



Municipality of Anchorage
Board of Ethics
C/o Municipal Clerk's Office
632 W. 6th Ave. Ste. 250 Anchorage, AK 99501

Date: June 25, 2020

To: Darrel Hess, Municipal Ombudsman
darrel.hess@anchorageak.gov
Kathryn Vogel, Municipal Attorney
kathryn.vogel@anchorageak.gov

From: Municipal Board of Ethics

Re: Response to Requests for Advisory Opinion 2019-02 and 2019-03 – *Confidentiality Waived*¹

Dear Mr. Hess and Ms. Vogel:

This advisory opinion responds to the above *Requests for Advisory Opinion* (Requests) from Municipal Ombudsman, Darrel Hess, and former Municipal Attorney Rebecca Windt Pearson, dated June 14 and June 28, 2019, respectively. The Requests concern the appearance of Mr. Hess at an Assembly work session to opine on a proposed ordinance, his posting of two posts on the Office of the Ombudsman's Facebook page, and his sharing of the posts on his personal Facebook page. Mr. Hess and Ms. Windt Pearson asked the Board of Ethics (Board) whether these actions violated the Municipal Code of Ethics (Ethics Code). The Board concludes that with the exception of the first post, Mr. Hess's actions comported with the Ethics Code. The Board also recommends that the Ethics Code be amended in the interest of clarity. This advisory opinion contains the Board's findings of fact and recommendations for corrective action.²

I. Factual Background

A. The Role of the Ombudsman

The Ombudsman occupies a unique position within the Municipality. The Office of the Ombudsman is established by Chapter 2.60 of the Anchorage Municipal Code (AMC or Municipal Code). The chapter describes the office as:

an independent, impartial municipal office, readily available to the public, responsible to the Assembly, empowered to investigate the acts of administrative agencies and to recommend appropriate changes toward the goals of safeguarding the rights of persons and

¹ See AMC 1.15.150D ("A request for advice is confidential unless confidentiality is waived by the person requesting an advisory opinion.")

² This opinion is based on the information provided by Municipal Ombudsman Darrel Hess and former Municipal Attorney Rebecca Windt Pearson at the October 10, 2019 Ethics Board meeting and by Assembly Chair Felix Rivera at the December 5, 2019 Ethics Board meeting. If material facts were not disclosed or were misrepresented, the opinion is without force and effect.

of promoting higher standards of competency, efficiency and equity in the provision of municipal services.³

Chapter 2.60 grants the Ombudsman broad authority to investigate administrative acts of municipal departments and employees. This authority includes instances in which the Ombudsman has reason to believe the acts may be “unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion, or unnecessarily discriminatory even though in accordance with law.”⁴ The Ombudsman may also investigate complaints brought by members of the public.⁵ He may conduct inspections, perform research, review documents, interview and subpoena witnesses, and he may “utilize any information [he] deems relevant to assist him in [a] determination on the merits.”⁶ He may bring a matter to the attention of municipal leadership (such as a department head, the Mayor, or the Assembly) or the public, and he may make recommendations for resolution.⁷ Before offering a recommendation critical of a department or person, he must consult with the department or person first.⁸ He may use social media to provide notice to the public of their rights and protections under Chapter 2.60.⁹

The Ombudsman reports to the Assembly Chair. The Chair at all times relevant to this matter was Felix Rivera. Chair Rivera explained that he often sought Mr. Hess’s input on proposed legislation because of the Ombudsman’s charge to evaluate acts through the “unique lens of fairness and equity.”¹⁰

B. Complaint to the Ombudsman

In the fall of 2018, the Office of the Ombudsman received a complaint from an Anchorage resident whose vehicle had been seized pursuant to the municipal Scofflaw ordinance.¹¹ The Scofflaw ordinance grants the Anchorage Police Department (APD) the authority to impound a vehicle whose driver has more than \$1,000.00 in “delinquent traffic fines.” Delinquent traffic fines are defined as unpaid fines for “moving violations.” Moving violations are not defined in the Code but are interpreted by the Municipality to include equipment and paperwork violations, but not criminal violations committed while operating a motor vehicle. The complainant took issue with this interpretation and the Municipality’s seizure of his vehicle. Mr. Hess, who has been the Ombudsman since 2012, had investigated multiple complaints concerning the Scofflaw ordinance over the years, but none challenging the Municipality’s interpretation of “moving violations” until the 2018 complaint.

