
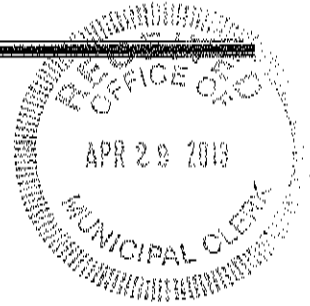




MUNICIPALITY OF ANCHORAGE
Office of the Municipal Attorney

Memorandum

DATE: April 29, 2013
TO: Amanda Moser, Acting Municipal Clerk
FROM: Dennis A. Wheeler, Municipal Attorney 
SUBJECT: Referenda Application 2013-2, Referendum Petition to Repeal AO 2013-37(S-2)(as amended)
Dept. of Law Matter No. 13-1233A



QUESTION:

Is the referendum petition application 2013-2, "Referendum Petition to Repeal AO 2013-37(S-2)(as amended)" received April 19, 2013, legally sufficient to be placed on the ballot at a municipal election?

BRIEF ANSWER:

Subject to the following Background and Discussion below, our Brief Answer is No. While the petition has satisfied the technical deficiencies present in petition application 2013-1, the petition addresses subjects prohibited by Alaska law.

BACKGROUND:

On April 3, 2013, sponsors submitted an application to the Municipal Clerk for a referendum petition titled "Referendum Petition to Repeal AO 37". In consideration of our advice, the Municipal Clerk's Office rejected that petition. The same sponsors submitted a new application, 2013-2, on April 19 (attached) which also proposes to repeal the ordinance.

On April 24, the sponsors, through their counsel, provided a separate letter outlining their position that the petition to repeal the ordinance is legally suitable to go to the voters.

Pursuant to Anchorage Municipal Code subsection 2.50.030A., "...[w]ithin ten business days after receiving a completed application, the municipal clerk shall verify the sponsors' qualifications and, after consultation with the municipal attorney, determine and certify the legal sufficiency, or lack thereof, of the application and the proposed initiative or referendum."

DISCUSSION:

I. Review standards.

The Municipal Clerk's pre-election review of an initiative or referendum petition application should be consistent with Alaska courts' standard of review, which "is limited to determining whether the initiative complies with the particular constitutional and statutory provisions regulating initiatives" and whether enforcement of the proposed ordinance is precluded by controlling authority as a matter of law.¹ Pursuant to AMC subsection 2.50.020B.3:

The proposed petition shall:

- a. set out verbatim the ordinance or resolution sought to be enacted or repealed by the petition;
- b. have the required names, residence and mailing addresses, signatures, and dates of signatures of the initial contact persons and sponsors;
- c. meet constitutional, charter and other legal requirements or restrictions;
- d. include only a single subject; and
- e. be enforceable as a matter of law or be clearly denominated as advisory only.

¹ *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 898 (Alaska 2003); *Alaskans for Efficient Government, Inc. v. State*, 153 P.3d 296, 298 (Alaska 2007); *Brooks v. Wright*, 971 P.2d 1025, 1027 (Alaska 1999). There is a dearth of case law discussing referenda applications submitted by citizens (*see* AS 15.45.250-.465), however courts treat pre-election reviews of initiatives and referenda similarly, thus the holdings regarding review of initiative applications are relied upon here.

The Application for repealing the labor ordinance includes the required names, residence and mailing addresses, signatures, and dates of signatures of the initial contact persons and sponsors,² and includes only a single subject.

There is a balancing of interests between the right to bring initiatives and referendums, and the Constitutional restrictions on such rights. The Alaska Supreme Court has explained that the restrictions of Art. XI, § 7 of the Alaska Constitution must also be liberally construed, as well as require strict compliance³ with such restrictions:

. . . it does not necessarily follow that a liberal construction of the people's initiative power requires a narrow construction of the limits that define the power. On the contrary, the mandate for liberal construction of the initiative right in article XII, section 11 concludes with a qualifying, cautionary clause: "subject to the limitations of Article XI." This reiterative warning underscores the importance of the restrictions. Additionally, we must never lose sight of another important right of the people implicated in all cases of constitutional construction, namely the right to have the constitution upheld as the people ratified it. *See Thomas*, 595 P.2d at 3-4. We must interpret all constitutional provisions -- grants of power and restrictions on power alike -- as broadly as the people intended them to be interpreted.⁴

II. The Petition Application satisfies the technical Code requirements for referendum petitions.

The new application properly cites the ordinance, includes the ordinance as an attachment, and does not contain misleading statements about the ordinance. Thus, the application resolves the technical defects present in the original application.

