

2015 OCT -4 PM 4:21  
THIRD DISTRICT  
CHECK TRIAL COURT  
BY: [Signature]

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*

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

BENJAMIN N. NAGEAK, et al.

Plaintiffs,

vs.

LT. GOVERNOR BYRON MALLOTT, 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,

Case No. 3AN-16-9015 CI

Defendants.

**PLAINTIFFS' (PROPOSED) FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

Plaintiffs, by and through counsel of record, Holmes Weddle & Barcott, P.C., hereby  
submit their proposed Findings of Fact and Conclusions of Law to the court as follows:

**FINDINGS OF FACT**

**I. PARTIES.**

1. Plaintiff Benjamin N. Nageak, a registered Democrat, appeared on the Primary  
Election Day ballot for reelection to the Alaska State House District 40, and at the conclusion

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

of the most recent recount was behind his challenger by eight votes. The remaining plaintiffs are qualified voters pursuant to AS 15.20.540.

2. Defendant Byron Mallott is the Lt. Governor of the State of Alaska. He is vested with the executive power of the State and is responsible for the faithful execution of the election. Josephine Bahnke is the Director of the Alaska Division of Elections, which administers the elections.

## II. FACTS.

1. A Primary Election took place in the State of Alaska on August 16, 2016. The Democratic candidates for the Alaska State House of Representatives were Benjamin Nageak and Dean Westlake.

2. When the results of the election were certified, Westlake had 819 votes and Nageak had 815.

3. Nageak requested a recount which was conducted on September 12, 2016, and resulted in a revision of the results where Westlake had 825 votes and Nageak had 817.

4. District 40 includes the North Slope of Alaska, Northwest Alaska and a number of villages just south of the Brooks Range.

5. The election was conducted by the Alaska Division of Elections ("Division") which hired temporary workers to work as election workers at 23 polling places one for each of the precincts in District 40.

6. The Division offered a variety of training options for election workers including a DVD version, teleconference trainings, web based training and others. In addition, it prepared a series of manuals and instructional materials for workers.

7. Voters at the polling places were supposed to be given a choice to select either the Republican ballot or the Alaska Independence-Democrat-Libertarian (“ADL”) Ballot.

8. There were numerous errors in the conduct of the election in nearly all of the precincts in House District 40. Some of those errors on their own likely changed the results of the election.

9. All polling places received supplies from the Division. Included was a Polling Place Elections Procedures Handbook which contained detailed information concerning the need to allow voters only one ballot in the primary election and how to provide special needs ballots to representatives of voters who were unable to come to the polling place. The materials included a poster to be displayed in the polling place and a placard to be put on the registration table which discussed the choices for selecting one primary ballot. Also in the supplies was a supply of party affiliation cards to be given to voters when they selected which ballot they wanted.

10. In the precinct of Shungnak, the four election workers provided every voter with both the Republican and the ADL ballots. Fifty voters voted in person and one voted a questioned ballot. A total of 102 votes were cast with all voters casting both ballots.

11. In addition, election officials failed to complete and sign the precinct register, the precinct certification, and the absentee voting accountability report. They also failed to call in the results on election night as instructed, and they failed to tally the votes using the tally book provided by the Division. They failed to record the identification of all voters and they did not record if there were any touch screen voters.

12. Shungnak had four poll workers on Election Day. All signed an oath to conduct the election in accordance with the law. At least one election judge worked in both the 2012 and 2014 primary elections, and participated in training by the Division of Election in 2014.

13. Had election workers required voters to choose a single ballot, fewer voters would have voted in the ADL primary. The average number of Shungnak voters who have selected the Republican ballot in primaries since 2006 is 12.75. That would reduce the number of votes in the ADL primary.

14. In spite of the numerous training opportunities provided by the Division there is no record that any election worker from Shungnak participated in any training.

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

16. In the precinct of Kivalina, seven voters insisted on voting both the Republican and ADL ballot, casting one in person ballot and one questioned ballot. The election workers in Kivalina required one of the ballots given to each voter be voted as a questioned ballot. In addition, election officials in Kivalina failed to complete and sign the absentee voting accountability report.