Mr. Hess began investigating the complaint but determined that some of the issues raised were more appropriately resolved by an administrative hearing. Thus, he referred the complainant to the Administrative Hearing Office (AHO), where a hearing on the seizure of the vehicle was held, and a written decision was issued. The AHO affirmed APD’s seizure of the vehicle but

³ AMC 2.60.010

⁴ AMC 2.60.110

⁵ AMC 2.60.115

⁶ AMC 2.60.120B and .130

⁷ AMC 2.60.140A and B

⁸ AMC 2.60.140.C

⁹ AMC 2.60.155

¹⁰ Testimony of Felix Rivera at Ethics Board meeting on December 5, 2019.

¹¹ The Scofflaw Ordinance is AMC 9.28.035.

pointed out that the public could benefit from revisions to the Scofflaw ordinance that reduce the potential for confusion by clarifying the meaning of “moving violations.”

C. Assembly Ordinance (AO) 2019-59, Work Session, and Facebook Posts

Following the AHO decision, Mr. Hess and Deputy Ombudsman May Ramirez-Xiong reached the conclusion that the Municipality’s existing interpretation of “moving violations” under the Scofflaw ordinance was unfair. They met with representatives of the Municipal Finance Department (Finance), APD, and the Municipal Attorney’s Office to express their concerns and discuss a path forward on potential revisions to the Scofflaw ordinance. Despite the input from the Ombudsman’s Office, Finance prepared a proposed ordinance, AO 2019-59, that would codify the Municipality’s existing interpretation and presented it to the Assembly for adoption.

Out of concern that the Assembly be fully informed before acting on the proposal, Mr. Hess and Ms. Ramirez-Xiong prepared an April 29 memorandum to the Assembly, detailing the reasons for the Ombudsman’s opposition to the proposal and recommending against its adoption. Mr. Hess posted a copy of the memorandum on the website for the Ombudsman’s Office, consistent with the office’s practice. He also requested a work session on the proposal to fully vet the issues. The Assembly agreed, and a work session was scheduled for June 14, 2019.

On June 2, 2019, a Sunday, Mr. Hess posted the following on the Office of the Ombudsman’s official Facebook page:

The Ombudsman’s Office disagrees with how the MOA is interpreting equipment and paperwork violations to be moving violations, and does not support passage of AO 2019-59. We believe that this practice is not fair and equitable and disproportionately impacts low-income and minority individuals and neighborhoods. We have heard MOA employees, who make five and six figure incomes with good health benefits, opine that it is “simple” for people to take care of equipment and paperwork violation fix-it tickets. The reality is that for thousands of Anchorage residents, it is not a simple matter to be able to pay \$50-\$75 for a new headlight or taillight, or to replace a windshield, etc. They can’t pay to fix the problem, and so they are fined, and they can’t afford to pay the fine. This starts a vicious cycle for many people who are struggling financially. Equipment and paperwork violations should not be counted as moving violations for the purposes of the Scofflaw ordinance.

The Assembly is holding a work session on AO 2019-59 at 1 pm on Friday, June 14th, in RM 155 at City Hall. The Assembly public hearing on the ordinance, and possible vote will be at the Assembly meeting on Tuesday, June 18th. Please help spread the word, and encourage people who have been impacted by the Scofflaw ordinance to show up for these meetings and express their opinions. Please consider testifying and/or providing written comments to the Assembly.

Attached to the first post was a copy of the April 29 memorandum from the Ombudsman's Office to the Assembly, as well as a copy of the Assembly Memorandum prepared by Finance regarding the proposed ordinance. Mr. Hess also shared the post, with the attachments, on his personal Facebook page.