III. The proposed referendum petition contains prohibited subjects involving administrative rather than legislative matters.

For the reasons noted in our prior opinion, we conclude the referendum violates the subject matter restrictions.

We acknowledge and appreciate the effort the sponsors made to outline their legal position on this issue, but do not find the reasons provided to be compelling justification to advise the Municipal Clerk the petition is legally sufficient.

² Subject to the Clerk's Office verification.

³ *Citizens Coalition for Tort Reform v. McAlpine*, 810 P.2d 162, 168 (Alaska 1991).

⁴ *Citizens Coalition for Tort Reform*, 810 P.2d at 169 (citing *Thomas v. Bailey*, 595 P.2d 1 (Alaska 1979) (additional citations omitted)).

We had suggested the sponsors write a more specific petition application, one targeting purely legislative matters. Unfortunately, we have not received a more precise application.

The sponsors concede that administrative matters are prohibited subjects for a referendum, but characterize the ordinance as involving legislative rather than administrative matters. The first basis for their position is because the matter being repealed is legislation (an ordinance), it therefore must be legislative. This analysis is obviously too simplistic. Under this interpretation of the test for legislative v. administrative matters, any ordinance, even if purely administrative in nature, is fair game for a referendum. Such a position is clearly not how the test is applied.

The generalized distinction the sponsors make between legislative and administrative matters does not comply with the specific guidelines for initiatives and referendum set out in *Swetzof v. Philemonoff*, 203 P.3d 471, 478-81 (Alaska 2009). Our legal memorandum explains and applies these guidelines to the various types of amendments made to the comprehensive labor laws in AMC 3.70 *et seq.*

This brings us to the sponsors' second basis for claiming the amendments are not administrative but legislative in nature. The sponsors characterize amendments in the ordinance as "broad and sweeping, not minor and technical." They also claim the ordinance declares 6 new policies, and addresses issues such as "scope of collective bargaining, which employees have the right to strike, and how employee compensation and benefits must be limited." These characterizations do not provide specifics. In our legal memorandum at page 9, examples of the varied types of amendments are listed that demonstrate the detailed aspects of collective bargaining that are administrative in nature, and simply part of a long existing statutory scheme created when Anchorage was exempted from PERA, addressing personnel and labor type matters. Even some of the limited changes made by the ordinance to the strike provisions simply incorporate and clarify existing law regarding AMC 3.70 provisions, as confirmed by the Alaska Supreme Court in *Plumbers & Pipefitters, Local 367 v. Municipality of Anchorage*, 2013 WL 1281791 (Alaska), rejecting the union's argument that the arbitrator's decision regarding impasse under AMC 3.70 should be binding on the parties because the union was enjoined from striking.

As far as their claim that new policies were created, and thus the ordinance is therefore on the whole legislative in nature, the sponsors only cite the standard section listed in the beginning of AMC chapters, entitled "policy", "declaration of policy", or "purpose", which was amended in part by the new ordinance. Further, as to the substance and specific changes made by the ordinance to this policy section, these amendments

generally clarify ongoing standing policy or equity objectives, or have very limited substance:

- Adding “while maintaining financial sound principles” to Section A;
- Adding the provision at Section C that states that Collective Bargaining Agreements (“CBA”) cannot contain provisions against managed competition;
- Limit direct labor costs increases at Section D;
- Uniform employee benefits and eligibility criteria at Section E;
- Unions shall reimburse Municipality for the time spent primarily on union work; by municipal employees at Section F;
- Uniform holidays at Section G; and
- Qualification based pay enhancement at Section H.

The emphasis on this being “new policy” appears to relate to the first prong of the *Swetsof* initiative/referendum guidelines at 203 P.3d at 481, in analyzing administrative v. legislative matters:

1. An ordinance that makes new law is legislative, while an ordinance that executes an existing law is administrative. Permanency and generality are key features of a legislative ordinance.

