


**CITY OF MADISON  
OFFICE OF THE CITY ATTORNEY  
Room 401, CCB  
266-4511**

Date: May 18, 2010

**MEMORANDUM**

TO: Members of the Ethics Board  
FROM: Michael P. May, City Attorney   
RE: Open Letter from Brenda Konkel

On April 29, 2010, Brenda Konkel sent you an open letter regarding a number of issues. Ethics Board Chair Charles Center asked that I provide a response to the letter in order to guide the Ethics' Board consideration of it, including any recommendations on how items in the letter might be handled by the Ethics Board.

The letter contains many items. I counted 28 numbered recommendations or suggestions. In addition, there are some statements about the manner in which the Ethics Code is applied, some of which I believe represent a misunderstanding of certain provisions of the Code.

I divided this memo up into three parts. The first part contains items on which the Board may wish to have further discussion. That discussion may or may not lead the Board to take any action or make any recommendations. The second section consists of items that might arguably be within the Board's authority, but on which I do not believe any change or further discussion is needed. The third section consists of items on which I believe the Ethics Board has no jurisdiction.

A. Items the Ethics Board May Wish to Discuss:

On page 3 of the memo, Ms. Konkel suggests three items that could be amendments to the Ethics Code. Under Sec. 3.37(10) (e), MGO, "The Ethics Board may make recommendations with respect to amendments to this Code of Ethics Ordinance."

The suggested amendments on page 3 are item 5 at the top of the page, and items 2 and 3 at the bottom of the page. Item 5 asks whether the ordinance could be amended to give a clear definition of personal conflict of interest. The Ethics Code, section 3.35(2) (f) currently defines personal interest as:

"any interest greater than nominal, direct or indirect, arising from blood, marriage, adoption, guardianship or designated family or

registered domestic partner relations or from close business, political or other associations.”

This definition is applied in circumstance where there is not a financial interest at stake, but the relationship of the incumbent to another person or business is such that one might reasonably question whether the incumbent could act fairly. When such a situation exists, some of which were described in Ms. Konkel's letter, I advise the incumbent to recuse themselves and not take any official action when they have such close personal interests. Whether that advice is followed is, of course, another matter.

The other suggestions on page 3 are to establish a dollar limit in the ethics law so that one would know what constituted “nominal” value, and adding a definition of “transportation.”

These would also be amendments to the code. I am not sure a definition of “transportation” is needed. While a dollar limit to establish a definition of nominal might provide some guidance to incumbents, my understanding is that when the code was drafted this was specifically avoided because it would encourage the regular receipt of gifts under that amount. If a definition of nominal was to be suggested, it should be relatively low and should be on a cumulative, annual basis.

On page 4 on the letter from Ms. Konkel, three other potential changes to the Ethics Code are suggested.

At the top of the page, the letter suggests changing the Ethics Code to state that alders cannot serve on committees for one year following the term of their office. My reading of the Code does not prohibit alders from being appointed to committees within the first year following the end of their term. Whether the Ethics Board wishes to consider this is a question for the Board. I consider the position of being on a board, committee, or commission of the City to be much different than a former alder appearing before that board requesting that certain actions be taken, either on behalf of the former alder or someone they are representing. Thus, I believe there is an important distinction between undertaking the obligations that come with being a member of City board, commission, or committee, and appearing before them.

At items 3 and 4 on the center of page 4, Ms. Konkel suggests changes with respect to definition of items which benefit the City.

The Ethics Code provides in Section 3.35(5) (g):

“No incumbent may receive and retain any transportation, meals, entertainment, fee, food, beverage, or reimbursement therefore, nor any honoraria, service fee or contract payment or anything of value except in accord with Section 3.35(6).”

