

November 29, 1994

Joseph L. Swanson, Director
Division of Elections
4th Floor Court Plaza Building
Juneau, AK 99811-0017

Re: Election Recount Procedures
A.G. file no: 661-95-0311
1994 Op. Att'y Gen. No. 2

Dear Mr. Swanson:

You have asked for assistance in determining the proper procedure for conducting an election recount. Your principal goal is to ascertain what can or must be done, within the terms of state law, to ensure that the recount results in an accurate figure. Specifically, I address the proper scope of each of the two phases of the recount process, focusing on (1) how detailed the review must be and (2) the mechanism by which the ballots must be recounted. With respect to the second question, we are aware that the apparent unsuccessful candidate in the 1994 gubernatorial contest has requested that the recount be done by hand for all ballots.

Based on our review of the applicable statutes and other law, we conclude, first, that the Division of Elections ("Division") must conduct a thorough review of all ballots as the initial phase of the recount process. Second, the Division should recount the ballots in the same manner that they were initially counted; that is, the hand-marked ballots must be recounted manually, and the punch-card ballots should be recounted by computer. At the same time, however, the Division may address any concerns regarding the correctness of the computer count by, for example, counting a number of precincts both by computer and by hand to verify the computer's accuracy.

A. THE REVIEW OF BALLOTS IN THE RECOUNT PROCESS

Alaska Statutes 15.20.480 sets out the procedure for recounts. The statute describes two aspects of a recount: the review of the ballots and the counting of the ballots.

The recount statute first describes the ballot review requirements. You must *review all* ballots to determine which ones were properly marked and should therefore be counted in the recount:

In conducting the recount, the *director shall review all ballots* whether the ballots were counted at the precinct or by computer or by the district absentee counting board or the questioned ballot counting board *to determine which ballots, or parts of ballots, were properly marked and which ballots are to be counted in the recount*

AS 15.20.480 (emphasis added).

As part of this review, the director must check both the accuracy of the initial count and the accuracy of the reviews that were conducted by all of the district boards. This check must include comparing the numbers of ballots cast against the registers and comparing the number of absentee ballots voted against the number distributed:

and [the director] shall check the accuracy of the original count, the precinct certificate and the review. The director shall check the number of ballots and questioned ballots cast in a precinct against the registers and shall check absentee ballots voted against absentee ballots distributed.

Id.

The detailed enumeration of the components of the review suggests that it should be careful and substantive. To satisfy the requirement that you determine which ballots are to be counted, as well as the requirement that you check the accuracy of the review at the district level, you should collect all ballots and envelopes, and carefully scrutinize any ballots that were challenged at the district review if those challenges are reasserted by a candidate. You must also carefully scrutinize

any ballots challenged by a candidate during the course of the recount. Finally, you must review any ballot that was rejected during the initial count or the recount if, during the course of the recount, any person challenges the decision to reject the ballot. This scrutiny will ensure that decisions are uniform across the state and that each ballot, and candidate, is afforded fair treatment. The review will add to the integrity of the entire election process by providing an additional opportunity to examine the accuracy of ballot-specific decisions.

The conclusion that the statute requires you to thoroughly review all ballots is supported by the Alaska Supreme Court's decision in *Willis v. Thomas*, 600 P.2d 1079 (Alaska 1979). That case was a recount appeal in which the Court described the proper scope of its review, and at the same time discussed the review conducted by the Director (then Lieutenant Governor) during the recount itself. The Court stated:

[The Director] must review all ballots, counted or uncounted for whatever reason, and make rulings as to whether they were properly included or excluded in the canvass. As a matter of course this involves making rulings on questioned or challenged ballots and must necessarily go beyond the ballots themselves.

Willis, 600 P.2d at 1082. It is apparent, then, that you must carefully review the ballots to determine which ones should be counted in the recount.

We recommend that you take steps to preserve a record of the challenges made by a candidate during the recount. The record must include your ruling on the challenge and the basis for the ruling. It would be appropriate for you to set ground rules for the making of challenges so that a good record of the proceedings can be kept.

B. THE COUNTING OF BALLOTS IN THE RECOUNT PROCESS

The recount statute also contains directions for the actual *ballot-counting* phase of the recount process. The same rules that were followed for the original count apply for the recount:

...

The rules in AS 15.15.360 governing the counting of hand-marked ballots and the rules in AS 15.20.730 governing the counting of punch-card ballots shall be followed in the recount

AS 15.20.480. The first statute referenced in this provision, AS 15.15.360, is titled "Rules for counting hand-marked ballots" and contains detailed guidance concerning the validity of all types of marks on a hand-marked ballot. Because that section requires that hand-marked ballots be individually examined, those ballots must be counted manually both in the initial count and in the recount.

