

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 86

19STCP05433

DAVID R EVANS vs DEAN C LOGAN, et al.

December 24, 2019

8:30 AM

Judge: Honorable Mitchell L. Beckloff

Judicial Assistant: F. Becerra

Courtroom Assistant: B. Byers

CSR: D. Van Dyke, CSR#10795

ERM: None

Deputy Sheriff: None

APPEARANCES:

For Petitioner(s): Bradley W. Hertz and Matthew C. Alvarez

For Respondent(s): Elena Marie Miller; Marc S Williams and Gabriel Pardo

NATURE OF PROCEEDINGS: Hearing on Petition for Writ of Mandate

The matter is called for hearing.

The parties have seen and read the Court's written tentative ruling.

After argument, the matter is taken under submission.

LATER:

The Court, having previously taken the matter under submission, issues its ruling in accordance with the "ORDER DENYING THE PETITION FOR WRIT OF MANDATE" consisting of 7 pages, filed this date and incorporated herein by reference to the Court file.

Summary of the Court's ruling: The petition is denied.

Counsel for Respondent is to prepare a proposed judgment, serve on the opposing parties for approval as to form, wait ten days after service for any objections, meet and confer if there are objections, and then lodge (do not efile) the proposed judgment directly in Department 86 and file (do not lodge) a declaration stating the existence or non-existence of any unresolved objections (LASC Local Rule 3.231 (n)).

A courtesy copy of this minute order and copy of ORDER DENYING THE PETITION FOR WRIT OF MANDATE is electronically mailed to counsel, this date, at the following email addresses:

bhertz@campaignlawyers.com

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Certificate of Mailing is attached.

SUPERIOR COURT OF CALIFORNIA COUNTY OF LOS ANGELES		Reserved for Clerk's File Stamp
COURTHOUSE ADDRESS: Stanley Mosk Courthouse 111 North Hill Street, Los Angeles, CA 90012		FILED Superior Court of California County of Los Angeles 12/24/2019 Sherri R. Carter, Executive Officer / Clerk of Court By: <u>Fernando Becerra</u> Deputy
PLAINTIFF/PETITIONER: Evans		
DEFENDANT/RESPONDENT: Dean C. Logan, in his capacity as Los Angeles County Registrar Recorder/ County Clerk		
CERTIFICATE OF MAILING		CASE NUMBER: 19STCP05433

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the Minute Order (Hearing on Petition for Writ of Mandate) of 12/24/2019, ORDER DENYING THE PETITION FOR WRIT OF MANDATE upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Los Angeles, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

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Sherri R. Carter, Executive Officer / Clerk of Court

Dated: 12/26/2019

By: Fernando Becerra
Deputy Clerk

CERTIFICATE OF MAILING

EVANS v. LOGAN

Case Number: 19STCP05433

Hearing Date: December 24, 2019

ORDER DENYING THE PETITION FOR WRIT OF MANDATE

David R. Evans, a registered voter in the County of Los Angeles, brings this petition for writ of mandate alleging Real Party in Interest, Rachel Rossi, as a candidate for Los Angeles County District Attorney, violated the Elections Code by seeking to designate herself, in a false and/or misleading manner, as a "Federal Public Defender" in official election materials. Petitioner requests an order compelling Respondent, Dean C. Logan, in his official capacity as the Los Angeles County Register-Recorder/County Clerk, to amend Rossi's ballot designation to read "Of Counsel," "Counsel," "Attorney," or another accurate and non-misleading designation.

Rossi filed an opposition. Petitioner filed a reply.

Based on information provided by Respondent, this matter must be decided no later than the close of business on December 24, 2019. The court heard argument and took the matter under submission to further consider the arguments raised by the parties.

Having considered the matter further, the petition is DENIED.

APPLICABLE LAW

This Petition is brought pursuant to Elections Code section 13314, subdivision (a)(1), which provides "[a]n elector may seek a writ of mandate alleging that an error or omission has occurred, or is about to occur . . . in the printing of, a ballot, sample ballot, voter pamphlet, or other official matter, or that any neglect of duty has occurred, or is about to occur."

Elections Code section 13314, subdivision (a)(2), provides:

"A peremptory writ of mandate shall issue only upon proof of both of the following: (A) That the error, omission, or neglect is in violation of this code or the Constitution, and (B) That issuance of the writ will not substantially interfere with the conduct of the election."

Elections Code section 13107, subdivision (a)(3) provides in relevant part:

" . . . immediately under the name of each candidate . . . may appear **at the option of the candidate only one** of the following designations: [As applicable here,]

No more than three words designating either the current principal professions, vocations, or occupations of the candidate, or the principal professions, vocations, or occupations of the candidate during the calendar year immediately preceding the filing of nomination documents.” (Emphasis added.)

