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1. CV64450 Zachary Abernathy vs. County of Tuolumne, et al.

Pleadings: Writ of Mandate
Moving Party: Petitioner
Motion filed: April 4, 2022
Tentative ruling: The Petition for a Writ of Mandate is GRANTED.

This is a special petition for a writ of mandate. At issue is respondent's refusal to allow petitioner to run for election to the office of County Superintendent of Schools, having concluded that petitioner is not a legally qualified candidate. Petitioner contends that he is effectively qualified for the job, except for the de minimis step needed for complete qualification: namely employment in an administrative position. Petitioner contends that the de minimis step will be satisfied when he wins the election. Both sides agree this is a legal issue with no appellate precedent.

Petitioner's Request for Judicial Notice

Petitioner asks this Court to take judicial notice of his paper certificate from the Commission on Teacher Credentialing (herein after "CTC"), as well as a screen shot from the website page associated with petitioner. Asking a court to take judicial notice of a document is asking the court to take judicial notice of its existence and – to the extent it is not subject to dispute – the significance or legal effect of its existence, if any. Taking judicial notice of a document does not equate with any determination regarding the truth of its contents or accepting a particular interpretation of its meaning. See Intengan v. BAC Home Loans Servicing LP (2013) 214 Cal.App.4th 1047, 1057; Scott v. JPMorgan Chase Bank, N.A. (2013) 214 Cal.App.4th 743, 753-754; Fontenot v. Wells Fargo Bank, NA (2011) 198 Cal.App.4th 256, 265. With that caveat, and in the absence of any opposition to the request that the Court take judicial notice, the request is GRANTED.

Although petitioner did not specifically request judicial notice, petitioner made reference to a similar writ petition filed in Santa Barbara Superior Court. In that case (22CV01113), Hon. Sterne *denied* a petition for mandamus seeking to *remove* from the ballot for county superintendent a candidate who possessed the same Certificate of Eligibility possessed by petitioner herein. Since petitioner addressed the Santa Barbara action, this Court takes judicial notice of the Minute Order issued 03/30/22. See Evidence Code §§ 451(a) and 452(d).

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Basis for Judicial Review

So long as judicial intervention will not substantially interfere with the conduct of a scheduled election, an elector may seek a writ of mandate alleging that an error or omission is about to occur in the printing of a ballot or voter information, or that any neglect of duty is about to occur. See Elections Code §§ 321, 13314(a)(1); *Kunde v. Seiler* (2011) 197 Cal.App.4th 518, 528-529. Traditional mandamus (CCP §1085) is used to review most election material disputes because these are adjudicatory decisions made without evidentiary hearings. See *Scott B. v. Board of Trustees of Orange County High School of Arts* (2013) 217 Cal.App.4th 117, 122-124.

Traditional mandamus can be used to compel an agency to exercise either a ministerial, or a quasi-judicial discretionary, duty. See *Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 657-661. An act is "ministerial" if a public officer is required to perform it in a prescribed manner in obedience to legal authority and without regard to the officer's own judgment or opinion concerning the propriety of the act, whereas an act is considered quasi-judicial or "discretionary" if the public official is directed to act according to the dictates of their own judgment, within certain prescribed boundaries. *Lockyer v. City & County of San Francisco* (2004) 33 Cal.4th 1055, 1082; *Hudson v. County of Los Angeles* (2014) 232 Cal.App.4th 392, 408. In each case, the underlying statute and regulations must be closely examined to determine how a particular duty should be classified. See *Citizens for Amending Proposition L v. City of Pomona* (2018) 28 Cal.App.5th 1159, 1187; *Galzinski v. Somers* (2016) 2 Cal.App.5th 1164, 1167; *Doe v. Albany Unified School Dist.* (2010) 190 Cal.App.4th 668, 678.

Although the parties did not directly address the issue, this Court finds that Elections Code §13.5 – which lies near the heart of this dispute – creates a discretionary duty because the public officer is tasked with reviewing the papers submitted and making a determination from the submissions whether there is "sufficient" information to demonstrate qualifications. As such, mandamus relief is only available if petitioner demonstrates that the public officer failed to exercise any discretion, or if the public officer clearly abused that discretion (ie, arbitrary, capricious, contrary to public policy, unlawful or lacking evidentiary support). See *Nowicki v. Contra Costa County Employees Retirement Association* (2021) 67 Cal.App.5th 736, 746; *Weinstein v. County of Los Angeles* (2015) 237 Cal.App.4th 944, 964-965; *County of Los Angeles v. City of Los Angeles* (2013) 214 Cal.App.4th 643, 653-654. In essence, the question boils down to whether the public officer had a reasonable basis in law, and a substantial basis in fact, to make the decision at issue. *Martis Camp Community Association v. County of Placer* (2020) 53 Cal.App.5th 569, 595.

