

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

Date: October 14, 2016

**MEMORANDUM**

TO: Ethics Board

FROM: Michael P. May, City Attorney

RE: Meeting on October 25

This memorandum accompanies the agenda for your meeting on October 25, 2016. The meeting has three agenda items. One is a reminder about the Jeffrey Clay Erlanger award. The second is to resolve the motion to dismiss which was held in abeyance. After consulting with the Chair of the Board, we are not scheduling a hearing with witnesses until this matter is resolved. The final item is a proposed amendment to the Ethics Code on which the Board should make a recommendation to the Common Council. This item is to be taken up second because Alder Verveer may be able to attend the latter part of the meeting.

**Reports of Other City Departments.**

At the last meeting, I was asked to solicit reports from other City agencies on the allegations of the Complaint. Attached are the reports of Purchasing (Count 1, the Hiebing Contract and to an extent, Count 4, the Tai Ping contract); Affirmative Action (Count 2, the Studio Gear contract and Count 4, the Tai Ping contract); Madison Public Library, Senior Center and Parks (Count 3, Friends of Monona Terrace); and Human Resources (Count 5, Time Cards).

**Other Questions.**

After the last meeting, James Cobb, a member of the Ethics Board, posed two questions to me. I responded to Mr. Cobb that it would be more appropriate to respond formally to the entire Board.

These are the questions posed:

"I'd like your advice on the 12-month limit soon. Also, if your name appears on an exhibit, how does that affect your standing as our advisor?"

**The Twelve Month Time Bar.**

This rule is reflected both in the Board's policy manual and in the ordinance. Sec. 3.35(12)(c), MGO, states as follows:

No action may be taken on any complaint which is filed later than 12 months after a violation of this Ethics Code is alleged to have occurred.

This limitation on the Board's authority acts much like a statute of limitations. Unless the complaint includes an allegation of a violation of the Code within 12 months prior to the filing of the complaint, the matter must be dismissed.

In this case, the complaint was filed on May 6, 2016. The 5 claims in the complaint should include allegations that a violation of the Ethics Code occurred on or after May 6, 2015. The ordinance is clear that the *complaint* must contain information for the Board to see that a violation is *alleged* to have occurred within the 12 month period. Normally, lacking such information in the complaint, the Board would dismiss the matter. If the complainant believes such acts occurred within 12 months, the dismissal would be without prejudice and a new complaint with the new information could be filed. If there was no way to make such allegations, the dismissal would be final.

The Board should not have to guess as to when the claimed violation occurred. It must be *alleged* to have occurred within 12 months.

If the Board carefully reviews the complaint filed in this case, together with the exhibits and other materials, several of the claims do not allege actions by Mr. McManners within 12 months of May 6, 2016. Count 2, the Studio Gear contract, only alleges that in "April/May 2015" the Studio Gear contract went over \$25,000; the exhibit 8 attached which shows payment of over \$25,000 is dated April 9, 2015. Count 4, the Tai Ping contract, states that the purchase was completed in 2014. Count 5, the Time Card allegations, states that Hurtgen's knowledge ended in March of 2015.

In this regard, I caution the Board against relying on allegations of a "pattern or practice" of Ethics violations that are outside the 12 month bar. There is nothing in the Code about patterns or practices, and if the matter is barred, it is barred. Such allegations might be very relevant to an employee's supervisor considering discipline, but they cannot bring time-barred complaints within the Ethics Board's jurisdiction.

#### **Documents of the City Attorney.**

In exhibits submitted in this proceeding, there are several documents authored by members of the Office of the City Attorney (OCA), including some authored by me. The question is whether the existence of these documents in any way impacts my ability to advise the Ethics Board.

The short answer is that it makes no difference under the circumstances of this case. In each of those instances, I was acting as City Attorney or my assistants were acting on my behalf. We are advising our client, as I am doing in this case.

With respect to items authored by others in my office, even if they were to become fact witnesses, I could continue to advise the Board under the rules established by the Supreme Court, SCR 20:1.11(f).

As to my own writings, they are all in the nature of legal opinions, not factual matters that might come before the Board in a hearing. If this Board were to ask my advice on the same legal questions, my advice to the Board would be the same. I would give the same advice regarding the Friends of Monona Terrace, the Board's jurisdiction when allegations of 3.35(4) stand alone (in fact, I have already effectively given that advice to the Board), and as to the propriety of the Hiebing contract, the Friends transactions and the Time Card dispute.

If there were factual questions relevant to the Board's determination such that I might become a witness – if I had seen or talked to persons involved in the transactions at issue here – then there might be an issue. But this has not occurred and no party has suggested as much.

Moreover, I am not certain that even in that instance it would impact my ability to advise the Board. The Supreme Court rule in such circumstances states that an attorney is generally not to be a witness and "act as an advocate" in the proceeding. SCR 20:3.7. I am not an advocate in this proceeding; my client, the City of Madison, is not a party, and I am simply advising one of the constituent agencies of my client as requested.

The Board is to give documents in the record from the City Attorney's office the weight the Board thinks they deserve.

CC: Kathy Hurtgen  
Gregg McManners  
Greg Everts  
Lisa Elkins  
Jessica Kramer  
Jill Bender

