

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
FOURTH JUDICIAL DISTRICT

IN RE 2011 REDISTRICTING CASES

Case No. 4FA-11-02209 CI

**RILEY ET. AL. PLAINTIFF'S OPPOSITION TO BOARD'S MOTION FOR SUMMARY  
JUDGMENT: TRUNCATION**

The Board seeks summary judgment denying the Riley Plaintiff's claims challenging the truncation of Senate Districts contained in the Final Plan. The Board claims that it strictly followed the standards set out in *Egan v Hammond*, which held that the Board has discretion to truncate incumbent Senator's terms where a Senate district boundary experiences "substantial change" in population. The Board also argues that it was reasonable to set the standard for "substantial change" to be more than 25% of a population change between the 2012 temporary plan and the third Final Plan.

The Court should deny the Board's motion because 1) the Board exceeded its powers by unnecessary truncation, 2) The Board's Truncation Method Did Not Bear A Rational Relation To Its Purpose, and 3) the Board's used an arbitrary standard.

**I.**

**STANDARD OF REVIEW**

While it is true that the Board has discretion to truncate an incumbent Senator's term where there is a substantial change in populations under *Egan v Hammond*, that discretion is not absolute. The Board's motion simply ignores the issue as to the standard of review.

It is axiomatic that the exercise of administrative discretion is subject to judicial review to determine "whether the regulation is consistent with the statutory provisions which authorize it

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(the commission) and second by determining whether the regulation is reasonable and not arbitrary.”<sup>1</sup> This latter review consists primarily of ensuring that the agency has taken a hard look at the salient problems and has genuinely engaged in reasoned decision making.<sup>2</sup>

**a) The Power of The Board To Truncate Senate Terms**

The Constitution mandates that Senators are elected to four year terms and that one-half of the senators shall be elected every two years.<sup>3</sup> While the Constitution set out a transition schedule alternating two and four year terms for the first Senate,<sup>4</sup> the Constitution is silent as to how Senate terms are to be allocated during the redistricting process. The constitutional and statutory provisions establishing the Redistricting Board's powers and processes are silent respecting truncation of incumbent terms and prospective truncation (i.e. shortening of future Senate terms).<sup>5</sup> Thus, there is no constitutional, nor statutory provisions, which might inform the Court respecting the limits of the Board's power to truncate Senate terms within the redistricting process.

Rather, the Courts have only addressed the issue of truncation during the 1970's redistricting cycle.<sup>6</sup> Specifically, the Court considered the truncation (termination) of incumbent's term prior to the time established at his/her original election.<sup>7</sup> The 1970's Final Plan required the truncation of incumbent senator terms because the plan was transitioning between multi-member and single member districts.<sup>8</sup> At the time, redistricting was conducted by the Governor, and in considering the matter, the Court found a need to address truncation and found

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1 *Interior Alaska Airboat Assn v. State, Bd. of Game*, 18 P.3d 686, 689-90 (Alaska 2001)

2 *Id.*

3 AK CONST. Art. II, §3

4 AK CONST. Art. XV, §10

5 See generally AK CONST. Art. VI, §8 and AS 215.10.200-300

6 *Eagan v Hammond*, 502 P.2d 856, 873-874 (Alaska, 1972); *Groh v Eagan*, 526 P.2d 863, 881 (Alaska, 1974)

7 *Id.*

8 *Id.*

that the Governor had both the power and discretion to truncate Senate terms as needed.<sup>9</sup> The Governor's power to terminate a sitting Senator's term was determined to be needed "when reapportionment results in a permanent change in district lines which either excludes substantial numbers of constituents previously represented by the incumbent or includes numerous other voters who did not have a voice in the selection of that incumbent."<sup>10</sup> The power to truncate senate terms is "incidental to his (the Governor's) general reapportionment powers".<sup>11</sup> Importantly, the Court has never addressed prospective truncation of Senate terms.

