ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672

8466 SENATE STATE AFFAIRS

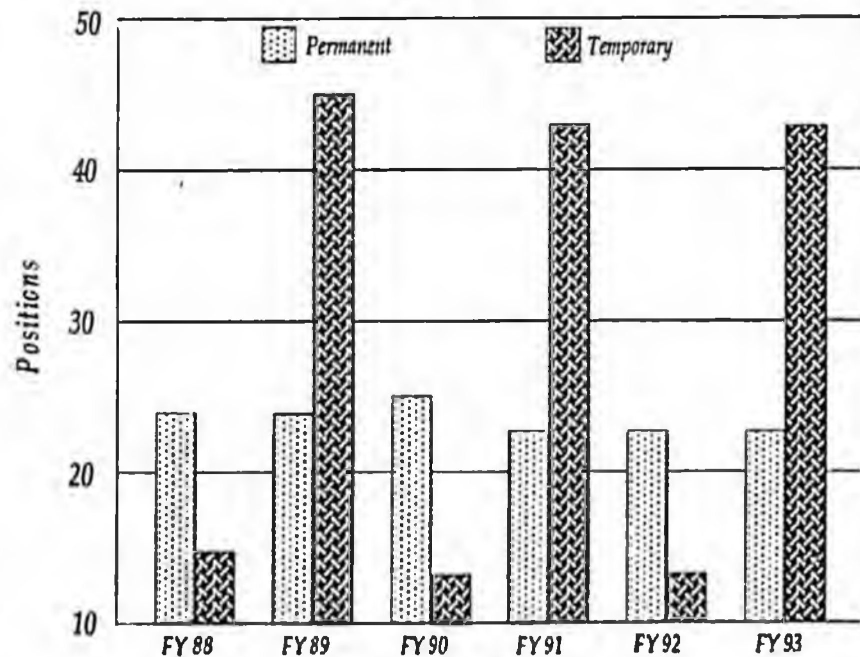
election supervisors do not have offices, persons may be designated to act as absentee voting officials.

Elections is also responsible for processing applications for the recall of the Governor, Lieutenant Governor, or a member of the state legislature. The director of Elections is responsible for certifying or refusing applications. When applications are certified, the director of Elections prepares the petition and, when returned, verifies signatures and ensures the number is correct.

To accomplish their statutory responsibilities, Elections is organizationally comprised of a director's office and four regional offices. For FY 93, Elections was budgeted 21 full-time and 2 permanent part-time positions. These positions were allocated between the director's office, located in Juneau, and four regional election offices. The regional offices are located in Juneau, Anchorage, Fairbanks, and Nome.

In addition to permanent staff, the anticipated use of temporary employees is provided for in the annual budget. During election years the number of temporary staff needed is greater than non-election years. For FY 93, an election year, 43 temporary positions were budgeted. In FY 92, a non-election year, only 14 temporary positions were budgeted. The following graph shows the trend of budgeted permanent and temporary positions for the last six years.

Elections must also hire individuals to work at each poll and on various election boards. Membership on each board is established by statutes. Election supervisors are directed by statute to appoint, within their district, an election board and a counting board for each precinct. The director of Elections appoints a state review board and a data processing review board.



Administrative support for Elections and the Office of the Lieutenant Governor, like all other divisions within the Office of the Governor, is provided by the Division of Administrative Services (DAS). DAS distributes monthly financial reports for use by each division in monitoring their budgets and provides assistance in areas such as personnel and procurement.

BACKGROUND INFORMATION

When the current administration came into office in December 1990, a decision was made by the Lieutenant Governor to ask for the resignations of all top management in the Division of Elections (Elections). Top management is comprised of the division director and regional election supervisors. In addition, staff in middle and lower positions were either asked to resign or voluntarily chose to leave because they expected to be replaced. This resulted in a 45% turnover of permanent positions within the first two months of the current administration. In some cases, the individuals replaced had been employed by the division for many years and had worked for more than one previous administration. By the end of our audit fieldwork (February 27, 1993), 87% of the staff employed at Elections when the current administration started are no longer employed there. Of the three remaining, two work in the director's office and one in the regional office in Anchorage.

Alaska Statute 39.25.110 makes all positions within the Governor's and Lieutenant Governor's offices exempt. This has been interpreted to mean it is within the Lieutenant Governor's prerogative to choose to replace the staff at Elections.[1] However, the decision to replace top management and other positions effectively eliminated most of the institutional knowledge within that division. The inexperienced staff who started at Elections had to deal with much more than just a normal election process. The closed primary caused by the republican rule presented an added dimension to Elections' work. Reapportionment activities and related court decisions significantly affected Elections' work and timelines related to the fall 1992 primary and general elections.

Republican Rule

At its March 31, 1990 convention, the Republican Party of Alaska (RPA) adopted a rule to allow only registered republicans, registered independents, and those who stated no preference of party affiliation to vote in the republican primary election. Due to inaction on this issue, RPA filed a complaint in district court in an attempt to get the rule implemented for the August 28, 1990 primary election. For various reasons the court refused to require implementation.

In an April 1992 letter from the Attorney General (AG) of Alaska, he expressed his opinion regarding composition of ballots considering party rules. In May 1992, RPA filed a complaint in district court to have the 1992 primary conducted in accordance with their party rule using the ballot approach presented by the AG. The complaint contends that, even though Elections had known of the rule since mid-1990, they were not taking necessary actions to ensure implementation in the 1992 primary.

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[1] Currently there are two court cases pending which were brought by Elections' employees who were dismissed at the beginning of the current administration. Resulting court decisions may provide added perspective regarding the Lieutenant Governor's authority.

No action was being taken to change the ballots because the Office of the Lieutenant Governor and Elections did not feel they had statutory or constitutional authority to adopt new election laws. Also, during this time, the legislature was considering two bills that would change election ballots. The court concluded that the Lieutenant Governor had the authority to promulgate election regulations. On July 9, 1992, RPA and the State reached an agreement and emergency regulations were adopted to accommodate the party rule.

Republican Rule's Effect on the Election Process

In order to meet its statutory deadline of providing ballots to absentee voting officials, the division entered into a contract to have ballots printed from July 11 to August 10, 1992. Total costs for ballots increased by more than $100,000 over the previous election. The DataVote Mainframe software, which is used for ballot counting throughout Alaska, had to be modified to handle the counting of multiple ballots. This did not constitute any additional costs.

Some forms required revision as a result of the closed primary. Several instruction booklets and guidelines were printed for workers and review boards to instruct them in the new procedures. Ballot eligibility sheets were created and provided to the public to explain the new primary. Absentee applications were revised to allow individuals to request the proper ballot. Also, a new form was created to allow voters to change their party affiliation up to, and on, the day of the election. Facsimiles of the new ballots were placed in newspapers around the State.

Election workers had initially been trained in May and June for the fall 1992 elections. They had to be retrained following the decision to implement the closed primary. This was accomplished through production of a video that was distributed to all boards. The media consulting portion of producing this instructional video cost Elections $5,000. In addition, procedures were written to supplement the procedures handbook that had already been distributed.

Voter confusion over the new rule was expected to result in more questioned ballots. According to Elections' staff, this necessitated the need to hire more election workers to review the ballots.

Reapportionment

Article VI of the Alaska Constitution mandates that the Governor reapportion the house of representatives immediately following each decennial census. The Governor may also redistrict by changing the size and area of election districts. A five-member reapportionment board is to be appointed to act in an advisory capacity to him. Within 90 days of the official reporting of the census, the board is to submit to the Governor a plan for reapportionment and redistricting. Within 90 days after receipt of the board's plan, the Governor is to issue a proclamation.

Any qualified voter may apply to superior court to compel the Governor to perform his reapportionment duties or to correct any errors in redistricting or reapportionment. Appeals are made to the supreme court.

Section 5 of the federal Voting Rights Act requires a state to submit any changes in election law or procedure to the U. S. Department of Justice (USDOJ) for a determination that the changes do not discriminate against minorities. This process is referred to as preclearance.

On September 5, 1991 the Governor issued a proclamation of reapportionment and redistricting with an accompanying statement of changes from the plan of the reapportionment board. In accordance with the federal Voting Rights Act, the plan was submitted to USDOJ and approved on April 10, 1992. Meanwhile, the Governor's plan was being challenged in superior court by Southeast Conference, a non-profit Alaska corporation; and others.

On May 11, 1992 after a 16-day trial, the superior court, citing numerous errors made by the reapportionment board, did not accept the plan but remanded it to the reapportionment board. An appeal was made to the supreme court and on May 28, 1992 that court affirmed that the plan was unconstitutional. The case was remanded back to the superior court with instructions to devise an interim redistricting plan for use in calendar year 1992. The supreme court also ordered the superior court to remand the case to the reapportionment board for a final plan.

To comply with supreme court directions, the superior court ordered three special masters (chosen from party nominations) to devise a redistricting plan. When the plan was submitted by the masters, the superior court modified it and adopted it on June 18, 1992. However, the supreme court, on June 25, 1992, further revised the plan to reflect some additional changes. Since then, that plan, referred to as the interim plan, has been in effect. Currently, the reapportionment board is working on a final plan.

Reapportionment's Effect on the 1992 Election Cycle

The aforementioned legal challenges and resulting legal decisions related to the Governor's initial plan caused a delay in completing tasks necessary for an election (see Election Cycle Timeline in Appendix A). After a reapportionment plan is adopted, district maps must be drawn and precinct boundaries determined. Until the interim plan went into effect, candidates did not know in which district to file. This delayed the printing of some forms and ballots. In addition, voters had to be notified of their new voting precincts.

Because of the delays in getting a legally acceptable plan, the following statutory dates were changed by the superior court.

1. The candidate filing deadline was initially extended from June 1, 1992 to June 26 and later extended to July 8. The last day for a candidate to withdraw was changed to July 10, 1992.

2. The date for the primary election was postponed from August 25 to September 8, 1992.

3. The deadline for filing of materials for the Official Election Pamphlet was changed from July 15 to August 5, 1992. The mailing date for the Official Election Pamphlet was delayed to October 12, 1992.

4. The court delayed regional education attendance area and coastal resource service area elections from October 6, 1992 to March 2, 1993.

Need for Maps as a Result of Reapportionment

As a result of reapportionment, Alaska went from 27 to 40 election districts. Also, based on an Elections' management decision, the number of precincts increased from 438 to 469. Virtually the whole State changed. Elections needed maps that identified districts to allow them to redraw and create precincts.

The reapportionment board had previously worked with the Alaska Department of Labor (ADOL) to create maps identifying Alaska's new districts. These maps were made available to Elections for drawing precincts and were sent by Elections to the USDOJ to obtain preclearance.

Once precincts were established by Elections, maps were needed to show candidates where they should file. Maps were also needed to assist in updating voter registration information. Voter registrations had to be 100% accurate so that registered voters were not disenfranchised or assigned to an incorrect district and precinct.

Elections' Mapping Costs

Elections had initially planned to create their own precinct maps. To this end, Elections purchased their own computer and software capable of doing mapping in FY 91. According to the Office of the Governor, Division of Administrative Services, Elections spent another $40,000 in non-personal service expenditures in FY 92 related to creating usable precinct maps. However, Elections determined that they did not have the expertise or the time necessary to gain the expertise in order to prepare usable maps.

Because of this, Elections entered into a Reimbursable Services Agreement with the Department of Natural Resources (DNR) in February 1992. DNR provided a 10-person team for seven weeks to create required maps. DNR produced statewide maps and an atlas, which was necessary to show each of the precincts. DNR maps were used to supplant the ADOL maps that had been previously submitted by Elections to USDOJ. ADOL's maps are said to have contained mistakes. USDOJ preclearance was obtained based on DNR maps. DNR maps were top-quality, color maps that cost Elections $166,512. Funding for this expenditure was part of a $424,000 FY 92 supplemental appropriation to Elections.

Elections had also entered into two contracts to provide backup assistance for mapping. Total costs incurred on these two contracts came to $21,000.

While the DNR maps were essential to obtaining preclearance and identifying precinct boundaries, they did not provide sufficient detail to permit the updating of required geographic information in the voter registration system. This was ultimately accomplished by Elections' staff through the use of city and taxi maps.

DNR made a proposal that the voter registration system be reengineered to accept information electronically from the map database and vice versa. This would have facilitated automatic update of all voter registration records. Anchorage staff thought there was a possibility that this proposal would be adopted so they delayed updating voter registration files. When the proposal was not adopted, Anchorage ran 24-hour shifts in August of 1992 to accomplish the required updates. The other regions had not expected DNR assistance so they had been doing input on an on-going basis. While we recognize that Elections incurred personal service expenditures related to mapping and updating voter information, their lack of records and inconsistent recording of financial transactions does not allow us to determine a cost for this work (see Recommendation No. 3).

Division of Elections' FY 93 Budget

While there are circumstances that are unique to the FY 93 election year, some had been anticipated and included in the agency's budget request. For example, the division requested funding in FY 93 to train workers and to print multiple ballots to accommodate the changes anticipated by the republican rule. Also, funding was requested to defray costs associated with creating additional precincts as part of reapportionment. Costs related to additional precincts included booths, curtain sets, ballot punches, boxes, and workers.

It should be noted that the amount submitted in the Governor's FY 93 budget request for Elections' operations was reduced by approximately $410,000 prior to the legislature adopting the FY 93 budget act. Except for supplies, funding in all expenditure categories was reduced from the Governor's request. The most significant reductions were related to requested reapportionment implementation equipment and contractual services for the primary election. They were reduced by $102,000 and $160,000, respectively. Travel costs to accommodate changes in the primary election were also reduced.

In anticipation of needing additional funding for FY 93, Elections drafted a supplemental appropriation request to be considered during the June 1992 special session. Their draft identified potential need of approximately $1.6 million for FY 93. An initial Office of Management and Budget (OMB) analysis of the request reduced the amount to be further researched to $961,000 after eliminating duplicate items, items already appropriated, and other unsupported items.

No further review or analysis of the remaining $961,000 balance was performed based on the Governor's decision to exclude the supplemental request from his agenda and limit the Second Special Session to the subsistence issue.

Our review of the OMB analysis and the now pending $891,500 supplemental appropriation request introduced on January 27, 1993 indicates that it is merely coincidental that the $961,000 balance is similar in magnitude to the amount of the current request. The components of the current request vary significantly by expenditure group from the components of the $961,000 balance. For example, personal services have decreased by $475,500 from an original estimate of $831,500 to a current estimate of $356,000; while contractual services have increased to $518,800 from an original estimate of $129,000.

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STATE OF ALASKA
Division of Elections
General Fund - Operating
Schedule of Expenditures and Encumbrances
Compared with Appropriations
Fiscal Years 1992 and 1993

	Total Appropriations (*Note 2*)	Expenditures	Encumbrances	Remaining Balance
Operating Programs				
FY 92 Elective Operations				
Personal Services	$1,385,871	$1,384,615	$ -0-	$ 1,256
Travel	88,892	88,832	-0-	60
Other Services & Charges	767,303	731,645	27,638	8,020
Supplies	42,025	41,723	-0-	302
Capital Outlay	93,409	93,405	-0-	4
Total	2,377,500	2,340,220	27,638	9,642
FY 92 Notice of Elections				
Other Services & Charges	10,000	10,000	-0-	-0-
FY 92 Total	$2,387,500	$2,350,220	$27,638	$9,642
FY 93 Elective Operations (*Note 1*)				
Personal Services	$1,268,000	$1,370,060	$ -0-	$(102,060)
Travel	113,600	110,028	150	3,422
Other Services & Charges	2,418,480	2,050,825	115,602	252,053
Supplies	39,900	42,328	2,092	(4,520)
Capital Outlay	2,420	3,372	-0-	(952)
FY 93 Total	$3,842,400	$3,576,613	$117,844	$147,943 (*Note 3*)

Note 1: *FY 93 information obtained from the state accounting system as of February 27, 1993. Expenditures do not include all known FY 93 liabilities or obligations of the division.*

Note 2: *Includes original and supplemental appropriations. FY 93 includes a $90,000 supplemental appropriation passed by the legislature and approved by the Governor on February 18, 1993.*

Note 3: *Due to incomplete recording of required financial transactions, FY 93 Elections balances, per the state accounting system, are not reflective of their actual financial condition. They have actually overexpended their FY 93 appropriation by more than $100,000.*

AUDITOR CONCLUSIONS

The election process faced by the Division of Elections (Elections) in FY 92 and FY 93 was unique in the volume and nature of external forces affecting timelines and work required.[2] For the first time in recent Alaska elections, a closed primary was held. Reapportionment occurs in ten year cycles and the computer process followed for the most recent reapportionment is not comparable to the less automated reapportionment of ten years ago. This period's reapportionment resulted in lawsuits which forced delays on Elections. In spite of tremendous difficulties and external factors, Elections successfully held primary and general elections on the dates set (see the Background Information section).

While we recognize that Elections was dealing with unusual circumstances, we do not believe that responsible fiscal management was a driving force in the decision-making process.

Elections Exceeds Original Authorized Budget in Both FY 92 and FY 93

As early as January 1992, it became evident that Elections might overspend its original FY 92 appropriation absent additional funding from the legislature. For all practical purposes, Elections did overexpend their original FY 92 funding since a required $424,000 FY 92 supplemental appropriation was not approved by the Governor until July 15, 1992, fifteen days after the end of the fiscal year. The supplemental appropriation was passed by the legislature during the First Special Session of the Seventeenth Legislature which convened between May 13, 1992 and May 16, 1992. It was needed to prevent an appropriation shortfall for the division.

The schedule on the opposite page compares expenditures and encumbrances to total appropriations for FY 92 and FY 93 as of February 27, 1993.

