

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

BENJAMIN N. NAGEAK,)
ROB ELKINS, ROBIN D. ELKINS,)
LAURA WELLES, and)
LUKE WELLES,)

Plaintiffs,)

vs.)

LT. GOVERNOR BYRON)
MALLOT, in his official capacity)
as Lt. Governor for the state of)
Alaska, and JOSEPHINE BAHNKE,)
in her official capacity as Director)
of the Divisions of Elections,)

Defendants.)

Case No. 3AN-16-09015CI

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case arises out of the August 16, 2016 primary election in Alaska, specifically the seat for District 40 of the Alaska House of Representatives. District 40 includes the North Slope of Alaska, northwest Alaska, and a number of villages just south of the Brooks Range. The Democratic candidates for District 40 were Benjamin Nageak and Dean Westlake. When the results of the election were certified, Westlake had received 819 votes and Nageak 815. After a recount conducted September 12, 2016, Westlake's margin increased to eight votes: 825 to 817. Four days later, Nageak, along with four qualified voters, filed a complaint alleging multiple irregularities with the election and contesting the results. Because of the upcoming general election, the case received expedited

consideration and trial commenced September 27. The evidence closed on October 3, and the parties presented their final arguments.

Summary of Decision

A court presiding over an election challenge must attempt to harmonize competing goals.¹ On one hand, the public has an important interest in the stability and finality of elections.² On the other hand, the health of a republic depends on maintaining the integrity of elections.³ Alaska law attempts to balance these competing goals by requiring an election challenger to prove more than mere error in the administration of an election; the challenger must show that election “malconduct” occurred. Malconduct is a “significant deviation” from the requirements of law. The challenger must show that the deviations either biased the vote or that they resulted from knowing noncompliance or reckless indifference to the requirements of law. Once this burden is met, the challenger must also show that the malconduct was sufficient to change the result of the election.

In the present case, most of the irregularities cited by plaintiffs do not rise to the level of election malconduct. The actions of the election officials in Shungnak, however, are of a much more serious and concerning nature. In the precinct of Shungnak, it is undisputed that election workers knowingly gave every voter both the ADL ballot and the Republican ballot.⁴ The Court finds that the election officials’ actions in Shungnak constitute election malconduct because they were significant deviations from constitutional and statutory norms. The

¹ *Hammond v. Hickel*, 588 P.2d 256, 272 (Alaska 1978).

² *See Dale v. Greater Anchorage Area Borough*, 439 P.2d 790, 792 (Alaska 1968).

³ *Hammond*, 588 P.2d at 272.

⁴ Defs.’ Trial Br. 7.

Court further finds that the malconduct changed the outcome of the election. In order to ensure the integrity of this and future elections as well as protect the rights of voters, the Court now enters the following findings of fact and conclusions of law.

I. FACTUAL BACKGROUND

On August 16, 2016, Mr. Nageak appeared on the primary election day ballot for reelection as a Democrat in Alaska State House District 40.⁵ On September 6, the state Ballot Review Board certified Dean Westlake, the other Democratic candidate, as the winner of the H.D. 40 primary with 819 votes to Mr. Nageak's 815 votes.⁶ On September 12, the Division conducted a recount which resulted in 825 votes for Mr. Westlake and 817 for Mr. Nageak.⁷ As a result, on September 16, Mr. Nageak, along with four qualified voters, filed a complaint contesting the election against Lieutenant Governor Byron Mallot and the Director of the Division of Elections, Josephine Bahnke, (collectively "the Division"). Defendant Mallot is vested with the executive power of the State and is responsible for the faithful execution of the election. The Division is responsible for administering elections.

In the complaint Nageak alleges several irregularities took place during the primary that changed the results of the election.⁸ Specifically, Nageak contends: 1) there was only one election worker at the precinct of Point Lay; 2) "other voting locations" only had two election workers present during voting hours; 3) in

⁵ Complaint ¶ 2.

⁶ Aff. Josephine Bahnke ¶ 4.

⁷ *Id.*

⁸ Complaint. ¶ 7.

Shungnak, the poll workers provided all 50 voters with both Republican and ADL ballots,⁹ and each voter voted both ballots and did not submit questioned ballots for the second ballot;¹⁰ 4) in Kivalina precinct, seven voters also voted both Republican and ADL ballots, but these voters were required to cast questioned ballots for the second ballot which the Division of Elections did not count in its initial review but did count during the recount; 5) in Browerville precinct, registered Republican voters were required to vote on questioned ballots if they asked to vote Democrat; 6) in Bettles precinct, an election worker identified a voter as Republican and did not give him the chance to choose between ballots; 7) in Buckland precinct, a number of special needs voters¹¹ received Democratic ballots despite being undeclared, the forms for these ballots were not properly completed and were not returned to Nome until 6 days after the election, and this

⁹ The Division refers to the ballot with the Republican candidates as the “Republican” ballot and the ballot with candidates for the Alaska Independence Party, the Green Party, the Libertarian Party, and the Democratic Party as the Alaska Independent-Democrat-Libertarian or “ADL” ballot. These are the terms used by both parties in their briefs, and the Court will follow suit to avoid confusion. Pls.’ Trial Br. 3, n.2. The Democratic Party permits any registered voter, no matter the party affiliation, to vote in its primary. Defs.’ Trial Br. 1. The Republican Party permits only those voters registered as Republican, Undeclared, or Non-Partisan to vote in its primary. *Id.* Copies of the two ballots are attached to this decision.