The constitutional amendments establishing the Redistricting Board vested the former powers of the Governor in the new Board, but did not expressly give the Board the power to truncate Senate terms. Thus, the Board only has the power to truncate Senate terms to the extent that such power is necessary and incidental to its redistricting powers. Generally, when construing the power of a state commission to exercise non-statutory powers which are implied as being necessary and incidental to the duties of the Commission, the statutory authority may not be implied beyond that which is necessary to accomplish its express statutory powers.<sup>12</sup> Thus, the Board's implied powers to truncate Senate terms may not be implied beyond what is reasonably necessary to produce a redistricting plan. Truncation beyond that which is necessary to implement its new plan is beyond the authority of the Board. Notably, the Courts have not address the issue of a redistricting board's power to shortened future terms of Senators to be elected in the future: i.e. prospective truncation.

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<sup>9</sup> *Groh v Eagan*, 526 P.2d at 881; *Eagan v Hammond*, 502 P.2d, at 874

<sup>10</sup> *Id.*, at 873-874

<sup>11</sup> *Id.*

<sup>12</sup> *Alaska Pub. Utilities Comm. V Anchorage Tel. Utility*, 902 P.2d 783 (Alaska, 1995).

**b) Hard Look & Reasoned Decision Making; Arbitrary Action**

As this Court has noted in the past, in determining whether a plan or a portion of a plan is reasonable and not arbitrary, the “Court must examine not policy but **process** and must ask whether the agency has not really taken a 'hard look' at the salient problems or has not generally engaged in reasoned decision making.”<sup>13</sup> An arbitrary process is antithetical to the requirement of a reasoned decision making process.<sup>14</sup> As a general matter, “there must be substantial evidence in the record that supports the findings that are disputed.”<sup>15</sup>

**II.**

**WHAT THE BOARD DID**

The 2012 Interim Truncation Schedule<sup>16</sup> ordered the Senate districts so that nine Senators would be elected in 2012 for two year terms that would expire in 2014. One Senator did not stand for election in 2012, and his term expired in 2014. The plan provided that ten Senate districts would be elected in 2014 for four year terms that expired in 2016. Thus, the interim plan provided that one-half of the senators would be elected every two years as required by the Alaska Constitution.<sup>17</sup> Specifically, the terms of ten (10) incumbents in SD A,B,E,I,K,M,N,P,Q, and T expire in 2014.<sup>18</sup> The remaining incumbent Senators terms expire in 2016.

As discussed in the *Riley Summary Judgment Memorandum*, the truncation schedule for the Final Plan<sup>19</sup> was adopted on July 7, 2013.<sup>20</sup> As previously detailed, the Board lowered its standards for truncation of incumbent Senator terms. Two years ago, the Board truncated all

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13 *Memorandum Decision and Order Re: 2011 Proclamation Plan* (Feb. 1, 2012), at 46.

14 *Interior Alaska Airboat Assn v. State, Bd. of Game*, 18 P.3d at 689-90

15 *City of Nome v Catholic Bishop of Northern Alaska*, 707 P.2d 870, 875 n. 2&3, and 876 (Alaska, 1985)

16 ARB 00015166-15167. See Riley Plt. Memo Sum Jud. Exhibit 9 (Senate Terms Amended/Interim Plan).

17 AK CONST. Art. II, §3

18 See Plt. Ex. 11 attached (Schedule of Incumbents in 2014 elections); Compare ARB 00015166-15167. See Riley Plt. Memo Sum Jud. Exhibit 9 (Senate Terms Amended/Interim Plan)

19 Riley Plt. Memo Sum Jud., at 37 et. seq.

20 *Id.*

Senators whose districts changed more than 13%. This year, the Board decided to truncate Senators whose districts changed more than 25%.<sup>21</sup> Of course, the process was very confused, and involved the Board going off record, conferring with the former chairman of the Republican party, and coming back on the record to take the action.

The resulting plan provides that fourteen Senate seats are up for election in 2014, ten for four (4) year terms and four for two year terms.<sup>22</sup> The Plan allows six Senators to serve out their four years ending in 2016.<sup>23</sup>

The Board claims that it truncated terms for four incumbent Senators: i.e. SD C, (Sen. Bishop) P (Sen. Stevens), G Sens. Fairclough and Dyson), and S (Sen. Hoffman).<sup>24</sup> However, the claim is misleading. Of the five (5) Senator's involved, only three of the incumbent Senator's terms were terminated earlier than scheduled under the 2012 Interim Truncation Schedule.

