analysis for this vote is the same as the previous under-vote challenge. The voter did not mark any of the designated ovals on the front page, but did mark over a candidate's party designation in three of four election questions. The voter marked one designated oval on the second page. The remainder of the page is unmarked.

No clear intent can be determined as to the voter's intent to actually cast a vote in the contest between Dodge and LeBon for the same reasons as expressed above. The markings over the party designation may have been meant as a vote or may simply have been a note by the voter who ultimately decided not to cast a vote in the election for House District 1. In addition, the ballot marking to the right of the candidate's name does not comply with AS 15.15.360(a)(5).

This court recommends upholding the Directors' decision to exclude the ballot.

¹¹ See *Miller v. Treadwell* (upholding mandatory requirement that mark be substantially within or touching provided oval despite other evidence showing intent).

¹² STATE 130-132.

B. Incorrect identifiers

Intervenors challenge the Director's decision to exclude two absentee ballots that did not contain accurate voter identifiers on their ballot attestations.¹³ Each absentee ballot attestation was completely filled out. However, the identifier on each voter attestation was incorrect.¹⁴ The Director is required to determine whether an absentee ballot is properly cast.¹⁵ A voter is required to provide at least one form of identification specified in 6 AAC 25.510(a), and the Director must exclude an absentee ballot if the voter failed to provide an identifier.¹⁶ Both absentee ballots failed to include an accurate identifier.

This court observes that, as to the attestations themselves, the signature on STATE 123 does not appear to be written by the same person who signed STATE 126. The voter identification number on STATE 123 does not appear to be written by the same person who filled in the voter identification number on STATE 126. The witness signatures appear to be by the same person, but the identity of the witness is indiscernible. Intervenors argue that the Director must compare all absentee ballots and relevant voter registrations¹⁷ and attempt to resolve any conflict within the information provided. No authority was identified for this court that imposes that duty on the Director or permits the Director to take that action. This court's interpretation of the relevant statutory

¹³ STATE 121-126.

¹⁴ Incorrect in that the name on the voter attestation did not match the voter identifier provided.

¹⁵ AS 15.20.203.

¹⁶ AS 15.20.081(f); 6 AAC 25.580(7).

¹⁷ The voter registration for the name provided and the voter identification provided.

scheme is that it is the voter's responsibility to completely and correctly fill out their absentee ballot or their vote will not be counted.

Further, despite the Intervenors' "innocent mistake" argument, the Director did not know who the voters were, what their competency level was, or whether someone else filled in the absentee ballot for them. The Director could not know how the transaction of filling out the absentee ballot occurred. The Director cannot presume an innocent mistake was made as argued by Intervenors.

This court recommends upholding the Director's decision to exclude both absentee ballots because the identifier requirement is mandatory and because the Director is not authorized to search beyond an individual ballot to attempt to provide a voter the correct identifier.

C. Voter residence issues

Appellant challenges three of the Director's determinations to exclude one question ballot by Robert Beconovich¹⁸ and count two absentee votes, by Dr. David Odom¹⁹ and Norma Jean Knapp.²⁰ This court recommends upholding all three of the Director's determinations.

1) Beconovich

Appellant argues Beconovich is a resident of House District 1 and never intended to change his voter residence. Parties agree that his voter registration was automatically updated when he registered online for the Permanent Fund Dividend in 2017. In that

¹⁸ STATE 012-014.

¹⁹ STATE 037-069.

²⁰ STATE 015-036.

update, his residency address was changed from 1214 20th Avenue, #C to 104 Kutter Road.

Appellants raise the issue of whether Beconovich knowingly or mistakenly registered at a different address. There is no evidence from Beconovich himself that he did not understand the PFD registration form. He stated that he does not know what he did when he filled out the form in 2017, and he affirmed to the court that he is responsible for having read what is on the form when he signed it. The language on the form is plain and simple, and states that the residential address the applicant identifies will be used as the applicant's residence for voter registration. It is not within this court's scope to determine whether there is any irregularity with the forms, but nothing appears to be out of order in terms of Beconovich's registration or how the Director handled the questioned ballot.

To the extent that the Appellant is challenging the manner in which the relevant statutes were applied (i.e. the automatic voter registration per PFD application) any such challenge is outside the scope of this recount appeal.²¹

This court finds that Beconovich registered himself for a district other than House District 1 thus limiting him to voting within that new district. As of November 6, 2018, he could not legally vote in House District 1. AS 15.07.070(d) requires a person be registered in the district they intend to vote at least 30 days prior to an election.²² In *Willis*, the Alaska Supreme Court recognized the necessity of being registered ahead of

²¹ This recount appeal is not an election contest. AS 15.20.480 (procedure for recount); AS 15.20.510 (provision for appeal to courts).

²² *Willis v. Thomas*, 600 P.2d 1079, 1086 (Alaska 1979) ("Alaska's election laws require that a person be properly registered in the district in which the vote is to be cast at least thirty days before the election.").

time in that particular district.²³ The decision by the Director not to count Beconovich's question ballot was proper because Beconovich was not registered to vote in House District I at least 30 days prior to the election on November 6, 2018.