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<u>County Superintendent of Schools</u>

The county superintendent of schools is a public office that can be filled either by public election or by appointment. See Cal. Const. Art IX §3 and Art. XI §1(b); Govt. Code §24009. It is an officer position, which means that to be eligible to hold that office the person must be "a registered voter of the county in which the duties of the office are to be exercised." Government Code §§ 24000(k), 24001. Here in Tuolumne County, it is an elected position.

In general, citizens possess "the right and duty of holding office." Govt. Code §274. While this is a fundamental right in the general sense, this is not a fundamental right protected by the Constitution. As such, the Legislature is free to condition that right with qualifications that are "nondiscriminatory and based on a real and substantial difference having reasonable relation to the object sought to be accomplished." *Boyer v. County of Ventura* (2019) 33 Cal.App.5th 49, 57; in accord, *Rando v. Harris* (2014) 228 Cal.App.4th 868, 880-881.

In 1946, California voters passed a proposition designed to streamline the job of county superintendent of schools by empowering the Legislature to "prescribe the qualifications required of county superintendents of schools." See Cal. Const. Art IX §3.1; *Seidel v. Waring* (1950) 36 Cal.2d 149, 150-151. The Legislature responded by enacting what is now Education Code §§ 1206 and 1208. Pursuant thereto, "no person shall hereafter be elected or appointed to office as county superintendent of schools of any county who does not possess a valid credential issued by the State Board of Education … authorizing administrative services."

In 1995, the Governor of California approved A.B. 51. One of the bill's primary objectives was to curtail the rising surge in citizens seeking election to important offices for which they had no qualifications to serve in, including county superintendent of schools. See Elections Code §13.5, Legislative Counsel Digest. Pursuant to this new legislation, a person seeking public office is not considered to be a legally qualified candidate unless that person files with the registrar (1) a declaration of candidacy and (2) authenticated documents "sufficient to establish, in the determination of the official with whom the [papers are] filed, that the person" meets the aforementioned qualifications to serve as county superintendent of schools. See Elections Code §§ 13 and 13.5.

Petitioner is a Legally Qualified Candidate

Petitioner has a beneficial interest herein, and has no plain, speedy or adequate remedy but for mandamus review. CCP §1086. Petitioner does not contend that the statutory qualifications for the position violate his First Amendment Rights, or that they are not rationally related to the job. He simply contends that the certificate he possesses is the functional equivalent of the certificate referenced in §1206 and §1208. The parties disagree as to what kind of document is required, and what that document must allow.

With regard to the first concern, although the controlling statutes offer inconsistent labels of that needed document (§1206 uses the term *credential*, while §1208 uses the term *certification*), it is of no import since those labels are synonymous and to some degree interchangeable. See Ed. Code §44002; 5 CCR §80001(e). Thus, as a practical matter, the document which must be presented can take the form of any official piece of paper from the CTC, regardless of the label attached.

What really matters is the second concern, to wit: what the piece of paper symbolizes. Here, petitioner possesses a piece of paper called Certificate of Eligibility for Administrative Services

Credential. This piece of paper "verifies completion of all requirements for the preliminary Administrative Services Credential and allows the holder to seek employment" in the academic administrative services field. See 5 CCR §80054(a)(8). The only difference between petitioner's piece of paper and a preliminary Administrative Services Credential is an actual job offer. Since petitioner does not yet have an offer of employment, he is relegated to the Certificate of Eligibility version of the Administrative Services Credential. *Id*.

Someone with a preliminary Administrative Services Credential is authorized to work in any administrative position responsible for student discipline, evaluating instructional services, reviewing employee performance, hiring, firing, fiscal management, and developing student support services. See 5 CCR §§ 80054(c), 80054.5. Someone with this piece of paper is "eligible" to hold a position as city or district superintendent. See Ed. Code §35028. Although some of the expressed duties of a county superintendent may seem at first blush to exceed the duties authorized for one holding a preliminary (or clear) Administrative Services Credential (compare Education Code §1240 *et seq*, with 5 CCR §80054.5), respondent herein conceded at the hearing on the Order Shortening Time that one holding a preliminary Administrative Services Credential qualifies to run for the position of county superintendent.

