



KENAI PENINSULA BOROUGH

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DAVE CAREY
BOROUGH MAYOR
CLERK'S OFFICE

TO: Milli Martin, Assembly President
Members, Kenai Peninsula Borough Assembly

FROM: David R. Carey, Borough Mayor *David R. Carey*

DATE: June 1, 2009

RE: Veto of Ordinance 2009-23, designating certain administrative employees as upper management and providing for disciplinary and termination appeal procedures

Pursuant to AS 29.20.220 and AS 29.20.270(a), I am hereby exercising my authority as Kenai Peninsula Borough Mayor to veto Assembly Ordinance 2009-23, designating certain administrative employees as upper management and providing for disciplinary and termination appeal procedures. I have great respect and consideration for decisions made by this Assembly and do not use my veto authority lightly. However, in this case I believe I must exercise mayoral veto authority for the following reasons:

1. The Ordinance obstructs effective governance.

While the assembly may disagree with particular employment decisions made to date, it is imperative to realize that as the chief executive officer of the borough, the mayor is charged with running the administration of the borough. "As chief administrator the manager [mayor] shall (1) appoint, suspend, or remove municipal employees and administrative officials, except as provided otherwise in this title" (AS 29.20.500) The mayor needs the support of his or her employees to effectively carry out the necessary duties of office. As found in many other levels of government, the mayor needs the ability to ensure positions are filled by those who are best suited to carry out the borough's business on a day-to-day basis. The mayor works with upper level management daily and needs to be able to trust and rely on the performance of these employees. If the assembly, which does not work with these employees on a day-to-day basis, has the ability to dictate who works directly under the mayor and even within his own office, the necessary trust and confidence is lost.

2. Ordinance 2009-23 potentially conflicts with applicable Kenai Peninsula Borough Code.

Ordinance 2009-23 would create an appeal process granted to "...administrative personnel who are directors of borough departments and other positions designated as upper management employees..." This new appeal process would allow a member of "upper management" who has been "suspended, demoted, reduced in pay, or discharged" to appeal to the assembly for a review leading to the final, binding decision.

Because it offers an appeal process, this ordinance appears to conflict with KPB 03.04.070, which provides in relevant part that upper level management employees “serve at the pleasure of the mayor who may suspend or discharge such employees in his sole discretion when he deems it necessary for the good of the service.”

Further, as quoted above, Alaska Statute 29.20.500(1), made applicable to my position through AS 29.20.250 (a) provides that the mayor has general authority to “appoint, suspend, or remove municipal employees and administrative officials.” Enactment of Ordinance 2009-23 would circumvent the current, existing authority granted to the mayor by the Alaska Legislature and previous borough assembly action.

It appears that the only way this ordinance can be reconciled with existing borough code is if the standard of review exercised by the disciplinary appeal board regarding the mayor’s decision to discipline or terminate an upper management employee is limited to whether the mayor’s decision violated the law including the covenant of good faith and fair dealing. The ordinance provides no standard of review and thus only creates confusion and conflict in actual application. The failure of the ordinance to address a standard of review would likely lead to a legal challenge.

3. This ordinance is unnecessary as upper management employees are already protected from unlawful employment actions.

All borough employees, including classified, legislative, and administrative designated staff are already protected from unlawful employment actions. There are other remedies available to enforce borough, state, and federal laws and regulations regarding adverse employment actions. Upper management employees are already protected by the covenant of good faith and fair dealing. Therefore, the ordinance adds little to existing available remedies.

4. Proposal to move forward - together

The assembly action on this ordinance has revealed a concern for the process of appointing and replacing certain administrative employees - a process that has been in place since the formation of the Kenai Peninsula Borough.

In addition to this veto message, I request a collaborative effort be undertaken between the assembly and my administration to review all sections of the code, including Titles 2 and 3 that pertain to the administration, personnel selection, retention, and organizational structure. The goal of this combined effort would be to identify potential changes necessary to ensure both continuity and flexibility within the administrative service classification. I believe such a review would lead to a resolution of the conflicts, both real and perceived, that exist within the code and other applicable law today. Moving forward in a more holistic review of the relevant personnel provisions of borough code would lead to a more definitive and reliable code governing personnel actions, as opposed to the confusion Ordinance 2009-23 creates. Instead of enacting one code section that conflicts with other existing provisions, a thorough review of Titles 2 and 3 would provide certainty and cohesiveness for the benefit of all borough employees, borough elected officials, and the public.