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MEMORANDUM

TO: Mayor Satya Rhodes-Conway and Alders

FROM: Michael Haas

DATE: September 16, 2020

RE: Options for Investigating Alder Conduct During Council Meetings

Since the Common Council meeting of September 1, 2020, there have been calls for an investigation to determine whose voice was heard to utter an apparent gender-related vulgarity after a member of the public was introduced on Zoom to provide comments on an agenda item. The Zoom video did not activate to display the individual who spoke the vulgarity and therefore there is no video recording showing the identity of that person.

This memorandum outlines the possible options for both conducting an investigation and for imposing consequences on an Alder under various circumstances. There may be issues to consider regarding whether each of these options would be appropriate in this instance. In short, the Council has the ability 1) authorize an investigation, 2) consider a resolution on the topic to possibly reprimand or censure an Alder, 3) consider imposing a fine against an Alder, or 4) conduct a public hearing to determine whether an Alder should be removed from office. In my opinion, however, conducting an investigation pursuant to Administrative Procedure Memorandum (APM) 3-5 is not an option under these circumstances and neither is an investigation that is ordered by the Mayor.

Council-Authorized Investigation

Put simply, the Common Council has the authority to police its members for conduct that occurs on the Council floor during a meeting and that authority includes conducting an investigation. While there is no specific statute or ordinance that mentions investigating Alders or incidents at public meetings, the Council has broad latitude to authorize investigations and take action regarding incidents during its meetings. This authority is included in Wis. Stat. § 62.11(5) which states that the Common Council "shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public…."

The Council can initiate an investigation as a separate matter or as part of the other options outlined below. In this particular case, the goals of an investigation would seem to be a factual determination of exactly what was said and identifying who said it. The investigation might involve interviewing Alders and other participants in the Council meeting and determining whether there are any technological tools that could assist in making conclusions, such as examining Zoom data or completing an expert voice analysis.

Ordering that an investigation occur leads to the question of who should conduct such an investigation. In my opinion the City Attorney's Office or other City staff should not be involved in such an investigation for two reasons. First, there is not an allegation that a criminal statute or an ordinance has been violated which would normally involve law enforcement and possibly the City Attorney's Office. Second, the City Attorney's Office represents and provides legal counsel to the Common Council, making it difficult to conduct an investigation related to possible Alder conduct without creating a conflict of interest in our legal representation that could potentially violate the Supreme Court rules governing the conduct of attorneys. An investigation conducted by a third party removes those potential conflicts and allows our office the ability to provide legal advice to the Council, should it be needed or requested.

Resolution to Reprimand or Censure

The Council also has wide latitude to consider and pass resolutions expressing its collective sentiments or judgment on a variety of topics. This could certainly include a resolution to reprimand or censure an individual for statements made during a Council meeting, assuming, of course, the individual can be identified.

Fine for Disorderly Behavior

Wis. Stat. § 62.11(3)(c) states that Common Council meetings "shall be open to the public; and the council may punish by fine members or other persons present for disorderly behavior."

The statute does not describe any specific process for imposing such a fine, although basic due process would seem advisable, such as providing notice and an opportunity for the Alder to be heard and respond to any allegations. The statute also does not include a definition of "disorderly behavior." By comparison, the term "disorderly conduct" is defined for purposes of civil and criminal prosecutions as "violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance."

Public Hearing to Consider Removal from Office

The most severe alternative is considering the removal of an Alder from office. Wis. Stat. § 17.12(1)(a) provides that an Alder may be removed from office only by recall or by the Council after a finding of cause, which is defined as "inefficiency, neglect of duty, official misconduct, or malfeasance in office." Wis. Stat. 17.001.

Wis. Stat. § 17.16 outlines the process for removing an Alder for cause. Written verified charges (a notarized complaint) must be filed by any resident taxpayer. A speedy hearing

must then be held by the Council and the Alder must be given a full opportunity to present a defense against the charges, personally and by legal counsel. Under Wis. Stat. § 17.12(1)(d), removal of an Alder requires a three-fourths vote of all members of the Council, or 15 votes.

The costs and expenses of the hearing and any investigation of the charges are paid by the City. However, the Council may require the person bringing the charges to provide a $1,000 bond in order to pay for costs and expenses in the event the Council finds that the complaint was "willful and malicious and without probable cause."

Yesterday the City Clerk received a complaint from Shadayra Kilfoy-Flores, the individual who was introduced to provide public comment at the September 1st Council meeting. The complaint demands that the Mayor and Common Council "censure the individual responsible, who appears to be Alder Skidmore, and for you to join me in my demand for his resignation. This is my notification of a FORMAL complaint to begin the process of accountability." Our Office will be in contact with Ms. Kilfoy-Flores to clarify her complaint and her request, and will provide a follow-up communication to the Council.

