

March 23, 2009

Matt Claman, Acting Mayor
Municipality of Anchorage
PO Box 196650
Anchorage, AK 99519

Re: Request for Advisory 2008-9

Dear Acting Mayor Claman:

This letter is a response for your request for advisory, 2008-09. It does not constitute a legal opinion, but reflects the consideration of the facts presented in the original letter, your testimony and response to questions to members of the Board on February 27, 2009, and discussions amongst Board members and Ms. Rhonda Westover of the Municipal Attorney's Office, in light of the Ethics sections of the Municipal Code.

A majority of the Board believes the relevant portion of the Code is Section 1.15.025(C). That section states, "The mayor holds a full time position of employment with municipal authority presumed incompatible and in conflict with serving as an employee to another person or entity." You indicated in your initial letter, and in our meeting, that you are in a formal leave of absence status with the law firm of Lane Powell, LLC.

The Board's questions and discussion focused on the specific details of your leave of absence, so as to determine whether or not you should still be considered an employee of that firm, even though officially on leave. You explained that you are receiving no compensation from the firm in any form; you do not receive any health care, retirement, or other benefits; you are not representing clients or performing any work for the firm; you are not carrying or using a firm cell phone or email device; and you do not have and are not using the firm's voice email or email system. You indicated that your only continuing business relationship with the firm is that your personal office in the firm's Anchorage location is still vacant and you still have some books and artwork in that office. However, we separately found that your professional biography is still posted on the Lane Powell website, giving at least the appearance of an active employment relationship, as it lists a phone number and email contact for you.

Given all of the above, a majority of the Board concludes that you are not an employee of the firm while in the leave of absence status. We base this conclusion on a factual analysis of the information you presented, a common sense understanding of the employer-employee relationship (that is, whether the firm as an employer could be in a position to influence your activities as acting Mayor), and an evaluation of the traditional legal factors used to determine whether an employment relationship exists.

On this last point, we note that courts typically look at the degree of independence afforded to a person, the extent of any financial ties, and whether there are contractual ties that suggest an

employee-employer relationship. We found none of those in your case. We do recommend, however, that you immediately advise Lane Powell, LLC, to remove your biography completely from its website unless or until you establish an employment relationship with the firm.

As noted, this is the view of a majority of the Board and was passed in the form of a motion at the February 27 meeting. At least one Board member disagreed, stating that appeal to the above described section of the Ethics Code does not cover your specific situation. For your consideration I have included in quotes below the unedited comments by this Board member:

“An employee on a leave of absence is still beholden to his or her employer in a number of ways. Because an employee on leave intends to resume active employment (here, within a law firm), considerations regarding retention, termination, promotion, client relations, future salary, firm profitability and one’s standing in the firm are all at play even when -- and perhaps *especially* when -- the employee is serving as mayor. Thus, while a leave of absence might appear to insulate the mayor from the interests of his or her employer, in reality it does not do so. Accordingly, from an ethical standpoint, Section 1.15.025 C (4) of the Municipal Ethics Code is best understood as requiring that the mayor not be an employee (on leave or otherwise) of another person or entity.

“However, the Ethics Code (§1.15.025 C (4)(a)) also recognizes that specific circumstances may allow the mayor to seek relief from this stringent ethical requirement. Being an “acting” mayor raises a unique set of circumstances. The acting mayor will only serve, as acting mayor, for a few months, and it perhaps would be draconian to require such an individual to resign his or her position (with the attendant career sacrifices) for a few months of public service. The Ethics Code allows for relief from §1.15.025 C (4) provided (1) there are unique circumstances and (2) the mayor presents a plan for the management of the potential conflicts of interest. If the acting mayor were to present an acceptable plan to the Ethics Board, then his continued employment could be consistent with the Ethics Code.”

As chair, I would like to conclude with one final observation. Your request for advisory opinion raises issues that were not directly anticipated in the Ethics Code rewrite, at least in the discussions and recommendations from the Board of Ethics side, which is my interpretation of the split in opinion on the Board concerning your request for advisory. The peculiar status of ‘acting mayor’ presents such issues that may require further clarification in amending the Code.

Best regards,

G. W. Kimura, Ph.D. (Cantab.)
Chair, Board of Ethics