



## **KENAI PENINSULA BOROUGH**

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**DAVE CAREY  
BOROUGH MAYOR**

### **MEMORANDUM**

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

**FROM:** Milli Martin, Assembly President   
David R. Carey, Borough Mayor 

**DATE:** July 23, 2009

**SUBJECT:** Ordinance 2009- 44, regarding appeal procedures for middle management and confidential employees

The primary purpose of this ordinance is to establish specific procedures to be followed when a middle management or confidential employee, as defined in the code, chooses to appeal a disciplinary action. In summary, for middle management employees, the ordinance provides for a written appeal to the mayor which must be submitted within seven calendar days of notice of the decision. The appeal must include reasons the employee believes the action violated the covenant of good faith and fair dealing, any supporting evidence, and the request for relief. The mayor has seven calendar days to provide a written decision. The code also authorizes an informal meeting between the employee and the mayor if requested by either party at any time before the employee files further appeal.

If the matter is not resolved, the employee may appeal to an appeal board consisting of three assembly members appointed by the assembly president. Within five calendar days of receipt of the appeal notice, the assembly president appoints three board members who meet and elect a chairperson. The board's chair schedules a hearing within 14 calendar days after the notice of the appeal, and the clerk provides immediate written notice of the time and place of the appeal to the mayor's office and to the appellant. The ordinance also clarifies that, as middle management employees are at will, the only grounds for the board to reverse the decision of the mayor regarding such employees would be to find that the mayor's decision violated the covenant of good faith and fair dealing and that the burden of proof is on the employee.

Both the appellant and the mayor's office are entitled to submit a written statement at least seven days before the hearing, and a reply statement within four days of the deadline for the opening statement.

The hearing procedure in this ordinance provides for opening statements by both parties, rebuttal, surrebuttal, and closing statements by both parties. Any witnesses must testify under oath, and the hearing is to be conducted informally regarding the introduction of evidence. The time period for each side is 30 minutes, and the final decision is to be entered within seven calendar days after the close of the hearing. An appeal from any decision will be on the record and must be filed in superior court within 30 days of the date the decision is issued.

The ordinance also provides that the same procedures apply to confidential service employees as middle management employees, except that if the confidential employee does not work in the mayor's office the disciplinary action is not at will. Those who do work in the mayor's office serve at will. .

Questions have been raised as to the definition of the covenant of good faith and fair dealing. There is no statutory definition in Alaska for the covenant of good faith and fair dealing, so the definition has evolved through case law. Essentially, the general rule is that the covenant of good faith and fair dealing does exist in all at-will employment contracts and requires at a minimum that an employer not impair the right of an employee to receive the benefits of the employment agreement and that the employer treat like employees alike. The employer must act in a manner that a reasonable person would regard as fair in dealing with the employee, and, further, the covenant of good faith and fair dealing is violated if the employer discharges an employee for the purpose of depriving the employee of a benefit of the contract.

Following are examples of cases where the employer was held to have breached the covenant of good faith and fair dealing:

The employee is disciplined for doing something that the employer has allowed other employees to do with no disciplinary action taken.

Testing an employee for drug use without prior notice where it had never tested another employee similarly, and suspended the employee immediately upon learning the results of the test.

If the employee can prove that the employer fired the employee for the specific purpose of preventing the employee from sharing in future profits to which the employee would otherwise be entitled.

If the employer's conduct was actually motivated by an improper or impermissible objective, meaning for the purpose of depriving the employee of one of the benefits of the contract.

Following are examples of cases where the employer was not held to have breached the covenant of good faith and fair dealing:

Where the employer had allowed employees to perform minor personal projects using spare materials and small amounts of other employees' time at the plant but did not allow the project at issue because it would have cost more than \$8,000 to

\$10,000 worth of materials and would have required probably 18 hours to finish the project as it was substantially different.

When disciplining an employee and denying him any grievance procedures where the policy manual clearly excluded supervisory personnel from grievance procedures.

Where policy authorized employer to terminate an employee for any reason whatsoever as long as it paid the employee an additional six months' salary as severance pay, there was no violation as the city followed that procedure.

Where the employer terminated an employee for failing to comply with the employer's grooming policy by not cutting his hair.

Where the employer terminated an employee due to a personality clash even though the employer stated that the termination was due to inadequate job performance.

This ordinance is intended to reduce confusion in the appellate process and help improve administration of nonunion personnel issues in the borough. Your consideration of this ordinance would be appreciated