ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
5857 HOUSE JUDICIARY

261

APPENDIX D

SUMMARY OF EFFECT ON VOTE TOTALS AFTER

SPECIAL MASTER'S FINDINGS

I. Results of Election After Special Master's Findings on egregated Votes (See Appendix A)

Bradley.....3560
Finkelstein.....3554

II. Proportionate Impact Using Hammond v. Hickel Formula After Special Master's Findings on Commingled Votes

A Results of Proportionate Reduction by Director of Elections (See Finkelstein Ex. 1)
Bradley.....3547.98
Finkelstein.....3544.02
Margin.....3.96

B. Adjustment to Total Vote Count due to Findings on Segregated Vote Totals
Bradley.....3544.98
Finkelstein.....3544.02

C. Results of Additional Proportionate Reduction by Special Master (See Appendices B and C)

Bradley.....3544.98
-5.565 Special Master's Findings
3539.415 Net

Finkelstein....3544.02
-3.435 Special Master's Findings
3540.585 Net

NEW MARGIN BETWEEN CANDIDATES.....1.17
(in Finkelstein's favor)

IN THE SUPREME COURT OF THE STATE OF ALASKA

DAVID FINKELSTEIN,

Appellant,

v.

SANDRA STOUT, Director of the Alaska Division of Elections, and STEPHEN A. McALPINE, Lieutenant Governor of Alaska,

Appellees,

and

W.E. "BRAD" BRADLEY,

Appellee/ Intervenor.

O R D E R[1]

No. S-3107

Before: Matthews, Chief Justice, Rabinowitz, Burke, Compton, and Moore, Justices. [Rabinowitz, Justice, and Moore, Justice, dissenting.]

I. INTRODUCTION

This is an election recount appeal brought pursuant to AS 15.20.510(2). This court referred the appeal to the Honorable Joan M. Katz of the Superior Court as a Special Master on December 8, 1988. Judge Katz filed her report on January 5, 1989. The report contains a detailed analysis of the challenges from all parties and of the evidence submitted in connection with the

---

1. An opinion, and partial dissenting opinions, will follow.

challenges.[2] The following introduction contained in the report sets the context of this case:

> In the general election of November 8, 1988, David Finkelstein and W.E. "Brad" Bradley vied for Seat A in House District 13. After the election, Finkelstein was certified by appellee Stout, Director of the Division of Elections, to be the winner of that race. The count was 3,549 to 3,546.
>
> At Bradley's request, a recount was conducted on December 1 and 2, 1988. Based on the recount, Stout certified that Bradley had defeated Finkelstein 3,563 to 3,554, a nine vote margin.
>
> In the course of the recount, Stout determined that 26 votes had been improperly counted. Finkelstein Ex. 1. The ballots had been commingled, rendering it impossible to ascertain for whom they had been cast. Based on the formula set forth in Hammond v. Hickel, 588 P.2d 256 (Alaska 1978), cert. denied, 441 U.S. 907 (1979), Stout proportionately reduced Bradley's vote total by 15.02 votes and Finkelstein's total by 9.98 votes. These reductions resulted only in narrowing the gap between the candidates to 3.96 votes. Having determined that the outcome of the election would not have been different based on the rejected ballots, Stout certified the election results premised on the recount totals demonstrating Bradley to be the prevailing candidate by nine votes.

Judge Katz concluded that because of various errors relating to the counting of ballots, the election should be set aside and a new election held. As explained herein, we conclude that a new

---

2. We express our gratitude to Judge Katz for her thoughtful and expeditious report.

election may be necessary depending on the count of nine illegally cast absentee ballots which were not commingled[3] and on the precise proportionate reduction formula employed by the Director.[4] For ease of reference we will adopt the same numbering system and terminology employed in the Master's Report.

II. SPECIFIC BALLOT CHALLENGES

A. Appellant's Challenges

1. Absentee ballot envelope oaths suggesting no permanent Alaskan residence

Finkelstein challenged fourteen absentee ballots in this group. Judge Katz accepted the challenges in three cases and rejected the other eleven. A majority of the court is of the view that none of the challenges should have been accepted. There was sufficient evidence in each case so that the voter's intent to indicate a new legal residence outside of the district was unclear. In the absence of a clear expression of intent to change a legal residence the residence cannot be considered to have been changed. Fischer v. Stout, 741 P.2d 217, 222-23 (Alaska 1987).

---

3. See part II.A.7., infra.

4. See part II.B.3., infra.

2. Post-election affidavits demonstrating non-residency

After the election and the recount, twenty-one voters signed registration affidavits stating that they were not residents of the district at the time of the election. The Director of Elections had counted the votes of these individuals and they have been commingled. Judge Katz declined to apply the proportionate reduction formula set out in Hammond v. Hickel, 588 P.2d 256, 260 (Alaska 1978), cert. denied, 441 U.S. 907 (1979) to these votes. We agree with this conclusion. In our view, this objection was untimely as it was raised after the recount was concluded.

3. Military post office box "residences"

Eleven challenges were considered under this category. All of the challenges were rejected by Judge Katz. We concur.

4. Absentee ballot lacking witness signature

One challenge was made under this category which was accepted by Judge Katz. On the place for the signature of the witness, with respect to this absentee ballot, there is only a postmark, with no signature. We agree with Judge Katz that this ballot should not have been counted.

5. Undated witness signatures

Three individuals cast absentee ballots on which the attesting official did not date his or her signature. Judge Katz accepted these three challenges. We disagree. The attesting official witness is required to date his or her signature. AS 15.20.081(d). However, we have held that this requirement is directory rather than mandatory and does not require invalidation of the ballot so long as the ballot in question is cast on or before election day. Hammond v. Hickel, 588 P.2d 256, 269 (Alaska 1978), cert. denied, 441 U.S. 907 (1979). The burden of proving ballot illegality in general and particularly that the ballot in question was not cast on or before election day is on the challenger. This burden was not carried as all three ballots were received by the Division of Elections prior to the election.

Alaska Statute 15.20.081(d) also requires voting in the presence of the attesting witness. While a majority of the court agrees with Judge Katz that this requirement is mandatory rather than directory, it is our view that Finkelstein did not carry his burden of showing a violation of this requirement.

6. Incomplete voter signature

One voter made a hand written mark which appears to be the beginning of a "K" in the voter signature blank of the voter oath on the back of the absentee ballot. A qualified attesting official witness attested that the oath was subscribed and sworn

to before the witness. Judge Katz ruled that this was not a signature as required by AS 15.20.081(d). She thus accepted the challenge made by Finkelstein. We disagree. The mark could be legally sufficient to serve as the voter's signature if that was the voter's intent. Fischer v. Stout, 741 P.2d at 225. Since the voter oath was properly attested as subscribed and sworn to, it is the view of a majority of the court that it has not been shown that the mark was not intended by the voter to serve as his signature.

7. Different witness dates

Thirty-two voters submitted absentee ballots which had been witnessed by two non-official witnesses on different dates. All of these votes were counted. However, the Division segregated nine of the total so that if they were counted illegally the votes can be directly deducted. The remaining twenty-three votes have been commingled. Judge Katz ruled that all thirty-two of these votes were properly counted. We disagree for the reasons that follow.

a.

Alaska Statute 15.20.081(d) sets out the procedures for voting absentee by mail. In relevant part, that section provides:

> Upon receipt of an absentee ballot by mail, the voter, in the presence of [an official] . . . may proceed to mark the ballot in secret, to place the ballot in the small

> envelope, to place the small envelope in the larger envelope, and to sign the voter's certificate on the back of the larger envelope in the presence of an official listed in this subsection who shall sign as attesting official and shall date the signature. If none of the officials listed in this subsection is reasonably accessible, an absentee voter shall have the ballot witnessed by two persons over the age of 18 years . . .

In Fischer v. Stout, we interpreted this section to mean that the two non-official witnesses must be present when the voter signs the voter's certificate. We stated:

> AS 15.20.081(d) and 6 AAC 25.110(a) specify the classes of persons authorized to serve as an attesting officer. If no appropriate officer is available, the voter may sign the voter's certificate in the presence of two persons over the age of 18 years and have those two witnesses sign the attestation form.

741 P.2d at 223 (emphasis added, footnote omitted). Thus, we interpreted the statute to mean that the role of the two non-official witnesses was the same as the function of the attesting official witness set forth in the statute.

One purpose of this statute is to insure that the ballot was marked by the voter, and not someone else, in circumstances free from coercion. The Mississippi Supreme Court has said concerning a similar requirement:

> The certificate . . . in addition to certifying that the voter executed the affidavit, certifies the voter first exhibited a blank ballot which was not marked or voted before it was exhibited to the witness, and that the voter then retired out of the witness' presence but within his sight so that he could see that he voted but not how

> he voted, that no one was present as he marked his ballot, that the voter was not solicited or advised in voting, and finally, that after making his ballot in secret, the voter placed it in the envelope, closed and sealed the envelope in the certifying officer's presence, and then signed and made affidavit to the first certificate.
>
> It is thus clear that the Legislature intended both signatures to be on the envelope because there were subsequent requirements to best ensure the integrity of an absentee ballot.

Fouche v. Ragland, 424 So.2d 559, 561 (Miss. 1982).

Since one objective is to insure that the voter mark his or her own ballot and that the vote be uncoerced, it would make no sense to require secret voting in the presence of an official, while waiving the presence requirement when two non-official witnesses are used.

The legislative history of the present statute, AS 15.20.081(d), confirms the view that the ballot is to be voted in the presence of either an attesting official or two non-official witnesses. Prior to 1980, the predecessor section to AS 15.20.081(d) required only one attesting witness who need not be an official. The statute was, however, clear that voting had to take place in the presence of the attesting witness.[5] Following

---

5. The former statute, AS 15.20.150, read as follows:

CASTING VOTE BY PERSONAL REPRESENTATIVE OR BY MAIL. Upon receipt of an absentee ballot

(Footnote Continued)

our decision in Hammond v. Hickel the legislature amended the statute, enacting AS 15.20.081(d) in its present form. The legislative committee memo accompanying the amendment said:

> Requires a person authorized to administer an oath to witness the signature on an absentee ballot. In the instance that a qualified official is not available, two persons may witness the signature.

Alaska State Senate, Special Committee on Electoral Reform, Document dated April 23, 1980 (section by section analysis). There are two conclusions to be drawn from this comment. The first is that there was no intent to change the requirement of voting in the presence of an attestor. Had there been such an intent it would have been mentioned. Second, the two non-official witnesses were regarded as a substitute for the attesting official witness, if one was not available. What was to occur before the

---

(Footnote Continued)

> through a personal representative or by mail, the voter, whether in or outside the state, inthe presence of an attesting witness who is at least 18 years of age, may proceed to mark the ballot in secret, to place the ballot in the small blank envelope, to place the small envelope in the larger envelope , and to sign the voter's certificate on the back of the larger envelope in the presence of the above-listed official or described persons who shall sign as attesting witnesses. The voter may then return the ballot properly enclosed in the envelopes, by personal representative to the election official who provided the ballot or by the most expeditious mail service, postmarked not later than the day of the election, to the election supervisor in his district.

attesting official witness or the two non-official witnesses was regarded as identical.

b.

Having established what the law requires, the next step is to determine whether it was complied with. In the case of the thirty-two ballots containing witness signatures subscribed on different dates, it can be said with a high degree of confidence that the voter did not mark the ballot, place it in the small envelope, place the small envelope in the larger envelope and sign the voter certificate on the back of the larger envelope in the presence of both non-official witnesses. If this had been done, the dates following the witnesses signatures would be consistent. Thus, the certificates themselves rebut the presumption of regularity and demonstrate non-compliance with the law.

c.

The next question is whether the director properly counted these absentee ballots even though they were not cast in the presence of the non-official witnesses.

Alaska Statute 15.20.203 requires the district absentee counting board to examine each absentee ballot envelope to determine whether the absentee ballot has been properly cast. Part (b) of the statute provides as follows:

(b) An absentee ballot may not be counted if

> (1) the voter has failed to properly execute the certificate;
> (2) an official or the witnesses authorized by law to attest the voter's certificate fail to execute the certificate;
> (3) the ballot is not attested on or before the date of the election;
> (4) the ballot, if postmarked, is not postmarked on or before the date of the election; or
> (5) after the day of election, the ballot was delivered by a means other than mail.

The conditions set out in this statute are not exclusive. In Willis v. Thomas, 600 P.2d 1079, 1083 n.9 (Alaska 1979) we quoted the following language from Carr v. Thomas, 586 P.2d 622, 626 (Alaska 1978), which in turn quoted Rich v. Walker, 374 S.W.2d 476, 478 (1964) as follows:

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

The requirement of voting in the presence of the non-official witness is, to use the terms of the language quoted above, "of a character to affect an obstruction to the free and intelligent casting of the vote . . . or to . . . affect an essential element of the election . . . ." As noted earlier, AS 15.20.081(d) is designed to insure that the vote cast is that of

the elector and that it was cast in circumstances free from coercion. Moreover, this requirement protects the integrity of the ballot process itself. Non-compliance with the requirements of AS 15.20.081(d) risks the frustration of these fundamental principles.

In Fischer v. Stout, 741 P.2d 217, 223, we noted that signing in the presence of the attestor was a condition of ballot validity: "AS 15.20.081(d) provides that an absentee ballot will be valid only if the ballot envelope is signed by the voter in the presence of an attesting officer." This statement is dictum. It is, however, correct. Because the requirements of AS 15.20.081(d) serve both to protect the essence of free and intelligent voting and to safeguard the integrity of the ballot process, the requirements should be regarded as mandatory.

Desjourdy v. Board of Registrars, 266 N.E.2d 672 (Ma. 1971) is instructive. There twenty-two absentee ballots were not marked in the presence of a notary as required by Massachusetts law and the ballot envelopes were signed by notaries outside the presence of the voters. Id. at 676, 677. The Supreme Judicial Court of Massachusetts held that these ballots should not have been counted:

> The procedure followed violated [the applicable statute] which sets up significant safeguards to ensure that the ballot represents the will of the voter. Its violation results in more than simply a technical irregularity. As these ballots stand, we have no way of knowing whether they were in fact marked by

> those in whose names they were received and cast.

266 N.E.2d at 677 (citations omitted).

Kiehne v. Atwood, 604 P.2d 123, 133 (N.M. 1979) is another case where a court invalidated ballots because of attestation illegality. There the oaths on seven absentee ballots were notarized by the county clerk. The voters were not in the clerk's presence when they signed the documents. All of the voters testified that they wanted the county clerk to notarize their signatures. In invalidating the ballots, the court stated:

> [A]s to the affidavits in question, swearing to and subscribing by the voter and attesting to by a notary or other official are not mere technicalities. The statutes prescribing these duties are not simply directory. The acts called for are significant safeguards against fraud and mistake, are necessary to preserve the purity of our elections, and are mandatory duties.

