



April 5, 2012

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The Honorable Debbie Ossiander
Chair, Municipality of Anchorage Assembly
City Hall
632 West 6th Avenue, Suite 250
Anchorage, AK 99501

Re: ***Recommendation for Appointment of Special Counsel
Review of April 3, 2012 Municipality of Anchorage Election***

Chair Ossiander:

The American Civil Liberties Union of Alaska Foundation is mandated to preserve and expand the individual freedoms and civil liberties of all Alaskans as guaranteed by the United States and Alaska Constitutions. From that perspective, we wish to advise you of concerns with respect to the conduct of the April 3, 2012 Municipality of Anchorage election, and work with the Assembly to ensure that:

1. The voting rights of each and every member of the Municipality are vindicated; and
2. That the public has full faith in a review of the current election, and confidence that future elections will be free and fair.

To ensure that is the case, as more fully set forth below, **we are recommending that the Assembly immediately use its authority to appoint an independent, special counsel – such as a retired Judge, or former member of the Attorney General’s office – to conduct a thorough review of the Election, and with authority to subpoena and order the preservation of appropriate records, provision of necessary staff and/or funding, and a mandate to issue a Report on the operation of the April 3 election.**

This recommendation is based, first and foremost, on the apparently not insubstantial levels of disenfranchisement that occurred. We have received complaints from voters who were unable to cast ballots in the election.

Appropriate Investigating Authority

We have heard through media reports that the Municipal Attorney's office is engaged in investigating the April 2012 election. **The Municipal Attorney's office is not entrusted with that authority; rather, the authority to conduct such investigations lies with the Election Commission and the Assembly.**

Moreover, the Municipal Attorney is employed at the pleasure of one of the participants in the election, which represents the kind of conflict of interest that would call into question the legitimacy of any such investigation.

1. The Separation of Powers Outlined in the Municipal Code and Municipal Charter Vests the Assembly and the Election Commission with the Authority to Investigate Elections

The operation of elections is specially vested in the Municipal Clerk, who serves at the pleasure of the Assembly. Anch. Muni. Charter, Sec. 4.05. Obviously, impartiality is of paramount importance in operating elections. By vesting the authority to appoint the Clerk in the Assembly, rather than the Mayor, the Charter avoids placing control over elections in a single, partisan individual.

The Election Commission is charged with "act[ing] in an advisory capacity to the assembly and the municipal clerk in the conduct of elections." Anch. Muni. Code 28.120.60. The Commission shall also "[i]nvestigate election contests and report to the assembly their findings, if requested." *Id.* The Election Commission shall also "[m]ake such other studies and recommendations relating to elections as it may determine to be necessary and to perform such other duties as the assembly may assign." *Id.* ***These functions are relegated to the Election Commission and the Assembly and not to the executive branch or the Municipal Attorney. Thus, it is improper for the executive branch to usurp the powers delegated to the Assembly.***

2. The Municipal Attorney "Serves at the Pleasure of the Mayor," One of the Contestants in the April 2012 Election, Presenting an Obvious Conflict of Interest

The Municipal Attorney is entrusted with the duty to "advise and assist the municipal government on legal matters." Anch. Muni. Charter, Sec. 5.04. The Municipal Code states he is "responsible for providing legal services to municipal government, managing all civil litigation to which the municipality is a party, and providing judicial prosecution of misdemeanor criminal offenses in direct support of enforcement activities." Anch. Muni. Code, Sec. 3.20.070(a). He

has no special duties or expertise related to elections or conducting internal investigations of administrative functions.

More importantly, according to the Municipal Charter, the Municipal Attorney “serves at the pleasure of the mayor.” Anch. Muni. Charter, Sec. 5.04. The Municipal Attorney serves “[w]ithin the office of the mayor and reporting to the mayor or his designee.” Anch. Muni. Code, Sec. 3.20.070(a). Even among executive branch agencies, only the Office of Management and Budget also remains under the direct supervision of the mayor and reports directly to him. *Id.*

As you know, Mayor Dan Sullivan was a candidate for re-election as mayor in the April 2012 election. Early returns indicate that Mayor Sullivan leads by a large margin in the votes already counted. In light of that fact, Mayor Sullivan has an obvious personal interest in minimizing any errors, misconduct, or other malfeasance that would impugn the outcome of the election. The Municipal Attorney is employed by the mayor, reports directly to him, and can be dismissed at the will of the mayor.