As a preliminary matter, the Board's claim is technically inaccurate when it states that a senate seat is truncated. As discussed above, truncation refers to the termination of the term of office of an elected and incumbent Senator.<sup>25</sup> Properly understood, "SD G" is not technically a truncated seat. As indicated above, SD G contains two incumbent Senators: Dyson and Fairclough. In 2012, Sen. Fairclough was elected to a four year term from the former (2012) SD M.<sup>26</sup> Also in 2012, Senator Dyson was elected to a two year term from the former (2012) SD F.<sup>27</sup> Thus, Sen. Fairclough's term was truncated; Sen. Dyson's term was not and expires in 2014.

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21 *Id.* See also ARB 000016914 (lines 11-24).

22 Compare ARB 00015166-15167

23 *Id.*

24 Def. Memo, at 2

25 *Eagan v Hammond*, 5*supra* at, 873-874; *Groh v Eagan*, *supra* at 881

26 See <http://senate.legis.state.ak.us/senator.php?id=fai>; See also See Riley Plt. Memo Sum Jud. Exhibit 8 (Senate Terms Amended/Interim Plan) and 10 (Senate Terms)

27 See <http://senate.legis.state.ak.us/senator.php?id=dys> . See also See Riley Plt. Memo Sum Jud. Exhibit 8 (Senate Terms Amended/Interim Plan).

Equally, SD P contains Kodiak, which is the residence of former Senate President Gary Stevens. Senator Stevens was elected from former (2012) SD R (Kodiak-Dillingham), and was elected to a two-year term in 2012.<sup>28</sup> Since his term ends in 2014 under the Interim Plan's truncation schedule, Sen. Steven's term was not truncated.

In 2012, Senators Bishop and Hoffman were elected from districts containing Fairbanks populations. They were elected for four year terms under the 2012 Interim Truncation Schedule. Under the new schedule, these Senator's terms were terminated or truncated. Thus, the terms of only three incumbent Senators were actually truncated: Senators Fairclough, Bishop and Hoffman.

However, the Board not only truncated the terms of sitting incumbent Senators, the Board also prospectively truncated Senate terms in four districts-- SD F, N, P, and T. These seats are up for election in 2014, and the Board shortened the term of office for these seats to two years as opposed to the four years required by the Constitution. All of these senate districts will be up for election again in 2016.

### III.

#### **THE BOARD EXCEEDED ITS POWER BY PROSPECTIVELY TRUNCATING FOUR SENATE DISTRICTS AND PLACING MORE THAN HALF THE SENATE DISTRICTS UP FOR ELECTION IN 2014**

As noted above, the Board prospectively truncated Senate terms in four districts-- SD F, N, P, and T. Under the Board's plan, those districts will hold elections in 2014, elect Senators who will serve only two terms, and will stand for election again in 2016. The prospective truncation of these four additional senate terms means that fourteen Senate seats will be up for election in 2014.

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<sup>28</sup> See Riley Plt. Memo Sum Jud. Exhibit 9 (Senate Terms Amended/Interim Plan).

The plan violates the Alaska Constitution in two ways. First, The Constitution mandates that Senators are elected to four year terms. Second, the Constitution requires that that one-half of the senators (i.e. ten) shall be elected every two years.<sup>29</sup> The first mandate is violated because four senate seats are elected for only two year terms. The second mandate is violated because more than one-half of the Senate is up for election in one year.

The truncation of an incumbent Senator's term has been found to be within the discretion of the Board, "when reapportionment results in a permanent change in district lines which either excludes substantial numbers of constituents previously represented by the incumbent or includes numerous other voters who did not have a voice in the selection of that incumbent."<sup>30</sup> However, there is no justification for prospectively shortening the term of a Senator who has not been elected. No voter will be represented in 2016 by a Senator who was elected by a substantially different constituency. Prospective truncation is very different than the truncation of an incumbent Senator's term, and cannot be justified on the same basis.

Equally, the shortened terms cannot be justified upon a need establish an alternating election sequence to assure that one-half of the senators would be elected every two years as required by the Alaska Constitution.<sup>31</sup> Under the truncation schedule for the 2012 Interim Plan ten incumbents in SD A,B,E,I,K,M,N,P;Q, and T had terms that expire in 2014.<sup>32</sup> The remaining ten incumbent Senators terms expire in 2016. Thus, prospective truncation of the four districts was not needed to assure that one-half of the senators would be elected every two years.