17. The seven questioned ballots from Kivalina were rejected as duplicates by both the regional review board in Nome, AK and the statewide review board in Juneau, AK. Thus they were not counted at either level and were not included in the certificate results prior to the recount.

18. Despite the decision of both review boards to reject the seven Kivalina questioned ballots as duplicates, the Director of the Division of Elections decided to count the questioned ballots during the recount. She stated that since there was no way to tell which ballot was voted first, the questioned ballots would be treated like the ballots from Shungnak i.e. they would be counted.

19. In Kivalina in 2016, Westlake received 38 votes and Nageak received 22.

20. In the precinct of Buckland, twelve special needs ballots were cast. Election workers acted as the 'representative' assisting the voter in the casting of those votes. Election workers failed to record the date of pick-up of the ballots and the date and time of their return. These ballots were not returned to Nome until six days after the election. The election workers were designated to work at the polling place, but apparently did not do so for much of Election Day.

21. The Polling Place Elections Procedures Handbook (and several other Division of Elections manuals) provided that a voter could designate a personal representative to go to the polling place and request a ballot, which an election official would issue upon verification by the official of the information provided by the representative, that a ballot should issue. The personal representative would then take the ballot to the voter to allow the voter to vote, and the representative would witness the signature and was required to return the ballot to the polling place prior to the close of voting at 8:00 P.M. on election night.

22. Rather than having a personal representative of each voter deliver the ballot for voting, election workers in Buckland collected twelve special needs votes, ten of which were signed by a single poll worker. In addition in Buckland, at least one in person voter cast a

vote without verifying eligibility and signing the precinct register. The number of paper ballots could not be confirmed because the poll workers tore off all ballots, leaving no stubs for verification or review. Election officials failed to complete and sign a questioned voter register.

23. In Buckland in the 2016 primary, Westlake received 43 votes and Nageak received 11 votes.

24. In the precinct of Browerville, election workers admitted that until about 5:00 P.M., they required registered Republicans who requested the ADL ballot to vote a questioned ballot. At least two individuals lodged complaints with election officials that poll workers refused to allow them to vote their rightful choice of ballot. Election workers in Browerville also failed to complete the precinct register, and failed to check the identification and eligibility of at least twenty voters.

25. At least one voter in Browerville, Mr. William Oviok, was on the precinct register and permitted to vote, even though the State has admitted that he was not eligible to vote due to felony conviction.

26. In the precinct of Point Hope, there was only one election worker present for the duration of the Election Day. At least eight (8) voters cast votes in Point Hope without verifying eligibility and signing the precinct register. Election officials failed to complete and sign a questioned voter register.

27. In the precinct of Ambler, election officials failed to timely return the ballots and election materials to Nome and Juneau for review and certification, and as such the authenticity and results of the thirty six ballots cast and final tally for House District 40 in

Ambler could not be verified by the regional and statewide review boards. Election workers additionally failed to complete and sign the absentee voting accountability report.

28. In the precinct of Barrow, poll workers failed to complete and sign the precinct register, the questioned voter register, the ballot statement, and the absentee in person register, and failed to return the machine tapes and zero reports to verify the reported results.

29. In the precinct of Noorvik, poll workers failed to complete and sign the precinct register and the questioned voter register, failed to have questioned voters sign the questioned voter register, failed to complete and sign the absentee voting accountability report, and failed to check the voter identification of one voter. Additionally, the number of ballots used in the precinct could not be confirmed, because the poll workers destroyed or failed to return the ballot stubs so they could not be used to verify the number of ballots issued.

30. In the precinct of Deering, poll workers failed to complete and have questioned voters sign the questioned voter register, failed to complete the precinct register, and reported the results of the election incorrectly. Additionally, the tally by election workers was incorrect. Upon review, there were more names on the register than ballots cast, and the number of ballots for the precinct could not be confirmed because the poll workers destroyed and/or failed to return the ballot stubs.

31. In the precinct of Kiana, poll workers failed to return the precinct register, and reported the results of the election incorrectly. Additionally, the number of ballots for the precinct could not be confirmed because the poll workers destroyed or failed to return the

ballot stubs, reported eleven more ballots cast than were returned to the Division, and sent the materials back in separate shipments.