¹⁰ According to the Division, “[v]oters must vote a questioned ballot if: their name is not on the precinct register; they do not have identification; their residence address has changed; during the Primary Election the voter requests a ballot type they are not eligible to receive; an observer challenges the voter’s qualifications to vote; or the voter has voted in another manner during the election.” *Questioned Voting*, STATE OF ALASKA DIV. OF ELECTIONS, https://www.elections.alaska.gov/vi_hv_quest_vote.php (last visited Sept. 29, 2016). The ballots are not automatically counted. *Id.* Instead, “[q]uestioned ballot envelopes are reviewed by a review board to determine if the ballot can be counted prior to opening the envelope [containing the ballot].” *Id.*

¹¹ Special needs voters are qualified voters who cannot go to polling place because of disabilities. AS 15.20.072(a). These voters can instead vote on special needs ballots obtained through a representative. *Id.* (b).

precinct had an unusually large number of special needs ballots compared to Palmer or Wasilla; and 8) finally, during an absentee and questioned ballot review session in Nome, workers misplaced four absentee ballots, and then removed four questioned ballots and counted them as absentee ballots to remedy the error.¹²

Based on these irregularities, Nageak alleges five statutory violations. First, he claims that allowing voters to cast both Republican and ADL ballots violates AS 15.25.060 and the Equal Protection Clause of the 14th Amendment.¹³ AS 15.25.060(b) provides that “[a] voter may vote only on one primary election ballot.”¹⁴ It further specifies that “[a] voter may vote a political party ballot only if the voter is registered as affiliated with that party, is allowed to participate . . . under the party’s bylaws, or is registered as nonpartisan or undeclared”¹⁵ The Equal Protection Clause requires that every citizen is afforded “an equally effective voice” in state legislative elections.¹⁶

Second, Nageak also alleges that the Division of Elections failed to follow procedures for special needs ballots as outlined by AS 15.20.072.¹⁷ Specifically, Nageak maintains that the Division of Elections received and counted 12 special needs ballots, but the Division did not keep a register of special needs ballot requests, the personal representatives for these voters did not sign a register or sign

¹² *Id.* ¶¶ 8–17.

¹³ Pls.’ Trial Br. 2–3.

¹⁴ AS 15.25.060(b).

¹⁵ *Id.*

¹⁶ *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

¹⁷ Pls.’ Trial Br. 4–5.

the oath of the representative, and an election official did not record when each ballot was issued and returned.¹⁸

Third, Nageak contends that election workers in Browerville precinct improperly required registered Republican voters to vote questioned ballots instead of allowing them to vote on the ADL ballots.¹⁹ Further, some voters allegedly did not receive a choice of ballot, and one voter requested an ADL ballot but only received an option to vote the Republican ballot despite being registered as a Democrat.²⁰

Fourth, Nageak asserts that four absentee ballots went missing during the regional review in the Nome office in violation of AS 15.15.480 which requires ballots to be kept in a “secure manner.” After discussion with the Juneau office, election officials replaced these missing ballots with four random, questioned ballots.²¹

Finally, Nageak alleges that the Division failed to appoint at least three qualified voters to the election board as required by AS 15.10.120(a) in the Point Hope precinct. Instead, only one voter was present during voting hours in Point Hope. The Division potentially violated this provision in other precincts based on the number of hours worked by election workers.

As a result of these violations, Nageak requests an order re-tabulating only those votes that were legally cast and directing the Division to certify the results.²²

¹⁸ *Id.*

¹⁹ *Id.* at 6.

²⁰ *Id.* at 6–7. According to Nageak’s trial brief, this voter may actually be a convicted felon and ineligible to vote either way. *Id.* at 7, n.9.

²¹ This claim was later found to be unsubstantiated because it did not change the ultimate vote count since both sets of ballots were already designated as “full count.” *See* Trial Tr. vol. 1, 323.

²² *Id.* Section IX, ¶ 1.

In the alternative, Nageak requests an order declaring the primary election in House District 40 invalid and requiring a new election conducted in accordance with the law.²³ Nageak also requests costs and attorney fees.²⁴

II. PROCEDURAL HISTORY

On September 16, 2016, Nageak filed two documents: a complaint alleging election violations in the Superior Court and a recount appeal with the Alaska Supreme Court. On the 19th, the Division requested an emergency Motion for Stay and/or Referral to the Superior Court in the recount appeal before the Supreme Court. The Supreme Court granted this motion on September 20. The Court also granted a motion to intervene by Mr. Westlake. As a result, on September 21, Defendants filed an Unopposed Motion for Status Conference to establish an expedited schedule for litigating due to approaching election deadlines before the Superior Court. Specifically, the Division requested a decision in both the Superior Court and the Supreme Court by October 14 in order to meet absentee ballot deadlines.²⁵ The Court granted this motion on September 22.

On September 26 at 1:39 P.M., the day before trial, Nageak filed a motion to amend pursuant to Alaska Civil Rule 15(a). In the amended complaint, Nageak stated that “it has become evident that there are additional qualified voters to be named as Plaintiffs, and the location of at least one city alleged in the complaint required revision.”²⁶ As a result, in the amended complaint, Plaintiffs entirely removed Mr. Nageak as a party and instead added in eight voters in addition to the

²³ *Id.* ¶ 2.

