IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

AUSTIN AHMASUK, Appellant, vs. DIVISION OF BANKING AND SECURITIES, Appellee.	)	Case No. 3AN-18-06035 CI

DECISION AND ORDER

I. INTRODUCTION

In this appeal from a decision of the Division of Banking and Securities ("DBS"), Austin Ahmasuk contends that his letter to the editor of *The Nome Nugget* was improperly classified as a proxy solicitation and additionally that application of the proxy solicitation regulations of 3 AAC 08 to his letter violated the constitutional guarantees of due process and free speech. Austin seeks review of the State of Alaska, Department of Commerce, Community, and Economic Development, Division of Banking and Securities' decision. The DBS adopted the proposed decision of the Administrative Law Judge who found that Austin's letter to the editor of *The Nome Nugget* constituted a proxy solicitation. The DBS imposed a civil penalty of $1,500.00, suspending the entire $1,500.00, on the

condition that Austin not violate the Alaska Securities Act for a period of five years. This court agrees with the DBS's interpretation and application of the proxy solicitation regulations and affirms the agency's final decision.

II. FACTS

The facts relevant to this administrative agency appeal are straightforward and undisputed. Austin Ahmasuk is a member of the Sitnasuak Native Corporation ("SNC"). The SNC holds an annual meeting where it elects Board members. The 2017 election occurred in May 2017. In April 2017, SNC sent voting members election and proxy information. The information provided three options for proxy submissions: (1) a member could authorize a "quorum only" proxy vote; (2) a member could issue a directed proxy, whereby the member allocated votes to an identified candidate or candidates; and (3) members could authorize a discretionary proxy, allowing the Board to case the member's vote for their chosen candidate and allocate votes among their candidates as they see fit. SNC shareholders are divided on the appropriateness of the discretionary proxy vote but have not voted to eliminate the practice.

On February 3, 2017, prior to candidates being announced for the July election, Austin emailed a letter to the editor of *The Nome Nugget*. The letter stated:

Dear Editor,

> The Village Corporation for Nome i.e. Sitnasuak Native Corporation (SNC) will soon be holding its annual election and shareholders will file for candidacy. SNC's shareholders have voiced time and time again that they do NOT want discretionary proxies used. Discretionary proxies are NOT required by any Alaskan law and there is NO law that prohibits an ANCSA corporation from prohibiting them for elections. Hundreds of SNC shareholders have said through public letters, social media, or through mailings that they do NOT want discretionary proxies used for elections. I believe SNC shareholders are realizing that discretionary proxies are harmful to our election process and are realizing in greater numbers such practices are disrespectful to our traditions. In 2015 and 2016 I and others spent many hours collecting signatures for a request for a special meeting to do away with discretionary proxies. We collected hundreds of signatures and we met with a 10% requirement as required by Alaska law to petition the SNC Board of Directors to consider doing away with discretionary proxies and to request a special meeting. You might ask yourself why all this commotion about discretionary proxies? Because I and others have thoroughly researched the issue and recognized there is an dramatic ethical argument about what is right and what is wrong with SNC's elections. Discretionary proxies have allowed single persons to use discretionary proxies to dramatically alter the outcome of an election for their singular goal. You know who they are they are members of the SNC 6. Please do NOT vote a discretionary proxy in 2017. Thank you, Austin Ahmasuk.

The newspaper published Austin's letter on February 9, 2017.

That same day, the DBS received a complaint alleging that Austin's letter was a proxy solicitation and contained false and misleading statements. The DBS opened an investigation into the complaint, and on March 13, 2017, issued a Cease and Desist Order finding that: (1) Austin's letter to the editor was a proxy

solicitation, distributed to shareholders under circumstances reasonably calculated to result in procurement, withholding, or revocation of a proxy; (2) Austin violated 3 AAC 08.307 by failing to file a copy of the letter concurrently with the Administrator; (3) Austin violated 3 AAC 08.315(a) by materially misrepresenting that discretionary proxies have allowed single persons to alter the outcome of an election; and (4) Austin violated 3 AAC 08.355 by failing to file required disclosures relating to proxy solicitations with the Administrator. The order imposed a $1,500 fine for the alleged violations.

