

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

STEVE STRAIT,)
)
Plaintiff,)
)
vs.)
)
GAIL FENUMIAI, Director of)
the State of Alaska, Alaska)
Division of Elections, and)
MEAD TREADWELL, Lieutenant)
Governor of the State of)
Alaska,)
)
Defendants,)
)
WALKER-MALLOTT FOR ALASKA,)
)
Intervenor.) No. 3AN-14-09199 CI
_____)

TRANSCRIPT OF ORAL ARGUMENT (EXCERPT)

BEFORE THE HONORABLE JOHN SUDDOCK
Superior Court Judge

Anchorage, Alaska
September 26, 2014
9:15 o'clock a.m.

TRANSCRIPTS ONLY
2921 Wiley Post Avenue
Anchorage, Alaska 99517
(907) 276-0306

APPEARANCES:

FOR THE PLAINTIFF: KENNETH P. JACOBUS, PC
BY: KENNETH P. JACOBUS, ESQ.
310 K Street, Suite 200
Anchorage, Alaska 99501

FOR THE DEFENDANTS: STATE OF ALASKA
DEPARTMENT OF LAW
ATTORNEY GENERAL'S OFFICE
BY: MARGARET PATON-WALSH, ESQ.
LAURA F. FOX, ESQ.
ASSISTANT ATTORNEYS GENERAL
1031 West Fourth Avenue, Suite 200
Anchorage, Alaska 99501

STATE OF ALASKA
DEPARTMENT OF LAW
ATTORNEY GENERAL'S OFFICE
BY: ELIZABETH M. BAKALAR, ESQ.
ASSISTANT ATTORNEY GENERAL
Box 11030
Juneau, Alaska 99811

FOR THE INTERVENOR: HOLMES WEDDLE & BARCOTT, PC
BY: SCOTT M. KENDALL, ESQ.
701 West Eighth Avenue, Suite 700
Anchorage, Alaska 99501

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1 PROCEEDINGS
2 Courtroom 401
3 9:15:23 AM
4 (This portion not requested)
5 10:14:18 AM
6 **THE COURT:** Often judges at this moment say I'm going to
7 take this under advisement, I'll get you a decision as soon as I
8 can, and -- but I think you need an immediate decision, because
9 it's pretty clear you want to go to the supreme court, whoever
10 wins or loses, and so I'm going to give you an oral decision,
11 with apologies for feeling I just don't have the time in this
12 context to give you a written decision.
13 The superior court is under certain constraints about how
14 it behaves and analyzes situations. Here we have an
15 administrative agency, the division of elections. Over the
16 years the supreme court has taken the position that to a certain
17 extent any administrative agency is entitled to some degree of
18 deference in some situations. One of the situations is
19 longstanding administrative practice. If they've done it that
20 way for a long time, 30 years or so here, and it's now
21 challenged, the fact that it's gone on for 30 years means
22 something. Doesn't mean everything, but it has -- it's
23 something to think about.
24 An administrative agency has some entitlement to
25 deference, also, when it's interpreting the statutes which

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1 create its jurisdiction and which govern its conduct, and that's
2 particularly true when there's agency expertise involved. The
3 division of elections has some built-up body of knowledge about
4 how to run elections and what works and what doesn't, and if
5 that inherited and present wisdom trenches on the issue at hand,
6 they're entitled to some room to move.
7 Cutting against that is the principle that it is the
8 Court's responsibility to rule on matters of pure law. If
9 Mr. Jacobus is saying that a regulation is bad because as a
10 matter of law the facts stipulated to don't present an
11 emergency, he's entitled to that decision.
12 In addition, the Court's constrained by -- of course, by
13 supreme court precedent. Mr. Kendall tells me that he thinks
14 O'Callaghan governs the situation and is squarely on point. I
15 disagree. O'Callaghan dealt with a situation where it was
16 internecine strife between two political parties. We don't have
17 internecine and strife between two political parties here. We
18 have tension between a gentleman who -- Mr. Strait, who says
19 that the rules should be different for a political party and a
20 nonparty candidate. O'Callaghan didn't expressly answer that
21 question.
22 What O'Callaghan did say: "Despite O'Callaghan's claims
23 to the contrary, there is nothing in the legislative materials
24 to suggest that the legislature meant to prevent a candidate who
25 withdraws after the primary election from being placed on the