APM 3-5

The most complicated question in this analysis is whether Administrative Procedure Memorandum 3-5 (available at APM 3-5) applies to situations such as a vulgarity being uttered at a Council meeting, presumably by an Alder. I will state up front that this is a gray area and there are valid arguments to decide this question in several different ways. Given the language of APM 3-5 as well as the history of its application and the apparent consensus that has developed over the years, it is my opinion that APM 3-5 cannot be invoked to require an investigation and to impose consequences under these circumstances.

As you know, the City's Administrative Procedure Memoranda are a series of policies, procedures and directives that have been issued by successive Mayors. APM 3-5 is entitled "Prohibited Harassment and/or Discrimination Policy." It was originally issued in 1996 and the current version was issued in 2012. APM 3-5 outlines typical provisions for an organizational harassment and discrimination policy – substantive definitions of and prohibitions on behavior that constitutes harassment or discrimination, a confidential complaint and investigation process, and possible consequences such as a corrective action plan and disciplinary action imposed by management staff.

The City Attorney issued Formal Opinion Formal Opinion 2017-003 three years ago which analyzed the question of whether APM's apply to the conduct of Alderpersons. In the Formal Opinion, City Attorney May stated:

> The APM, on their face, apply almost exclusively to city employees, not members of the Common Council. As such, they represent directives from the City's chief executive officer, the Mayor, to city employees who are part of the City's administration or executive branch. One APM (3-5, relating to prohibited harassment or discrimination) purports to cover the Alders, but a close examination shows that it directs city staff as to how they are to respond when a claim of discrimination or harassment is made against an Alder. It contains no authority to discipline the elected official.

The Formal Opinion explained how separation of powers principles led to the conclusion that the Mayor is not the supervisor of elected Alders and may not direct, by executive order, the conduct of the Council. For the reasons outlined below, I believe that conclusion applies to the incident which occurred at the September 1st Common Council meeting. As stated above, this is not to say that an investigation cannot take place, but only that APM 3-5 is not the appropriate vehicle or framework for such an investigation.

First, as to the resident who was introduced to provide public comment, APM 3-5 does not apply because it is clearly concerned with interactions among City employees and offensive behavior to which City employees are subjected. The resident who appeared at the Council meeting is not a City employee and that forum is not the resident's workplace.

But to recognize that a Mayoral directive cannot result in discipline of an Alder (only the Council has that ability), and that APM 3-5 does not apply to comments aimed at City residents who are not employees does not complete the analysis. There is also the question of whether a City employee can invoke the APM 3-5 process to allege that the comment of an Alder at a Council meeting created a hostile work environment.

In addition to the separation of powers concerns, the plain language of APM 3-5 indicates that it applies to harassment and discrimination between City employees or to behavior directed or aimed at City employees. Within the definition of "harassment," APM 3-5 describes "hostile environment" as "coworker to coworker behavior composed of abusive and degrading conduct directed against a protected class member that is sufficient to interfere with their work or create an offensive and hostile work environment." Significantly, APM 3-5 then states that "Harassment becomes a violation of this policy whenever an employee engages in any of the activities described above or in any similar behavior based upon a person's membership in a protected class." Based on this language, APM 3-5 does not appear to apply to the conduct of Alders because they are neither coworkers in, nor employees of, the City.

Admittedly this question is complicated by Section 8 of APM 3-5 which states:

> **Complaints Regarding the Conduct of Elected Officials:** Elected officials of the City of Madison are obligated to abide by the requirements of this policy. City government has limited or no effective means of disciplining its elected officials for violations of this policy. The most effective remedies for such violations are those belonging to the electorate - i.e. the power of the ballot box. However, the City has a legal obligation to investigate any allegations of such violations by its elected officials. Persons having such complaints should file them using the procedures set forth in this policy. Any person receiving a report or a complaint alleging a violation of this policy by an elected official shall forward such information to the Department of Civil Rights Director, the Human Resources Director and the City Attorney who shall then jointly conduct a prompt, thorough and fair investigation into such allegations. The elected official being investigated shall receive the Notice of Investigation as set forth below. The Department of Civil Rights Director, the Human Resources Director and the City Attorney shall, upon completion of their investigation, issue a public report in compliance with sec. 19.356, Wis. Stats., redacting such information as necessary to protect the identity of the

complainant and the cooperating witnesses.

This section expresses an intent to apply the APM 3-5 standards to elected officials and provide a means for some level of accountability, notwithstanding the conflicting language cited above and the inability to use APM 3-5 to impose discipline against an elected official. The issue may be further clouded by the fact that the City invoked the APM 3-5 process in one or two previous cases involving Alders, most notably when a sexual harassment complaint was filed by a City employee against an Alder.

In my opinion the proper way to reconcile Section 8 of APM 3-5 with both the separation of powers principles and the conflicting language in the remainder of the policy is to recognize the ability, and indeed the responsibility, of the City to investigate harassing or discriminating conduct of elected officials when it is directed toward or aimed at City employees. In the 2011 investigation report of the incident involving allegations of sexual harassment, the investigators noted that federal and state laws require employers to maintain and enforce effective anti-harassment and anti-discrimination policies on behalf of their employees. The investigation under APM 3-5 was terminated only because an outside attorney retained by the City concluded that the events did not take place in the workplace or a location that could be reasonably regarded as an extension of the workplace.

