

CITY OF MADISON
ETHICS BOARD

KATHERINE M. HURTGEN,
Complainant,

v.

Ethics Board Matter #44164

GREGG McMANNERS,
Subject of Complaint.

MOTION TO DISMISS THE COMPLAINT

In response to this Complaint, Gregg McManners files the following Motion to Dismiss. Ms. Hurtgen has alleged that Mr. McManners violated the Madison General Ordinances, and that these violations are also violations of the City's Ethics Code. The allegations are baseless; however, even if entirely merited they are outside the Ethics Board's jurisdiction, based on well-established precedent. Faced with similar allegations previously -- *i.e.*, purported violations of Sec. 3.35(4), MGO, based on independent legal violations -- the Board has determined that it lacks jurisdiction. This precedent exists for good reason and plainly applies here.

**I. THE ETHICS BOARD LACKS JURISDICTION TO HEAR THE
COMPLAINANT'S ALLEGATIONS.**

The Complaint against Mr. McManners alleges that he violated Sec. 3.35(4) of the City's Ethics Code by violating City Ordinance or some other law:

- Allegation 1 (Hiebing Group, Inc. Contract) asserts that Mr. McManners failed to comply with Sec. 4.26, MGO, the City's purchasing rules.
- Allegations 2 and 4 (Studio Gear Contract, Tai Ping Carpet Contract) assert that Mr. McManners failed to comply with Sec. 39.02, MGO, the City's Affirmative Action Ordinance.

- Allegation 3 (Friends of Monona Terrace) argues that Mr. McManners failed to follow Sec. 3.35(5)(c), relating to outside employment.
- Allegation 5 (Time Card Fraud) argues that Mr. McManners violated unspecified provisions of federal or state employment law.

Each one of these claims relies on an independent, underlying legal violation,¹ which the Complaint then seeks to bootstrap into a violation of Sec. 3.35(4) of the City's Ethics Code. Based on well-established precedent, the Board lacks jurisdiction to hear such allegations. And for good reason. If every Ordinance or other legal violation was also an ethics violation under Sec. 3.35(4), the Board's jurisdiction would be almost infinite. The Board, moreover, has no special expertise in Affirmative Action law, City purchasing rules, or state and federal labor law; thus, it is ill-equipped to determine whether there even exists a predicate legal violation on which to hang the ethics charge. Even attempting to make these judgments will involve the Board in satellite litigations about purchasing requirements, affirmative action rules, etc.

In a Memo dated June 2011, City Attorney Michael P. May discussed the slippery slope the Board is headed down. In this earlier case, it was the members of the Ethics Board who were accused of failing to do their legal duty under the law.² There, as here, the Complaint alleged violations of the Ethics Code, Sec. 3.35(4), based on other alleged violations. In this Memo,

¹ Here, at least, the underlying violation that then becomes the Ethics Code violation is an ethics rule. This is the only instance where the Board even arguably has jurisdiction, but even here jurisdiction is not well-founded. Ms. Hurtgen alleges "outside employment," but the rule fails to apply under the factual circumstances she alleges. Mr. McManners, moreover, sought and obtained legal advice on this precise issue, which he then faithfully applied. This advice shows that the assistance Monona Terrace provided to the Friends of Monona Terrace group was not unlawful. It also effectively immunizes Mr. McManners from Ms. Hurtgen's allegations. *See* Wis. Stat. § 19.59(5) ("It is prima facie evidence of intent to comply with . . . any ordinance enacted under this section when a person refers a matter to . . . [an] attorney for a local governmental unit and abides by the advisory opinion, if the material facts are as stated in the opinion request."). Ms. Hurtgen was well aware of this advice but makes no mention of it in her Complaint. Moreover, if this matter goes to hearing, Mr. McManners will present evidence to show that the assistance provided to the "Friends" group by Monona Terrace is typical of help routinely provided to similar groups by other city agencies.

² This Memorandum is attached as **Ex. A** hereto (Memorandum to Common Council Organizational Committee from Michael P. May, City Attorney, dated June 3, 2011.)

Attorney May cited to two previous cases where the Ethics Board had found that, when a Complaint charges a violation of Sec. 3.35(4), MGO, based on the alleged violation of some other law or ordinance, the Board lacks jurisdiction. This conclusion holds, moreover, regardless of whether the non-ethics violations are proven.