The other reference, AS 15.20.730, is titled "Rules for counting punch-card ballots" and sets out rules concerning the types and exact location of specific punches that the computer must and must not count.¹ This set of rules, like the rules for hand-counting, applies both in the initial count and in the recount.

¹ In 1980, the legislature amended the recount statute, AS 15.20.480, to expressly refer to punch-card ballot rules for counting. *See* section 98, chapter 100, SLA 1980, which underscores that it specifically intended that punch-card ballots be recounted by computer.

Although AS 15.20.730 contemplates that punch-card ballots be counted by a computer, it does not impose an absolute requirement that a computer be used exclusively. Indeed, in some circumstances hand-counting of certain punch-card ballots is necessary. For example, "all punch-card ballots which cannot be processed through the computer and all write-in votes on ballots which have been processed through the computer" must be hand-counted by a counting team. AS 15.20.685(b). In addition, if a computer fails and no alternate site is available, punch-card ballots at that site "shall be counted manually." AS 15.20.690(a); *see also* AS 15.20.730(c) (when punch-card ballots are counted manually, the same rules concerning the validity of punches apply).²

A person opposed to a hand recount could argue that the statute sets out just a few situations when punch-card ballots must be hand-counted, indicating that in all other situations punch-card ballots *must* be computer-counted, based on a maxim of statutory construction. It is doubtful, however, that such a reading of the statute would be upheld, particularly because another section of the statute establishes that hand-counting can supplement computer-counting. *See* AS 15.20.685(a) ("The election supervisor shall appoint a counting team or teams *to assist in the counting of punch-card ballots* at the computer counting center") (emphasis added). Thus, there appears to be no prohibition against hand-counting at least some of the punch-card ballots.

In addition, some punch-card ballots *must* be both computer-counted and hand-counted. This requirement appears in the statute setting out the specific, and rigorous, schedule for testing the election computers to ensure that the system is functioning properly. *See* AS 15.20.620.

² Similarly, AS 15.15.360(c) provides that hand-marked punch-card ballots are to be counted according to that section's rules, i.e., manually.

One of the prescribed tests occurs during the final tabulation by computer, when "a manual count of different individual races in six precincts chosen at random shall be made, and the results checked against those of the system." AS 15.20.620(d).

To respond to those who are seeking a hand-count of *all* ballots, the Division has several options. It could, within the confines of the statutes, offer to hand-count punch-card ballots in *more than* the six precincts required by AS 15.20.620(d) to further cross-check the computer's accuracy. Such an extended check is authorized by the generalized provision stating that "other tests shall be made to ensure that the system is functioning properly" at various specified times. AS 15.20.620(b). This may satisfy any concerns that certain marks on the punch-card ballots are not being picked up by the computer.

In addition to considering the option of further cross-checking the computer tally, I suggest that you assure those seeking a recount that you will manually check each of the write-in punch-cards to discover whether any voter wrote in the name of candidate Campbell or Knowles and then punched that write-in line. Although this may be perceived as a remote possibility, I understand it would not be burdensome,³ and it could uncover some additional votes that should be counted.

³ Barbara Whiting, the Administrative Officer for the Division of Elections, explained that as of November 17, there were only 268 write-in votes for governor statewide, and that the computers segregate these punched ballots.

C. OTHER PROCEDURES FOR RECOUNT

The statute sets out several other rules that I mention here for the sake of completeness.

One additional substantive rule concerns absentee ballots: "[t]he director shall count absentee ballots received before the completion of the recount." AS 15.20.480; *see also* AS 15.20.081(e) and (h).

Three procedural rules also appear in this statute. First, you may perform just one recount, even if more than one request is received:

For administrative purposes, the director may join and include two or more applications in a single review and count of votes.

AS 15.20.480. Second, "[t]he recount shall be completed within ten days" of the day it begins; for the gubernatorial race, the recount must begin within three days after the receipt of an application following certification of the election. *Id.*; AS 15.20.460. Finally, "[t]he director may employ additional personnel as necessary to assist in the recount." AS 15.20.480.

D. CONCLUSION

Thus, the rules that emerge for conducting a recount are the following:

- (1) you must review all ballots;
- (2) you must carefully consider and make a ruling on
 - (a) ballots challenged at the district review if those challenges are reasserted,
 - (b) ballots challenged by a candidate during the course of the recount, and
 - (c) ballots rejected during the initial count or the recount if, during the course of the recount, any person challenges the decision to reject;
- (3) all hand-marked ballots must be hand-counted;

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- (4) punch-card ballots may be computer-counted, but can also be hand-counted to the extent necessary to cross-check the computer's accuracy; and
- (5) certain punch-card ballots must be hand-counted.

Please contact me if my department can be of further assistance.

Very truly yours,

Bruce M. Botelho
Attorney General