The court recommends upholding the Director's decisions to exclude Beconovich's questioned ballot.

2) Odom and Knapp

Appellant argues the Director improperly counted the ballots of Odom and Knapp. Appellant's argument to this court goes to the scope of the court's review in a recount appeal under AS 15.20.480 and the scope and procedures the Director must take during a recount.

Appellant timely raised a question regarding the residency of Odom and Knapp prior to the recount. She presented information for the Director's consideration and argued that Odom and Knapp should not be considered residents of House District 1.

This court considered the testimony of Dodge and Lawrence and that portion of the record on appeal, STATE 15 – 36, regarding Appellant's challenge to Knapp's residency. The information the Director had before her at the time of the recount was the information contained within STATE 15 – 36. This court reviewed those documents. STATE 27 – 30 are photographs of the building at 1804 South Cushman. STATE 31 – 36 are public documents regarding the description and the zoning description of the building.

²³ *Id.* ("This is obviously an important piece of information, which goes to the very purpose of the registration requirement.").

This court considered the testimony of Dodge and Lawrence and that portion of the record on appeal, STATE 37 – 69, regarding Appellant’s challenge to Odom’s residency. The information the Director had before her at the time of the recount was the information contained within STATE 37 – 69. This court reviewed those documents. STATE 58 – 62 are photographs of the building at 3514 International Street. STATE 63 – 69 are public documents regarding the description and the zoning description of the building.

For both of these voters, the Appellant argues that because each building looks like a commercial building, has no outward appearance of what would typically be considered a “home,” and is zoned as commercial, the buildings cannot be considered as the voters’ residence for purposes of voting in the House District I election.²⁴

This court finds that it is feasible that the addresses given by Odom and Knapp could in fact be residences. The addresses contain a building with four walls, and from the outside appear to have sufficient room for a person to live in. There was no evidence that the residences given could not be the voters’ residences or that they are in fact not their intended residences. Appellant acknowledged that at the time of the recount, the information before the director would not necessarily overcome the presumption of residency.

Appellant argued that the Director had a duty to investigate whether the addresses given were the voters’ residences or not. The statute, as created by the legislature, does

²⁴ The Appellant does not challenge that the addresses 1804 South Cushman and 3514 International Street are within House District I.

not include a duty for the Director to make that investigation for purposes of a recount. The law in this state allows voters to register and provide a statement under oath of intent of residency. Unless a voter says that he or she has a different residency, or unless there is a physical impossibility of that residency,²⁵ the law requires the presumption created by the registration be relied upon when verifying a voter's qualifications.

This court finds that the information at the time of the recount, although raises a question to Odom's and Knapp's residency, was insufficient evidence to overcome the presumption of residency. The court recommends upholding the Director's decision based on the information at the time of the recount.

After the recount, no affirmative evidence has been offered regarding Knapp's residence. Dodge testified that she spoke to someone and that person stated Knapp lives in New Mexico. Assuming Dodge's statement is true, it is still not enough to overcome the presumption of residency. It is feasible that Knapp lives in New Mexico and also lives in Alaska at the address given and maintains residency there. Knapp indicated with her absentee ballot that her intent was for that to be her residence. Under the state's election laws, that is sufficient evidence of residency.

The affidavit of Odom obtained after the recount is beyond the scope of a recount appeal. Only information in front of the Director at the time of the recount is to be considered in her decision to count or not count an absentee ballot. To the extent this

²⁵ *Fischer v. Stout*, 741 P.2d 217, 221 (Alaska 1987) (finding that post office box or private mail service address is clearly not a voter's fixed place of habitation because "human beings are of insufficiently diminutive stature to dwell comfortably within such a space," and therefore a post office box or private mail service address is "insufficient to fix a voter's residence within a voting district.").

court has incorrectly determined the scope of the recount appeal, Odom's affidavit as produced by Dodge is clear statement of intent by Odom that he is not a resident of House District 1. It is a notarized affidavit. AS 15.05.020 requires only a written statement by the voter declaring an intent to establish his or her voting residence.

This court recommends upholding the Director's decision to count Odom and Knapp's ballots. If there is a concern that these voters are not residents of either the district or the State of Alaska, that is for another time and place and for other divisions of the State of Alaska to investigate. At the time of the recount, everything on the face of what Odom and Knapp filed with the Alaska Division of Elections was consistent with election laws and their declaration of voting residence within House District 1.

Conclusion

The statutory scheme for our elections allows for imperfection in the casting and counting of votes. The court must presume that the Alaska State Legislature understood the nuances and imperfections that exist in elections when the current statutory scheme was enacted. As acknowledged by the Court in *Cissna*, there may be times when a vote by someone who is not a resident of the state is counted.²⁶ The Legislature made balancing decisions between perfection in the election process versus finality and a prompt decision. The Legislature chose to emphasize providing its citizens finality and prompt decisions in state and local elections. Prompt decisions ensure the continuity of

²⁶ *Cissna v. Stout*, 931 P.2d 363, 369 (Alaska 1996).

