  
**MESSER CAPARELLO**  
Attorneys At Law  
*Strategically Positioned in Florida's Capital*

Mark Herron  
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April 16, 2013

Ashton Hayward III  


RE: Official Opinion Letter re: Ethics Inquiries

Dear Mr. Hayward:

The purpose of this correspondence is to respond to your inquiries regarding the effect and scope of the provision of the Pensacola City Charter regarding the "full-time" nature of the Office of Mayor of the City of Pensacola as well as your obligations to report gifts received in your capacity a Mayor.

**Full-Time Mayor**

The Pensacola City Charter provides that the Mayor of the City of Pensacola "shall serve in a full-time capacity." See Article IV, Section 4.01(a). It further provides that the Mayor shall "devote his or her entire work time to the performance of the duties of the Mayor's office, and hold no other elected public office while Mayor." See Article IV, Section 4.01(a)(14). In light of this provision, you inquire to what extent this provision limits your ability to engage in, pursue, acquire and retain private economic interests, available to all other citizens, subject to restrictions and limitations available to all other citizens, subject to the limitations of the Code of Ethics for Public Officers and Employees, Part III of Chapter 112, Florida Statutes.<sup>1</sup>

The duties and responsibilities of the Mayor are set forth in the Pensacola City Charter:

- (1) To exercise the executive powers of the City and supervise all departments, including, but not limited to, the power to appoint, discipline, and remove all officers and employees, unless otherwise provided in this Charter.

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<sup>1</sup> The Pensacola City Charter requires that the City Council "enact by ordinance a Code of Ethics for all elected and appointed officers and employees of the City which shall set standards of conduct equal to or stronger than the standards of conduct established by law." Article IX, Section 9.01. The City Council, in Chapter 2-6 of the Pensacola Code of Ordinances, has adopted a Code of Ethics. None of the provisions of the Pensacola Code further illuminate the scope and effect of the requirement that the Mayor "shall serve in a full-time capacity" or "devote his or her entire work time to his or duties on the Mayor's office...."

(2) To enforce the charter and ordinances of the City and all applicable County, State, or federal general laws, special laws or ordinances.

(3) To present recommendations to the City Council on the requirements of its municipal government.

(4) To appoint a City Administrator, who shall serve at the pleasure of the Mayor.

(5) To appoint a City Attorney, with the consent of the City Council by an affirmative vote of a majority of City Council Members, and who may be removed by the Mayor with the consent of the City Council by an affirmative vote of a majority of the City Council Members.

(6) To appoint the City Clerk, with the consent of the City Council by an affirmative vote of a majority of the City Council Members, and who may be removed by the Mayor with the consent of the City Council by an affirmative vote of a majority of the City Council Members.

(7) To appoint the head of each department, with the consent of the City Council by an affirmative vote of a majority of City Council Members.

(8) To suspend, discipline, or remove a department head with or without cause, and without the consent of City Council Members, unless otherwise provided for in this Charter.

(9) To prepare and submit the annual budget and capital program to the City Council.

(10) To exercise a veto power over ordinances and resolutions adopted by City Council within five (5) days of adoption by City Council, except the Mayor may not exercise veto power over (i) an emergency ordinance as defined in Florida Statutes; (ii) those ordinances adopted as a result of quasi-judicial proceedings when such proceedings are mandated by law; and (iii) ordinances proposing Charter amendments, which the Council is required by law or by this Charter to place on the ballot. The Mayor may veto any "line item" in a budget or appropriation ordinance or resolution within five (5) days of adoption by City Council. A veto may be overridden only by an affirmative vote of at least six (6) Council Members.

(11) To attend all meetings of the City Council with authority to participate in discussions, but without power to vote.

(12) To submit to the City Council and make available to the public a complete report of the finances and administrative activities of the City at the end of each fiscal year.

(13) To keep the City Council fully advised as to the financial condition and future needs of the City.

(14) To devote his or her entire work time to the performance of the duties of the Mayor's office, and hold no other elected public office while Mayor.

(15) To determine, consistent with this Charter, the organization of the City government and the power and duties assigned to the various departments.

#### Article IV, Section 4.01(a).

The Charter provides that the salary of the Mayor shall be set by ordinance. See Article IV, Section 4.01(c).<sup>2</sup>

There is no definition in the Pensacola City Charter as to what constitutes "full-time capacity" or "entire work time" for the purposes of these restrictions on the ability to engage in outside economic interests. Nor is there is any single legal definition for "full-time work."

