

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>KAYLA KOETHER, in her individual capacity as the Democratic Nominee for the Iowa House of Representatives District 55, Plaintiff,</p> <p>vs.</p> <p>PAUL PATE in his official capacity as Iowa Secretary of State; BENJAMIN STEINES in his official capacity as County Auditor for Winneshiek County, Iowa, Defendants.</p>	<p>CASE NO.: EQCE083821</p> <p>ORDER ON MOTION TO DISMISS, MOTION TO CHANGE VENUE AND MOTION TO ENLARGE</p>
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This matter came before the Court on Defendant Benjamin Steines’s Motion for Change of Venue, Plaintiff Kayla Koether’s Motion to Enlarge and Defendant Paul Pate’s Motion to Dismiss. A hearing was held on December 20, 2018. Present at the time of the hearing was Plaintiff’s Counsel, Shayla McCormally and Kolby Warren. Present for Defendant Paul Pate was Matthew Gannon. Stephen J. Belay appeared by phone for Defendant Benjamin Steines. After considering the briefs and argument on this matter, the Court issues the following ruling and order.

FACTUAL BACKGROUND

As the Court noted in its previous ruling, this case arises from the November 6, 2018 election for Iowa House District 55. The Plaintiff in this matter, Kayla Koether, is the Democratic candidate for that seat. Her opponent is Republican Michael Bergan. The election was extremely close. Of the nearly 14,000 ballots cast, only nine votes separated Koether and Bergan, with Bergan in the lead.

At question, in this case, are the absentee ballots received by the Winneshiek County Auditor on or after the election date of November 6, 2018. At the beginning of this case, 33 absentee ballots were not counted by the Winneshiek County Absentee and Special Voters Precinct Board because they did not contain the postmark indicating when they had been placed in the federal mail system.

Iowa Code § 50.24(2) states that a canvassing board shall “contact the chairperson of the special precinct board before adjourning to include in the canvas...any absentee ballots which were received after the polls closed in accordance with section 53.17 and which were canvassed by the special precinct board after election day.” Furthermore, Iowa Code § 53.17(2) states:

[I]n order for the ballot to be counted, the return envelope must be received in the Commissioner’s office before the polls close on election day or be clearly postmarked by an officially authorized Postal Service or bear an intelligent mail barcode traceable to a date of entry into the federal mail system not later than the day before the election and received by the commission or not later than noon on the Monday following the election.

Iowa Code § 53.17(2)(2018).

In response to the Plaintiff’s request for injunctive relief, on December 3, 2018, this Court entered an order directing the Winneshiek County Auditor to number the ballots 1 to 33 and to coordinate with the U.S. Postal Service to read the barcodes on the ballot envelopes to determine when they had been placed in the mail. In that Order, the Court specifically stated that it was providing injunctive relief in order to preserve evidence that could potentially be lost. The Court denied the Plaintiff’s Motion for additional relief which, in part, requested the stay of the vote certification. The Court specifically stated that the order of that day did not affect the merits of the case and was not to be interpreted as anything other than an attempt to preserve evidence. On December 5, 2018, the Winneshiek County Auditor returned to the court a report indicating

that the barcodes had been read. The report stated in part:

The following ballots were deposited with the USPS on November 5, 2018:

- a. Exhibit Nos. 1 through 18; Exhibit Nos. 20 through 28; and, Exhibit Nos. 30 through 31;
- b. Exhibit No. 19 was deposited with the USPS on November 6, 2018;
- c. Exhibit Nos. 29, 32 and 33. USPS did not supply data for these envelopes.

Subsequent to the entry of the Order and report by the Winneshiek County Auditor, three motions were filed by the parties. First, a Motion for Change of Venue was filed by the Winneshiek County Auditor. Second, a Motion to Dismiss was filed by the Secretary of State and joined by the Winneshiek County Auditor. Finally, a Motion for Enlargement and Clarification was filed by the Plaintiff. Because Defendant Paul Pate's Motion to Dismiss is dispositive, the Court will address it first.

STATEMENT OF LAW

The Defendants challenge the power of the judicial branch to entertain this action. Specifically, they claim that this Court should dismiss the action because it lacks subject matter jurisdiction to address the issue presented by the Plaintiff.