Id. at 133.

In Fugate v. Mayor and City Council of Town of City of Buffalo, 348 P.2d 76 (Wyo. 1959), twelve absentee ballot affidavit forms were attested to by an election official not in the presence of the affiants. Id. at 79. These votes were held to be illegal. Id. at 85. See also McCavitt v. Registars of Voters of Brockton, 434 N.E.2d 620, 6289 (Mass. 1982) (ballots marked outside presence of notary held invalid).

The fact that the ballots in the present case were not cast in the presence of two non-official witnesses is due in part to the failure of the voter instructions on the voter oath form to state explicitly the requirement that the vote be cast in the presence of the witnesses. We have noted that errors "solely on the part of election officials" will not invalidate ballots. Willis v. Thomas, 600 P.2d 1079, 1087 (Alaska 1979) (registered voters' names not on voters' lists on election day). See also Fischer v. Stout, 741 P.2d at 223, 224. That observation, however, was not made where the official omission caused or contributed to a violation of a mandatory requirement, and we decline to extend it to such cases. A voter who has voted illegally has an interest in having his or her vote counted, and that interest stands on a high level where the source of the illegality lies with election officials. On the other hand, where the vote violates provisions designed to insure the integrity of the electoral process, the public has a supervening interest - that of fundamentally sound elections - which is protected by not counting illegal votes, regardless of the source of their illegality.

8. Ballots without postmarks received after the election

Four challenges were made under this category, all of which were rejected by Judge Katz. We concur.

9. Unregistered voter

The state has conceded that the absentee ballot of the unregistered voter in question should not have been counted. Judge Katz concurred and accepted the challenge. We concur as well.

10. Punchmark ballots

Involved here are challenges to fourteen votes for Bradley where the punchmarks were placed in the boxes for both Bradley and Finkelstein. Judge Katz accepted three of these challenges, namely to ballots 29, 20, and 30. Judge Katz was evidently under the impression that ballot 29 had been counted. We are advised by all counsel that in fact it was not counted and thus it should not be subtracted from Bradley's total. Ballots 20 and 30 were called by the Director for Bradley. Judge Katz, however, was of the view that the voters' intent could not be determined from the ballots. We disagree. In our view it is evident that the voting machine was voting low and that the voters in these cases intended to vote for Bradley.

A different situation exists with respect to ballot 27. Judge Katz recommended that this vote be attributed to Bradley. We disagree and accept Finkelstein's challenge. There is no consistent pattern on this ballot of the punchmarks being either high or low. The intent of the voter cannot be determined.

On all other ballots within this category we concur with the recommendations of Judge Katz which upheld the Director.

B. Intervenor's Challenges

1. Absentee ballots lacking voter signatures

Bradley contends that fifteen absentee ballots which were not counted because they were not signed should have been included. Judge Katz held that the Division was correct in refusing to include these ballots. We concur.

2. Special overseas absentee ballots

Three voters submitted special absentee ballots and later mailed regular absentee ballots which for various reasons were held invalid. Bradley argues that under these circumstances the original special ballots of these voters should have been counted. The Division disagreed and Judge Katz recommended that the decision of the Division be upheld. We concur.

3. Proportionate Formula

In order to determine whether the errors in counting commingled ballots might have affected the election, a proportionate formula was employed. See Hammond v. Hickel, 588 P.2d 256, 260, cert. denied, 441 U.S. 907 (1979). Bradley contends that the formula was not strictly proportional because it failed to include ballots which were cast for write-in candidates or which were blank with respect to the

Finkelstein-Bradley race. We agree that the principle espoused by Bradley is correct. We are, however, uncertain as to what the precise ratio is which results from application of this principle. That should be determined by the Director on remand.

III. CONCLUSION

The Director certified that Bradley had defeated Finkelstein by nine votes, 3,563 to 3,554. We have accepted one challenge which reduces Bradley's total to 3,562 votes (part II.A.10. of this order, ballot 27). There were fifty-one illegal ballots which were counted and commingled. (Twenty-six found by the Director, twenty-three in accord with part II.A.7. of this order, and one each for parts II.A.4. and II.A.9.) In addition, there were nine illegal ballots which were counted but not commingled. (Part II.A.7.)

This case is REMANDED to the Director with the following instructions:

1. The nine segregated ballots should be deducted from the vote totals of the candidate for whom they were cast. A provisional prevailing candidate will then be apparent.

2. The appropriate proportional reduction formula should be applied to the fifty-one illegally counted commingled ballots.

3. If application of the proportional reduction formula does not change the provisional result noted in step 1, the Director should certify the prevailing candidate forthwith.

4. If application of the proportional reduction formula would change the provisional result achieved in step 1, a new election should be held promptly.

Entered at the direction of the court this 11th day of January, 1989.

David A. Lampen

DAVID A. LAMPEN
Clerk of the Supreme Court

RABINOWITZ, Justice, joined by MOORE, Justice, dissenting.

I dissent from the court's holding that the director improperly counted 32 absentee ballots which had been witnessed by lay persons on different dates. Thus, I would affirm the certification of the Director of the Division of Elections that W.E. "Brad" Bradley is the winner of the election for Seat A in House District 13.

This court's special master rejected the state's contention that the dating of lay witnesses signatures is only directory. Instead the special master ruled that it is a mandatory aspect of absentee voting that lay witnesses be present when the ballot is cast and the voter certificate is executed. AS 15.20.081(d). The special master further reasoned that normally the failure to comply with a mandatory provision which has as its purpose establishing "presence" should prove fatal to these ballots. Nevertheless the special master concluded that the director properly counted these disputed absentee ballots. In so doing the special master reasoned as follows:

> However, once again, the Division has utilized procedures, in this case forms, that are seriously deficient. Option 2 under the witnessing affidavit provides in full:
>
> > If no authorized official is reasonably available, you may have the certificate witnessed by two persons over the age of 18.
> >
> > Witness Signature_____ Date_____

Witness Signature_____ Date_____

at (City/State or Country)_____

Finkelstein Ex. 147, p. 1. Unlike the official executing an affidavit under Option 1, the lay witnesses are not told what it is that they are to "witness." They may reasonably believe that it is sufficient if a person they know to be the individual whose name appears on the oath brings the certificates to them to sign, after the fact. Such an interpretation would be consistent with the type of certification required on permanent fund dividend application forms.

While the witness' certificate is simply unclear, the instructions to the voter on the secrecy envelope are actually misleading. The voter is directed to take the certain steps. The first four are summarized below. The fifth step is quoted as it appears in the instructions.

[1. & 2. Mark the ballot.]

[3. Turn the ballot over and vote the other side.]

[4. After all choices have been marked, put the ballots in the secrecy envelope.]

5. Complete and sign the VOTER OATH on the back of the return mailing envelope. Also have your oath WITNESSED, using OPTION 1 or OPTION 2 described on the back of the return mailing envelope.

Two additional steps regarding mailing follow.

These instruction suggest that the voting process itself need not be witnesses. There is, furthermore, nothing said to inform the voter that his or her oath should be executed in the presence of the lay witnesses. To negate the votes of 35 individuals on the grounds that they did not meet requirements never made known to them or their witnesses would constitute disenfranchisement of a most

> egregious sort. Under these circumstances, the ballots of these individuals were properly counted.

In my view the special master's analysis is in accord with this court's voting decisions. In Fischer v. Stout, 741 P.2d 217, 223, 224 (Alaska 1987) we said:

> In Willis we upheld the decision of a master to count the votes of two voters whose names did not appear on the voters list because the registrars failed to send their registration applications to the Division of Elections. 600 P.2d at 1087. As in Willis, the error with regard to Ms. Munoz's application was 'solely on the part of the election officials.' Id. Her vote should have been counted.

An additional point in Fischer concerned whether the ballot of Daryl Wallace should have been counted. In attempting to correct an error in the address given on his voter registration card, the voter checked the box cancelling his registration. In regard to the issue we said:

> Fischer argues that the voter registration card is confusing and that Mr. Wallace's ballot should have been counted. We agree . . . his vote should have been counted.1/

Of additional significance is that portion of our decision in Fischer v. Stout where in connection with a name change issue it was observed that:

> Accordingly, we will seek a construction of the phrase which avoids the wholesale disfranchisement of qualified electors. See

---

1. Fischer v. Stout, 741 P.2d 217, 224 (Alaska 1987).

Carr v. Thomas, 586 P.2d 622, 626 (Alaska 1978) (footnote omitted).2/

The authorities alluded to above are reflective of this court's recognition that the right to vote is a fundamentally important right.[3] Our own precedents are also in accord with the view that "Absentee voting regulation should not be construed in a manner that unduly interferes with the exercise of this right by those otherwise qualified to vote."[4] In this regard the Supreme Court of Colorado further concluded that:

> Nor should the exercise of the voting right be conditioned upon compliance with a degree of precision that in many cases may be a source of more confusion than enlightenment to interested voters. A rule of strict compliance, especially in the absence of any showing of fraud, undue influence, or intentional wrongdoing results in the needless disenfranchisement of absent voters for unintended and insubstantial irregularities without any demonstrable social benefit.5/

---

2. Id. 741 P.2d at 2?5. In Carr this court noted:

> Courts are reluctant to permit a wholesale disfranchisement of qualified electors through no fault of their own and '[where] any reasonable construction of the statute can be found which would avoid such a result, the courts should and will favor it.'

Carr v. Thomas, 586 P.2d 622, 626 (Alaska 1978).

3. Erickson v. Blair, 670 P.2d 749, 754 (Col. 1983).

4. Id. 670 P.2d at 754.

5. Id. 670 P.2d at 755.

(footnote continued)

Given the importance of the right to vote, and our decisions which have refused to disenfranchise voters due to mistakes of election officials, I conclude that the special master correctly upheld the director's decision to count these 32 disputed absentee ballots.[6] As the special master noted the lay witnesses were given unclear instructions concerning the witness certificate. Additionally, the instructions to the absent voter were "actually misleading." In short, these inadequate directions failed to articulate the precise roles the voter and his or her witnesses were to play in the absentee voting process. Further, there is no indication in this record of fraud, voter coercion, intentional wrongdoing, or a pattern of similarity among the names of the witnesses who signed the witness certifications on these absentee ballots. In such circumstances I would not penalize the absentee voters for the failure of Alaska's election officials to furnish unambiguous instructions concerning the manner in which the absentee voter, and his or her

---

(footnote continued)

The Erickson court went on to reject the rule of strict compliance and in turn adopted a standard of substantial compliance concluding that such standard "is adequate to the task of both preventing fraud in the elections and perserving the absent voter's right of suffrage against unnecessary and technical restrictions."

6. Application of Moore, 154 A.2d 631, 637-38 (N.J. 1959).

two lay witnesses, were required to carryout their respective roles in the absentee voting process.[7]

---

7. Implicit in the resolution I would reach is my agreement with the state's contention that the requirements of AS 15.20.081(d) should be construed as directory, under AS 15.20.203(b)(2), for purposes of determining the consequences of any noncompliance on the part of lay witnesses in executing absentee voter certificates.

STATE OF ALASKA

OFFICE OF THE GOVERNOR

DIVISION OF ELECTIONS
P.O. BOX AF
JUNEAU, ALASKA 99811-0105
PHONE (907) 465-4611

January 18, 1989

The Honorable Pat Pourchot
Alaska State Senator
P. O. Box V
Juneau, AK 99811

Dear Senator Pourchot:

I appreciate your interest in following up on the implementation of that portion of House Bill 284 covering the special advance ballot often called the "submarine ballot." I am happy to report that in its first implementation during the 1988 elections, it seems to have been a success. In our analysis of voter activity in connection with the use of the special advance ballot we found the following:

Number of Special Advance Ballots Sent to Overseas and APO/FPO Voters	493	
Total Returned	349	
Never Opened Because Official Ballot Was Also Received		171
Opened and Counted Because Official Ballot Was Not Received		150
Rejected Because of Deficiencies or Determination of Ineligibility, and Official Ballot Was Not Received		24
Returned Undeliverable by Post Office		4
Total Special Advance Ballots Not Received	114	
Official Ballots Received		105
No Ballot Received From Voter		39

I hope this information is helpful. Please let me know If I can provide any additional assistance.

Sincerely,

Sandra J. Stout
Director

01-A2LH

STATE OF ALASKA

OFFICE OF THE GOVERNOR

DIVISION OF ELECTIONS
P.O. BOX AF
JUNEAU, ALASKA 99811-0105
PHONE (907) 465-4611

January 5, 1989

The Honorable Pat Pourchot
Alaska State Senate
P. O. Box V
Juneau, AK 99811

Dear Senator Pourchot:

In response to questions raised during last week's meeting with your staff, I have outlined a few recommendations which may offer some solutions to the various elections issues we discussed. They relate specifically to voter registration requirements, and clarifications of procedures regarding candidacy filings. These alternatives have not had the benefit of any legal review. However, they may offer some avenues for your consideration.

AS 15.07.060. Required Registration Information

(2) address and other necessary information establishing residence <u>and term of residence in Alaska and in election district</u> if requested;

(4) [TERM OF RESIDENCE IN STATE AND IN ELECTION DISTRICT AND] whether the applicant has previously been registered to vote in another jurisdiction, and, if so, the jurisdiction and address of the previous registration;

<u>Explanation:</u> A voter may register to vote at any time. The criteria for voting in a specific election is that they must be properly registered 30 days prior to the election. The 30 day cut off for registration is the controlling element with regard to their eligibility to vote in a specific election.
As a practical matter, under the Uniformed and Overseas Citizens Absentee Voting Act, the federal government prescribes an official post card form which contains both absentee voter registration application and an absentee ballot application. The form used by overseas and military voters does not specifically request length of residency. Nearly 4,000 Federal Post Card Applications were received this year, and approximately 75% had

to be rejected simply because the voter did not include his or her length of residency. Each of these voters had to be written a letter requesting them to complete new forms which included the length of residency information.

(See suggestions regarding AS 15.25.030.)

AS 15.07.070. Procedure for Registration

(c) The names of persons submitting completed registration forms by mail which are <u>received by the director or election supervisor</u> [POSTMARKED] at least 30 days before the next election shall be placed on the official registration list for that election. The name of a person submitting a completed registration form by mail which was not <u>received by the director or election supervisor</u> [POSTMARKED] before the 30 day requirement shall not be placed on the official registration list for the next election but shall be placed on the master register after that election.

