

AUG 25 2014

CANYON COUNTY CLERK  
DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

\_\_\_\_\_  
GREGORY L. COLLETT,

Plaintiff,

vs.

PATTI ANNE LODGE,

Defendant.  
\_\_\_\_\_

OPINION IN PRIMARY  
CONTEST

CV-2014-5506-C

**PROCEDURAL HISTORY**

Gregory L. Collett initiated this proceeding contesting the nomination of Patti Anne Lodge as candidate for the office of state senator representing Idaho State Legislative District Number 11 by filing an Affidavit and Notice of Contest with this court on May 30, 2014.

On June 9, 2014, Mr. Collett filed a certificate of service indicating that he served copy of the Affidavit and Notice of Contest on Defendant by mail.

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On June 11, 2014, Mr. Collett filed a Memorandum in Support of Contest. The Memorandum was unsigned and consisted exclusively of documentary and other evidence Mr. Collett wished to offer in support of his Affidavit and Notice of Contest.

On June 12, 2014, the court (Carey, J.) entered its Memorandum to Plaintiff, noting that because there was no proof of proper service of the Affidavit and Notice of Contest, the court had not set the contest for hearing. On the same date, Patti Anne Lodge entered an appearance through counsel.

On June 18, 2014, Mr. Collett caused a second Affidavit of Service to be filed.

On June 30, 2014, counsel for Ms. Lodge filed a Motion to Strike Plaintiff's Memorandum in Support of Contest because it was unsigned, it consisted of "redundant, immaterial, impertinent, or scandalous matter," and was not timely filed under Idaho Code section 34-2124.

On July 10, 2014, Patti Anne Lodge filed her Affidavit in Response to Affidavit and Notice of Contest, together with attached supporting documents.

On July 29, 2014, the court entered its Notice setting the matter for a Scheduling/Status conference and ordered the parties to "be prepared to inform the Court of any additional evidence they wish to present and to schedule further proceedings."

The matter came before the court on August 11, 2014. Mr. Collett appeared on his own behalf and Mr. Joseph W. Borton appeared for Ms. Lodge. In addressing the Motion to Strike, the court permitted Mr. Collett to sign the original Memorandum in Support of Contest in open court and denied the Motion to Strike. The court indicated that it did not require the production of any additional evidence pursuant to Idaho Code section 34-2127. However, the court

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permitted Mr. Collett to file his Affidavit in Reply to Patti Anne Lodge and granted Ms. Lodge leave to file a response, if desired, on or before August 18, 2014. The court also directed the parties to file any affidavits of costs and fees requested on or before August 18, 2014.

### **LEGAL STANDARDS**

As the party seeking affirmative relief from the court, Plaintiff bears the burden of proving the grounds asserted in his contest. *Jaycox v. Varnum*, 39 Idaho 78, 226 P. 285 (1924).

In an election contest, this court's findings of fact must be supported by competent evidence. *Noble v. Ada County. Elections Bd.*, 135 Idaho 495, 500, 20 P.3d 679, 684 (2000). The application of the law to such facts is a question of law. *Id.*

### **ISSUES BEFORE THE COURT**

Pursuant to Idaho Code section 34-2122, a "candidate at a primary election may contest the nomination of any candidate for the same office based upon the grounds as set out in this chapter." There does not appear to be any issue regarding whether Plaintiff has standing to contest Defendant's nomination at the primary election.

Idaho Code section 34-2101 establishes the grounds for contesting an election:

1. For malconduct, fraud or corruption on the part of the judges of election in any precinct, township or ward, or of any board of canvassers, or by any member of either board sufficient to change the result;
2. When the incumbent was not eligible to the office at the time of the election;
3. When the incumbent has been convicted of felony, unless at the time of the election he shall have been restored to civil rights;
4. When the incumbent has given or offered to any elector, or any judge, clerk, or canvasser of the election, any bribe or reward in money or property, for the purpose of procuring his election, or has committed any violation as set out in chapter 23, title 18, Idaho Code;
5. When illegal votes have been received or legal votes rejected at the polls sufficient to change the result;

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6. For any error in any board of canvassers in counting votes or in declaring the result of the election, if the error would change the result;
7. When the incumbent is in default as a collector and custodian of public money or property;
8. For any cause which shows that another person was legally elected.

Plaintiff relies on two specific grounds in this proceeding. First, Plaintiff asserts that Defendant was not eligible for the office at the time of the election. Affidavit and Notice of Contest, ¶ 17. Second, Plaintiff asserts that Defendant “has given or offered to any elector, or any judge, clerk, or canvasser of the election, any bribe or reward in money or property, for the purpose of procuring his election, or **has committed any violation as set out in chapter 23, title 18, Idaho Code.**” Affidavit and Notice of Contest, ¶ 18 (emphasis in original).