Our review of expenditure levels for FY 93 indicates that Elections had overexpended its current year operating appropriation by December 1992. The graph on the following page depicts FY 93 expenditure levels, as reflected in the state accounting system (AKSAS), as February 27, 1993. Additional known liabilities of at least $250,000, which consists of a large reimbursable services agreement (RSA) obligation and numerous unpaid invoices, are not included as expenditures. AKSAS controls did not prevent the continuing overexpenditure of funds because all known liabilities and anticipated obligations had not been recorded (see Recommendation No. 3).

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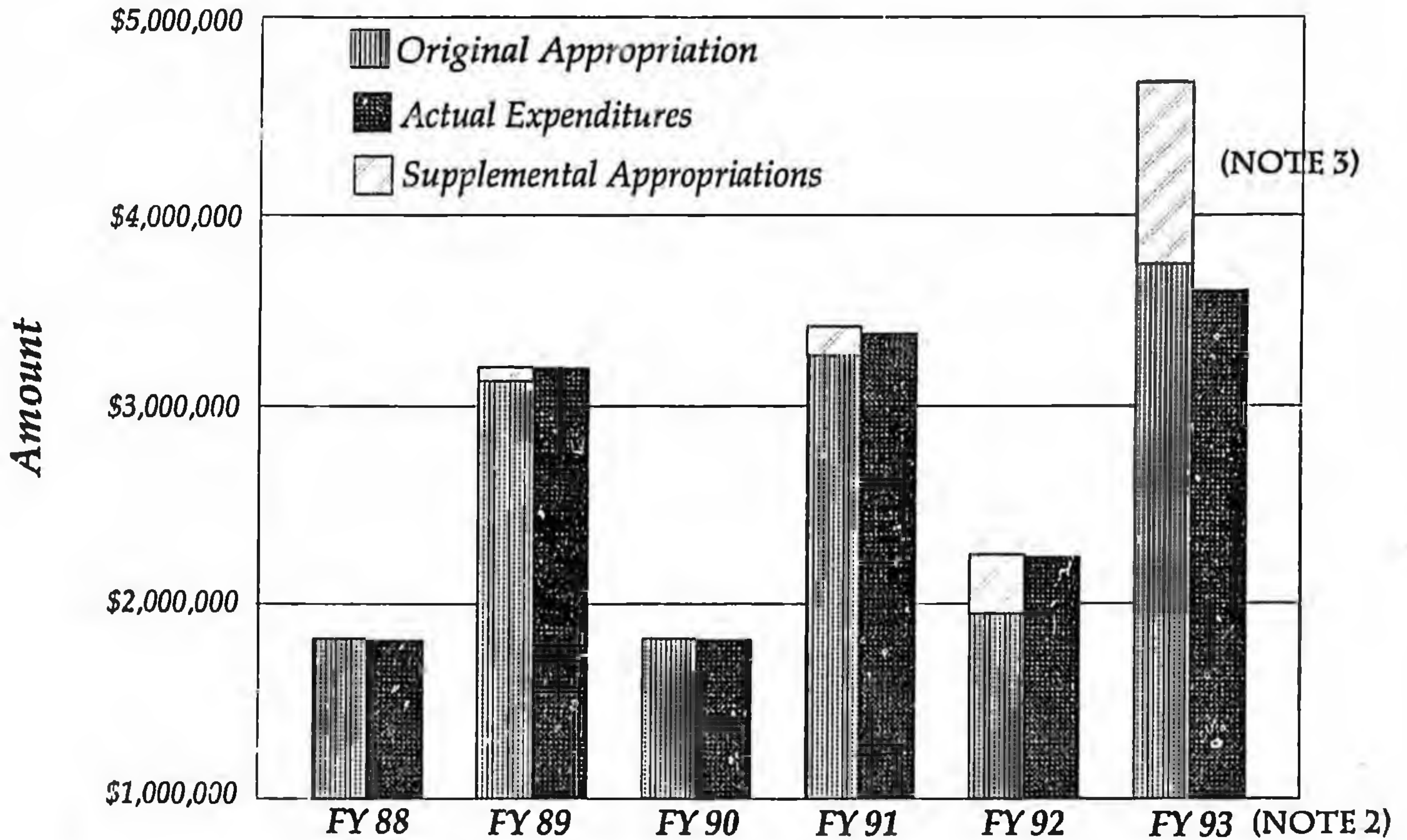
[2] The relationship between external factors which influenced the most recent election cycle and various activities performed by Elections are presented in the Election Cycle Timeline included in Appendix A to this report. Also presented in conjunction with this timeline information is a pictorial view of expenditures incurred on a monthly basis during the same timeframe.

Division of Elections

Operating Budget and Actual Expenditures
FY 88 - FY 93

(NOTE 1)



NOTE 1 *FY 88, FY 90, and FY 92 are non-election years. FY 89, FY 91, and FY 93 are election years.*

NOTE 2 *FY 93 expenditures were obtained from the state accounting system as of February 27, 1993 and do not include all known FY 93 liabilities or obligations of the division.*

NOTE 3 *FY 93 Supplemental Appropriations include a $90,000 supplemental appropriation passed by the legislature and approved by the Governor on February 18, 1993, and a request for an $891,500 supplemental appropriation that is being considered by the legislature.*

Elections Did Not Make Sufficient Effort to Comply With Appropriations Act

In January 1992 the Office of the Governor, Division of Administrative Services (DAS) prepared projections that indicated there could be a possible overexpenditure of Elections' original FY 92 appropriation. DAS provided these projections, which used historical expenditure trends from previous election cycles, to Elections as an early warning management tool to allow for adjustments of spending rates based on a thought-out plan. While DAS felt that their analyses were being met with disbelief (see Recommendation No. 4), that division continued to provide Elections with financial projection assistance.

At the end of FY 92, Elections sought and obtained a supplemental appropriation for FY 92 (see comments on page 15). In addition to obtaining the supplemental appropriation, we were also told by staff that some purchases which would normally have been made in the non-election year of FY 92, were deferred until the FY 93 election year. Delaying these purchases likely compounded Elections' current FY 93 overexpenditure situation.

The spending pattern for FY 93 was different from those in previous election years in that higher amounts were expended at a faster pace. Elections' director has repeatedly claimed that reapportionment was the reason for unbudgeted expenditures. She has also stated that Department of Law and Office of Management and Budget officials pledged their support when it came time to request a supplemental appropriation for FY 93 (see Recommendation No. 1). We believe that the Elections director, based on her understanding of the situation, felt justified in making each expenditure and incurring each obligation during FY 93. While we recognize the difficulty in accomplishing the recent elections, we believe that Elections has displayed total disregard of their financial responsibility to spend within their appropriation authority.

Analyses of expenditure patterns provided by DAS continued to be ignored by Elections. The administrative officer at Elections during the period of the 1992 primary and general elections also prepared projections and issued spending pattern warnings. These too went unheeded by the director and the Lieutenant Governor. Finally in November 1992, attempts were made to prolong Elections' operations. Steps taken in this effort such as laying off temporary employees, reducing some permanent staff hours, and cancelling contracts were appropriate. However, the staff reductions taken were insignificant in terms of overall cost savings and other more drastic measures were not employed. Instead, Elections, with assistance from DAS, the Office of the Lieutenant Governor, the Department of Law (LAW), and the Office of Management and Budget (OMB), took several inappropriate accounting actions to permit the continued expenditure of funds, even after total available FY 93 appropriations had been exhausted.

A $242,000 RSA with Department of Administration, Division of Information Services (DIS) signed on November 4, 1992 was not encumbered as required (see Recommendation No. 1). A significant portion of the anticipated services had already been rendered by DIS by that time. Failure to encumber funds for the RSA permitted AKSAS to continue processing other Elections' expenditures. Had the RSA been properly encumbered, our analysis indicates Elections would have been out of funds by December 1992.

As a means to transfer a legal services contract obligation to another agency, Elections entered into an inappropriate $50,000 RSA with LAW. The agreement was signed by officials from LAW, Office of the Lieutenant Governor, DAS, and OMB (see Recommendation No. 5).

In our estimation, despite efforts on the part of DAS to "free-up" additional operating funds, Elections had overexpended their original FY 93 appropriation by more than $100,000 as of February 16, 1993. We consider this estimate to be very conservative. We assumed that most current encumbrances could be released for other uses and we intentionally underestimated pending payroll expenditures. A more realistic estimate would be approximately $240,000.

The incurring of additional obligations or expenditures by or for elections will be in violation of Alaska Statutes and the Alaska Constitution. One possible immediate action which could mitigate the current overexpenditure situation would involve a transfer of additional monies to the Governor's Contingency Fund from other Executive Operations allocations via the revised program process. These additional contingency fund monies could then be made available to Elections to meet their current liabilities. Absent action of this nature or supplemental funding by the legislature, an immediate suspension of all division activities, and a furlough of all staff is seen as the most viable option available to the administration.

Personnel Decisions Lead to Poor Morale and High Costs

Elections' employees who have worked for the current administration describe a picture of poor morale within the division. Two reasons most commonly expressed for the poor morale are that favoritism rather than hard work and job merit determines personnel actions and the excessive amount of overtime that was worked by some employees at Elections.

We found that Elections has had higher personal service expenditures in FY 93 than in previous election years and their FY 93 budget was exceeded (see above comments). Our analysis shows that by January 25, 1993, personal service costs exceeded the amount authorized for all of FY 93 by approximately 6%. We believe there are a number of factors that caused the high personal service expenditures. Both the termination of long-term employees at the start of the administration, followed by additional turnover in crucial positions, indirectly impacted personal service expenditures by creating the need for extra overtime. Direct causes of high personal service expenditures were significant range increases for some positions, the amount of unbudgeted overtime claimed, and the use of temporary employees in excess of budget.

The above actions that caused high personal service costs cannot be attributed solely to reapportionment and the other external factors described in the Background Information section of our report.

Decision to Replace Long-Term Elections' Employees - The Lieutenant Governor and Elections' director made a poor management decision by not considering the long-term consequences when they asked for the resignations of all top management and some mid- and lower-level ranges when they took office. As a result, Elections lost most of its institutional knowledge with the termination of those individuals (see Recommendation No. 2). We feel the resulting lack of expertise and understanding of election processes contributed significantly to the amount of overtime and number of temporary employees hired. Elections used additional human resources to make up for the loss of election process knowledge.

Turnover in Top Financial and Program Positions - Four of the top and mid-management positions at Elections have had high turnover since the advent of the current administration. This degree of turnover causes disruption to normal operations. It takes time for new people to understand and efficiently carry out their assigned tasks.

Top management includes regional election supervisors. One region has had two election supervisors while another region has had three election supervisors. Election supervisors are responsible for drawing precinct boundaries within their region and for overseeing input of voter registration and legal descriptions for their region, as well as general supervision of regional staff.

Mid-level management includes the positions of project coordinator and administrative officer. Three people acted in the position of project coordinator, which oversees the publication of the Official Election Pamphlet. The Official Election Pamphlet, which is mandated by statute, was a project that was picked up and put down as the project was passed from one employee to another. The position of administrative officer is the primary position charged with fiscal responsibility. Nine different people have acted in that administrative role since December 1990.

In spite of large pay range increases in the administrative officer position, Elections has found it impossible to keep this position filled. At the beginning of this administration, the position was classified as an administrative assistant at a range 16. When the administrative assistant, who had been at Elections for over 2 years, was asked to resign, it was because Elections wanted to change functions of the position. They did not feel the individual could act in the new capacity. The position was not upgraded at that time. Instead, the position was again filled at the administrative assistant level. The appointed individual only stayed in the position for five months.

Before the position was refilled, Elections upgraded the position to administrative officer at a range 18. The first person hired in this capacity stayed for only 6½ months. Again, Elections chose to increase the range of the position, this time to a range 20. The person who filled the position for five months was transferred to another position within Elections. Five more individuals have acted in the capacity of administrative officer since that time. The longest tenure has been six months. The last three employees to hold this position were paid at a range 21.

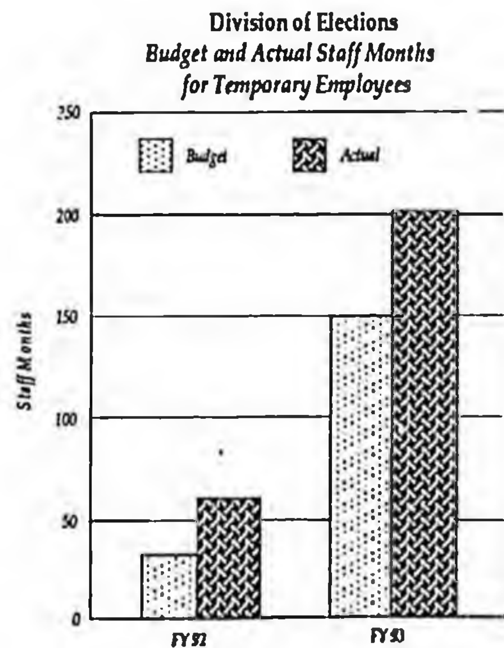
Unbudgeted Overtime Worked by Permanent Staff - Many current and former Elections' personnel state that the division's permanent employees have very poor morale. One reason cited is the excessive amount of overtime employees worked in FY 93 in preparation for the primary and general elections. Individuals in ranges 17 and above did not earn overtime pay. The Elections' director estimated that these 9 employees jointly worked about 3,500 hours in FY 93.

Permanent employees in ranges below 17 were eligible for overtime, as were temporary employees. We conducted an analysis comparing the first six months of FY 93 to the last election year, FY 91. We found that overtime for the first six months of FY 93 exceeded overtime for all of FY 91 by over $200,000.

Thirteen overtime eligible permanent employees have already been paid in excess of $110,000 from working more than 5,000 hours of overtime in FY 93. While it is humanly possible to work the overtime submitted in FY 93 for each employee, the distribution of overtime in Juneau and Anchorage does not seem reasonable. One Juneau employee had 527 hours of overtime while another Juneau employee, being paid at the same range, only worked 235 hours of overtime during the same period. An administrative assistant in the Southeast Region Office earned 318½ hours of overtime while the administrative assistant in the director's office only had 23¼ hours of overtime. In Anchorage, two employees were at the same range from October 1992 to February 1993. During this period one employee had 328¾ hours of overtime while the other had 157⅓ hours of overtime.

Unequal distributions of overtime, such as the ones we have cited, often cause poor morale among staff. In addition, Elections would have benefitted by having overtime more evenly distributed among staff to avoid employee fatigue and resulting mistakes.

Use of Temporary Employees - As shown in the graph to the right, and further discussed in Recommendation No. 1, Elections exceeded budgeted staff months for temporary employees in both FY 92 and FY 93. We estimate that staff months worked in excess of budget accounts for $128,000 in personal service costs for FY 93.



Lack of Documentation to Support Personnel Decisions - Another reason cited for poor morale is employees' perception that personnel actions are directed by favoritism rather than job merit. As discussed in Recommendation No. 2, Elections can do little to dispel this perception since they lack documentation to support bases for decisions. We cannot, however, ignore the pervasiveness of disagreement with the employment practices voiced by those employees.

Pay Ranges Increased for Some Permanent Positions - As discussed in Recommendation No. 1, the current administration chose to substantially increase the range of several permanent positions in FY 92. This increase had not been budgeted in FY 92 when it went into effect and, as a result, may have contributed to Elections overexpending their original FY 92 budget.

The increased ranges were budgeted for FY 93. We believe that the increased ranges, while budgeted, account for some of the increased expenditures in FY 93 as compared to prior election years. Our analysis indicates that after the first four months of FY 93, personal services costs had more than doubled those of the same period of the previous election year, FY 91. They also exceeded FY 89 expenditures for the same period by approximately $400,000.

Despite Elections' Claims, Reapportionment is not the Sole Cause of Higher Expenditures - We compared FY 93 personal service expenditures to those of previous election years to determine if reapportionment was the sole cause for the higher expenditures. One of our analyses strongly indicates that reapportionment is not the sole factor in higher personal service costs. All work associated with reapportionment, which included redrafting precinct boundaries and inputting new precinct information into the voter registration system, was completed before the primary election in September 1992. Yet we found that 20% of Elections' FY 93 personal services budget was expended during the month of November 1992 alone. During the same month in election years FY 91 and FY 89, only approximately 10% of personal services costs were expended. Therefore, the 10% increase in personal service expenditures for the month of November 1993 must be attributable to a factor other than reapportionment. We surmise that it was caused in part by the significant range increases given to previously lower-range positions and retention of a large number of temporary employees.

Some Contracts and Reimbursable Services Agreements are Appropriate, Others are Not

As of January 25, 1993, 58% of total recorded Elections' FY 93 expenditures were for contractual services. The majority of contractual service expenditures were incurred in the General/Primary allocation. Ninety-six percent of total budgeted contractual services in the General/Primary allocation have already been exhausted. The total FY 93 amount expended through January 25, 1993 is more than that expended for the entire election years of FY 89 and FY 91.

We reviewed contracts and RSAs that Elections entered into in FY 92 and FY 93. Our focus was on those related to the election process and reapportionment driven tasks. Most of the contracts were for normal, recurring costs of Elections. These contracts include the printing of ballots, printing of the Official Election Pamphlet, and hiring a firm to assist with the counting of election ballots. Other contracts were for services unique to the FY 92 and FY 93 election processes.

Two contracts were in response to election process changes caused by having a closed primary. Elections entered into one contract for $23,450 to develop an educational campaign

designed to inform potential voters of changes to the statewide election process. A second contract for $5,000 was entered into with an individual for media consulting services to create a training video for election workers. We believe that the scopes of these two contracts are justified and directly related to the closed primary.