Simply because the policy section of a particular municipal code chapter is amended does not mean it is “new policy”, particularly when it is clarifying an existing position. Additionally, as the Alaska Supreme Court recognized in *Swetsof*, 203 P.3d at 479, not all laws are purely legislative in character, particularly municipal laws, and that there can be an overlap that can be both legislative as well as administrative in nature. Further, the sponsors continue to request repeal of the entire ordinance. In accordance with AMC 2.50.020B.3, the Municipality is only able to consider the verbatim request by the sponsors.

The sponsors raised two more arguments relating to the remaining *Swetsof* guidelines:

2. Acts that declare public purpose and provide ways and means to accomplish that purpose generally may be classified as legislative. Acts that deal with a small segment of an overall policy question generally are administrative.

3. Decisions which require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be

characterized as administrative, even though they may also be said to involve the establishment of a policy.

As addressed in our memorandum, the recent amendments are to AMC 3.70, which was created years ago from Anchorage's personnel rules as a result of Municipality of Anchorage opting out of the State's Public Employment Relations Act ("PERA") in October of 1976,⁵ and amended numerous times. They address numerous types of personnel and labor matters. They also involve specialized training and experience in personnel and labor matters, and financial costs and expenses related to collective bargaining.

It should be noted that the Utah case cited by the sponsors,⁶ *Carter v. Lehi City*, 269 P.3d 141 (Utah 2012) specifically rejects this 3rd guideline accepted by the Alaska Supreme Court in *Swetzof*. We are, of course, bound to follow Alaska court decisions, not Utah's. The Utah Supreme Court's recent decision to dramatically change course and devise a new test does not mean the Alaska Supreme Court will do the same. In any event, the Utah case is readily distinguishable because the Utah Constitution is very different from Alaska's and allows for direct voter enactment of "any desired legislation," and repeal of "any law passed by the legislature," while the Alaska Constitution has specific restrictions.⁷

We have additional concerns regarding the constitutionality of the referendum, including to the extent to which the referendum may violate restrictions on appropriations⁸ and

⁵ *Anchorage Municipal Employees Association v. Municipality of Anchorage*, 618 P.2d 575, 575-77 (Alaska 1980).

⁶ We appreciate the sponsors notifying us of the recent Utah Supreme Court's overruling of the *Shriver* decision. We have notified Westlaw, which is correcting the case history regarding the *Shriver* decision. However, it was just one decision in a line of cases that support the Municipality's rejection of the referendum because it addresses administrative rather than legislative matters. We referenced a number of non-Alaska cases, some cited by the Alaska Supreme Court in *Swetzof*.

⁷ Utah Constitution, Art. VI, § 1, created in 1900; see also *Carter*, 269 P.3d at 148-49. Also note that only about half the states allow for initiatives and referendums. *Carter, Id.* In Alaska, that right is by statute for municipal initiatives/referendums, with the only specific reference to the Alaska Constitution limiting rights by prohibiting certain subject matters (Art. XI, § 7). *Sitkans for Responsible Government v. City & Borough of Sitka*, 274 P.3d 486, 492-93 (Alaska 2012). Alaska law on municipal initiatives and referendum is also distinguishable from Utah which subjects municipalities to the constitutional right of initiative and referendum, and states in the Utah Constitution at Art. VI, § 1(2)(b) that the voters may "require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect."

⁸ Anchorage Municipal Charter §3.02(a).

enactments necessary to the immediate preservation of public health, safety, and welfare⁹, but these concerns, while valid, arguably may not rise to the standard for pre-petition clearance and we do not address them here.

CONCLUSION:

The Municipal Attorney's Office has determined the Application is defective as a matter of law, under the legal requirements for submission of a referendum application. We recommend the Application be rejected pursuant to AMC subsection 2.50.020B.3.c.

⁹ Initiatives and referenda cannot impermissibly address subject matter areas restricted by the Alaska Constitution at Art. XI, §7, including "law necessary for the immediate preservation of the public peace, health, and safety...."



Municipality of Anchorage

Office of the Municipal Clerk

632 West Sixth Avenue Anchorage, Alaska 99501 Suite 250
Mailing Address: P.O.Box 196650 Anchorage, AK 99519-6650

2013-2

Phone: 343-4311 Fax: 343-4313

Municipal Clerk: Jones, Barbara A.

