IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA, ex rel., RUSS BARGER,

Relator,

vs.

ROBERTY B. EVNEN and DAVID J. SHIVELY, in their official capacities,

Respondents,

vs.

GEORGE C. DUNGAN, III,

Intervenor.

CI22-4090

ORDER

THIS MATTER CAME on for consideration of the Relator Russ Barger's filing of December 5, 2022, entitled, "Verified Petition for Writ of Mandamus and Declaratory Judgment;" this Court's Order to Show Cause of December 6, 2022; and the Respondent Robert Evnen's Response to Order to Show Cause filed December 12, 2022. David Begley appeared for Relator; Jennifer Huxoll and Christopher Felts appeared for Respondent Evnen; Eric Synowicki appeared for Respondent Shively; and Daniel Gutman appeared with Dungan. Briefs were previously submitted; evidence was offered and additional argument was presented at the hearing.

Relator seeks a writ of mandamus ordering the Nebraska Secretary of State, Robert Evnen, to recount votes from a recent legislative election using a hand recount method. Relator also seeks a declaratory judgment. Being duly apprised, the Court finds as follows:

I. The Court Lacks Jurisdiction to Address the Mandamus

The matter first proceeds to address subject matter jurisdiction, without which the Court may not consider the Relator's purported mandamus filing of December 5, 2022. The law of Nebraska is clear that the filing of a motion and affidavit for a verified petition is a jurisdictional requirement before a district court may issue a writ of mandamus. *State ex rel. Malone v. Baldonado-Bellamy*, 307 Neb. 549, 559, 950 N.W.2d 81, 87 (2020). "[A] person choosing to seek speedy relief by a writ of mandamus ... must follow the procedural requirements set forth in §§ 25-2156 through 25-2169." *Id.* at 557, 86.

Nebraska Revised Statute § 25-2160 requires that, "[T]he motion for the writ must be made upon affidavit." An affidavit is a written declaration made under oath. Relator failed to satisfy the requirement because, as pointed out in the Respondent Evnen's brief, the purported verification page of Relator's filing of December 5 used an electronic signature symbol ("/s/") for both Relator and the notary public, indicating it was electronically signed, but it lacked any sort of an electronic notary seal to provide verification.

The Legislature has provided a specific statutory scheme which authorizes and governs the use of electronic notary verifications. It is possible to verify an electronically filed petition under the Electronic Notary Public Act, Neb. Rev. Stat. § § 64-301 to 64-317. Among other requirements in the Electronic Notary Public Act, section 64-309 requires:

> In performing an electronic notarial act, all of the following components shall be attached to, or logically associated with, the electronic document by the electronic notary public and shall be immediately perceptible and reproducible in the electronic document to which the notary public's electronic signature is attached: (1) The electronic notary seal; (2) the notary public's electronic signature; and (3) the completed wording of one of the following notarial certificates: (a) Acknowledgment, (b) jurat, (c) verification or proof, or (d) oath or affirmation.

Section § 64-302(5), defines an electronic notary seal: "Electronic notary seal means information within a notarized electronic document that includes the notary public's name, jurisdiction, and commission expiration date and generally corresponds to the data in notary seals used on paper documents." Without question, Relator's filing of December 5, 2022, failed to include the required information and therefore failed to be a verification.

At argument, Relator attempted to rescue the filing by referring to the Nebraska Uniform Electronic Transactions Act, Neb. Rev. Stat. § 86-612, et seq. However, the argument missed the point because the infirmity was the lack of verification, meaning it was not notarized. It may have been an electronically signed document, but it was simply not a verified affidavit as required. Relator's further argument relying on § 86-638 provided no exception to the requirements of the Electronic Notary Public Act. Instead, the text of that statute requires conformity with other applicable law, such as in this circumstance, the Electronic Notary Public Act. It reads:

> If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, *together with all other information required to be included by other applicable law*, is attached to or logically associated with the signature or record.
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> *Id.* (emphasis added)