(f) Incomplete or inaccurate registration forms may not be accepted and shall be reexecuted. The date or registration shall be the date of reexecution before a registration official, or the <u>date the application is received by the director or election supervisor</u> [POSTMARK DATE] if the application for registration is by mail.

<u>Explanation:</u> Often registration forms completed and returned by mail do not have a postmark. (Based on our study of 1800 absentee envelopes in 1984, we determined that nearly 1/3 had no readable postmark.) Additionally, voters frequently return by mail registrations and updates in an envelope. Requirement that the postmark date be the date of registration for by mail registrants adds a cumbersome and costly administrative burden to the division because it requires retention of envelopes with the applications, and/or microfilming of both sides of each application form to maintain a permanent record of the postmark, if one is affixed.

AS 15.25.030. Declaration of Candidacy

(2) the full <u>residence and</u> mailing address of the candidate<u>, and the length of the candidate's term of residence in Alaska and in the election district in which the office is being sought</u>;

(8) that the candidate meets [WILL MEET] the specific residency requirements of the office for which he is a candidate;

(14) that the candidate [HE] is not a candidate for any other office to be voted on at the primary or general election [AND THAT HE HAS NOT FILED ANOTHER DECLARATION OF CANDIDACY OR NOMINATING PETITION FOR THE OFFICE FOR WHICH THIS DECLARATION IS FILED]; (Consistent with Statutory c...

...

(b) A person filing a declaration of candidacy under this section shall, on the same date [SIMULTANEOUSLY] file a statement of income sources and business interests which complies with the requirements of AS 39.50.010 - 39.50.200.

Explanation: Length of residency is of specific importance in relation to candidacy filings and candidate eligibility to run for office. Therefore, information about length of residency should be made part of the filing requirement.

With regard to the technical amendment to Section (b), be conflict of interest documents are accepted with the Declaration of Candidacy by the Director of Elections, however, they are really supposed to be submitted directly with APOC. The word "simultaneously" is not appropriate when the documents are actually filed at two separate locations.

Additionally, a new section would have to be added to address your concerns about candidates who withdraw their filings to refile for another seat, withdraw their declarations to file nominating petitions for the general election, or who amend their registrations and declarations of candidacy at the last moment before the filing deadline. Perhaps the simplest way to address these concerns is to provide specifically for the amendment of filings and stipulate a deadline for such amendments.

The second difficulty with the current statutes is in subsection 14 of AS 15.25.030 which requires that the candidate, under oath, state in substance that "he is not a candidate for any other office to be voted on at the primary or general election, and that he has not filed another declaration of candidacy or nominating petition for the office for which this declaration is filed." As indicated above, perhaps the second part of the statement should be deleted from the statutes. As you know, it is not uncommon for a candidate to file for office quite early.

If the oath is to be taken literally, it would mean that no candidate would ever be able withdraw his or her declaration to resubmit a new one, or to make any change his or her candidacy declaration. This may not be practical.

Your attorney can probably assist in clarifying the intent of the legislature in addressing the two issues about which you are concerned. One suggestion might be:

AS 15.25.030. New Section

(c) The information provided in compliance with the requirements of AS 15.25.030 on a declaration of candidacy which as been filed with the director may not be amended, altered or otherwise withdrawn and refiled by the candidate within the 15 days immediately preceding the filing deadline established in AS 15.25.040.

The Division of Elections has always been very grateful for your generous support and commitment. Please let me know if I can be of any further assistance.

Sincerely,

Linda Edgeworth

Linda Edgeworth
Information Officer

OLD

VOTER OATH

I, _____ declare that I am a
(Print Name)
citizen of the United States, and have been a resident of Alaska for at least 30 days. I have not requested a ballot from any other state and am not voting in any other manner in this election. I have not claimed to be a resident of any other state for any purpose during the last 30 days. If I had this oath attested to by witnesses other than an authorized official, it is because no official empowered to administer an oath was available. I swear under penalty of perjury that the foregoing is true.

1. My permanent Alaskan Residence Address is:

_____ _____ , AK _____
Zip Code

(DO NOT use RO. Box, Rural Route #. You must use street address, plat #, legal description, or other physical location description.)

2. Provide at least one of the following for identification purposes:

Voter # _____ Birthdate _____

Social Security # _____

X _____ (Voter Signature) _____

IMPORTANT: THIS CERTIFICATE MUST BE PROPERLY WITNESSED USE OPTION 1 OR OPTION 2 AT THE RIGHT UNLESS PROPERLY WITNESSED, YOUR BALLOTS MAY NOT BE COUNTED

WITNESSING AFFIDAVIT

OPTION 1

This certificate may be executed before an official qualified to administer oaths. The following persons are qualified: Notary Public; U.S. Postmaster or authorized postal clerk; Commissioned Officer of the Armed Services; Judge; Justice; Magistrate; Clerk of the Court; employees of the Alaska Division of Elections or designated absentee voting official.

Subscribed and sworn to before me this _____ day of _____ ,
19 _____, Time _____, at (City/State or Country) _____

_____

Attesting Witness _____

Title _____

(If Alaska Notary, affix seal.)

OPTION 2

If no authorized official is reasonably available, you may have the certificate witnessed by two persons over the age of 18.

Witness Signature _____ Date _____

Witness Signature _____ Date _____

at (City/State or Country) _____

REVIEW BOARD USE

- ☐ Purged (Date) _____
- ☐ Deleted (Date) _____
- ☐ Count Full
- ☐ No Count _____ Reject Codes

- ☐ Federal Only
- ☐ SW Only
- ☐ SW/S/J
- ☐ SW/S
- ☐ SW/J
- ☐ All but DC

Comments/Initials

_____

_____

_____

Ballot Sequence#

REVIEW BOARD USE

- ☐ Purged (Date) _____
- ☐ Deleted (Date) _____
- ☐ Count Full
- ☐ No Count _____ REJECT CODES

- ☐ Federal Only
- ☐ SW Only
- ☐ SW/S/J
- ☐ SW/S
- ☐ SW/J
- ☐ All but DC

Comments/Initials:

_____

_____

_____

BALLOT SEQUENCE #

NEW

VOTER OATH

I declare that I am a citizen of the United States, and have been a resident of Alaska for at least 30 days. I have not requested a ballot from any other state and am not voting in any other manner in this election. I have not claimed to be a resident of any other state for any purpose during the last 30 days. If I had this oath attested to by witnesses other than an authorized official, it is because no official empowered to administer an oath was available. I swear under penalty of perjury that the foregoing is true.

1. My Permanent Alaskan Residence Address is: _____

_____ (City) _____ AK (ZIP) _____

(DO NOT use P.O. Box, PSC Box, Rural Route #. You must use street address, plat#, legal description, or other physical location description in Alaska. If the address you provide is different than that appearing on your current voter record, your eligibility to vote in this election will be based on the new information you have provided.)

2. Provide at least one of the following for identification purposes:

Voter # _____ Birthdate _____

Social Security # _____

3. X _____
(VOTER SIGNATURE – FAILURE TO SIGN WILL RESULT IN YOUR BALLOT NOT BEING COUNTED)

WITNESSING AFFIDAVIT

OPTION 1: This certificate may be executed before an official qualified to administer oaths. The following persons are qualified: Notary Public; U.S. Postmaster or authorized postal clerk; Commissioned Officer of the Armed Services; Judge; Justice; Magistrate; Clerk of the Court; employees of the Alaska Division of Elections or designated absentee voting official.

Subscribed and sworn to before me this _____ day of _____, 19 _____.

Time _____, at (City/State or Country) _____

Attesting Witness _____

Title (IF ALASKA NOTARY, AFFIX SEAL) _____

OPTION 2: If no authorized official is reasonably available, you may have the certificate witnessed by two persons over the age of 18.

Witness Affidavit: By signing below, I attest that to the best of my knowledge the voter voting this ballot is the person he or she purports to be, and that the voter oath was subscribed and sworn to before me.

Signature _____ Signature _____

Date _____ at (City/State or Country) _____

For Secrecy Sleeve

GENERAL INSTRUCTIONS
FOR VOTING BY MAIL
APRIL 4, 1989

HOUSE DISTRICT 13
SPECIAL ELECTIONS

Your ballot for this election must be voted, witnessed and mailed not later than **April 4, 1989.** If you mail your ballot on the last day, remind your postal clerk that the envelope must be postmarked not later than April 4, 1989.

VOTING YOUR BALLOT

1. Choose your candidate, and with a pen, mark an "X" in the box to the right of the name.
2. After you have marked your ballot, put it in the SECRECY ENVELOPE before placing it in the return mailer.
3. **THE LAW REQUIRES THAT YOU FILL OUT THE INFORMATION ASKED FOR ON THE RETURN MAILER. IF IT IS NOT COMPLETE, YOUR BALLOT WILL NOT BE COUNTED.**

VOTER OATH

1. To vote in this election, you must be a registered voter **AND** an Alaska resident. You are asked to give your physical residence address **WITHIN THE STATE OF ALASKA.** This means:
   - give your street address, highway name, milepost, trailer park and space number, tract or plat number. **DO NOT use a P.O. Box, PSC Number, Star or Rural Route Number as a "residence" address.**

(Instructions continued on reverse side)

NOTE: If the address you give is different than that on your current voter record, it will be treated as a change of address. The new address you give will be used to decide if you are still eligible to vote in this election.

2. You must give at least one: Voter Number, Social Security Number or Birthdate.
3. **READ AND SIGN THE VOTER OATH IN THE PRESENCE OF YOUR WITNESS(ES).**

WITNESSING AFFIDAVIT

1. You **MUST** have your Voter Oath properly witnessed. Choose Option I, or Option II described on the return mailer. Your witness(es) are attesting that you are the person you claim to be, and that you signed your Voter Oath in their presence.

IMPORTANT!
Your ballot will not be counted if you:

1. fail to give your residence address **WITHIN THE STATE OF ALASKA:**
2. fail to give your voter number, or social security number, or birthdate;
3. fail to sign your Voter Oath in the presence of your witness(es);
4. fail to have your ballot properly witnessed; or
5. fail to vote and mail your ballot on or before April 4, 1989.

Provisions

Section 12 — Sets deadline for receipt of voted absentee ballots mailed from inside U.S. to 10 days after election rather than 15.

Section 13 — Sets same deadline for APO/FPO/overseas.

Advantages

1. Closes potential window for fraud by tightening the deadline. Current 15 day deadline offers opportunity to "work" absentee list following announcements of election night returns to encourage unvoted ballots to be voted and sent in after election day.

2. Tighter deadline will allow earlier certification which is critical after primary.

3. All counting will be done at regional level so that State Review Board can audit final numbers. Under current statutes, audit begins before deadline is reached and counting is still being completed at Director's level.

Supporting Evidence

1. Only 6 states allow receipt of ballots after close of polls. Those only allow two or three days. At 10 days Alaska would still be the most liberal state.

2. Reviewed 1857 absentee ballots from 1984 general.

   a. 85 - 90% voted absentees arrive by election day.
   b. 1/3 of returned ballots had no readable postmark.
   c. 30% were not returned at all and could be "worked" after election night returns are announced.
   d. Of postmarked ballots, 98% took 5 or fewer days to be received.
   e. 98.5% posted from APO/FPO and Overseas addresses arrived within less than 10 days of postmark.
   f. 10 day extension was deemed adequate by court in Colorado case, with regard to military and overseas ballots.

Part of floor amendments to HB884

Conforming Sections

HB 211

The following sections of the bill are conforming amendments:

(9) (OK) 12 13 OK

Sections 14, 15, 17, 18 relate to counting and review schedule based on the 10 day deadline.

VOTED ABSENTEE BY MAIL BALLOT DEADLINES
(And Conforming Sections)

SUMMARY OF RECOUNTS
1978 - 1986

* Indicates OVERTURNED RACE

Year	District		Original Vote Spread	Recount Vote Spread	Charge
1978 Gen	S-F	*Kelly (R) Willis (D)	+4	+1	Free
1978 Prim	Governor	Hammond (R) Hickel (R)	+98	+98	Free
1980 Gen	H-6	Charney (D) Elliott (R)	+120	+116	Deposit
1980 Gen	H-7	Bierne (R) dal Piaz (D)	+76	+59	Deposit
1980 Gen	H-9	Kubitz (D) Buchholdt (D)	+53	+54	Deposit
1980 Gen	H-16	Chuckwuk (D) O'Hara (R)	+5	+27	Deposit
1980 Gen	H-13	Fritz (R) Malone (D)	+8	+13	Free
1980 Gen	H-20	Koponen (D) Smith (D)	+50	+57	Deposit
1982 Prim	S-J	Goddard (R) McCracken (R)	+3	+2	Free
1982 Prim	H-23	Fondell (R) Hennes (R)	+19	+19	
1982 Prim	H-24	Juettner (R) Wallis (R)	+6	+8	Free
1982 Gen	S-D	Fischer (R) Smith (D)	+52	+53	Free
1982 Gen	H-12	Uehling (R) dal Piaz (D)	+35	+33	Free
1984 Prim	H-12	Childers (D) *Ratcliff (D)	+1	+1	Free

Year	District	Vote Spread		Vote Spread	Charge
1984 Prim	H-14	Barnes (R) Pignalberi (R)	+997	+998	Deposit
1984 Gen	H-5A	Navarre (D) Sikorski (R)	+79	+72	Deposit
1984 Gen	H-5B	Fritz (R) Marrou (L)	+53	+56	Deposit
1984 Gen	H-10A	Boucher (D) Cowdery (R)	+47	+38	Free
1984 Gen	H-11	Jenkins (R) McKinnon (D)	+33	+32	Free
1984 Gen	H-25	Binkley (R) Vaska (D)	+74	+82	Deposit
1986 Prim	S-F	Faiks (R) Vonhippel (R)	+2296	+2296	Deposit
1986 Gen	S-H	Fischer (D) Uehling (R)	+15	+12	Free

NO REFUNDS WARRANTED

ONLY 2 RACES OVERTURNED - BOTH IN SITUATION IN WHICH THE VOTE SEPARATION WAS 4 OR FEWER VOTES.

Bradley request rejected

Times - 1/27/89

TIMES STAFF

The Alaska Supreme Court this morning rejected Republican House candidate Brad Bradley's request for reconsideration of its decision that forces a new election in Bradley's race against Democrat David Finkelstein.

The court decision should clear the way for the scheduled April 4 election in disputed House seat 13-A.

Bradley's motion, filed Jan. 20, asked the court to reconsider its Jan. 11 decision that he could not be declared winner of the East Anchorage seat.