32. In the precinct of Noatak, poll workers failed to sign the absentee in person register, failed to sign the questioned voter register, and failed to have questioned voters sign the questioned voter register. Additionally, the number of ballots for the precinct could not be confirmed because the poll workers destroyed or failed to return the ballot stubs.

33. In the precinct of Kaktovik, poll workers failed to return both the precinct register and the questioned voter register, and failed to complete and sign the absentee voting accountability report. Additionally, poll workers reported the results of the election incorrectly.

34. In the precinct of Wainwright, poll workers failed to check voter identification for four voters, mismarked the spoiled ballots, and reported the results of the election incorrectly. The records of the Division should that while there were four election workers in Wainwright two worked only 2 hours on election and one worked only 4 meaning that the polling place could not have been fully staffed while it was open.

35. In the precinct of Selawik, poll workers failed to complete and sign the precinct register, failed to certify the results, and misrepresented the number of ballots cast by eleven.

36. In the precinct of Point Lay, poll workers failed to complete and sign the absentee voting accountability report, failed to complete and sign the precinct register, and failed to certify the results. Additionally, the optical scan machine incorrectly reported the results for the precinct.

37. In the precinct of Nuiqsut, poll workers failed to check any voter's identification, failed to complete the precinct register, failed to certify the results, and failed to complete the ballot statement.

38. In the precinct of Kotzebue, poll workers failed to sign the absentee in person register.

39. In the precinct of Hughes, poll workers failed to complete the precinct register.

40. In the precinct of Atqasuk, poll workers failed to complete and sign the questioned voter register, the tally book, and failed to check the identification and eligibility of one voter.

41. In the precinct of Bettles, poll workers failed to complete and sign the precinct register.

42. In the precinct of Anaktuvuk Pass, poll workers failed to complete and sign the precinct register, failed to check the identification and eligibility of two voters, failed to complete the ballot statement, and two questioned ballots were unaccounted for during the statewide review board's review. In addition the hours reported to the Division by the election workers establish that the polling place could not have had three poll workers during the hours it was open.

43. In the precinct of Allakaket, poll workers failed to complete and sign the precinct register and the questioned voter register, failed to check any voter identification, and at least one (1) voter cast a vote without verifying eligibility and signing the precinct register.

44. No member of the Libertarian party serves on either the Regional Review Board in Nome or the Statewide Review Board.

45. Records maintained by the Division establish that in 11 of the 23 precincts in District 40 none of the poll workers reported receiving any training in 2016.

46. An individual who was constitutionally prohibited from voting was allowed to vote in the primary. The Division director testified that the Division learned of the names of voters who because of a criminal conviction cannot vote by accessing a data base maintained by the Department of Corrections which contained very little information from which the Division could determine if a conviction was for a crime of moral turpitude which would bar the offender from voting.

47. The Division does not conduct any kind of evaluation of the performance of election workers.

#### CONCLUSIONS OF LAW

1. Alaska Statute 15.20.540(1) provides that "A defeated candidate or 10 qualified voters may contest the nomination or election of any person or the approval or rejection of any question or proposition upon [...] malconduct, fraud, or corruption on the part of an election official sufficient to change the result of the election.

2. In *Hammond v Hickel*, the Supreme Court of Alaska held that "malconduct," as used in AS 15.20.540, means "a significant deviation from statutorily or constitutionally prescribed norms." 588 P.2d 256, 258 (Alaska 1978).

3. The court in *Hammond v Hickel* further held that malconduct requires "knowing non-compliance with the law or reckless indifference to norms established by law," and that "any malconduct on the part of election officials must be of sufficient magnitude 'to change the results of the election.'" *Id.* quoting AS 15.20.540.

4. In *Finkelstein v. Stout*, the court held that “after an election [provision in the election law] 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 essential to the validity of an election, or that its omission shall render it void.” 774 P.2d 786, 790 (Alaska 1989) quoting *Carr v. Thomas*, 586 P.2d 622, 626 (Alaska 1978).

5. Multiple manifest errors occurred in the August 16, 2016 Primary Election in House District 40. In aggregate these errors are sufficient to change the result of the election.