²⁴ *Id.*

²⁵ *Aff. Josephine Bahnke 2.*

²⁶ *Mot. at 2.*

original four. More specifically, Plaintiffs removed references to Mr. Nageak from the caption of the case, the footer, and section II titled “parties.” At the time Plaintiffs filed the amended complaint, the Division had not filed an answer to the complaint. Directly following the motion, intervenor Dean Westlake filed a preliminary opposition at 3:35 P.M on the 26th claiming that amended complaint divested this Court of jurisdiction. Plaintiffs quickly responded and filed a revised motion to amend along with a revised first amended complaint at 4:04 P.M. This motion added Mr. Nageak back into the complaint in the caption, the footer, and the “parties” section.²⁷ Further, in the notice that accompanied the motion, Plaintiffs alleged that they “inadvertently omitted Benjamin Nageak from the caption list and list of parties.”²⁸

During the second day of trial, the Division called Mr. Nageak to testify telephonically about his status as a party. In response to the question “do you want to be a party in this lawsuit?,” Mr. Nageak replied “no.”²⁹ He added that he “thought [he] wasn’t” a party anymore.³⁰ Because of the conflict between this testimony and the revised First Amended Complaint, the Court issued an order requiring Mr. Nageak to appear telephonically on the morning of the third day of trial to clarify.³¹ Mr. Nageak did so, and stated that he *did* “want to continue to be a party,” and “stay in the lawsuit.”³² He attributed his response the day before to a

²⁷ Revised Mot. to Amend 1–2.

²⁸ Defs.’ Opp. Mot. to Amend, App. E, at 2.

²⁹ Trial Tr. vol.1, 253.

³⁰ *Id.*

³¹ Order Sept. 28, 2016.

³² Trial Tr. vol.1, 358.

misunderstanding, stating that he had been calling from a “really crowded place.”³³

The following day, the Division filed its opposition to the motion to amend. The Division’s opposition echoed Westlake’s argument, contending that because the Division had not filed an answer to the complaint, Plaintiffs’ amended complaint unilaterally became effective upon filing under Rule 15(a) and 41(a)(1), resulting in the Court’s loss of jurisdiction over the election contest.³⁴ Finally, the Division argued that due to the strict 10-day deadline outlined in AS 15.20.550, Plaintiffs could not now amend the complaint and add in new parties in order to re-obtain jurisdiction.³⁵

Nageak filed a reply in support of the motion to amend on October 3.³⁶ In it, Nageak argued that the court had jurisdiction because both the original complaint and the revised amended complaint included Nageak as a party.³⁷ Therefore, if the court denied the motion to amend, it would have jurisdiction, and if it granted it, it would have jurisdiction as well.³⁸ Further, Nageak averred that voluntary dismissal under Rule 41(a) was inapplicable to the motion to amend because there had been no request for dismissal.³⁹ Finally, Plaintiffs alleged that

³³ Trial Tr. vol.1, 359.

³⁴ Defs.’ Opp. Mot. to Amend 6–7.

³⁵ *Id.* at 7.

³⁶ Pls.’ Reply Mot. to Amend 1.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 3.

based on the most recent testimony from Nageak, he wanted to remain a party and that any assertions to the contrary were due to the “quality of the call.”⁴⁰

Trial concluded on October 3, and parties submitted proposed findings of fact and conclusions of law on October 4.

III. LEGAL STANDARDS

A. Standard of Review

The Alaska Supreme Court has repeatedly emphasized that the right to vote is a fundamental right of citizenship.⁴¹ Therefore, the courts must review election statutes with an eye toward protecting voters.⁴² Indeed, the court has stated that “the voter shall not be disenfranchised because of mere mistake, but [the voter’s] intention shall prevail.”⁴³ Accordingly, “every reasonable presumption will be indulged in favor of the validity of an election.”⁴⁴ But, courts must also ensure the integrity of the election process by adhering to election statutes.⁴⁵ Therefore,

All provisions of the election law are mandatory, if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only, in support of the result, unless of a character to affect an obstruction to the free and intelligent casting of the vote or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is

⁴⁰ *Id.* at 5, n.2.

⁴¹ *See Miller v. Treadwell*, 245 P.3d 867, 868 (Alaska 2010).

⁴² *Id.* at 869.

⁴³ *Id.* (alteration in original) (quoting *Edgmon v. State, Office of the Lieutenant Governor, Division of Elections*, 152 P.3d 1154, 1157 (Alaska 2007)).

⁴⁴ *Turkington v. City of Kachemak*, 380 P.2d 593, 595 (Alaska 1963).

⁴⁵ *See Hammond v. Hickel*, 588 P.2d 256, 272 (Alaska 1978).

essential to the validity of an election, or that its omission shall render it void.⁴⁶

B. Subject Matter Jurisdiction

In order for a court to have jurisdiction over an election contest, a “defeated candidate or 10 qualified voters” must bring an election contest before the Superior Court within ten days of state review.⁴⁷ A court should strictly construe jurisdictional statutory provisions in an election contest because “public policy demands that election results have stability and finality.”⁴⁸

Pursuant to Alaska Civil Rule 15(a), “[a] party may amend the party’s pleading once as a matter of course at any time before a responsive pleading is served.”⁴⁹ Further, “if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served.”⁵⁰ Generally, if a party can amend as a matter of right but instead seeks leave of the court, the party is

⁴⁶ *Finkelstein v. Stout*, 774 P.2d 786, 790 (quoting *Carr v. Thomas*, 586 P.2d 622, 626 (Alaska 1978)).

⁴⁷ AS 15.20.540; AS 15.20.550. A plaintiff can also file a recount appeal with the Superior Court if there are errors in the recount regarding the validity of the ballot or directly with the Supreme Court if there are errors in the recount for “candidates for the legislature or Congress or the office of governor and lieutenant governor.” AS 15.20.510. In contrast to an election contest, “the inquiry in a recount appeal is whether specific votes or classes of votes were properly counted or rejected.” *Willis v. Thomas*, 600 P.2d 1079, 1081 (Alaska 1979).

⁴⁸ *Dale v. Greater Anchorage Area Borough*, 439 P.2d 790, 792 (Alaska 1968) (strictly construing a provision requiring written notice of an election contest).

