

Timothy A. McKeever, Esq.
tmckeever@hwb-law.com
Stacey C. Stone, Esq.
sstone@hwb-law.com
Holmes Weddle & Barcott, P.C.
701 W. 8th Ave., Suite 700
Anchorage, Alaska 99501
Ph: (907) 274-0666
Fax: (907) 277-4657
Attorneys for Plaintiffs

FILED IN OPEN COURT

Date: 9.27.16

Clerk: DW

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

BENJAMIN N. NAGEAK, et al.

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 Division of
Elections,

Defendants.

Case No. 3AN-16-9015 CI

PLAINTIFFS' TRIAL BRIEF

Plaintiffs by and through counsel, Holmes Weddle & Barcott, P.C., and hereby submit their trial brief. Plaintiffs assert that the multiple, manifest errors that occurred in the August 16, 2016 Primary Election in House District 40 in aggregate are sufficient to change the result of the election for the Alaska State House of Representatives in District 40.

I. ISSUES TO BE TRIED

The primary issue to be heard at trial is whether pursuant to AS 15.20.540(1) there was malconduct, fraud, and/or corruption on the part of one or more election official(s) sufficient to change the result of the election.

II. RELIEF REQUESTED

Plaintiffs seek an order directing that the Division tabulate only those votes which were properly and legally cast in the August 16, 2016 Primary Election in House District 40, and the correct result therefrom be certified. In the alternative, Plaintiffs seek an order declaring that because of the malconduct, and many manifest errors stemming therefrom in the conduct, of the August 16, 2016 Primary Election in House District 40, that the true winner cannot be determined, and therefore a new election must be conducted with the Division taking appropriate corrective actions to insure that the election is conducted consistent with all laws and regulations.

III. LAW AND FACTS ANTICIPATED AT TRIAL

a. Double Ballots and Voter Disenfranchisement

AS 15.25.060(a) sets forth the rights of voters in primary elections, providing in part as follows:

A voter may vote only one primary election ballot. A voter may vote a political party ballot only if the voter is registered as affiliated with that party, is allowed to participate in the party primary under the party's bylaws, or is registered as nonpartisan or undeclared rather than as affiliated with a particular political party and the party's bylaws do not restrict participation by nonpartisan or undeclared voters in the party's primary. For the purpose of determining which primary election ballot a voter may use, a voter's party affiliation is considered to be the affiliation registered with the director as of the 30th day before the primary election.

The Equal Protection Clause of the Fourteenth Amendment requires that election laws apply equally to all voters, so as to ensure that every citizen is afforded "an equally effective voice" in the election of members of his state legislature.¹

¹ *Reynolds v. Sims*, 377 U.S. 533, 564-65, 84 S. Ct. 1362, 1383, 12 L. Ed. 2d 506 (1964).

Contrary to AS 15.25.060(a), voters in Shungnak and the District 40 Precinct of Kivalina were allowed to cast multiple primary votes. All fifty of Shungnak's primary voters were permitted to and did cast votes in both the Republican and ADL ballots.² These voters were not required to cast questioned ballots and all votes were counted. A number of primary election voters in the District 40 Precinct of Kivalina, were likewise allowed to vote both the Republican and ADL ballot. Unlike in Shugnak, these voters were required to cast questioned ballots, which were not initially counted by the regional and statewide review boards, but were subsequently counted during the recount.

Allowing these Shungnak and Kivalina voters to vote multiple ballots represents a reckless indifference to the requirements of AS 15.25.060(a). This violation resulted in the disenfranchisement of each voter who was properly allowed to vote only one ballot, as they were deprived of their constitutional right to participate equally in the election process. These illegal votes were erroneously counted in the election, and materially altered its results. The above violations must be cured, either through a properly conducted recount or an additional election, before either candidate can be duly nominated.

b. Special Needs Ballots

AS 15.20.072(a) provides that "A qualified voter with a disability who, because of that disability, is unable to go to a polling place to vote may vote a special needs ballot." The voter must request a special needs ballot from an election official and have it delivered by a personal representative.³ That representative must sign an official register, providing the

² The Division of Elections refers to the ballot with 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 "ADL" ballot. Plaintiffs will use the same terms.

³ AS 15.20.072(b).

following information: (1) the representative's name; (2) the representative's residence and mailing address; (3) the representative's social security number, voter identification number, or date of birth; (4) the name of the voter on whose behalf the representative is requesting a ballot and voting materials; (5) an oath that the representative is receiving a ballot and voting materials on behalf of the voter, will not vote the ballot for the voter, will not coerce the voter, will not divulge the vote cast by the voter, and has been notified that unlawful interference with voting is punishable under AS 15.56.030; and (6) the representative's signature.⁴ After signing the register, the representative may then deliver the special needs ballot to the voter, where the voter may then complete the ballot and all required information on the envelope, and sign the ballot in the presence of the representative.⁵ The representative must then sign attesting to the authenticity and date of the voter's signature, and return the ballot to the election officials at the polling site "not later than 8:00 p.m. Alaska time on election day."⁶

The evidence to be presented at trial will show that twelve special needs ballots from Buckland were counted in the primary election. Out of the twelve special needs ballots, ten were issued to and delivered by a single individual, Krystal M. Hadley, who then served as a personal representative for ten separate voters. Each of the twelve special needs voters returned an ADL ballot.