### ANALYSIS

The court will address each of the grounds for contesting the primary election raised by Plaintiff separately.

#### **I. Bribe/Reward or Violation of Idaho Code Title 18, Chapter 23 (I.C. § 34-2101(4))**

There is no evidence before the court that Defendant gave or offered any bribe or reward in money or property to any person for the purpose of procuring her nomination at the primary election.

The only evidence Plaintiff has adduced in support of his claim that Defendant committed a violation of Idaho Code title 18, chapter 23 is his conclusive statement (Affidavit and Notice of Contest, ¶ 15) that Defendant “has violated Idaho Code 18-2322.” The court concludes that this is insufficient to satisfy Plaintiff’s burden of proof on the ground set forth in Idaho Code section 34-2101(4).

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## II. Defendant's Ineligibility to Hold the Office to which she was Nominated

Plaintiff's primary contention in this proceeding is that Defendant is ineligible to hold the office of state senator for Idaho State Legislative District Number 11, because she does not meet the residency requirements for such office.

Article III, section 6 of the Idaho Constitution requires a state senator to be, at the time of his election, a citizen of the United States, an elector of this state, and an elector of the county or district whence he may be chosen, for one year next preceding his election. Idaho Code section 34-614 requires that a person elected to the office of state senator: (1) have attained the age of twenty-one (21) years at the time of the general election; (2) be a citizen of the United States; and (3) have resided within the legislative district one (1) year next preceding the general election at which he offers his candidacy.

Idaho Code section 34-107 defines the meaning of "residence," for purposes of Idaho Code, title 34:

"Residence" defined. (1) "Residence," for voting purposes, shall be the principal or primary home or place of abode of a person. Principal or primary home or place of abode is that home or place in which his habitation is fixed and to which a person, whenever he is absent, has the present intention of returning after a departure or absence therefrom, regardless of the duration of absence.

(2) In determining what is a principal or primary place of abode of a person the following circumstances relating to such person may be taken into account: business pursuits, employment, income sources, residence for income or other tax pursuits, residence of parents, spouse, and children, if any, leaseholds, situs of personal and real property, situs of residence for which the exemption in section 63-602G, Idaho Code, is filed, and motor vehicle registration.

(3) A qualified elector who has left his home and gone into another state or territory or county of this state for a temporary purpose only shall not be considered to have lost his residence.

(4) A qualified elector shall not be considered to have gained a residence in any county or city of this state into which he comes for temporary purposes only, without the

intention of making it his home but with the intention of leaving it when he has accomplished the purpose that brought him there.

(5) If a qualified elector moves to another state, or to any of the other territories, with the intention of making it his permanent home, he shall be considered to have lost his residence in this state.

Plaintiff asserts that, under the statutory definition, Defendant does not reside in Idaho State Legislative District Number 11, because: (1) the “former residence of Patti Anne Lodge, located at 18500 Symms Road Caldwell ID 83607, was removed from her property in 2011” (Affidavit and Notice of Contest, ¶ 1); (2) “the property located at 18500 Symms Rd does not qualify as a residence” (Affidavit in Reply to Patti Anne Lodge, ¶ 1); and (3) “Patti Anne Lodge moved to 703 East Logan Street Caldwell ID 83605, located in District 10, at that time [in 2011], and has lived there to this date” (Affidavit and Notice of Contest, ¶ 2).<sup>1</sup>

Resolution of this issue requires the court to engage in statutory interpretation. “The objective of statutory interpretation is to give effect to legislative intent.” *State v. Yzaguirre*, 144 Idaho 471, 475, 163 P.3d 1183, 1187 (2007). “Such intent should be derived from a reading of the whole act at issue.” *St. Luke's Reg'l Med. Ctr., Ltd.*, 146 Idaho 753, 755, 203 P.3d 683, 685 (2009). Statutory interpretation “should begin with an examination of the literal words of the statute, and this language should be given its plain, obvious, and rational meaning.” *Williamson v. City of McCall (In re Williamson)*, 135 Idaho 452, 455, 19 P.3d 766, 769 (2001). “If the statutory language is unambiguous, ‘the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to consider rules of statutory construction.’” *St. Luke's Reg'l Med. Ctr., Ltd.*, 146 Idaho at 755, 203 P.3d at 685 (quoting *Payette River Prop. Owners Ass'n v. Bd. of Comm'rs of Valley Cnty.*, 132 Idaho 551, 557, 976 P.2d 477, 483 (1999)).

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<sup>1</sup> There appears to be no dispute that 18500 Symms Road, Caldwell, Idaho is located in Idaho State Legislative District Number 11 and that 703 East Logan Street, Caldwell, Idaho is not located in District Number 11.

