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August 16, 2019

Lew Hitts, Trustee
Village Council Members
Village of Newberry
302 E. McMillan Ave.
Newberry MI 49868

SUBJECT: Village Council questions and future action

Dear Mr. Hitts and council members:

Pursuant to our letter of engagement and the instructions provided by the village's attorney, Jeff Jocks, the first question posed was to determine whether a complaint can be made against Lori Stokes, Village President, for actions that may have been taken by President Stokes prior to her being seated as the Village President. The question is presumed to refer to actions taken by Ms. Stokes after her election, but prior to her being seated as the Village President. To the extent that there were any disputes between Ms. Stokes when she was a private citizen of the village is not an issue that involves the village. Further, the labor dispute which originated between the village and Ms. Stokes while Ms. Stokes was an employee of the village has been resolved.

As far as previous disputes involving village employees and Ms. Stokes, there was an earlier investigation done by attorney Todd Millar with a report presented to the village council. Therefore, this report is not meant to reinvestigate or rehash the report already provided by Mr. Millar, including its conclusions.

Employee handbook and personnel policies manual

Without being able to review the final arbitration agreement, it is difficult to determine whether any action could be taken against President Stokes by the village manager or any employee of the village. If the arbitration agreement and settlement entered into between the village and Ms. Stokes at the end of April, 2019 eliminated possible causes of action between the parties based upon Ms. Stokes's former employment with the village and her interaction with employees during her last year of employment and her termination from employment, then such issues are resolved. This is particularly true with respect to the interaction of Ms. Stokes while employed by the village, the village manager and the assistant village manager given the regulations contained in the Village of Newberry Personnel Policies Manual and the Village of Newberry Employee Handbook.

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The next issue involves the village manager's leave of absence to take care of a family member who was ill. As raised in attorney, Jay Zelenock's letter of November, 2018 the Federal Family Medical Leave Act (FMLA) and the paid Medical Leave Act under Michigan law apply to this issue. However, these acts only apply to employers with fifty (50) or more employees with respect to private entities. While technically the FMLA applies to public employers regardless of the number of employees, the FMLA itself states an employee will not be eligible under the FMLA unless he or she works within seventy-five (75) miles of fifty (50) employees of the employer (see 29 USC § 2601-2654). Also see *Tilley v Kalamazoo County Road Commission*, decided January 26, 2015, Federal 6th Circuit Court of Appeals. In the *Tilley* case, the Court of Appeals interpreted the FMLA regulation, 29 CFR 825.108d., as meaning that even a public agency is considered to be a covered employer under the FMLA and the public employee is only eligible for FMLA leave if his or her employer, the public agency, meets the threshold of having fifty employees within 75 miles of the municipality. See also 29 USC §2611, definitions, §2, "Eligible Employees". Appendix E of the Village of Newberry's Personnel Policies Manual discusses in the most general terms the Family Medical Leave Act. Although Appendix E is entitled "Village of Newberry Family Medical Leave Act", the Appendix itself does not appear to adopt the provisions of the FMLA above and beyond its application to the Village of Newberry. The problem with Appendix E is that it may, through its language, have added FMLA coverage to employees or at least created an issue of fact because Appendix E does not appear to put in qualifying language, such as an employee "could be eligible for FMLA benefits if, among other things, there are at least fifty employees within 75 miles of the Village." Otherwise the Village of Newberry Personnel Policies Manual does not apply to elected officials unless an elected official is also an employee. The same would be true with the Village of Newberry Employee Handbook which defines "employee" as "any classified or unclassified employee of the Village of Newberry, including any independent contractor or their employees." As such, any time off taken by the village manager was governed by section 8 on page 2 of the Village Manager's Contract. There is no information or claim in any of the documents or as a result of any of my interviews with elected village officials and staff which would indicate that the village manager's leave of absence in any way violated any contract or provision of the Village Manager Ordinance.

With respect to the Village Manager Ordinance as well as the Village Manager's Contract, I have reviewed village attorney, Jeff Jocks's detailed opinion letter dated December 13, 2018 to the village regarding village manager oversight. I concur with Mr. Jocks's analysis in its entirety. According to detailed information provided by the village manager, the recommendations in the December 13, 2018 letter to amend the Village Manager Contract and Village Manager Ordinance have not been implemented. That should be done forthwith in order to comply with existing state statutes and, in particular, MCL 65.8 of The General Law Village Act which specifically addresses the employment of a village manager.

In reviewing the Village of Newberry's Employee Handbook and Personnel Policies Manual, it is evident that neither the title nor the content of the handbook or the Personnel Policies apply to elected and "appointed officials" of the village. Elected officials include all council members, including the village president as well as appointed officials such as the planning commission. The policies apply to the village manager and all other employees. Throughout my interviews as well as the documents provided to me, I see no evidence of any violation of the personnel policies manual or the employee handbook on the part of the village manager or any other employee.