⁴⁹ Alaska Civ. R. 15(a).

⁵⁰ *Id.*

deemed as having waived the amendment as of right and the amendment is then up to the discretion of the court.⁵¹

Similarly, Alaska Civil Rule 21 provides that “[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.”

Finally, Alaska Civil Rule 41(a)(1) provides: “[A]n action may be dismissed by the plaintiff without an order of the court: [a] by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, which first occurs.” Although a number of courts have liberally construed Federal Rule of Civil Procedure 41(a) to allow for dismissal of some parties, this power is at the discretion of the court.⁵² The Alaska Supreme Court has also held that federal authorities are persuasive when interpreting a similarly worded Alaska rule.⁵³ Consequently, a court must consider all of these rules in determining whether an amended complaint automatically drops a party plaintiff or if instead the decision is at the discretion of the court.

C. Election Contests

AS 15.20.540 provides, “[a] defeated candidate or 10 qualified voters may contest the nomination or election of any person . . . upon one or more of the following grounds: (1) malconduct, fraud, or corruption on the part of an election official sufficient to change the result of the election; (2) when the person certified as elected or nominated is not qualified as required by law; (3) any corrupt practice as defined by law sufficient to change the results of the election.”⁵⁴

⁵¹ *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 458 (6th Cir. 2013).

⁵² 9 Charles Alan Wright et al., *Fed. Prac. & Proc. Civ.* § 2362 (3d ed. 2016).

⁵³ *Langfeldt-Haaland v. Saupe Enterprises, Inc.*, 768 P.2d 1144, 1147 (Alaska 1989).

⁵⁴ AS 15.20.540.

Malconduct is ““(1) a significant deviation from statutorily or constitutionally prescribed norms’ (2) which introduces a bias into the vote.”⁵⁵ An irregularity with no element of bias, will only amount to malconduct if there is “a knowing noncompliance with the law or a reckless indifference to norms established by law.”⁵⁶ Generally, a court should analyze whether each irregularity is a significant deviation individually.⁵⁷ But, “in rare circumstances, an election will be so permeated with numerous serious violations of law, not individually amounting to malconduct, that . . . cumulation of irregularities may be proper and will support a finding of malconduct.”⁵⁸

Once this burden is met, a party must also show that the malconduct was “sufficient to change the election results.”⁵⁹ This means that the court must consider the total number of votes and whether these votes could change the election.⁶⁰ When considering votes, there are four possible approaches.⁶¹ First, if the number of votes affected by malconduct is ascertainable and the bias favors one candidate over the other, the disfavored candidate gets the votes.⁶² Second, “[i]f the number of votes affected by the bias cannot be ascertained with precision, a new election may be ordered, depending upon the nature of the bias and the

⁵⁵ *Willis v. Thomas*, 600 P.2d 1079, 1081 (Alaska 1979) (quoting *Hammond v. Hickel*, 588 P.2d 256, 259 (Alaska 1978)).

⁵⁶ *Hammond*, 588 P.2d at 259.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 260.

⁶² *Id.*

margin of votes separating the candidates.”⁶³ Third, where there is no bias from the malconduct and instead individual votes are affected randomly, these votes should be “counted or disregarded, if they can be identified, and the results tabulated accordingly.”⁶⁴ Finally, “if the malconduct has a random impact on votes and those votes cannot be precisely identified, . . . the contaminated votes must be deducted from the vote totals of each candidate in proportion to the votes received by each candidate in the precinct or district where the contaminated votes were cast.”⁶⁵

IV. ANALYSIS

A. The Filing of the First Amended Complaint Did Not Destroy this Court’s Subject Matter Jurisdiction.

Plaintiffs’ original complaint was brought by Mr. Nageak and four voters.⁶⁶ In the absence of Mr. Nageak, plaintiffs could not establish subject matter jurisdiction unless at least ten voters brought suit.⁶⁷ Mr. Westlake and the Division argue that when plaintiffs filed their First Amended Complaint on September 26, 2016, the day before trial began, defendants had not yet filed any answer in the case, therefore the First Amended Complaint immediately effected the removal of Mr. Nageak without the necessity of a court order. In addition to removing Mr. Nageak, the First Amended Complaint simultaneously attempted to add more voters to meet the ten voter threshold. Westlake and the Division argue, however,

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ The four voters are Mr. Rob Elkins, Mrs. Robin Elkins, Mrs. Laura Welles, and Mr. Luke Welles. Compl. 1.

⁶⁷ AS 15.20.540.

that by the time Nageak filed the First Amended Complaint, it was too late to add new voters because the ten-day period to file the election contest had lapsed. Thus, they argue, the removal of Mr. Nageak in the First Amended Complaint destroyed subject matter jurisdiction and the attempt to add new voters in the same pleading was ineffective because it could not relate back to the date of the original filing. It is axiomatic that the action cannot be maintained if the court has no power to rule on it.⁶⁸

There are three problems with the subject matter jurisdiction challenge. First, plaintiffs maintain Mr. Nageak was dropped from the First Amended Complaint in error, and they have attempted to correct their error by attempting to withdraw the pleading and filing a Revised First Amended Complaint.

Second, the case had already been placed on the trial calendar when the First Amended Complaint was filed. Indeed it was filed only the day before trial started. Civil Rule 15(a) does not expressly address the limits on a party's ability to amend on the eve of trial except with respect to a pleading "to which no responsive pleading is permitted," such as an Answer. But by the time a case reaches, literally, the eve of trial, allowing automatic amendment of an unanswered complaint could seriously impede the trial court's ability to manage the speedy and effective disposition of the case. Civil Rule 15(a) should not be construed to have permitted plaintiffs to amend their complaint without obtaining a court order.