Three contracts and one RSA were in response to reapportionment. The RSA was with the Department of Natural Resources (DNR). The description of services to be provided per the RSA states that DNR will provide Elections' full support for their mapping and legal description project. The total cost to Elections for this RSA was $166,887. As discussed in the Background Information section, we believe that Elections benefitted from this RSA.

While two of the reapportionment contracts seem appropriate and properly justified, the third is of somewhat questionable benefit to Elections. One contract was entered into for $30,000 and subsequently amended to $130,000. The contract scope of services stated that the vendor would provide, upon the request of Elections, specific programming assistance on the software used to develop the reapportionment precinct maps. The services on the contract were actually only used twice and cost Elections $16,000. The remaining balance on the contract was cancelled. We believe that the services are reasonable and that Elections displayed good foresight in planning for backup assistance on their mapping needs.

A second contract for $5,000 was entered into for technical and computer support on reapportionment related precinct mapping projects. Again, this contract seems justifiable.

The third contract, for $50,000 was with an Oregon consulting firm. While payments on this contract were coded to the FY 92 Reapportionment project, the contract scope of services lists reapportionment as one of nine tasks to be performed by the vendor. We have been told by both former and current staff that this vendor was performing duties that had previously been performed by Elections' staff. There is some feeling among those people that had the division not experienced the loss of institutional knowledge at the advent of the current administration, this contractor's services would not have been necessary. Our review of the scope of services of the contract indicates that many of the functions listed should have been responsibilities of the Elections' director or her staff. These include assisting in the development and validation of management techniques used by the division, and determining the logistic placement and monitoring of appropriate Elections' personnel needed for each function throughout the election processes.

While we did not note any contract procurement violations in our review of the contracts discussed above, three procurement violations on small procurements were reported to General Services and Supply by DAS. These procurement violations are discussed in Recommendation No. 1.

We reviewed two other significant RSAs entered into by Elections, one with DIS for $242,000 and one with Department of Law (LAW) for $50,000. The RSA for computer support and services with DIS is related to reasonable costs of the division and was budgeted for in FY 93. As discussed in Recommendation No. 1, this RSA was never encumbered. Although DIS has rendered approximately $230,000 of services on this RSA, they have never

been paid. Since Elections has already overspent their FY 93 appropriation, DIS will not be reimbursed without additional funding for Elections.

The RSA with LAW is an inappropriate method of transferring funds between appropriations. Our analysis of this RSA is presented in Recommendation No. 5.

Elections' Requests for FY 93 Supplemental Appropriations Exceed Actual Needs

Elections submitted two requests for supplemental appropriations for FY 93 to the legislature for consideration in January 1993. The first was for $90,000 needed to hold mandated regional education attendance area (REAA) and coastal resource service area (CRSA) elections on March 2, 1993. The second was for an additional $891,500 to fund Elections' operations until the end of the fiscal year and to allow payment of unpaid obligations.

We reviewed these requests and assessed their reasonableness in light of Elections' current financial condition (see comments on page 15-18). Our review and analysis is summarized in the following section.

$90,000 REAA/CRSA Supplemental Appropriation Request - Funds needed for administering these required elections were part of Elections' original FY 93 appropriation. Due to the level of expenditures for other purposes, Elections has exhausted their current year appropriation and requires additional funding. A supplemental appropriation of $90,000 was passed by the legislature and approved by the Governor on February 18, 1992 for this purpose.

Documentation provided by Elections and DAS, and our review of REAA/CRSA election costs from prior years, indicate that $90,000 is a reasonable estimate of the cost of conducting the REAA/CRSA elections. This amount closely parallels prior year costs to administer similar elections in the fall of 1991. According to their request, Elections intends to use the $90,000 supplemental appropriation for payment to election workers ($52,300); advertising ($23,500); and printing, polling place rental, freight, and supplies ($14,200).

Initial planning for the REAA/CRSA elections, which began several months ago, was funded with $25,000 made available to Elections from the Governor's Contingency Fund. DAS and Elections plan to reimburse the contingency fund from the recently approved supplemental appropriation. In our opinion, these funds do not require repayment. Accordingly, we are recommending that any additional supplemental appropriation to Elections for FY 93 be reduced by this amount.

$891,500 Operating Supplemental Appropriation Request - According to Elections, this supplemental appropriation is needed to pay for operations for the remainder of FY 93 and to pay current obligations for which no funds remain. They stated in their request that the additional funding is needed because they incurred extraordinary costs during the 1992

general and primary elections and that they have insufficient balances in their appropriation to continue daily operations through June 1993.

The primary components of their request are as follows:

Personal Services		
18 Full-Time and 2 Part-Time Staff	$338,908	
2 Temporary Employees	17,292	$356,200
Travel		14,100
Contractual Services		
DIS Computer Services	310,000	
Legal Services	125,000	
Other (phones/printing/postage/etc.)	83,800	518,800
Supplies		2,400
Total Requested		$891,500

Documentation provided by Elections, DAS, and DIS was reviewed and analyzed. We also calculated estimates of anticipated monthly personal service expenditures at Elections for the balance of FY 93.

Our review and analysis determined the following:

> Personal Services - Elections' request for $338,908 assumes it is necessary to return 18 permanent full-time (PFT) positions to 37.5 hour work weeks (some are currently filled for only 30.0 hours/week) and retain 2 permanent part-time (PPT) positions for the remainder of the year. Since this number of positions is within Elections' original FY 93 budget totals and approximates the number of PFT and PPT positions budgeted each year, this assumption seems reasonable. Our estimate of projected personal service expenditures for these positions confirms that the portion of this amount related to PFT and PPT positions is not unreasonable.
>
> Also included in the $338,908 request is $5,600 for overtime that Elections believes it necessary to pay to a past employee. This employee supposedly worked the overtime hours, but was deemed overtime ineligible by the Department of Administration, Division of Personnel due to her employment status under the Fair Labor Standards Act. Accordingly, we propose that the requested supplemental appropriation be adjusted downward by $5,600.
>
> We also do not believe that funding for additional temporary positions is warranted. Funding for this purpose was not included in Elections' memorandum to DAS delineating their remaining estimated FY 93 needs. Therefore, we propose that the requested supplemental appropriation be adjusted downward by another $17,300.

Travel - It is consistent with Elections' operations to expect some need for travel during the remainder of the fiscal year. However, the amount requested for this purpose is in excess of that likely to be required. Travel can reasonably be limited to no more than $5,000 for the remainder of the fiscal year. This is estimated by us to be equivalent to 5 one week trips to Anchorage for Elections' director. Accordingly, we recommend that the overall supplemental appropriation request be adjusted downward by $9,100.

Contractual Services

$310,000 for DIS Computer Services - Elections estimates the need for $310,000 to be used to pay for the services of DIS. Some of this is to be used to meet obligations already incurred but not yet paid, while the remainder is comprised of an estimate of needs for the remainder of the fiscal year.

Of the $310,000, $8,328 relates to an existing RSA for which services have already been provided and monies are already encumbered. Accordingly, there is no need for additional funds for the payment of this obligation. We propose that the Elections' request be adjusted downward by this amount.

An additional $34,400 relates to an RSA for which services have already been rendered and, according to DIS fiscal staff, payment has already been made. There is no conceivable reason why additional funding would be required for this purpose. We recommend that the requested supplemental appropriation be adjusted downward by an additional $34,400.

Of the remaining $267,272, the largest component is related to an RSA for computer chargeback totalling $242,000. Funds for this service were budgeted in FY 93, but no encumbrance was ever recorded by Elections (see Recommendation No. 1). As of January 22, 1993, a total of $214,725 had been billed on this RSA, but nothing has yet been paid. An additional $14,618 is due for January 1993 chargeback. Payment of these past obligations and for any future DIS services per this RSA is required. Even when considering a possible 10%-15% chargeback rebate, which is probable per DIS, it is likely that the entire $242,000 will be needed by Elections during the current fiscal year. No adjustment to the requested amount is proposed.

The remaining amounts estimated to be required for DIS services are related to consulting to be provided to Elections on an as-needed basis. Since Elections no longer employs any data processing staff, it is reasonable to expect they will utilize DIS. Although the extent to which these services will actually be needed is not known, we will not propose any further adjustments to this request category.

Legal Services - This $125,000 obligation was not budgeted. A contract for legal services was entered into by Elections to obtain representation for the

Elections' director in a suit brought against her by the Governor. It relates to actions she took contrary to the recommendation of the attorney general in regards to recall certification. The attorney general ultimately granted her the authority to secure counsel, but said the costs would be paid by Elections.

At this time, the original contract has been amended downward to $50,000. Any billings received before this supplemental appropriation is approved will be paid by LAW (see Recommendation No. 5). To date, no payments have been made. Elections plans to reimburse LAW with supplemental funds and amend the contract back to the original $125,000.

In our opinion, $50,000 for legal services is required in order to encumber funds for the existing legal service contract when the inappropriate RSA with LAW addressed in Recommendation No. 5 is rescinded. No additional legal services obligations exist or are anticipated for the remainder of the current fiscal year. Therefore, we recommend that the requested supplemental appropriation be adjusted downward by $75,000.

Other (phones/printing/postage/etc.) - $83,800 of the request is attributable to this category. Of this, $50,000 is intended to be used to reimburse the Governor's Contingency Fund. The rest relates to miscellaneous contractual services. This contractual services portion is not considered unreasonable.

The $50,000 requested to refund the contingency fund, however, is not considered a necessary cost of operations for Elections. In our opinion, these funds do not require repayment. Accordingly, we propose that Elections' request be adjusted downward for this $50,000 and an additional $25,000 to offset the amount already made available to them for this expressed purpose in the $90,000 REAA/CRSA supplemental appropriation already approved (see comments on page 23).

Supplies - Due to the insignificance of the amount being requested for supplies, nothing was done to determine its validity. No adjustments to the amount requested are proposed.

Summary of Proposed Adjustments

Original Elections Request			$891,500
Less:	Past Employee Overtime	$ 5,600	
	Temporary Employees	17,300	
	Travel	9,100	
	Encumbered DIS Obligation	8,328	
	Previously Paid DIS Bill	34,400	
	Legal Services	75,000	
	Contingency Fund Repayments	75,000	224,728
Estimate of Actual Need			$666,772

Notwithstanding the fiscal mismanagement which led to the current situation at Elections, it is not possible for them to legally continue operations absent additional funding from the Governor's Contingency Fund or a supplemental appropriation for the remainder of FY 93. The amount of supplemental funding requested, however, is in excess of that required.

In our opinion, if Elections manages their funds in a fiscally responsible manner, no more than $667,000 in supplemental funding is needed for their operations for the remainder of FY 93. We highly recommend that Elections work closely with DAS to ensure controls are imposed to guarantee that any additional funds are expended in accordance with the mandate of the legislature (see Recommendation No. 4).

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RECOMMENDATIONS

Recommendation No. 1

Division of Elections (Elections) must improve their fiscal management and make concerted efforts to operate within the constraints imposed by law, regulation, and the appropriation process.

Elections has violated statutes, regulations, and administrative policy in many areas. They have overexpended their appropriations, failed to encumber obligations, incurred procurement violations, and have not paid vendors in a timely manner. These problems are partly associated with Elections not utilizing the services and advice of the Office of the Governor, Division of Administrative Services (DAS) and partly the result of high turnover in the administrative officer position (see Recommendation No. 2). But, the underlying cause is in not having a management team that understands these processes and is committed to compliance with them.

Overexpenditure of Appropriations

Total Disregard of Fiscal Responsibility - Elections has displayed total disregard of their financial responsibility to spend within their appropriation authority. At the end of our field work, we estimate the division has overexpended their FY 93 operating appropriation by more than $100,000. According to the director of DAS, Elections' appropriation was exhausted by December 1992. See the Auditor Conclusions section for additional analyses.

Elections' director indicates that she was given a mandate to accomplish a specific task - having a primary and general election. The task seemed insurmountable with the external factors that were driving the work (see the Background Information section). She felt that she was assured by high level officials within the Department of Law and Office of Management and Budget that she must do whatever she had to do to accomplish the task, whatever the cost. She believed that those officials would support her request for a supplemental appropriation when it was presented to the legislature.

Officials she indicated having given her this assurance explained to us that their discussion was not intended to be a blanket approval to ignore prudent fiscal management. While they recognized a supplemental appropriation would be necessary, they assumed normal fiscal controls would be in place and that a supplemental request would be supported by the justifiable expenditures of the division.

Unbudgeted FY 92 Personnel Actions - There are numerous examples in several budgetary line items in both fiscal years 1992 and 1993 where Elections' actions display disregard for appropriation and budgetary constraints. Our review of personnel issues at Elections indicates to us that responsible fiscal management was not a driving force in making personnel decisions. In fiscal year 1992, when a supplemental was necessary, Elections

chose to hire staff at ranges higher than budgeted and also chose to double fill positions for a total of 12½ months.

The current administration chose to substantially increase the range and step of several permanent positions. Two positions that had been at range 16 were increased to a range 18 then ultimately changed to a range 21. This resulted in a net increase of approximately $14,000 per year in base pay for each of these positions. One of the two positions had been a range 16 for ten years. A third position which had been a range 8 for 7 years was changed to a 14, then down to a 10. In FY 92 these three positions were paid at ranges higher than budgeted. However, the FY 93 budget did reflect the new ranges and steps actually being paid.

FY 92 Double Filled Positions

Elections has double filled various positions for extended periods of time. While double-filling positions is not prohibited, most agencies do not make a practice of this because their budget will not support the added expenditure. Elections double-filled five positions; two positions for 1½ months, one position for 2½ months, and two positions for 3½ months. This total of 12½ months when positions were double-filled were all in fiscal year 1992.

FY 92 also had higher than budgeted salary expenditures for temporary employees. Elections had to hire temporary employees to prepare for the primary and general elections. As shown in the graph on page 20, Elections had budgeted 14 temporary positions in FY 92 for a total of 29 staff months. Temporary positions were filled for a total of 62 staff months during FY 92. This exceeded budgeted staff months by 33.

<u>FY 93 Personal Services Exceed Budget by More than $238,000</u> - Elections continued to use temporary employees in fiscal year 1993. Again, Elections exceeded the budgeted number of temporary employees hired in both number and total staff months. Elections had budgeted 43 temporary positions. But between mid-July to mid-August of FY 93 there were 46 to 47 temporaries on staff. Staff months were budgeted at 150, but halfway into fiscal year 1993, Elections has already used 201 staff months (see graph on page 20). Considering an average pay range of 8, at step A, this equates to $128,000.

In addition to exceeding staff months for temporary employees, unbudgeted overtime of $110,000 was paid to permanent staff in fiscal year 1993. Because Elections had nearly exhausted their FY 93 appropriation shortly after the general election, Elections terminated all temporary employees at the end of November. At the same time, permanent staff in non-supervisory positions were reduced to a 30-hour work week. This less than significant gesture had little effect on the current year shortfall situation.

<u>Travel Expenditures</u> - One situation that occurred in the travel line item, while not high in dollars, illustrates Elections' flagrant disregard for proper fiscal management. An Anchorage employee was temporarily assigned to Juneau for an extended period. A personnel action was signed by Elections' director making Juneau the employee's new work station. This meant the employee would not be eligible for travel per diem while in Juneau. Three months

after the employee had started working in Juneau, her work station was retroactively changed back to Anchorage effective the date she left for Juneau. This change meant that Elections owed the employee per diem for the period she was in Juneau, which was paid by Elections. Since the employee's work station was now Anchorage, she was no longer eligible for per diem while on travel status to Anchorage.

But she inappropriately received a $1,000 travel advance processed on a field warrant for travel to Anchorage. Since the employee had work-related fuel charges in the amount of $93.67, DAS notified Elections that the employee needed to reimburse Elections for $906.33. Elections asked DAS to recalculate the per diem overpayment. DAS complied and came up with the same result. Elections asked for another recalculation with additional information on dates and locations. DAS provided Elections with the additional information requested. DAS's second review still concluded that $906.33 was overpaid to this employee. Elections proposed a per diem scenario that would not only eliminate the overpayment to the employee, but cause an additional amount to be owed. But this scenario did not take into account the work stations as established by Elections' director. DAS's finance officer responded to the director, which was copied to the Lieutenant Governor, by saying that there was no basis on which to pay the employee per diem barring retroactive changes to her work station. The finance officer then added, *"However, further retroactive changes would also serve to create the appearance of manipulating the State system to benefit an individual."*

The division director responded by writing a memorandum and preparing two personnel action forms dated January 24, 1993 to retroactively change the employee's work station. The memorandum and personnel actions were signed by the division director and initialled by the Lieutenant Governor. One personnel action retroactively changed the employee's work station to Juneau when the employee was in Anchorage. The second personnel action reassigned the work station as Anchorage after the general election. The results of these actions cause the $906.33 overpayment to be eliminated and create the need to pay the employee an additional $2,700 in per diem. We agree with the finance officer's statement that the state system is being manipulated to benefit an individual. Since the retroactive change occurred in January 1993, Elections' director and the Lieutenant Governor were both well aware of the financial crisis that existed within the division. The lack of sufficient balance in their FY 93 appropriation did not seem to enter into the decisions made.

Overexpenditure Summary - The situations explained above indicate Elections' lack of understanding and concern with complying with the annual appropriated budget. Alaska Administrative Manual 25.040 explains the legal significance of the annual appropriated budget.

