

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

Date: May 9, 2018

MEMORANDUM

TO: Common Council Executive Committee

FROM: Michael P. May
City Attorney

RE: City of Madison Procedures for Employee Complaints

Council President Baldeh asked me to prepare a memorandum on the various City procedures for handling employee complaints. For the reasons explained in this memorandum, this is not to be an inquiry into any specific complaint. Rather, it is staff's effort to educate the Council on existing processes in the City, and the necessary separation of executive and legislative roles relating to supervision of employees.

Setting aside whether the CCEC has the legal authority at this time to inquire into such issues,¹ it is important to review those procedures outside the context of any specific complaint. Individual employee complaints are very fact-intensive. The legislative function generally operates at a much higher level, considering matters of policy and budgeting.

As an initial matter, remember that we are dealing with government employees. Private employees often serve under the legal doctrine of "employees-at-will" and may be discharged for any nondiscriminatory reason. The law is different for government employees. Before a City employee may be disciplined or fired, the employee is entitled to certain due process rights: notice of the charges and a right to be heard. To maintain due process, the City cannot change the system on an ad hoc basis for some employees. So for the Council to weigh in on some employee complaints and not others would raise due process concerns. That is why the City has developed the detailed systems it has for discipline and handling of employee complaints.

1. Employee Grievance Procedures under Sec. 3.53(9), MGO.

Prior to Act 10, most employees had grievance procedures in the collective bargaining agreements (CBA) with the City. With the removal of CBAs for general municipal employees, the City (working with employee associations) developed the procedure in

¹ The CCEC's legal authority is a real concern that I suggest be addressed in a separate memo and discussion. The CCEC has direct jurisdiction over certain areas by ordinance, such as Council rules (sec. 33.13(3), MGO) and state and federal legislative issues (sec. 33.13(4)(b), MGO). All of its remaining jurisdiction must come from referrals of matters or assignment of duties from the Common Council (sec. 33.13(4)(a) and (d), MGO). This issue has not come from a referral or assignment from the Council, and my observation is that many matters that the CCEC has taken up in recent years fall into that class.

this ordinance. Sec. 3.53, MGO, is the City's Civil Service Ordinance. The section cited above covers complaints over matters in the City's vacation and leave ordinance (sec. 3.32, MGO) and the City's Compensation Plan (sec. 3.54, MGO). It also covers any matter that might be in the General Municipal Employee Handbooks, or a matter grievable under the City's Personnel Rules (matters other than discipline and safety). It contains a three-step administrative process, followed by mediation and arbitration to resolve disputes.

This procedure in many ways mimics what employees had under the CBAs. It is an important protection for employees, and provides management with a valuable procedure to assess, contest, or settle a complaint from an employee. There is no legislative involvement with the process.

The General Municipal Employee Handbook draws a distinction between those matters grievable under its procedures and matters of discipline and safety, subject to the process in the Personnel Rules:

"Employees may file grievances using the following procedure regarding the general interpretation, application, compliance with, or enforcement of City of Madison ordinances §3.32 and §3.54 or this handbook. However, matters covered under the City's Personnel Rules or a valid labor contract shall be subject to the appeals and grievance procedures contained therein, unless otherwise specified."

2. CBAs.

Employees represented by unions have grievance procedures relating to all matters in their respective CBAs. As noted above, these tend to be similar to the procedures in sec. 3.53, MGO. CBAs are excluded from the coverage of sec. 3.53.

3. Professional and Supervisory Employees.

Because they never had a union contract and are not covered under the General Municipal Employee Handbook, these employees in CG 17, 18, and 19 have a procedure to appeal actions taken by the City, (other than discipline or safety matters) , in the Employee Handbook for Professional, Confidential and Supervisory Employees. They are not covered by the procedure in sec. 3.53, MGO, discussed above, but the procedure in the handbook is similar:

<http://www.cityofmadison.com/human-resources/benefits/employee-handbooks>

As noted, the Handbooks have language drawing the distinction between those items of discipline and safety, subject to the Personnel Rules, and those items grievable under the Handbooks.

4. Personnel Rules.

Matters related to safety or discipline are covered in section 9 of the Personnel Rules, which allows for appeals to a Hearing Examiner and up to the Personnel Board. By contract, this section applies to Department and Division Heads:

<http://www.cityofmadison.com/sites/default/files/city-of-madison/human-resources/documents/PersonnelRules.pdf>

The inclusion of safety complaints in this procedure was required by the Legislature after Act 10.

5. APM 3-5.

This policy governs claims of harassment or discrimination. It has a detailed process for investigating such claims. APM 3-5 has proven very helpful both in finding instances of discrimination and in disproving claims that lacked substance.

A person who believes he or she has been harassed or discriminated against within the policy may file a complaint. The complaint may be filed with the employee's supervisor, the Department/Division Head, the DCR, or with the Mayor if the complaint is against a Department/Division Head or a Mayoral aide. In most cases, upon receipt of the complaint, it is referred to the Department or Division Head, who is to appoint a neutral investigator. DCR is to assist in the investigation. If the complaint is against a D/D Head or Mayoral Aide, it is assigned to the Mayor's office to appoint one or more investigators, and the Mayor is the final decision maker on corrective action.