Since the Ethics Board could not rule on a Complaint against its own members, the 2011 case was heard by the Common Council Organizational Committee (CCOC). Consistent with the Board's prior rulings, the CCOC dismissed the 2011 Complaint against the members of the Ethics Board for lack of jurisdiction. Attorney May's legal discussion of the issue in 2011 applies with equal force here:

2. Ethics Code Allegations. The complaints allege that the actions complained of violate Sec. 3.35(4) of the Ethics Code. This section reads as follows:

Responsibility of Public Office. Incumbents are agents of public purpose and hold office for the benefit of the public. They are bound to uphold the Constitution of the United States and the Constitution of this State and to carry out impartially the laws of the nation, state, and municipality. They are bound to discharge faithfully the duties of their office regardless of personal considerations, recognizing that the public interest must be their primary concern. Incumbents shall adhere to the rules of work and performance established as the standard for their positions by the appropriate authority. They shall not exceed their authority or breach the law or ask others to do so, and shall work in full cooperation with others unless prohibited from so doing by law or by officially recognized confidentiality of their work.

3. Discussion. In two recent cases, the Ethics Board dealt with allegations that a violation of Section 3.35(4) had occurred. In each instance, the Ethics Board dismissed the complaint for lack of jurisdiction.

The first case was Davin Pickell v. Janet Piraino, Legistar No. 21193. The complaint alleged that Ms. Piraino, when acting as Chief of Staff to then Mayor Dave Cieslewicz, lied to employees at Overture during the discussion of privatization of the Overture Center. On February 9, 2011, the Ethics Board dismissed the

complaint for lack of jurisdiction. You can find the Legistar file here:

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The second case was Davin Pickell v. Dave Cieslewicz, Legistar No. 22274. The four complaints combined in this case alleged that Mayor Cieslewicz appointed Dierdre Garton to the Overture Ad Hoc Committee when Ms. Garton had an inherent conflict of interest, that he failed to take action when she failed to disclose that interest at meetings, that he failed to review her filed Statement of Interests and that he failed to take action when she did not recuse herself from decisions on the Overture Ad Hoc Committee. On June 2, 2011, the Ethics Board dismissed this complaint for lack of jurisdiction. Although no minutes of that meeting yet exist, you can find the Legistar file here:

<http://legistar.cityofmadison.com/detailreport/?key=24622>

Similarly, in this case, the allegations are that sec. 3.35(4) of the Code was violated when the Ethics Board members made their decisions on prior complaints.

This section of the Ethics Code is unique. It does not deal with the traditional concerns of the Ethics Code regarding conflicts of interest or financial gain, nor is it a procedural rule such as how hearings are to be conducted or requiring the filing of Statements of Interest.

As City Attorney, I have some concerns about the nature of the complaints, in that the gist of the complaints seem to simply be that the Ethics Board made incorrect rulings in its prior cases. I question whether that constitutes a violation of the Ethics Code [footnote omitted]. I know that Assistant City Attorney Steve Brist has expressed similar concerns to the Ethics Board.

First, if the allegations are meant to show that the Ethics Board members failed to "discharge faithfully the duties of their office," the allegations are fatally deficient. The complaint alleges they made an incorrect decision. The duties of their office are to make decisions on Ethics complaints. If the complaint is that the Ethics Board members "exceed[ed] their authority or breach[ed] the law," I am concerned that any ruling that such an allegation constitutes a potential violation under the Ethics Code opens up a very slippery slope. Every instance in which the City or City officials were found to have acted improperly -- say, a court ruling that a tax assessment was too high -- could then be turned into a complaint under the Ethics Board for failing to follow the law. Carried to its logical conclusion, a complaint could be filed against any City

official, employee, or board member who received a parking ticket because they "breach[ed] the law." That certainly is not what this section is aimed at.

Second, the prior rulings of the Ethics Board seem to reflect a view that this section of the Code is a general statement of policy only, and that the section is not meant to be an independent basis for violations of the Ethics Code, except perhaps in the rarest of circumstances. . . . this section is not meant to provide an independent basis for other complaints about a failure to make a correct decision when that decision is entrusted to a City official.

Ex. A, pp. 2-4.³

For the reasons outlined in Attorney May's 2011 Memo, as quoted, including the specific cases Mr. May identified, the Board should dismiss Ms. Hurtgen's Complaint for lack of jurisdiction. Dismissal not only is required by well-established precedent, it is also required by what are very sound and valid policy reasons. The Board has no special expertise in City purchasing rules, Affirmative Action rules, federal or state labor law, or any of the myriad other claims of legal violation that might be brought before it masquerading as a Sec. 3.35(4) violation. If the Board intends to decide whether Mr. McManners has "discharge[d] faithfully the duties of [his] office" (Sec. 3.35(4), MGO), it better prepare for an onslaught of Complaints, with no logical stopping point, because it will be expanding its jurisdiction almost infinitely.