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1 ballot as the candidate of another party."
2 Read, it's okay, Mr. Coghil, you've callously betrayed
3 Senator Sturgulewski, left her in the lurch, hanging, twisting
4 in the wind, you've abandoned her to go form a team with
5 Governor Hickel on another political party. Perhaps it's not
6 pretty, perhaps it's not loyal, but that's politics. You form
7 coalitions. You cheat the other side and pass the savings on to
8 the public, as Chilkoot Charlie said.
9 The supreme court says that's okay, even after a primary
10 that political parties can reshuffle the deck, form new
11 coalitions, and that's okay. Doesn't -- it doesn't control our
12 case, because it's okay because the statute says it's okay.
13 There's a statute that says after the election a party can
14 appoint by party petition, by internal party decision. No
15 voters involved. Lieutenant governor resigns, the guys, the
16 gals, get together in the back room, cigar smoke, perfume
17 wafting into the air, they get to decide. Even as to the
18 candidate in chief, the governor, Mr. Jerry Ward said, I'm out
19 of here, Mr. John Lindauer said "no mas," and in came a
20 completely new slate of interlopers, and they became the
21 governor and lieutenant governor of the State of Alaska
22 ultimately, and the supreme court said that's just fine.
23 So it's clear that the rules of the road for a political
24 party are shuffle the deck, stab each other in the back, do it
25 all in the back room after a primary election, and you're good

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1 to go. If the voters of the state of Alaska disapprove, they'll
2 sweep you out the door.
3 That's not the question in this case. The question is
4 whether a nonparty can kind of, sort of do the same thing.
5 Here, perhaps less egregious facts, we don't have Mr. Walker
6 exiting and somebody else coming in to take his place. All we
7 have is the lieutenant governor candidate, Mr. Fleener, saying
8 that he no longer wishes to participate.
9 But I'll tell you what, O'Callaghan -- talk about
10 restraining influences on a court -- O'Callaghan gives me pause,
11 because O'Callaghan says it's okay for a party to play as rough
12 and dirty as it wishes post primary election, shuffle the cards,
13 spy versus spy, betrayal, disloyalty, blind political ambition,
14 as Mr. Jacobus says in his brief, that's all okay. That's the
15 democratic process. If the supreme court says that's all okay
16 for a political party to do, political party candidate, I guess
17 I should be reticent and careful about saying it's not okay for
18 a nonparty candidature, because I think we all intuitively say,
19 except perhaps Mr. Strait takes a different position, that a
20 nonparty candidate should be treated in fairness like a party
21 candidate, should have the same rights and responsibilities, and
22 Ms. Paton-Walsh suggests that rises to the level of equal
23 protection under our laws.
24 Here, starting back in 1982 I'm told, the divisions of
25 election sought a [sic] attorney general opinion on the matter,

(Pages 7 to 10)