Third, as noted above, Alaska Civil Rule 21 provides that "[p]arties may be dropped or added *by order of the court* on motion of any party *or of its own*

⁶⁸ See *Robertson v. Riplett*, 194 P.3d 382, 386 (Alaska 2008).

initiative at any stage of the action and on such terms as are just.”⁶⁹ The rule makes clear that a party cannot add or drop parties unilaterally. Courts are divided as to which rule controls when the Rules 15 and 21 conflict.⁷⁰ But, there is persuasive case law indicating that a court should apply Rule 21 to resolve “problems of judicial administration” such as jurisdictional issues.⁷¹ Consequently, if Plaintiffs here wished to remove a party, the appropriate procedure would likely have been to file a motion under Rule 21. But, either way, the court retains discretion to decide this issue in light of the expedited proceedings.

For the reasons stated above, the court concludes that subject matter jurisdiction over this case has not been destroyed by the filing of the First Amended Complaint.

B. The Election Irregularities in Shungnak Amount to Malconduct; the Remaining Alleged Irregularities Do Not.

(1) Shungnak “Over-Voting”

The most significant irregularities in the August 2016 primary election took place in the Shungnak precinct. There, it is undisputed that four election workers provided every voter with both the Republican and ADL ballots.⁷² Fifty voters voted in person and one voted a questioned ballot, but a total of 102 votes were cast with all voters casting both ballots.⁷³

⁶⁹ Alaska Civ. R. 21 (emphasis added).

⁷⁰ 6 Charles Alan Wright et al., *Fed. Prac. & Proc. Civ.* § 1479 (3d ed. 2016).

⁷¹ *Gordon v. Lipoff*, 320 F. Supp. 905, 923 (W.D. Mo. 1970) (finding that Rule 21 controlled when plaintiffs sought to gain diversity jurisdiction through an amended complaint filed as of right under Rule 15).

⁷² Defs.’ Trial Br. 7; Trial Tr. vol. 1, 140.

⁷³ Ex. 28; Trial Tr. vol. 1, 155, 157.

The evidence shows that the Division offered training⁷⁴ to the Shungnak election workers in preparation for the 2016 election, but they did not participate.⁷⁵ None of the Shungnak election workers participated in any training offered by the Division in 2016, and there is no evidence that Division supervisors followed up to investigate why or to offer additional training. All of the local officials signed an oath to conduct the election in accordance with law, and at least one election judge worked in both the 2012 and 2014 primary elections, and had participated in training by the Division in 2014.⁷⁶

The U.S. Supreme Court has recognized that under the First Amendment a political party has a right to exclude non-party members from its candidate selection process.⁷⁷ In exercising this right, the Alaska Republican Party has

⁷⁴ To staff the election, the Division hired temporary workers for 23 polling places, one for each of the precincts in H.D. 40. Ex. 1; Trial Tr. vol. 1, 62. The Division offered a variety of training options for these election workers including a DVD training, teleconference trainings, web-based trainings, and other resources. Trial Tr. vol. 1, 83–85, 92–93. In addition, the Division prepared a series of manuals and instructional materials for workers. *See, e.g.*, Ex. 34 & 35. Further, all polling places received supplies from the Division. *See* Ex. 22. The supplies included a Polling Place Elections Procedures Handbook containing detailed information concerning the need to allow voters only one ballot. *Id.* The materials also included a poster to be displayed in the polling place and a placard to be put on the registration table, both of which explained the choice for selecting one primary ballot. *Id.* Among the supplies were party affiliation cards to be given to voters when they selected which ballots they wanted. *Id.* Based on the training and materials, election workers were supposed to give voters at the polling places a choice to select either the Republican ballot or the ADL ballot. Trial Tr. vol. 1, 93. Shungnak precinct had four poll workers on Election Day. *Id.* at 155; Ex. 1. All of them signed an oath to conduct the election in accordance with law, Ex. 5A, and at least one election judge worked in both the 2012 and 2014 primary elections, and had participated in training by the Division in 2014. Trial Tr. vol. 1, 158.

⁷⁵ Ex. 5C.

⁷⁶ *Id.*

⁷⁷ *California Democratic Party v. Jones*, 530 U.S. 567, 582 (2000).

chosen to hold closed primary elections.⁷⁸ It is also well-established that allowing some voters to cast more than one ballot deprives other voters of the equal protection of the law guaranteed by the Fourteenth Amendment.⁷⁹

The actions of the election officials in Shungnak in issuing every voter both ballots violated clearly established constitutional rights as well as the requirements of statutory law.⁸⁰ Given the constitutional dimensions of these actions and the scale on which they occurred, it is the opinion of this court that they constitute election malconduct. Furthermore, the court finds that the officials' actions in allowing all voters to vote both ballots biased the outcome. The actions biased the vote because they occurred in a precinct that lopsidedly favored Mr. Westlake. The same error, in a precinct strongly favoring Mr. Nageak, would have biased the vote the other way.

The evidence also warrants a finding that election officials in Shungnak acted in reckless disregard of the requirements of law. As their employer, trainer, and supervisor, the Division shares in the responsibility for the local officials' conduct. The Division did not present testimony from any of the Shungnak election workers. Judging purely on the basis of their actions, the evidence nonetheless supports the conclusion that they acted with reckless disregard to the requirements of law. They did not participate in any advance training offered by the Division for the 2016 election; they did not review the materials sent to them; they did not review and follow the instructions on the ballot choice poster and placards sent to them; and they knowingly gave every voter two ballots.