Initiative and Referenda Application

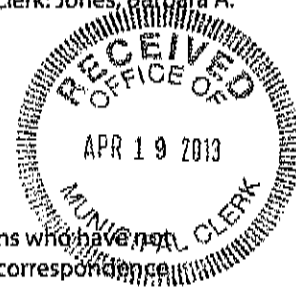
Anchorage Charter: Section 3.20 ~ Anchorage Municipal Code: Chapter 2.50

Anchorage Municipal Code: Chapter 2.50.020 **Application for a petition**

2.50.020.B Form and content. The application shall contain:

- 1) The name, residence and mailing address, signature and date of signature of two resident citizens who have not been convicted of a felony and who are the primary and alternate contact persons to whom all correspondence relating to the petition may be sent. The two contact persons shall be considered sponsors;
- 2) The name, residence and mailing address, signature and date of signature of at least ten qualified voters not including the contact persons who will sponsor the petition. Additional qualified sponsors may be added not less than three days before the date of first circulation of the petition certified by the clerk;

(AO No. 2002-162, § 1, 12-17-02)



Primary Petition Committee Sponsor

Print Name: Sam Andrew Holleman

Phone Number: (907) 345-6271

e-mail Address: andy.holleman@anchoragepa.org

Residence Address: 4330 Sunstone Cir. 99516

Mailing Address: Same

Identifier: _____
(Voter #, Social Security #, or Date of Birth)

Signature of Requestor: [Signature] Date: 4-19-2013

Alternate Petition Committee Sponsor

Print Name: JASON M. ALWARD

Phone Number: (907) 240-8229

e-mail Address: ja/ward@iuoe302.org

Residence Address: 13801 DAVIS STREET ANCHORAGE, AK 99516

Mailing Address: SAME

Identifier: _____
(Voter #, Social Security #, or Date of Birth)

Signature of Requestor: [Signature] Date: 4/19/13

Date : April 12, 13

To: Barbara Jones, Municipal Clerk

From: Andy Holleman, Primary Committee Petition Sponsor

Subject: Petition for Referendum of AO No. 2013-37(S-2)(as amended).



Dear Ms. Jones,

In response to the April 15, 2013 Memorandum from the Office of the Municipal Attorney, identifying problems with referendum petition application 2013-1, we are today submitting a revised application that we believe satisfies the concerns raised in that Memorandum.

- We have identified the ordinance for which repeal is sought using the citation the Memorandum uses on page 3: AO No. 2013-37(S-2)(as amended).
- We have attached the full ordinance.
- We have not provided a summary. The Municipal Code 2.50.020(B) does not require a summary as part of the petition application. This should eliminate any concern regarding whether the summary is misleading or confusing.

We anticipate the Municipality will contend again that the proposed referendum addresses administrative rather than legislative acts and therefore is not an appropriate subject for a referendum. Based on our review of relevant authority, we believe this analysis is mistaken. We intend to submit a short letter next week addressing this issue.

Thank you,

Andy Holleman
301-7004



Municipality of Anchorage Initiative and Referenda Application

2013 - 2

Anchorage Charter: Section 3.20 ~ Anchorage Municipal Code: Chapter 2.50

Phone: 343-4311 Fax: 343-4313

Municipal Clerk: Jones, Barbara A.

Anchorage Municipal Code: Chapter 2.50.020 Application for a petition

2.50.020.B Form and content. The application shall contain:

3)The petition proposed to be circulated. The proposed petition shall be submitted on the form provided by the municipal clerk in the application packet. The proposed petition shall:

a.set out verbatim the ordinance or resolution sought to be enacted or repealed by the petition;

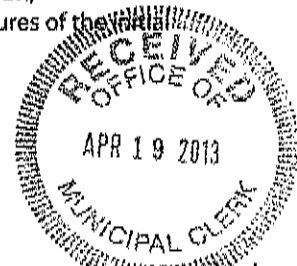
b.have the required names, residence and mailing addresses, signatures, and dates of signatures of the individual contact persons and sponsors;

c.meet constitutional, charter and other legal requirements or restrictions;

d.include only a single subject; and

e.be enforceable as a matter of law or be clearly denominated as advisory only.