Initial counts in the race gave first Finkelstein and then Bradley a narrow lead. However, Superior Court Judge Joan Katz recommended a new election, saying the Division of Elections had made so many ballot-counting errors that it was impossible to say who won.

A final recount ordered by the Supreme Court technically gave Finkelstein an eight-vote margin, but since the tally was based on a formula and not a ballot count, justices said it could not be used to award an election victory to him.

Bradley's motion for reconsideration argued that the court erred in invalidating 32 absentee ballots that were improperly witnessed.

Voting in April

Times - 1/24/89

WE'LL GET a trial run at the April elections that the Anchorage Assembly have decided are best for us.

Beginning in 1993, the assembly decreed a week or so ago, Anchorage's local elections will be held on the third Tuesday of the fourth month of the year, instead of the first Tuesday of the 10th month of the year. That will put Anchorage out of synch with the rest of the cities and boroughs of Alaska, which hold their local elections in October.

Well, no matter. And maybe no big deal, because back in the old days even the Alaska primary elections were held in the springtime — and everybody survived just fine. The assembly said it voted for the change, four years from now, to get our local elections removed from a slot between the August state primary and the November general elections — and thus give the candidates a shot at having the undivided attention of the voters.

WE'LL GET a chance to see how all of this will work this April 4.

That's the date picked by the state Division of Elections for a rerun of the Brad Bradley-David Finkelstein race for the Alaska House of Representatives from District 13-A in east Anchorage.

Mr. Finkelstein, a Democrat, came out of the election with an unofficial edge.

But after a recount Mr. Bradley, a Republican, a former state senator and a former member of the Amchorage Assembly, was certified as the winner.

Mr. Finkelstein sued, and a Superior Court judge — acting as a master for the Supreme Court — recommended a new election, contending the recount was laced with errors. Using some kind of a weird formula to allocate proportionate shares of the vote, the court held that Finkelstein had won — but said a new election should be held.

Any scheme that attempts to allot percentages of votes to anybody is a nutty and mysterious way to treat ballots cast by voters, but that's another story.

IN THIS case, as a result of all this court interference under terms of a state law that should be repealed, the 1989 legislative session will be in its 86th day, with only 34 days left to go, before the voters of the district get a chance once again to pick their representative.

Meanwhile, Gov. Steve Cowper — acting under the authority of another state law that ought to be tossed out — has appointed a legislator for the district. He seems to have a made a good choice, but the fact remains the seat went to a person who had never run for office and probably was unknown to most of the residents of the district.

But, all those things aside, we will see how an April election works in these days and times.

We may find we like it.

Times - 1/21/89

Bradley asks high court to reconsider

Republican argues against new election

By PATTI HARPER and BOB ORTEGA
Times Writers

Republican House candidate Brad Bradley has asked the Alaska Supreme Court to reconsider a Jan. 11 ruling forcing him to square off against Democratic opponent David Finkelstein in a second election April 4.

Initial counts in the race for House District 13, Seat A gave Finkelstein the lead. A recount then gave Bradley a narrow victory.

Two weeks ago, however, Superior Court Judge Joan Katz recommended a new election, saying the Division of Elections had made so many ballot-counting errors that it was impossible to say who had won.

A final recount ordered by the Alaska Supreme Court technically gave Finkelstein an eight-vote margin, but since the count was based on a formula, and did not reflect specific ballots, Lt. Gov. Steve McAlpine ordered a new election.

Bradley's motion for reconsideration, filed by attorney David Devine on Friday, argued that the court erred in invalidating 32 absentee ballots that were improperly witnessed.

Bradley's eight-page request for reconsideration asserted that the majority "overlooked or misconceived" certain "propositions of law."

Those propositions include presumptions of the validity of an election and that the ballot of a voter "not morally at fault" for a mistake normally should be declared valid.

The majority opinion of Chief Justice Warren Matthews and Justices Edmond Burke and Allen Compton concluded the 32 absentee ballots should not have been counted because the dates were different for each of the two required witness signatures. If the witnesses signed on different dates they both could not possibly have seen the voter sign the required certificate, which is what the court interprets state law to require.

The purpose of the law "is to insure that the ballot was marked by the voter, and not someone else, in circumstances free from coercion," the justices said.

The two dissenting justices agreed with Katz that though the ballots normally should

See Bradley, page B-2

Bradley: Republican hopes to avoid new election

Continued from page B-1

not have been counted, the voters and witnesses were given "unclear" direction on the forms they signed. Justices Jay Rabinowitz and Daniel Moore decided that absent any evidence of fraud or coercion, those people should not be disenfranchised.

In his motion, Bradley argued Finkelstein must show there was some sort of actual "fraud, coercion or other impropriety" before any of the ballots may be invalidated.

There is no evidence "when even hinted at some wrongful conduct by these voters or anyone else," the brief states.

"Thirty-two qualified people cast ballots in order to have some say in their government," Bradley argued.

"These voters are being disenfranchised for noncompliance with a technical rule which was never made known to the voters," he said.

"Neither the absentee ballot envelope nor the absentee ballot instructions advised the voters that witnesses had to sign on the same day."

The requirement that two people witness the marking of a ballot may actually provide a greater opportunity for coercion of voters, Bradley said.

"Two witnesses could gang-up to coerce a voter more effectively than one," he said.

Don Clocksin, an attorney for Finkelstein, said showing fraud or misconduct was not required in a recount appeal such as Finkelstein filed with the Supreme Court. They needed only to show that there were mistakes in the counting of ballots, he said.

He predicted the court will reject Bradley's request. The court rarely reconsiders its decisions.

"It seems an act of desperation, an effort to change at least one vote on the Supreme Court without any new arguments," Clocksin said of the motion for reconsideration. "He made his best shot and he lost, and I don't know how many times he gets to reargue it."

Clocksin said, "Some of the arguments made by Bradley's lawyer really should be addressed to the legislature because they argued that the law should be different than it is."

He said Bradley essentially is arguing that two witness signatures should not be required.

"I hope Mr. Bradley works with the legislature, of which Mr. Finkelstein expects to be a part, to correct any errors he believes exist in the election laws," Clocksin said.

"I think the bottom line here is that no one, repeat no one, knows which candidate got more votes, and that's why we're having a new election," he said.

Bradley, Finkelstein face off again April 4

Times - 1/19/89

By PATTI HARPER
Times Writer

A new election to decide whether Republican Brad Bradley or Democrat David Finkelstein will represent an Anchorage State House district will be held April 4, Lt. Gov. Stephen McAlpine said.

"That is the date unless the U.S. Department of Justice or some court orders us otherwise," he said Wednesday. Some news reports that the election would be held later in April were premature and incorrect, he said.

Finkelstein was originally declared the winner of the District 13 race after the Nov. 8 election. But Bradley came out on top after a recount in early December. A recent Alaska Supreme Court analysis of disputed ballot issues resulted in an order for a new election.

Democrat Ann Spohnholz was appointed by Gov. Cowper Wednesday to represent the Mountain View and East Anchorage district until the new election is held.

See Runoff, page A-10

Runoff: Election

Continued from page A-1

McAlpine said the April date leaves enough time for the Division of Elections to prepare emergency regulations for the election and have those regulations approved by the U.S. Department of Justice.

The Department of Justice requires 60 days for its review. McAlpine said he will request an expedited review, but he was skeptical of chances for a decision coming early enough to set an earlier election date. The state must give the public at least 40 days advance notice of an election, he said.

Elections officials will send the proposed regulations to federal officials for review sometime within the next week, he said. They will ask that some of the things required for normal elections not be done for this special run-off.

For instance, McAlpine said absentee voter stations will not be opened statewide, and overseas voters will have to request absentee ballots instead of having them mailed automatically.

Candidate says system worked

Although all the facts in Saturday's editorial about the Bradley-Finkelstein election are correct, I would like to take exception with your conclusion. I don't believe that the system failed, or that the Division of Elections made major errors. In fact, the Supreme Court found that in almost all cases, the Division of Elections conducted the election perfectly.

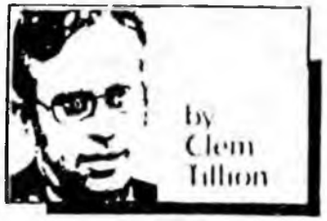
What the Supreme Court did say was that one ballot (out of 7,000!) wasn't counted correctly, and the instructions for absentee ballot witnesses need to be improved. The election was close enough that even these small changes were enough to make a difference.

I don't believe that any blame needs to be placed in this election. I was ahead by 3 votes when the election was certified, behind by 3.9 after the recount, ahead by 1.17 after Judge Katz's review, and ahead by 8 after the Supreme Court decision. Obviously, even the slightest reinterpretation of vote totals was enough to affect the outcome.

ADN 1/12/89

— *David Finkelstein*

Courts have no right to deprive citizens of representation



by Clem Tillion

It was with a sense of alarm that I heard the courts had vacated the election in the Bradley-Finkelstein affair.

I am less disturbed by the thought that the court would look at an election or even that the court would go so far as to tell the Division of Elections that this or that ballot should not be counted than I am that the legislature met without all the areas of the state being represented. This is wrong.

The court in its zeal left several thousand people unrepresented. The judges should be tried for such an action.

When John F. Kennedy became president of the United States by carrying the state of Illinois by 8,000 votes when 13,000 illegal ballots had been counted in Chicago, the thought of leaving our nation without a president was not even considered.

When the court ruled that the election should stand because no one could prove how many votes had been stolen by which party, a few of us choked. I feel to this day that Kennedy did not truly win a majority, but it was better that he be my president than the office be left vacant.

It should be possible to arrest a legislator for major crimes such as murder, but only the body to which he or she was elected should have the right to remove that person from his elected office.

The people should never be left without their legal voice as a result of the action of another branch of government.

The special privileges given elected officials under both the federal law and in Alaska's Constitution are not given because our elected officials are in themselve so great, it's that the voice of the people shall not be muzzled however inane their voice shall sound. The reason a legislator may not be stopped on his way to and from the chambers or that he or she may not be removed by any but a body of their fellow legislators for acts committed is to ensure that the representatives of the people are not silenced by police, the executive body or the judiciary.

It was not always this protected. In the freewheeling days of Boss Tweed in New York, his police would stop opposition members on their way to the council chambers, and the Boss' tame judges would hold them long enough to avoid a vote or even to avoid embarrassing debate. If, when freed, they spoke out in protest of the arrest and treatment, the courts served as a deterent to future members who might act so rationally.

Now while the excesses of men like Boss Tweed are today at least partly controlled, the purpose behind the safeguards in our laws and in the state constitution are still valid.

The peoples' voice shall not be silenced, and in a representative form of government, what more complete a silence can there be than that of leaving the seat empty.

For any court to rule that neither candidate has won is a dangerous precedent to allow any judge or any body of judges to set.

Halibut Cove charter boat skipper Clem Tillion is a former president of the Alaska Senate.

Times 1/15/89

The court rules: a failed election

Daily News 1/14/89

As the Alaska Legislature moves into its second week, Anchorage's House District 13A remains without representation. The more than 7,000 voters who cast ballots in the November election between Republican Brad Bradley and Democrat David Finkelstein have been told, "Sorry, your votes don't count. We'll have to do it again."

Meanwhile, Gov. Steve Cowper is expected to appoint an interim representative. With the district facing a minimum of two months without elected representation, circumstances demand a quick method of filling the void, and perhaps the best solution is to let the governor chose someone.

No, the quarrel isn't with the governor's authority, nor with the Supreme Court's ruling that required a new election, given the situation the justices had to deal with. The quarrel is with an elections system that let things get this far.

Close elections are a fact of life in Alaska. A handful of votes have determined more than one election in the past. Thus, it behooves the people who run state elections — the Division of Elections and Lt. Gov. Steve McAlpine, who supervises the division — to have the resources, regulations and equipment to deal with tight races.

In the counts and recounts of the Bradley-Finkelstein race, a number of problems were discovered.

One was ballots that had been mismarked or marked for both candidates. Some of the mismarkings stemmed from troubles with the machines that punch the ballots.

Another was deficient voter instructions included with absentee ballots. The Supreme Court concluded that the instructions failed to explicitly state that the vote must be cast in the presence of two witnesses.

Voters deserve machinery and election guidelines that prevent such miscounts. When problems arise, elections staff must have the training to handle them properly. Voters deserve a system that produces accurate, conclusive and timely vote counts.

The system failed this time. The voters who went to the polls in November have been, in effect, disenfranchised. A fundamental tenant of democracy went unfulfilled. The Division of Elections, the lieutenant governor, and, if necessary, state legislators should begin work now to assure it doesn't happen again.

McAlpine orders vote for District 13A

By SHEILA TOOMEY
Daily News reporter

Lt. Gov. Steve McAlpine on Thursday ordered a new election for House seat 13A, after a recount of 80 disputed votes failed to establish a clear winner in the contest between Republican Brad Bradley and Democrat David Finkelstein.

The final recount, ordered by the Alaska Supreme Court, put Finkelstein eight votes ahead, but because his lead was based on a mathematical formula, and not on counting actual ballots, he could not legally be declared the winner.

Since Bradley also could not be declared the winner, a ruling by the Supreme Court Wednesday required that a new election be held.

Finkelstein won election night tabulations, but Bradley asked for a recount, setting off a mathematical marathon leading to the court decision that leaves the district without a representative.

Gov. Steve Cowper plans to appoint an interim representative from the district within a week, said press aide David Ramseur. Cowper met with legislators Thursday and his office was already "compiling a list of potential appointees," Ramseur said.

The seat is legally vacant and does not belong to any party, he said, so Cowper is free to appoint anyone who is a resident of the district.

McAlpine warned that the earliest a new election can be held is in "a minimum — and I think that's the important word — a minimum of 60 to 75 days." If the race is close enough for a recount or court challenge, it could take considerably longer to seat an elected District 13A representative.

McAlpine said he may decide to postpone the election until after the current 120-day legislative session is over, to ensure the people of the district get effective representation during the crucial last few weeks.

"Somewhere around the fifth of May, some poor guy is going to end up sitting down in the legislature when the bills are flying by ... If someone would get sworn in in the last 10 days of the session, that would not serve the district well."

In 1977, when a western Alaska House race between Nels Anderson Jr. and Joe McGill had to be done over, an interim representative, appointed by then-Gov. Jay Hammond, served until March 11.

The Associated Press

Lt. Gov. Steve McAlpine explains the results of the ballot recount.

Finkelstein, who got the news of his sort-of victory in Anchorage, urged that the election be held as soon as possible. He estimated that only about 50 percent of the voters who cast ballots in November would be likely to turn out, making any prediction about a winnner impossible.

