

Introduced by: Martin, Mayor  
Date: 08/04/09  
Hearing: 09/01/09  
Action: Failed Introduction  
Vote: 3 Yes, 6 No, 0 Absent

**KENAI PENINSULA BOROUGH  
ORDINANCE 2009-44**

**AN ORDINANCE AMENDING THE PROVISIONS IN KPB CHAPTER 3.04 TO  
CLARIFY POSITIONS IN THE ADMINISTRATIVE SERVICE AND DISCIPLINARY  
AND TERMINATION APPEAL PROCEDURES FOR MIDDLE MANAGEMENT AND  
CONFIDENTIAL SERVICE EMPLOYEES**

**WHEREAS,** the borough code currently establishes a general process for appeal procedures regarding middle management and confidential employees who wish to appeal a disciplinary or termination action, but the code is vague regarding numerous procedural issues; and

**WHEREAS,** clarification of standards and authorized grounds for personnel actions may reduce appeals by clarifying the rights and obligations for management and the affected employees; and

**WHEREAS,** it is in the borough's best interests to clarify that department heads, managerial positions, such as the chief of staff and special assistant to the mayor and administrative assistants to the mayor, are automatically in the administrative service, as well as certain other positions that are classified administrative by resolution; and

**WHEREAS,** clarifying that middle management personnel are administrative personnel serving at the will of the mayor will help clarify the mayor's authority and the employee's scope of appeal procedures; and

**WHEREAS,** as middle management and confidential employees in the mayor's office serve at the will of the mayor, the only basis for overturning a decision to discipline or terminate such employees is if the action violates the covenant of good faith and fair dealing; and

**WHEREAS,** the public's and the borough's best interests would be served by clarifying the proper procedure regarding such appeals to prevent the expenditure of unnecessary funds for the parties and the borough during any such appeal;

**NOW, THEREFORE, BE IT ORDANED BY THE ASSEMBLY OF THE KENAI  
PENINSULA BOROUGH:**

**SECTION 1.** That KPB 3.04.070 is hereby amended as follows:

The administrative service shall consist of full-time paid staff who are the heads of departments, the chief of staff, the special assistant to the mayor, administrative assistants to the mayor, and also certain positions which are administrative, professional, sensitive or confidential in nature that have [AND HAVING] been classified “administrative” by assembly resolution. Administrative employees serve at the pleasure of the mayor who may suspend or discharge such employees in his or her sole discretion when [HE] the mayor deems it necessary for the good of the service. Employees in the administrative service are subject to provisions of this chapter in all respects except where the context clearly indicates otherwise.

**SECTION 2.** That KPB 3.04.300 is hereby amended as follows:

**3.04.300. Middle management service—Disciplinary and termination appeal procedures.**

A. Any middle management service employee who is suspended, demoted, reduced in pay, or discharged from the middle management service may appeal that decision to the mayor [in writing] by submitting a written appeal within [14] seven calendar days of notice of the decision. The written appeal shall include the following:

1. The action that the employee is appealing to the mayor.
2. As the employee is an at-will employee pursuant to KPB 3.04.070 and KPB 3.04.290, reasonably detailed reason(s) that the employee believes the action violated the covenant of good faith and fair dealing, and any written statements from witnesses or other evidence supporting the employee’s belief.
3. The relief requested by the employee of the mayor.

B. The mayor shall provide a written decision to the employee within seven calendar days of receipt of the written appeal.

C. In an effort to resolve the dispute, an informal meeting shall be held between the employee and the mayor if requested by either the mayor or the employee at any time before the employee files an appeal to the termination and disciplinary appeal board described below.