> *The annual appropriated budget authorizes and provides the basis for control of financial operations during the fiscal year. The appropriations constitute maximum expenditure authorizations during the fiscal year, and cannot legally be exceeded unless subsequently amended by the legislature.*

We recognize that a supplemental appropriation for FY 93 was anticipated even prior to the beginning of the fiscal year; however, we are not convinced that all steps were taken to

operate Elections with prudent fiscal management. Had Elections used reasonable care when making expenditures, the supplemental request may have been substantially less. Elections should improve their financial management and operate within the constraints imposed by the appropriation process.

Encumbering Obligations

Encumbrances are required by administrative policy and generally accepted accounting principles to be recorded in certain instances. Section 30.010 of the Alaska Administrative Manual (AAM) states that encumbrances must be recorded for contracts estimated to cost $5,000 or more. Reimbursable Services Agreements (RSAs) are contracts for services between state agencies that should follow the same rules as contracts with private vendors per AAM 25.160.

Elections did not establish an encumbrance for an RSA entered into with Department of Administration, Division of Information Services (DIS). At the time the RSA for $242,000 was signed by both agencies, Elections did not have a sufficient balance to allow encumbering for this obligation. At that time DIS had already performed services related to the agreement in excess of $200,000. No funds were ever encumbered in relation to this RSA. Elections simply chose to ignore the RSA obligation.

By not establishing an encumbrance to restrict existing funds for the RSA with DIS, the state accounting system permitted Elections to continue to make other purchases. This allowed Elections to overexpend their appropriation in the non-personal service accounts. Elections needs to establish encumbrances for all known obligations to help prevent future budget shortfalls and assist in responsible fiscal management.

Procurement

According to documentation provided by DAS, Elections committed three procurement violations during FY 92 and FY 93. One of the violations was caught by DAS's supply officer and two were identified by the administrative officer at Elections at that time. While the circumstances regarding each incident were different, the cause in each case was staff's unfamiliarity with the state procurement code.

In the first incident, an administrative assistant rented a copier for one month at a cost of $325. The project for which she rented the copier was larger than anticipated so she did not return the copier until the job was completed four months later. Since the total cost came to $1,210, Elections should have complied with 2 AAC 12.400. This regulation requires that for the procurement of supplies, services, or construction between $1,000 and $5,000 that at least three firms or persons be contacted for quotations. Since Elections did not do a solicitation for the rental of the copier, a procurement violation occurred.

In the second incident, Elections had a delivery order for $4,750 established with a vendor for producing camera-ready district maps. This delivery order was increased by $2,630 without submitting a Request for Alternate Procurement (RAP) to General Services and

Supply (GSS). An increase of this magnitude, without approval from GSS, is in violation of AAM 81.250 which addresses steps to follow for unanticipated amendments.

In the third incident, Elections did submit a RAP for a sole source, emergency purchase to GSS. Before the RAP was approved or even submitted to GSS, an employee at Elections had already faxed the vendor an authorization to proceed.

In their investigation of the three incidents, which was submitted to GSS, DAS stated that they were mandating Elections submit all purchase requests through Elections' administrative officer. It will be the administrative officer's responsibility to ensure that all requests for purchases are made in accordance with the state procurement code. We concur with DAS's mandate.

Untimely Payment of Vendor Invoices

Elections' average invoice payment date is more than 30 days. In many instances Elections has taken over three months to pay vendors, and in some cases as long as five months.

The payments were late because of Elections' failure to approve and forward the invoices to DAS for input and certification in a timely manner. Upon receipt of an invoice, Elections date stamps the invoice. The approval date was often a month after the date Elections showed receiving the invoice. Once the approved invoice was transferred to DAS, payment usually took place within three or four days. The overall lag time indicates that bill paying seems to have been a low priority of top management at Elections.

Alaska Statute 37.05.285 requires that payment for purchases and goods or services, with some exceptions, must be made by the date specified under contract or by 30 days after receipt of a proper billing. The statute goes on to require the payment of interest at the rate of 1.5 percent a month if payment for goods or services is not made on or before the required payment date. Had interest been requested and paid as required, Elections would have further overexpended their appropriation. In accordance with 2 AAC 15.115(b), it is the policy of DAS that interest is only paid when requested.

Elections should develop and implement procedures to ensure that bills are paid in a timely manner.

Recommendation No. 2

Elections should, in conjunction with DAS, establish personnel management practices that reflect sound merit principles of employment. As an alternative, to avoid future reoccurrence of undocumented hiring practices and personnel decisions, the legislature should explore the possibility of making all non-policy making positions in Elections part of the State's non-exempt service and subject to the rights and protection granted in the State Personnel Act.

An individual's right to vote is guaranteed in the Constitution of the United States. Alaska has adopted statutes and regulations to ensure that voters in Alaska are not disenfranchised. It is imperative that prudent management practices be followed to ensure compliance with these statutes and regulations. Poor personnel management decisions increase the potential that essential elements of the election process will not be completed efficiently or accurately. The risk of this occurring, and therefore compromising the election process, must be minimized.

Alaska Statute 39.25.110 makes all positions within the Governor's and Lieutenant Governor's offices exempt from the provisions of the State Personnel Act. The current Lieutenant Governor chose to replace many of the staff at Elections when he took office. Prior administrations have generally chosen to replace only the division director or, in some cases, the director and the regional elections supervisors. Non-policy making positions have previously been left intact to prevent the loss of institutional knowledge and skill within the division.

Filling of Exempt Positions

Current Office of the Governor procedures exist which define the manner in which exempt positions shall be filled within the department. According to these Standard Operating Procedures (SOPs), positions can be filled by political appointment or by following recruitment procedures which are described in the SOPs. Political appointments are typically used for top level positions such as directors, while the prescribed recruitment SOPs are generally followed for positions below director level.

Elections is composed of five separate offices, the director's office and four regional offices. Some of the positions in the director's office have been filled by the Lieutenant Governor and other positions have been filled by the director. The election supervisor in each region hires the people to work in that region. Under the current administration, the positions in the five offices have not been filled by open recruitment, such as advertising in a local newspaper. Instead, the positions are filled by individuals who bring unsolicited resumes to the office or through hiring contacts of current Elections' employees. While we were told that interviews were held with prospective employees, Elections did not maintain any documents to support their hiring decisions.

A past regional supervisor informed us that she felt pressure to hire some individuals she believed to be unqualified but were friends of the Elections' director or the Lieutenant Governor. Our review indicates that many individuals appointed into positions at Elections had in fact previously worked on various campaigns of the Lieutenant Governor. Current and former employees at Elections have stated that, in some cases, the person appointed to a given position appears to have been selected based on this association instead of their actual qualifications for the job.

Appointment to Administrative Assistant/Officer Position

According to the director of Elections, the person to fill the administrative assistant/officer position has usually, if not always, been selected by the Lieutenant Governor without significant input from her. We believe the director should be actively involved in the filling of this fiscal position. This position, which was a range 16 at the beginning of the current administration and has since been upgraded to a range 21, has experienced a great deal of turnover. Nine employees have held this position since December 1990, with the longest period of responsibility being 6½ months.

While AS 15.10.105 states that the Lieutenant Governor controls and supervises Elections, the same section also describes the duties of the division director. One duty of the division director is "*the employment and training of election personnel.*" Perhaps by having the director involved in the selection process of a position that she directly supervises, there would be less turnover in this key financially responsible position.

Personnel Actions and Employee Morale.

Elections did not document the basis for decisions relating to employee promotions, hiring, demotions, and terminations. Positions that had been established at certain ranges for a number of years were increased immediately by the new administration, and then constantly readjusted both upward and downward in the following months. According to the Elections director, she advanced employees by several ranges for temporary periods of time as a motivating tool to accomplish a specific work objective.

Poor morale has developed at Elections. One of the reasons for the poor morale, according to current and former employees, is the perception that favoritism, rather than job merit, controls personnel actions. Because Elections does not adequately document their personnel decisions, we were unable to dispel the possibility that favoritism may have played a role in personnel actions. However, neither can we ignore the pervasiveness of disagreement with the employment practices voiced by those employees.

Following are three examples which illustrate employee concerns with the inequity of personnel actions that affected their jobs.

1. At the end of November 1992, when non-supervisory staff hours were reduced to 30 hours a week because of the budget crunch, one person's hours were cut to 15 hours per week. This reduced work week meant the person was not eligible for any state benefits, including health insurance. This same person was also told his range had been decreased. The employee stated in his resignation letter, "*All I want is to be treated the same as everyone else in this office.*"

2. The director of Elections has stated that the reason one non-decisionmaking employee was terminated at the beginning of the current administration was because his position was going to be upgraded and he did not meet the new requirements. While this position was eventually upgraded, it was filled for five months by another person who

is said to have possessed no more budgetary experience than the individual terminated. The terminated employee received an out-of-court settlement related to this dismissal.

3. One regional supervisor explained the "catch-22" situation of that position. The employee explained in a letter to the Lieutenant Governor that Elections' staff are forbidden by AS 15.10.105 to participate in any form of political activity other than voting. The employee went on to say, *"Ironically, the Division falls administratively under the Office of the Governor, which puts us in the position of having to vie with loyal party campaign workers for our positions while we follow the line of strict neutrality."*

Elections should formalize the process of hiring, promoting, demoting, and terminating personnel by documenting the bases for these personnel actions. Rather than develop their own personnel procedures, Elections should abide by current DAS SOPs. These procedures already address the issues of advertising an open position, interviewing and selection techniques, and performing employee evaluations. Elections should utilize the services of the Office of the Governor, Personnel Office when taking personnel actions to reduce the possibility of violating an applicant's or employee's civil rights.

Legislative Alternative

Absent corrective action on the part of the Office of the Lieutenant Governor and Elections, the legislature should consider the possibility of making all non-policy making positions in Elections part of the State's non-exempt service and subject to the rights and protections granted under the State Personnel Act.

The State Personnel Act, AS 39.25, is based upon the merit principle of employment. AS 39.25.010 explains what the merit principle of employment involves:

> *(1) recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment;*
>
> *(2) regular integrated salary programs based on the nature of the work performed;*
>
> *(3) retention of employees with permanent status on the basis of the adequacy of their performance, reasonable efforts of temporary duration for correction in inadequate performance, and separation for cause;*
>
> *(4) equal protection of applicants and employees with regard only to consideration within the merit principles of employment; and*
>
> *(5) selection and retention of an employee's position secure from political influences.*

By enacting legislation to make Elections part of the non-exempt service, which is covered by the State Personnel Act, the legislature could assure institutional knowledge would be maintained during changes of administrations. Also, that the merit principle of employment would be followed.

Recommendation No. 3

We recommend that Elections use the accounting features available through the state accounting system (AKSAS) as a management tool and ensure that all financial activity is properly recorded.

Alaska Administrative Manual 10.070 gives agencies the authority to set up detail accounts below the statewide level to accommodate particular accounting and reporting requirements. Given the unique circumstances (e.g., reapportionment, republican rule, and recall) affecting Elections in FY 92 and FY 93, design and establishment of adequate and appropriate accounting structures was crucial. Elections did establish various collocation codes and ledger codes to track expenditures by region and for some specific functions, but their use is limited and inconsistent.

Responsibility for Proper Accounting and Controls - Although familiarity and day-to-day working knowledge of AKSAS accounting structures and relationships is commonly the responsibility of a division's administrative officer and administrative staff, ultimate responsibility rests with their supervisors.

In the case of Elections, ultimate responsibility lies with the division director and the Lieutenant Governor. Unfortunately, the level of working and conceptual knowledge of the State's accounting system possessed by these individuals is limited. Numerous features available through the accounting system to assist management in formulating plans and monitoring progress and financial condition have gone unused. In our opinion, this lack of knowledge, coupled with high turnover in the administrative officer position, contributed significantly to the Division of Elections' current overexpenditure situation.

Inconsistent and Incomplete Accounting Records - We found inconsistent and incomplete coding of expenditure transactions by project. Because of this, it is not possible, for example, to readily determine the actual cost of all Elections' expenditures related to reapportionment or to isolate costs incurred specific to the effects of the closed primary. Another example of inadequate expenditure control involves Elections' $424,000 FY 92 supplemental appropriation.

During the First Special Session in 1992, the legislature passed a supplemental appropriation for Elections. The act reads, *"The sum of $424,000 is appropriated from the general fund to the Office of the Governor, division of elections, for the redrafting of precinct boundary maps related to the 1991 reapportionment for the fiscal year ending June 30, 1992."*

Since this supplemental appropriation is for a specific purpose, it should have been established as a separate appropriation. This was not done. Instead, the $424,000 was simply added to Elections' existing FY 92 operating appropriation. As a result, it is not possible to readily identify from the accounting records that the appropriated funds were spent in accordance with the mandate of the legislature.

Specific Coding Errors - Examples of the type and nature of coding errors noted during our review include the incorrect recording of an Anchorage employee's pay to the director's office collocation code, failure to allocate a vendor payment between appropriate project codes, and failure to allocate personal services expenditures to the projects on which employees were working.

Encumbrances - Encumbrances are required to be established in certain instances. They can also be used a management tool to permit greater control over an agency's budget. Elections does not use encumbrances as a management tool and has failed to record encumbrances in some instances where they are required (see Recommendation No. 1). Failure to record encumbrances distorts an agency's true financial position in that balances in the accounting records are not reflective of all obligations of that agency.

In summary, Elections' limited use of controls and features provided in AKSAS has resulted in their inability to adequately track expenditures and monitor their budget. Elections is also unable to substantiate that funds were expended in accordance with their appropriations. We recommend that Elections use the accounting features of AKSAS as a management tool and establish additional controls to ensure that all financial activity is recorded in accordance with established policies, procedures, and administrative requirements.

Recommendation No. 4

Elections should take the necessary steps to rekindle the previous longstanding, positive working relationship with DAS.

Elections could have avoided many of the problems addressed in preceding recommendations if they had sought and relied on the expertise available in DAS. DAS has historically worked closely with management of the Division of Elections. Under the current administration this has not been the case.

In addition to a division director with many years of state experience, DAS has a payroll officer, a finance officer, and a procurement officer each with the necessary knowledge and experience for their respective fields. Since DAS is a service organization, they are able to support divisions under the Office of the Governor (OG) that need assistance or advice in any of these technical areas.

DAS's responsibilities to other OG divisions in the area of budget monitoring are as follows:

1. Monitor authorization balances and expenditures.

2. Provide a variety of monthly AKSAS financial reports.

3. Provide budget analysis and expenditure projections.

4. Research and discuss "red flags" with appropriate staff.

5. Provide additional support as needed.

DAS feels that Elections has not been responsive to many of their suggestions. When DAS determined that Elections was headed toward financial shortfall in January 1992, they provided numerous expenditure projections, trend analyses, and prior year comparisons. DAS believes their forewarnings and analyses were met with total disbelief.

According to the director of Elections, she lost trust in DAS's director when he bypassed her and provided financial information about her division directly to the Lieutenant Governor. As a result, she did not trust him personally and began to question the validity and accuracy of any information he provided. Information provided during FY 93 was also viewed as unreliable.

To promote and ensure overall efficiency and economy, it is imperative that Elections rely on the services and expertise available within DAS.

Elections' lack of reliance on DAS contributed significantly to the problems addressed in Recommendation Nos. 1 through 3. Failure by Elections to heed DAS's warnings and recommendations regarding spending patterns is partially responsible for the extent to which Elections overexpended their FY 93 budget (see the Auditor Conclusions section).

Recommendation No. 5

The use of RSAs by the Department of Law (LAW); Office of the Governor, Division of Administrative Services; Office of Management and Budget; and the Office of the Lieutenant Governor should be limited to instances where services are to be provided by one state agency on behalf of another. RSAs should not be used to circumvent the appropriation process.

On January 31, 1993, OG entered into a $50,000 RSA with LAW. Per the agreement, LAW is the requesting agency party to the RSA and Elections is the servicing agency. The following is the description of the services to be provided:

> *This agreement provides temporary funding in the amount of $50,000 to help defray outside counsel costs incurred by the Division of Elections in defense of Hickel v. Thickstun and the parallel lawsuit, Coghill v. The Director of Elections. The Division of Elections hereby agrees to seek a supplemental appropriation to repay Law as soon as funds are available.*

For all practical purposes, this agreement is no more than a loan to Elections.

The use of an RSA in this fashion is not appropriate. AAM 40.060 addresses the purpose of an RSA being where one agency is reimbursed the costs of providing services to another agency. This section states that *"RSAs will not be used as a means of transferring funding sources between appropriations."* In our opinion, loans between state agencies are generally inappropriate regardless of the actual form they take.

We are not addressing the issue of Elections needing to secure the legal counsel because of LAW's potential conflicts of interest. Our concern with the issue is that this RSA was not prepared because of the potential conflict, but rather as a means to prolong Elections' operations despite their having run out of funds.

Elections originally entered into a $125,000 sole source contract for legal services on October 29, 1992. The attorney general had delegated to the director of Elections the authority to secure independent counsel, at state expense, in a memorandum dated October 1, 1992. This memorandum also stated that funding for this representation would come from Elections' sources.

On January 8, 1993, the original contract amount was amended downward to $50,000 in order to "free-up" additional operating funds for Elections. As noted above, the subject RSA was dated January 31, 1993. It is clear that it was fashioned merely to facilitate additional "freeing of funds." In effect, this permits Elections to incur additional expenditures beyond those permitted by their current appropriations.

The budget act in which agency appropriations are established is law. For LAW, OG, and the Office of the Lieutenant Governor to permit an RSA of this nature is to condone a violation of the budget act. We recommend that this practice cease and that this particular RSA be rescinded immediately.