Bradley was in Juneau Thursday, where he predicted to The Associated Press that he would win the re-match.

In November, Finkelstein won all the District 13A precincts except Elmendorf Air Force Base which cast enough votes for Bradley to all but wipe out Finkelstein's lead.

In the history of counts and recounts, Finkelstein won the first. Bradley then asked for a recount and won that. Finkelstein went to Superior Court and won that, by 17 votes. But no one won the count that counted, the last one.

Following the Supreme Court's directive, the Division of Elections started with a final vote count, which gave Bradley an eight vote lead over Finkelstein, 3,562 to 3,554. Then they subtracted two sets of illegal votes from those totals.

Subtracting nine ballots that made up the first set resulted in seven votes being subtracted from Bradley and two from Finkelstein. That left Bradley with a three vote lead, making him the provisional winner.

Next, 51 votes were subtracted from the two totals. These votes — all absentee or challenged ballots — were disqualified on the basis of the envelopes they came in. Because the actual ballots had long

See Page C-3, RECOUNT

RECOUNT: Election ordered

Continued from Page C-1

since been turned in with the more than 6,000 ballots cast in the original election, they were subtracted using a proportional formula.

In this step, Bradley lost 28 votes and Finkelstein 10, putting Finkelstein ahead by eight.

So why wasn't Finkelstein declared the winner? Because declaring a winner on the basis of a formula as opposed to known, counted votes is not acceptable, according to the Supreme Court. That left District 13A with a winnerless race and a need for a new election.

After announcing the rematch, McAlpine listed some of the things his office has to do before the reballoting can take place.

First, he has to get permission from the Alaska courts. "I do not have to comply with every single state law" governing general elections, such as issuing a voter pamphlet and opening absentee voting booths around the state.

That's because Alaska is on a federal list of states that once practiced voter discrimination, the procedural details of the special election must be approved by the U.S. Department of Justice, which has 60 days to issue a decision.

The race will be strictly between Finkelstein and Bradley, McAlpine said. Only the voting has been reopened, not the filing period. And normal registration rules will apply, which means anyone who hopes to vote in the special election must be registered in the district 30 days ahead of time.

McAlpine was reluctant to estimate how much the special election will cost. Probably somewhere between $100,000 and $200,000, he said when pushed for a number. "It will be done by the cheapest, most effective method," he said.

Times - 1/13/89

Appointment will be made within week

TIMES STAFF
and ASSOCIATED PRESS

Gov. Steve Cowper will appoint someone to represent District 13-A "as soon as possible" until a spring election is held, but it could take as long as a week before the appointment is made, said a spokesman from the governors office.

In the election, to be held in mid-March at the earliest, Anchorage voters will get another chance to decide whether Republican Brad Bradley or Democrat David Finkelstein will represent them in the House of Representatives.

Cowper spokesman David Ramseur said the governor is asking legislators for names of possible appointees and that Cowper had one or two ideas of his own on people to appoint.

McAlpine, the state's top elections official, said a new election in the disputed District 13-A race was necessary because of a state Supreme Court order issued Wednesday.

The court ordered a recalculation of the Nov. 8 general election results after Finkelstein challenged the Elections Division's recount of the close contest. Because the recalculation indicated a change in the outcome, with Finkelstein holding an eight-vote edge, a new election was ordered.

Finkelstein had not yet recommended to Cowper, also a Democrat, who should fill the seat temporarily.

"It's an amusing situation," Finkelstein said. "I'd like to have my wife appointed and Bradley would like to have his wife appointed, but I don't think either one is appropriate because of their ties to the campaign. The best person is someone not tied to the campaign," he said.

McAlpine said the election cannot be held for at least 60 days because the Law Department is required to review the election procedure during that period.

The initial election results showed Finkelstein with a three-vote victory, but a recount gave Bradley the election by nine votes. After Finkelstein filed his challenge, the Supreme Court last week stayed Bradley's swearing-in pending resolution of the case.

The court ordered Wednesday that about 60

See Cowper, page B-5

Cowper: Taking suggestions

Continued from page B-1

challenged votes be reconsidered, most under a complex formula used to determine whether errors might have affected the outcome of an election. The court said if the formula showed a different outcome, that a new election be held.

Justices Jay Rabinowitz and Daniel Moore were the dissenters in the 3-2 decision. They argued that Bradley should be certified as the winner of the Nov. 8 election.

Bradley said after the news conference that the court's order was "rather nit-picking and after the fact." He said he was confident he would win in another election, however.

Finkelstein said he was pleased that a new election would be held.

House Democrats met immediately following McAlpine's announcement.

Court requires recount

Disputed ballots to be reconsidered

By SHEILA TOOMEY
Daily News reporter

The Alaska Supreme Court Wednesday handed the disputed Bradley-Finkelstein House race back to the Division of Elections with instructions to count 60 votes slightly differently and figure out if there's a winner or if a new election is necessary.

Finkelstein

Bradley

Lt. Gov. Steve McAlpine said Wednesday that his office expects to have the latest, and perhaps last, recount of the District 13A vote finished today.

The ballots and absentee voter envelopes in dispute were locked in the Supreme Court chambers and not accessible Wednesday night, McAlpine said. An elections official, accompanied by security personnel, will retrieve them today and the re-calculations ordered by the high court should be done fairly quickly, he said.

David Finkelstein, the Democratic contender in a race that has turned into a marathon, said he knows where the disputed votes will go and predicted a new election will be ordered.

Republican Brad Bradley could not be reached for comment. His attorney, David Devine, said he does not remember how nine of the disputed ballots were voted so could not predict an outcome.

So far, each candidate has been a winner at least once. Finkelstein won the first count, right after the Nov. 8 election, by

See Page E-3, DISPUTE

Anchorage Daily News · Thursday, January 12, 1989 E3

DISPUTE: Court orders another count in House election

Continued from Page E-1

three votes. Bradley won the first recount, by nine votes. Finkelstein won a decision from Superior Court Judge Joan Katz, sitting as a special master for the Supreme Court. She put him 17 votes ahead and ordered a new election, saying the original one was too flawed to figure out who won.

Meanwhile, the 13A seat in the state House of Representatives remains vacant as the legislative session moves toward the end of its first week.

Should a new election be ordered, Gov. Steve Cowper is expected to name an interim representative, with House approval. Finkelstein said he has asked Cowper not to appoint him.

"It's not my seat. It's not Mr. Bradley's seat," he said. "It should be someone not connected to either of us."

Following the instructions issued by the Supreme Court Wednesday, three outcomes are now possible: either Finkelstein or Bradley could be declared the winner, or a new election could be ordered. Finkelstein said it is very unlikely he will pick up enough votes to win outright.

When the Supreme Court finished its count Wednesday, the candidates were eight votes apart, with Bradley leading 3,562 to 3,554. But the court declared 60 of these votes invalid and ordered them subtracted from the totals in a two-step process.

Step 1 involves counting nine ballots that have been declared illegal and simply subtracting them. At this point a provisional winner will be named, the court said.

Step 2 involves 51 envelopes that once contained absentee ballots. For a variety of reasons, the votes submitted in these envelopes have been declared invalid and they must also be subtracted.

Unfortunately, these ballots were long ago mixed with all the other ballots, so it is impossible to know for certain how many should be subtracted from each candidate.

As in past disputed elections, the court ordered these ballots assigned to the candidates in proportion to the number of known absentee ballots they received. Because Bradley received many more absentee votes than Finkelstein, it is expected that Bradley will lose more of these disputed votes, as he did in the recounts completed to date.

If the provisional winner is still ahead after Step 2, then that candidate should be declared the winner, the court ruled.

If the proportional subtraction changes the provisional outcome, a new election should be held, the court said. In the past, the court has held that declaring a winner on the basis of unknown votes would be inappropriate.

Because applying a proportion is likely to result in numbers that include fractions, it is possible that Bradley or Finkelstein could come out ahead by less than a vote.

Times 4/10/89

Intrusion by the courts

THE ALASKA Supreme Court treads on mushy constitutional tundra when it tells the legislature, as it did last week, to deny a seat in the House of Representatives to either of two candidates claiming election from an Anchorage district, pending the high court's determination of who actually won the race.

At the risk of meddling in affairs of the judiciary, let's express an opinion that this is a matter which is no business of the courts or the judges.

The courts might be called upon to settle a legal dispute — there's no argument about that.

But neither prior to nor after such a decision has the court the constitutional right to order the legislature not to seat whoever it wants to admit as a member.

THE AUTHORITY is clearly spelled out in the Alaska Constitution.

Says Section 12 of Article II of that guiding document:

"The houses of each legislature shall adopt uniform rules of procedure. Each house may choose its officers and employees. Each is the judge of the election and qualifications of its members . . ."

The House and Senate, in other words, are the judge and jury of those who will be legislators. The constitutional language couldn't be more specific. In an election dispute of this nature, the legislative body involved has the final say.

Not a judge of the Superior Court.

Not the justices of the Supreme Court.

They have no authority, as we read this constitutional provision, to even suggest — much less issue a formal stay, as they did last Saturday — to the Alaska House that it should not swear in Republican Brad Bradley as the new representative of an East Anchorage district.

Mr. Bradley, a former state senator and most recently a member of the Anchorage Assembly, was certified after a recount as the victor in his race last November with Democrat David Finkelstein. Mr. Finkelstein filed suit, and Superior Court Judge Joan Katz did her own thing with the ballots and declared the Democratic contender as the winner, using some kind of a percentage formula to allocate a share of certain votes that she found questionable.

WE DON'T question Judge Katz' sincere attempt to sort through a bunch of challenged ballots to come up with a decision.

But that's a process that already had been handled by the state election judges.

And the ultimate decision — despite whatever the results might be, in the eyes of whoever last looked at the ballots — belonged to the members of the House, not to the justices of the Supreme Court.

The legislature — not the court — is the judge of its members.

The House, had it been so inclined, could have told Mr. Bradley, yesterday to step aside on its own determination that he had not won the election. And it could have called Mr. Finkelstein forward to be sworn in as the new representative from Anchorage.

What it might more properly have done is declare the seat still vacant and directed the state elections office to conduct a new election in the district.

But that is the legislature's business, not the courts.

Our constitution, we suggest, says as much in language so plain that it's surprising the high court would even bother to get involved.

Court may call re-vote

By PATTI HARPER
Times Writer

1/6/89

The Alaska Supreme Court was meeting at press time today to decide whether it should order a new election in the District 13 State House race between Republican Brad Bradley and Democrat David Finkelstein.

The state's attorney in the case, John Rubini, wants the court to uphold the election results. But he asked the five justices to order that the declared winner, Brad Bradley, not be sworn in next week if they cannot reach a decision today.

Bradley's attorney, David Devine, said he opposes that idea. It would leave voters in the East Anchorage district without representation, he said. "I don't think Mr. Bradley should be kept from taking office," unless there is a decision ordering a new election, he said.

Anchorage Superior Court Judge Joan Katz recommended to the court late Thursday that the election be re-run. She was acting as a special master to clarify the vote counting issues in Finkelstein's legal challenge to Bradley's apparent nine-vote win.

Katz agreed with Finkelstein that a number of ballots were improperly counted. She calculated that vote totals should be adjusted in a way that reverses the outcome and puts Finkelstein ahead by 1.17 votes.

All attorneys agreed today that she made an error and the actual difference between the two candidates using her decisions is .41, less than one vote.

Since there is no way to identify which of the thousands of ballots counted were the ones improperly cast, the calculations cannot reflect actual votes.

All parties had agreed that if the challenge had this result a new election should be called, Katz noted.

"We haven't even thought of that," Division of Elections spokesperson Linda Edgeworth said about the logistics of holding a new election.

The state wants the Supreme Court to decide elections officials properly declared Bradley the winner.

See Re-election, page A-8

Re-election: Court considers election to settle disputed race

Continued from page A-1

Any new election would take at least 60 days to satisfy election law requirements, said John Rubini, an attorney representing the state. That's half of the 120-day legislative session.

Edgeworth said this morning that it might be possible to trim that timeline to 40 days.

Gov. Steve Cowper would have the responsibility to appoint someone to represent the district until the ultimate winner is decided, Rubini said.

Speaker-elect of the House, Sam Cotten, D-Eagle River, said this morning that he's already been contacted by the governor's office for suggested appointees. Cotten said he didn't have any names for Cowper.

"We certainly won't seat Bradley or Finkelstein (when the legisature convenes Monday) if the court has called for a new election," Cotten said. "We're going to follow what the court directs."

Cotten said the court decision won't affect the organizational structure of the House even though Bradley would be minority member if seated while Finkelstein would joing the majority coalition.

Finkelstein was the first apparent winner in the hard-fought race to represent the East Anchorage district, which includes Mountain View and Elmendorf Air Force Base. He was initially certified the victor after the Nov. 8 polling.

But a recount in early December left Bradley ahead 3,563 to 3,545.

Finkelstein appealed to the high court, challenging more than 70 votes for a variety of reasons.

Katz agreed with Finkelstein that three of the votes credited to Bradley should be thrown out because the ballots were not clearly punched, the marks falling between the two candidates' names.

Today, attorneys in the case agreed that one of those votes was not counted and so should not have been deducted from Bradley's total.

Katz also agreed with Finkelstein that nine other ballots were improperly counted.

The division had already decided another 26 absentee ballots were improperly cast. Since none of those votes could be determined, the candidates were each docked a portion of a vote for each vote thrown out. The proportions were based on the percentage of the total absentee vote each candidate had received.

Since Bradley got more of that vote, he was docked more. That is what left Finkelstein ahead in Katz's calculations.

Bradley was docked about .62 votes for for every vote thrown out, while Finkelstein was docked about .38.

Devine argued to the high court this morning that Katz was wrong to accept Finkelstein's arguments.

Devine said he believes the court will declare Bradley the legitimate winner.

SB

66

HOUSE COMMITTEE REPORT

(7)

Date Referred: March 3, 1989 FURTHER REFERRALS: JUDICIARY

Date of Committee Action: 5/7/89

The LABOR & COMMERCE Committee considered: CSSB 66(Rls)

CS FOR SENATE BILL NO. 66 (Rules)
[IMMUNITY/TREATMENT OF INTOXICATED PERSONS]
"An Act relating to immunity for treatment of intoxicated or incapacitated persons; and providing for an effective date."