The court concludes that the definition of residence set forth in Idaho Code section 34-107 is unambiguous. Pursuant to section 34-107(1), “residence” is the “principal or primary home or place of abode of a person. Principal or primary home or place of abode is that home or place in which his habitation is fixed and to which a person, whenever he is absent, has the present intention of returning after a departure or absence therefrom, regardless of the duration of absence.”

It is uncontroverted that Defendant established residence at 18500 Symms Road, Caldwell, Idaho, for purposes of Idaho Code section 34-107(1), more than one year next preceding the general election at which she offers her candidacy. For instance, in her Affidavit in Response to the Affidavit and Notice of Contest, Defendant states:

I have maintained my residence at 18500 Symms Rd continuously since 1996 except for temporary absences for travel, visiting family and now for building a new home on the exact site of the old house. During any temporary absence I have always had an actual and present intention of returning after a departure or absence therefrom.

Affidavit of Patti Anne Lodge, ¶ 3. In fact, Plaintiff has conceded this fact. For instance, as noted above, Plaintiff refers to 18500 Symms Road as Defendant’s “former residence.” In addition, in his Affidavit in Reply to Patti Anne Lodge, Plaintiff states:

I am not contesting the intention of the defendant to return to her property when a new home has been built.

Affidavit in Reply, ¶ 3.

Accordingly, in order to establish that 18500 Symms Road is not Defendant's residence, for purposes of the election law, Plaintiff must prove that Defendant lost her residence at 18500 Symms Road or gained residence in a district other than District Number 11.<sup>2</sup>

As set forth above, Idaho Code section 34-107(3) provides that a "qualified elector who has left his home and gone into another state or territory or county of this state for a temporary purpose only shall not be considered to have lost his residence." Plaintiff has not produced any evidence that Defendant lost her residence at 18500 Symms Road. Similarly, all the evidence before the court indicates that Defendant's absence from 18500 Symms Road is "for temporary purposes only," without the intention of making District Number 10 her home and with the intention of leaving District Number 10 when she has accomplished the purpose that brought her there. Based upon this, Plaintiff has not established that Defendant gained residence in District Number 10.

In his affidavit of August 11, 2004, Plaintiff argues that Defendant "should be removed from office" because she did not obtain the consent from the Governor to be absent from the district for more than thirty (30) days. This argument is of no aid to the Plaintiff as this is not a ground set forth in title 34, chapter 21. In addition, it is unclear what the sanctions would be under this section or who would have standing to raise a violation.

In light of the foregoing, Plaintiff's contest of the nomination of Patti Anne Lodge as candidate for the office of state senator representing Idaho State Legislative District Number 11 is denied and this proceeding is dismissed.

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<sup>2</sup> Plaintiff apparently seeks to insert an "actually reside" requirement into Idaho Code section 34-107. *See Bradbury v. Idaho Judicial Council*, 149 Idaho 107, 233 P.3d 38 (2009). However, the legislature did not see fit to include any such requirement in the express language of the statute.



## COSTS AND ATTORNEY FEES

In her Affidavit in Response to Affidavit and Notice of Contest, Defendant requests an award of attorney fees and costs incurred in defending this proceeding, pursuant to Idaho Code section 12-121 and/or 12-123 “and that the bond posted be released to me as part of that reimbursement.”

Idaho Code section 34-2125 requires “the contestant shall file with the court a bond, in the amount of five hundred dollars (\$500), to be used to pay costs of the contestee in the event the primary election be confirmed or the prosecution fail.” That statute is not a basis for an award of attorney fees. *See Noble*, 135 Idaho at 504. Defendant has established costs in the amount of \$66.00. The court directs that the bond be released to Defendant, in the amount of \$66.00, to reimburse such costs and that the remainder be returned to Plaintiff.

The court is not left with the abiding belief that that the instant proceeding was brought or pursued frivolously, unreasonably or without foundation. In addition, the court is not persuaded that Idaho Code section 12-123 (or 12-121) applies to a proceeding of this nature. Accordingly, the court declines to award attorney fees to Defendant.

Dated this 25<sup>th</sup> day of August, 2014.

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Ron Schilling  
Senior District Judge

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing OPINION IN  
PRIMARY CONTEST was served upon the following persons on August 25,  
2014:

Gregory L. Collett  
21255 Lonkey Ln.  
Caldwell, ID 83697  
Facsimile: 208-345-1129

Joseph W. Borton  
Borton – Lakey Law & Policy  
141 E. Carlton Ave  
Meridian, ID 83701  
Facsimile: 208-385-5384

Chris Yamamoto  
Clerk of the District Court

By: [Signature]  
Deputy Clerk

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