

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

Date: August 31, 2018

FORMAL OPINION 2018-001

TO: Mayor Paul Soglin
All Alderpersons

FROM: Michael P. May
City Attorney

RE: Water Utility General Manager Contract: Legistar Item 52323

The renewal of the contract of the Madison Water Utility (MWU) General Manager (GM) is on the Common Council agenda for next Tuesday, September 4. The lead body, the Finance Committee, has recommended approval. The Water Utility Board (WUB), in a vote on Tuesday, August 28, failed to vote to approve the appointment and renew the contract. The vote was two in favor of renewal and three opposed. Thus, the contract comes before the Council with no recommendation from the WUB.

Mayor Soglin and Council President Baldeh asked for my opinion on whether the Council may approve the new contract under these circumstances.

Question Presented

May the Common Council vote to confirm the appointment and renew the contract of the Water Utility GM despite the failure of the WUB to concur in that approval?

Short Answer

Yes, Common Council approval is all that is required to renew the appointment and the contract.

Sec. 13.02, MGO, would appear to require the concurrence of the WUB. That section, however, is also subject to sec. 3.54, MGO, which provides in relevant part (3.54(9)(f), MGO) that:

If the employment contract so states, then in the event any provision of the employment contract directly conflicts with any City ordinance, . . . the provision of the employment contract shall apply . . .

The contract with the Water Utility Manager has a clause that it overrides the ordinances in the event of a conflict. The contract also provides for renewal by the

Common Council alone, so those terms take precedence over any possible conflict in the ordinances.

Analysis

1. The Ordinances.

Sec. 13.02, MGO, says:

13.02 - APPOINTMENT OF GENERAL MANAGER; DUTIES.

- (1) The Water Utility General Manager shall be appointed by the Mayor, in consultation with and subject to the approval of the Water Utility Board, and further subject to the approval of the Common Council. The position shall be filled according to Sec. 3.54(9)(f) of these ordinances. The General Manager shall hold her/his position pursuant to the terms of the employment contract provided for in such section. The Water Utility General Manager shall be the chief executive of the Water Utility and shall perform those duties generally described in this chapter and such other duties as may be delegated by the Board.

This section of the ordinances has three distinct provisions: First, that the Manager is appointed by the Mayor, and the appointment must be approved by the Council and the WUB. Second, the position is filled pursuant to sec. 3.54(9), MGO. And third, that the GM holds the position “pursuant to the terms of the employment contract provided for in such section.”

Sec. 3.54(9), MGO, is titled “Compensation of Managerial Employees,” and 3.54(9)(f) provides in part:

If the employment contract so states, then in the event any provision of the employment contract directly conflicts with any City ordinance, resolution, regulation, rule or policy, the provision of the employment contract shall apply, except that nothing in any employment contract shall be interpreted as modifying the provisions of Sec. 3.35.

. . . .

All contracts described herein shall be approved by resolution of the Common Council.

2. The General Manager's Contract.

The existing contract with the GM provides in section IV. B.:

The Mayor, in his/her sole discretion, may offer renewal of this Agreement to the General Manager. The Mayor shall notify the General Manager of the intent to renew the Agreement at least ninety (90) calendar days before the expiration of this Agreement. Failure to so notify the General Manager shall extend the term of this Agreement by the time of the delay in actual notification (but in no event for more than ninety (90) days) without change in the General Manager's anniversary date, and shall not act as a full renewal of the Agreement. **Renewal of the Agreement and of its provisions shall be subject to the approval of the Common Council.** In the event the Common Council does not renew this Agreement, this Agreement will remain in effect for ninety (90) days following the non-renewal action by the Common Council or five (5) years from the date of this Agreement, whichever is later.

(Emphasis added).

The contract also provides in section II.B.:

In the event a provision of this Agreement conflicts with any City ordinance, resolution, regulation, rule or policy, the provision of the Agreement shall control, except that nothing herein shall be interpreted as modifying the obligations or terms of Madison General Ordinance 3.35.

