

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

RANDALL KOWALKE,

Plaintiff,

v.

Case No. 3AN-22-07404 CI

DAVID EASTMAN, STATE OF
ALASKA, DIVISION OF
ELECTIONS, and GAIL FENUMIAI,
in her official capacity as Director of
Elections,

Defendants.

**ORDER DENYING EXPEDITED CONSIDERATION OF PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION**

On August 29, 2022, Plaintiff Randall Kowalke filed a motion asking the court to expedite consideration of his motion for a preliminary injunction. Defendants the State of Alaska, Division of Elections and Division Director Gail Fenumiai (the "Division") filed their opposition to expediting consideration of the preliminary injunction on August 30. Defendant David Eastman separately filed his opposition later that same day. Kowalke filed a reply memorandum on August 31.

I. Procedural Background

Kowalke filed his complaint on July 29, 2022 alleging that because Eastman is a lifetime member of the Oath Keepers he is therefore barred from running for public office

by Article XII, section 4 of the Alaska Constitution¹ and AS 24.05.060.² Kowalke further alleged that the Division improperly determined that Eastman was eligible to run for reelection.³

The Division filed a motion to dismiss on August 12, 2022. On August 23, with no other filings having been made in the case, the court scheduled a status hearing for August 30 to address scheduling. On August 29, Kowalke filed his motion for a preliminary injunction as well as the motion to expedite. Kowalke also filed his opposition to the Division's motion to dismiss. That same day, Eastman filed a motion for an extension of time until September 12 to file an answer to the complaint or a motion to dismiss as well as a motion to change venue in this case to Palmer. On August 30, the Division filed its opposition to expedited consideration.

At the status hearing on August 30, Eastman asked to have until the end of the day to file his opposition to the motion for expedited consideration. Kowalke asked to have until 10:30 a.m. on August 31 to file his reply memorandum. The court accepted the parties' proposed briefing schedules, and those filings were timely submitted.

¹ "No person who advocates, or who aids or belongs to any party or organization or association which advocates, the overthrow by force or violence of the government of the United States or of the State shall be qualified to hold any public office of trust or profit under this constitution." Alaska Const. art. XII, § 4.

² "A person is not qualified for membership in the legislature who is disqualified to hold public office under the provisions of art. XII, § 4, Constitution of the State of Alaska, and as it may be implemented by law. Each member of the legislature, before entering upon the duties of the office, shall take the oath of office prescribed in art. XII, § 5, Constitution of the State of Alaska, and such further oath or affirmation prescribed by law for members of the legislature or other officers of the state." AS 24.05.060.

³ See June 20, 2022 Letter from Division Director Fenumiai to Kowalke, attached to Plaintiff's Complaint as Exhibit 1.

II. Discussion

Under Civil Rule 77(g), a party may seek expedited consideration if a decision on the principal motion is needed “in less time than would normally be required for the court to issue a decision.” Kowalke has asked the court to expedite consideration of the underlying motion for a preliminary injunction. That motion asks the court to order the Division of Elections to remove Eastman’s name from the general election ballot. Kowalke argues that a decision on his request for a preliminary injunction is needed by 12:00 p.m. on September 6, 2022 and prior to the Division of Elections printing ballots for the November general election.

The Division has opposed. It argues that expedited consideration is not warranted because Kowalke caused the time crunch now facing the parties by unnecessarily delaying his request for a preliminary injunction and not pursuing other remedies, such as an administrative appeal. The Division also argues that even if Kowalke is successful, removing Eastman’s name from the ballot is not necessary to grant him the relief he seeks. Finally, the Division points out that its motion to dismiss will not be ripe until after September 6—oral argument on the motion is now scheduled for September 9—and so deciding on the preliminary injunction would unduly burden the Division. Finally, the Division argues that this is an important question facing the court and additional time is needed to allow for full briefing.

Eastman has also opposed expedited consideration of the requested preliminary injunction. In addition to echoing the Division’s arguments above, Eastman argues that

Kowalke could have filed his suit sooner and therefore not needed to request expedited consideration. Eastman also argues that Kowalke did not comply with Rule 77(g)'s procedural requirement to make a good faith effort to resolve the issues prior to requesting expedited consideration.

In Kowalke's reply, he argues that he was not dilatory in filing his suit or seeking an injunction. Kowalke also points out that the proposed time-table is workable and supported by prior precedent in election-related cases.⁴ Finally, Kowalke argues the importance of having orderly elections and that failure to timely-address the preliminary injunction could create unnecessary complication for the voters.

The court does not find based on the record before it that a decision on the preliminary injunction is needed prior to ballots being printed. Kowalke's argument would have more force if the preliminary injunction could impact a statewide election. However, this case concerns only House District 27 and it is not apparent that the Division could not account for updated ballots. And, even if Kowalke ultimately prevails in this action, the Division points out that other potential remedies exist even if Eastman's name remains on the ballot. Additionally, unlike previous elections referenced by Kowalke, the November general election allows voters to rank their choices, potentially blunting any impact of a change to the candidates. Past elections have also seen candidates withdraw after ballots had been printed and mailed without throwing the election into chaos. Finally, the court

⁴ See *State v. Galvin*, 491 P.3d 325, 330-31 (Alaska 2021) and *State v. Arctic Village Council*, 495 P.3d 313, 318 (Alaska 2021).

gives some weight to the defendants' argument that Kowalke could have sought injunctive relief at least several weeks ago and avoided the tight deadline now facing the parties. When these considerations are weighed against the extremely short deadline facing the parties and the court prior to the September 6 date for ballots to be printed, expedited consideration is not warranted.

III. Decision

The motion for expedited consideration is DENIED.

While the requested preliminary injunction will not be addressed on an expedited basis, the court is mindful that a prompt and final decision in this matter is in the public interest. The parties should be prepared to discuss scheduling trial in this case (should one be needed) as well as argument for other pending motions at the September 9, 2022 oral argument.

Dated at Anchorage, Alaska, this 31st day of August, 2022.



JACK R. MCKENNA
Superior Court Judge

I certify that on 8/31/2022
a copy of the above was mailed to:
S Fletcher, T Flynn,
~~COOF~~ J Davis, L Harrison, J Miller
Secretary/Deputy Clerk