

IN THE SUPREME COURT OF THE STATE OF ALASKA

FILED
STATE OF ALASKA
APPELLATE COURT

2018 DEC 12 PM 1:06

CLERK APPELLATE COURT

BY _____
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Supreme Court No. S-17301

Kathryn Dodge,

Appellant,

v.

Lt. Governor Kevin Meyer, and
Division of Elections Director
Josephine Bahnke,

Appellees.

Trial Court Case No. 3AN-18-00001RA

**STATE'S OPPOSITION TO MOTION TO CORRECT OR SUPPLEMENT THE
RECORD**

The appellant, Kathryn Dodge, seeks to supplement the record in this recount appeal with two affidavits, executed on December 4, 2018 and December 5, 2018. Because the recount result was certified on November 30, 2018—five days before these affidavits were provided to the division—these documents are not part of the Division's record of the recount and the appellees (collectively, the "Division") oppose this motion. Moreover, at Ms. Dodge's request, this Court has appointed a special master in this matter. The Division believes that the special master should make a recommendation regarding the legal significance and factual reliability of any additional evidence that Ms. Dodge seeks to rely on in this appeal.

1. The Division complied with the Court's Notice to Prepare the Record.

Although Ms. Dodge argues that these two affidavits fall within the scope of both AS 15.20.510 and this Court's order to the Division to prepare the record, she is

mistaken. AS 15.20.510 provides that “the director shall furnish *the record of the recount taken*, including all ballots, registers, and other election material and papers pertaining to the election contest.” Ms. Dodge focuses on whether affidavits could be considered “other election material and papers pertaining to the election contest,” but ignores the key phrase—“the record of the recount taken.” Because these affidavits post-date the recount, by definition they cannot be part of the “record of the recount.”

For the same reason, Ms. Dodge’s reliance on subparagraph 2 of the Court’s Notice to Prepare the Record is misplaced. The Court ordered the division to “prepare and forward the record in this matter,” with two paragraphs outlining the parts of the record that were being requested, after a teleconference in which the parties discussed the transmission of an *excerpted record*. The Division’s exclusion of materials provided by Ms. Dodge days after the recount was not a “unilateral” decision taken by the Division in bad faith. The order clearly requests *the record in this matter*. The language of the Court’s two subparagraphs was designed to capture the portion of the recount record relevant to the appellant’s claims. The Division never contemplated including these documents because they are not part of the “record of the recount taken.”

2. Ms. Dodge will have an opportunity to present her extrinsic evidence to the special master

The Division has concerns about the administrability of a system under which candidates and voters may challenge the Director’s decisions at a recount based on evidence post-dating the recount. However, without conceding the relevance or admissibility of these particular affidavits, the Division recognizes that the Court may

wish to consider post-recount evidence as it weighs the related legal questions. Any potential relevance of the affidavits, however, does not transform them into part of “the record of the recount taken” by the division. Ms. Dodge will have an opportunity to present evidence and make it part of the record before this Court.

In her original application to this Court, Ms. Dodge proposed that in order “to resolve issues of fact regarding three voters’ qualifications to cast a vote in the State Representative District 1 race,” the Court could “elect to ... appoint a special master for the limited purpose of hearing evidence and providing a recommended finding as to the qualifications of each individual named” in the appeal. [Orig. App. At ¶ 17] This Court granted that request and has appointed a special master to hear the evidence regarding these voters’ qualifications to vote in House District 1. Ms. Dodge will therefore have an opportunity to present any evidence she would like to present to the special master and have it considered by the Court. The parties will then have the opportunity to argue about the relevance, admissibility, and significance of the evidence to the special master and then to this Court.

There is thus no need to have this new evidence added to the administrative record of the recount without the benefit of the special master’s review as if these documents were somehow part of the recount process. Because adding these documents to the record is both inconsistent with the meaning of “the record of the recount taken” and unnecessary to protect Ms. Dodge’s ability to present her arguments and evidence to this Court, the Division opposes Ms. Dodge’s motion.

Dated December 12, 2018.

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CERTIFICATE OF SERVICE AND TYPEFACE


This is to certify that on the 12th day of December, 2018, true and correct copies of the *State's Opposition To Motion To Correct Or Supplement The Record* and this *Certificate Of Service* were sent via 1st class U.S. Mail and Electronic Mail to the following:

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I further certify, pursuant to Appellate Rule 513.5, that the font used in the documents is Times New Roman 13 point.


Brett Hubbard
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