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29 AK CONST. Art. II, §3

30 *Id.* at 873-874

31 AK CONST. Art. II, §3

32 *See* Plt. Ex. 11 attached (Schedule of Incumbents in 2014 elections); Compare ARB 00015166-15167. *See* Riley Plt. Memo Sum Jud. Exhibit 9 (Senate Terms Amended/Interim Plan)

The Board offers no justification for the prospective truncation. There is no legal authority or justification for the Board to prospectively shorten terms of Senators, and such action was clearly violative of the Alaska Constitution.

#### IV.

### **THE BOARD'S ACTIONS WERE ARBITRARY RELATIVE TO INCUMBENT TRUNCATION**

The Board's actions were arbitrary in that 1) the Board's Math was wrong, 2) the Board's calculations did not have a rational relationship to measuring incumbent Senator's changed districts, and 3) the Board arbitrarily lowered the standard of population change that would trigger incumbent truncation.

#### **a) The Board's Math Was Wrong**

The calculations used by the board to determine truncation contained a mathematical impossibility with regard to SD N and O. Specifically, as the Senate term schedule indicates, the Board believed that former (2012) SD N comprised of 50.2% of the new SD N, and 50.3% of new SD O.<sup>33</sup> Of course, it is mathematically impossible for one former district to comprise more than 50% of each of two new districts. The math is simply wrong. The Board's methodology in making these calculations is not known, but the specific error in calculations of changes in these two former districts creates an inference that the Board's methodology is likely to have created other mathematical errors in calculating the differences between other old and new districts.

#### **b) The Board's Calculations Did Not Have A Rational Relationship To Measuring Incumbent Senator's Changed Districts.**

In three cases, the board didn't understand which incumbent senator's seats were being truncated and used the wrong former districts for

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33 ARB 00017354-17355



comparison, which means that the Board's incumbent truncation processes did not bear a rational relationship with the goal of truncation of incumbent Senator terms.

As noted above, the Board claims that it truncated terms for only four incumbent Senators in SD C, P, G, and S. But these districts actually contain five incumbent senators: i.e. Bishop (C), Stevens (P), Fairclough/Dyson (G), and Hoffman (S).<sup>34</sup> In truth, the Board only truncated three (3) of these incumbent Senator's terms: i.e. Senators Fairclough, Bishop and Hoffman. As noted above, it did not truncate the terms of Senators Stevens or Dyson because their terms expire in 2014. It appears that the Board was not actually truncating incumbent Senator terms at all. Rather, it appears to have been randomly assigning terms to districts without regard to whether the percentage change in the incumbent Senator's old/new constituency.

This conclusion is further supported by the fact that the Board used the wrong old districts in calculating the degree of change for three (3) new Senate districts. Senator Stevens was elected from former (2012) SD R (Kodiak-Dillingham), and was elected to a two-year term in 2012.<sup>35</sup> Under the third Final Plan, Sen. Stevens, who resides in Kodiak,<sup>36</sup> would be the incumbent Senator for SD P. However, in calculating the change in SD P the Board used former (2012) SD O. The incumbent for former (2012) SD O was Senator Peter Micciche, who resides in Kenai,<sup>37</sup> and would actually reside in the new SD O. However in calculating the change in new SD O, the Board compared the former (2012) SD N, which elected Sen. Giessel, from South Anchorage.<sup>38</sup> In calculating the change in new SD N, the Board also compared the former (2012) SD N. Sen. Giessel, who resides in both the old and new SD N. The multiple use of the

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34 See Ex. 11, attached

35 See Riley Plt. Memo Sum Jud. Exhibit 8 (Senate Terms Amended/Interim Plan).

36 See <http://senate.legis.state.ak.us/senator.php?id=stg>

37 <http://senate.legis.state.ak.us/senator.php?id=mhe>

38 <http://senate.legis.state.ak.us/senator.php?id=gie>

former (2012) SD N as a comparison with two new districts resulted in the obvious mathematical error discussed in the prior section.

There are additional problems with the new SD G, which has two incumbents: i.e. Sen. Dyson who was elected from the former (2012) SD F,<sup>39</sup> and Sen. Fairclough who was elected from the former (2012) SD M.<sup>40</sup> In calculating the change for new SD G, the Board used former (2012) SD M, which only measured the change in Sen. Fairclough's district. There was no calculation of change between Sen. Dyson's new district and his old district, the former (2012) SD F. The former (2012) SD F, was used to compare the new SD F, which does not have an incumbent.