Thus, transportation, meals, food, etc., are not to be accepted unless allowed under Sec. 3.35(6), MGO. This section has two exceptions that could arguably be applicable in situations such as the Mayor's trip to Europe. Section 3.35(6) (c) provides as follows:

"During her or his term, no elected official or member of any board, committee, or commission shall receive and retain honoraria such as money or anything of value other than commemorative or other items of nominal value for or in recognition of activities related to or arising from their City roles or positions. Such persons may accept and retain from persons or entities other than the City the cost or reimbursement of actual and reasonable expenses related to such activities whether or not such activities arise from their City roles or positions, except that elected officials may not receive and retain any such payments from a lobbyist or from a business or organization or local government that employs a lobbyist."

I interpret this section as doing two things. First, it prohibits receipt of anything from the lobbyist or entity that employs a lobbyist. The Mayor's Office was so advised with respect to the Europe trip. The balance of this section deals with a situation where an elected official or member of a board, committee, or commission is given some honor or award in recognition of their service. In such circumstances, it is not uncommon for the entity providing the award to also provide for covering of expenses related to such activities, and this section allows it.

A more relevant section is Section 3.35(6) (b) which reads as follows:

"During her or his term, no elected official or member of any board, committee or commission shall receive and retain from the City or on behalf of the City transportation, lodging, meals, food or beverage, or reimbursement therefore unless the same were incurred or received primarily for the benefit of the City and not primarily for her or his private benefit or that of any other person."

This section requires that reimbursement received from the City, or from another person on behalf of the City, is only allowed in a situation where the activity giving rise to the expenses was primarily for the benefit of the City and not for the personal benefit of the individual involved.

In her letter, Ms. Konkol said it was "reported that the City Attorney approved the trip because the Foundation paid for it." I don't know where that information comes from, but it is not accurate. Second, setting aside the specifics of the Mayor's trip to Europe, I do believe there is a significant distinction between businesses that regularly appear before the Common Council seeking approval of items offering free food and drinks, and attendance at a conference not sponsored by such businesses and on a matter directly related to operations of the City.

The rationale of the Ethics Code which allows a person to accept reimbursement "on behalf of the City" is that there is no personal benefit to the individual at all. The individual could have put in to have the costs and reimbursements covered by the City, and have it paid with tax dollars. But rather than do that, it is paid by an outside third party, so long as it meets the requirements of the Code.

All that being said, I do believe that this section of the code needs some clarification. It is very difficult to determine what is "primarily for the benefit of the City." I have not always agreed with determinations that others may have made in this regard. In addition, I think there is a need to either amend the code, or adopt a specific interpretation of the Code, that would improve application of it. If this section of the Code is to meet its purpose, it seems to me that the incumbent (or employees under subsection 3.35(6) (e)) should submit the expenses through the normal City process for reimbursement, with an indication that the approved expenses will be reimbursed by an outside entity. Such a process would serve two important purposes. First, it provides more transparency in exactly what expenses were submitted for reimbursement, and what entity will provide the reimbursement. Second, the City has certain limitations on various types of expenses, such as meals and hotel costs. This would ensure that any reimbursement did not exceed amounts that the City would normally reimburse. If such were to occur, then there might in fact be a personal benefit, because the official or employee would otherwise be required to pay out of their own pocket for the amounts above the reimbursement. The Board may wish to discuss this issue.

On page 5 of the Konkel letter, there is a suggestion of having regular meetings of the Ethics Board.

I discussed this briefly with the Chair of the Board. It is an item that has been percolating in my head for some time, due to the sometimes regular and sometimes irregular meetings of the Board. The Board may wish to consider setting up at least semi-annual meetings so that it has a regular time to meet. It is possible that there may be no issues that come before the Board at that time, and in such instances, the meeting could be canceled by the Chair. But in the event there were matters to take up, all members of the Board would be aware of this meeting time well in advance and would be free to handle any matters on the agenda. This is something that I believe the Board may wish to discuss.

B. Items That I Do Not Recommend the Board Take Up:

At the top of page 2, the Konkel letter makes some suggestions with respect to disclosures.

