

October 20, 2010

Ms. Gail Fenumiai
Director, State of Alaska Division of Elections
P.O. Box 110017
Juneau, AK 99811-0017

SENT VIA E-MAIL ONLY

Dear Ms. Fenumiai:

I represent the Alaska Democratic Party. We received a copy of your letter dated October 20, 2010 concerning procedures to be used in the upcoming general election, in particular the procedures regarding write-in voting. We are troubled by the Division's apparent intent to provide election workers with a list of write-in candidates that they can show to voters. We do not believe that creating, displaying, or distributing such a document complies with Alaska law.

Alaska law authorizes the Division of Election to prepare and distribute to voters only certain election materials so that they may make informed decisions at the polls. Those materials include the official election pamphlet and sample ballots (see AS 15.58.010, .020). The law also provides an exhaustive list of information that the Director may provide: "regarding the date of the election and hours the polling place will be open, instructions on how to cast a questioned ballot, instructions for first-time voters who initially registered by mail, general information on voting rights, prohibitions on acts of fraud and misrepresentation, and whom to contact to report violations." AS 15.15.040(c). The Division may also post instructions at a polling place on how to cast a write-in ballot. 6 AAC 25.070(d). No other election materials are authorized by Alaska law. There is no statutory or other legal basis for generating and making available to voters a list of write-in candidates and we are unaware, in the fifty-year history of the state, that such a list has ever previously been generated or used.

You are correct that election officials may assist voters, when requested, as provided for by AS 15.15.240, which states:

A qualified voter needing assistance in voting may request an election official, a person, or not more than two persons of the voter's choice to assist. If the election official is requested, the election official shall assist the voter. If any other person is requested, the person shall state upon oath before the election official that the person will not divulge the vote cast by the person assisted.

The statute clearly contemplates a voter who requires assistance because of illiteracy, physical incapacity, or inability to operate the polling machinery. It does not allow poll workers to freely provide counsel and advice to voters as to the array of potential voting options. There is no indication either in the text of the statute or its legislative history that the statute was intended to empower poll workers to give information to voters as to their potential voting choices. Such conduct, inadvertently or by design, could sway voters in their decision-making. Poll workers are present to ensure that voters are able to use the polling machinery, not to provide voting advice.

Given that detailed instructions as to the proper method of casting a vote for a write-in candidate is posted in every polling booth, it is unclear what permissible purpose providing a roster of the write-in candidates serves, other than to improperly influence the decision of a voter. In fact, the Division of Elections' own procedural handbook provides: "The election board must not discuss write-in candidates with voters. If a voter asks how to vote for a write-in, refer the voter to the instructions on the poster in the voting booth or on the sample ballot." State of Alaska Division of Elections Polling Place Election Procedures, Optical Scan Precincts, Rev. 7/30/09, p. 17. The Division's own instructions require that a voter needing assistance be referred to the write-in poster and not any other materials. Indeed, your statute provides that "During the hours that the polls are open, an election board member may not discuss any political party, candidate, or issue while on duty." AS 15.15.160.

The distinction suggested in your letter between electioneering and providing informative materials does not apply. Providing the voter with a list of write-in candidates falls clearly within the blanket prohibition embodied in 6 AAC 25.070(b). That prohibition is unambiguous: "Information regarding a write-in candidate may not be discussed, exhibited, or provided at the polling place, or within 200 feet of any entrance to the polling place." Your reliance on 6AAC 25.070(d) is also misplaced. It only authorizes assistance to the voter in understanding how to cast a write-in vote, it does not allow the Division to offer suggestions to on who to vote for. Given the particular circumstances of this year's election, the display of a write-in candidate's name in a polling location, in any manner, is de facto political advocacy. There is no justification for it. The lack of express terms of advocacy for a candidate's election is not dispositive of the nature of a document or item. In the case of a write-in candidacy, the proper spelling of the candidate's name is the primary goal of electioneering.

There is also no justification for giving elevated status to write-in candidates who have filed a declaration of intent under AS 15.25.105. That statute deals only with the counting of votes post-election. It gives no special status to such candidates pre-election. Alaskans are still free to vote by write-in for any candidate they desire even though that vote may not be counted if a contest satisfies the requirements for the counting of write-in votes under 6 AAC 25.085.

Since Early Voting has already begun and thousands of Alaskans may be casting ballots under an inappropriate procedure, we request this letter receive your immediate attention. We request that

you immediately withdraw the list of write-in candidates from all voting locations and comply with the prohibition on distributing such materials throughout the remainder of the voting process. Because this improper conduct could directly affect the outcome of the election, we are also requesting that election workers be directed to segregate the ballots of all voters who are shown or given a list of write-in candidates pending the resolution of this issue.

We would appreciate your reply before 1:00 p.m. on Friday, October 22. Thank you for your time and consideration.

Sincerely,

Joe McKinnon
Attorney-At-Law
1434 Kinnikinnick St.
Anchorage, Alaska 99508
907-278-9307

cc: Patti Higgins
Chair of the Alaska Democratic Party