[B]D. The following procedures shall be used for an appeal if the employee is not satisfied with the mayor’s final decision or the parties are otherwise unable to resolve the dispute:

1. *Request for Hearing.* Within seven calendar days of receipt of the mayor's decision, the affected employee shall request a hearing through the mayor's office before a [MANAGEMENT] termination and disciplinary appeal board consisting of three assembly members appointed by the assembly president. The request for a hearing shall be filed with the borough clerk on a form supplied by the borough clerk. It must include the name, address, and telephone number of the employee, a copy of the mayor's written decision that is being appealed by the employee, and if the employee is represented by an attorney, guardian, or other representative, acceptable documentation of the person's legal authority to represent the employee. Additionally, the request must state whether the employee requests that the hearing be held in public or in private, as allowed by the Open Meetings Act. Upon receipt of the request for a hearing, the clerk's office shall promptly deliver a copy of the request to the assembly president and to the mayor's office.
2. *Hearing Scheduling.* Within five calendar days of the clerk's office's receipt of the notice of appeal, the president shall appoint the three board members, who shall meet and elect a chairperson. The board, through its chairperson, shall schedule a hearing within [21] 14 calendar days after notice of the appeal [AT WHICH TIME THE REASONS FOR THE ACTION SHALL BE REVIEWED.] and, through the borough clerk, shall provide immediate written notice of the time and date for the appeal to the office of the borough mayor and to the appellant. Notice may be in person, via first class mail, telefax, or by email. If notice is provided by telefax or email, the clerk shall take reasonable steps to verify that the appellant and the mayor's office received the notice.
3. *Applicable Standard:* As the employee is an at-will employee as provided in KPB 3.04.070 as now enacted or may be hereinafter amended, the middle management employees serve in the administrative service and at the pleasure of the mayor. Accordingly, the only grounds for the board to reverse the decision of the mayor is to find that the decision violated the covenant of good faith and fair dealing with respect to the employment contract with the employee. The burden of proof is on the employee.
4. *Opening Statement.* Both the appellant and the mayor's office shall submit a written statement to the clerk's office at least seven calendar days before the hearing. The written statement may include a statement of facts, a statement of the party's perception of the correctness of the mayor's decision, a list of any asserted errors, and any citations to applicable ordinances, laws or other legal authority for the position taken by the party to the appeal. The board may waive irregularities in the content of the notice of appeal or written statements. Unless otherwise approved by the chair for good cause shown, the opening statement shall be no more than 5 pages.

5. Reply Statement. Each party that filed an opening statement may submit a reply statement within four calendar days of the deadline for the opening statement. The reply shall be limited to a response to matters raised in the opening statements and shall be no more than three pages, unless otherwise approved by the chair for good cause shown.
  6. Extension. The board, upon good cause shown, may grant an extension of time to any party or legal representative for the completion of any act required under this section, except for the filing of the notice of appeal. The remaining parties shall be given a reasonable opportunity to respond to the request before the chair issues a decision. The request may be granted where it does not appear that the other party will be unduly prejudiced by the delay. Any decision issued by the chair shall apply equally to all parties.
- E. Hearing Procedure.
1. The board shall permit oral argument by both the employee, or approved representative as described above, and the office of the mayor or his or her designated representative.
  2. Agenda. Argument shall be conducted in the following order:
    - i. Appellant's opening statement.
    - ii. Appellee's opening statement.
    - iii. Rebuttal by Appellant.
    - iv. Rebuttal and Closing by the Appellee.
    - v. Sur-rebuttal and closing by the Appellant.
  3. If the appellant or representative is not present when called, the board shall consider any written presentation, evidence, and documents presented to it and thereafter proceed according to the remaining applicable provisions of this chapter.
  4. All persons presenting evidence shall do so under oath, administered by the borough clerk.
  5. The hearing shall be conducted informally with respect to the introduction of evidence. Irrelevant evidence may be excluded by the chairperson. Each side shall have a total of no more than 30 minutes to present their case. Each side shall be responsible for dividing their 30 minutes between oral presentation, argument, testimony (including witness testimony), and rebuttal. The time required to answer questions from the board shall not be charged against either party.

6. If the party has reserved a portion of their 30 minutes, that party may then present rebuttal evidence, with the appellant proceeding first. The appellant and mayor's office may call and cross-examine each other's witnesses during rebuttal. The scope of cross-examination is limited to the issues raised in direct questioning.