This presents an obvious conflict of interest. Regardless of whether the Municipal Attorney would *in fact* be swayed in his investigation by the personal political interests of his supervisor, even the *appearance* of impropriety or partiality in the investigation would compromise its integrity. *Griswold v. City of Homer*, 925 P.2d 1015, 1028 (Alaska 1996)(“[T]he integrity required of public officeholders demands that the appearance of impropriety be avoided.”).

Notably, members of the Election Commission (who *are* entrusted with the authority to investigate the conduct of elections) are prohibited from being an “employee of the municipality” or holding an “elected or appointed public . . . office.” Anch. Muni. Code 28.120.30. The Municipal Attorney, by his office, thus runs afoul of exactly the kinds of conflicts of interests the Municipal Code seeks to avoid in determining who has authority to investigate elections. Similarly, the general conflict of interest ordinance prohibits participation in any administrative or quasi-judicial proceeding which “could foreseeably profit in any material way through resolution” of the matter at issue. Anch. Muni. Code 3.60.070. Since the Municipal Attorney could be fired at the will of the Mayor, preserving his position, his salary, and his benefits – which are undoubtedly valuable – is a foreseeable “profit” to serving the personal interests of the Mayor.

More importantly, the participation of the Municipal Attorney in the investigation puts him in a hopeless ethical bind. A lawyer may not “use a confidence or secret of a client to the disadvantage of the client.” Alaska R. Pro. Conduct 1.8(b); *see also* Alaska R. Pro. Conduct 1.6. If, in fact, high-ranking Municipal officials engaged in any impropriety and the Municipal Attorney discovered such a fact, he might be ethically obliged not to report such a fact. Alaska R. Pro. Conduct 1.13(d) (prohibiting lawyers for an organization from revealing “client confidences” relating to representation of an organization to investigate an alleged violation of law). The Municipal Attorney will enter an ethical thicket in serving the interests of his client and, at the same time, exposing any secrets discovered in the investigation which might tend to

expose the Municipality to litigation or other “disadvantage.” **The Municipal Attorney cannot serve in both roles in an effective manner.**

Further, in the event the election ends up in litigation, any report or investigation of the Municipal Attorney would be difficult to use either for or against the city’s interests. The Municipal Attorney would likely defend any suit in which the Municipality was sued, and his role as investigator would make him a witness in his own case, precluding his effective representation of the Municipality. Alaska R. Pro. Conduct 3.7. Further, as an attorney serving mixed roles – both advocate for the municipality and investigator of potential misconduct – difficult questions of what communications are privileged attorney-client communications and what are non-privileged investigatory communications would create new and separate problems in any litigation. **If the result of the review is favorable, the Municipality has a vested interest in using the report to defend itself. If the result of the review reflects poorly on the election proceedings, the Municipality will appreciate having a review conducted at arm’s length from thorny questions relating to an attorney serving dual roles. Only by having an independent investigator whose *sole* function is to investigate potential malfeasance can such evidentiary problems be avoided.**

3. To Avoid Even the Appearance of a Potential Conflict of Interest, the Municipal Clerk is Not An Appropriate Investigatory Authority

As noted above, members of the Election Commission are prohibited from being an “employee of the municipality” or holding an “elected *or appointed* public . . . office.” Anch. Muni. Code 28.120.30. And, just as the Municipal Attorney, by his office, potentially runs afoul of the kinds of conflicts of interest the Municipal Code seeks to avoid, the Municipal Clerk could potentially have a conflict of interest in investigating the election, or – at a minimum – the appearance of a potential conflict of interest. Without, in any way, calling into question the ethics or impartiality of the Clerk’s Office, it is the better practice to absent the Clerk from directing the investigation.

Clearly, the Clerk will be involved in the investigation, and will have the opportunity to make statements, provide records, etc.

But, where – as here – there is credible evidence of some error, however minor, by the Clerk’s office, an independent, special investigating counsel is required.

4. The Assembly Has Authority to Appoint an Appropriate Special Counsel to Investigate the April 2012 Election, and Should Use That Authority

As the Assembly and, under its supervision, the Election Commission are entrusted with the operation of and investigation of elections, **the Assembly should use its authority to appoint an independent, special counsel to investigate the election, speak to witnesses, subpoena documents, and submit a Report to the Election Commission and the Assembly regarding**

the proceedings of the April 2012 election. Such appointment should include provision of necessary resources and funding, to include personnel needed to conduct interviews and review documents. The final Report should describe whether improprieties and mistakes took place, the scope of those improprieties and mistakes, and whether and how the conduct of future elections should be reformed to prevent similar events from recurring.

