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

Date: September 9, 2016

MEMORANDUM

TO: Mayor Paul Soglin

FROM: Michael P. May
City Attorney

RE: Report on Preliminary Investigation into Allegations at Monona Terrace

Katherine Hurtgen, an employee at Monona Terrace (MT), filed a complaint in May, 2016, at the Ethics Board against Monona Terrace Executive Director Gregg McManners. Hurtgen also made claims of employment discrimination, which have now resulted in a complaint filed with the State Equal Rights Division. Our office waited to process the Ethics Board Complaint until we had responded to the discrimination claim.

The gist of most of the five counts of the Ethics complaint relate not to traditional concerns of the Ethics Board, such as conflicts of interest or possible personal financial gain, but failure of Mr. McManners to properly carry out his duties as Director of MT.

You asked me to investigate the complaint and report to you, as chief executive of the City and supervisor of city employees, as to what had happened and whether these were matters that might require discipline by you, McManners' supervisor.

To my surprise, the Ethics Board (EB) found it had jurisdiction over these claims. In 2011, the EB rejected a series of complaints surrounding the changes at Overture, in many instances finding that the only claim was that an employee failed to properly carry out his or her duties. Indeed, at one point the entire EB faced complaints under the Code for making improper rulings under the Code. That matter was heard by the CCOC, which rejected jurisdiction.

The ongoing matter before the EB limits my ability to conduct an investigation without creating a conflict or the possibility of becoming a witness. I could cure that by appointing another attorney to advise the EB, but since the matter is scheduled for a hearing on September 22, 2016, you indicated I should report on those matters that were of public record, and supplement my report upon the conclusion of the EB hearings.

Claim One: Failure to follow Sec. 4.26, MGO, in approval of contract with Hiebing Group.

On November 3, 2015, the Common Council approved a contract with the Hiebing Group (Legistar No. 40254). The claim is that although the Council approved a sole source contract on the grounds that Hiebing was the only firm available to do the work, pursuant to sec. 4.26(4)(a)(2), MGO, in fact Hiebing was not the only firm available.

I am not at all sure what to make of this claim. The Executive Director believed that Hiebing was effectively the only firm available; the Council found it was the only firm available; an employee at MT disagrees with that finding, and this is alleged to violate city law and the Ethics Code. On its face, the resolution approved by the Council is perfectly legal under sec. 4.26, MGO

Perhaps more importantly, at least two other exceptions in sec. 4.26, MGO, could have been applied to approve this sole source contract. It is undisputed that Hiebing provided these services for many years, and sec. 4.26(4)(a)(7), MGO, allows a sole source for a consultant who worked for the City such that it is more efficient to continue to use the consultant who provided work in the past. In addition, the exception in 4.26(4)(a)(9), MGO, is a catch-all that allows a sole source whenever "authorized by law, rule, resolution, or regulation." This sole source contract was authorized by a resolution of the Council.

Thus, the contract and the process followed was legal three times over.

I find no basis for the claim of illegal action by Mr. McManners; indeed, the claim appears to reflect a gross misunderstanding of the City's contracting rules. Ms. Hurtgen is an Associate Director at MT and acts as the Business and Finance Manager. She should be knowledgeable of City purchasing procedures.

Claim 2: Violation of Affirmative Action Ordinance in Studio Gear Contract.

This claim alleges that McManners violated the City's Affirmative Action Ordinance. The contract with Studio Gear was an open purchase order. In these instances, when a vendor crosses the $25,000 threshold in the AA ordinance, the vendor is to file an AA plan with the City. Here, it is alleged that when Studio Gear passed that threshold, Hurtgen brought it to the attention of Mr. McManners. McManners allegedly told Hurtgen to continue purchases with a City P-card, which would not trip the filing requirement. Hurtgen alleges that she refused to do so, that AA noticed that Studio Gear had gone over the threshold and asked for an AA plan. Studio Gear refused and, per City ordinance, the vendor was debarred from further business until a plan was filed.

As with the first claim, I struggle to determine the basis of the claim. The allegations – even accepted at face value with no chance for a response by Mr. McManners -- boil down to a claim that a Manager suggested a course that would circumvent City ordinances; the Manager was told we cannot do that; it was not done. At least in my office, there are numerous times when employees discuss a course of action and one employee says, "No, we can't do that because of this City rule," and therefore the course of action is abandoned. I suggest this happens all over the City every day. But nothing contrary to law actually happens.