In this case, Relator's filing lacked a stamp or electronic notary seal identifying the notary's commission. As noted by the Nebraska Supreme Court in *Baldonado-Bellamy*, where the relator failed to file a properly verified petition, "the mandamus action was not begun and the district court did not have jurisdiction." *Id.* at 560, 88. The Court continued, "our precedent treats § 25-2160 as imposing a jurisdictional requirement, and parties cannot waive a jurisdictional requirement." *Id.*

Notably, after the infirmity was pointed out by the Respondent's responsive brief, but prior to the hearing, Relator filed with the Clerk another document purporting to show a notary seal and signatures. When asked about it's significance at the hearing, Relator confirmed the filing of December 12, 2022 was not another pleading or attempt at an amendment, and he was not seeking another Order to Show cause. Instead, as he stated in his Reply Brief filed contemporaneously with it, the document was filed **"[a]s a separate JUSTICE filing as a "brief," I am submitting a scanned Verified Petition which the undersigned scanned from the hard copy in his pleading file."** Relator also attempted to offer a copy of the same document, exhibit 9, but neither of these actions by Relator could possibly cure the infirmity of failing to file the required verified affidavit to invoke subject matter jurisdiction at the time of filing, nor do the parties, or this Court, possess the power or discretion to waive or excuse such failure. Because here, as in *Baldonado-Bellamy*, the Relator failed to file a properly verified petition, the mandamus action was not begun and this district court does not have jurisdiction to address it.

II. Relator's Argument that § 32-1118 Requires a Hand Recount is Without Merit.

In the alternative, and pursuant to the request for a declaratory Judgment, this Court finds no merit to the Relator's legal argument that the statutes governing recounts of such elections require the Secretary of State to conduct a recount by hand.

The Nebraska Legislature sets the rules and judges its elections. See, Article III, section 10, of the Constitution of Nebraska. In that regard, the Legislature has provided statutory schemes to govern its elections, to wit: the Legislative Qualifications and Elections Contests Act. Neb. Rev. Stat. § 50-1501, et seq., and the Elections Act, Neb. Rev. Stat. § 32-101 to 32-1551.

Relator's request for declaratory relief (and improperly a mandamus) claims that Neb. Rev. Stat. § 32-1118 of the Elections Act provides for a hand recount. A plain reading of that statute does not so provide. That section reads:

> (1) The apparent loser at a general election for a seat in the Legislature may secure a recount of the ballots cast at such election by filing a petition for a recount in duplicate with the Secretary of State no later than the fourth Monday after the election. The petition shall be accompanied by a corporate surety bond in the penal sum of two thousand five hundred dollars conditioned for the payment of costs pursuant to section 32-1116 if the recount fails to change the results of the election. If at any stage of the recount the amount of the bond becomes inadequate, the Secretary of State may order an increase in the amount of such bond.
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> (2) The Secretary of State shall, by certified or registered mail, give notice of the filing of a petition under this section not later than the day following the filing of the petition and deliver a copy of the petition to the declared winner. The Secretary of State shall also, by the most practicable means of communication, direct the election commissioner or county clerk of each county involved to deliver the ballot boxes to the office of the election commissioner or county clerk designated by the Secretary of State no later than the following Monday.
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> (3) After the ballot boxes have been received at the designated office, they shall be opened and the ballots for member of the Legislature shall be recounted under the supervision of the Secretary of State. The Secretary of State may employ such persons as may be necessary to conduct the recount and fix their compensation.
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> (4) The Secretary of State shall, on or before December 20, certify the results of the recount to each of the parties to the recount and to the Clerk of the Legislature.

Nowhere in § 32-1118, the section relied upon by Relator, is there any language providing that a recount is to be conducted by hand. Statutory language is to be given its plain and ordinary meaning, and courts do not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Stick v. City of Omaha*, 289 Neb. 752, 759, 857 N.W.2d 561, 567 (2015). Nor is it within the province of this court to read a meaning into a statute that is not warranted by the legislative language. *Id.* The statute simply does not say what Relator claims, but it does say that the Secretary of State shall supervise recounts. The statute is

harmonious in that respect with the duties and powers granted by the Legislature to the Secretary of State to supervise elections including recounts as set forth in the Elections Act. See, Neb. Rev. Stat. §§ 32-202 and 32-203.