On April 7, 2017, Austin requested a hearing to set aside the order on three grounds: (1) the letter to the editor is political speech and is protected by the First Amendment; (2) his letter is not a proxy solicitation; and (3) he did not make false or misleading statements. Austin and the DBS agreed to brief the legal issues related to whether the letter was a proxy solicitation and whether such a letter constitutionally could be subject to proxy solicitation regulations, and postpone proceedings related to alleged false or misleading statements.

Austin filed a motion for summary judgment and the DBS opposed. The Administrative Law Judge held oral argument then issued a written decision on December 29, 2017. The decision concluded that Austin's letter to the editor fit within the regulatory definition of a proxy solicitation, and that applying the regulations to Austin's letter did not violate his rights under the constitutional

guarantees of free speech and due process. Pursuant to AS 44.64.060(f), the Commissioner of the Department of Commerce, Community, and Economic Development exercised his option not to consider the issues involved and let the ALJ's decision stand as the final decision in the case. Austin then filed his notice of appeal with this court.

III. STANDARD OF REVIEW

Relative to questions of law, the Alaska Supreme Court has said: "We apply the reasonable basis standard of review to questions of law involving agency expertise, and the substitution of judgment standard to questions outside the agency's expertise."[1] Questions of law regarding the proxy solicitation regulations contained in 3 AAC 08 do not involve agency expertise. The court therefore reviews the agency's application of statutory law substituting its independent judgment.[2] In reviewing an agency's resolution of constitutional issues, the court applies its independent judgment.

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[1] *Pyramid Printing Co. v. Alaska State Comm'n for Human Rights*, 153 P.3d 994, 998 (Alaska 2007).

[2] *State, Dep't of Pub. Safety, Div. of Motor Vehicles v. Fernandes*, 946 P.2d 1259, 1260 n.1 (Alaska 1997).

IV. DISCUSSION

A. Ahmasuk's Letter to the Editor of the Nome Nugget Constitutes a Proxy Solicitation

Article 3, Chapter 8, of Title 3 of the Alaska Administrative Code governs the solicitation of proxies for Alaska Native Claims Act corporations. Section 3 AAC 08.365 provides definitions relating to the solicitation of proxies. Two definitions are at issue in this case: Proxy and solicitation. 3 AAC 08.365(12) provides the definition for proxy as:

> "proxy" means a written authorization which may take the form of a consent, revocation of authority, or failure to act or dissent, signed by a shareholder or his attorney-in-fact and giving another person power to vote with respect to the shares of the shareholder.

And 3 AAC 08.365(16) provides the definition for solicitation as:

> "solicitation" means
>
> (A) a request to execute or not to execute, or to revoke a proxy; or
>
> (B) the distributing of a proxy or other communication to shareholders under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy.

According to 3 AAC 08.307, a proxy solicitation must be filed concurrently with the Administrator of Securities when it is distributed to shareholders. The DBS determined that Austin's letter was a communication to shareholders under circumstances reasonably calculated to result in the withholding of a proxy, and accordingly needed to be filed with the administrator.

Austin argues that the DBS misinterpreted or misapplied the proxy solicitation definitions because "the letter advocated against use of a particular kind of proxy but it did not advocate against all proxies or against any identifiable candidates."[3] Austin contends that reading the regulatory scheme as a whole makes clear that the regulations govern "requests to provide or withhold a proxy that will be voted for or against a particular candidate or ballot proposition" and not "communications related to *forms* of proxies."[4] The court finds Austin's interpretation of the proxy solicitation regulations to be too narrow, confusing, and inconsistent with the plain language of the definitions.

While Austin correctly states that the only reported Alaska Supreme Court cases on proxy solicitations concern express solicitations for proxies for specific candidates or specific propositions, the language of the regulations does not suggest such a narrow interpretation. The proxy solicitation regulations in 3 AAC 08 do not differentiate between different types of proxies. Austin argues that sections 3 AAC 08.335, .345, and .355 "implicitly presume that the communication supports or opposes a specific, identifiable candidate or position on an issue on which shareholders will vote," and therefore the entire regulatory

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[3] Br. of Appellant at 10.

[4] *Id.* at 11.

scheme must be interpreted to apply only to communications directed towards specific candidates or positions. That is an unreasonable reading and interpretation of the regulatory scheme as a whole.