<p style="text-align: right;">Page 7</p> <p>1 and the attorney general back then, who was a gentleman of 2 considerable renown in the legal community at the time named 3 Norman Gorsuch, issued an opinion, attorney general opinion, 4 that said it's okay for the division of election to issue an 5 emergency regulation to handle just that situation. Mr. Jacobus 6 says, well, foul, first foul, that's not according to law. Law 7 is the legislature. But the fact of the matter is Mr. Jacobus 8 is wrong on the point. 9 "By law" means the legislature, but the legislature can 10 delegate its writ to administrative agencies by statute, and 11 it's done so. It's given agencies in general and the division 12 of elections in particular the authority to create regulations 13 to manager interstices in the law, things the law doesn't cover, 14 to clarify, to establish procedures for elections, and so when 15 the division of election institutes a regulation, either 16 emergency regulation or one fully compliant with the longer time 17 schedules in the Administrative Procedure Act, it's by force of 18 law, by dint of law. 19 Those attorney general opinions, they also are entitled to 20 some deference by the Court. There again, it's not explicitly 21 in the supreme court opinions that they're controlling, hugely 22 influential, but they're entitled to some consideration, and I 23 think it is notable that the attorney general opinions have over 24 time been consistent on the point that the division of election 25 has the authority to implement an emergency regulation. I mean,</p>	<p style="text-align: right;">Page 9</p> <p>1 position if Mr. Fleener resigns, I need a new lieutenant 2 governor and I choose Mr. Mallott. 3 Is that a crisis? Is that an emergency? Well, the people 4 of the state of Alaska expect an election. They expect an 5 election with at least two candidates, with at least two 6 governors and lieutenant governor candidates. They expect to 7 have a choice. They don't expect that they're going to get a 8 crippled candidate, one who wears some sort of badge, an 9 imprimatur of division of elections or judicial badge of shame, 10 you don't get to have a lieutenant governor because you've done 11 something risky or bad or inappropriate. 12 Is that a crisis? I agree with Ms. Paton-Walsh it depends 13 on who you're looking at. If it be a self-created emergency, 14 it's still an emergency. The people of the state of Alaska need 15 and are entitled to resolution of that issue. It's a crisis. A 16 nominated lieutenant governor has resigned. A candidate has 17 resigned. There is no statute in place to handle the situation. 18 The only available way to handle it is as it's always been 19 handled, to put in place an emergency regulation. 20 You could say that it's a self-created emergency of the 21 division of elections because one doesn't know why no permanent 22 regulation has ever been enacted since 1982 when this issue 23 first came up. Maybe it's the absence of -- maybe this is a 24 third rail of Alaska politics, for all I know, like social 25 security in the senate. Maybe it's too hot to handle. I don't</p>
<p style="text-align: right;">Page 8</p> <p>1 Michael Geraghty, our current attorney general, could have 2 weighed in on the matter and issued yet one more attorney 3 general opinion, but he didn't feel the need to weigh in on this 4 particular matter. 5 Mr. Jacobus is correct, Mr. Strait has the absolute right 6 to challenge the validity of an emergency regulation. He has 7 citizen standing. Welcome to the court. You're here 8 appropriately. 9 The argument is that this is a self-created emergency, 10 that the candidates have shot themselves in the foot, all four 11 of them, Mr. Walker, Mr. Fleener, even Mr. French, and 12 Mr. Mallott, that they all misinterpreted the state of the law, 13 and that because they have not adequately understand --stood 14 what their rights are based on precedent, how it's always been 15 done, their reading of the statute, that they've done it to 16 themselves, that they've put themselves in a position of 17 vulnerability. They didn't have to take that risk. Since they 18 did take that risk -- or they -- Mr. Walker could have run as a 19 Democrat, even though he's not a Democrat. Never has been, 20 never will be, as far as I can tell. One never knows, but 21 lifetime Republican, wants to be a Republican governor of the 22 State of Alaska. He's not going to run as a Democrat. 23 Arguably, it would be intellectually disingenuous to do so. I 24 presume he's a man of principle. But there's nothing wrong with 25 running as an Independent. And so he and his campaign took the</p>	<p style="text-align: right;">Page 10</p> <p>1 know why, but for whatever reason there's never been a permanent 2 regulation until Lieutenant Governor Treadwell has now proposed 3 to do so. 4 But I'll tell you what, it's been clear since 1982, A, 5 that there is no permanent regulation, B, that the division of 6 elections takes the position that if the issue comes up, they 7 have the authority to implement a [sic] emergency regulation, 8 and the wording of that emergency regulation back in 1982 was 9 very, very similar, if not identical to the current one. There 10 have been 15 legislatures since then. Any one of those 11 legislatures could have said, you know, we think you're 12 misinterpreting our statute, you're doing something untoward, 13 something we don't approve of, you're not having a sensible 14 resolution of this issue. Any one of those legislatures could 15 have passed a law putting in place a parallel provision to what 16 governs the party -- or not -- but resolve the issue, but those 17 15 legislatures have been content to leave the division to its 18 interpretation of its mandate and its writ. 19 So I find that there was a valid emergency within the 20 wording and intendment of the Administrative Procedures Act. 21 This is, in fact, as things go, a rare event. The situation 22 doesn't come up that often, but when it does it's a train wreck, 23 and the people of the state of Alaska are entitled to a 24 resolution. 25 It's Mr. Jacobus's position that if two -- if the day</p>

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1 after an election two lieutenant governor candidates, one a
2 party candidate, one a nonparty candidate, they both walk out of
3 a church and they're both hit by a bus, the People Mover, they
4 both can no longer serve -- I won't tell you if they're dead or
5 not, but they can no longer serve -- it's Mr. Jacobus' position
6 that the party candidate can be replaced and the nonparty
7 candidate cannot. Why is that? Well, Mr. Jacobus comes up with
8 a point of distinction. It's the point of distinction that he
9 insists upon as the center of his rationale.