⁷⁸ *2014 ARP Rules*, Alaska Republican Party, http://www.alaskagop.org/party_rules (last visited Oct. 4, 2016); *see also* AS 15.25.060(b).

⁷⁹ *Baker v. Carr*, 369 U.S. 186, 208 (1962).

⁸⁰ AS 15.25.060(b).

This conduct cannot be characterized as an “honest mistake,” as the Division argues, without robbing the term of all meaning and undermining accountability for the conduct of elections. AS 15.10.105(b) admonishes that “[i]t is essential that the nonpartisan nature, integrity, credibility, and impartiality of the administration of elections be maintained.” Accepting the malconduct as an “honest mistake” would undermine the credibility of the election and incentivize similar “honest mistakes” in the next election cycle. This would be a terrible message to send.

The evidence also strongly supports the conclusion that the outcome of the election not only *could* have, but *would* have been different if the malconduct had not occurred. Because the conduct occurred in a heavily pro-Westlake precinct, it produced substantially more over-voting for him than for Mr. Nageak.⁸¹ There is no question that had election workers required voters to choose a single ballot, fewer voters would have voted in the ADL primary. The most reliable way to determine that number is to average the number of voters who selected the Republican ballot in Shungnak in the past. Here, the average number of Shungnak voters who have selected the Republican ballot in primaries since 2006 is 12.75.⁸² This means that many voters would not have voted in the ADL primary

⁸¹ The Division correctly points out that the issuance of both the ADL and Republican ballots did not result in double votes for either Democratic primary candidate. The evidence shows, however, that it produced “over-votes” because Republican party voters who otherwise may have voted only their party ballot were allowed to also vote an ADL ballot.

⁸² Plaintiffs called Randolph Ruedrich to testify as an expert witness concerning the impact of the Shungnak officials’ actions. In rebuttal, intervenor Westlake called John Heckendorn. Mr. Ruedrich has over two decades of experience with Alaska voting patterns. He performed a precinct-level analysis of how the issuance of two ballots affected the vote in Shungnak. Mr. Heckendorn’s experience only dates to about 2012. He presented a mathematical “what if” analysis of the overall District 40 vote in order to support the theory that issuance of two ballots made no difference. In a conspicuous

and the votes received by both state house candidates would have been reduced.⁸³ Allocating the reduction resulting from the 12.75 votes to the candidate in proportion to their percentages of votes cast in Shungnak in 2016 shows that Mr. Westlake's vote count would have been reduced by 11.9 votes and Mr. Nageak's vote count would have been reduced by 0.76 votes.⁸⁴ Given the existing 8-vote differential favoring Mr. Westlake, it is clear that the malconduct of the election workers in Shungnak was of sufficient magnitude to have changed the outcome of the election.

In sum, the actions of the election officials in Shungnak had several effects. First, many Shungnak voters were not eligible to vote the Republican ballot but did so anyway, which violated the Alaska Republican Party's right to a closed primary. Second, Shungnak voters who were eligible to vote the Republican ballot—that is, those registered as Republican, nonpartisan or undeclared—avoided having to make a choice between the ADL ballot and the Republican ballot. This had the effect of increasing the voting in the Democratic Party primary contest between Westlake and Nageak. Third, with respect to the primary races for U.S. Senate and U.S. House of Representatives, all voters in Shungnak were allowed to vote in both the Republican and Democrat primaries. Finally, because the issuance of two ballots occurred in a heavily pro-Westlake precinct, the ultimate effect of the election officials' actions was to increase Westlake's votes

omission, however, Mr. Heckendorn did not present an analysis of the Shungnak precinct vote. The court finds Mr. Ruedrich's testimony more authoritative and reliable.

⁸³ Of the voters in Shungnak who voted in the ADL primary in 2016, 47 cast votes for Westlake and 3 voted Nageak. It is unknown how the one voter who cast the questioned ballot voted as those results were reported with the district-wide questioned ballots.

⁸⁴ Trial Tr. vol. 1, 391–92.

disproportionately. The effect was not neutral; it biased the vote total in favor of Mr. Westlake.

Having found that plaintiffs have met their election contest burden, the appropriate remedy must be determined. The Alaska Supreme Court disfavors new elections as an “extreme remedy.”⁸⁵ Where election malconduct has a random impact on votes and those votes cannot be precisely identified, the court has held that contaminated votes must be deducted from the vote totals of each candidate in proportion to the votes received by each candidate in the precinct or district where the contaminated votes were cast.⁸⁶ Applying this approach to the Shungnak votes decreases Mr. Westlake’s vote total by 11 votes while Mr. Nageak’s vote total is diminished by 1 vote.

(2) Kivalina Precinct “Over-Voting”

The second incident of “over-voting” in the H.D. 40 primary occurred in Kivalina precinct when seven voters cast both ADL and Republican ballots.⁸⁷ But, there, unlike in Shungnak, election workers in Kivalina properly required the seven voters who requested two ballots to first cast a regular ballot in the ballot box, and then cast their second ballot in a questioned ballot envelope.⁸⁸ Both the Regional Review Board in Nome and the Statewide Review Board treated the seven questioned ballots as duplicates and did not count them.⁸⁹ But, ultimately, on the recount the Division decided to count these because the Division “wanted

⁸⁵ *Hammond*, 588 P.2d at 259.

⁸⁶ *Id.* at 260. The *Hammond* decision explains that when a bias is present, all of the contaminated votes should be awarded to the challenger. *Id.* The Court has found a bias here. However, the Court concludes that the pro rata reduction approach is the more appropriate remedy and minimizes the number of votes that must be disregarded.