RECOMMENDATIONS:
[ ] be replaced with HCS CSSB 66 (L+C) [ ] the same title [ ] a new title
[ ] have attached amendment(s)
[ ] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[ ] fiscal impact _____
[ ] zero fiscal note _____
[ ] zero with analysis _____

APPROVES PREVIOUS: (Date/Dept)
[ ] fiscal note(s) _____
[ ] zero fiscal note(s) _____
[ ] zero fn/analysis _____

SIGNING DO PASS:

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend
Mark Bayer		X	
		X	
		X	
		X	
		X	
		X	

Chairman's signature

ted" are never understood to signify positive will or intention, unless when joined with other words which show that they are to receive an artificial or unusual, if not an unnatural, interpretation. Lexington v. Lewis, 10 Bush, Ky., 677.

"Negligence" is not synonymous with "incompetency," since the competent may be negligent. Alabama City, G. & A. Ry. Co. v. Bessiere, 190 Ala. 59, 66 So. 805, 806; Barclay v. Wetmore & Morse Granite Co., 92 Vt. 195, 102 A. 483, 496.

See Care.

Actionable Negligence. See Actionable Negligence.

Collateral Negligence. In the law relating to the responsibility of an employer or principal for the negligent acts or omissions of his employee, the term "collateral" negligence is sometimes used to describe negligence attributable to a contractor employed by the principal and for which the latter is not responsible, though he would be responsible for the same thing if done by his servant. Weber v. Railway Co., 20 App.Div. 292, 47 N.Y.S. 11.

Comparative Negligence. See Comparative Negligence.

Concurrent Negligence. Arises where the injury is approximately caused by the concurrent wrongful acts or omissions of two or more persons acting independently. Carr v. St. Louis Auto Supply Co., 293 Mo. 562, 239 S.W. 827, 828.

Contributory Negligence. The act or omission amounting to want of ordinary care on part of complaining party, which, concurring with defendant's negligence, is proximate cause of injury. Honaker v. Crutchfield, 247 Ky. 495, 57 S.W.2d 502.

Any want of ordinary care on the part of the person injured, (or on the part of another whose negligence is imputable to him,) which combined and concurred with the defendant's negligence, and contributed to the injury as a proximate cause thereof, and as an element without which the injury would not have occurred. Railroad Co. v. Young, 153 Ind. 163, 54 N.E. 791; Barton v. Railroad Co., 32 Mo. 253, 14 Am.Rep. 418; McLaughlin v. Electric Light Co., 100 Ky. 173, 37 S.W. 851, 34 L.R.A. 812; 25 C.J. § Damages; Townsend v. Missouri Pac. R. Co., 163 La. 872, 113 So. 130, 132, 54 A.L.R. 538.

The negligent act of plaintiff which, concurring and cooperating with negligent act of defendant, becomes real, efficient, and proximate cause of injury, or cause without which the injury would not have occurred. Elder v. Plaza Ry., 194 N.C. 617, 140 S.E. 298, 299; James v. Delaware, L. & W. R. Co., 92 N.J.L. 149, 104 A. 328, 333.

"Assumption of risk" and "contributory negligence" are not synonymous. Chicago, R. I. & P. R. Co. v. Rogers, 60 Okl. 249, 159 P. 1132, 1136.

Concurrent Contributory Negligence. Knowledge of specific danger and negligent failure to avoid it. Sprinkle v. St. Louis & S. F. R. Co., 215 Ala. 191, 110 So. 137, 140.

Mutual Contributory Negligence. Exists when injury would not have happened but for negligence of both parties. Alexander v. Missouri, K. & T. R. Co. of Texas, Tex.Civ.App., 287 S.W. 153, 155.

Criminal Negligence. Criminal negligence which will render killing a person manslaughter is the omission on the part of the person to do some act which an ordinarily careful and prudent man would do under like circumstances, or the doing of some act which an ordinarily careful, prudent man under like circumstances would not do by reason of which another person is endangered in life or bodily safety; the word "ordinary" being synonymous with "reasonable" in this connection. State v. Coulter, Mo.Sup., 204 S.W. 5.

Negligence of such a character, or occurring under such circumstances, as to be punishable as a crime by statute; or (at common law) such a flagrant and reckless disregard of the safety of others, or wilful indifference to the injury liable to follow, as to convert an act otherwise lawful into a crime when it results in personal injury or death. 4 Bl. Comm. 192, note; Cook v. Railroad Co., 72 Ga. 48; Rankin v. Transportation Co., 73 Ga. 229, 54 Am.Rep. 874; Railroad Co. v. Chollette, 33 Neb. 143, 49 N.W. 1114.

Culpable Negligence. Failure to exercise that degree of care rendered appropriate by the particular circumstances, and which a man of ordinary prudence in the same situation and with equal experience would not have omitted. Carter v. Lumber Co., 129 N.C. 203, 39 S.E. 828; Woodman v. Nottingham, 49 N.H. 387, 6 Am.Rep. 526; Kimball v. Palmer, C.C.A.Va., 25 C.C.A. 394, 80 F. 240.

Degrees of Negligence. There are degrees of care, and failure to exercise proper degree of care is "negligence," but there are no degrees of negligence. Murray v. De Luxe Motor Stages of Illinois, Mo.App., 133 S.W.2d 1074, 1078.

Classification of "negligence" as "gross," "ordinary," and "slight" indicates only that under special circumstances great care and caution, or ordinary care, or slight care are required, but failure to exercise care demanded is "negligence." 38 Del.Laws, c. 26. Gallegher v. Davis, 7 W.W.Harr. 380, 183 A. 620.

Gross Negligence. The intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness. Seelig v. First Nat. Bank, D.C.Ill., 20 F.Supp. 61, 68.

The failure to exercise slight care. Jones v. Atchison, T. & S. F. Ry. Co., 98 Kan. 133, 157 P. 399, 400; Burton Const. Co. v. Metcalfe, 162 Ky. 366, 172 S.W. 698, 701.

The want of slight diligence. The want of that care which every man of common sense, how inattentive soever, takes of his own property. The omission of that care which even inattentive and thoughtless men never fail to take of their own property. Litchfield v. White, 7 N.Y. 442, 57 Am.Dec. 534; Seybel v. National Currency Bank, 54 N.Y. 299, 13 Am.Rep. 583; Briggs v. Spaulding, 141 U. S. 132, 11 S.Ct. 925, 35 L.Ed. 662; The want of ordinary diligence and care which usually prudent man takes of his own property of like description. Dalton v. Hamilton Hotel Operating Co., 242 N.Y. 481, 152 N.E. 268, 270. In the law of torts (and especially with reference to personal injury cases), the term means such negligence as evidences a reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or that entire want of care which would raise the presumption of a conscious indifference to the rights of others which is equivalent to an intentional violation of them. McDonald v. Railroad Co., Tex.Civ.App., 21 S.W. 775; Railroad Co. v. Bodemer, 139 Ill. 596, 29 N.E. 692, 32 Am.St.Rep. 218; Colt v. Western Union Tel. Co., 130 Cal. 657, 63 P. 83, 53 L.R.A. 678; Bremer v. Lake Erie & W. R. Co., 318 Ill. 11, 148 N. E. 862, 866, 41 A.L.R. 1345.

Indifference to present legal duty and utter forgetfulness of legal obligations, so far as other persons may be affected, and a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence. Burke v. Cook, 246 Mass. 518, 141 N.E. 585, 586. Negligence bordering on recklessness. People v. Adams, 289 Ill. 339, 124 N.E. 575, 577.

"Gross negligence," is substantially higher in magnitude than simple inadvertence, but falls short of intentional wrong. Young v. City of Worcester, 253 Mass. 451,

RECEIVED

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: SSSB 66(Rules)
PUBLISH DATE: 2/3/89

OFFICE OF
SENATOR RICK HALFORD

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act relating to immunity for treatment of intoxicated persons..."
Sponsor: Senator Halford
Requestor: Senator Halford

Agency Affected: Public Safety
BRU: Law Enforcement
Component: AST, FHP, CAP, VPSO, FP

EXPENDITURES/REVENUES: (Thousands of Dollars) (Inflation not included)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

SB 66 would prevent lawsuits against the State, Department, and its officers, employees, and agents for discretionary decisions regarding incapacitated (intoxicated) persons. Passage of this bill may eliminate future liability, ~~and~~ would have no fiscal impact on the Department's present budget.

Prepared by: Captain C. Roger McCoy, Special Assistant Phone: 465-4322
Division: Office of the Commissioner Date: 2/28/89

Approved by Commissioner: Arthur English Date: 2-28-89
Agency: Department of Public Safety

HOUSE COMMITTEE REPORT

(7)

Date Referred: March 10, 1989 FURTHER REFERRALS:

Date of Committee Action: 4/~~27~~/89

The JUDICIARY Committee considered: CSSB 66(Rls)

CS FOR SENATE BILL NO. 66 (Rules)
[IMMUNITY/TREATMENT OF INTOXICATED PERSONS]
"An Act relating to immunity for treatment of intoxicated or incapacitated persons; and providing for an effective date."

RECOMMENDATIONS:
[ ] be replaced with CS SB 66 (Judiciary) [ ] the same title [ ] a new title
[ ] have attached amendment(s)
[ ] do pass
[ ] do not pass
[ ] no recommendation
[X] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[ ] fiscal impact _____
[ ] zero fiscal note _____
[ ] zero with analysis _____

APPROVES PREVIOUS: (Date/Dept)
[ ] fiscal note(s) _____
[X] zero fiscal note(s) 2/3/89 Pub Safety
[ ] zero fn/analysis _____

SIGNING DO PASS:

Mike Miller
Terry Mountjoy
Mike Miller
Jay Ellis

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend
Mike Davis		✓	
Cliff Jacobs		↘	
Peter Thurman		✓	

Peter Thurman / Mike Miller
Chairman's signature

ALASKA STATE LEGISLATURE

Anchorage Office:
3111 C St., Suite 530
Anchorage, AK 99503
907-561-7616

While in Juneau:
P.O. Box V
Juneau, AK 99811
907-465-4958

Senator Rick Halford

MEMORANDUM

To: Representative Peter Goll, Co-Chairman
Representative Max Gruenberg, Co-Chairman
House Judiciary Committee

From: Senator Rick Halford

Date: March 19, 1989

I would appreciate a hearing on Senate Bill 66 at your earliest convenience.

This bill was introduced after concerns were shared with me by the Anchorage Chamber of Commerce's Crime Commission and the Alaska Municipal League. The concerns came about after an Alaska Supreme Court ruling determined that Municipalities have an affirmative duty to take persons incapacitated by alcohol in a public place into protective custody and transport them to appropriate treatment facilities.

It is my believe that when the Legislature first enacted the Uniform Alcoholism and Intoxication Treatment Act in 1972, they intended to provide immunity to municipalities and the State as well as peace officers and emergency service personnel. They did this by explicitly stating that peace officers or members of the emergency service patrol who comply with the section are acting in the course of their official duty and are not criminally or civilly liable for it. The original bill expanded the current subsection (g) of AS 47.37.170, to clarify that immunity was to be granted to municipalities and the State as well.

Senate Bill 66 has undergone a major metamorphosis as it has evolved through the committee process. The current form of the bill amends AS 47.37.170 (g)

Residence: P.O. Box 190 • Chugiak, AK 99567 • 907-694-4958

to allow individuals to sue for damages caused by gross negligence or intentional misconduct in relation to the decision of whether to take or not to take an individual into protective custody, or to release them from protective custody, if they are intoxicated or incapacitated.

I encourage you to hear this bill in your committee as soon as possible.

North Slope Borough School District

HJOU Bill file

RECEIVED MAR 2 1 1989

March 23, 1989

Senator Al Adams
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Al:

The Board of Education for the North Slope Borough School District supports the passage of Senate Bill 194, related to judicial review of school boards' non-retention or dismissal of teachers. For a school board to not retain or dismiss teachers and other staff is a serious matter. Any decision made regarding the employment or dismissal of staff is done with as much factual information as possible, following Board Policy and existing State and Federal laws. Therefore, we agree with the contents of this Legislation that the Superior Court should not reverse the School Board's decision to dismiss teachers.

We urge the passage of this bill.

Sincerely,

Leona

Leona Okakok
President, Board of Education

BL/ma

cc: Representative Eileen MacLean
Representative Johnny Ellis,
Chairman, House HESS Committee
Representative Peter Goll,
Chairman, House Judiciary Committee
Shirley Holloway, Superintendent
Ashley Reed, Lobbyist, NSBSD

Pouch 169 • Barrow, Alaska 99723 • (907) 852-5311

HB 32
HB 88
SB 66

TANANA CHIEFS CONFERENCE, INC.
Board of Directors
Resolution No. 89-1

SUPPORTING NATIVE ELDERS IN THEIR FIGHT AGAINST ALCOHOL AND DRUGS

WHEREAS, there are many problems which threaten our survival as a people, but none have such a devastating impact on our [illegible] and families as does the problem of alcohol and drug abuse

WHEREAS, the use of alcohol and drugs offers nothing to our [illegible] villages but broken spirits, broken families, pain, grief, suffering and death; and

WHEREAS, the use of alcohol and drugs never has been and never will be of any value to our Native culture and Native people; and

WHEREAS, since its introduction from other cultures, Native elders have warned their villages that alcohol and drugs are the greatest threat to health, life and cultural values; and

WHEREAS, as the keepers and teachers of Native culture, the elders of today speak stronger than ever against alcohol and drugs and have committed themselves to bring their message against alcohol and drugs to their villages; and

NOW THEREFORE BE IT RESOLVED that the Tanana Chiefs Conference Board of Directors request that Governor Steve Cowper and every Alaska State legislature and member of Alaska's delegation in Congress support the efforts of the Interior villages in their fight against alcohol and drug abuse; and

BE IT FURTHER RESOLVED that the Tanana Chiefs Conference Board of Directors direct TCC to pursue state, federal, local, and private sector funding to institute comprehensive region wide alcohol and drug prevention programs utilizing elders, concerned village volunteers, village councils and youth in each village and that these concerned village teams be afforded training and ongoing support; and

BE IT FURTHER RESOLVED that the Village Councils and village courts pass ordinances against alcohol and drugs and strictly enforce these ordinances through their village courts; and

BE IT FURTHER RESOLVED to protect our children and families, Village Councils and courts strongly consider the use of traditional Native justice mechanisms and banish bootleggers and drug pushers from our village; and

BE IT FURTHER RESOLVED each school in each village includes a comprehensive drug prevention to their curriculum and actively implement preventive education at every grade level; and

BE IT FURTHER RESOLVED as an example to our children and to each other no alcohol to be served at any TCC function from this day forward; and

389-222.1

BE IT FURTHER RESOLVED any TCC employee determined to have a drug or problem be given the option to receive treatment or be ately terminated from employment; and

BE IT FURTHER RESOLVED each Native person of strong body and mind lend hand to help their elders and village leaders in this most serious task; and

BE IT FURTHER RESOLVED for the spiritual well being of our children families and for the survival and strengthening of our villages from this day forward, let it be known that the elders of the Athabascan Nation have declared war on all those who are associated with alcohol and drug abuse.