The Assembly has the authority under the charter to “engage such legal counsel, other professional advisors and staff as it requires in the execution of its legislative functions.” Anch. Muni. Charter, Sec. 4.06. The supervision of elections is one of the core functions entrusted to the Assembly by the creation of a Municipal Clerk under the supervision of the Assembly. Anch. Muni. Charter, Sec. 4.05. The Assembly should use its authority to examine the proceedings of the election.

There is No Acceptable Level of Disenfranchisement

The right to vote is a fundamental right. *See, e.g., Sonneman v. State*, 969 P.2d 632 (Alaska 1998). The right to vote does not depend on whether one’s individual vote would have swayed an election, and denial of that right cannot be justified by the margin of victory. Many people have pointed to apparently large margins of victory in the early returns for various candidates and propositions. This assertion seems to be premature while there are roughly 8500 votes uncounted, and unknown numbers of questioned ballots and provisional ballots used when regular ballots apparently ran out.

Regardless, even if the margins of victory in the numerous races turn out to be substantial once all the votes are tallied, **disenfranchisement of voters for no better reason than the simple unavailability of ballots is wholly unacceptable.** Under Anchorage ordinances, ballots should have been prepared for 70% of the registered voters in the city. Anch. Muni. Code 28.40.010(B). Moreover, those ballots should have been distributed throughout the city *before* voting began. Anch. Muni. Code 28.40.020(B).

The total number of ballots that should have been prepared numbered more than 140,000. The number of ballots processed by the Municipal Clerk number – to date – roughly 55,000. At least 80,000 more ballots should have been available at the polls. While some of those ballots may have been special ballots (such as those for the disabled, those in other languages than English, or those for certain precincts with an eighth proposition listed) and some may have been used in questioned ballots or early voting, the polling places seem to have run out of the most common ballot: a ballot in English, issued for a voter without special needs or any unique ballot propositions listed.

It is hard to understand how the Clerk could have run out of appropriate ballots for the vast majority of Anchorage voters, when the Clerk should have still had at least half the ballots on hand at the end of the day.

Early reports to a phone line that we have set up to field concerns regarding the election indicate that confusion, irregularities in distribution of ballots, use of *ad hoc* ballot substitutes (such as photocopies of sample ballots), redirection of voters to one precinct after another, long lines and waits, and complete denial of the right to vote occurred in many instances.

Certain election workers also reported that *fewer* ballots were delivered to their precincts than in previous years, and that requests for more ballots were disregarded. We will seek to produce appropriate affidavits from witnesses describing these difficulties for the Assembly.

Interim Steps

While the Assembly considers how to address the problems of the April 2012 election, **we ask you, in your authority as Chair, to order the Municipal Clerk immediately to preserve any and all documents relating to the election.** We ask you to include in the instructions to the Clerk an order to take steps to prevent the deletion of information by any regular, scheduled document elimination programs, such as e-mail technology which may delete e-mails, video recordings, audio recordings, or other media.

Conclusion

The Municipal Attorney's investigation of the April 2012 election usurps the Assembly's role in managing the electoral process and invites ethical conflicts and evidentiary problems. The Municipal Attorney lacks the independence to serve as an appropriate investigator of electoral issues. **Under the separation of powers outlined in the Anchorage Charter, the Assembly should conduct such an investigation. Appointment of an Independent Special Counsel is the best and simplest course and a power specifically provided to the Assembly in the Charter. Regardless of whether electoral problems materially altered the outcome of the election, the Assembly must ensure that Anchorage citizens can exercise the right to vote.**

We are happy to speak with representatives of the Assembly at your earliest convenience. As you know, you may reach the ACLU anytime at (907) 258-0044, or contact me via email at jmittman@acklu.org.

Sincerely,



Jeffrey Mittman
Executive Director
ACLU of Alaska Foundation

Chair Debbie Ossiander

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cc: The Honorable Daniel Sullivan, Mayor of Anchorage
Dennis Wheeler, Esq., Law Dept., Municipality of Anchorage
Members of the Municipal Assembly
Julia Tucker, Esq., Assembly Counsel, Municipality of Anchorage
Barbara Gruenstein, Municipal Clerk