⁸⁷ Compl. 2.; Defs.’ Ex. A, at 7–9.

⁸⁸ Trial Tr. vol. 1, 170–71 (Josephine Bahnke); Trial Tr. vol. 1, 492 (Angelique Horton).

⁸⁹ Trial Tr. vol. 1, 172; Trial Tr. vol. 1, 496.

to treat them all as they had been treated when there was an instance where there were two ballots cast.”⁹⁰ The Court finds that this decision was in error.

First, the Division’s conclusion to count the ballots goes directly against the law. AS 15.25.060 clearly states that “[a] voter may vote only one primary election ballot.”⁹¹ Here, the ballots were clearly marked as duplicate, questioned ballots. Indeed, the regional and state review boards followed policy and did not count these ballots. The Division should have upheld their decisions. Second, although Nageak argues that the Court cannot determine the intent of these voters because they voted two ballots, the Court finds that Ms. Horton’s and Ms. Bahnke’s testimony on this issue resolves this quandary. Specifically, Ms. Horton stated that the chairperson of the Kivalina election board “gave [the voters] the ballot they were eligible for when they went in to vote” and “gave them one ballot first.”⁹² Although Ms. Bahnke’s testimony had some inconsistencies as to the order in which the Kivalina voters cast their ballots,⁹³ her testimony ultimately supports the conclusion by Ms. Horton that voters first received and then voted on the ballots which they qualified for.⁹⁴ Indeed, she stated that “according to the precinct chair, [the Kivalina voters] . . . voted their first choice ballot in the ballot box, and then voted the questioned ballot.”⁹⁵ Therefore, the Court finds that these voters did make a choice as to their preferred ballot, and the Division ignored this

⁹⁰ Trial Tr. vol. 1, 173–74.

⁹¹ AS 15.25.060(b).

⁹² *Id.* at 493.

⁹³ Trial Tr. vol. 1, 173.

⁹⁴ *Id.* at 170–71.

⁹⁵ *Id.* at 171.

choice when failed to disregard the questioned ballots. The Court finds that this was in error, but as discussed below, this error was harmless.

The Alaska Supreme Court held in *Hammond v. Hickel*, that where there is no bias from the malconduct and instead individual votes are affected randomly, these votes should be “counted or disregarded, if they can be identified, and the results tabulated accordingly.”⁹⁶ The Court believes that this approach applies here. Election workers separated the seven over-votes in Kivalina by requiring a questioned ballot envelope. Therefore, the Court can easily identify the duplicate votes. When parties opened the ballots in court, there were five Republican ballots and two ADL ballots.⁹⁷ Of the two ADL ballots, one went to Mr. Nageak and one went to Mr. Westlake.⁹⁸ Therefore, the seven illegally-cast, duplicate ballots from Kivalina result in a one vote reduction for each candidate, which makes no difference to the outcome of the election.

(3) Buckland Special Needs Ballots

Nageak also alleges multiple violations of statutory requirements for special needs ballots. Special needs ballots are important in rural Alaska, and in some communities on the North Slope, elders are encouraged to call the precinct by phone or VHF radio and request one.⁹⁹ Alaska Statute 15.20.072(c) requires that a representative for a special needs voter sign a register that includes a list of information about the voter and the representative as well as the representative’s signature. A special needs ballot envelope contains blanks for all of the

⁹⁶ 588 P.2d 256, 260 (Alaska 1978).

⁹⁷ Trial Tr. vol. 1, 545.

⁹⁸ *Id.*

⁹⁹ Trial Tr. vol. 1, 51, 110, 448.

information required by AS 15.20.072(c) in the column entitled “Step 1.”¹⁰⁰ When a voter requests a special needs ballot, the voter’s representative fills out this information directly onto the envelope.¹⁰¹ A carbon copy of the information filled out on the ballot envelope is torn off and remains with the precinct voter register, which serves as the register containing special needs voter information required by AS 15.20.072(c).¹⁰² When the polls close at 8 p.m. on Election Day, the precinct chair accounts for special needs ballots by matching the carbon copies of the special needs ballot envelopes with the returned special needs ballot envelopes.¹⁰³

Twelve special needs ballots were cast in the 2016 primary in the House District 40 precinct of Buckland.¹⁰⁴ Eleven of these special needs ballots were cast by Buckland voters; the remaining ballot was cast by a voter from another area and was thus considered a questioned ballot as well as being a special needs ballot.¹⁰⁵ All but one of the voters who cast the special needs ballots in Buckland were elderly, with ages ranging from 64 to 94 years old; the average age was 79.¹⁰⁶ Further, ten of the special needs voters in Buckland cast their ballots with the assistance of Krystal Hadley, who served as a poll worker in Buckland.¹⁰⁷

The evidence in the record shows that the Division substantially complied with the statutory requirements for special needs ballots. First, the language of AS

¹⁰⁰ Ex. Z.

¹⁰¹ *Id.*

¹⁰² Ex. Y; Trial Tr. vol. 1, 53.

¹⁰³ Trial Tr. vol. 1, 73.

¹⁰⁴ Ex. Y.

¹⁰⁵ Ex. Y; Ex. 10; Trial Tr. vol. 1, 117–19, 133.

¹⁰⁶ Ex. Y; Trial Tr. vol. 1, 222.

¹⁰⁷ Ex. Y; Trial Tr. vol. 1, 449.