6. The wholesale neglect of official duties by poll workers across several precincts is not only evidence of the severe deficiency in adequate training by the Division of Elections. The failure of poll workers to perform the most basic requirements and meet the minimal standards in their official capacity shows a widespread reckless indifference for Alaska law and the rules and policies set forth by the Division itself. The nearly complete failure of nearly all precincts to follow even the most basic election laws, is representative of a wholesale disregard for the longstanding regulations which are set in place to ensure the fairness and impartiality of elections, and to protect against abuse of process.

7. By allowing certain voters to cast more than one ballot and allowing those multiple ballots to be counted, the Division of Elections has deprived other voters in District 40 of the equal protection guaranteed by the 14th Amendment of the United States Constitution.

8. Fifty-one voters in Shungnak were permitted to cast two ballots each. This is a clear significant violation of the law and the fundamental principle that voters should be allowed to cast only one vote in any election. It was a significant departure from election norms.

9. The evidence established that election workers failed to participate in any training, did not review the material sent to them, did not review the ballot choice poster and placard, did not attempt to understand the party affiliation cards, and failed to properly report the results and document their activities. They acted with reckless indifference to the norms established by law.

10. The evidence establishes that fifty-one voters voted both the ballots in violation of the law. Twenty-five people eligible for the Republican ballot voted in the primary. Twenty-five people who were not eligible to vote the Republican ballot were improperly allowed to vote that ballot.

11. Because voters were not required to choose which ballot they wanted, more voters voted in the ADL election than would have had the election been properly conducted. The most reliable way to determine that number is to average the number of voters who selected the Republican ballot in Shungnak over a number of elections. The court declines to attempt to ascertain which particular election or elections are most similar to the 2016 election.

12. The average number of voters who have chosen the GOP ballot is 12.75. This would mean that many voters would not have voted in the ADL primary and the votes received by the state house candidates would have been reduced.

13. Allocating the reduction resulting from 12.75 votes to the candidate in proportion to their percentages of votes cast in Shungnak in 2016 shows that the malconduct of the election workers in Shungnak was of sufficient magnitude to have changed the outcome of the election.

14. The decision to count the votes cast by the seven voters in Kivalina was a significant departure from election norms.

15. The decision to issue the ballots was also a significant departure from election norms.

16. The decision to count the seven questioned ballots in Kivalina made at the recount by the Director, was made with knowing non-compliance or reckless indifference to the norms.

17. Because it is unknown which of these sets of ballots is the true intent of the voters, and which was cast first, the director should have declined to count either set of ballots. That error is of the magnitude sufficient to change the outcome of the election.

18. Twelve special needs ballots from Buckland were counted in the primary election even though they failed to comply with the requirements of AS 15.20.072. The poll workers in Buckland showed reckless indifference to the statutory rules and regulations governing the election.

19. AS 15.20.072 requires three people to complete the special need voting process, with an important distinction between the role of the election official and that of a personal representative.

20. For paid election workers to leave the polls, personally issue, deliver, and witness the special needs ballots for 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, and a willful violation of AS 15.20.072.

21. The twelve votes involved in this issue are enough to change the outcome of the election.

22. Alaska law and the Division's training and election materials allow Republican, Undeclared, and Non-partisan voters to select either the Republican ballot or the ADL ballot in a primary. Despite this longstanding rule, in at least the Browerville precinct, when registered Republicans, Undeclared, and Non-partisan voters requested to a vote the ADL ballot, such voters were wrongfully required by election workers to cast a questioned ballot in violation of AS 15.15.210.

23. Election officials had no good reason to suspect that the questioned persons were not qualified under AS 15.05, and thus requiring each to vote a questioned ballot was a violation of their right to cast their ballot of choice.

24. The Director of the Division of Elections has the obligation to appoint at least three qualified voters to serve on an election board in each precinct under AS 15.10.120, and to provide for a comprehensive training program for that election board under AS 15.10.107. The Director 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." AS 15.10.105(a).