CERTIFICATION

I hereby certify that this resolution was duly passed by the Tanana Chiefs Conference, Inc. Board of Directors on March 16, 1989 at Fairbanks, Alaska and a quorum was duly established.

Daisy Northway
Secretary-Treasurer
Tanana Chiefs Conference, Inc

Submitted by: Executive Board

389-222.2

HB 114
SB 66

TANANA CHIEFS CONFERENCE, INC.
Board of Directors
Resolution No. 89-112

IMMUNITY FROM SUIT BY INTOXICATED PERSONS

WHEREAS, a legislative proposal has been introduced to take away the right of people to sue the state, municipalities, police, other emergency service people for performing or failure to perform duties in dealing with intoxicated or incapacitated persons; and

WHEREAS, the Tanana Chiefs Conference Board of Directors are concerned that if the police are not liable in any way for their performance of duties with intoxicated or incapacitated persons that the public would be put at undue risk; and

WHEREAS, community service patrols can be operated in a very task specific manner and at a cost effective rate in dealing with incapacitated persons but are not currently funded to patrol at an adequate level.

NOW THEREFORE BE IT RESOLVED that the Tanana Chiefs Conference Board of Directors opposes removing liability from the state, municipalities, police, or other emergency service people for performing or failure to perform duties in dealing with intoxicated or incapacitated persons; and

BE IT FURTHER RESOLVED that the Tanana Chiefs Conference Board of Directors support increased funding of Community Service Patrols and other services for chronic public inebriates.

C E R T I F I C A T I O N

I hereby certify that this resolution was duly passed by the Tanana Chiefs Conference, Inc. Board of Directors on March 16, 1989 at Fairbanks, Alaska and a quorum was duly established.

Daisy Northway
Secretary-Treasurer
Tanana Chiefs Conference, Inc

Submitted by: Alcohol Workshop

389-222.113

ALASKA STATE LEGISLATURE

Anchorage Office:
3111 C St., Suite 530
Anchorage, AK 99503
907-561-7616

While in Juneau:
P.O. Box V
Juneau, AK 99811
907-465-4958

Senator Rick Halford

MEMORANDUM

To: Representative Max Gruenberg, Co-Chairman
Representative Peter Goll, Co-Chairman
House Judiciary Committee

From: Senator Rick Halford

Date: April 19, 1989

Senate Bill 66, dealing with the question of immunity for treatment of incapacitated individuals is currently in the House Judiciary Committee. I am interested in having the bill move from committee at your earliest possible convenience.

Thank you for your attention to this matter.

Residence: P.O. Box 190 • Chuginak, AK 99567 • 907-694-4958

Alaska MUNICIPAL League

TELEPHONE
(907) 586-1325

217 SECOND ST., SUITE 200
JUNEAU, ALASKA 99801

TO: Representative Peter Goll, Co-Chair
Representative Max Gruenberg, Co-Chair
Members of the House Judiciary Committee

FROM: Scott A. Burgess, Executive Director

DATE: April 6, 1989

SUBJECT: SB 66 - Immunity for Treatment of Incapacitated Persons

The Alaska Municipal League supports legislation which removes an affirmative duty upon municipalities or their agents to take persons incapacitated by alcohol into protective custody under AS 47.37.170(b). Therefore, AML supports the SB 66 and HB 116, as originally introduced and which provided for complete immunity. AML believes complete immunity is what the legislature originally intended when the statute was adopted and is necessary to fulfill the legislative intent and relieve the costly burden of the liability implied by the Supreme Courts's ruling. House CS for CS Senate Bill 66 (L&C) creates a "gross negligence" standard of liability under AS 47.37.170 which is a lower standard than "intentional misconduct" adopted in the Senate version, CS for SB 66 (Rules). The "gross negligence" standard is not necessary to insure that the intent of AS 47.37 is carried out and will not adequately protect municipalities, especially from the costs to defend against frivolous court cases and higher insurance costs.

For the second year, relief from the implied liability created by the Supreme Court ruling in Busby v Municipality of Anchorage is a priority of the AML and the 126 municipalities the AML represents directly. The AML believes the Court misinterpreted the intent of the Legislature in AS 47.37.170(b) and the resulting implications of liability have created an unnecessary and unintentional burden on our law enforcement officials and our correctional facilities. SB 66, as introduced, provides legislative clarification for the courts and removes the threat of liability which is a deterrent to the protection of all our citizens. House CS for CS for SB 66 (L&C) does not go far enough in providing protection for municipalities in carrying out a State-mandated duty.

I have attached a copy of the AML position on Busby which was contained in the AML's Municipal Platform which outlines the AML's legislative priorities for 1989 and which was provided to all legislators. I have also attached copies of letters form municipalities and the relevant AML resolutions passed by the AML membership at their annual conference in November.

Governor Cowper introduced HB 406 last year which would have provided complete immunity under AS 47.37 but unfortunately the bill did not get out of the House. Some believe that the immunity granted under AS 47.37.170(g) should be qualified or conditional by adding a legal test of "gross negligence", as is proposed in House CS for CS for SB 66 (L&C). This is inappropriate and unnecessary. No problem or complaint existed before Busby. The Supreme Court in the Busby case did not rule that the defendant was incapacitated or that the Anchorage police officer did not do their duty under AS 47.37.170 (b); only that the statute did constitute a duty. Our law enforcement officials are professionals and understand and carry out their duties under AS 47.37. Creating a civil liability for carrying out this duty may have the opposite effect of deterring the effective enforcement of AS 47.37 or the best protection of the public. In addition, such liability causes increased insurance costs and may reduce the availability of the insurance. Plus, the cost of defense for invalid claims can be significant and non-recoverable.

The AML supported SB 66, as introduced, and again asks that the Committee consider language providing for complete immunity. AML urges the Committee to consider passing the bill out as originally introduced and, if not, with "intentional misconduct" language as passed by the Senate. The AML urges the Legislature to resolve the issue this year.

Attachments

cc: Senator Halford
Representative MacLean

Removal of Municipal Liability Imposed by Busby Decision

The Alaska Municipal League urges the Legislature to pass legislation reversing the implied liability of municipalities caused by the Busby decision regarding taking incapacitated persons into protective custody.

Background

The decision of the Alaska Supreme Court in Busby v. Municipality of Anchorage, which interpreted the intent of the Alaska Legislature in enacting AS 47.37.170(b), judicially created a duty to take incapacitated persons into custody that the Legislature did not intend to impose upon local communities.

The purpose of AS 47.37.170(b) is to provide for a compassionate local response to one aspect of the alcohol/drug crisis in local communities. However, to change that ability of local communities to help those in need into an affirmative duty to do so imposes on local communities obligations they are neither equipped nor fairly required to meet. The League supports a wide variety of measures to deal with the complicated issues of alcohol/drug abuse in Alaska. Nonetheless, the creation by the courts of a governmental obligation to take incapacitated persons into custody that took place without the discussion and study of the impacts of that obligation that would occur during the normal legislative process was not a good or fair way to address the problem.

The effect of this court decision has been that municipalities with police powers are now forced to pick up all persons who appear to be incapacitated and put them in a treatment facility, where possible, or in state or municipal correctional facility. The result has been great expense to the municipality or the State and an increased workload for peace officers, which comes at the expense of other duties, including investigation of violations of alcohol control laws.

Therefore, the League supports amending AS 47.37.170(b) by adding to it the following declaration: "This section shall not impose any affirmative duty upon municipalities or their agents to take persons incapacitated by alcohol into protective custody."

Resolution of the Alaska Municipal League

Resolution No. 89-7

A RESOLUTION URGING THE REVERSAL OF THE IMPLIED LIABILITY OF MUNICIPALITIES REGARDING TAKING INCAPACITATED PERSONS INTO PROTECTIVE CUSTODY

WHEREAS, the purpose of AS 47.37.170(b) is to provide for a compassionate local response to one aspect of the alcohol/drug crisis in Alaska communities to help those in need, and

WHEREAS, the Alaska Supreme Court decision in *Busby v. Municipality of Anchorage* incorrectly interpreted the legislative intent behind AS 47.37.170(b) and judicially created an affirmative duty to take incapacitated persons into custody that was never intended to be imposed upon local communities, and

WHEREAS, the effect of this decision has been that municipalities with police powers are now forced to pick up all persons who appear to be incapacitated and put them in a treatment facility. where possible, or in state or municipal correctional facilities, and

WHEREAS, this obligation has resulted in a great deal of expense to municipalities or the State and an increased workload for peace officers, leaving them with inadequate time for other police duties, including investigation of violations of alcohol control laws, and

WHEREAS, this decision to burden local governments with an obligation that they are neither equipped nor fairly required to meet was arrived at judicially, without any communication with or consideration for the communities involved and the impact such an obligation would have;

NOW, THEREFORE, BE IT RESOLVED that the Alaska Municipal League urges the 16th Alaska Legislature to enact legislation which clarifies the municipalities' Good Samaritan role in assisting incapacitated individuals by adding to AS 47.37.170(b) the simple declaration:

Resolution of the Alaska Municipal League

Resolution No. 89-8

A RESOLUTION SEEKING ALTERATIONS OF STATE STATUTES TO ALLOW MORE LOCAL AUTONOMY IN DEALING WITH THE PUBLIC INEBRIATE PROBLEM

WHEREAS, Alaska Statute 47.37.170(b) requires that a person appearing to be incapacitated by alcohol in a public place be taken into protective custody by a peace officer, and

WHEREAS, little latitude is available to local governments under this statute to deal with the problem, and

WHEREAS, AS 47 places local jurisdictions in undue risk of litigation, and

WHEREAS, compliance with AS 47 jeopardizes municipal financial ability to provide health and related social services to persons experiencing alcohol related problems;

NOW, THEREFORE, BE IT RESOLVED that the Alaska Municipal League urges the Legislature to alter AS 47.37.170 to permit greater local autonomy in dealing with public inebriates.

Adopted this 18th day of November 1988 in Fairbanks, Alaska.

Heather Flynn, President

ATTEST:

Scott A. Burgess, Executive Director

Resolution of the Alaska Municipal League

Resolution No. 89-9

A RESOLUTION URGING THE LEGISLATURE TO PROVIDE FUNDING TO MUNICIPALITIES TO OFFSET THE COST OF COMPLYING WITH THE PROVISIONS OF AS 47.37

WHEREAS, alcohol abuse is purported to be the number-one health problem in the State of Alaska, and

WHEREAS, the Alaska Supreme Court has held that municipalities have an affirmative duty to take persons incapacitated by alcohol in a public place into protective custody and transport them to an appropriate treatment facility, if one is available, and

WHEREAS, if a treatment facility is not available, the municipality must detain incapacitated persons in a state or municipal detention facility, and

WHEREAS, failure to provide protective custody to persons incapacitated by alcohol may result in liability for damages to the intoxicated person when injury results, and

WHEREAS, this increased responsibility and liability have been imposed on municipalities at a time when there are decreasing state revenues to fund municipal jail contracts, and

WHEREAS, treatment facilities and detention facilities have no real means to enforce the collection of fees from those who are taken into protective custody, and

WHEREAS, those taken into protective custody often do not have the resources to pay for medical treatment or detention, and

WHEREAS, local governments have been forced to assume the financial burden of providing medical examination, treatment, and protective custody detention as required by AS 47.37, and

WHEREAS, once an incapacitated person is taken into protective custody, the treatment facility or detention facility assumes further liability for the safety and welfare of that person while detained, and

CITY OF CRAIG ALASKA

P.O. Box 23, Craig, Alaska 99921 (907) 826-3275

February 24, 1989
FAX to:
Senator Dick Eliason
State Capitol
Juneau, Ak 99811

Dear Dick,

You will be in a key position to make a decision on SB66 and other bills that relate to the *Busby* issue. Craig has had direct experience in defending itself against unfounded claims last year in *Nelson v. Craig* wherein the Court ruled that the claim was unfounded and that the City was entitled to recover court costs and attorney fees from the plaintiff. However, since plaintiff has no assets, the City is spending more money to perfect the claim. This suit would not have been filed had there been immunity provided for officers who were simply doing their job properly.

Please support SB66 as introduced, providing immunity for police officers. I recognize that there is a sentiment by some legislators not to trust our certified officers to perform adequately and that there is a feeling that the rights of the incapacitated persons may be jeopardized if officer's can not be sued for failing to recognize or incarcerate them when they are located. However, in a situation where individual professional judgement is required, such as the decision as to whether a person is incapacitated and in need of custody, wide latitude should be afforded the officer on the street. Municipalities need immunity from this particular liability. Without it, all discretion of the officer is removed. Our officers when encountering an incapacitated person MUST place that person in custody. They may not release them to family, they may not take them home, they must go to jail or an approved treatment facility (which most SE communities do not have). The "intentional misconduct" standard is certainly better than the "gross negligence" standard, but the fact is that without a clear immunity, small communities will be forced to defend against unfounded and expensive suits.

Your support on this issue will directly affect the price of doing business in every community you represent, and the rest in the State. I hope you can support us on this. Thanks.

Sincerely,

David R. Palmer
City Administrator

cc: Rep Peter Goll
AML

From Police Organizations (see back)

REMOVAL OF MUNICIPAL LIABILITY IMPOSED BY BUSBY DECISION

The Busby decision arose from a case in Anchorage involving an inebriate who was contacted, but not taken into custody, by a police officer and who was later struck by a motor vehicle. Busby sued the municipality for not having taken him into custody. The case reached the Supreme Court, which found in Busby's favor.

The Court interpreted the intent of the legislature in enacting the Uniform Alcoholism and Intoxication Treatment Act, AS 47.37.170 (b), to create a duty for municipalities to take incapacitated persons into custody. The purpose of the statute is for municipalities to help those in need. The Court apparently interpreted this as a responsibility which imposes upon municipalities substantial obligations, including placing such persons in a treatment facility or in a state or local correctional facility.

Some communities, especially those in outlying areas with very small police departments or remote state trooper posts have no treatment or correctional facilities. They only have a holding facility, or local jail, with no professional person to provide suitable treatment.

We encourage and support legislation which would remove the liability from municipalities and their officers for acting in good faith and making a decision not to take an inebriated person into custody. With this kind of liability attached, the impact upon the municipalities and the ability for officers to make good common sense decisions about a person's liberty is great.

