

Government of the District of Columbia

OFFICE OF THE CORPORATION COUNSEL

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IN REPLY REFER TO:
OLC:LNG:lng
(AL-97-081)

February 12, 1997

Jonda McFarlane
Commissioner
Advisory Neighborhood Commission 2-E
3265 S street, N.W.
Washington, D.C. 20007

Re: May Advisory Neighborhood Commission 2-E delay
the election of officers pending the outcome
of litigation challenging the election of two
of its commissioners?

Dear Commissioner McFarlane:

This is in reply to your February 7, 1997 letter requesting the advice of this Office concerning whether it is proper for Advisory Neighborhood Commission (ANC) 2-E to delay the election of officers because of pending litigation challenging the election of two of its commissioners.

You have informed me by telephone that at the present time, at the beginning of each monthly public meeting, ANC 2-E selects a "moderator" to preside at that meeting; that no commissioner has been elected to serve in the office of vice-chairperson; that last year's treasurer, Commissioner Craig Davitian, continues to serve as treasurer; and that no secretary has been elected (the ANC 2-E staff person is currently taking the minutes of each meeting). You have further informed me that the reason ANC 2-E did not conduct an election of officers in January is that the validity of the elections of two ANC 2-E commissioners, namely Commissioner Rebecca Sinderbrand and Commissioner James Fogarty, is under challenge in litigation that is currently before the D.C. Court of Appeals.

For the following reasons, I conclude that in failing to conduct an election of officers in January, ANC 2-E violated applicable statutory law.

As you are likely aware, in a letter dated January 9, 1992, this Office advised ANC 2-E that incumbent officers may hold over in office until their successors are elected.

The first sentence of section 14(e) of the Advisory Neighborhood Commissions Act of 1975, D.C. code § 1-262 (1992), provides in pertinent part: "Each Commission shall elect from among its members at a public meeting of the Commission held in January of each year a Chairperson, vice-chairperson, secretary, and treasurer." (Emphasis added.) The underscored word "shall" in a statute is, unless otherwise indicated, a word of command. There is no indication in section 14 that the word "shall" as it appears in the first sentence was intended to have a meaning other than its usual meaning.² Accordingly, ANC 2-E is required by law to conduct an election in January of each year to fill these four offices.

The circumstance that the validity of the elections of Commissioners Sinderbrand and Fogarty is being challenged in pending litigation is not a legal justification for the failure of ANC 2-E to comply with the statutory command set forth in the first sentence of section 14(e). stated otherwise, the pending legal challenge to the validity of their elections does not constitute a legal impediment to the holding of elections to choose the officers of ANC 2-E. Absent a legal impediment, the mandate of the first sentence of section 14(e) must be obeyed if ANC 2-E is to be in compliance with law. In this regard, it is relevant to state that it is my understanding that the D.C. Court of Appeals had issued a stay order prohibiting Ms. sinderbrand and Mr. Fogarty from taking the oath of office as commissioners of ANC 2-E. It is further my understanding that the Court of Appeals subsequently vacated this stay order and that Ms. Sinderbrand and Mr. Fogarty were then sworn in as commissioners of ANC 2-E pursuant to the election certifications published by the D.C. Board of Elections and Ethics in the D.C. Register. Therefore, at this time, Commissioners Sinderbrand and Fogarty must be considered to be de jure commissioners of ANC 2-E. As such, they have the same rights and duties as the other commissioners of ANC 2-E.³ These rights include the right to be a

² The very next sentence in section 14(e) reads as follows: "Each Commission may also elect any other officers the Commission deems necessary." (Emphasis added.) The word "may," by contrast, means discretion. That is, an ANC mayor may not choose to elect other officers, such as a parliamentarian. But it must elect a chair, a vice-chair, a secretary, and a treasurer.

³ At 3 McQuillin, Municipal Corporations (3rd ed. 1990) § 12.102, the following is stated in regard to de facto and de jure officers:

An officer de facto is to be distinguished from an officer de jure. The latter is one regularly and properly elected or appointed and qualified and holding office during a constituted term, while the former is one who has the reputation or appearance of being the officer he or she assumes to be but who, in fact, under

candidate for a commission office and these duties include the duty to comply with the statutory mandate set forth in the first sentence of section 14(e).

In sum, the answer to your question is that it is not legally permissible for ANC 2-E to delay the election of officers pending the outcome of the challenge to the elections of Commissioners Sinderbrand and Fogarty. To come into substantial compliance with the mandatory requirement set forth in the first sentence of section 14(e), ANC 2-E should conduct an election of officers at its next monthly public meeting or at a properly noticed special public meeting called for that purpose.⁴

Sincerely,



Leo N. Gorman
Assistant Corporation Counsel
Office of Legal Counsel

cc: The Honorable Kathleen Patterson
Chairperson
Committee on Government operations
Council of the District of Columbia

the law, has no right or title to the office he or she assumes to hold.

since the elections of Ms. Sinderbrand and Mr. Fogarty as commissioners of ANC 2-E have been certified as proper by the Board of Elections and Ethics and since these certifications have not been overturned by any competent authority, it must be concluded that, at this time, Ms. Sinderbrand and Mr. Fogarty are de jure commissioners of ANC 2-E.

⁴ The failure of ANC 2-E to elect officers not only places ANC 2-E in violation of applicable statutory law, but such failure is likely to have serious adverse financial consequences for ANC 2-E. Under section 16(j) of the Advisory Neighborhood Commissions Act of 1975, D.C. Code § 1-264(j) (1992), the commission-approved quarterly financial report that ANC 2-E is required to file with the D.C. Auditor is required to be "signed by the Chairman, the secretary, and the treasurer••••" At this time, without a chairperson and without a secretary, ANC 2-E cannot file with the D.C. Auditor a legally sufficient quarterly financial report. The failure of an ANC to file a legally sufficient quarterly financial report with the D.C. Auditor can result in the withholding of the next quarterly allotment that the ANC is due to receive.

The Honorable Jack Evans
Councilmember, Ward 2
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