Iowa Rule of Civil Procedure 1.421(1)(a) states that lack of subject matter jurisdiction may be raised by a motion to dismiss. "Subject matter jurisdiction" refers to the power of a court to deal with a class of cases to which a particular case belongs. *Franklin v. State*, 905 N.W.2d 170, 171–72 (Iowa 2017). A constitution or a legislative enactment confers subject matter jurisdiction on the courts. *Id.* Although a court may have subject matter jurisdiction, it may still lack the authority to hear a particular case for one reason or another. *Id.* The lack of subject matter jurisdiction can be raised "at any time." *Klinge v. Bentien*, 725 N.W.2d 13, 16 (Iowa 2006).

The Defendants contend that this Court lacks subject matter jurisdiction because the right to contest an election of this type rests exclusively with the Iowa House. They cite both the Iowa Constitution and the Iowa Code in support of the argument that this is a matter of separation of powers. The separation of powers doctrine is violated “if one branch of government purports to use powers that are clearly forbidden, or attempts to use powers granted by the constitution to another branch.” *State v. Phillips*, 610 N.W.2d 840, 842 (Iowa 2000). The doctrine requires that a branch of government not impair another in the performance of its constitutional duties. *Klouda v. Sixth Judicial Dist. Dep't of Corr. Servs.*, 642 N.W.2d 255, 260 (Iowa 2002).

The basis of the separation of powers within the State of Iowa is found in Iowa Constitution Article III, section 1. It specifically states:

“The powers of the government of Iowa shall be divided into three separate departments the Legislative, the Executive, and the Judicial: and no person charged with the exercise of the powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.”

Iowa Const. Art. III (of the Distribution of Power), section 1. As the doctrine applies to the case at bar, Article III, section 7, further clarifies the role of the legislature in this matter. It states:

Each house shall choose its own officers, and judge of the qualification, election, and return of its own members. A contested election shall be determined in such manner as shall be directed by law.

Iowa Const. Art. III (Officers-Elections Determined), section 7. Pursuant to that section, the General Assembly enacted chapters 57 and 59 of the Iowa Code, providing for the general contesting of elections and the procedure in the Senate and House respectively for the contest of elections for seats in those bodies. With this as the constitutional and statutory backdrop, the Court now turns to whether this case should be dismissed.

ANALYSIS

In this matter, the Plaintiff in her Petition asked the Court for three points of relief. They include: 1) Temporarily enjoining the Secretary of State from certifying the canvass results of the election for Iowa House District 55; 2) a writ of mandamus directing the Winneshiek County auditor to obtain from the United States Postal Service information contained in barcodes printed on the absentee ballot envelopes; and, 3) a writ of mandamus ordering the Winneshiek County auditor to count all the ballots that were determined to have entered the postal mail stream on or before November 5, 2018. This Court previously entered an order denying the Plaintiff's motion to enjoin the state canvass of election results. In addition, the Court ordered the Winneshiek County Auditor to work with the United States Postal Service to determine if the barcodes printed on the absentee ballot envelopes could be read and provide information about when the absentee ballots were mailed. As previously stated, the Winneshiek County Auditor reported that information to the Court on December 5, 2018. As a result, two of the three counts in the Petition have been resolved conclusively.

This Court lacks jurisdiction to resolve the third count of the Plaintiff's Petition. The Plaintiff's third count asks this Court to order that the 29 ballots that were mailed and recorded by the United States Postal Service before November 6, 2018, be counted by the Winneshiek County Auditor. Iowa Code chapters 57 and 59 are the exclusive remedy for a candidate seeking to contest the result of an election for a seat in the General Assembly. As set forth above, grounds for a contest include "that illegal votes have been received or legal votes rejected," Iowa Code § 57.1(2)(e), or "any error in any board of canvassers in counting the votes." Iowa Code § 57.1(2)(f). The grounds asserted by the Plaintiff to count the ballots falls squarely within the parameters of Iowa Code § 57.1, and as a result, this matter should be left to the legislative branch. By constitution and statute, the power of the legislature over election contests for

legislative seats is clearly spelled out. *Luse v. Wray*, 254 N.W.2d 324 (Iowa 1977). That power is constitutionally given to the legislative branch, and this Court lacks subject matter jurisdiction as a result.