(AO No. 2002-162, § 1, 12-17-02)



Proposed Petition

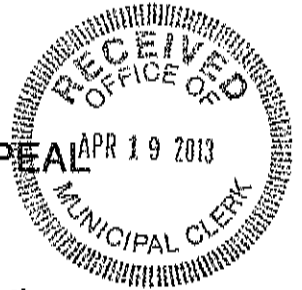
Petition Title: Referendum Petition to Repeal AO No 2013-37 (5-2) (as amended)

Proposed Petition: see attached

Multiple horizontal lines for additional text or signatures.

Unsworn falsification in the second degree. "A person commits the crime of unsworn falsification in the second degree if, with the intent to mislead a public servant in the performance of a duty, the person submits a false written or recorded statement that the person does not believe to be true... on a form bearing notice, authorized by law, that false statements made in it are punishable. Unsworn falsification in the second degree is a class A misdemeanor. A.S. 11.56.210(2) and (2)(b).

PETITION TITLE: REFERENDUM PETITION TO REPEAL
AO No. 2013-37(S-2)(as amended)



Proposed petition: In accordance with Section 3.02 of the Home Rule Charter for the Municipality of Anchorage and Section 2.50 of the Anchorage Municipal Code, we the undersigned qualified voters of the Municipality of Anchorage submit this Referendum Petition calling for the repeal of Anchorage Ordinance ("AO") No. 2013-37(S-2)(as amended), enacted on March 26, 2013, amending Section 3.70, Employee Relations, of the Anchorage Municipal Code. A copy of AO No. 2013-37(S-2)(as amended) is attached and is incorporated into this petition application by reference.

We the undersigned registered voters of the Municipality of Anchorage request the following question be placed before the voters of the Municipality of Anchorage as a referendum question:

Shall AO No. 2013-37(S-2)(as amended), an ordinance amending Anchorage Municipal Code chapter 3.70, Employee Relations, remain law?

Yes No



Municipality of Anchorage

Initiative and Referenda Application

Anchorage Charter: Section 3.20 ~ Anchorage Municipal Code: Chapter 2.50

2013-2

Phone: 343-4311 Fax: 343-4313

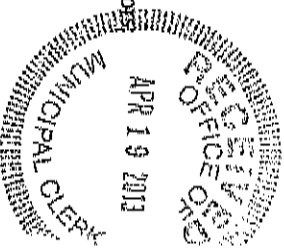
Municipal Clerk: Jones, Barbara A.

Anchorage Municipal Code: Chapter 2.50.020 Application for a petition

- 2.50.020.B Form and content. The application shall contain:
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 - b. have the required names, residence and mailing addresses, signatures, and dates of signatures of the initial contact persons and sponsors;
 - c. meet constitutional, charter and other legal requirements or restrictions;
 - d. include only a single subject; and
 - e. be enforceable as a matter of law or be clearly denominated as advisory only.
- (AO No. 2002-162, § 1, 12-17-02)

Ten Qualified Voters

Printed Name	Residence Address	Mailing Address	*Identifier: Voter#, Social, or DOB	Signature	Date
DAVID PETERSON					1-19-1
Geard Asselm					1/19/1
William T. Sims					4/19/1
RON FUNNER					4-19-
Tim Morgan					4/19/1
SAMUEL RHODES					4/19/1
Felix Rivers					4/19/1
DUSTY MORGAN					4/19/1





Municipality of Anchorage

Initiative and Referenda Application

Anchorage Charter: Section 3.20 ~ Anchorage Municipal Code: Chapter 2.50

2013 - 2

Phone: 343-4311 Fax: 343-4313

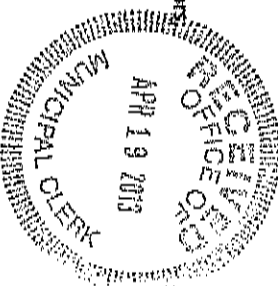
Anchorage Municipal Code: Chapter 2.50.020 Application for a petition

Municipal Clerk Jones, Barbara A.

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 - d) include only a single subject; and
 - e) be enforceable as a matter of law or be clearly denominated as advisory only.

Ten Qualified Voters



Printed Name	Residence Address	Mailing Address	Identifier: Voter, Social, or DOB Signature	Date
Dale Miller				4/19/13
Rodney L. Harris				4-19-13
Melinda Taylor				4/19/13
DEREK C. HSIEN				4-19-13
Joelle S Hall				4-19-13
Margaret M Wilcox				4-19-13
Theophile P. Graber				4/19/13