II. MANY OF THE EVENTS IN THE COMPLAINT ARE TIME-BARRED; THUS, THE COMPLAINT ALSO FAILS UNDER THE BOARD'S PROCEDURE RULE.

Even if the Board had jurisdiction, and could hear this Complaint without getting bogged down in non-ethics-related legal questions, the Complaint also fails because it violates the Board's one-year time limit on the filing of a complaint. *See* Madison Ethics Board Policy Manual, Section IV.A.1 ("Rules of Procedure") ("No action may be taken on any complaint

³ *See also* Memorandum (Aug. 23, 2016) from City Attorney Michael P. May to Members of the Ethics Board ("In the past, the Board has found such allegations [*i.e.*, those Ms. Hurtgen is making here] are not within its jurisdiction, that is, alleging a violation of some other law or rule outside the Ethics Code, and then asserting this also is a violation of 3.35(4), generally is not within the jurisdiction of the Board.").

which is filed later than twelve months after a violation of the Ethics Code is alleged to have been violated.”).

Much of Ms. Hurtgen’s Complaint is barred under this Procedural Rule. Based on the dates she specifies, many of the events alleged fall outside the applicable time period. In other cases, moreover, the events she alleges would very likely fall outside the applicable time period if the Complaint were specific enough to allow for such a determination--*i.e.*, the allegations are overly vague as to time.

The Complaint was filed May 6, 2016. Under the one-year rule, therefore, the actions/conduct at issue must have occurred on or after May 6, 2015. Despite this requirement, the Complaint contains many allegations that are either expressly time-barred or time-barred based on when the events actually occurred (but where the Complaint does not specify). *See, e.g.*, Allegation 1 (“Effective January 2015, the City began using the new software program, Munis which, among other applications, tracked the contract acquisition process. . . . Upon information and belief, whenever Hiebing submitted an invoice, either McManners or Zeinemann would draft an LPO, then issue and sign a check to Hiebing.”); Allegation 2 (“By April of 2015, Studio Gear’s invoice totaled \$25,760 which pushed it over the \$25,000 limit.”); Allegation 3 (“McManners instructed Hurtgen to manage the checkbook and compile information for the tax returns for Friends of Monona Terrace, . . . This was work that Hurtgen did on City time, at the direction of McManners, on many different days . . .”); Allegation 4 (“Despite taking exception to the affirmative action process, [Tai Ping Carpet] . . . was paid over \$579,600 in 2014. . . . McManners . . . chose to look the other way while this conduct, on the part of one of Zeinemann’s direct reports, was taking place.”); Allegation 5 (After Jeff Griffith was let go in October 2014, Hurtgen reviewed and approved timecards until about February or March

2015; “Hurtgen raised the issue [alleged timecard irregularities] to McManners and Zeinemann who dismissed Hurtgen’s convictions . . .”).

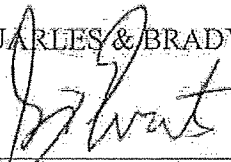
In each of these examples, the Complaint covers events before May 6, 2015, or fails to specify the time frame of the events in question. Accordingly, dismissal of the Complaint is also required by the Board’s Procedural Rule--and prior practice as well. *See Davin Pickell v. Tom Carto*, Legistar 22255 (June 2, 2011) (Complaint dismissed without prejudice under one-year Procedural Rule due to lack of specific information as when the incidents alleged had actually occurred), <https://madison.legistar.com/Calendar.aspx> [Board Minutes of June 2, 2011 Meeting].

III. CONCLUSION

Dismissal is required, based on well-established precedent, because the allegations in the Complaint fall outside of the Board’s jurisdiction. This jurisdictional principle makes sense because, without it, the Board’s jurisdiction expands infinitely to cover, potentially, any violation of federal, state, or local law, all of which might become fodder for a “failure to faithfully discharge duties” charge under Sec. 3.35(4) of the Ethics Code. Most of the Complaint is also barred by the Board’s Procedural Rule, which prohibits consideration of matters more than a year old.

Respectfully submitted this 16th day of September, 2016.

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

Date: June 3, 2011

MEMORANDUM

TO: Common Council Organizational Committee
(Alders Cnare, Bidar-Siefaff, Bruer, Ellingson, King, Schmidt, Palm, and
Clear)

FROM: Michael P. May, City Attorney

RE: Ethics Complaints Against Ethics Board Members

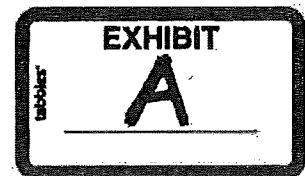
This matter is scheduled to be heard at a special meeting of the CCOC on June 28, 2011, at 4:30 p.m., in Room 103A of the City-County Building. This memo hereby gives notice of this meeting, at which the CCOC will conduct a jurisdictional hearing and, if jurisdiction is found, will proceed to a hearing on the substance of the complaints.

