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28 December 2010

HAND DELIVERED

City Clerk
City of Madison
City-County Building
210 Martin Luther King, Jr. Blyd.
Madison, WI 53703

Re: Ethics Board Complaint
Davin Pickell v. Tom Carto

Dear Clerk:

Enclosed for filing and distribution to the Ethics Board please find the enclosed Motion.

Sincerely,

A handwritten signature in black ink, appearing to read "Rick Petri", written over a white background.

Rick Petri

RP:srp
25471.108089
City Clerk lt
Enclosure
cc: Davin Pickell VIA U.S. MAIL
Thomas Carto VIA EMAIL tcarto@cityofmadison.com
Steven C. Brist VIA EMAIL sbrist@cityofmadison.com
Attorney James D. Sweet VIA EMAIL
Attorney Catherine J. Furay VIA EMAIL

4826-8878-5672, v. 1

CITY OF MADISON ETHICS BOARD

In the Matter of the
Complaint of
Davin Pickell against
Tom Carto.

Motion for Reconsideration

TO: DAVIN PICKELL

NOTICE OF MOTION

Now comes the Respondent, Tom Carto, by Murphy Desmond S.C. by Attorney Marinus (Rick) J.W. Petri who hereby moves to reconsider your finding of subject matter jurisdiction rendered on December 8, 2010, such motion to be heard at a time and place to be determined by the Board.

BACKGROUND

On December 8, 2010, this Board determined it had subject matter jurisdiction over Respondent Carto based upon a Complaint filed by Pickell on or about November 9, 2010. On that same date, this Board found it had no jurisdiction over a Complaint filed by Pickell against Deirdre Garton pursuant to your Policy Manual, sec. IV.7. The substance of the Garton Complaint was that she utilized City resources for a private advocacy purpose regarding the then-continuing negotiations over the future of the Overture Center. It appears to us that the Board decided the jurisdictional issue as to the Garton Complaint because Garton was not an "incumbent" as that word is defined in sec. 3.35(3)(c), M.G.O., although it wasn't clear what the basis for the decision was in terms of the discussion of the Board members prior to the "no jurisdiction" vote.

The Board then discussed and voted that it did have jurisdiction over the Carto Complaint. The sum and substance of that Complaint was that Carto failed to prevent the "wrong" committed by Garton. Both the Garton and Carto Complaints allege that sec. 3.35(5)(b), M.G.O., was violated by virtue of allegedly using City computers, employees and letterhead; Garton for the "sending" of the message and Carto for "...letting...Garton...use City owned equipment..." Preceding the above quoted language from the Complaint, it alleges "Tom Carto...bears ultimate responsibility..." for Garton's alleged acts.

At the time of the hearing you were given copies of the following documents which, understandably, you could not review at the time of the December 8, 2010 hearing. Those documents included the Operation and Cooperation Agreement between the City and MCAD, Carto's Employment Agreement with the City, Carto's Employment Agreement with 201, Carto's job description and a copy of sec. 3.41, M.G.O. entitled "privilege." Sections of those documents were referenced in argument to the Board.

ARGUMENT

Logically, it is hard to fathom a conclusion which exonerates Garton and puts Carto to his proof. Having said that, I realize full-well that you were given a raft of documentary evidence and argument and that it was logistically impossible for you to absorb all that material on December 8, 2010.

Allow me to reiterate and to expand upon that which was presented to you on December 8, 2010. To the extent that I refer to material not presented or to arguments not made, they are presented herein as an offer of proof.

A copy of what we believe to be the email in question is attached hereto. The distribution list to which the email was sent was produced by 201 staff, on 201 letterhead, using 201 computers and was signed by Deirdre Garton, Chair of the 201 Foundation. All the email encourages is for those who have any interest in the Overture Center, to get involved in the then-occurring discussion regarding Overture's future. It was not and is not an advocacy piece; it did not take a position regarding various governance models then under consideration. Carto is President of 201 but is non-voting. Garton is Chair. Carto has and had no authority to prevent Garton from sending out the email. If the claim made by Pickell is one alleging a "failure to supervise," it must fail because given the relationship between the parties, there was no *respondeat superior* relationship giving rise to a duty to supervise.