From the limited evidence available in this case, however, the gender-based vulgarity appears to have been directed at the resident appearing at the meeting and there is no evidence indicating it was directed at any specific City employee or employees. I certainly acknowledge and agree that the term that appears to be uttered on the Zoom recording is universally recognized as a patently offensive and inappropriate remark to be made, regardless of who is present or whether it is done in public or private. And I have listened to the pain expressed by City employees who are offended and hurt by being subjected to that type of language, regardless of who it was directed at. As a legal matter, however, I cannot conclude that APM 3-5 applies to speech or conduct of an elected official that is not directed at City employees or does not takes place in the employee's work environment.

Again, I also recognize that there are valid arguments to the contrary. To that point, I note that Deputy City Attorney Patricia Lauten and I discussed this matter with the Human Resources Director Harper Donahue, Civil Rights Director Norm Davis and Affirmative Action Manager Melissa Gombar, and we did not reach consensus regarding the applicability of APM 3-5 under these circumstances. The Department of Civil Rights (DCR) believes strongly that APM 3-5 should be used as a vehicle to conduct a fact-finding investigation to attempt to identify the speaker of the vulgarity.

DCR also noted that APM strongly encourages all City employees to report any violations of the harassment and discrimination policy. It also specifically states that managerial staff are required to promptly notify their Department/Division Head of all observed instances of harassment, and that any employee who fails to take appropriate action upon receiving a complaint of a violation is guilty of misconduct. One reading of this language would require managerial employees to take action to initiate an investigation under these circumstances. Indeed the question arose whether a City employee can invoke the APM 3-5 process to allege that the comment of an Alder at a Council meeting, directed towards a non-City employee, created a hostile work environment because the comment was overheard by a City employee. While I do not share that understanding, I believe that is a valid concern which deserves some attention.

In my opinion, APM 3-5 and its reporting requirement apply when a City employee is involved in the interaction that is the subject of the complaint, such as an allegation that an elected official assaulted, harassed, or discriminated against a City employee. In that case a manager or supervisor has an obligation to pass along any complaint they receive and to take appropriate action upon observing a violation. This can include, for example, a workplace incident involving a third party vendor and a City employee that creates a hostile environment and which the City is required to address. But I do not believe it was intended to apply to interactions between two individuals who are not employees of the City, even if City employees overhear or are a witnesses to the incident.

For example, if two employees of an outside vendor are involved in an argument while making a delivery to the City-County Building which involved harassment or discrimination, we would not invoke APM 3-5 regardless of the number of City employees that witnessed it or what their personal reactions were to the incident. In this case a gender-based vulgarity appears to have been lodged at one non-City employee by another non-City employee. While it is a novel issue in the City's experience with APM 3-5, in my opinion the more correct and defensible reading of the policy is that it does not apply under those circumstances.

The final factor in my consideration of the applicability of APM 3-5 is the City Attorney's conclusion in Formal Opinion 2017-003 and the approach initiated by the Common Council as a result of that Opinion. After concluding that the APM's generally do not apply to the Alders, City Attorney May recommended that the Council take action to formally regulate their conduct. In response, the Council formed the President's Work Group to Review Applicable Administrative Procedure Memoranda. While the work of the Work Group was interrupted, at last night's meeting the Council extended its deadline.

As a policy matter, therefore, the Common Council has acted, based on the analysis of this Office, as if the Mayoral directives of APM 3-5 do not apply to the conduct of Alders, at least short of an allegation of harassment or discrimination directed at a specific City employee. Given that the Council has not chosen to adopt for itself the terms of APM 3-5 in any legislation or other action, I do not believe I can construe APM 3-5 to apply to the circumstance of the September 1st meeting as a substitute for a Council determination to that effect.

Mayor-Authorized Investigation

Finally, for the reasons outlined in the analysis of APM 3-5, I also do not believe the Mayor can order that executive agency staff conduct a formal investigation of the Council or a specific Alder for comments during a Council meeting that are not directed at City staff and that do not establish a violation of a specific state or federal law.

Conclusion

Having surveyed the possible approaches that may be pursued or that apply to varying degrees, this analysis concludes where it started. The utterance of an apparent gender-based vulgarity occurred at an open meeting of the Common Council, a forum where the Council has the greatest interest in and authority to police itself and its members. Legislative bodies have the ability to investigate one of their own and censure a member of

the legislative body if warranted. The Common Council also has the ability to conduct an investigation, engage an outside third party to conduct an investigation and impose discipline appropriate for a member of a legislative body. To resolve any existing uncertainty about the applicability of APM 3-5, if the Council determines that an investigation is warranted, I recommend that it initiate a fact finding investigation or engage an outside third party to conduct a fact finding investigation and then determine whether further action is warranted.

Please feel free to contact me if you have any questions regarding this memorandum.