The federal Fair Labor Standards Act requires that an hourly employee must be paid overtime if the employee works more than 40 hours during any seven-day period. However, that is not a legal definition of full-time employment. IRS regulations require that an employer provide all "full time employees" with the same fringe benefits in certain instances, or the benefits are taxable income. Employers generally resolve this issue at the 32 hour per week mark. But, that's just a customary practice of employers – it is not a legal definition of full-time employment. Florida unemployment law deems full-time employment as being "able and available" to work a 40-hour work week. But, the definition is flexible, because nowhere does it actually say that 40 hours per week means full-time employment. The law merely requires that an employee be available to work all of the hours that the employer is prepared to offer. If the employee is able and available to do so, then that's full-time work.

The City of Pensacola Employee Handbook provides that "[a]ll employees of the City shall work a forty-hour work period, as provided for under the provisions of the Fair Labor Standards Act ... the workweek begins at 12 midnight Sunday with work scheduled during the regular office hours of

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<sup>2</sup> Section 2-2-8 of the Pensacola Code of Ordinances provides as follows:

The compensation to be paid to the mayor shall be one hundred thousand dollars (\$100,000.00) per year, payable in equal bi-weekly installments as compensation for services rendered to the city. The mayor shall also be offered participation in the Florida Retirement System, and shall be entitled to such health, dental and life insurance benefits as are available to the city workforce at the premiums paid by the city workforce. The mayor shall be compensated for mileage on a vehicle which is incurred in connection with city business at the rate established by city policy. The mayor shall be reimbursed for the actual expenses incurred in connection with his or her official duties while outside of and beyond the corporate limits of the city in accordance with the city travel and expense reimbursement policies.

In addition, Section 1 of Ord. No. 07-07 provided that the compensation of the mayor shall be increased by 0.5 percent effective October 1, 2006

City Hall.”<sup>3</sup> Thus, it may be reasonable to conclude that the reference to “full-time” and “entire work time” means spending 40 hours a week fulfilling the duties of Mayor, recognizing also that time spent performing the duties and responsibilities of Mayor may extend into the evening hours and weekends.<sup>4</sup>

It may be also reasonable to conclude from the language of the Pensacola City Charter that it does not explicitly prohibit all employment outside limits prescribed by the Charter. Had the framers of the Charter intended to do so, they could have used language similar to that which prohibits the Mayor from holding any elective office, such as “and hold no other elected public office or employment while Mayor.” They did not.

Thus, the challenge is identifying what constitutes “full-time capacity” or “entire work time” for the purposes of these restrictions on your ability to engage in outside economic activity. In my opinion, these restrictions do not prohibit or restrict your ability to purchase, lease, invest in, own, develop, or sell real property; or to purchase, invest in, own, or sell tangible or intangible real or personal property. Nor do these restrictions limit your ability to apply for and hold any business or professional license. These restrictions, in my opinion, likewise do not *per se* prohibit your ownership of business entities that engage in such activities.

Without specific facts as to the nature and extent of any intended employment-related activity, an opinion cannot be rendered. In addition, the only definitive opinion as to the nature and extent of the limitations imposed by the Pensacola City Charter can only be obtained by a declaratory judgment pursuant to Chapter 86, Florida Statutes, based on specific facts as to the nature and extent of any intended employment-related activity.<sup>5</sup>

### Gift Law

Under Florida’s gift law,<sup>6</sup> a public officer is prohibited from accepting a gift from a lobbyist, who lobbies the public officer’s agency, or the partner, firm, employer, or principal of a lobbyist, of that

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<sup>3</sup> City of Pensacola Employee Handbook at p. 10.

<sup>4</sup> Under Georgia law, a full-time public official is one who works 30 hours a week for more than 26 weeks per calendar year. See Section 45-10-20(5), Official Code of Georgia (2011).

<sup>5</sup> Section 86.021, Florida Statutes, provides as follows:

**Power to construe.**—Any person claiming to be interested or who may be in doubt about his or her rights under a deed, will, contract, or other article, memorandum, or instrument in writing or whose rights, status, or other equitable or legal relations are affected by a statute, or any regulation made under statutory authority, or by municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing may have determined any question of construction or validity arising under such statute, regulation, municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing, or any part thereof, and obtain a declaration of rights, status, or other equitable or legal relations thereunder.