In terms of what may be relevant in the Operation/Cooperation agreement, I invite you to review section VIII.i. which states in part:

The District [MCAD] agrees to...develop new audiences for the arts through community outreach and educational programs and services; participate in advancing the public agenda for local arts development;..."

(Emphasis added).

The "advocacy piece" to which Pickell objects is precisely directed as "community outreach" and encourages "participation in advancing the public agenda." In short, the email must be recognized as consonant with what is expected, indeed required, pursuant to the Operation/Cooperation Agreement.

We turn next to the Employment Agreement between the City and Carto. That agreement is replete with provisions granting extremely broad discretion consistent with other agency heads and to weigh in on public policy issues (the job description demands

On January 4, 2007, Carto and 201 State executed an agreement by which Carto was named President and CEO of 201. Sec. I.D. states:

Carto's performance of the duties and responsibilities provided herein is subject to any requirements or limitations set out in the City Agreement and any agreement or Memorandum of Understanding between MCAD and 201 State.

The folding in of the "City Agreement" into Carto's contract with 201 necessarily includes the "direct conflict" language providing Carto with safe harbor from any purported conflict between his duties and responsibilities on the one hand and the Ethics Code on the other.

You were also provided a copy of Carto's job description. That job description includes the following particularly relevant material:

Represent the interest of MCAD and the OCA and maintain liaisons with a diverse group of elected officials (City, County and State) and administrators. Foster and support legislation favorable to MCAD and its tenants. Plan and direct a continuous program of public information and outreach. Serve as the advocate and official spokesperson for MCAD...

Provide vision, leadership and direction to the OCA and works closely with MCAD to develop and evaluate the business model...

Serve as a key spokesperson and advocate for the arts community, arts education and the work of the OCA at local, regional and national levels.

This small part of the full job description bears witness to the broad scope of job functions and the advocacy expectations of the City as also reflected in the Employment Agreement. The job description commands that Carto "...serve as the advocate"..."evaluate the business model..." and "...advocate for the arts community..." The Complaint seems to suggest that advocacy (along with failure to prevent the Garton email from being disseminated) is a violation of the Code. Yet there can be no doubt that the City's

expectations are that Carto perform all aspects of his job description within the context of his Employment Agreement.

To interpret the Ethics Code as contravening the expectations of the City as manifested in any number of documents is to place Carto in an untenable position so preposterous that it would have served as a model for a Greek tragedy.

Last, but not least, you were provided a copy of sec. 3.41, M.G.O., which states:

3.41 PRIVILEGE.

The conduct of a public officer or police officer, although otherwise in violation of an ordinance, is privileged when undertaken in good faith and in an apparently authorized and reasonable fulfillment of any duties of such office or position or in reasonable accomplishment of a lawful investigation or arrest. Such privilege may be considered in any decision to prosecute such officer and is a defense to prosecution. (Cr. By Ord. 6772, 10-5-79; Renum. By ORD-07-00048, 4-12-07)

As one of many City boards with sanctions powers, I think it important for you to consider the implications. By its very lack of explicit limitations, this is an ordinance of general applicability to be considered by all City agencies and officials with sanction powers. In addition, when there are two or more ordinances which potentially reach the same subject matter, they must be construed to be consonant with each other if at all possible.

Within the context of the Carto Complaint, when one considers that he acted within the scope of his job description, consistent with his duties pursuant to the Agreements with the City and 201, that he acted as a "public officer" in "good faith and in apparently authorized and reasonable fulfillment of any duties of such office..." as those terms are used in sec. 3.41. "Good faith" could not be more clearly manifested if the act(s) were indisputably within the scope of job duties.

I would also add as additional weight to the above argument, that sec. 3.41 was adopted in 1979, after the Ethics Code was already on the books. Under ordinarily accepted rules of statutory construction, a later-adopted ordinance is deemed to have modified a previously existing ordinance if they touch upon the same subject matter.