Copies of this memorandum are being sent to the complainant, Davin Pickell, and to the Ethics Board members named in the complaints, David Albino, Eric Hands, Laura Rose and Carol Weidel.

Attachments:

Attached to this memorandum are the following documents for your information for the hearing.

- Attachment A: A copy of Sec. 3.35, MGO, the City's Ethics Code.
- Attachment B: The Ethics Board Policies, which establish the procedure for hearing complaints. The CCOC is to follow these procedures.
- Attachment C: Complaints filed by Davin Pickell against Ethics Board members Albino, Hands, Rose, and Weidel.
- Attachment D: The Ethics Board minutes of the meeting of December 8, 2010, which contain the decisions underlying the above complaints, along with the original complaints that were the subject matter of the decisions of December 8, 2010.



Analysis:

1. **Factual Background:** In 2010, Davin Pickell filed complaints under the Ethics Code against Mayor Dave Cieslewicz and Deirdre Garton. Copies of those complaints are included in Attachment D. The Ethics Board took them up at a hearing on December 8, 2010, and dismissed the complaints. The minutes of the Ethics Board meeting in which the complaints were dismissed is also contained in Attachment D.

In March, 2011, Mr. Pickell filed complaints under the Ethics Code against four members of the Ethics Board: David Albino, Eric Hands, Laura Rose, and Carol Weidel. In those complaints, Mr. Pickell alleges that the Ethics Board members violated the Ethics Code in making their determinations of December 8, 2010.

There are a total of eight complaints, one each against the four members of the Ethics Board (EB) mentioned above for their decision in the prior complaint against Cieslewicz, and one each against the four members for their decision in a prior complaint against Garton. Because the complaints are identical in each case, the CCOC really has only two matters to consider: The complaint against the EB members related to the Cieslewicz decision, and the complaint against the EB members for the Garton decision. Whatever the CCOC would decide as to one member of the EB would have to hold for all the other members, because the complaints are identical.¹

2. **Ethics Code Allegations:** The complaints allege that the actions complained of violate Sec. 3.35(4) of the Ethics Code. This section reads as follows:

Responsibility of Public Office. Incumbents are agents of public purpose and hold office for the benefit of the public. They are bound to uphold the Constitution of the United States and the Constitution of this State and to carry out impartially the laws of the nation, state, and municipality. They are bound to discharge faithfully the duties of their office regardless of personal considerations, recognizing that the public interest must be their primary concern. Incumbents shall adhere to the rules of work and performance established as the standard for their positions by the appropriate authority. They shall not exceed their authority or breach the law or ask others to do so, and shall work in full cooperation with others unless prohibited from so doing by law or by officially recognized confidentiality of their work.

¹ I note that one complaint, against Ethics Board member Weidel related to the Garton decision, names Weidel on the face of the complaint but makes reference to EB member Rose in the body. Because I assume this was a clerical error and that the complainant could simply amend the complaint, I suggest the CCOC consider this to have been properly brought against EB member Weidel.

It is not exactly clear what provision of this section is alleged to have been violated. The gist of the complaints appears to be that the Ethics Board made a wrong decision, either substantively or procedurally, when they made the decisions referenced in Attachment D to this memo.

For example, with respect to the decision made by EB members in the complaint against Ms. Garton, the complaint alleges that the Board "used a somewhat illogical line of reasoning" in that "there was no expectation the complaints would be thrown out due to improperly following administrative procedures or other trivialities."

In the complaint with respect to the Ethics Board handling the complaint against Mayor Cieslewicz, it is alleged again that the EB used "a somewhat illogical line of reasoning." The complaint alleges that in finding that the Board did not have jurisdiction over the Complaint against the Mayor, "the conclusion was incorrect, and illogical." The complaint alleges that decisions on the grounds on lack of jurisdiction are themselves a violation of the Ethics Code and indicate a fundamental misunderstanding of the purpose of the Board, the concept of jurisdiction, and how a complaint is to be evaluated.

3. **Discussion.** In two recent cases, the Ethics Board dealt with allegations that a violation of Section 3.35(4) had occurred. In each instance, the Ethics Board dismissed the complaint for lack of jurisdiction.