25. The Director failed to appoint the requisite number of election workers, and failed to train the election workers that were appointed. The failure of poll workers across each precinct to meet the minimum standards of Alaska law and to follow the most basic election rules is directly attributable to the Director's failure to properly train and supervise the election personnel. In aggregate, the errors created a primary election marred by impropriety, with incomplete and missing records which cannot be reviewed or verified. The Director was aware of the deficiencies in workers and in training, and failed to remedy the insufficiencies in time to prevent widespread issues and disparities across House District 40.

26. AS 15.10.105(b) directs that "It is essential that the nonpartisan nature, integrity, credibility, and impartiality of the administration of elections be maintained." The laws and regulations governing elections in Alaska were implemented to maintain that standard and protect against abuse of process.

27. Despite the training options offered by the Division of Elections, the appointed poll workers performed their official duties on election day with reckless indifference and a general disregard for the Alaska state and federal law, and the very rules and regulations of the Division of Elections.

28. Election materials were mishandled, and records across several precincts were incomplete, inaccurate, and/or missing altogether. The years of experience of several poll workers, and the easy access of available training materials makes the confusion and widespread errors all the more egregious.

29. Whether poll workers purposefully misrepresented the rules and mishandled the materials, or their deficiencies were the result of a wilful ignorance, the errors were

inexcusable just the same. The behavior of many workers, but across several precincts, was such a significant deviation from the elections statutes and longstanding Division of Elections policies, that it rises to the level of malconduct and casts doubt over the results.

30. While the review boards are intended to confirm the accuracy of each precinct's election materials and results, the materials provided were so deficient that independent verification is impossible. Registers and accountability reports cannot confirm the number and authenticity of voters when they are incomplete and/or missing altogether. Partial stubs were omitted from several precincts, preventing any independent verification of ballots issued and/or cast. Signatures of poll workers and election officials alike are missing, voter identification was waived, and several votes were cast across precincts without any record of the voter and/or eligibility at all. Without these materials and records to audit, the review of the regional and statewide boards is incomplete, an empty effort bringing no further legitimacy to the flawed process.

31. The regional and statewide review boards are not in compliance with AS 15.10.180 and AS 15.20.190 both of which require that the membership include representatives of the party whose candidate for governor receive the second highest vote total in the last gubernatorial election. In the election, Governor Walker was not affiliated with any party, the Republican party candidate received more votes than any other candidate affiliated with a party, and the Libertarian party had the second highest vote total and therefore is entitled to membership on the boards.

32. The Director has failed in her responsibility to take reasonable steps to insure that voters who have been convicted of a crime are unable to vote. AS § 15.07.135(a).

33. Due to the aforementioned and widespread failures, the primary election is permeated with serious violations of law including malconduct of a magnitude sufficient to change the outcome of the race and other violations which individually not amounting to malconduct that substantial doubt has been cast on the outcome of the vote.

**RELIEF REQUESTED**

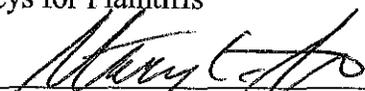
I. Plaintiffs seek an order directing that the Division tabulate only those votes which were properly and legally cast in the August 16, 2016 primary election in House District 40, and the correct result therefrom be certified.

II. 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 ensure that the election is conducted consistent with all laws and regulations.

III. An award for Plaintiffs and against Defendants for reasonable costs and attorneys' fees.

DATED this 4<sup>th</sup> day of October, 2016.

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

By: 

Timothy McKeever  
AK Bar No. 7611146  
Stacey Stone  
AK Bar No. 1005030

**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 4<sup>th</sup> day of October, 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  
Laura Fox  
Alaska Department of Law -- Civil Div.  
P.O. Box 110300  
Juneau, AK 99801  
Email: libby.bakalar@alaska.gov  
Email: margaret.paton-walsh@alaska.gov  
Email: laura.fox@alaska.gov

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

By: \_\_\_\_\_

*Shel M*  
Legal Secretary/Assistant  
Holmes Weddle & Barcott, P.C.

**HOLMES WEDDLE & BARCOTT, PC**

701 WEST EIGHTH AVENUE, SUITE 700  
ANCHORAGE, AK 99501-3408  
TELEPHONE (907) 274-0366  
FACSIMILE (907) 277-4657