10 The party can replace it, can replace the candidate
11 because the statute says it can, and because in replacing it it
12 turns to its central committee, and its central committee is
13 comprised of sentient beings who breathe and walk and talk and
14 chew gum, and who are also registered voters of the state of
15 Alaska, perhaps. I don't know if that's a requirement to be a
16 member of the central committee, but I suspect everybody is a
17 voter.

18 And so it's in the back room with the cigar smoke and the
19 perfume wafting, those party functionaries who pick the new
20 lieutenant governor, presumably without consulting the party
21 nominee. Mr. Jacobus imagines that the party nominee doesn't
22 actually pick his or her replacement and the central committee
23 rubber stamps it. But it's that voter nex-- what he calls that
24 nexus with the voters. What is the mystical nexus with the
25 voters? It's that they are voters, okay. So that's what

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1 legitimizes this in Mr. Jacobus's eyes.

2 On the other hand, the nonparty candidate doesn't have a
3 central committee because he's not a party. So it's the
4 governor nonparty nominee who picks a successor, as here
5 Mr. Walker picked Mr. Mallott. Illegitimate, says Mr. Jacobus.
6 Why is that? Because he doesn't have a central committee of
7 voters to perform the task; therefore, he doesn't have a
8 nexus -- his selection method doesn't have a nexus to the voters
9 of the state of Alaska.

10 Well, where does this nexus business come from? It
11 doesn't come from statute. Doesn't come from supreme court
12 decision. It's an argument. It comes from the pen of
13 Mr. Jacobus. But as Ms. Paton-Walsh points out, there is going
14 to be a nexus between the voters of the state of Alaska and that
15 newly-appointed lieutenant governor. It's called an election.
16 If the voters of the state of Alaska feel that that lieutenant
17 governor candidate is unwisely or intemperately suggested, they
18 won't elect the ticket.

19 Therefore, I find that Mr. Jacobus' basis for why a
20 political party should be treated one way and a [sic]
21 independent candidature should be treated completely differently
22 is essentially that one's a party and one's not, and I find
23 that's an irrational basis of distinction. I think squarely
24 presented with the equal protection issue that the supreme court
25 would say, look, if the legislature wants to say once the

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1 primary -- the gavel falls on the primary that's it, no more
2 backstabbing, no more coalition building, no more political
3 wrangling in the back rooms, it could do that, and that would be
4 that. After the primary -- after the petitions are in on the
5 primary day for nonparty candidates, locked in stone.

6 I think constitutionally the state could do that, or the
7 state can act as the legislature has done and said, wait a
8 minute, when you have a -- when you force a governor to run with
9 a lieutenant governor you create an instability, because if the
10 lieutenant governor resigns for whatever reason and the governor
11 candidate can't replace him or her, kind of sunk. So we're
12 going to allow replacement up to the last possible moment, which
13 is in effect ballot printing time.

14 The legislature has made that decision that's the way
15 we're going to go, but it did not expressly say, and what
16 applies to the goose applies to the gander. It just said that's
17 how political parties are going to operate. Having applied that
18 rule to the goose, I think our supreme court would say it's
19 constitutionally required to apply the same rule to the gander,
20 and I think I should not lightly ignore the rule of goose/gander
21 as a superior court judge who's got O'Callaghan hanging over me,
22 that says the legislature has okayed this kind of -- call it
23 monkey business -- after the primary, but I don't think I have
24 to make a constitutional decision, and I'm, again, retarded by
25 the principle that I'm not supposed to make a constitutional

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1 decision if I don't absolutely have to.

2 I think the legislature has given to the division of
3 election the discretion to create valid regulations, that it's
4 done so. There's no obvious conflict with an existing statute.
5 It's facially a reasonable response to an existing problem. I
6 just don't have any basis to invalidate an agency regulation
7 acting under powers delegated to it to do sensible things.
8 There's nothing wrong with the regulation.

9 And so I'm just left, again, with a sense of I'd better be
10 humble. There's a longstanding agency practice. There's agency
11 precedent exactly on point. There are attorney general
12 opinions. There's ample opportunity of the legislature to
13 change the situation over 15 different legislatures if it was at
14 all unhappy with it. There's a valid emergency. The division
15 of elections has enacted the same regulations that others have.