The first case was Davin Pickell v. Janet Piraino, Legistar No. 21193. The complaint alleged that Ms. Piraino, when acting as Chief of Staff to then Mayor Dave Cieslewicz, lied to employees at Overture during the discussion of privatization of the Overture Center. On February 9, 2011, the Ethics Board dismissed the complaint for lack of jurisdiction. You can find the Legistar file here:

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As City Attorney, I have some concerns about the nature of the complaints, in that the gist of the complaints seem to simply be that the Ethics Board made incorrect rulings in its prior cases. I question whether that constitutes a violation of the Ethics Code.² I know that Assistant City Attorney Steve Brist has expressed similar concerns to the Ethics Board.

First, if the allegations are meant to show that the Ethics Board members failed to "discharge faithfully the duties of their office," the allegations are fatally deficient. The complaint alleges they made an incorrect decision. The duties of their office are to make decisions on Ethics complaints. If the complaint is that the Ethics Board members "exceed[ed] their authority or breach[ed] the law," I am concerned that any ruling that such an allegation constitutes a potential violation under the Ethics Code opens up a very slippery slope. Every instance in which the City or City officials were found to have acted improperly – say, a court ruling that a tax assessment was too high – could then be turned into a complaint under the Ethics Board for failing to follow the law. Carried to its logical conclusion, a complaint could be filed against any City official, employee, or board member who received a parking ticket because they "breach[ed] the law." That certainly is not what this section is aimed at.

Second, the prior rulings of the Ethics Board seem to reflect a view that this section of the Code is a general statement of policy only, and that the section is not meant to be an independent basis for violations of the Ethics Code, except perhaps in the rarest of circumstances. That is, this section is meant primarily as an exhortation, urging incumbents to carry out their duties faithfully and to act within the law. Under this view, while there might be some egregious actions by an incumbent that also would be a violation of sec. 3.35(4) -- say, for example, conduct that amounted to misconduct in office under sec. 946.12 of the State criminal statutes or malfeasance in office warranting removal from office under sec. 17.12 of the State statutes – this section is not meant to provide an independent basis for other complaints about a failure to make a correct decision when that decision is entrusted to a City official. (One wonders whether a complaint under the City's Ethics Code would provide much incentive for proper

² The CCOC asked for the opinion of the City Attorney as to whether EB decisions or Ethics decisions when entrusted to the CCOC were subject to any appeal. The ordinance does not reference any appeal rights, which means that the decisions are subject to review by the Circuit Court under common law certiorari procedures under Wis. Stat. Sec. 753.04.

behavior to an official facing criminal charge for misconduct or removal from office for malfeasance).

The CCOC should measure the complaints in this case in light of the prior decisions of the Ethics Board and the concerns about application of sec. 3.35(4) to actions of City officials.

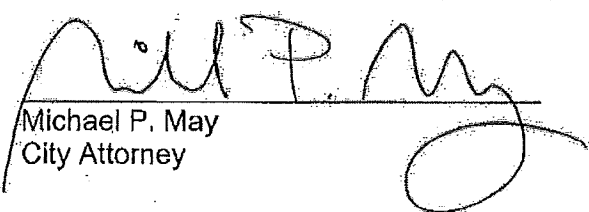
4. **Procedure.** Pursuant to the policies established by the Ethics Board, the CCOC should first have a jurisdictional hearing and then have a hearing on the substance. By this memorandum, I have given notice to the parties that the CCOC may conduct both of these hearings at the same meeting

The jurisdictional hearing simply asks: Assuming everything in the complaint is true, does it allege a violation of the Ethics Code? If the answer is no, then there is no jurisdiction to proceed any further. The complaint would be dismissed for lack of jurisdiction. Assuming that there is jurisdiction, the next question is whether the actual conduct, as shown by the evidence at the hearing, actually constituted a violation of the Ethics Code.

Because this is a quasi-judicial hearing, members of the CCOC should not discuss this matter outside of the hearing, nor should they receive any ex parte communications from third persons about the hearing. All the information that the CCOC should consider should be that presented at the hearing, and the materials presented with this memo.

I will separately email to the CCOC members some training material we provided on quasi-judicial hearings as background information.

I have been informed by EB member Laura Rose that she is on vacation at the time of the scheduled hearing. I invited her to make a written submission. The CCOC will have to determine whether to include the complaints against Ms. Rose at the scheduled hearing, or whether to reschedule to accommodate her.



Michael P. May
City Attorney

Enclosures

CC: Davin Pickell Michael Jacob
David Albino Drew Cochrane
Eric Hands Michael Verveer
Laura Rose
Carol Weidel
Steve Brist