Title 2 of the California Code of Regulations at section 20714, subdivision (b) provides:

“ ‘Principal’ as that term is used in Elections Code § 13107, subdivision (a)(3) means a substantial involvement of time and effort such that the activity is one of the primary, main or leading professional, vocational or occupational endeavors of the candidate. The term ‘principal’ precludes any activity which does not entail a significant involvement on the part of the candidate. Involvement which is only nominal, pro forma, or titular in character does not meet the requirements of the statute.”

Elections Code section 13107, subdivision (e)(1) provides in relevant part:

“The Secretary of State and any other election official shall not accept a designation of which any of the following would be true:

It would mislead the voter.”

ANALYSIS

The Petition alleges Rossi has designated her job title as "Federal Public Defender" on the ballot for the upcoming election for district attorney. Rossi's opposition papers inform that she changed her ballot designation to "Public Defender, Federal" on December 19, 2019. Therefore, the issue now before the court is whether Rossi's use of "Public Defender, Federal" as her ballot designation is permitted by law. Respondent Logan believes Rossi should be permitted to use "Public Defender, Federal" as her ballot designation.¹

Rossi Correctly Designated her "Current or Principal Profession" under Election Code section 13107, subdivision (a)(3):

Petitioner argues Rossi is currently working as an attorney with a law firm with "Of Counsel" status. Petitioner alleges Rossi was last employed as an Assistant Federal Public Defendant in January 2019. Petitioner alleges Rossi must rely on her current position as an attorney with the

¹ Respondent Logan's further response and opposition indicates Respondent Logan looked to elections from past years to consider Rossi's current ballot designation, "Public Defender, Federal." "[T]he Registrar's initial review revealed other examples from elections in years past where a non-judicial candidate's occupation was given first, followed by a comma, and a third word." (Further Response of Logan 3:24-26.)

law firm to select her ballot designation. Thus, Petitioner asserts Rossi must use a ballot designation such as Of Counsel, Counsel, Attorney or some similar designation.

According to Rossi's declaration, Rossi worked with the Office of the Federal Public Defender for the Central District of California as an Assistant Federal Public Defender from October 6, 2014 to February 15, 2019. (Rossi Decl. ¶¶ 5-6.) Rossi's position with the office was full time. Rossi supports her declaration with relevant documentation, including a paycheck stub for the pay period ending February 17, 2019 showing her title as Assistant Public Defender. (*Id.* at Ex. 3.)

Subsequent to her employment with the Office of the Federal Public Defender, Rossi worked on a full-time basis as counsel to the United States House of Representatives, Committee on the Judiciary. (*Id.* at ¶ 12.) Rossi concluded this position on September 20, 2019. (*Ibid.*)

Rossi began performing Of Counsel services for the law firm on September 23, 2019. (*Id.* at ¶ 15.)

Rossi attests, however, "the majority of [her] time has been spent working on [her] campaign for Los Angeles County District Attorney." (*Id.* at ¶ 14.) Rossi estimates she works a "minimum" of approximately 50 hours per week on her campaign "and often work[s] up to seventy or more hours per week," sometimes "up to fifteen hours per day on campaign work." (*Ibid.*) Rossi estimates from September 23, 2019 through the present day she has "averaged less than part-time hours" with the work she has performed for the law firm. (*Id.* at ¶ 17.) Rossi estimates she has spent about 75 percent of her time working on her campaign and about 25 percent of her time providing services to the law firm. (*Ibid.*)

The plain language of Elections Code section 13107, subdivision (a)(3) allows a candidate, at his or her "option," to select a designation appearing under his or her name on the ballot that reflects "[1] **either the current principal professions, vocations, or occupations of the candidate, or [2] the principal professions, vocations, or occupations of the candidate during the calendar year immediately preceding the filing of nomination documents.**" (Emphasis added.) Thus, under circumstances like those here, the statute provides a candidate with two options.²

² Based on Elections Code section 13314, Rossi argues this finding is fatal to Petitioner's claims. That section at subdivision (a)(2)(A) provides where an error or omission has occurred or is about to occur in the printing of a ballot, the court may issue a peremptory writ only where "the error, omission, or neglect is in violation of this code or the Constitution." While Rossi is correct the statute is clear and unambiguous—an Election Code violation is required before a peremptory writ may issue—as the Secretary of State's regulations should be consistent with the Election Code, a violation of applicable regulations would likely result in a violation of the Elections Code.