On June 3, 2019, Deputy Municipal Attorney and Ethics Officer Dee Ennis sent Mr. Hess an email expressing concerns about the post, including that it "advocate[ed] a partisan position with the use of municipal resources (MOA Ombudsman website and perhaps your time)." Later that day, Mr. Hess replaced the original post, which he acknowledged "went too far," with the following:¹²

The Ombudsman's Office disagrees with how the MOA is interpreting equipment and paperwork violations to be moving violations, and does not support passage of AO 2019-59. In keeping with the code-mandated role of the Ombudsman's Office, we have articulated our concerns to the Assembly in the attached memo. We believe that this practice is not fair and equitable and disproportionately impacts low-income and minority individuals. For thousands of Anchorage residents, it is not a simple matter to be able to pay \$50-\$75 for a new headlight or taillight, or to replace a windshield, etc. They can't pay to fix the problem, and so they are fined, and they can't afford to pay the fine. This starts a vicious cycle for many people who are struggling financially. Equipment and paperwork violations should not be counted as moving violations for the purposes of the Scofflaw ordinance.

The Assembly is holding a work session on AO 2019-59 at 1 pm on Friday, June 14th, in RM 155 at City Hall. The Assembly public hearing on the ordinance, and possible vote will be at the Assembly meeting on Tuesday, June 18th. You may testify and/or provide written comments to the Assembly.

Note: These documents are all public documents and are part of the public record.

When Mr. Hess replaced the original post on Ombudsman's Facebook page, his personal Facebook page was automatically updated to replace the first with the second post.

In the Facebook conversation that ensued after the second post, Mr. Hess attached a copy of a June 12, 2019 memo from the American Civil Liberties Union (ACLU) to the Assembly. The memo expressed the ACLU's view that the proposed ordinance was unfair and should not be adopted for reasons similar to those articulated by Mr. Hess.

¹² Mr. Hess explained that he believed the original post "went too far" when asked by the Board why he replaced the original post with a new one. He also stated that he and Dee Ennis, both in her role as the Deputy Municipal Attorney and Municipal Ethics Officer, regularly exchange comments and advice on different municipal issues, including their positions and roles.

At the request of Assembly Chair Rivera, Mr. Hess participated in the June 14 work session on the proposal. Wearing a shirt embroidered with the logo of the Ombudsman’s Office, Mr. Hess presented his opinion on the proposal and the reasons for his position. Municipal Treasurer Dan Moore also appeared at the work session and presented Finance’s views.

II. Findings and Analysis

A. Did the Ombudsman violate the Ethics Code by appearing at an Assembly work session at the request of his supervisor and providing his opinion on the proposed ordinance while wearing Ombudsman apparel?

The Ethics Code prohibits municipal employees, such as the Ombudsman, from engaging in partisan activity in specified circumstances.¹³ “Partisan activity” is defined in AMC 1.15.110A.2 as “[a]n act for the purpose of supporting a party, cause or action.¹⁴ In this case, Mr. Hess appeared before the Assembly and opined on the ordinance proposed by Finance. This act was for the purpose of supporting a cause or action: persuading the Assembly to reject the proposed ordinance. Thus, Mr. Hess did engage in partisan activity as defined in the Code.

Nevertheless, the Board concludes that the Ethics Code did not prohibit the Ombudsman from appearing at the Assembly work session. AMC 1.15.110D.2 allows municipal employees to “use their titles when engaging in political or partisan activity when authorized to do so by their responsible official. . . .” Here, Mr. Hess attended the work session and gave his professional opinion, as the Ombudsman, on the proposed ordinance because he was asked by his supervisor, former Assembly Chair Rivera, to do so. This action falls within the scope of allowable partisan activity under 1.15.110D.2.

B. Did the first or second Facebook post on the Office of the Ombudsman’s Facebook page violate the Ethics Code?

Generally, municipal employees are prohibited from using municipal resources to express partisan positions or engage in partisan activity. AMC 1.15.110C of the Ethics Code provides that municipal employees “shall not use . . . municipal resources for political or partisan activity,” with limited exceptions for elected officials and the school superintendent.¹⁵ In this case, Mr. Hess, who is neither an elected official nor the school superintendent, used municipal resources – the Office of the Ombudsman’s Facebook page – for the two posts at issue. The question is whether either or both of the posts constitute partisan activity.