First, the Konkel letter seems to suggest that there was a general rule that an alder who served on the board of a non-profit funded by the City was required to resign. I have not given such an opinion in the six years that I have been City Attorney. I have

not been able to find such a prior opinion by the City Attorney's Office. I was unable to find any opinions of the Ethics Board that impose such a requirement.

Such an elected official, or a member of a committee for that matter, would be required to recuse themselves from taking any action on the City approval of funding under sec. 3.35(5)(a) and (f). And, under Wis. Stat. Sec. 946.13, such person could not be involved in preparing the materials that came to the City to obtain funding. This applies to staff persons who were involved in obtaining the funding, just as much as it applies to members of the board of directors.

If a person is in that position and recuses themselves and abstains from taking action, in the budget or in any committee considering it, they have fulfilled their obligation under the Ethics Code. Sec. 3.35(5)(f), MGO. They do not fulfill their obligation by disclosing a disqualifying conflict of interest and then still voting on the matter. I am not aware of any advice to any persons that they need not disclose potential conflicts, unless it was in the context of stating that if one abstains from voting, the disclosure is unnecessary. This is pursuant to the Code.

The only situation that I am aware of that would require resignation of one type or another is that discussed in City Attorney's Formal Opinion #05-003, which can be found here:

<http://www.cityofmadison.com/attorney/documents/2005opinions/05-003.pdf>.

This involved a situation where a person would have been on the Board of Public Works, and would have helped prepare their company's submissions of bids to be awarded in the Board of Public Works. In such circumstance, a person not only must recuse themselves from taking any action on the Board of Public Works, but must refrain from participating in the presentation of the proposal to the City. In such circumstances, it might be necessary for the employee to change jobs, resign the employment, or if the person served as a director or officer of the body funded by the City, the person could resign from the board of the funded entity.

The Konkel letter has several suggestions on education and training. Training on the Code of Ethics and on the requirement to disclose conflicts and recuse oneself are provided annually, and separate training is done for new alders. I believe they are well aware of the rules under this portion of the code, because I regularly get inquiries about it. Whether my advice is followed is, of course, another matter. I am certainly willing to send another reminder to the alders with respect to these issues as we get closer to the budget.

On page 3 of the Konkel letter, there is a suggestion of filing annual conflict of interest forms and obtaining consistent outcomes on land use matters.

I am not aware of a need to file additional forms with respect to conflicts of interests. Our office endeavors to give consistent advice on all matters under the Ethics Code. Whether that advice is consistently followed is another matter.

On page 4 of the Konkel letter, item 2 at the top, there is a suggestion of clarifying the laws about an individual testifying on their personal behalf. It is not at all clear to me what is being requested with respect to this item. To the extent it relates to personal conflicts of interest, this was discussed previously.

On page 4 of the Konkel letter, at the bottom of the page, there is a suggestion to have the City Attorney do a monthly report of questions received about ethics issues to keep the Board informed of current issues, and to create some "quasi-complaint" or "quasi-advisory opinion" under the Ethics Code.

I would oppose both of these. The ethics advice that the City Attorney gives generally is confidential, and I see no need to report, monthly or otherwise, to the Ethics Board on requests for opinions that come to me.

The Ethics Code now has two manners in which issues may be brought before it, either by complaint or by request for an advisory opinion from the person covered by the code. I believe those are sufficient. Similarly, at the top of page 5, where there is a suggestion of a more formal discovery system, I believe much of this information can be obtained under the public records law. I am not aware of deficiencies in our current system, or that it need be made more adversarial.

C. Matters that are outside the jurisdiction of the Ethics Board:

A number of suggestions relate to how the City should operate its website and other policies that are within the jurisdiction of the City's Information Technology Department, and not the Ethics Board. I do not believe the Ethics Board should consider them. A number of items suggested by Ms. Konkel relate to questions under the Lobbying Law, or the Open Meetings Law, none of which are within the jurisdiction of the Ethics Board. Similarly, I have commented on education and training of alders and others, which I also believe is outside the jurisdiction of the Ethics Board.

CC: Brenda Konkel