Out of the twelve special needs ballots cast, the evidence to be presented at trial will show indisputably that none of those ballots were completed and delivered in compliance with AS 15.20.072. First, elections officials failed to keep a register of special needs ballots in

⁴ AS 15.20.072(c).

⁵ AS § 15.20.072(d).

⁶ AS 15.20.072(d-e).

violation of AS 15.20.072(c). As such, there is no signed register evidencing the voters who requested a special needs ballot from election officials, there is no signed list of personal representatives, and none of those individuals who delivered special needs ballots signed the oath of the representative. In an email dated September 7, 2016, and included in Plaintiff's Exhibit No. 7 (Page 1 of 6), Angelique Horton admitted as much, stating that "[t]here is no register for special needs voters." Not only is this an admission that the election officials had failed to comply with AS 15.20.072, but the cavalier response further evidences the officials' reckless indifference for following the statutory rules and regulations governing the election. Additionally, election officials failed to complete the ballot envelope sections concerning when each special needs ballot was issued, and to record the date and time when each special needs ballot was returned. Not one of the twelve special needs ballots is marked with the issuing or the return date. As such, there is no way of evidencing the date and time each of the twelve ballots were returned.

To be countable, the return of the special needs ballots must be before 8:00 p.m. on Election Day per AS 15.20.072(e), and due to the failure of election officials to comply with the minimum standards of the elections statutes, the timeliness of all twelve special needs ballots is at issue.

Moreover, under AS 15.20.072, there is an important distinction between the role of the election official and that of a personal representative. The statutory language provides detailed rules regarding the process for the election worker to make a special needs ballot available to be picked up by a personal representative and delivered to the voter, such that it can be concluded that the intent of the statute is for these actors to not be one in the same. For

one paid election worker to personally issue, deliver, and witness the special needs ballots for ten of the twelve special needs voters, with no register and no demarcation evidencing the date and time the ballots were issued or returned, is a significant deviation from prescribed norms.

c. Questioned Ballots and Voter Disenfranchisement

In order to question a ballot, a person must have a good reason to suspect that the questioned person is not qualified to vote pursuant to AS 15.05. AS 15.25.014 provides that the political parties shall provide to the Director the scope of those voters that may participate in the party's primary election for selection of the party's candidate. The Director is required to permit a voter registered as affiliated with another party to vote the party's ballot if the party's bylaws so allow.⁷ In order to accomplish this, the Division of Elections directs election workers to refer to the "primary election ballot choice poster and flyers."⁸

Plaintiffs will demonstrate at trial that when registered Republicans requested to a vote a ADL ballot in the Browerville precinct, such voters were required by election workers to cast a questioned ballot, even though it is clear from the Division's training and election materials that the election workers had no good faith basis to require a questioned ballot do so. In addition, evidence will demonstrate that at least one voter in the Bettles precinct was not given a choice of which ballot to vote, but was merely handed the Republican Party ballot. Finally, in Barrow, a voter, who may or may not have been eligible to vote to begin with, requested an ADL ballot but was only allowed to cast a Republican ballot, something he was

⁷ AS 15.25.014.

⁸ Plaintiff's Exhibit No. 35 (Page 16 of 43). Evidence will demonstrate that the Division issued a document entitled, "Primary Election Ballot Options". This document indicates the two ballot options with a corresponding column which indicates who is eligible to vote that ballot. This clearly demonstrates the only closed primary is the Alaska Republican Party Primary and only R-U-N voters can vote, but the Democratic, Libertarian, and Independence Party Ballot was clearly open to all voters.

not eligible to do based on party affiliation.⁹ It is unknown the impact on the outcome of the election, because it is uncertain how many voters were disenfranchised by this malconduct of the election workers.

d. Missing and/or Lost Ballots

AS 15.15.480 provides for the security of ballots, “[a]ll official ballots in the possession of election officials, whether voted or not voted, shall be kept in a secure manner until destroyed in accordance with law.”

Evidence offered at trial will demonstrate that in the Nome Regional Office of the Alaska Division of Elections, during the regional review, at least four absentee ballots went missing. Multiple counts over several hours revealed that there were only 67 ballots when there should have been 71. Regional Supervisor, Angelique Horton and another election worker took all the ballots into a back room with no observers present to apparently discuss with the ‘board in Juneau.’ After the two emerged from the room with the ballots, it had been decided to replace the four missing absentee ballots with random questioned ballots. None of the observers were allowed to witness the questioned ballots being selected or removed from their questioned envelopes, they were merely placed in with the absentee ballots to be counted.