As stated above, AMC 1.15.110A.2 defines “partisan activity” as “[a]n act for the purpose of supporting a party, cause or action. The Board finds that both the first and second posts meet this definition. Both posts expressed the Ombudsman’s opposition to the proposed ordinance and the reasons for his opposition. This content alone supported the cause or action of voting against the proposal and rendered both posts partisan activity.¹⁶ Thus, under a strict application of

¹³ AMC 1.15.110C

¹⁴ AMC 1.15.110A.2

¹⁵ Further, AMC 1.15.110F broadly provides that employees “shall not engage in partisan activity addressing municipal matters while at the workplace or in the performance of work duties.”

¹⁶ The partisan nature of the first post was furthered by the use of inflammatory language (i.e., “We have heard of MOA employees, who make five and six figure incomes with good health benefits, opin[ing] that it is

1.15.110C, both posts would be prohibited as an unauthorized use of municipal resources for partisan activity.

Such a strict interpretation of the Ethics Code would create a conflict with Chapter 2.60, however, because Chapter 2.60 authorizes the Ombudsman to conduct activities that 1.15.110C appears to prohibit and other municipal employees are not generally allowed to do. Specifically, AMC 2.60.140A authorizes the Ombudsman to make recommendations – which necessarily entails taking a position – to resolve matters within his jurisdiction. Under 2.60.110C, such matters include administrative acts the Ombudsman believes to be unfair, which logically includes legislative proposals by a municipal department.¹⁷ Chapter 2.60 also authorizes the Ombudsman to notify the public of potentially unfair administrative acts and to use social media to do so.¹⁸ Thus, in light of the special powers granted to the Ombudsman, taking a position on proposed legislation and notifying the public through a post on the Office of the Ombudsman’s Facebook page falls within the ambit of the Ombudsman’s unique municipal duties under Chapter 2.60.

The Board acknowledges the tension between the Ethics Code as written and Chapter 2.60. A rigid application of AMC 1.15.110 would effectively preclude the Ombudsman from making recommendations on proposed legislation – an official duty of his position under Chapter 2.60 - because it technically constitutes partisan activity. The Board does not countenance such a result. Rather, the Board interprets 1.15.110C more narrowly as prohibiting the Ombudsman from using municipal resources for partisan activity outside the ambit of his prescribed Chapter 2.60 duties, but not those he is authorized by Chapter 2.60 to perform. Thus, so long as the Ombudsman was acting within the scope of his official duties, he does not run afoul of AMC 1.15.110C. This interpretation, which reads 1.15.110 in concert with Chapter 2.60, is consistent with the long-standing tenet of statutory construction that statutes in a regulatory scheme be construed in accordance with each other “so as to create a harmonious whole.”¹⁹

Applying this interpretation to the two posts at issue, the Board finds that the first post was prohibited by AMC 1.15.110C, but not the second post. Although Chapter 2.60 authorizes the Ombudsman to use social media to provide notices expressing his views on proposed legislation, the first post went further by using emotionally-charged language (i.e., “We have heard MOA employees, who make five and six figure incomes with good health benefits, opine that it is “simple” for people to take care of equipment and paperwork violation fix-it tickets”) and calling for citizens to take action against the proposal (“Please help spread the word, and encourage people who have been impacted by the Scofflaw ordinance to show up for these meetings and express their opinions.”) Thus, the post went beyond notifying the public of the Ombudsman’s views to

‘simple’ for people to take care of equipment and paperwork violation fix-it tickets”) and language calling for citizens to take action against the proposal (i.e., “Please help spread the word, and encourage people impacted by the Scofflaw ordinance to show up at [public] meetings and express their opinions.”)

¹⁷ This is consistent with Assembly Chair Rivera’s testimony that he often seeks the Ombudsman’s recommendations on proposed legislation, given the charge of fairness inherent in the Ombudsman’s position. Indeed, recommending changes to safeguard fairness and equity is one of the stated purposes of the Ombudsman’s Office in AMC 2.60.010.