Respondent contends that permitting petitioner's name to appear on the ballot could upend the entire election because should he be victorious he could be easily challenged on the basis that petitioner was indeed not authorized to perform administrative services for the county "at the time of the election." Elections Code §16100(b). However, "the purpose of an election contest is to ascertain the will of the people at the polls, fairly, honestly and legally expressed … it is the duty of the court to validate the election if possible. That is to say, the election must be held valid unless plainly illegal." *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 192; *Denny v. Arntz* (2020) 55 Cal.App.5th 914, 920. Adding to this already steep hill, the person challenging an election result has the burden of proving a defect by clear and convincing evidence. *Clark v. McCann* (2015) 243 Cal.App.4th 910, 915; in accord, *Arntz v. Superior Court* (2010) 187 Cal.App.4th 1082, 1091 [removing a candidate's name from the ballot is only warranted when "ineligibility for a particular public office is clear"]. Thus, the risk that someone might challenge petitioner after the fact is of little concern since petitioner will need to secure the preliminary Administrative Services Credential if he is to take office at all. If he converts his certificate in the intervening six months, his status as unqualified "at the time of the election" will be moot. See, *e.g., Julian Volunteer Fire Co. Assn. v. Julian-Cuyamaca Fire Protection Dist.* (2021) 62 Cal.App.5th 583, 603-604 [Brown Act violation moot by virtue of public election on same issue]; *TransparentGov Novato v. City of Novato* (2019) 34 Cal.App.5th 140, 149-153; *City of Palo Alto v. Public Employment Relations Bd.* (2016) 65 Cal.App.5th 1271, 1320.

The registrar has a ministerial duty to place a candidate's name on the ballot, but only if that candidate presents sufficient evidence of qualifications. Petitioner presented the registrar with a copy of his Certificate of Eligibility for Administrative Services Credential, as well as an explanation similar to the one provided *supra*. Respondent registrar does not contend that she exercised her discretion and found that the papers presented by petitioner were inadequate; instead, it appears to this Court that the registrar failed to exercise any discretion at all - deferring

entirely to legal opinions offered by others. See Bautista Declaration, Paragraphs 14-16 and Exhibit 11 thereto. The Court does not fault Ms. Bautista for deferring to the opinion of County Counsel.

While some people may believe it prudent to prefer someone with deep administrative experience for the position of county superintendent, the Legislature did not specify in §1206 or §1208 that the candidate had to possess a clear Administrative Services Credential (which would guarantee some work experience in the field, even if only the minimum of two years required to obtain such credential). There is no rational basis for drawing a distinction between a candidate possessing a Certificate of Eligibility for Administrative Services Credential and a candidate with a preliminary Administrative Services Credential since the only difference between the two is the existence of a job offer. Respondent concedes that a candidate with a preliminary Administrative Services Credential qualifies for the ballot, even though that credential does not require actual administrative experience. Rather, a preliminary Administrative Services Credential only requires a Certificate of Eligibility for Administrative Services Credential and a job offer. If petitioner wins the election, he will have a job offer. Provided that he follows through with the administrative steps of converting his Certificate of Eligibility for Administrative Services Credential to a preliminary Administrative Services Credential before he is sworn in, he will have both the qualifications and the powers needed to do the job. See 5 CCR §§ 80054(c) and 80054.5. There is more than enough time between voting and installation to make that happen. See 5 CCR §80443.

The petition for a writ of mandate is GRANTED. Absent an exigency, this Court would remit the matter back to the registrar with instructions to discharge her ministerial duty to either accept petitioner as a qualified candidate or reject his papers after exercising her discretion in good faith. However, in light of the clear exigency with ballet materials due to the printer tomorrow, the order shall be that the registrar deem petitioner to be a legally qualified candidate for the position of county superintendent of schools, and to process his papers accordingly.

In addition, although petitioner has not asked for this relief, this Court hereby strikes from the Court record paragraphs 17-18 of the Bautista Declaration, including petitioner's March 17, 2022 handwritten note attached thereto as Exhibit 10. This Court further orders that the March 17, 2022 handwritten note is to be stricken from the records of the County Clerk. The concern is that this note appears to have been triggered by the March 15, 2022 letter from County Counsel, which this Court concludes presented an incorrect statement of the law, and that someone hoping to sabotage petitioner's chances in the election might publicize this note and use it to "show" that petitioner was not committed to running. To the contrary, this writ proceeding shows otherwise.