The Ethics Code proscribes certain conduct by incumbents. Sec. 3.41 carves out circumstances under which a facial ethics violation is "forgiven"; that is, if an act is done in good faith and in reasonable reliance on apparent authorization (as articulated above), it serves as a defense to otherwise proscribed conduct. Such is the case in the instant matter.

CONCLUSION

You are to weigh whether there is a violation. On one side of the scale is an assertion Carto failed to prevent Garton from sending an email (see attached). On the other side of the scale is the Operation/Cooperation Agreement, Carto's City Employment Agreement, Carto's 201 Employment Agreement, Carto's job description and sec. 3.41, M.G.O. The scale tips decidedly in one direction.

We think your initial determination regarding jurisdiction was not well articulated and we ask you to reconsider that initial judgment. We also extend to Mr. Pickell an invitation to present evidence in written response which he believes he has to support his conclusion regarding City employees, City equipment, etc., because factually we know there is no such evidence. Bear in mind, too, that Mr. Pickell's Complaint never included the email in question which we are providing assuming we "read between the lines" of his Complaint properly.

Allow us to also add the following: City department and division heads are frequently asked to weigh in on policy issues and they should do so even in the face of disagreements among elected officials. One integral function of these high-level positions is advocacy and they accomplish this through the use of City resources as part of their jobs. That reality is important to protect and the Ethics Code and interpretations of the Code must consider this vital aspect of the public intercourse necessary to the proper functioning of a democratic society.

Your prompt and positive consideration of this motion is appreciated.

Dated this 27 day of December, 2010.

MURPHY DESMOND S.C.
Attorneys for Respondent

By: 

Marinus (Rick) J.W. Petri
State Bar Number: 1012373
33 East Main Street, Suite 500
P.O. Box 2038
Madison, WI 53701-2038
(608) 257-7181

From: Inside Overture [mailto:reply-54@pacmail.em.marketinghq.net]
Sent: Friday, October 22, 2010 12:16 PM
To: Young, Jay
Subject: Now's the time - Overture needs you!

Stay Connected! [Facebook.com/OvertureCenter](#)
[Twitter.com/OvertureCenter](#)

Dear Friend,

Overture Center's 2010/11 season is well underway!

Last night, the main lobby hosted a free concert featuring Chicago singer/songwriter Blake Thomas, and all three main theaters will be up and running this weekend. CTM's *Good Night Moon* is in The Playhouse; star-on-the-rise Ingrid Michaelson is in Capitol Theater; and the one and only Joan Rivers is in Overture Hall. The new cycle of gallery exhibits opens next week, Madison Opera is in rehearsals for *The Marriage of Figaro*, and the local band The Gomers should draw a capacity crowd for their three free Kids in the Rotunda performances on Saturday.

All of that artistic expression and activity make me proud to be a part of the Overture family. Keeping all of these programs alive and well is important to the economy and civic life of our community. And keeping these programs alive and well is, at least in part, up to you!

You might have seen some more news on our future lately. The Overture Ad-Hoc Committee approved the Focus Model and recommended that the City Council adopt it, with a few conditions. *Everyone is at the table working hard to come to an agreement: the mayor's office, the City Council leadership and the Overture negotiating team.*

As we work through this process, we'd love for you to stay engaged in the conversation. Community leaders need to hear from the people they represent, on every side of any given issue.

- **Contact your alder.** As you know, your alder is elected to represent you. They can best do that when they know what you think and feel. [Click here to find out how you can contact your alder.](#) Then email, call, or both!
- **Speak at a meeting.** Overture's future will be on the agenda when the Common Council meets on Tuesday, November 9 at 6:30 pm in Room 201 of the Madison Municipal Building, 210 Martin Luther King Boulevard. When you arrive, register for your three minutes to tell your Overture story.
- **Write a letter to the editor,** [use this online letter form](#), and [sign the petition](#) **did.** Tell the whole community why Overture is important to you. It couldn't be easier -- [just click here](#) and scroll to the bottom of the page to submit your letter.

And, as always, feel free to write or call with questions.

Sincerely,

Deirdre Garton
Chair
[201 State Examination](#)

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