¹⁸ AMC 2.60.140 and 2.60.155A and B

¹⁹ *Alaska Airlines, Inc., et al. v Darrow, et al.*, 403 P.3d 1116, 1128 (Alaska 2017); *see also Rydwell v. Anchorage School District*, 864 P.2d 526, 530-31 (Alaska 1993) (It is presumed “that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous.”)

a polemical expression exhorting the public to act in a certain way.²⁰ Such activity falls outside the scope of the Ombudsman's duties under Chapter 2.60 and is prohibited by AMC 1.15.110C.

In contrast, the second post uses neutral language to express the Ombudsman's position on the proposed ordinance and notify the public of upcoming public meetings. These activities are consistent with the Ombudsman's official duties under Chapter 2.60. Moreover, Mr. Hess followed the procedures specified in Chapter 2.60 for bringing his recommendations to the Assembly and public by first consulting with Finance. The Board finds that the second post falls within the ambit of Ombudsman's authorized duties under 2.60 and is not prohibited by AMC 1.15.110C.

The Board also considered whether Mr. Hess's attachment of the ACLU memorandum to the Facebook conversation rendered the second post in violation of the Ethics Code. Mr. Hess attached the memo - a public document addressed to the Assembly - for the purpose of supporting his recommendation on the legislative proposal from Finance. He did not include a hashtag or other hyperlink that would connect a Facebook user to information about the ACLU and the political and other causes it advocates.²¹ The inclusion of the memo in the Facebook conversation for the purpose of substantiating his position on the proposed ordinance did not polemicize Mr. Hess's recommendation and was consistent with the Ombudsman's duties under Chapter 2.60. Accordingly, the second post is not prohibited by AMC 1.15.110C.

C. Did the Ombudsman violate the Ethics Code by sharing the posts on his personal Facebook page?

AMC 1.15.120 states that municipal employees shall not "use, disclose, or release confidential or nonpublic information gained through [their] municipal positions" unless authorized by law or court order. There are no provisions in the Ethics Code prohibiting municipal employees from disclosing public information. In this case, neither the first nor second post by Mr. Hess on the Office of the Ombudsman's Facebook page constituted confidential or nonpublic information. Rather, both posts were public documents containing only public information. Similarly, the attachments to the post (i.e., the memorandum from the Ombudsman's Office to the Assembly and the Assembly Memorandum prepared by Finance) were public information. Thus, by sharing the posts and their attachments on his personal Facebook page, Mr. Hess did not run afoul of AMC 1.15.120 and did not violate the Ethics Code.

III. Recommended Action

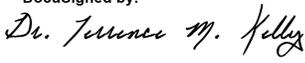
The Board concludes that the Ombudsman's appearance at the Assembly work session to opine on the proposed ordinance at his supervisor's request was allowed by AMC 1.15.110D.2 and did not violate the Ethics Code. The Board further concludes that the first post on the Office of the Ombudsman's Facebook page was prohibited by AMC 1.15.110C of the Ethics Code because it went beyond the scope of the Ombudsman's authorized duties under Chapter 2.60, while the second post, which replaced the first, was not prohibited. Finally, the Board finds that the Ombudsman's sharing of the posts on his personal Facebook post did not violate the Ethics Code.

²⁰ See Advisory Opinion 2014-4.

²¹ The inclusion of a hashtag or other hyperlink could run the risk of being construed as incorporating and expressing support for the messages and other content associated with the hyperlink. See Advisory Opinion 2018-1.

The Board recommends vigilance in ensuring that future social media posts by the Office of the Ombudsman steer clear of language that could be construed as polemicizing the Ombudsman's views or exhorting the public to take action. Such vigilance is necessary to ensure that social media posts comport with the Ombudsman's authorized duties under Chapter 2.60 and are not prohibited by AMC 1.15.110C. Additionally, the Board believes that changes to the Ethics Code that clarify the relationship between AMC 1.15.110C and Chapter 2.60 are warranted. The Board recommends that the Ethics Code be amended accordingly.

Respectfully,

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Terrence Kelly, Board of Ethics Chair
Jack McKenna, Board of Ethics Member
Marsha Olson, Board of Ethics Member