The Plaintiff clearly has a recourse to resolve her complaint. Through the process set out in Iowa Code §§ 57 and 59, the Plaintiff can contest the election with the House and seek the relief she requests. Specifically, Iowa Code § 57.1 gives “any eligible person who received votes for” an office the ability to contest an election. Iowa Code § 57.1 (2018). In order to start this process, the Plaintiff need only serve on the other candidate, and file with the Secretary of State, a notice of contest which allege “the fact or facts, believed to be true by the contestant which, if true, would alter the outcome of the election.” Iowa Code § 59.1 (2018). The Iowa House of Representatives (or a committee of its representatives), will sit as a “contest court” and hear the matter. Furthermore, pursuant to Iowa Code § 59, the parties can conduct discovery, issue subpoenas and take depositions as part of the contest procedure. The statute even allows the Plaintiff the right to have the ballots opened and considered. See Iowa Code § 57.5 (2018).

Even though she has the right to bring an election contest and have the ballots considered by the House, the Plaintiff contends that she needs the Court to order the Winneshiek County Auditor to open and count the ballots prior to bringing an election contest. She claims that under Iowa Code § 57.1(2)(f) she must prove as a matter of jurisdiction that a tally of the absentee ballots would, in certainty, change the outcome of the election result. In support of this contention, the Plaintiff cites to Iowa Code § 62.5 which states a contestant is required to include “the names of the persons who are alleged to have voted illegally or whose votes were rejected.” The Plaintiff’s argument, however, is without merit. Iowa Code § 62.5 applies only to the election contests of “county officials.” The section that applies to the Plaintiff’s election, Iowa

Code § 57.1, does not include such a requirement. Rather, it only requires that the contestant “allege a fact or facts, believed true by the contestant which, if true, would alter the outcome of the election.” Iowa Code § 57.1 (2018). As such, the Plaintiff only needs to allege the possibility that the votes would change the election outcome. It is enough that she pleads that only nine votes separate the two candidates, and the 29 votes, which appear to be validly cast, might have been cast for her and have not been counted.

The procedure by which the Plaintiff can contest the election is constitutionally established and legislatively enacted. It provides a clear remedy to the Plaintiff. The right and responsibility to rule on an election contest has been constitutionally given to the legislature and pursuant to Article III section 1 of the Iowa Constitution, the judicial branch should not interject itself in this matter.¹

¹ While there are undoubtedly situations in which a court may become involved in an election issue, those circumstances involve a party asserting the violation of the constitutional right vis-à-vis a vote contest. The Iowa Supreme Court has held that “Iowa courts have power to adjudicate substantial claims of deprivation of federal or Iowa constitutional rights by the Houses of the Iowa General Assembly in the exercise of the Houses' election contest powers under section 7, Article III, of the Iowa Constitution.” *Luse v. Wray*, 254 N.W. 324, 328 (Iowa 1977). In this case, the Plaintiff is not asserting a constitutional right and the allegedly disenfranchised voters are not before the Court. As such, the limited exceptions that would allow the Court to intervene in an election are not present.

CONCLUSION

In sum, this Court holds that the Iowa House of Representatives, in exercising its sovereign power under Article III, section 7, has the exclusive right to determine the merits of this contest. Therefore, this Court must conclude that it lacks subject matter jurisdiction to consider this action because a vote contest of this nature is a role constitutionally given to the legislative branch. Having found the initial issue to be dispositive of this case, the Court deems it unnecessary to address the remaining issues asserted in Defendant Steines's Motion for Change of Venue and Plaintiff's Motion to Enlarge and Clarify.²

ORDER

The Defendants' Motion to Dismiss is hereby GRANTED. The Plaintiff's claim is dismissed. Court costs will be assessed to the Plaintiff.

IT IS SO ORDERED

² As part of the House of Representative's duty and responsibility as the "contest court", it will need to determine the meaning of "intelligent mail barcode" under Iowa Code § 53.17(2). In deference to the separation of powers, this Court will not address that issue. See *Luse v. Wray*, 254 N.W.2d at 330.



State of Iowa Courts

Type: OTHER ORDER

Case Number **Case Title**
EQCE083821 KAYLA KOETHER V PAUL PATE AND BENJAMIN STEINES

So Ordered

A handwritten signature in black ink, appearing to be "S. Beattie". The signature is written in a cursive, flowing style.

Scott J. Beattie, District Court Judge,
Fifth Judicial District of Iowa