Relator suggests an ambiguity should be found by reading Neb. Rev. Stat. §§ 32-1118 and 32-1119 together. Clearly the sections should be read with others in the scheme, but Relator draws a false dichotomy between them and erroneously considers the latter section, 32-1119, as pertaining solely to close elections (with a margin one percent or less), and further claims that the former, 32-1118, must therefore deal with elections with a greater margin than one percent. But those two statutes do not address wholly separate circumstances. Instead, the circumstance of a margin of one percent or less is addressed only in subsection one of section 32-1119, and it says that in that circumstance the candidate is entitled to an automatic recount. The remainder of the subsections of § 32-1119 do not pertain exclusively to such close elections. Were Relator's reading correct, they would be exclusively applicable to such close margin cases.

In other words, Relator reads the two sections, 32-1118 and 32-1119 as pertaining to separate circumstances depending on the margin of votes cast. He then suggests that since section 32-1118 is devoid of the requirement that the recount be done in the same manner as the count on election day, the recount should be conducted manually as requested. However, as noted, a careful and plain reading of the statutes does not include such language and instead reveals that only subsection one of section 32-1119 pertains uniquely to elections with a margin of one percent or less, and the other subsections of 32-1119 have general application.

One example in § 32-1119 is all that is needed to refute Relator's proposition. Subsection 3 of section 32-1119 plainly has general applicability, not only to close margin cases discussed in subsection one but to any election recount. In subsection 3, any recount involving

candidates who filed with the Secretary of State (such as this legislative race) is to be held on the day directed by that subsection (the fifth Wednesday after the election). That provision is generally applicable and is in no way limited to cases with a margin of one percent or less.

Relator's claim is not supported by the plain language of the statutes; rather, the Elections Act in §32-1119(6) directly addresses how the Secretary of State is to conduct recounts in Neb. Rev. Stat. where it states that:

> **The procedures for the recounting of ballots shall be the same as those used for the counting of ballots on election day. The recount shall be conducted at the county courthouse, except that if vote counting devices are used for the counting or recounting, such counting or recounting may be accomplished at the site of the devices. Counties counting ballots by using a vote counting device shall first recount the ballots by use of the device. If substantial changes are found, the ballots shall then be counted using such device in any precinct which might reflect a substantial change.**

Nowhere does that subsection indicate it only applies to recounts when the candidate failed to win by a margin of one percent or less. Courts are to give statutory language its plain and ordinary meaning. *Stewart v. Neb. Dept. of Revenue*, 294 Neb. 1010, 885 N.W.2d 723 (2016). A statute is not open to construction if its language is plain, direct, and unambiguous. *Id.* Courts cannot read into a statute a meaning that is not there or read anything direct and plain out of the statute. *Id.* If the statute is clear, its words are the end of any judicial inquiry about its meaning. *Id.* Relator's contention arises from an erroneously perceived dichotomy between 32-1118 and 32-1119, and it then proceeds, impermissibly, to add additional language to the statutes.

Subsection six of section 32-1119 regarding the method to be used for recounts applies equally without regard to the vote margin, and the language is plain, direct, and unambiguous. If the Legislature meant to impose a specific or different recounting method based on the size of the margin, it would have simply said so.

Finally, Relator asked rhetorically at the hearing why would elections use paper ballots if they were not meant to be manually examined? But this case was brought as a demand for a recount, not an election contest which provides for a full examination of the ballots cast. See, § 50-1519(2) of the Legislative Qualifications and Elections Contests Act (providing a full examination of whatever ballots for the legislature are cast).

CONCLUSION

The Court lacks subject matter jurisdiction to address the purported mandamus, and the petition for the writ is dismissed. In the alternative, Relator's legal claims are without merit, and all requested relief is denied.

IT IS SO ORDERED.

Dated December 15, 2022.

BY THE COURT:

Kevin R. McManaman
District Judge