



MUNICIPALITY OF ANCHORAGE

Office of the Municipal Attorney

Memorandum

DATE: October 6, 2022

TO: Anchorage Assembly

FROM: Blair Christensen, Acting Municipal Attorney *BMC*

CC: Dean Gates, Assembly Counsel

SUBJECT: **AO 2022-72 – Creates a Legislative Veto that Violates Charter**

Assembly Ordinance 2022-72 proposes to change how arbitrators' decisions in interest arbitration for unions that are classified as A.2 and A.3 are handled under Title 3.70 of the Anchorage Municipal Code. The Municipal Attorney's Office identified potential constitutional issues with the way this ordinance structured the Assembly's action on an arbitrator's decision in collective bargaining for labor agreements and proceeded to thoroughly reviewed it and relevant case law. We write to you as the named sponsors of AO 2022-72 to communicate our legal analysis and conclusion that AO 2022-72 creates an unconstitutional legislative veto and recommend withdrawal of the ordinance.

As a general matter, when a union and an employer fail to successfully negotiate certain terms within a collective bargaining agreement, an arbitrator may be brought in to provide an impartial determination of how the unresolved issues should be resolved. Currently, the administration's last best offer becomes the collective bargaining agreement for a union classified as A.2 or A.3 unless the Assembly approves the arbitrator's decision by eight votes.¹ The eight-vote requirement was apparently put in place with the assumption that any sitting mayor would veto a simple majority passage of an arbitrator's decision in order to effectively implement the administration's last best offer, and essentially builds the veto override into the process. Significantly, the current version of AMC subsection 3.70.110C.10.b. requires affirmative action by the assembly to make the arbitrator's decision effective—it does not allow an arbitrator's decision to automatically become effective unless otherwise acted on by the assembly.

¹ Pursuant to AMC 3.70.110, bargaining units classified as A.1 have binding arbitration as these bargaining units provide services that may not be given up for even the shortest period of time.

The change proposed by AO 2022-72 turns the current procedure on its head. Specifically, the proposed ordinance would make the arbitrator's decision final and binding on the parties unless the arbitrator's decision is rejected by eight votes of the Assembly. The proposed ordinance does not require the Assembly to affirmatively adopt the arbitrator's decision—it is automatically adopted without a majority vote of the body. Under this structure, the mayor's ability to veto and thereby apply the administration's last best offer is denied. Even if the ordinance only required a majority vote to reject the arbitrator's decision the mayor's veto is meaningless because a veto action results in acceptance of the arbitrator's decision and is inapposite to the position taken by the administration with its last best offer. Courts have found that legislative processes structured this way are unconstitutional and violative of the separation of powers doctrine.

Legislative action by inaction is generally termed a “legislative veto,” and this ordinance creates one.² The first problem we encounter is that the Assembly—the legislative branch here—doesn't have a veto power.³ The assembly may only take legislative action by following the constitutionally defined legislative process. The mayor, on the other hand, has been given the veto power under §5.02(c) of the Anchorage Municipal Charter. In response to the mayor's exercise of the veto power, the Assembly may override that veto under the Charter by obtaining a two-thirds majority vote any time within 21 days after the veto is exercised.

By failing to take affirmative action by a majority vote, this proposed ordinance allows the assembly to take action in a manner that improperly circumvents the mayor's veto power.⁴ When the assembly considers an arbitrator's decision, it must indicate action by an affirmative vote. The assembly cannot pass an ordinance that allows an arbitrator's decision to become final and binding “unless rejected by eight votes of the assembly.” Although the ordinance requires the assembly action to be “a resolution stating the assembly resolves to reject the arbitrator's decision” and a “yes” vote may appear to be an affirmative action, in substance the action is

² *Am. Fed'n of Gov't Emps., AFL-CIO v. Pierce*, 697 F.2d 303, 306 (D.C. Cir. 1982) (holding that legislative vetoes violate the principle of separation of powers because “[t]hey provide a means for Congress to control the executive without going through the full lawmaking process, thus unconstitutionally enhancing congressional power at the expense of executive power.”); *see also Alfange, The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?*, 58 *Geo. Wash. L. Rev.* 668, 723 (1990) (discussing legislative vetoes and defining them as allowing “Congress to take action with legislative effect without the requirement of the passage of a bill by both houses and its submission to the President for a possible veto.”).