15.20.072 does not explicitly prohibit an election official from serving as a personal representative. Indeed, it seems as if allowing an election worker to be a personal representative has been the norm for a number of years in rural areas.¹⁰⁸ Further, election officials are perhaps better equipped to complete the requirements of this statute. The record shows election officials filled out each special needs ballot envelope from Buckland with all of the information required by AS 15.20.072(c).¹⁰⁹ Second, although, more special needs ballots were cast in Buckland than in other communities in House District 40,¹¹⁰ this was likely because of the community's familiarity with the special needs ballot option.¹¹¹ Third, Nageak presented no evidence that the special needs ballots from Buckland were not cast and received by 8 p.m. on Election Day. Fourth, this Court concludes that the special needs ballots were sent in a timely manner. In Region IV precincts, including Buckland, special needs ballots are sent the day after Election Day to the regional headquarters in Nome to be counted by the Regional Questioned and Absentee Ballot Review Board.¹¹² Mail can take six to fourteen days to get from Buckland to Nome because it is routed from Buckland to Kotzebue, then to Anchorage, and finally to Nome.¹¹³

Finally, in addition to having blanks for the information required by AS 15.20.072(c), a special needs ballot envelope has a column entitled "Election

¹⁰⁸ Trial Tr. vol. 1, 51.

¹⁰⁹ Ex. Y.

¹¹⁰ Trial Tr. vol. 1, 503.

¹¹¹ *Id.* at 424.

¹¹² *Id.* at 224–25, 458.

¹¹³ *Id.* at 223–24, 453.

Official.”¹¹⁴ This column includes blanks where an election official can record when a special needs ballot is issued to a representative or returned to the Division.¹¹⁵ None of the information requested in the “Election Official” column of the special needs ballot envelope is required by law. Therefore, the absence of a notation on an envelope recording the receipt of a ballot in the “Election Official” column of the envelope does not prove untimeliness. Indeed, when an election official serves as a voter’s personal representative, the ballot is never really “issued” by the Division or “returned” to the Division—instead, it remains in the Division’s custody the whole time. As a result, the Court finds the errors in Buckland do not rise to the level of malconduct, and no adjustment to the final vote count is needed.

(4) Other Isolated Errors

Finally, Nageak alleges that additional errors occurred with regards to the number of election board workers present at each precinct, instances in which election workers required registered Republicans who requested the ADL ballot to cast a questioned ballot, and a variety of other instances involving failure to fill out precinct and ballot registers. The Court finds that none of these irregularities rise to the level of malconduct. These irregularities do not show a significant deviation from statutory and constitutional norms. Nageak did not prove the Division acted with knowing or reckless indifference to election laws, and these irregularities did not result in any bias for one candidate or another. In short, these irregularities were not systematic, and were instead, isolated and random.

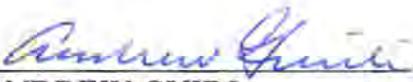
¹¹⁴ Ex. Z.

¹¹⁵ *Id.*

V. CONCLUSION

The Division of Elections is directed to retabulate the vote total in conformance with the decision expressed above and recertify the result. Specifically, with respect to the Shungnak precinct, the Division shall decrease Mr. Westlake's vote total by 11 votes and decrease Mr. Nageak's vote total by 1 vote. In addition, with respect to the Kivalina precinct, the Division shall exclude the seven illegally-cast questioned ballots, thereby decreasing each candidate's vote total by one vote. At the conclusion of its retabulation, the Division of Elections shall certify Mr. Nageak as the winner of the Democratic primary in H.D. 40.

ORDERED this 6th day of October, 2016, at Anchorage, Alaska.


ANDREW GUIDI
Superior Court Judge

I certify that on 10-6-16
a copy of the above was mailed to
each of the following at their
addresses of record:

Stow
McKeever
Fof
Pacton-Urlesw
Gulley



**State of Alaska Official Ballot
Primary Election, August 16, 2016**

Alaska Democratic Party
Alaska Libertarian Party
Alaskan Independence Party

Instructions: To vote, completely fill in the oval next to your choice, like this: ●

United States Senator (vote for one)	
<input type="radio"/> Blatchford, Edgar	Democrat
<input type="radio"/> Metcalfe, Ray	Democrat
<input type="radio"/> Stevens, Cean	Libertarian
United States Representative (vote for one)	
<input type="radio"/> Watts, Jon B.	Libertarian
<input type="radio"/> Hibler, William D. "Bill"	Democrat
<input type="radio"/> Hinz, Lynette "Moreno"	Democrat
<input type="radio"/> Lindbeck, Steve	Democrat
<input type="radio"/> McDermott, Jim C.	Libertarian
State Senator District T (vote for one)	
<input type="radio"/> Olson, Donald C. "Donny"	Democrat
State Representative District 40 (vote for one)	
<input type="radio"/> Westlake, Dean	Democrat
<input type="radio"/> Nageak, Benjamin P. "Piniqluk"	Democrat

DEFENDANT
EXHIBIT NO. BB
ADMITTED 9.29.16
3AN-16-09015 CI
(CASE NUMBER)



State of Alaska Official Ballot
Primary Election, August 16, 2016

Alaska Republican Party

Instructions: To vote, completely fill in the oval next to your choice, like this: ●

United States Senator (vote for one)	
<input type="radio"/> Murkowski, Lisa	Republican
<input type="radio"/> Kendall, Paul	Republican
<input type="radio"/> Lamb, Thomas	Republican
<input type="radio"/> Lochner, Bob	Republican
United States Representative (vote for one)	
<input type="radio"/> Young, Don	Republican
<input type="radio"/> Heikes, Gerald L.	Republican
<input type="radio"/> Tingley, Jesse J. "Messy"	Republican
<input type="radio"/> Wright, Stephen T.	Republican

DEFENDANT
 EXHIBIT NO. CC 16
 ADMITTED 8/16
3AM-16-09015 CI
 (CASE NUMBER)