After some discussion during the hearing in this matter, Petitioner agreed Election Code section 13107, subdivision (a)(3) would allow Rossi to rely on a previously held position for her ballot designation.³ Initially, Petitioner disagreed with the manner in which the court was reading the statute. Having considered the statute and Petitioner's argument further, the court's position on the interpretation of the statute is unchanged—a candidate has a choice or option under the statute. Elections Code section 13107, subdivision (a) allows one of the enumerated ballot designations "at the option of the candidate . . ." One of those options, subdivision (a)(3) provides a further choice within the subdivision:

"No more than three words designating either the current principal professions, vocations, or occupations of the candidate, or the principal professions, vocations, or occupations of the candidate during the calendar year immediately preceding the filing of nomination documents." (Elec. Code § 13107, subd. (a)(4)[emphasis added].)

There is no legitimate dispute Rossi's principal occupation "during the calendar year immediately preceding the filing of the nomination documents" was that of Assistant Federal Public Defender. Rossi engaged in this occupation from 2014 through February 2019. Thus, under the second option available to a candidate as set forth in Elections Code section 13107, subdivision (a)(3), relying solely on the statute, Rossi may rely on her employment with the Office of the Federal Defender for her ballot designation.

Prior to somewhat conceding the issue during the hearing, Petitioner did not acknowledge Election Code section 13107, subdivision (a)(3)'s internal designation alternatives. Instead, in his moving papers, Petitioner selectively acknowledges only one of the alternatives—the first alternative, "current principal professions, vocations, or occupations of the candidate." In his reply, however, Petitioner more closely focuses on section 20714, subdivision (d) of Title 2 of the California Code of Regulations (Section 20714(d)) to support his argument Rossi cannot rely on her prior position as the basis for her ballot designation.

Section 20714(d) provides:

"If the candidate is engaged in a profession, vocation or occupation at the time he or she files his or her nomination documents, the candidate's proposed ballot designation is entitled to consist of the candidate's current principal professions, vocations and occupations. In the event the candidate does not have a current principal profession, vocation or occupation at the time he or she files his or her nomination documents, the candidate may use a ballot designation consisting of his or her principal professions, vocations or occupations, which the candidate principally engaged in during the calendar year immediately preceding the filing of the candidate's nomination papers."

³ That is, nothing in the statute qualified Rossi's entitlement to select one option over the other. As discussed herein, however, Petitioner contends a regulation qualifies the statutory option.

The court agrees with Petitioner, Rossi must comply with applicable regulations as well as Elections Code section 13107, subdivision (a)(3).

Under Petitioner's interpretation of Election Code section 13107, subdivision (a)(3) and Section 20714(d), Rossi may not reference the Office of the Federal Public Defender in her designation if Rossi's position with the law firm is her "current **principal** profession, vocation or occupation."

Section 20714, subdivision (b) of Title 2 of the California Code of Regulations defines the term "principal." The regulation provides in part:

" 'Principal,' as that term is used in Elections Code § 13107, subdivision (a)(3), means a substantial involvement of time and effort such that the activity is one of the primary, main or leading professional, vocational or occupational endeavors of the candidate. The term 'principal' precludes any activity which does not entail a significant involvement on the part of the candidate. Involvement which is only nominal, pro forma, or titular in character does not meet the requirements of the statute."

Assuming without deciding Petitioner's interpretation of the regulation is correct,⁴ Petitioner does not prevail under his own interpretation of the regulation. That is, based on the evidence presented by Rossi, the court finds Rossi currently does not have a "principal" occupation, as defined by the regulation. Rather, the evidence shows Rossi's work for the law firm does not involve "a substantial involvement of time and effort." Her work with the law firm "does not entail a significant involvement on the part" of Rossi. Instead, Rossi expends "substantial involvement of time and effort" on her campaign for district attorney.

The evidence establishes Rossi is not an employee of the law firm where she has "Of Counsel" status.⁵ The work Rossi elects to perform for the law firm is at her sole discretion and she performs this work as an independent contractor, not an employee. Rossi has no guarantee she will be provided any work by the law firm. (Schafler Decl., ¶ 4.) Further, Rossi works "less than part time" at the firm. Rossi estimates only 25 percent of her time is devoted to the legal work while 75 percent of her time is devoted to her campaign for district attorney. On average, Rossi

⁴ Given the plain language of Elections Code section 13107, subdivision (a)(3) providing a candidate with an either/or option, it is not clear to the court Petitioner's interpretation of the regulation is correct. An agency has " 'no discretion to promulgate a regulation which is inconsistent with the governing statute.' " (*County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501, 508 [quoting *Ontario Community Foundations, Inc. v. State Bd. of Equalization* (1984) 35 Cal.3d 811, 816.]

