

# LEGAL SERVICES

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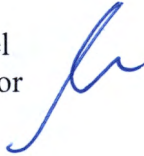
## MEMORANDUM

August 26, 2016

**SUBJECT:** Contested Election (Work Order No. 29-LS1729)

**TO:** Senator Bill Stoltze  
Attn: Brandon Brefczynski

**FROM:** Jean M. Mischel  
Assistant Revisor



You have requested an expedited follow up memorandum to the expedited memorandum dated August 25, 2016, "specifically addressing malconduct committed by an election official, and potential legal remedies in such event." The previous memorandum described in some detail the law pertaining to malconduct in an election under AS 15.20.540(1), including the requirements that a defeated candidate or 10 qualified voters bring the action and prove bias resulting from a significant deviation from statutorily prescribed norms that were sufficient to have changed the result of the election.<sup>1</sup> This memorandum therefore focuses on potential remedies. However, as can be seen from the caselaw summarized in the previous memorandum, election officials and courts have tailored remedies to the specific facts at issue. A comprehensive list of remedies is therefore not possible since the remedy is dependent on the factual findings.

Under art. V, sec. 3, Constitution of the State of Alaska, the "method for determining election contests, with the right of appeal to the courts, shall be prescribed by law." Under art. II, sec. 12, Constitution of the State of Alaska, *each house* is the judge of the election and qualifications of its members and may expel a member with the concurrence of two-thirds of its members.

Under AS 15.15.340 - 15.15.350, the director of elections, additional election officials, and the election board have the authority to make initial factual and legal determinations concerning the election, subject to state ballot counting review. Upon completion of the state ballot counting review the director shall certify the person receiving the largest number of votes. AS 15.15.450. The certificate of election entitles the prevailing candidate to receive the oath of office; administering the oath to new members who have been certified as being elected is mandatory. AS 24.05.160.

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<sup>1</sup> See, *Hammond v. Hickel*, 588 P.2d 256 (Alaska 1978), *cert. denied*; *Boucher v. Bomhoff*, 495 P.2d 277 (Alaska 1972).

As described in the previous memorandum, the legislature has established the grounds for a contested election in AS 15.20.540. The action may be brought in the superior court within 10 days after the completion of the state review. AS 15.20.550.<sup>2</sup> The following is a nonexhaustive list of remedies a court may impose after finding grounds for a contested election based on official malconduct sufficient to change the results of the election.<sup>3</sup>

- validate the results of the election despite the findings of malconduct, when irregularities are curable;<sup>4</sup>
- invalidate specified ballots for error and uphold the election certification;
- invalidate election results, overturn the certificate of election, and order a new election be conducted;
- calculate the proportion of affected ballots and assign the same proportion to each candidate's results; depending on the results, either uphold the certification of the election or invalidate it;
- remand the case to the director of elections, order a recount in a manner consistent with its opinion, and order either certification of the results or a new election depending on the results;
- order the lieutenant governor to take certain measures in order to ensure the integrity of the next general election;
- validate parts of a ballot that are not affected by error and validate the election results.

I trust this information is helpful.

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<sup>2</sup> A contested election action is separate from an appeal of a recount under AS 15.20.510, in which malconduct is not directly at issue. The legislature has retained authority for the chamber in which the candidate seeks membership to review error on a recount involving a candidate for the general election for the state legislature under AS 15.20.520. However, both a contested election action and a recount appeal may be available.

<sup>3</sup> Courts are "reluctant to permit a wholesale disenfranchisement of qualified electors through no fault of their own" and have uniformly held that in reviewing and interpreting election statutes, "where any reasonable construction of a statute can be found which will avoid such a result, the courts should and will favor it." *Miller v. Treadwell*, 245 P.3d 867 (Alaska 2010) (citations omitted).

<sup>4</sup> See, *Hammond, Id.* (finding malconduct, though significant and could have affected the outcome, was not knowing noncompliance with the law or a reckless indifference to norms established by law and upholding the results of the election because irregularities were "curable" by such measures as allocation of disputed votes, addition of delayed ballots, and a recount).