<sup>6</sup> Section 112.3148, Florida Statutes.

gift has a value in excess of \$100.<sup>7</sup> A lobbyist is defined as "any natural person who, for compensation, seeks, or sought during the preceding 12 months, to influence the governmental decisionmaking of a reporting individual or procurement employee or his or her agency or seeks, or sought during the preceding 12 months, to encourage the passage, defeat, or modification of any proposal or recommendation by the reporting individual or procurement employee or his or her agency."<sup>8</sup>

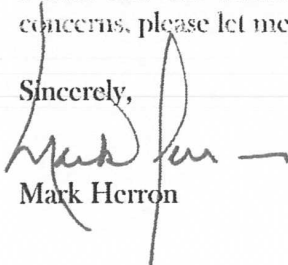
In addition, the gift law requires that a public officer file a statement with the Commission on Ethics, no later than the last day of the calendar quarter, for the previous calendar quarter, for any gift which the public officer accepted which he or she believes had a value in excess of \$100, for which compensation was not provided to the donor with 90 days (which reduced the value of the gift to \$100 or less).<sup>9</sup> The gift law does not require a public officer to report gifts from relatives<sup>10</sup> or gifts which are prohibited by law.<sup>11</sup>

Reportable gifts are required to be reported on Commission on Ethics Form 9, which, when duly signed and notarized, must be filed with the Commission on Ethics no later than the last day of the calendar quarter that follows the calendar quarter for which this form is filed (For example, if a gift is received in March, it should be disclosed by June 30.) Gifts from governmental entities, direct support organizations, and honorarium related expenses are required to be reported on Commission on Ethics Form 9 on an annual basis by July 1 of the year following the year following the year covered by the form.

Without specific facts as to the nature of any specific gift, a definitive opinion cannot be rendered as to whether and how that gift should be reported. Any specific questions or concerns with reporting can be addressed in a follow-up inquiry and analysis.

I trust that this information is of assistance to you. If you have any additional questions or concerns, please let me know.

Sincerely,



Mark Herron

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<sup>7</sup> Section 112.3148(4), Florida Statutes.

<sup>8</sup> Section 112.3148(2)(b)1., Florida Statutes.

<sup>9</sup> Section 112.3148(8)(a), Florida Statutes.

<sup>10</sup> Section 112.3148(8)(a)1., Florida Statutes.

<sup>11</sup> Section 112.3148(8)(a)2., Florida Statutes.

MESSER CAPARELLO, P.A.  
 2618 CENTENNIAL PLACE  
 TALLAHASSEE, FLORIDA 32308  
 TELEPHONE (850)222-0720  
 E.I.N. [REDACTED]

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March 06, 2013

Account No: 2843-19094

Statement No: 433038

ASHTON HAYWARD  
 [REDACTED]

Attn: JAMES MESSER

ETHICS ISSUES

Fees

			Hours		
02/06/2013	MH	Conferred by telephone with Jim Messer re potential ethics issue / outside employment;	0.20		
02/21/2013	MH	Conferred with Ashton Hayward re outside employment under the Pensacola City Charter / gift issues / financial disclosure issues;	1.00		
02/22/2013	MH	Reviewed and analyzed Aston Hayward's 2011 Form 1 financial disclosure form; reviewed and analyzed law re same; reviewed corporate records / property appraiser records re same;	1.40		
02/25/2013	MH	Prepared email memorandum to Ashton Hayward re analysis of 2011 financial disclosure form;	0.10		
02/27/2013	MH	Conferred with J.B. Donnelly re draft letter to Ashton Hayward / full-time employment issue;	0.30		
02/28/2013	MH	Revised draft letter to Ashton Hayward re outside employment / gift issues;	1.00		
		For Current Services Rendered	4.00	1,170.00	

Recapitulation

<u>Timekeeper</u>	<u>Hours</u>	<u>Rate</u>	<u>Total</u>
MARK HERRON	0.10	\$0.00	\$0.00
MARK HERRON	3.90	300.00	1,170.00

Total Current Work 1,170.00

Balance Due \$1,170.00

Please Remit \$1,170.00

**ALL INVOICES DUE UPON RECEIPT.  
 THANK YOU FOR YOUR PROMPT PAYMENT.**