⁵ During the hearing, Rossi's counsel noted the law firm's reference to Rossi on its website of something less than a full-time employee, i.e., "Of Counsel," supports her position her work with the law firm is not a principal profession, vocation or occupation.

has spent no more than 17 hours per week in the last 12 weeks providing services to the law firm. (Schafler Decl. ¶ 5.) Thus, Rossi spends 52 hours a week on average on her campaign efforts. A reasonable inference from this evidence is that Rossi's campaign work has priority over work she does for the law firm.⁶

While Rossi would be "entitled to consider" her status as a licensed attorney "her principal profession[], vocation[] or occupation[]" for purposes of her ballot designation, nothing in the state statute or regulation required her to do so where she correctly identified her past principal occupation. (2 CCR § 20714, subd. (b)(1).)

Even without regard to whether Rossi has a "principal" profession, vocation or occupation, Petitioner's argument does not prevail because Section 20714(d), like Elections Code section 13107, subdivision (a)(3), does not *require* any particular ballot designation. Section 20714(d) is permissive in all its language—it does not compel any particular result except where a candidate asserts his/her entitlement under the regulation.

The first sentence of Section 20714(d) provides a candidate is "entitled"⁷ to use a ballot designation reflecting the candidate's current profession, vocation or occupation if it is a principal profession, vocation or occupation. The plain language of the regulation does not require—that is, mandate—a current principal profession, vocation or occupation be used by a candidate as a ballot designation. In fact, the first sentence advises a candidate as well as an election official of a candidate's right. By contrast, if the Secretary of State had intended the regulation to fix the designation or bind a candidate, the Secretary of State could have promulgated the regulation with mandatory language such as "shall" instead of "entitled." The terms have very different meanings.

The second sentence of Section 20714(d) instructs candidates in those situations where he/she has no principal profession, vocation or occupation. Even in that situation, however, the regulation does not mandate a particular result. Instead, the regulation is permissive and instructs a candidate he/she may use of a former principal profession, vocation or occupation or no designation at all.

Finally, when considered in its overall context, Section 20714(d) is not intended to and does not resolve all issues concerning ballot designations; that subdivision of the regulation merely instructs on some issues and mandates nothing. For example, the regulation does not resolve which prior principal profession, vocation or occupation a candidate must or ought to select when he/she has had more than one "during the calendar year immediately preceding the filing of the candidate's nomination papers" and currently does not have one. (Section 20714(d).) The regulation does not resolve which principal profession, vocation or occupation a candidate

⁶ Petitioner agreed at the hearing if Rossi had no employment whatsoever and merely worked on her campaign, she could use a ballot designation based on prior employment.

⁷ Entitled is defined as "have a right to certain benefits or privileges." (See <https://www.merriam-webster.com/dictionary/entitled>.)

must use when he/she has more than one. (2 CCR § 20714, subd. (b) [“the activity is one of the primary, main or leading professional, vocational or occupational endeavors of the candidate”].)

Importantly, the court’s interpretation of section 20714(d) as mere instruction does not conflict with Elections Code section 13107, subdivision (a)(3) which clearly provides a choice of an either/or option to a candidate. (See footnote 4 *supra*.)

Rossi’s Designation of “Public Defender, Federal”:

As noted, Rossi has changed her ballot designation to “Public Defender, Federal.” Rossi is limited to only three words for the designation. (Elec. Code § 13107, subd. (a)(3).) Thus, Rossi may not use her actual former title, “Assistant Federal Public Defender,” as a ballot designation under the Elections Code.

While Petitioner takes issue with any reference to Public Defender in Rossi’s ballot designation, in Reply Petitioner does not make any new arguments concerning Rossi’s new designation, “Public Defender, Federal.” Petitioner suggested at the hearing something like “Criminal Defense Attorney” would be permissible.

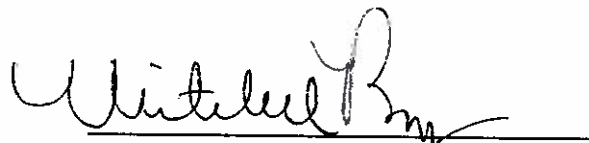
The court finds Rossi’s new designation is not confusing. A reasonable voter would not believe Rossi is the appointed Federal Public Defender based on the manner in which she has now configured her ballot designation. The comma in Rossi’s newly configured designation informs a reasonable voter her occupation is that of a Public Defender in the federal court system.

CONCLUSION

Based on the foregoing, the petition is DENIED.

IT IS SO ORDERED.

December 24, 2019



Hon. Mitchell Beckloff
Judge of the Superior Court