16 Many of the distinctions that Mr. Jacobus draws invite the
17 division of election to be a fact-finding agency. After all,
18 Mr. Fleener could have said, I'm withdrawing, and my reason for
19 withdrawing is a secret. Would the division then have to build
20 a little room with a table and a bare light bulb over it, have
21 folks come in and say, "Mr. Fleener, I don't know, I think you
22 really had something in mind"? No.

23 That's precisely the reason that we so trust the division
24 of elections, its integrity and impartiality, because they are,
25 folks, we just go by the books. We don't slice and dice

(Pages 15 to 17)

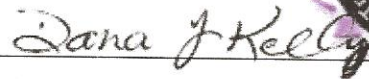
<p style="text-align: right;">Page 15</p> <p>1 depending on who's doing what to whom. That -- the messy 2 business of politics is not our affair. We are the arbiters, 3 the umpires. We make the rules. You guys live by them. 4 It's that integrity and impartiality that caused 5 Mr. Walker, Mr. Fleener, Mr. Mallott, to lay their political 6 futures in the hands of an agency in an administration that 7 serves their opponent governor, and they did that without 8 thinking twice, because they trusted the agency to do the right 9 and sensible thing according to law and precedent, and they were 10 quite correct. The division of elections did it without 11 breathing hard, the same day. I think that's something we can 12 all be proud of. 13 Okay, so you have my decision. I deny preliminary or 14 permanent injunction. I grant the state summary judgment that 15 the regulation was validly enacted as an emergency regulation 16 within the discretion of the division of elections, and it 17 adequately comports with -- does not conflict with statute, and 18 so is a valid regulation. 19 I guess I should make a decision on the laches thing. I'm 20 not really taken with that argument. Mr. Strait's a private 21 citizen. He is a Republican party functionary. I think he's a 22 party chairman or something, but, still, he's a private citizen 23 who has a right to come to court to challenge a regulation. 24 You had a late-breaking development. He's got to decide, 25 A, I'm going to be the one to step up to the plate on this.</p>	<p style="text-align: right;">Page 17</p> <p>1 THE CLERK: Please rise. Court is in recess. 2 (Court recessed) 3 10:46:07 AM 4 / 5 / 6 / 7 / 8 / 9 / 10 / 11 / 12 / 13 / 14 / 15 / 16 / 17 / 18 / 19 / 20 / 21 / 22 / 23 / 24 / 25 /</p>
<p style="text-align: right;">Page 16</p> <p>1 Nobody else is. I mean, I assume that that takes some thought. 2 B, he's got to find a lawyer, he's got to find a funding source 3 for that lawyer, and the lawyer's got to do some research and 4 come up with some arguments, which you found the right lawyer 5 for the job, I think, Mr. Strait, because Mr. Jacobus is 6 creative and dogged and he came up with all of the arguments 7 conceivable, and he did a good job of reducing them to writing 8 under pressure and arguing this case, and it was a standup 9 performance. 10 All of that takes time, and I just don't feel that I 11 should say that -- I should be critical of him for doing that in 12 10 days or 20 days rather than five days. So that's my call on 13 that, and when you think about it, he could have his declaratory 14 judgment that the statute -- or that the -- on the validity of 15 the regulation and there could be some workout for this 16 particular election, so there's utility in you coming. We'll 17 get this issue decided. We'll see if O'Callaghan applies next 18 door to nonparty candidates. 19 To you, Ms. Paton-Walsh, to Ms. Fox, to the extent that 20 she authored -- you know, your briefing, I'm sure you've been 21 told this before, is some of the purest, best appellate legal 22 writing I've ever seen, and so you should be I think quite proud 23 of that. 24 Okay. Thank you all for attending. We'll stand in 25 recess.</p>	

TRANSCRIBER'S CERTIFICATE

I, Dana J. Kelly, Certified Electronic Transcriber, hereby certify:

That the foregoing pages numbered 2 through 17 are a true, accurate and complete transcript of proceedings in Case No. 3AN-14-09199 CI, Strait v. Fenumiai, et al., transcribed by me from a copy of the electronic sound recording to the best of my knowledge and ability.

DATED: September 27, 2014.


A handwritten signature in cursive script that reads "Dana J. Kelly".

Dana J. Kelly

AAERT Certified #00172