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ELECTION CYCLE TIMELINE

EXTERNAL FACTORS:

Reapp. Board Appointed on 1/30/91

Reapp. Plan Submitted to Governor on 6/11/91

Proclamation of Reapp. Plan on 9/5/91

Reapp. Plan Challenged on 10/4/91

Preclearance Requested on 11/1/91

Preclearance Approval on 4/10/92

AG Letter on Closed Primary Ballot issued 4/24/92

ELECTIONS TASKS:

Reimbursable Services Agreement Period of Performance for DNR to assist with a Ten-Person Team for Seven Weeks to Produce Top Quality, Color Statewide Maps and Atlas to Show Precincts

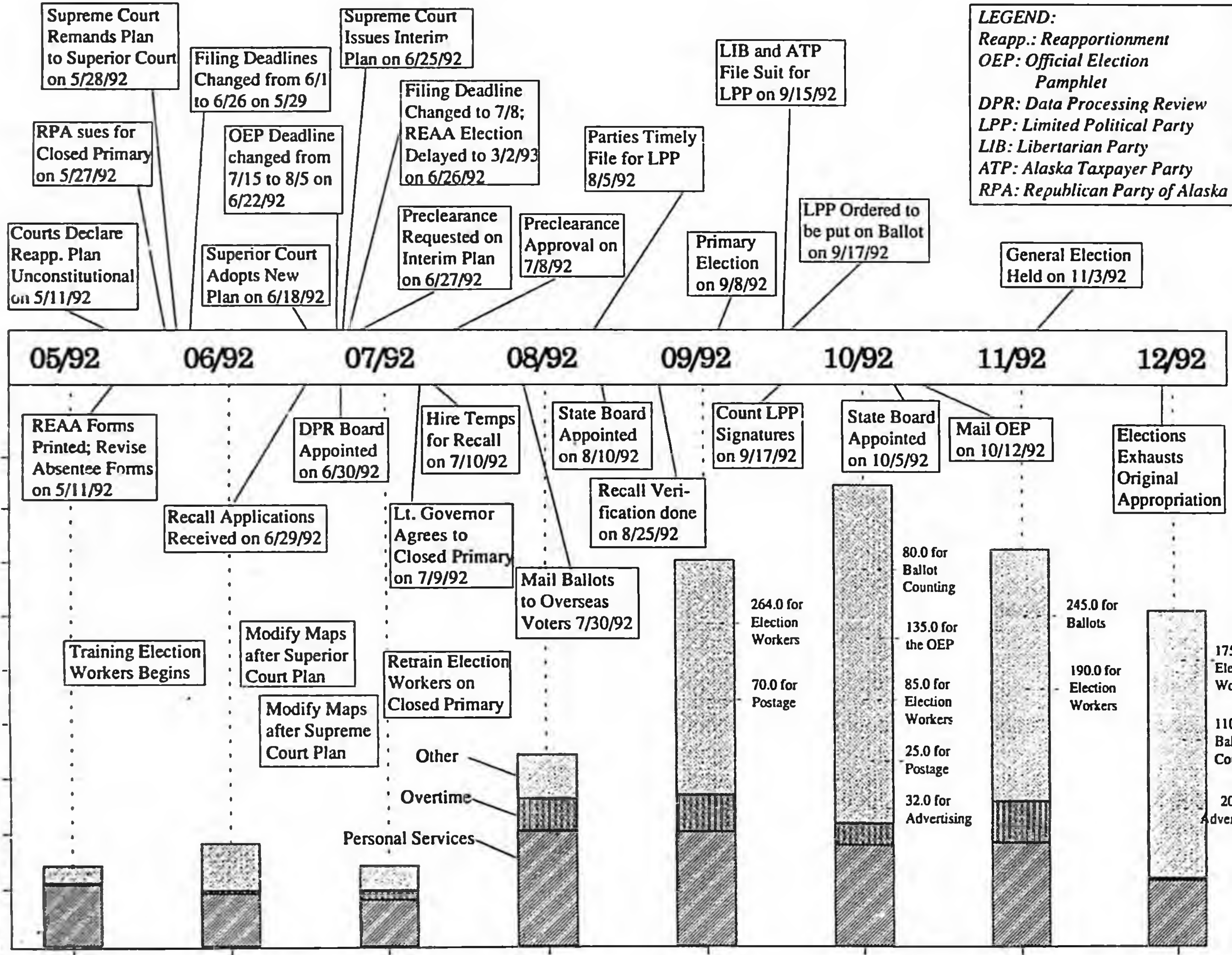
Expenditures In Thousands $

$900
800
700
600
500
400
300
200
100
0

Personal Services

Other

Overtime


Supreme Court Remands Plan to Superior Court on 5/28/92
Filing Deadlines Changed from 6/1 to 6/26 on 5/29
Supreme Court Issues Interim Plan on 6/25/92
Filing Deadline Changed to 7/8; REAA Election Delayed to 3/2/93 on 6/26/92
LIB and ATP File Suit for LPP on 9/15/92
Parties Timely File for LPP 8/5/92
RPA sues for Closed Primary on 5/27/92
OEP Deadline changed from 7/15 to 8/5 on 6/22/92
Courts Declare Reapp. Plan Unconstitutional on 5/11/92
Superior Court Adopts New Plan on 6/18/92
Preclearance Requested on Interim Plan on 6/27/92
Preclearance Approval on 7/8/92
Primary Election on 9/8/92
LPP Ordered to be put on Ballot on 9/17/92
General Election Held on 11/3/92
LEGEND:
Reapp.: Reapportionment
OEP: Official Election Pamphlet
DPR: Data Processing Review
LPP: Limited Political Party
LIB: Libertarian Party
ATP: Alaska Taxpayer Party
RPA: Republican Party of Alaska
05/92
06/92
07/92
08/92
09/92
10/92
11/92
12/92
REAA Forms Printed; Revise Absentee Forms on 5/11/92
DPR Board Appointed on 6/30/92
Hire Temps for Recall on 7/10/92
State Board Appointed on 8/10/92
Count LPP Signatures on 9/17/92
State Board Appointed on 10/5/92
Mail OEP on 10/12/92
Elections Exhausts Original Appropriation
Recall Applications Received on 6/29/92
Lt. Governor Agrees to Closed Primary on 7/9/92
Recall Verification done on 8/25/92
Mail Ballots to Overseas Voters 7/30/92
Training Election Workers Begins
Modify Maps after Superior Court Plan
Modify Maps after Supreme Court Plan
Retrain Election Workers on Closed Primary
Other
Overtime
Personal Services
264.0 for Election Workers
70.0 for Postage
80.0 for Ballot Counting
135.0 for the OEP
85.0 for Election Workers
25.0 for Postage
32.0 for Advertising
245.0 for Ballots
190.0 for Election Workers
175.0 for Election Workers
110.0 for Ballot Counting
20.0 for Advertising
$900
800
700
600
500
400
300
200
100
0

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STATE OF ALASKA

OFFICE OF THE GOVERNOR

DIVISION OF ELECTIONS

- ☐ *REGION I ELECTIONS OFFICE*
- ☐ *REGION II ELECTIONS OFFICE*
- ☒ *REGION III ELECTIONS OFFICE*
- ☐ *REGION IV ELECTIONS OFFICE*

March 18, 1993

Mr. Randy S. Welker
Legislative Auditor
Division of Legislative Audit
P.O. Box 113300
Juneau, AK 99811-3300

Dear Mr. Welker:

Thank you for your "Confidential" preliminary report copy for review by myself on the Division of Elections. I welcome any audit or systems review of any part of the State system I am personally responsible for. It is always healthy to have this review as long as it is fair and objective.

I have reviewed the preliminary audit and agree with many of the items. However, I find the audit is lacking on professionalism and objectivity in the sections where you respond to allegations and improprieties that were allegedly discussed by former employees. Some of these employees were replaced due to not performing their duties and might have left the Division of Elections under bad terms. I would hope that you had reviewed the employee evaluations of those former employees your auditors interviewed to make sure their comments could be considered credible.

I also feel that you have not presented accurate facts when discussing my decision or the Director of Elections decision to replace Elections' employees. You indicate that Elections lost most of its institutional knowledge when former employees were terminated. Your comments are unfounded by the success of the Primary and General elections and the fact that for the first time in Alaska history, the Division of Elections had to implement a closed primary election system during the same election year in which reapportionment was taking place. I believe the fact that the 1992 elections were highly successful in light of the numerous obstacles the Division of Elections had to overcome proves the employees in the Division of Elections were knowledgeable in the election process and had the expertise to carry out the election demands. You fail to mention that perhaps the amount of overtime hours were directly attributed to completing election preparations which in previous years the Division of Elections had 6 months to perform and in 1992 Elections only had 2-3 months to perform. This time crunch is undoubtedly going to cause an excessive amount of overtime.

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P.O. BOX 110018
JUNEAU, ALASKA 99811-0018
(907) 465-3021

REGION II ELECTIONS OFFICE
800 E. DIMOND BOULEVARD, SUITE 3-680
ANCHORAGE, ALASKA 99515-2045
(907) 522-8683

REGION III ELECTIONS OFFICE
675 - 7TH AVENUE, STATION H
FAIRBANKS, ALASKA 99701-4594
(907) 451-2835

REGION IV ELECTIONS OFFICE
ALASKA STATE OFFICE BUILDING
P.O. BOX 577
NOME, ALASKA 99762-0577
(907) 443-5285

Mr. Randy Welker
Page 2
March 18, 1993

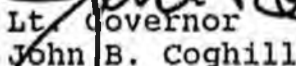
It was known that the Division of Elections would not have sufficient funds in their FY93 budget to complete reapportionment related tasks and conduct the 1992 elections in the time crunch they were facing. During one of the many reapportionment court hearings, Judge Larry Weeks acknowledged this fact and ordered the Division to request supplemental funding so that the election could be conducted on time. The Attorney General's office also indicated to Elections that they had to do whatever was necessary to conduct the elections on time and they too felt we would need supplemental funding.

I agree with the audit that Elections may not have had as tight of fiscal control as they should have had. Your comments are well taken and the Fiscal Officer we now have is competent to carry out the functions and to follow the recommendations in the audit. However, I feel your audit has made too many allegations that Elections employees lack the expertise and knowledge to conduct and accurate and efficient election. During the 1992 elections we had no election contests, no lost ballots, and reported results faster than in previous years. We conducted re-counts in close races and had candidates watching our review of ballots. There were no reports of disenfranchising voters or misconduct involving the election management. In fact, Elections was instrumental in increasing voter registration and voter turnout and also was involved in the KIDS VOTING project in Fairbanks which had a direct impact on voter turnout.

Attached are some comments regarding the audit. Please take all my comments as constructive criticism and my willingness to work with the Legislative Audit Division to provide sound recommendations to the Legislature.

I served 16 years in the Legislature and know that the only way we can solve these issues is to face them. I wish I had the opportunity to discuss these items with you before they were reported in your audit. Again, thank you for the opportunity to comment.

Sincerely,



Lt. Governor
John B. Coghill

Enclosure

1 of 3

COMMENTS BY LT. GOVERNOR JOHN B. COGHILL
PRELIMINARY AUDIT REPORT ON THE DIVISION OF ELECTIONS

Objectives, Scope and Methodology

I believe one of your objectives should have been to review and analyze the functions Elections had to perform during previous election years and the functions Elections had to perform to conduct the 1992 elections with reapportionment and implementing a closed primary. It does not appear that your audit compared the 1988 and 1990 election calendars with that of the 1992 election calendar. If the calendars had been analyzed, you would have found that the Elections' work load for 1992 was of a much greater magnitude than that of any previous election years.

Background Information

Your information on the number of previous administration employees still working in Elections is not correct. There are two working in the Director's office, one in Anchorage and one in Fairbanks. The Fairbanks office had two previous administration employees, however, one of those employees retired from the Division in January. Your audit does not reflect the number of previous administration employees who left Elections by retiring or pursuing other job opportunities.

Elections could not adopt the proposal made by DNR to accept information electronically from the map database to the voter registration system. 1) there were no funds available to implement a total refiguration of our VREMS system, and 2) it was too major of a systems configuration to implement when there were only a few weeks before the primary election. It was also known that the map database was not 100% correct and Elections felt that they could not risk even a slight incorrect assignment of voters to the wrong election district which could cause a candidate to contest the outcome of their election.

Your audit does not take into consideration the fact that due to the reapportioning of the legislative districts, Elections was required to adjust precinct boundaries and write new legal descriptions for every precinct in the state. The precinct legal descriptions were being prepared at the same time Elections was trying to transfer voters to their new election districts. Elections received no assistance on preparing legal descriptions. It is easy to draw a map, it is more complex and difficult to prepare legal land descriptions of those lines.

Auditor Conclusions

As you mention, Elections anticipated the need of additional funding for FY93 and drafted a supplemental appropriation request to be considered during the June 1992 special session. When the Governor failed to include this special appropriation request on

the special session agenda, and when the AG's office and Judge Larry Week ordered Elections to do whatever is necessary to conduct the elections on time, Elections had no choice but to overexpend their FY93 appropriation. If Elections had not overexpended their appropriated amount, they could not have provided vital district information and voter information to the candidates or the public. Perhaps your audit should reflect the fact that Elections prepared a scenario to conduct the 1992 elections and presented this scenario to the AG's office and the Court which would have changed the entire election timeframe (having the State primary on November 3 with the Federal general and having the State general election on January 5th) so that Elections could conduct the election within their appropriated amount.

Your allegations that Elections' employees lack the expertise and understanding of the election process contributed significantly to the amount of overtime and number of temporary employees is a gross misrepresentation of the facts. If your audit had compared the functions of Elections during previous election years and the functions necessary to conduct the 1992 elections along with the fact that the 1992 elections were highly successful, you would have found that the employees currently working in Elections are highly competent individuals.

Your audit is not totally correct on the turnover of regional election supervisors. You fail to mention that some of the turnover in supervisors resulted from retirement or the supervisor relocating with her family out of state.

When discussing the disparity of worked overtime by employees, your audit does not mention that not employees were in a family situation that would allow extra overtime. Those employees who did not have outside family commitments could (and offered) to work more overtime than those employees with family commitments.

Although reapportionment was a cause for higher expenditures, you must also take into account the fact that Elections substantially increased voter registration, had the highest voter turnout and processed 3,878 more absentee ballot requests than in the 1988 Presidential election. Elections also mailed every voter in the State of Alaska a new voter ID card which informed the voter of their new district/precinct and polling place in an effort to eliminate voter confusion.

I do not agree with your "Summary of Proposed Adjustments". When additional funding was critical for Elections to keep their doors open, we agreed to repay the amount loaned to Elections from the Governor's Contingency Fund. I feel this is a binding contract that must be complied with.

RECOMMENDATION #1

Elections has hired a new fiscal officer, Mr. Michael Mooney who has the expertise and management ability to comply with this recommendation. I have ordered Mr. Mooney to review all fiscal management with the four regional offices and to coordinate all of Elections' fiscal management with DAS. I have further ordered him to work with the auditors to assure tight fiscal control and management and to comply with your requests and observations.

RECOMMENDATION #2

After analyzing your comments and overseeing the Division of Elections for the past two years, I agree with your recommendation to classify personnel in Elections below the Director and Deputy Director positions. I believe all personnel in the four regional offices should be transferred to the classified service.

However, I take exception to your remarks in this section on the low moral. I have observed the low moral to be caused by burn-out from working so many hours during the 1992 elections, the negative comments about Elections' employees and their expertise, the lack of funds to do the job and last but not least, throwing the supplemental appropriation into the political arena after a job well done.

RECOMMENDATION #3

I agree that Elections should implement a working knowledge of AKSAS as a management tool. I have instructed the Fiscal Officer and his assistant to pursue AKSAS training. However, I do not feel it is wise for me, as Lt. Governor, to take the time to have a complete understanding of the AKSAS system and its functions - I have hired competent staff who I trust to accomplish the tasks I have given. Your comments on encumbrances has been my frustration with the system.

RECOMMENDATION #4

I feel we crossed this bridge. Our Fiscal Officer, Mr. Mooney, has all the capabilities of working satisfactorily with DAS.

RECOMMENDATION #5

As a longstanding legislator, I have always taken the position that the RSA process should only be used in extreme circumstances. As Lt. Governor of the State of Alaska, I felt that an extreme circumstance was the fact that it was important to keep the Division of Elections' doors open as long as possible.

Some of the comments you made on the lawsuits, especially Coghill vs. Director of Elections do not represent the entire facts.

WALTER J. HICKEL
GOVERNOR

P.O. Box 110001
Juneau, Alaska 99811-0001
(907) 465-3500

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

March 15, 1993

RECEIVED
MAR 1 6 1993
LEGISLATIVE AUDIT

Mr. Randy S. Welker
Legislative Auditor
Legislative Audit Division
P.O. Box 113300
Juneau, AK 99811-3300

Re: Confidential preliminary audit report entitled: Office of the Governor, Division of Elections, Selected Financial Compliance and Management Issues, February 27, 1993.

Dear Mr. Welker:

This letter is in response to the Division of Elections preliminary audit report findings and recommendations which pertain to the Division of Administrative Services.

Recommendation No. 1

Overexpenditure of Appropriations

The Division of Administrative Services (DAS) made almost daily attempts to calculate outstanding invoices and obligations for the Division of Elections (Elections) to reconcile balances and determine Elections' actual financial status. This task was made difficult by the fact that Elections itself was unaware of total obligations. Despite written attempts requesting all purchases and obligations be coordinated through a central source in the Director's office, numerous individuals including full-time and temporary employees continued to obligate funds and incur expenditures. Elections' financial status has been at best a moving target.

We concur that stronger internal controls are required for Elections to ensure that all obligations can be accounted for and encumbered as necessary.