⁹ According to the Division of Elections, the voter was registered as a “D” voter and was authorized to vote an ADL Ballot. However it appears that the Division may have failed to comply with AS 15.07.135(a) which required the Director to make reasonable efforts to obtain a list of convicted felons, cancel their registration, and remove their names from the registration list, as the same individual is apparently charged by the district attorney with improperly voting in a recent local election in Barrow, AK. If so, this another example of the malconduct which permeated this election and the failure of the Division to comply with the minimum statutory standards.

Plaintiffs further anticipate that additional issues with ballot security will be offered at trial. There was at least one envelope returned to Nome that was missing its ballot, and there was another stack of 30 ballots from which one went missing, and only after seven counts change of hands did the missing ballot curiously appear.

e. Election Workers

Pursuant to AS 15.10.105(a), the Director of the Division of Elections is responsible for the, "supervision of central and regional election offices, the hiring, performance evaluation, promotion, termination, and all other matters relating to the employment and training of election personnel..." In each precinct, an election supervisor is required by law to appoint at least three qualified voters to the election board, if voters cannot be found in the precinct a voter registered in the House District and if that cannot be found, a voter registered in the State may be appointed to serve on the election board.¹⁰

Plaintiffs anticipate that trial, evidence will establish that in the Point Hope precinct, there was only one election worker present during the time that voting was taking place and ballots were counted. Further, evidence will show that in Point Hope, with only one election worker, there were eight (8) ballots cast by people who did not sign the precinct register. Therefore, it is unknown whether those eight voters were even eligible, e.g. of proper age, to vote and unknown which ballot these voters selected. While these eight votes in and of themselves are not sufficient to change the outcome of the election, the cumulative impact must be considered. The evidence will also show that in several other precincts, poll workers did not record enough hours to have had three workers at the polls while they were open.

¹⁰ AS 15.10.120(a) (emphasis added).

IV. CONCLUSION

Malconduct has been defined as a "significant deviation from statutorily or constitutionally prescribed norms."¹¹ Plaintiffs maintain that the casting and counting of at least twenty five double ballots in both the Shungnak and Kivalina precincts alone constitutes such reckless indifference, by both the Director of the Division of Elections and by the election worker, to the norms established by the U.S. Constitution and State law that malconduct has occurred and the election results must be retabulated consistent with law or a new election must take place.

Furthermore, Plaintiffs assert that this matter is the rare circumstance where the election was "so permeated with numerous serious violations of law, [some] not individually amounting to malconduct, that substantial doubt will be cast on the outcome of the vote."¹² Here, not only do we have a considerable instance of malconduct in the counting of double ballots which violates the very basic constitutional principle of equal protection, one vote per person, but there are also numerous instances of irregularity, that so permeate the election that substantial doubt has been cast not only on the result but on the competence of the Division of Elections as a whole. This is not a case where some minor irregularities occurred based on volunteerism, there were serious errors made.

There is an eight (8) vote margin between the two Democratic candidates for State House District 40. Any one of these irregularities could have impacted the vote, as the margin is so narrow. If voters had not been allowed to cast two ballots, the outcome of the election

¹¹ *Hickel v. Hammond*, 588 P.2d 256, 258-9 (Alaska 1978) citing *Boucher v. Bomhoff*, 495 P.2d 77 (Alaska 1972).

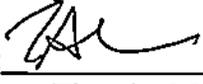
¹² 588 P.2d at 259.

would have been different. This is not unlike the case of *Finkelstein v. Stout*, wherein there was a nine (9) vote margin, and the court remanded the matter to the Director to retabulate the votes to correct the irregularities and the illegalities.¹³

In order to maintain the public and voter confidence and to ensure there is no doubt in the validity of each person's singular vote, this election must either be retabulated or a new election conducted.

Dated this 27th day of September, 2016.

HOLMES WEDDLE & BARCOTT, P.C.
Attorneys for Plaintiffs

By: 

Timothy McKeever (Bar No. 7611146)
Stacey Stone (Bar No. 1005030)

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

¹³ 774 P.2d 786 (Alaska 1989).

CERTIFICATE OF SERVICE

The undersigned certifies that on this 27th day of September, 2016, a true and correct copy of the foregoing document was served via:

- E-Mail
- U.S. Mail
- Facsimile
- Hand-Delivery

to:

Elizabeth Bakalar
Margaret Paton-Walsh
Alaska Department of Law – Civil Div.
P.O. Box 110300
Juneau, AK 99801
Email: libby.bakalar@alaska.gov
Email: margaret.paton-walsh@alaska.gov

Thomas Amodio
Reeves Amodio LLC
500 L St. Ste 300
Anchorage, AK 99501
Email: tom@reevesamodio.com

By: Jana M. Hardwick
Legal Secretary/Assistant
Holmes Weddle & Barcott, P.C.

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657