L. Dist D.

JAN 2 6 1989

City and Borough of Sitka

304 LAKE STREET · SITKA, ALASKA · 99835

January 24, 1989

PUBLIC OPINION MESSAGE

The City and Borough of Sitka wishes to express its support for Senate Bill 66. This bill wisely returns the duty to aid intoxicated persons to the status of a "public duty" removing the ability of individuals to sue for an alleged failure to perform that duty. It allows public officials, normally police officers, to reasonably weigh an individual's right to freedom from restraint against that same individual's personal safety without the added distraction of concern for liability resulting from a decision which someone else might later decide was wrong.

1/24/89

Sent to C&RA

1791-1991
CITY OF KENAI
"Oil Capital of Alaska"
210 FIDALGO KENAI, ALASKA 99611
TELEPHONE 283-7535
FAX 907-283-3014

January 23, 1989

Senator Rick Halford
Alaska State Legislation
Pouch V
Juneau, Alaska 99811

Re: Senate Bill 66

Your efforts for corrective legislation relative to the oppressive financial burden the *Busby* decision will have on municipalities and *Busby's* detrimental psychological effect on our cadre of dedicated police officers is most appreciated.

As a City Attorney, who is also a former Public Defender and criminal defense attorney, as well as a member of AML's Legislative Committee, I have attempted to study this legislation objectively and have concluded that corrective legislation such as SB 66 is not only appropriate, but much needed.

To suggest that the decision whether or not to take an incapacitated person into custody is one to which civil liability should attached, is both ludicrous and demeaning to the police officer involved, as well as a slap in the face of every professional police department in the State of Alaska. Furthermore, such civil liability could well result in redlining of certain areas insofar as police activity is concerned so that the problem is not encountered, the liability alleviated, and resultant deaths and injuries, as a result of custodial arrests not taking place, multiplied. It can be anticipated that in the present economic climate such "unavailability" of police officers would be couched ostensibly in terms of "fiscal restraints," when in fact, the real reason would be fear of liability with its resultant financial burden for the governmental agency involved.

Again, we thank you for your assistance in the forming of SB 66 as a reasonable and rational solution to a serious and expensive problem for all concerned.

CITY OF KENAI

Timothy J. Rogers
City Attorney

TJR/clf
cc: Senator Mike Szymanski
Senator Al Adams
Senator Paul E. Fischer
Representative C.E. Swackhammer
Representative Mike Navarre
Scott Burgess, AML
Mike Daugherty, AACP
Duane Udland, AACP
John McKibben, AACP
George Novaky, AACP
Glen Godfrey, AACP
Richard Cummings, AACP
Shirley Warner, APOA
Dale Florian, APOA
Steve Kalwara, APOA
John Shover, APOA, FBINAA
Greg Russell, APOA
Greg Hansen, APOA
Terry Quarton, APOA
Kevin O'Leary, FBINAA
Rick Ross, FBINAA
Turk Mayfield, FBINAA
Dan Anslinger, AACP, FBINAA

NORTHWEST ARCTIC BOROUGH

P.O. BOX 1110
KOTZEBUE, AK 99752
(907) 442-2500 / FAX 442-2930

January 27, 1989

Steve Cowper, Governor
State of Alaska
P.O. Box A
Juneau, Alaska 99811-0101

Dear Governor Cowper:

Last week the hearing on Senate Bill 66 was cancelled although we would have testified in favor of the bill.

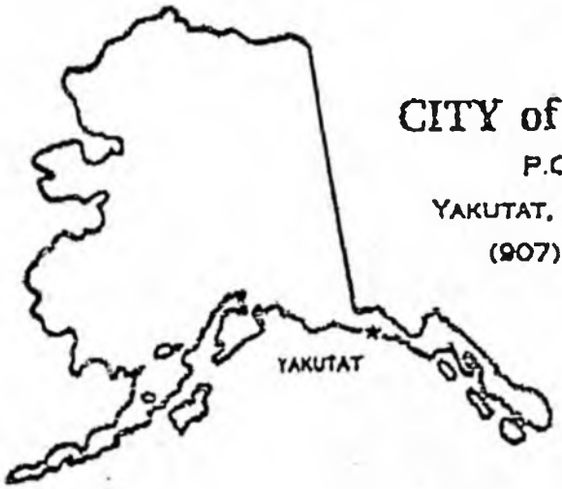
We support AML's position on complete immunity and feel that it would benefit all the eleven second-class communities in our district. As a member of AML we have been part of their deliberations and we feel you should consider this as a supportive issue on our behalf.

Thank you for considering our concern.

Sincerely,

Chuck Greene, Mayor

cc: Scott Burgess, AML
Senator Al Adams
Representative Eileen MacLean



CITY of YAKUTAT

P.O. Box 6

YAKUTAT, ALASKA 99689

(907) 784-3323

To: Mr. Larry Scandling

FROM: City Manager J. R. Filip

SUBJECT: SB 66

DATE: January 24, 1989

The City of Yakutat supports legislative initiatives which provide complete immunity from provisions of AS47.37. In the absence of immunity, the City may be unreasonably exposed to added expense at a time when municipal revenues are already strained.

Your support of these changes is appreciated.

Sincerely,
The City of Yakutat

James R. Filip
City Manager

cc: Sen. Eliason
Rep. Goll
A.M.L.

JAN 2 6 '89

CITY OF KING COVE

P.O. Box 37 • King Cove, Alaska 99612 • (907) 497-2340

January 24, 1989

Honorable Steve Cowper
Governor, State of Alaska
P.O. Box A
Juneau, AK 99811-0101

Dear Governor Cowper:

The City of King Cove asks for your support of SB 66 which provides a municipality immunity for actions taken or not taken under AS 47.37. The potential liability a small community could incur in a "Busby" case or action would seriously impact the City's financial position. In addition, as a member of the recently created Joint Insurance Association among municipalities, the City is concerned that one or several "Busby" cases could result in the break-up of the JIA.

The City hopes that you and the legislature act to provide complete immunity to municipalities for actions taken or not taken under AS 47.37.

Sincerely,

Wayne Marshall
City Manager
City of King Cove
1007 W. 3rd Ave. Suite 201
Anchorage, AK 99501

cc: Bob Evans, Deputy Chief of Staff
Laury Roberts Scandling, Director of Constituent Relations
Scott Burgess, AML

Alaska MUNICIPAL League

TELEPHONE
(907) 586-1325
FAX 463-5480

217 SECOND STREET, SUITE 200
JUNEAU, ALASKA 99801

TO: Representative Peter Goll, Co-Chair
Representative Max Gruenberg, Co-Chair
Members of the House Judiciary Committee

FROM: Scott A. Burgess, Executive Director

DATE: April 26, 1989

SUBJECT: SB 66 - Immunity for treatment of incapacitated persons

Relief from the implied liability under AS 47.37.170 (b) resulting from the Alaska Supreme Court 1987 ruling in Busby v. Municipality of Anchorage has been a top priority of the Alaska Municipal League for two years. The issue has been debated extensively and the AML will agree to the language in proposed House CS for CS for Senate Bill No. 66 (Judiciary) (Ford 4/13/89, attached) in order to get the issue resolved legislatively this year. AML understands the standard of liability in the proposed Judiciary CS would be "gross negligence or intentional misconduct" rather than AML's request for complete immunity. Further, if the Co-Chairs believe the proposed language is what is necessary to move the bill out of committee, the AML will not oppose the Judiciary CS in order to get the bill passed, to get relief from potential frivolous lawsuits, and to get on with the job of protecting the public.

Attachment

SAB2:sb66g

6-0197M
Ford
4/13/89

Original sponsors: Halford, Kelly,
Faiks, and Jones

IN THE SENATE BY THE JUDICIARY COMMITTEE

HOUSE CS FOR CS FOR SENATE BILL NO. 66 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to immunity for treatment of intoxicated or incapacitated persons; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 47.37.170(g) is repealed and reenacted to read:

(g) A person may not bring an action for damages based on the decision under this section to take or not to take an intoxicated person or a person incapacitated by alcohol into protective custody, unless the action is for damages caused by gross negligence or intentional misconduct.

* Sec. 2. This Act applies to causes of action that accrue on or after the effective date of this Act.

* Sec. 3. This Act takes effect immediately under AS 01.10.070(c).

Alaska State Legislature

Al Adams
District L

WHILE IN SESSION
P.O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-3707

OUT OF SESSION
P.O. Box 333
Kotzebue, Alaska 99752
(907) 442-3245

3111 C Street
Anchorage, Alaska 99503
(907) 561-7622

Official Business

Bill file
SB66

March 21, 1989

George N. Ahmaogak, Sr.
Mayor
North Slope Borough
Post Office Box 69
Barrow, Alaska 99723

Dear George:

Thank you for your letter regarding Senate Bill 66 delineating reasons that passage of this legislation is important for the North Slope Borough. From the first committee hearing I have been supportive of this legislation and will continue to urge its passage this session.

Currently the bill is in the House Judiciary Committee and has yet to be scheduled. A staff member from the sponsor's office, Senator Halford, has said that requests are being made to hear the bill in that committee.

A copy of the North Slope Borough's position paper will be sent today to the two committee chairmen, Representatives Goll and Gruenberg. A copy will also be sent to Representative MacLean so that she can urge a hearing also.

Thank you again for your clear and concise statement about this bill. As always, it is a pleasure working for and with you.

Sincerely,

Al Adams, Chair
Community and Regional Affairs Committee

NORTH SLOPE BOROUGH

OFFICE OF THE MAYOR

P.O. Box 69
Barrow, Alaska 99723

Phone: 907-852-2611

George N. Ahmaogak, Sr., Mayor

March 15, 1989

Senator Al Adams
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Senator Adams:

Enclosed for your information, and for any action that you may recommend, is the North Slope Borough's position on Senate Bill #66. Any assistance that you may be able to give the Borough in stating its position would be greatly appreciated.

Thank you for your continued support in representing the people of the North Slope.

Sincerely,

George N. Ahmaogak, Sr.
Mayor

Enclosure

cc: Government Affairs
Dennis Packer, NSB Director, Public Safety
SLI/File

North Slope Borough

P O S I T I O N

Bill or Resolution: SB#66 - An Act Relating To Immunity For Treatment of Intoxicated Persons

Date: March 1, 1989

The North Slope Borough, Department of Public Safety fully supports Senator Halford's SB#66 offering complete immunity for cities and municipalities and their employees in dealing with intoxicated individuals. The "Busby" decision directly affects police officers and others who come into daily contact with intoxicated individuals. In the "bush" areas of the State, we are at a disadvantage when handling those who are intoxicated.

Below are a few factors to consider in support of Senator Halford's proposed legislation and why the Borough supports it:

1. In Barrow there is no detoxification facility other than the jail in which to place intoxicated individuals.

2. During 1988 the North Slope Borough, Department of Public Safety "detoxed" 700 individuals in the jail in Barrow under Title 47. The officers used their own discretion and follow department policy and procedure in dealing with intoxicated persons.

3. The North Slope Borough, Department of Public Safety operates a State contracted jail facility, however, the State does not reimburse the Department for detaining individuals under Title 47, which is a State imposed law. Nor does the State assume any of the liability for detaining these individuals in our jail.

4. The State has imposed a law under Title 47, made an interpretation of that law based on the "Busby" decision, and is willing to have the municipalities and cities of the State be responsible, above and beyond what is reasonable, for acting in good faith in their attempts to address the problems associated with intoxicated persons.

   The "Busby" decision has resulted in the police picking up all individuals suspected of drinking and putting them in jail to avoid a lawsuit. This puts an unnecessary strain on our police department as well as on the correction facility.

North Slope Borough

P O S I T I O N (Continued)

Bill or Resolution: SB#66 - An Act Relating To Immunity For Treatment of Intoxicated Persons

Date: March 1, 1989

5. Our Village Officers often detain individuals for "detox". When doing this the officer is then committed to watching the individual until released. By doing so the officer cannot leave the individual alone for any reason, thus reducing the officer's ability to respond to other calls if necessary in the village.

6. In conclusion, I have attached a copy of the position statement from the Alaska Chiefs of Police, Alaska Peace Officers Association and the FBI Academy Associates on this legislation, which the Department of Public Safety fully supports.

I hope that this information will be helpful and any further information is needed please contact Dennis O. Packer, Director, Department of Public Safety.

Attachments

\wp\betsy\Mpos.dps

— Position Statement —

ALASKA CHIEFS OF POLICE ASSOCIATION
ALASKA PEACE OFFICERS ASSOCIATION
FBI NATIONAL ACADEMY ASSOCIATES

Concerning Legislative Proposals

before the

Sixteenth Alaska Legislature

January 1989

INDEMNIFICATION FOR GOVERNMENT EMPLOYEES

We have made indemnification for Public Employees our number one priority. It has been given our highest priority because we see no other single issue that has greater potential impact for both law enforcement and other government workers as well.

It has long been accepted that government must be held responsible for what it does. When the government takes, or fails to take action, courts have held that the government is liable for its actions, and injured parties have, through law suits or claims, received compensation for the wrongs done to them. Generally, when a law suit is filed, it is filed against the government and the suit names employees of the government as parties to the action. Traditionally, employees have not been held personally liable for actions they have taken at the behest of their employer, unless those employees were clearly working outside the scope of their authority.

Recent court rulings have led to the current trend that holds public employees personally responsible for actions that they have taken in their jobs. This trend now places public employees in a position where their own personal assets and savings are at risk whenever law suits are filed, even though that employee was working within the scope of their employment without any intent of causing harm.

This places all public employees at risk from the highest level policy makers to the lowest level of workers where those policies are carried out. The social workers, the road maintenance supervisor, the police officer, the medic, the fireman, and the department manager, are all vulnerable. We in law enforcement believe this is an undue burden upon public employees and it carries great potential for the workings of government to become bogged down, because employees fear that decisions they make in good faith may result in the loss of their personal assets.

When employees are doing the work of the government within the scope of their authority and without malice, they should not be held personally liable when they are named as parties to law suits. Legislation should be passed that indemnifies public employees and frees them from the burden of working under the constant threat that the good faith judgements they make can result in the loss of their homes, cars and savings or other assets.

REMOVAL OF MUNICIPAL LIABILITY IMPOSED BY BUSBY DECISION

The Busby decision arose from a case in Anchorage involving an inebriate who was contacted, but not taken into custody, by a police officer and who was later struck by a motor vehicle. Busby sued the municipality for not having taken him into custody. The case reached the Supreme Court, which found in Busby's favor.