Encumbering Obligations

With regard to the RSA with the Department of Administration, Division of Information Services (DIS), the appropriate encumbrance document was prepared by DAS before the RSA was forwarded to DIS for signature and additional coding. At the time the transaction was entered into the State Accounting System sufficient funds were available (October 18, 1992).

It has been the policy of the Office of the Governor not to certify add RSA documents until receipt of an approved copy of the RSA from the Division of Budget Review. The RSA was approved November 4 and received by DAS November 6. By this time there were insufficient funds available for the document to process. Elections was notified via memorandum that the RSA could not be encumbered and asked to review other encumbrances to see if sufficient funding could be made available to fund the RSA.

In the future DAS will establish management encumbrances for Elections' RSAs at the onset of the process to ensure that funds are still available for obligation upon OMB approval of the agreement. We have initiated management encumbrances to ensure that funds are reserved for expenditures identified in the two Elections supplementals approved this year, and will make greater use of management encumbrances with Elections' FY 94 budget.

Procurement

Additional procurement violations not highlighted in the audit necessitated the revocation of Elections' purchasing authority. The delegated authority will be reinstated when DAS is assured that internal controls are in place to guarantee that the Office of the Governor's purchasing procedures and the State Procurement Code are adhered to.

Untimely Payment of Vendor Invoices

It is recommended that the Division of Administrative Services pay interest, as required by statute, on those bills that are not paid within the 30-day statutory deadline.

DAS communicated verbally and via memorandum to Elections requesting prompt turnaround of invoices and reminding them of the obligation to pay within thirty days. However, in accordance with AAC 15.115(b) it is DAS policy, as that of most state agencies, to pay interest only when requested by the vendor.

Recommendation No. 3

Inconsistent and Incomplete Accounting Records

DAS disagrees with the audit finding that the supplemental appropriation of $424,000 for reapportionment costs (Chapter 5, FSSLA 1992, Section 52) was incorrectly recorded as a supplemental to Elections operating budget. The finding states "Since this supplemental appropriation is for a specific purpose, it should have been as a separate appropriation."

Elections' FY 92 budget request identified activities related to reapportionment (copies of the budget forms are attached). Since costs exceeded available funds, supplemental funds were requested and approved by the legislature. The Office of Management and Budget, Division of Budget Review, identified this item as a supplemental to the agency's operating budget in their analysis of SB 483 and authorized the recording of the funding as such.

OMB maintains that the supplemental was recorded properly. Reapportionment-related costs were not a separate function or a new item for Elections. The funding was appropriated during FY 92 to cover FY 92 expenditures. Costs associated with Reapportionment were recorded using a ledger code so that expenditures could be identified and matched to the appropriation request.

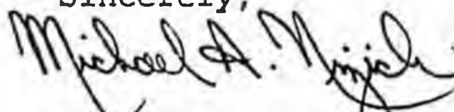
Recommendation No. 5

The use of RSAs by the Department of Law (LAW), DAS, Office of Management and Budget, and the Lieutenant Governor's Office should be limited to instances where services are to be provided by one state agency on behalf of another. RSAs should not be used to circumvent the appropriation process.

We do not concur with the audit's findings nor recommendation pertaining to the January 31, 1993 RSA. The RSA was not prepared with the intent to circumvent the appropriation process. The Attorney General is the State's provider of legal services. DAS maintains that this is a bonafide RSA for services normally paid by Law. The RSA went through the normal review process by all appropriate agencies, was determined to be valid, and approved accordingly.

Thank you for the opportunity to comment on the preliminary audit findings.

Sincerely,



Michael A. Nizich
Administrative Director

Attachments

BUDGET REQUEST UNIT (BRU): Elective Operations

NAME/POSITION OF BRU MANAGER: David G. Koivuniemi, Director	PHONE: 465-4611
NAME/POSITION OF AGENCY CONTACT: David G. Koivuniemi, Director, Division of Elections	PHONE: 465-4611

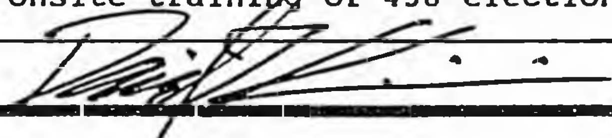
LIST STATUTORY/REGULATORY BASIS FOR SERVICES PROVIDED (I.E., ALASKA STATUTE, ALASKA ADMINISTRATIVE CODE, OR FEDERAL REGISTER):

Statutory/Regulatory Citation	Component/Programs, Services	Statutory/Regulatory Citation	Component/Programs, Services
AS 04: Elections/Local Liquor Option	Elections	AS 29: Elections/ Municipal Incorporation	Elections
AS 14: Elections/REAA School Board	Elections	AS 46.40: Coastal Mgmt. Program	Elections
AS 16.51: Alaska Seafood Marketing Institute	Elections	AS 15: Election Code	Elections & Prim. & Gen.

DESCRIPTION OF THE BRU SERVICES AND RESPONSIBILITIES:

During FY 92, the Division will conduct the statewide Regional Educational Attendance Area and Coastal Resource Service Area, and several special and local option elections. Major election activity for statewide Primary and General elections for U.S. President, Vice President, Alaska State House and Senate, as well as Congressional seats actually begins mid-year FY 92 when the ordering of forms and election supplies is initiated divisionwide, staff is hired to oversee increased election activity, and the onsite training of 438 election boards begins.

SIGNATURE OF BRU MANAGER:



DATE: 10.10.90

-53-

B1 BRU COVER PAGE

AGENCY Office of the Governor

BRU Elective Operations

FY 92

Revised Date: 10/10/90

Major effort will continue to focus on streamlining the election process while assuring the expeditious and accurate processing and counting of ballots.

In FY 92 the Division will conduct the 1991 REAA & CRSA elections and complete a large portion of the work necessary for the statewide Primary and General elections. The Division reviewed five statewide initiatives in FY 91 and anticipates that the use of the initiative process will increase in FY 92. Reapportionment and the changes it will bring to district boundary lines, etc. will also be dealt with during FY 92.

B2 BRU ISSUES

AGENCY Office of the Governor

BRU Elective Operations

FY 92

Page 2 of 2
Revised Date: 10/10/90

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

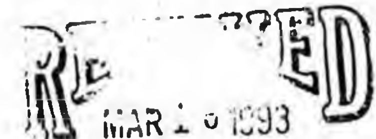
DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300 - STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

March 16, 1993

Randy S. Welker
Legislative Auditor
P.O. Box 113300
Juneau, AK 99811-3300



LEGISLATIVE AUDIT

Dear Mr. Welker:

This is in response to the Division of Legislative Audit's preliminary audit report on:

Office of the Lieutenant Governor, Division of Elections, Selected Financial Compliance and Management Issues, February 27, 1993.

In the report, you have concluded that the Reimbursable Services Agreement between the Department of Law and the Division of Elections is an inappropriate transferring of funds between appropriations. The RSA, in the amount of $50,000, was provided to the division to temporarily pay for the defense of the director of elections in Hickel v. Thickstun and Coghill v. Thickstun. These lawsuits seek declarations that the certification by the Director of the Division of Elections of the applications to recall the Governor and the Lieutenant Governor was invalid and that any recall petitions issued by the Director of the Division of Elections are void.

As Attorney General, I had previously determined that the director's actions certifying the recall applications were contrary to state law, and I advised the director that the Department of Law would not permit the director to obtain the counsel of her choice, outside the Department of Law, at State expense, in the action I filed against the director. This action, State v. Thickstun, seeks relief that is similar to that sought in Hickel v. Thickstun and Coghill v. Thickstun. The department's premise was that state officials who reject legal advice from the Department of Law are required to defend their actions at their personal expense when sued in connection with the rejected advice. This has been the consistent position of the Department of Law at least since it was articulated by Attorney General Avrum Gross, who stated, in 1976, that "this office interprets the law for state agencies and, once

printed on recycled paper by C.D.

that law has been interpreted, agencies are obliged to follow it....[I]f [state officers] ignore that advice [they] will be exposed to personal liability for any costs incurred in litigation which may follow." Letter from A. Gross to W. McIver (March 17, 1976).

I subsequently decided to authorize the director to retain independent counsel at State expense for her defense in the lawsuits filed against her by the Governor and the Lieutenant Governor. I took this limited action because I believe that the public's confidence in our judicial system would be eroded if, in proceedings of this nature, it were perceived that the State's chief executives, having challenged the director's actions as a state official, had sought to thwart the defense of the director's actions by requiring her to personally finance her own defense. Because of the obvious conflict created by the fact that the Department of Law is involved in similar litigation against the Director of the Division of Elections, ethical considerations precluded the department from representing the director in the actions brought by the Governor and the Lieutenant Governor.

As Attorney General, I am required by law, under AS 44.23.020, to represent the state in all civil actions in which the state is a party. Normally, the Department of Law would have represented the Director of the Division of Elections in her capacity as a state officer, except for the circumstances discussed above. Although I was reluctant to provide temporary funding, limited to the defense of the Director of the Division of Elections in the Hickel and Coghill lawsuits because of the director's refusal to follow the Department of Law's advice, I was constrained to do so in order to insure the public's confidence in the basic fairness of our judicial system. Furthermore, time was also a constraint. Courts simply do not recognize an agency's financial condition as an excuse for not defending against an action. Consequently, the Department of Law provided interagency funding to the Division of Elections for this purpose. In effect, this transaction delegated the Department of Law's authority to direct the defense, because the department could not oversee or be involved in the management of outside counsel that was hired to defend the division's director, without violating the Code of Professional Responsibility.

I must, therefore, respectfully disagree with your conclusion that this use of Department of Law funds by the Division of Elections (albeit temporary in nature in this case) is an inappropriate method of transferring funds between appropriations Although this RSA transaction was caused by the failure of a state official to follow the advice of the Department of Law, and although I regret the necessity for the transaction, it was

nonetheless an appropriate and lawful use of funds that were appropriated for the purpose of conducting the state's legal business. This includes defending lawsuits filed against the state and defending lawsuits filed against state officers acting in their official capacity, even under these very unusual circumstances.

Very truly yours,

Charles E. Cole
Attorney General

(Intentionally left blank)

ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

Division of Legislative Audit

P. O. Box 113300
Juneau, AK 99811-3300
(907) 465-3830
FAX (907) 465-2347

March 16, 1993

Members of the Legislative Budget
and Audit Committee:

We have reviewed the Office of the Lieutenant Governor; Office of the Governor, Division of Administrative Services (DAS); and the Department of Law (LAW) responses to our preliminary audit report. For those areas where they do not agree, we have considered their responses and in one case have modified the report because we believe that additional clarification was warranted. In particular, the section of Recommendation No. 1 regarding untimely payment of vendor invoices was changed to recognize that DAS' stated policy is congruous with 2 AAC 15.115(b). However, this change is considered minor and does not lead us to change our overall stated position. We therefore reaffirm our conclusions and recommendations as contained in this report.

We believe the following issue warrants further comment given its importance and the apparent disagreement on the part of DAS and LAW:

<u>Recommendation No. 5</u>

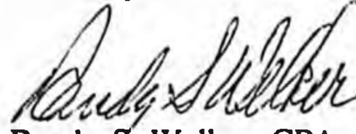
Both DAS and LAW consider the subject reimbursable services agreement (RSA) to be an appropriate and lawful use of funds appropriated to LAW to pay for the costs of legal services. Although we agree that the cost of state legal services are commonly paid by LAW, this particular RSA merely served as the vehicle for providing additional temporary funding to the Division of Elections (Elections) as indicated by the language cited on page 39 of our report.

LAW has further stated that the courts simply do not recognize an agency's financial condition as an excuse for not defending against an action. We point out that Elections had funding encumbered to provide $50,000 for these legal costs. The receipt of the RSA authority allowed Elections to "free up" their encumbered funds for other purposes.

Since it appears that our recommendation to rescind this RSA will not be implemented, we provide the following alternative. The description of services delineated in the RSA should be amended to recognize that the funding is being provided by LAW for outside counsel

costs incurred by Elections. All references to this being a temporary action should be removed, as should all provisions related to the planned repayment of funds provided per the RSA. LAW should then pay for the referenced legal services costs. This will eliminate the need for Elections to seek $50,000 in supplemental funding for this specific purpose.

Sincerely,



Randy S. Welker, CPA
Legislative Auditor

FAIRBANKS
Daily News-Miner
"Independent in All Things Neutral in None"
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DAN JOLING, Managing Editor — DERMOT COLE, Asst. Managing Editor — SUE MATTSON, Editorial Page Editor

Status of elections employees should be changed

This morning members of the Senate State Affairs Committee will conduct a hearing on a bill that would change the status of Division of Elections employees.

If the bill is adopted, as we think it should be, jobs in the Elections Division would no longer be political appointments exempt from the provisions of the State Personnel Act, except for the director and deputy director. The jobs would become classified positions. Employees would be hired through the state's regular hiring system, would be considered for promotion based on merit, and could be fired only for cause and not for political reasons.

The change is needed because a legislative audit and an ombudsman's investigation showed that politically based employee turnover caused a loss of institutional memory that resulted in extra costs and inefficiency; and that lack of job security meant some employees were reluctant to question improper practices within the division.

Senate Bill 199, which would make the change, was introduced this month after the Division of Legislative Audit and the Ombudsman's Office both recommended elections employees who do not hold policy-making positions be placed in the classified service.

The audit division's recommendation resulted from an audit that examined the division's compliance with the appropriations act. The ombudsman's recommendation came after an investigation into an allegation that Director Chariot Thickstun and some of her staff improperly used state phones to make excessive personal phone calls and did not reimburse the state for long distance charges in a timely manner.

Both reports found that some Division of Elections employees felt reluctant to address problems in the division because they could be fired at the discretion of the director.

In his response to both reports, Lt. Gov. Jack Coghill, who oversees the Division of Elections, said the reports didn't adequately address the fine outcome of the 1992 elections.

As we see it, that outcome is not in contention. After the chaos of reapportionment, the election did go well, with results compiled in a timely manner and no question of any irregularities occurring. Neither the audit nor the investigation was examining the conduct of the election.

Lt. Gov. Coghill recommends that employees be granted partially exempt status. That status, however, will not grant the protection needed to ensure employees are hired, promoted and fired for merit rather than political reasons.

Interestingly, Division of Elections employees are specifically prohibited by state law from participating in partisan political activities. That makes sense. You don't want the people in charge of elections acting in a partisan manner.

The problem is, as long as all Elections Division jobs are political appointments, those same employees who are prohibited from partisan activities can be fired from their jobs so the jobs can be given to others who are in favor because of their partisan activities.

If Senate Bill 199 is adopted, current division employees could not be terminated if they failed to meet the minimum qualifications of the position established when the position is placed in the classified service.

Thus, adopting the bill does not threaten [illegible]body's job. It does ensure that future hiri[illegible] promotion would be based on merit. It provi[illegible] protection for employees if they see abuses within the division.

We think the bill would make the division more efficient and would treat employees more fairly. We encourage the Legislature to adopt it.

RUMORS, QUIPS & INSIDE TIPS

ON THE INSIDE

LOVIN' WHERE HE'S LIVIN'—Ten-year-old Wesley Andrews recently sent us a short poem he wrote, along with a note saying his dad thought we might be able to use it. Wesley might want to check the distance between Prudhoe Bay and Barrow, but we applaud his sentiment. Here's his poem titled "Fairbanks, Alaska":

It snows for eight months and is cold all the way

Today's la

The Alaska Legislature is dealing with a number of interesting employer and employee rights bills this year. It's not an isolated Alaskan issue, but one that every legislature in the country faces.

The trend in federal and state law has shifted the balance of the scales of justice toward employees.

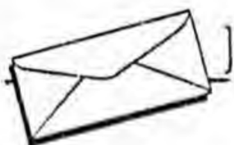
The Employee Retirement Income Security Act forbids employers from firing or otherwise discriminating against workers who have high risks for diseases.

The Americans with Disabilities Act of 1990 makes it illegal for employers to discriminate against disabled workers in hiring, firing, discipline and promotion, with a definition of "disabled" so broad that it might even cover diseases like AIDS.

The constitutionality of drug testing of workers is an open legal question in federal and state courts.

Mounting health insurance costs can incline employers to use employee health information for decisions about who gets promoted and who gets a pink slip. A very ha[illegible] legal line can be crossed if a civil court jury sees that the health information had no direct bearing on job performance.

Congress recently gave the Occupational Safety and Health A[illegible] more teeth, and some congressmen talk about adding criminal penalties for OSHA violations that are now enforced through civil action.



Tell the reasons

April 19, 19[illegible]

To the Editor:

As a concerned and informed parent of a North Pole High School student I would like to relay a message both to the general public and the students at North Pole High. Rodney Duncan stands accused of making lewd sexual advances and suggestions toward many young women students (both current and past students). So far he has led supporters to believe this was a "religious teaching" issue. Rodney Duncan has decided to keep his supporters in the dark regarding true facts as to why he was fired, has continued to keep quiet the truth so that his many uninformed supporters do not turn on him.

His teaching credentials have been brought up many times and once again they are not the [illegible] For those who want to stand [illegible] Rodney Duncan [illegible]

SB
216

Alaska State Legislature

Legislative Research Agency

130 Seward Street, Suite 213
Juneau, Alaska 99801-2196

Phone: (907) 465-3991
Fax: (907) 465-3351

May 20, 1993

MEMORANDUM

TO: Senator Georgianna Lincoln

FROM: Christine M. Cheff
Legislative Analyst

RE: **Restrictions on the Display of Pornographic Material**
Research Request 93.213

You asked if legislation to restrict the places and manner in which pornographic material may be displayed has been introduced previously in Alaska. You also asked if there are any local ordinances in Alaska, or laws in other states, which impose such restrictions.