Following the investigation, the investigators prepare a Final Report. DCR and the City Attorney may assist in the preparation of this report, which the D/D Head is to either accept, and proceed to a corrective action plan, or ask for further investigation. The investigators do not impose discipline; that is the duty of the D/D Head or the Mayor.

<http://www.cityofmadison.com/mayor/apm/3-5.pdf>

Although not of the detailed nature of the procedures of APM 3-5, Sec. 39.02(6)(e), MGO, provides for a procedure for informal complaints of discrimination in the Affirmative Action Division.²

² The ordinance provides: "Complaints. The Citywide Affirmative Action Plan shall contain an informal complaint procedure. The procedure shall permit applicants and employees to bring complaints of prohibited discrimination to the Division of Affirmative Action for investigation and informal problem-solving and resolution. Department and Division heads shall cooperate with the Affirmative Action Division Manager in carrying out the informal complaint procedure, but nothing contained in the informal complaint procedure may relieve an appointing authority of responsibility for selection, discipline and discharge decisions. The Affirmative Action Division Manager shall provide every person who makes a complaint with information, in writing and in accessible format, on filing formal complaints with local, state and federal agencies empowered to receive such complaints. Such information shall

6. Complaints to Supervisors.

Either by job description or contract, each supervisory employee is responsible for the oversight and operation of the employees they supervise. Thus, as City Attorney, I am responsible to see that City employees in the Attorney's Office comply with City ordinances and resolutions, Administrative Procedure Memoranda, including the Rules of Conduct in APM 2-33³, and any other policies adopted for the operation of our office. This shows that – outside of the special procedures set out above -- the supervisors or D/D Heads are the ones who will receive complaints about the employees they supervise. The supervisor or D/D Head must investigate and undertake any necessary disciplinary action. Under these chain-of-command procedures, if I were to receive a complaint about an employee in another department, I would refer it to the D/D Head for that employee.

If the complaint is about a supervisor or D/D Head, the complaint may be made to the Mayor's office. The Mayor will determine what steps to take next, which may be to determine the complaint is without merit, or that an internal or external investigator(s) should look into the matter.

This procedure also is available for complaints about policy or systemic issues. Just as a D/D Head is required to supervise employees and see that they follow the rules, the D/D Head is required to see that all city programs and services under his or her control operate properly. If some program is not working, or having deleterious results, the supervisory staff and D/D Head should be made aware of the issues and be given the opportunity to solve the problem. As in individual complaints, these systemic complaints may rise up the administrative chain to the Mayor's office. If considered a valid concern, they may result in internal or external review, and if administrative responses do not solve the problem, the concerns may lead to the legislative responses noted below.

7. Appropriate Legislative responses.

You will note one thing common to all the procedures set out above: None of them involves elected officials, other than the Mayor as chief executive of the City.

There are good reasons for this: Investigations of individual complaints often take months to complete and can require the review of hundreds of documents and multiple witness interviews. The Council is ill equipped, in terms of time and resources, to deal with the necessary investigative measures required. For example, the laws under which the Council operates do not allow for confidential investigations, which may make for uncooperative witnesses. Another reason is simply that, by adopting sec. 3.53 and the Employee Handbooks and Personnel Rules, the Council has effectively delegated

include applicable time limits.”

3 <http://www.cityofmadison.com/mayor/apm/2-33.pdf>

these duties to the executive department. This delegation maintains the division between executive/administrative action and legislative policy action.

Thus, if an alderperson would hear of a complaint by an employee (or former employee) the correct response would be the same as if I received one about an employee in another Department: refer the matter to the appropriate D/D Head, or if necessary, to the Mayor. In addition to Mayoral review, the Council could pass a resolution to provide for an internal or external review of an individual's complaint, if the complaint was serious enough or involved a high government official.

The Council's role on questions of systemic problems is perhaps more important. A good example is the recent review of the Police Department, where an outside expert was brought in to review systemic issues in a particular department. The report of the outside expert provides a blueprint for the Council and the department to consider policy changes. The Council also can use the power of the purse to provide for a review of departments by putting funds in the annual budget dedicated to such purposes.

In all cases, these procedures protect the supervisory chain, while allowing the legislative body to get reports and make policy decisions.

There are at least two other reasons the Council should remain on the policy or legislative level and not get involved in individual complaints. First, to the extent Council members interview or gather information from potential complainants or witnesses, the alderpersons will likely make themselves into potential witnesses in any investigation or lawsuit. The alderpersons may also put themselves in a position where they must recuse themselves from considering any reports that come out of an investigation. Second, to the extent the Council members wish to become sounding boards through public hearings or even private interviews outside the established rules for hearing employee complaints, the Council will have opened a door that cannot be closed. Any city employee with a complaint about any matter will insist on similar treatment, and the issues could go on and on. The city might even face claims of discrimination if some employees are given a public forum to air their concerns while others are not.

Conclusion.

The City has a plethora of established procedures to address complaints from City employees. If the Council wants to get involved in this process, it should be on a policy level, not an individual case level. The Council certainly may examine those processes, and may request reviews by internal or external investigators, on individual cases or on systemic issues. The Council generally should not engage in such investigations itself.

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