Of course, in truncating incumbent Senators' terms, the goal is to measure whether the new district “excludes substantial numbers of constituents previously represented by the incumbent or includes numerous other voters who did not have a voice in the selection of that incumbent.”<sup>41</sup> That process implicitly requires that the Board actually measure the number of former/new constituents that are represented by the incumbent Senator. While it is not clear what the Board's measurements actually sought to measure, it is crystal clear that the Board was not measuring the former/new constituents in districts for which Senators Stevens, Micciche, and Dyson were incumbents.

The record establishes that the Board was laboring under a profound misunderstanding of what it was actually doing, and confusion over incumbent truncation. The Board did not truncate four senate districts; rather it truncated three (3) incumbent Senator terms, and used the wrong measurements to compare districts, or simply failed to measure the changes in former districts in a number of districts. A fundamental element of a “reasoned decision-making process” assumes

39 <http://senate.legis.state.ak.us/senator.php?id=dys>

40 <http://senate.legis.state.ak.us/senator.php?id=fai>

41 *Groh v Eagan*, 526 P.2d at, 881; *Eagan v Hammond*, 502 P.2d, at 874

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that the Board actually knew what it was doing. Clearly, the Board did not understand that “truncation” referenced the termination of incumbent Senator terms, and/or used the wrong metrics to measure the exclusion or inclusion of old/new voters in incumbent's new districts. At best, such fundamental misunderstanding of the incumbent truncation process and the use of inappropriate metrics fails to reflect the “reason decision-making” required of the Board, and/or failed to bear any rational relationship to the purpose of incumbent truncation. More likely, however, the process used by the Board was simply arbitrary and unreasonable.

**c) The Board Arbitrarily Lowered The Standard Of Population Change That Would Trigger Incumbent Truncation** The Board asserts in its memorandum that it never adopted an incumbent truncation standard for change in districts' populations two years ago. The Board further asserts that in adopting the Third Final Plan, it exercised its discretion to adopt a standard that provided that a Senator's term would be truncated if the district experienced more than 25% change in population from the prior district. The argument is misleading.

First, the claim that the Board did not adopt a standard in 2011 is simply untrue. As noted in the Riley's summary judgment memorandum,<sup>42</sup> in adopting its first Final plan in 2011, the Board adopted a recommendation from the Board counsel to truncate all seats that had over a 13% change (i.e. 87% the same).<sup>43</sup> In adopting the Interim Plan, the Board clearly did not apply this standard or any other standard, because it's plan was inconsistent. For example, in the Interim plan, the Board did not truncate SD P, which was 86.7% the same, while it prospectively truncated SD B (City of Fairbanks), which was 86.9% the same.<sup>44</sup>

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42 See Riley Plt. Memo Sum Jud., at 39 et. seq.

43 ARB 000003534 (lines 13-17)

44 See Riley Plt. Memo Sum Jud. Exhibit 8 (Senate Terms Amended/Interim Plan).

Finally, the Board adopted a new standard on July 7, 2013 by deciding to truncate all seats that experienced more than a 25% change in population.<sup>45</sup> In discussing truncation, the Board record demonstrates profound confusion over the issue, and required the Board to go off record and “get educated” by Randy Ruedrick, the former chairman of the Republican Party.<sup>46</sup> After getting educated off record, the Board reconvened, and moved quickly to change the standard with the clarity and passion of college freshmen.<sup>47</sup> In doing so, the Board acknowledged that the change would only affect one incumbent Senator: i.e. Senator Coghill (R/North Pole), whose district had changed by 23% (i.e. 77% the same). The change was too great (using the Board's metrics) so as to require truncation under the old standard, but was less than the new standard so that Sen. Coghill's term would not be truncated. It should not escape any notice that SD B contained Ester/Goldstream, which has been a major area of contention throughout this litigation. The net effect of refusing to truncate Sen. Coghill's term is to deny to the voters of Ester/Goldstream the right to participate in the election of the Senator who will represent them in the 2014-2016 Legislature, and to effectuate that disenfranchisement by changing the standards for the truncation of incumbent senator terms.