I conclude that this is not an act subject to discipline.

Claim 3: Friends of Monona Terrace

The claim here is simple: McManners violated the Ethics Code, sec. 3.35(5)(c), MGO, by requiring Hurtgen to provide assistance to the Friends of Monona Terrace. This section of the Code bars an employee from outside employment if it would impair their judgment. On its face, this is no claim. It may mean that *Hurtgen* violated this rule by helping Friends of Monona Terrace (Friends), but McManners did not. At the Ethics Board jurisdictional hearing, it was suggested that perhaps the section violated was 3.35(5)(b), which bars giving special privileges or advantages to any person.

As you know, the Friends and other such affiliated organizations (AO) of the City have had a checkered past. An employee of MT that assisted the Friends in the past was discharged and convicted of criminal violations for misappropriation of funds. It was after that incident that City agencies were warned not to allow employees to control the funds of these outside AOs. Earlier this year, the Council approved a new ordinance, sec. 4.29, MGO, regarding AOs, requiring that the AO be registered with the City Clerk, and barring employees from handling AO funds unless approved by the Mayor. In at least one instance (Parks Foundation), the Council approved a City employee working for the Foundation pursuant to a formal agreement.

The City ordinance contemplates some level of cooperation between the City staff and the AOs. Since these organizations raise and provide funds to the City to assist in City operations, there is a clear benefit to the City from the AOs, and a failure to provide such cooperation would be detrimental to the City. While it is always better to have a written agreement governing relationships with AOs, the ordinance does not require it, and if the City staff duties are relatively minor, the cost of a formal agreement may outweigh the benefits. My understanding is that the work done by Ms. Hurtgen is to make and keep track of deposits, to make out a few checks every year and deliver them to the Friends for authorization, and to turn over those records to the Friends for them to do their taxes. As Finance Director of MT, Ms. Hurtgen should be qualified for these minimal duties, and these do not seem burdensome or outside the range of "other duties as assigned" by a supervisor.

Mr. McManners asked our office back in 2012 about this arrangement, and I indicated I thought it was allowed. Last year, Ms. Hurtgen asked some Assistant City Attorneys about it, but the inquiry apparently was never answered.

I am unclear as to the basis for discipline based on these allegations, as I suspect that the City would afford similar privileges to any AO that provides substantial benefits to the City, and McManners asked our office about the arrangement. I do recommend that MT and the Friends memorialize the arrangement in a written contract, to delineate any duties undertaken by the City.

I cannot see any matter for discipline in these allegations.

Claim 4: Intentional Disregard of AA Requirements in Tai Peng Carpet Contract

The claim here is that McManners authorized a large (over $500,000) contract with Tai Peng, which company never filed an AA plan. The gist of the complaint is that McManners knew this and continued to authorize payments on the contract. I assume those payments were made by Hurtgen.

It is not clear to me where the responsibility lies between MT and Affirmative Action for policing compliance with the filing of the AA Plan. To make a judgment on McManners' actions will take further investigation, which will occur after the Ethics Board hearing on September 22.

I note that for purposes of the Ethics Board complaint, the challenged action appears to have occurred no later than 2014, beyond the 12 month limit for Ethics complaints in sec. 3.35(12)(c), MGO.

Claim 5: Failure of hourly Employees to Properly Use Timecards.

This claim (entitled "Timecard Fraud") essentially alleges that Hurtgen discovered that some employees were not properly swiping their timecards or otherwise recording their time. She brought this to the attention of McManners and he failed to do anything about it. In fact, the problem was eventually fixed, so I take it that Hurtgen's real complaint is that McManners did not fix it fast enough.

As with the other complaints, I am having some problem discerning the nature of this one. Presumably, we give employees a reasonable time to fix problems in the operation of their agencies, whether mere administrative issues or issues of legal compliance. Without further investigation, I cannot make a judgment whether Mr. McManners acted within a reasonable time. A full report on this item will have to await investigation after the Ethics Board hearing.

I note that this item, as with others, does not appear to allege any violation within the 12 months prior to the complaint, meaning the Ethics Board lacks jurisdiction.

Conclusion.

I conclude three of the five complaints cannot be the basis of discipline. The other two are not as clear. I will supplement this report when I am able to interview McManners and Hurtgen outside of my advising the Ethics Board.