Pornography is protected under the First Amendement of the United States Constitution. It is generally defined as material which is erotic in nature and may or may not have artistic merit. The United States Supreme Court, however, has defined certain other materials as obscene and, therefore, not protected under the First Amendment. Such materials are measured against the following three-part test enunciated in *Miller v. California*, [413 U.S. 15 (1973)]:

1. whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

2. whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

3. whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Supreme Court Test

Because there is no other national standard for obscenity, its regulation is left to the discretion of individual states and communities. According to Paul McGeady, director of the National Obscenity Law Center--a clearinghouse for obscenity law information--42 states have obscenity laws and there are 46 states with pornography laws to limit the display, distribution, and sale of material considered harmful to minors. As you know, Alaska does not have an obscenity law or one that pertains to harmful materials.

Legislative Research

Our search of legislation introduced in Alaska from the 13th through 17th legislatures resulted in the identification of two bills--HB 449 (1988) and HB 133 (1989)--which refer to the display of materials harmful to minors (Attachment A). Both bills were sponsored by the same legislator and are essentially identical. The only committee that heard the bills was House Judiciary and neither of the bills was passed. During the committee hearing on HB 133, proponents argued that it would bring Alaska's law into conformity with other states' laws. Committee members and the public primarily objected to the bill because of its broad language, i.e., the adoption of "contemporary community standards" as a determinant of whether material would be considered "harmful to a minor." Although not discussed in the hearing, the bill generally required that businesses where such materials were exhibited or displayed must restrict their access, including viewing, by minors who were not supervised by a parent.

Following are overviews of three local Alaska ordinances (Attachment B) and the laws of a sample of three states--Montana, New Jersey and South Dakota (Attachment C)--that pertain to the display of materials harmful to minors. Also reviewed is a Minneapolis, Minnesota ordinance which Mr. McGeady believes would serve as a good model obscenity law (Attachment D).

Local Ordinances

From our search of the local ordinances for Alaska's major cities, it appears that Anchorage, Ketchikan, and Palmer are the only ones with obscenity provisions. None of the ordinances provide specific guidelines concerning the display of obscene materials.

The Anchorage ordinance (AMC 8.05.420) makes it unlawful for any person to knowingly disseminate, distribute or exhibit indecent materials that may be harmful to persons less than 18 years old. Included in the definition of indecent materials are: pictures, photography, drawings, sculpture, motion picture, books, pamphlets, and magazines. "Harmful" is described as the representative or descriptive quality of a conduct or abuse based on the U.S. Supreme Court's three-part test.

Under the Ketchikan (9.24.010) and Palmer (9.28.010) municipal codes, obscene materials such as books, pictures, articles, drawings, or statuary may not be published, printed, engraved, sold, offered for sale, given away, or exhibited in public places. Additionally, possession of such materials for any of those stated purposes is unlawful. Neither ordinance, however, includes a restriction on materials harmful to minors.

State Laws

The Montana, New Jersey and South Dakota statutes summarized below are examples of the various ways in which states have restricted the display of obscene materials.

Commercial establishments or newsstands in **Montana** must keep obscene material "behind devices commonly known as blinder racks so that two-thirds of the material is not exposed to view" or make "other reasonable efforts" to prevent minors from viewing the material (45-8-206). Persons who violate this statute may be fined an amount not to exceed $500, or be imprisoned for not more than six months, or both.

Under **New Jersey** statutes (2C:34-3.2), municipalities may enact ordinances which provide that obscene materials in a retail store, newsstand, booth, concession or similar business to which persons under 18 years old have "unimpeded access," may not be displayed at a height of less than five feet or without covering over the front. Fines of up to $1,000, 30 days imprisonment, or both may be imposed against violators.

In **South Dakota**, magazines, books or newsprint which display or contain obscene material on the cover may not be distributed, displayed, sold or exhibited for sale in any public place unless wrapped and sealed so that no more than the title, name, price or date is exposed (22-24-29.1).

The Minneapolis Ordinance

In 1985 the U.S. District Court in Minnesota upheld a Minneapolis ordinance which requires that sexually explicit books, magazines and other materials deemed harmful to minors be kept in sealed wrappers and that covers of certain materials be blocked with an opaque cover.[1] The court ruled against the plaintiffs who contended that the ordinance was broad and restricted adult access to materials protected under the First Amendment of the U.S. Constitution. As a result of this decision, states and municipalities may place stricter controls on materials available to youth than on those available to adults if the materials fall within the determinants of obscenity as defined by the U.S. Supreme Court in *Miller v. California*. The court also determined that the "harmful to minors" standard was not subject to a constitutional challenge for vagueness.

I hope this information will be useful. Please do not hesitate to call if we may be of further assistance on this matter.

Attachments

---

[1] *Upper Midwest Booksellers v. City of Minneapolis*, 602 F.Supp 1361 (1985).

American Family Association Law Center

Correspondence:
P.O. Drawer 2440
Tupelo, Mississippi 38803

Telephone:
(601) 844-5036

Deliveries:
107 Parkgate Drive
Tupelo, Mississippi 38801

Facsimile:
(601) 844-9176

February 9, 1994

Via Facsimile (907) 465-3810

Deborah Luper
Legislative Aid to
Senator Loren Leman
State Capitol
Juneau, AK 99801

Dear Ms. Luper:

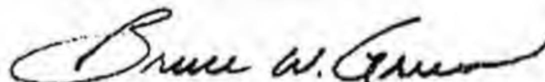
Your recent facsimile to Pat Truemen, dated February 1, 1994, was forwarded to me for review. I appreciate very much the efforts of Senator Leman on behalf of children and families. If time and resources permit, the AFA Law Center is available to help your efforts in any way we can.

With regard to Senator Leman's attempt to label sexually explicit and/or violent video and music materials, I am not optimistic considering your time constraints. Efforts such as Senator Leman's have met with great opposition and often resulted in constitutionally defective statutes or amendments. Typically, they are subject to successful attack on the grounds that they are either underinclusive and overbroad or they are unlawful delegations of legislative authority.

I mention this because I believe the time frame under which you are working may be prohibitive in carefully drafting an amendment that will stand up to legal attack. If Senator Leman desires to present an amendment no later than this session, I suggest that you review the draft materials included with this letter. I am not recommending them but simply suggesting you review them in formulating your language.

I regret that we do not have the time to be involved more directly in this process. Please feel free to call on future matters. We will look forward to working with you.

Very truly yours,



Bruce W. Green
Legal Counsel

BWG:jeg
Enclosure

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

M E M O R A N D U M   February 10, 1994

SUBJECT: Sectional Summary of SB 216. (Work Order No. 18-LS1121\A)

TO: Senator Georgianna Lincoln
Attn: Annie

FROM: Jerry Luckhaupt
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill - the bill itself is the best statement of its contents.

Section 1. The bill amends AS 11.61 by adding a new section prohibiting the sale or display of material harmful to minors where minors are present or allowed to be present and where minors are available to view the material unless each item of the material is sealed in an opaque wrapper. It describes the requirement of an opaque wrapper, provides exceptions from the reach of the statute, provides a definition of material harmful to minors, prescribes that a violation is punishable as a class B misdemeanor, subject to sentencing under AS 12.55.135 (imprisonment) and 12.55.035 (fine).

GPL:pl
94-121.plm

Sectional Analysis

Fairbanks North Star Borough PUBLIC LIBRARY
1215 Cowles Street • Fairbanks, Alaska 99701 • 907/459-1020

MEMORANDUM

TO: Portia Babcock, Senate State Affairs Committee Clerk

FROM: Greg Hill, Library Director GH

DATE: March 3, 1994

SUBJECT: CS for SB 216

I want to express my extreme concern about the wording in the Committee Substitute for Senate Bill 216. Removal of the exemption for libraries in this legislation seriously weakens the ability of public libraries to act as a forum for ideas and knowledge. I believe that the language in Section 11.61.127, paragraph (c), part (1) (A) (iii), "taken as a whole, lacks serious literary, artistic, political, or scientific value" is much too vague to protect the wide variety of materials that can be found in most libraries. Please reconsider exempting libraries from this legislation.

Fairbanks North Star Borough PUBLIC LIBRARY
1215 Cowles Street • Fairbanks, Alaska 99701 • 907/459-1020

Facsimile Cover Sheet

To: Portia Babcock
Company: Senate State Affairs Committee
Phone: 465-2095
Fax: 465-3810

From: Greg Hill, Director
Company: Fairbanks North Star Borough Libraries
Phone: 459-1020
Fax: 459-1024

Date: 03/03/94
Pages including this cover page: 2

Comments: Regarding Committee Substitute for Senate Bill 216

DAVIS WRIGHT TREMAINE

LAW OFFICES

2600 CENTURY SQUARE · 1501 FOURTH AVENUE · SEATTLE, WASHINGTON 98101-1688
(206) 622-3150

DEBORA K. KRISTENSEN
(206) 628-7643

March 7, 1994

Senator Loren Leaman
Chairman
Senate Community and Regional Affairs Committee
Pouch V
Juneau, Alaska 99801

Re: Opposition to Proposed Committee Substitute for Senate Bill No. 216

Dear Senator Leaman:

We are writing to offer you our opinion that Proposed Committee Substitute for Senate Bill 216 ("PCSSB 216"), an Act relating to the sale, display or distribution of sound recordings and related materials, is unconstitutional. PCSSB 216 requires mandatory labeling, places restrictions on display, and criminally penalizes the sale of musical sound recordings deemed "harmful to minors." Because PCSSB 216's provisions are in direct contradiction to both the history and principles of the First Amendment and the separate and distinct guarantees of Article I, Section 5 of the Alaska State Constitution, as more fully explained below, we urge you to withdraw it from consideration by the Alaska State Legislature.

I. PCSSB 216 Abridges the Right of Free Speech and Expression.

"Music, as a form of expression and communication, is protected under the First Amendment." Ward v. Rock Against Racism, 491 U.S. 781, 790, reh'g denied, 492 U.S. 937 (1989). See also Schad v. Mount Ephriam, 452 U.S. 61, 65 (1982); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557-58 (1976). While the constitutional protections afforded to music under the First Amendment are broad, those protections are even greater in Alaska under Article 1, Section 5 of the Alaska Constitution which, "protects speech in a more explicit and direct manner than the federal constitution." Messerli v. State, 626 P.2d 81 (Alaska 1980).

29235\3\00002.LTR
Seattle

The United States Supreme Court has emphasized the special role music serves in our society and the importance of protecting music against government censorship:

> Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state. The Constitution prohibits any like attempts in our own legal order.

Ward, 491 U.S. at 790. Particularly invidious is censorship of expression based on its content, R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992), or "simply because society finds the idea offensive or disagreeable." Texas v. Johnson, 491 U.S. 397 (1989).

Your consideration of PCSSB 216 seems to assume that it does not fun afoul of either the United States or Alaska Constitutions because it purportedly regulates only "obscene" or "violent" speech. This position suffers from several significant flaws. First, expression having social and/or artistic value enjoys and always has enjoyed full constitutional protection. As the U.S. Court of Appeals for the Eleventh Circuit stated in the leading case to subject music to the Miller test, "we tend to agree with appellants' contention that because music possesses inherent artistic value, no work of music alone may be declared obscene." Luke Records, Inc. v. Navarro, 960 F.2d 134, 135 (11th Cir. 1992).

The inherently subjective nature of a piece of music, i.e., the various meanings understood by different listeners, makes it especially intolerable to regulate music. Constitutional speech protections cannot depend upon determinations whose inherent subjectivity "would allow a jury to impose liability on the basis of the juror's tastes or views." Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988). Indeed, "it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." Cohen v. California, 403 U.S. 15, 25 (1971). Further, music does not lose its constitutional protection by virtue of sexually explicit lyrics any more than

movies and books lose protection simply because they contain some scenes of nudity. See Erznoznik v. City of Jacksonville, 422 U.S. 205, 211 n.7 (1975).

Second, even if some musical expression could in theory be "obscene" or "violent," simply because the State purportedly aims to regulate obscene or violent speech does not vitiate the First Amendment and Article I, Section 5. The State's efforts must be clearly, carefully, narrowly and fairly drawn so as not to infringe on protected expression. PCSSB 216 is not so drawn, and it therefore substantially and unconstitutionally infringes on protected musical expression. See R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1993) (finding that even "fighting words" cannot be regulated).[1]

Also unavailing is any reliance on Ginsberg v. New York, 390 U.S. 629 (1968), to argue that PCSSB 216 affects only speech that is obscene as to minors and is, therefore, constitutionally permissible. In Ginsberg, the Court did not consider the statute's effects on adults' access to expression that is not obscene as to them or the indirect chilling effect on expression that is not obscene as to anyone. As the Eleventh Circuit has recognized, the Court in Ginsberg "did not address the difficulties which arise when the government's protection of minors burdens (even indirectly) adults' access to material protected as to them." American Booksellers v. Webb, 919 F.2d 1493, 1502 (11th Cir. 1990), cert. denied 111 S. Ct. 2237 (1991).

Alaska cannot, by enacting a law for the protection of minors, "prohibit an adult's access to material that is obscene for minors but not for adults." Id.; see also Butler v. Michigan, 352 U.S. 380, 383 (1957) (legislation must not "reduce the adult population ... to reading only what is fit for children"). A statute that prohibits such access or deters protected expression, directly or indirectly, is unconstitutionally overbroad: it restricts more speech that the Constitution permits. See R.A.V., 120 L. Ed. 2d at 316-17 n.3. An overbroad statute must be struck down on its face and held

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[1] Regardless of the State's alleged ability to regulate obscenity, there is absolutely no authority for the State to regulate "violent" speech. See R.A.V., 112 S. Ct. 2538 (1993).

incapable of any constitutional application.[2] See Osborne v. Ohio, 495 U.S. 103, 112 & n.8 (1990); Erznoznik, 422 U.S. at 215-17.

The statute by definition regulates material that "appeals to the prurient interest of minors in sex." AS 11.61.127(c)(1)(A) (emphasis added). Because this definition of obscenity under Miller -- and because the category of materials that appeals to the prurient interest of minors is larger than that which appeals to the prurient interest of adults -- PCSSB 216 necessarily reaches expression that is not obscene in constitutional terms. Thus, the statute's prohibitions on sale, distribution, and exhibition of erotic material directly apply to some material that is not obscene. The clearest example of this direct application is the statute's display restriction, which prohibits all distributors and dealers from displaying a sound recording found "harmful to minors" "in any place where minors are present or are allowed to be present and where minors are able to view such material." AS 11.61.127(a). This prohibition directly affects the access of everyone, including adults, to such sound recordings simply because they have been found "harmful" with respect to minors.

Third, regulations designed for the protection of minors must embody the least restrictive means of furthering the government's interest in protecting minors. Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989).

The display restriction is not the least restrictive means of furthering the government's interest in keeping the contents of sound recordings away from minors. Indeed, it is wholly unrelated to furthering that interest. The prohibition on displays might make sense for a magazine which a naked body on the front cover. As applied to a compact disc, whose contents can only be heard and not seen, the requirement is absurd. This

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[2] The overbreadth doctrine is predicated on the danger that "persons whose expression is constitutionally protected may well refrain form exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." New York v. Ferber, 458 U.S. at 769-73 (quoting Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980)).

aspect of PCSSB 216 is unquestionably overbroad and unconstitutional.[3]

II. PCSSB 216 Constitutes an Invalid Prior Restraint.

PCSSB 216 explicitly authorizes suppression <u>before</u> the sound recording is played. AS 11.61.128(a) and (b) empower prosecutors to institute a criminal action when someone merely displays or "sells or offers to sell [to anyone] an audio recording, phonograph record, magnetic tape, compact disc, or music video recording that contains lyrics that include or are descriptive of material harmful to minors." A sound recording need not have become available to minors in order for prosecutors to initiate the process; it is enough, for example, that a sound recording has been sold or distributed by a record company to a particular store. As the statute authorizes censorship <u>before</u> the sound recording at issue is heard, it constitutes an unconstitutional prior restraint.

Just as clearly, PCSSB 216 operates as a prior restraint as to all affected individuals not provided notice that the sounding recording is considered "harmful to minors" under PCSSB 216. For example, the risk of denied access to an entire market of consumers -- which accounts for a significant percentage of sales of popular music -- carries serious enough consequences for record producers and musical artists that artistic decisions may be compromised to avoid even approaching the ambit of PCSSB 216. Record store owners and distributors will be restrained from distributing potentially erotic sound recordings for fear of incurring the substantial costs of defending an erotic determination hearing or facing the substantial penalties for violating an erotic music recording determination -- which they may not even have knowledge of. The effect of the prior restraint is thus a dramatic curtailment of protected expression.

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[3] This chilling of free speech is patently the product of state action, which exists if "the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State." <u>Lugar v. Edmondson Oil Co.</u>, 457 U.S. 922, 937 (1982); <u>see also Bantam Books, Inc. v. Sullivan</u>, 372 U.S. 58 (1963) (self-censorship under threat of even informal government sanctions deemed state action). "When the state acts directly or even indirectly and its influence is significant, then constitutional restraints must be observed." <u>Ginn v. Mathews</u>, 533 F.2d 477, 479 (9th Cir. 1976).