The record clearly establishes that the Board engaged in a result-oriented process to avoid truncating Sen. Coghill by changing the standards. The record is also clear that the process was the subject of extensive interference by Mr. Ruedrick, off and on the record, which substituted partisan goals for reasoned decision-making. The process was clearly arbitrary and unreasonable.

### CONCLUSION

The Court should deny the Board's motion for summary judgment respecting truncation,

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45 ARB 000016914 (lines 11-24)  
46 ARB 000016912-ARB 000016915  
47 ARB 000016914 (lines 11-19)

because, 1) the Board unnecessarily engaged in prospective truncation without legal authority or justification, and 2) used an arbitrary and unreasonable process to truncate incumbent Senators that contained mathematical errors, compared the wrong old/new districts to measure changes in populations, and changed standards in order to protect one Senator from truncation.

Date: September 23<sup>rd</sup>, 2013

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Certificate of Service

I certify that a true and correct copy of the foregoing was served by e-mail on this September 23<sup>rd</sup>, 2013 to:

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House					Senate					
Community	2013 Dist.	2012 Dist.	Incumbents		Community	2013 Dist.	2012 Dist.	Up 2014	Incumbent	
Fairbanks	1	4	Scott Kawasaki	D						
Fairbanks	2	3	Steve Thompson	R	Fairbanks	A	B	X	Pete Kelly	R
North Pole	3	1	T Wilson/D Isaacson	R						
Fairbanks	4	2	David Guttenberg	D	North Pole	B	A		John Coghill	R
Fairbanks	5	5	Pete Higgins	R						
Interior	6	39/38	OPEN		Fairbanks	C	C	X	Click Bishop	R
Wasilla	7	9	Lynn Gattis	R						
Big Lake	8	10	Mark Neuman	R	Wasilla	D	E		Charlie Huggins	R
Chickaloon	9	6	Eric Feige	R	highway valley					
Wasilla	10	7	Wes Keller	R	highway valley	E	D	X	Mike Dunleavy	R
Palmer	11	8	Shelly Hughes	R						
Chugiak	12	11	Bill Stoltz	R	Palmer	F	F	X	OPEN	
Eagle River	13	12	Dan Saddler	R						
Eagle River	14	26	Lora Reinbold	R	Eagle River	G	M	X	F Dyson/A Fairclough	R
Anchorage	15	13	Gabrielle LeDoux	R						
Anchorage	16	14	Max Gruenberg	D	Anchorage	H	G		Bill Wielechowski	D
Anchorage	17	15	Andy Josephson	D						
Anchorage	18	16	Harriet Drummond	D	Anchorage	I	H	X	Berta Gardner	D
Anchorage	19	17	Geran Tarr	D						
Anchorage	20	18	Les Gara	D	Anchorage	J	I		Johnny Ellis	D
Anchorage	21	19	Lindsey Holmes	R						
Anchorage	22	20	Mia Costello	R	Anchorage	K	J	X	Hollis French	D
Anchorage	23	22	Chris Tuck	D						
Anchorage	24	21	Craig Johnson	R	Anchorage	L	K		Lesil McGuire	R
Anchorage	25	24	Charisse Millett	R						
Anchorage	26	23	Bob Lynn	R	Anchorage	M	L	X	Kevin Meyer	R
Anchorage	27	25	Lance Pruitt	R						
Anchorage	28	27	Mike Hawker	R	Anchorage	N	N	X	Cathy Giessel	R
Kenai	29	28	Mike Chenault	R						
Soldotna	30	29	Kurt Olson	R	Soldotna	O	O	X	Peter Micciche	R
Homer	31	30	Paul Seaton	R						
Kodiak	32	35	Alan Austerman	R	Kodiak	P	R	X	Gary Steven	R
Juneau	33	32	Beth Kertula	D						
Juneau	34	31	Cathy Munoz	R	Juneau	Q	P	X	Dennis Egan	D
Sitka	35	34	Jonathan Kreiss-Tomkins	D						
Wrangell	36	33	Peggy Wilson	R	Sitka	R	Q		Bert Stedman	R
Dillingham	37	36	Bryce Edgmon	D						
Bethel	38	37	Bob Herron	D	Bethel	S	S	X	Lyman Hoffman	D
Nome	39	39	Neal Foster	D						
Barrow	40	40	Benjamin Nageak	D	Golovin	T	T	X	Donny Olson	D