None of the sections of 3 AAC 08 state that the communication regulated must be directed towards a specific candidate, ballot proposition, or that if the communication relates to proxies it must encompass all types of proxies. The regulatory scheme provides for broad application. This is evidenced by 3 AAC 08.355, the section on non-board solicitations. Austin argues that this section implicitly presumes a narrow interpretation; however, the language is inclusive of every situation such that the shareholder must file only the information applicable to their particular solicitation. Additionally, Austin's suggested interpretation of solicitation would be counter intuitive. While the regulation defining solicitation references communication reasonably calculated to result in withholding of *a* proxy, Austin urges the court to interpret that to mean a communication reasonably calculated to result in the withholding of *all* proxies. The plain language of the regulation and common sense go against such an interpretation.

This court does not suggest, as Austin implies, that under a broad and inclusive reading of the definition of solicitation every disparaging comment by a shareholder will be treated as a proxy statement because it might influence a shareholder vote. Austin's letter was not simply a disparaging comment of the

current SNC board. It was not simply a statement about a type of proxy. Austin's letter was a communication to shareholders, specifically referencing the upcoming election, specifically urging shareholdings to withhold a proxy. Those circumstances are reasonably calculated to result in the withholding of a proxy. And that type of communication should unmistakably be classified as a proxy solicitation.

B. Applying the Proxy Solicitation Regulations to Austin's Letter Does Not Violate Due Process or Free Speech.

Having found that the definition of "proxy solicitation" includes Austin's letter to the editor; the court must now consider whether applying the proxy solicitation regulations to Austin's letter violates his constitutional guarantees of due process and free speech.

1. Due Process

Due process requires that regulations give fair notice of what is forbidden or required, and prohibits impermissibly vague laws.[5] Austin argues that he "had no fair notice that putting a sentence of criticism into a letter discouraging the use of discretionary proxies would convert his letter into a 'proxy solicitation.'"[6] A regulation is impermissibly vague and violates due process where the "language is

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[5] *State v. O'Neill Investigations, Inc.*, 609 P.2d 520 (Alaska 1980).

[6] Br. of Appellant at 21.

so indefinite that the perimeters of the prohibited zone of conduct are unclear" and an individual does not have adequate notice of what type of conduct is prohibited.[7]

The court does not find the proxy solicitation regulations to be impermissibly vague. Rather, the court finds the regulations to be clear and instructive as to what conduct is prohibited. Austin had fair notice that communicating to shareholders, before an election, about a specific election, urging them to withhold a proxy would be classified as a proxy solicitation. And he had fair notice that a filing of the proxy solicitation was required in order to avoid a penalty. Applying the regulations to Austin's letter does not violate his constitutional guarantee of due process.

2. Free Speech

Austin argues that applying the proxy solicitation regulations to his letter to the editor violates free speech because his speech fell outside of that speech that the government has a compelling interest in regulating. Austin distinguishes between "traditional" proxy solicitation and the type of proxy solicitation he took part in. He argues that "traditional" proxy solicitation may be regulated because the government has a compelling interest in protecting the integrity of an election, but that his speech, which addressed concerns about a type of proxy voting, the

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[7] *F/V American Eagle v. State*, 920 P.2d 657, 663 (citing *Marks v. City of Anchorage*, 500 P.2d 644, 646 (Alaska 1972)).

government does not have a compelling interest in regulating. The court does not buy into this distinction between "traditional" proxy solicitations and other proxy solicitations. Again, Austin's argument requires that the court interpret the definition of proxy solicitation to mean solicitations that advocate voting for or against a particular candidate or proposition. This court has rejected that interpretation.

It is not disputed that the government has a compelling interest in protecting the integrity of an election. The court finds that whether a proxy solicitation is directed towards a particular candidate or ballot proposition or towards a particular type of proxy does not change the character of the government interest involved. As the Alaska Supreme Court found in *Meidinger v. Koniag, Inc.*, Alaska's proxy solicitation regulations do not violate constitutional guarantee of free speech.[8] We therefore reject Austin's free speech argument.

V. CONCLUSION

For the reasons set forth above, this court affirms the DBS decision finding that Austin's letter to the editor was a proxy solicitation and that applying

[8] *Meidinger v. Koniag, Inc.*, 31 P.3d 77, 84-85 (Alaska 2001).

Alaska's proxy solicitation regulations to Austin's letter did not violate the constitutional guarantees of due process or free speech.

Dated this 4th day of March, 2019, at Anchorage, Alaska.

ANDREW PETERSON
Superior Court Judge

I certify that on 3-4-19 a copy of the above was delivered to:

S. Orlansky
R. Schmidt
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