³ *See State ex rel. Barker v. Manchin*, 279 S.E.2d 622, 632 (W. Va. 1981) (holding that “[t]he entire Legislature may, at some later date, sustain or reverse the action of the Committee by concurrent resolution. Inaction by the Legislature validates the Committee's disapproval of rules and regulations and precludes their implementation by the Executive Department. The power of a small number of Committee members to approve or to disapprove otherwise validly promulgated administrative regulations, and of the entire legislative body to sustain or to reverse such actions either by concurrent resolution or by inertia, constitutes a legislative veto power comparable to the authority vested in the Governor, as head of the Executive Department, by W.Va.Const. art. VII, s 14, and reverses the constitutional concept of government whereby the Legislature enacts the law subject to the approval or the veto of the Governor.”).

⁴ *See State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 772 (Alaska 1980) (noting that the executive must be given the opportunity to veto legislative acts of the legislative branch).

authorizing the arbitrator's decision to become the contract with a veto power vested in the assembly. The implications of the proposed ordinance are highlighted when one considers specific hypotheticals. If, for instance, an arbitrator's decision could only garner a simple majority of the assembly but not a super majority, then the mayor should be able to successfully veto the assembly's action accepting the arbitrator's decision. The proposed ordinance, however, eliminates the mayor's ability to veto the action by the assembly in that situation. Furthermore, even if there were sufficient votes to overcome the mayor's veto of a simple majority vote of the assembly, the assembly cannot circumvent by ordinance the process outlined by the Charter. Thus, the proposed ordinance conflicts with Anchorage Charter Section 5.02 and violates the separation of powers doctrine by creating a legislative veto process.

A second constitutional problem is created by the fact that making the arbitrator's decision become law of the labor contract without an affirmative vote of the Assembly in each instance is effectively creating a delegation of legislative and executive powers to the future arbitrators. In *State v. Public Safety Employees Ass'n.*, 93 P.3d 409 (Alaska 2004), the Alaska court determined that having an arbitrator hear mandatory subjects of bargaining does not impermissibly delegate legislative (or executive) powers to the arbitrator, but that no arbitrator can be delegated powers beyond the arbitration of mandatory subjects.⁵ Any ordinance that effectuates an arbitrator's decision by default is effectively granting the arbitrator legislative power in excess of the requisite arbitration of mandatory subjects, because his or her decision becomes law in the absence of a supermajority veto by the future Assembly. A bargaining unit that attempts to include a permissive subject that the administration declines to include in their negotiations may have the arbitrator take it up and include in the arbitrator's decision even though not a mandatory subject. Such delegations are therefore prohibited under Alaska law.

We have not found any case in Alaska that is directly on point. There are analogous state and federal cases (including an Alaska Supreme Court case cited previously) that strike down other types of legislative vetoes and that essentially hold that regardless of how cumbersome the legislative process may be, the process is an integral part of our system of government and must be followed.⁶ Pursuant to the Charter and relevant case law the requirements for legislative action are: a simple majority vote of the Assembly to adopt the arbitrator's decision, the possibility of a veto by the mayor (which, if taken, would reverse the Assembly's action), and, if vetoed, the possibility of a veto override (which would reverse the effect of the veto).

While shortcuts may sometimes seem appealing, and in practical terms often are, courts have determined that the varied and enduring checks and balances inherent in our governmental

⁵ *State v. Pub. Safety Emps. Ass'n*, 93 P.3d 409, 419 (Alaska 2004).

⁶ See *I.N.S. v. Chadha*, 462 U.S. 919, 959 (1983) (stating "[t]he choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President."). See also *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 779 (Alaska 1980) (holding that legislative veto of agency regulations was unconstitutional because, among other things, it violated the governor's veto power).

processes are designed to protect the public from the improvident exercise of power and are in place because of conscious choices made by founders who fully understood them. Thus, even if seemingly clumsy, inefficient, or unworkable, those processes must be followed without exception. There is no reason to believe that the Alaska Supreme Court would rule differently. The proposed ordinance is most likely unconstitutional and should be withdraw