F. Decision. Within seven calendar days following the close of the hearing, the board shall render a written decision and set forth the reasons upon which the decision is based. The decision shall be binding upon the administration and the employee.

G. The first 12 months of employment shall be considered a probationary period. Probationary middle management employees may be discharged if, in the sole opinion of the mayor, they will not reach satisfactory status within the 12 months. Discharges under such circumstances are not subject to the appeal procedures described in paragraphs (A) [AND B] through (E) above.

H. Any appeal from such decision shall be on the record and must be filed in the Superior Court of the State of Alaska in Kenai within 30 days of the date the final decision is issued, as provided in the Alaska Rules of Civil Procedure governing appeals from administrative agency decisions.

**SECTION 4.** That KPB 3.04.306 is hereby amended as follows:

**3.04.306. Confidential service—Disciplinary and termination appeal procedures.**

A. Any confidential service employee, other than those employed in the borough clerk's office, who is suspended, demoted, reduced in pay, or discharged may appeal that decision to the mayor by written instrument within [15] 7 calendar days of service of notice of the action. Any confidential service employee who is employed in the borough clerk's office who is suspended, demoted, reduced in pay, or discharged may appeal that decision to the assembly president by written instrument within [15]7 calendar days of service of notice of the action. The written appeal shall include the following:

1. The action that the employee is appealing to the mayor or assembly president, as applicable.

2. Reasonably detailed reason(s) that the employee believes the action violated the borough code, and any written statements from witnesses or other evidence supporting the employee's belief.

3. The relief requested by the employee.

- B. The mayor or assembly president, as appropriate, shall provide a written decision to the employee within 7 calendar days of receipt of the written appeal.
- C. In an effort to resolve the dispute, an informal meeting shall be held between the employee and the mayor or assembly president, as appropriate, if requested by either party at any time before the employee files an appeal to the termination and disciplinary appeal board described below.
- [B]D. The [FOLLOWING] procedures set out in KPB 3.04.300(D) through (H) shall be used for an appeal by a confidential employee if the employee is not satisfied with either the mayor's or assembly president's final decision, as appropriate. Any reference to middle management employees shall be deemed to refer to confidential employees for purposes of this procedure. If the confidential employee is classified as administrative, then that employee works at the will of the appointing authority, and must meet the same standards as set out for middle management employees. Otherwise, confidential employees are entitled to the same conditions of employment as classified employees and must meet the applicable standards for classified employees. The affected employee of the mayor shall request a hearing through the mayor's office, and the affected employee of the assembly shall request a hearing through the assembly president. [THE HEARING SHALL BE HELD BEFORE A DISCIPLINARY APPEAL BOARD CONSISTING OF THREE ASSEMBLY MEMBERS APPOINTED BY THE ASSEMBLY PRESIDENT. THE BOARD, THROUGH ITS CHAIRPERSON, SHALL SCHEDULE A HEARING WITHIN 15 WORKING DAYS AFTER NOTICE OF THE APPEAL, AT WHICH TIME THE REASONS FOR THE ACTION SHALL BE REVIEWED. WITHIN FIVE WORKING DAYS FOLLOWING THE CLOSE OF THE HEARING, THE BOARD SHALL RENDER A WRITTEN DECISION AND SET FORTH THE REASONS UPON WHICH THE DECISION IS BASED.] The decision shall be binding upon the employee, and either the administration and the assembly, as applicable. When the employee is an employee of the assembly, the assembly president shall be substituted for the mayor in the above cited appeal procedures.

**SECTION 5.** That this ordinance takes effect immediately upon its enactment.

**ENACTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH THIS \*  
DAY OF \* 2009.**

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Milli Martin, Assembly President

ATTEST:

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Johni Blankenship, Borough Clerk

Vote on Motion to Introduce:

Yes: Pierce, Smith, Martin

No: Fischer, Knopp, Long, Smalley, Sprague, Superman

Absent: None