Finally, PCSSB 216 provides that music deemed "harmful to minors" but never found to be obscene -- i.e., speech and expression fully protected by the United States Constitution -- cannot be distributed to its adult audience without meeting specific preconditions. It enforces these conditions through the threat of criminal proceedings that leave the speaker two choices: comply or be silent. This is precisely the sort of prior restraint[4] the Supreme Court of the United States struck down in its landmark decision of Near v. Minnesota, 283 U.S. 697 (1931). The laws struck down in Near threatened the publisher with contempt proceedings for resuming distribution of speech that failed to meet certain preconditions. Id. at 712-13. Such a prior restraint, the Court declared, is "the essence of censorship," id. at 713, and is "the most serious and the least tolerable infringement on First Amendment rights." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

III. PCSSB 216 Unlawfully Compels Speech as Part of the System of Prior Restraint.

Under PCSSB 216, without the benefit of judicial guidance on what is considered "harmful to minors," all copies of sound recordings deemed "harmful to minors" by **prosecuting attorneys**, sold in any community in the State, must be labeled on the front cover with a **PARENTAL ADVISORY**. AS 11.61.128(c). PCSSB 216 thus compels artists, producers, distributors, and retailers to carry a state-mandated message, upon threat of criminal penalties. AS 11.61.128(c), (g) & (h). This message should not be confused with the voluntary labeling system that has been developed by the recording industry. First, the label applied is different, and, second, and far more fundamentally, it is compelled by the government.

Compelling speech violates the constitutional guarantees of free speech just as surely as does censoring speech. In Wooley v. Maynard, 430 U.S. 705 (1977), the Court heard a First Amendment challenge to a New Hampshire law requiring all automobile license plates to carry the state motto "Live Free or

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[4] Prior restraints include "injunctions and related judicial processes enforced through contempt proceedings." J. Jeffries, Jr., Rethinking Prior Restraint, 92 Yale L.J. 409, 421 (1983). See also Alexander v. United States, 113 S. Ct. 2766 (1993).

Die." The court held it unconstitutional, stating: "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." 430 U.S. at 714.; see also Pacific Gas & Elec. v. California P.U.C., 475 U.S. 1, 9-18 (1986).

PCSSB 216 infringes even more deeply on Alaska residents' free speech rights than did the statute in Wooley. By imposing its message on particular speakers, rather than all citizens of the state, PCSSB 216 makes it more probable that the speaker will be understood to endorse that message. It also will stigmatize the artists and distributors associated with the work. PCSSB 216 thus not only compels speech, but interferes with artists' rights to communicate freely with their audiences. The labeling scheme imposed by the statute abridges the right of free expression, wholly apart from the other constitutional flaws in the statute's scope and procedures.[5]

IV. PCSSB 216 is Underinclusive.

The United State Supreme Court has made clear that a State's interest in regulating speech is suspect if the State ignores other potential sources of an alleged harm. See United States v. Edge Broadcasting Co., 113 S. Ct. 2696 (1993). Here, the State does not even attempt to address the many other avenues, such as books and movies, on which similar allegedly harmful words are spoken. This suggests the lack of seriousness in the State's purpose as well as discrimination among media.

V. PCSSB 216 Violates Due Process Under The Federal and State Constitutions.

The essence of due process is notice and an opportunity to be heard. See Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). Due process protections are even more critical when First Amendment freedoms are threatened under a law that attempts to curtail speech the State deems indecent or obscene. Smith v. California, 361 U.S. 147, 149-50 (1959). Indeed, the Supreme Court has maintained a special "insistence that regulations of

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[5] It acts as a disincentive for compliance with the voluntary labeling schemes already in place by the recording industry.

obscenity scrupulously embody the most rigorous procedural safeguards ..." Id. (emphasis added; citations omitted); see also Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 561 (1975) ("rigorous procedural safeguards" required).

Of the numerous constitutional infirmities of PCSSB 216, the bill's failure to provide minimal due process protections for free speech is the most blatant. Notably, PCSSB 216 does not require that a prosecutor prove the central element of its criminal provisions -- that the sound recording is "harmful to minors" -- before a criminal action is undertaken. AS 11.61.127. Without such a requirement, there is no way a person of "common intelligence" can determine, without guessing, whether or not a particular sound recording is "harmful to minors." This is due, in part, to the legal definition of "obscene" and the state's ability to regulate this area of speech. Indeed, for this reason any reliance on Ginsberg v. New York, 390 U.S. 629 (1968), as support for the constitutionality of PCSSB 216's definition of prohibited materials, is misplaced. Ginsberg's finding was based on the fact that the state statute regulating obscenity as to minors at issue was "virtually identical to the Supreme Court's most recent statement of the elements of obscenity." Id., 390 U.S. at 643. In this case, however, PCSSB 216's definition of prohibited materials is not of "obscene" materials, but rather of "harmful to minor" materials. As such, the statute's definition of prohibited materials does not conform to the Supreme Court's "most recent statement of the elements of obscenity" and is unconstitutionally vague.

PCSSB 216 also fails to define prohibited conduct with sufficient specificity to put citizens on notice of what conduct they must avoid. Without such guidance, classic words such as "To be or not to be, that is the question?" (a potentially "violent" message), or the sexual context of Shakespeare's Romeo and Juliet, read aloud or captured on a sound recording, could be criminalized and, therefore, banned in Alaska. Thus, PCSSB 216's failure to list or provide specific subjects that are prohibited violates Alaska citizens' right to due process under both the

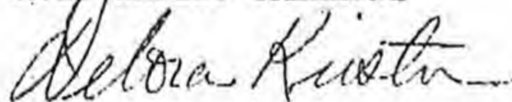
Alaska and United States Constitutions. See McKinney v. Alabama, 424 U.S. 669 (1976).

Further, PCSSB 216 fails to provide notice to all those who may be subject to criminal prosecution under AS 11.61.127 and 11.61.128. On its face, this provision imposes criminal penalties on those who sell sound recordings deemed harmful to minors even if they were never notified of a judicial determination that the sound recording was "harmful to minors." This constitutes a violation of the right to due process. To prosecute someone for selling a sound recording that the accused does not know has been declared "harmful to minors" is fundamentally unfair.

Given the numerous constitutional infirmities of PCSSB 216, and the very real threat that the State of Alaska would be liable for all attorneys fees and costs incurred in a legal challenge to PCSSB 216 pursuant to 42 U.S.C. § 1988, see Video Software Dealers Ass'n v. Webster, 968 F.2d 684 (1992) (similar unconstitutional bill was enacted into law, challenged and reversed, costing taxpayers over $200,000), we urge you to remove PCSSB 216 from consideration by the Alaska State Legislature.

Very truly yours,

DAVIS WRIGHT TREMAINE



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RECORDING INDUSTRY ASSOCIATION
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ALASKA STATE LEGISLATURE

Senator Georgianna Lincoln

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Committee
Transportation
Labor and Commerce
Administrative Regulation Review

Minority Whip

Bush Caucus Chair

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Dry Creek
Eagle
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Galena
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Gulkana
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Huslia
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Iliamna
Kakhonak
Kaltag
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Koyukuk
Lake Minchumina
Lime Village
Livengood
Lower Kalskag
Manley Hot Springs
McCarthy
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Minto
Nabesna
Nelchina
Newhalen
Nikolai
Nondalton
Northway
Nulato
Paxson
Port Alsworth
Rampart
Red Devil
Ruby
Shageluk
Sheep Mountain
Slana
Sleetmute
Stevens Village
Stony River
Sutton
Takotna
Tanacross
Tanana
Tatitlek
Tazlina
Telida
Tetlin
Tok
Tonsina
Tolsona
Tuluksak
Tyonek
Upper Kalskag
Valdez
Venetie
Whittier
Wiseman

March 10, 1994

MEMORANDUM

TO: Senator Loren Leman, Chair
Senate State Affairs Committee

FROM: Senator Georgianna Lincoln

RE: SB 216- Display of Sex Explicit Materials Near Minors

To clarify our earlier discussion, I would entertain amendments to the original version of SB 216 if they fit under the title of the bill. As I have stated, my intent in introducing the legislation was to prohibit the display (a visual term) of sexually explicit materials near minors.

ALASKA STATE LEGISLATURE

Senator Georgianna Lincoln

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Evansville
Fort Greely
Fort Yukon
Gakona
Galena
Glennallen
Grayling
Gulkana
Healy Lake
Holy Cross
Hughes
Huslia
Igiugig
Iliamna
Kakhonak
Kaltag
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Nikolai
Nondalton
Northway
Nulato
Paxson
Port Alsworth
Rampart
Red Devil
Ruby
Shageluk
Sheep Mountain
Slana
Sleetmute
Stevens Village
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Sutton
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SPONSOR STATEMENT
SB 216

SB 216 would make illegal the display of certain pornographic materials in locations where children may be exposed to them. Although municipalities may adopt ordinances to deal with this issue, most have not done so. Without statutory prohibitions, the display of pornography is legal in locations accessible by children and this display is inarguably a form of child abuse.

SB 216 has been introduced in response to the outcry of concerned citizens in my district whose children have been subjected to the display of pornography in stores. As a safety and well-being measure, SB 216 would place into Alaska Statute prohibition of this type of action.

Pornography is harmful to children. This statement is not simply a feeling on my part, it is the unanimous conclusion of the United States Attorney General's Commission on Pornography. The commission found further that pornography can lead to the lowering of a child's inhibitions to engage in child pornography.

The war against child abuse must be waged on multiple levels. Restricting the display of pornography to children must be a part of our strategy against child abuse. We must do all in our power to protect our children and SB 216 would be one step in that direction.

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 216

Revision Date: February 11, 1994
Title: "...sale, display or distribution of material harmful to minors..."
Sponsor: Senator Lincoln
Requestor: Senate State Affairs Committee

Department Affected: Department of Law
BRU: Prosecution
Component: All

COMPONENT SERIAL NO. 0085 through 0090

EXPENDITURES/REVENUES:

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND &						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						
FUNDING:						
1002 Federal						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-
POSITIONS:						
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)
Please see the attached analysis.

Richard L. Pegues

Prepared by: Richard I. Pegues, Director
Division: Administrative Services Division

Phone: 465-3672
Date: February 11, 1994

Richard L. Pegues /FOR/

Approved by Commissioner: Bruce M. Botelho, Attorney General
Agency: Department of Law

Date: February 11, 1994

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Rev 11/93

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 216

ANALYSIS CONTINUATION:

This bill adds a new section to AS 11.61 that provides that a person commits the crime of sale or display of material harmful to minors if the person knowingly sells, displays, or distributes any material, including the cover or packaging of the material, that is harmful to minors in any place where minors are present or are allowed to be present and where minors are able to view such material unless each item of the material is sealed in an opaque wrapper. The bill defines material harmful to minors to mean a description or representation, in any form, of nudity, sexual conduct, or sexual excitement when it:

(1) predominately appeals to the prurient, shameful, or morbid interest of minors in sex;

(2) is potently offensive to contemporary standards in the adult community with respect to what is suitable sexual material for minors; and

(3) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

The bill would not apply to:

(1) recognized and established schools, religious institutions, museums, medical or psychological clinics, hospitals, public libraries, and government agencies in making available or providing material harmful to minors to a minor as an official function; or

(2) a parent or guardian of a minor who provides material harmful to minors to the minor.

Sale or display of material harmful to minors would be a class B misdemeanor. The Department of Law does not believe that there would be fiscal impact, because the incidence of violations would be relatively low.

8-LS1121\E
Luckhaupt
2/17/94

CS FOR SENATE BILL NO. 216(STA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE STATE AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR LINCOLN

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the sale, display, or distribution of material harmful to
2 minors at places where minors are present or allowed to be present and where
3 minors are able to view such material; and prohibiting the sale or display of
4 certain audio recordings, phonograph records, magnetic tapes, compact discs, or
5 music video recordings, without warning labels and opaque wrappings."

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

7 * Section 1. AS 11.61 is amended by adding new sections to read:
8 Sec. 11.61.127. SALE, DISPLAY, OR DISTRIBUTION OF MATERIAL
9 HARMFUL TO MINORS. (a) A person commits the crime of sale, display, or
10 distribution of material harmful to minors if the person knowingly sells, displays, or
11 distributes any material, including the covers and packaging of the material, but not
12 including audio or music video recordings, that is harmful to minors in any place
13 where minors are present or are allowed to be present and where minors are able to

1 view such material unless each item of the material is sealed in an opaque wrapper.

2 (b) In this section, the requirement of an opaque wrapper shall be satisfied if
3 the portions of the covers or packaging of the material that visually depict material
4 harmful to minors are blocked with the opaque wrapper and the wrapper is sealed.

5 (c) In this section,

6 (1) "material harmful to minors" means a

7 (A) description or representation, in any form, of nudity, sexual
8 conduct, or sexual excitement when it

9 (i) predominately appeals to the prurient, shameful, or
10 morbid interest of minors in sex;

11 (ii) is patently offensive to contemporary standards in
12 the adult community as a whole with respect to what is suitable sexual
13 material for minors; and

14 (iii) taken as a whole, lacks serious literary, artistic,
15 political, or scientific value for minors; or

16 (B) graphic description, representation of, or incitement to
17 violent behavior that if acted out would constitute felonious behavior that is
18 morally repugnant to the community as a whole;

19 (2) "music video recording" means a visual depiction of a song or
20 songs that is not voluntarily rated by the Classification and Rating Administration
21 (CARA).

22 (d) Sale or display of material harmful to minors is a class B misdemeanor.

23 Sec. 11.61.128. UNLAWFUL SALE OR DISPLAY OF AUDIO OR MUSIC
24 VIDEO RECORDING. (a) A person commits the crime of unlawful sale of audio or
25 music video recording if the person knowingly sells or offers to sell an audio
26 recording, phonograph record, magnetic tape, compact disc, or music video recording
27 that contains lyrics that include or are descriptive of material harmful to minors, unless
28 the cover of such recording, record, tape, or disc contains a warning label that the
29 lyrics contain material harmful to minors.

30 (b) A person commits the crime of unlawful display of audio or music video
31 recording if the person knowingly displays an audio recording, phonograph record,

1 magnetic tape, compact disc, or music video recording, whose packaging uses words,
2 symbols, or pictures that include or describe material harmful to minors unless the
3 recording is sealed in an opaque wrapping.
4 (c) In this section, the requirement of a warning label shall be satisfied if the
5 label is affixed to the front cover, beneath any cellophane or other clear wrapping
6 material or above any opaque wrapping material, of the audio recording, phonograph
7 record, magnetic tape, compact disc, or music video recording and for (1) cassette
8 tapes and compact discs or other recordings the same size or smaller than cassette
9 tapes or compact discs, is printed with black letters of eight point type or larger, except
10 that the words "WARNING" and "PARENTAL ADVISORY" shall be of 10 point type
11 or larger on a fluorescent yellow background; or (2) all other audio or music video
12 recordings larger than cassette tapes or compact discs, is printed with black letters of
13 12 point type or larger on a fluorescent yellow background, except that the words
14 "WARNING" and "PARENTAL ADVISORY" shall be printed in letters which are of
15 48 point type or larger, and the label reads substantially as follows:
16 "WARNING:
17 May contain explicit lyrics that include or describe material
18 harmful to minors.
19 PARENTAL ADVISORY".
20 (d) In this section, the requirement of an opaque wrapper is satisfied if the
21 portions of the packaging of the audio recording, phonograph record, magnetic tape,
22 compact disc, or music video recording that describe, advocate, or encourage the
23 conduct described in (b) of this section are blocked with an opaque wrapper and the
24 wrapper is sealed.
25 (e) In a prosecution under this section, each day that a violation occurs and
26 each audio recording, phonograph record, magnetic tape, compact disc, or music video
27 recording that is found in violation of this section is a separate offense.
28 (f) In this section, "material harmful to minors" and "music video recording"
29 have the meanings given in AS 11.61.127.
30 (g) Except as provided in (h) of this section, a violation of (a) or (b) of this
31 section is a class B misdemeanor.

1 (h) A person convicted under this section is guilty of a class A misdemeanor
2 if the person has previously been convicted of a violation of this section.

8-LS1121\A

SENATE BILL NO. 216

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - FIRST SESSION

BY SENATOR LINCOLN

Introduced: 5/9/93
Referred: STA, HES, JUD

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the sale, display, or distribution of material harmful to
2 minors at places where minors are allowed to be present and where minors are
3 allowed to view such material."

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

5 * Section 1. AS 11.61 is amended by adding a new section to read:
6 Sec. 11.61.127. SALE OR DISPLAY OF MATERIAL HARMFUL TO
7 MINORS. (a) A person commits the crime of sale or display of material harmful to
8 minors if the person knowingly sells, displays, or distributes any material, including
9 the covers and packaging of the material, that is harmful to minors in any place where
10 minors are present or are allowed to be present and where minors are able to view
11 such material unless each item of the material is sealed in an opaque wrapper.
12 (b) In this section, the requirement of an opaque wrapper shall be satisfied if
13 the portions of the covers or packaging of the material that visually depict material
14 harmful to minors are blocked with the opaque wrapper and the wrapper is sealed.

1 (c) This section does not apply to

2 (1) recognized and established schools, religious institutions, museums,
3 medical or psychological clinics, hospitals, public libraries, and governmental agencies
4 in making available or providing material harmful to minors to a minor as an official
5 function; or

6 (2) a parent or guardian of a minor who provides material harmful to
7 minors to the minor.

8 (d) In this section, "material harmful to minors" means a description or
9 representation, in any form, of nudity, sexual conduct, or sexual excitement when it

10 (1) predominateiy appeals to the prurient, shameful, or morbid interest
11 of minors in sex;

12 (2) is patently offensive to contemporary standards in the adult
13 community as a whole with respect to what is suitable sexual material for minors; and

14 (3) taken as a whole, lacks serious literary, artistic, political, or
15 scientific value for minors.

16 (e) Sale or display of material harmful to minors is a class B misdemeanor.

Sen. Lincoln would be fine if this were taken out.

New Text Underlined [DELETED TEXT BRACKETED]