3. Is there a conflict?

One reading of sec. 13.02, MGO, is that the concurrence of the WUB is only required on the *initial* appointment of the GM, and that any subsequent renewals are not truly appointments. I am uncertain as to that reading, although as will be seen below, the correct understanding of the interplay between the ordinances and the contract language gets us to the same spot. Because there is no contract on the initial appointment, there is nothing that could conflict with the ordinances, and the approval of the WUB as to that initial appointment is required. Since the GM now has a contract, we must examine its terms.¹

4. Assuming a conflict between the ordinances and the GM's Contract, the Contract terms govern.

The language in 3.54(9)(f) is clear. If the manager's contract has a provision to the effect that the contract governs over inconsistent ordinances, then the contract terms prevail. Sec. 13.02, MGO, specifically mentions 3.54 (9), MGO, meaning that it is to be

¹ I note a real anomaly here: No matter what, if a majority of the Council wanted to confirm the appointment, the Council could always adopt an ordinance to repeal the language in sec. 13.02 on the concurrence of the WUB, and then approve the contract without any legal concerns.

read as part and parcel of that section. The GM's contract has language that the contract governs over conflicting ordinances.

Sec. 3.54(9)(f), MGO, excludes one ordinance and one ordinance only from the rule that a managerial contract governs over conflicting ordinances. The excluded ordinance is sec. 3.35, the City's Ethics Code. If the Council intended to exclude other ordinances, like sec. 13.02, MGO, it could have done so. But it did not.

Further, sec. 13.02 itself states: "The General Manager shall hold her/his position pursuant to the terms of the employment contract provided for in such section." Although not in itself conclusive, this is further evidence that sec. 13.02 recognizes the paramount importance of the managerial contract.

Thus, the GM's contract, if it conflicts with sec. 13.02, MGO, is the governing document.²

5. The GM Contract Provides for its renewal by the Common Council.

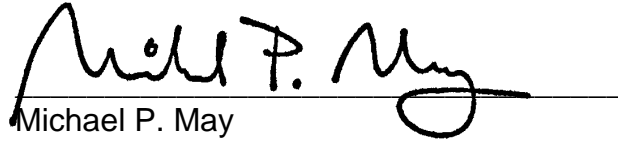
The language from the GM contract quoted above makes it clear that renewal of the contract is to be done by the Common Council. The Council certainly is within its rights to refer the contract and the appointment to the WUB, but any action by the WUB is a recommendation only. The Council decides whether to approve the renewal of the contract and appointment of the MWU GM.

Conclusion

Under the City's ordinances and the existing contract between the City and the Madison Water Utility General Manager, the Common Council determines whether to renew the contract. Any action by the Water Utility Board is simply a recommendation to the Council.

We recommend that the Human Resources Department work with the City Attorney to review all managerial contracts to be sure they do not raise questions such as discussed here. For example, both the Library Board and the Monona Terrace Board have some authority over the appointment of managers. These need to be reviewed to be certain they are consistent with the managerial contracts.

² There are two other minor points. First, it is important that 3.54(9)(f), MGO is there, as it avoids any argument that the resolution approving the contract overrides the ordinance – a legal problem as resolutions cannot override ordinances. However, with 3.54(9) on the books, it is an ordinance that modifies other ordinances – a legal convention used all the time. This provision authorizes managerial contracts that control over conflicting ordinances. Second, at a recent Common Council meeting, I made reference to sec. 13.02 and the propriety of referring the contract to the WUB. At that time, I had neither reviewed the GM's contract, nor studied the authority in 3.54(9), MGO. Such are the risks of opining on the fly.



Michael P. May
City Attorney.

SYNOPSIS: Under current ordinances, both the Water Utility Board and the Common Council must approve the initial appointment of the General Manager of the Madison Water Utility. The interplay between the language of the current General Manager's contract and other city ordinances means that the Common Council alone approves renewals of the contract and the appointment.

CC: Maribeth Witzel-Behl
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