

Date: July 10, 2013
To: Members, Independent Citizens Redistricting Commission (ICRC)
From: John Steiner & Sabine Romero, Assistant City Attorneys
Cc: JJ Gutierrez, Staff Liaison
Re: Legal Q&A from July 3, 2013 ICRC Meeting

The ICRC poses the following questions regarding Ms. Catherine Cocco. Ms. Cocco is in New York and not available to attend ICRC meetings in person until August 13. Her first meeting would have been June 26.

Of course, the ICRC maintains independence in its considerations and decision making.

1. Can Ms. Cocco be sworn in from her remote location or via videoconference?

Yes, Ms. Cocco can take the oath of office at any time in front of any notary public at her remote location. She cannot be sworn in via videoconference, because the swearing in is coupled with signing an affirmation, and with recording the oath in the notary public's record book.

Once sworn in, she can participate in meetings by videoconference, and under state law, that would not be considered an absence. However, whether to use the videoconference option is up to the ICRC; videoconference is allowed but not required.

2. If the commission decides not to proceed with Mrs. Cocco, what steps are next required? The commission felt the following steps were appropriate:

- **Send notification letter to Mrs. Cocco regarding her inability to serve.**
- **Select new member with 15 days of notification to Mrs. Cocco.**

Next steps depend on whether one takes the position that Ms. Cocco is a member or takes the position that she is not a member.

One could reasonably argue that either way. One could argue she is not a member because she has not been sworn in; that the ICRC may determine that her inability to attend until mid-August constitutes turning down the offer of membership; and the ICRC could simply pick an alternate participant. On the other hand, one could argue that the charter does not address this issue specifically, and therefore the ICRC may choose to address her as a current member.

It appears from the question that the commission is assuming Ms. Cocco is a member.

Assuming that she is a member, the commission would need to have a cause to remove her. The charter states that a vacancy can be created by "removal, resignation, or absence" (City Charter, Art II, Sec. 3(J)(2)). It further states that the commission may

remove a member for any one of three things: (1) “substantial neglect of duty,” (2) “gross misconduct in office,” or (3) “inability to discharge the duties of office.” The charter defines “substantial neglect of duty” to mean that “an individual has disregarded a manifest duty, prescribed by this section, intentionally, knowingly, or negligently” (City Charter, Art II, Sec. 3(A)(7)). It goes on to say that “Missing half or more of the meetings in a three month period constitutes a substantial neglect of duty.” In calculating the three month period, if we consider June 26 as Ms. Cocco’s first meeting, then the three month clock begins to run on that date (June 26 to September 26).

The way that the definition of “substantial neglect of duty” is written, missing more than half the meetings in a three month period is a substantial neglect of duty, but it's not necessarily the *only* thing that is a substantial neglect of duty; the substantial neglect standard doesn't *solely* depend on missing half the meetings in the three month period. The ICRC could reasonably decide that missing all of the meetings during the organizational phase of the ICRC process is also a substantial neglect, or they could decide that her absence during this phase constitutes an inability to discharge the duties. It is up to the ICRC to determine this interpretation.

The other two grounds for removal (gross misconduct in office and inability to discharge the duties of office) are not further defined. Again, it would be within the ICRC's reasonable discretion to decide what each of these three grounds mean in the context of specific behavior.

Were the commission to decide that Ms. Cocco's declining to attend any meetings until August 13 meets one or more of the grounds for removal, and, again, assuming the ICRC considers her to be a member for this purpose, then the method for removal is a vote by a supermajority of 10 votes in an open meeting. This would be followed by a written notification to Ms. Cocco from the ICRC of the removal, which, presumably, would need to state the grounds for the removal. Ms. Cocco needs to be afforded a reasonable opportunity to respond. The charter doesn't say what this “opportunity for response” needs to look like. Presumably, the letter would give Ms. Cocco a deadline to provide a written response or otherwise make an appearance before the ICRC stating why she should not be removed.

The opportunity for response implies that if the ICRC needs to act again on the removal depending on whether it finds the response (if any) persuasive. However, assuming that the ICRC doesn't find the response persuasive, it seems that it would be reasonable to consider the original vote to remove the member in question as the time of the vacancy for the purpose of counting the 15 day period in which to appoint a new member.

The 15 days is not a waiting period; it's meant to encourage the ICRC to fill the vacancy quickly. The ICRC could fill the vacancy immediately after considering Ms. Cocco's response. Nor is the 15 days a firm deadline. If the ICRC fails to act within 15 days of the vacancy, it doesn't lose the authority to fill the vacancy; the 15 days is a good example of a “directory” provision.

3. **Assuming Ms. Cocco is absent for the next six meetings, and according to one commissioner's interpretation of the charter a commissioner cannot be absent for more than half of the held meetings in three month period, does this constitute inability to serve?**

Missing half or more of the meetings in a three month period constitutes "a substantial neglect of duty." It might also be reasonably considered to be an inability to serve. In any instance, it would be within the ICRC's reasonable discretion to decide what each of the three grounds for removal stated in the charter mean in the context of specific behavior.