Regardless of the fact that the personnel policies and employee handbook do not apply to elected and appointed officials (who are not employees of the village), a review of Dr. James-Mesloh's employment contract has some points which the village council should take note of. First of all, employee benefits, under paragraph 10, page 2 of the contract states that:

All provisions of the village charter, ordinances and resolutions of the village relating to holidays, health insurance, life insurance, hospitalization, retirement plans from a pension, and other fringe benefits *and working conditions (as they now exist or hereafter may be amended)* that apply to all other salaried exempt department heads of the village shall also apply to Dr. James-Mesloh. (Emphasis added)

Thus, the council through its role as employer of Dr. James-Mesloh, as village manager, is responsible to ensure that the working conditions applicable to all employees are applicable to Dr. James-Mesloh, including her rights under the employee handbook as well as the Village of Newberry Personnel Policies Manual. Since Dr. James-Mesloh is employed by the village council as a whole, any actions or communications of an official manner between the government of the Village of Newberry and Dr. James-Mesloh must be taken through direct action of the village council and not through any actions of any individual council members, including the village president. With the village council properly controlling and administering its communication with the village manager, possible conflicts with the employee handbook and any possible violation of the personnel policies manual can be avoided in the future.

Conflicts of Interest, social media, emails

Your main conflict of interest with respect to pecuniary issues between Village President Stokes and Village Manager James-Mesloh has been resolved as of the end of April, 2019 when arbitration involving Village President Stokes's previous role as an employee of the Village of Newberry was finalized in a settlement. What remains is a conflict related to personal issues between the two parties which given the emails provided as well as through interviews of township elected officials, the village manager

and employees, clearly shows a conflict between President Stokes and Manager James-Mesloh on a personal level. This continues to hinder village governance.

Michigan law has long recognized that a conflict of interest deprives parties of their due process right in any fair and impartial administrative hearing (see *Crampton v Michigan Department of State*, 395 Mich 347 (1975) and *Barkey v Nick*, 11 Mich App 381 (1968)). In *Crampton*, the Court delineated these factors which suggest the appearance of a conflict of interest sufficient to overturn administrative decisions. The list describes inherently impermissible those situations in which a member of the administrative body,

- 1) has a pecuniary interest in the outcome;
- 2) *has been the target of personal abuse or criticism from the party before him;* (emphasis added)
- 3) is enmeshed in *other* matters involving petitioner; (emphasis added)
- 4) might have prejudged the case because of prior participation as an accuser, investigator, fact finder, or initial decision maker.

Michigan law is unclear on what constitutes an appearance of an impropriety or what we have called in the 13th Circuit based upon a ruling in 2001 by Circuit Court Judge Rodgers of Traverse City, the “appearance doctrine.” Judge Rodgers, in the case of *Citizens for Sensible Growth, Inc., v Charter Township of Elmwood, et al*, Grand Traverse Circuit Court No. 01-5451-CE, stated the following about the appearance doctrine:

While Michigan law is not clear on this point, it has been long recognized in other states that an appearance of impropriety is every bit as damaging as a conflict of interest. Both destroy the faith and trust that is integral to the operation of government in a representative democracy. As our government becomes increasingly more remote from its people, it seems important to strengthen the ethical requirements for those who participate in it. The people’s confidence in government cannot long be sustained if we turn a blind eye to behavior that creates an impermissible appearance of impropriety.

The evil lies not in the influence improperly exercised, but rather in the creation of a situation tending to weaken public confidence and to undermine the sense of security of individual rights which the property owner must feel assured will always exist in the exercise of zoning powers. *Mills v Planning & Zoning Commission of the Town of Windsor*, 144 Connecticut 493; 134 A2nd, 250 (1957).

Although Judge Rodgers’s case involved a matter before a zoning board of appeals, the principles of conflict of interest are applicable to the village council and its members with respect to boards, such as the village planning commission, the village’s

employees and the village manager. This does not preclude individual council members from having an opinion regarding the function of the village manager and incorporating the same in any reviews. However, if elected officials outside of the scope of their duties to the village are engaging in activities such as posting personal feelings (critical or not) toward an employee of the village or the village manager on social media or otherwise engage in personal confrontations outside of the scope of the relationship between the village council and the village manager and/or employees as provided in the village's ordinances, employment contracts, personnel policies, and employee handbook, it raises conflicts of interest. This is the essence of an appearance of impropriety. These in turn may allow an employee, including the village manager, to latch on to these instances of behavior outside of the scope of the relationship between the council, the village manager and/or employees and to raise conflict of interest issues in addition to other grievances which may result in arbitration or even litigation against the village.

Recommendations

The direct dispute involving the former employment of President Stokes while being resolved through arbitration appears to continue to impact the function of village government, including the village council's relationship with the village manager and vice versa. This, of course, trickles down to employees as well. Based upon the interviews that I have conducted, morale at the village is low. This results in a diminished quality of performance of both elected officials and employees of the village when providing services to its citizens. Service to the citizenry of the village is the primary job of both elected officials and employees. Good service should also be an ethical requirement starting with elected officials.

The village has already received numerous emails and memos from the village attorney regarding the lawful functions of the village council, including its members and president, as well as the village manager pursuant to statutes and ordinances. Regardless of past disputes, one of the first things that must occur is that the village manager attend, as required in her contract, all village council meetings and provide reports as stated in her employment contract. Although it appears that the village manager is otherwise performing her duties, a critical measure of performance includes the requirement to attend village council meetings regardless of any concern for the tempestuous nature of such meetings.

In addition, the village council must eliminate the tempestuous nature of meetings so that village business is accomplished in an orderly fashion without interruption from members of the public or members of the village council. This requires council members to attend meetings in their entirety and with members tempering their emotions regardless of any personal feelings of discontent or animosity between council members, any employees or members of the public who are attending the

meeting. A controlled environment for the meeting is crucial to getting business done and serving the citizens of Newberry. While public comment is a requirement for any public meeting, a public meeting is a business meeting open to the public. It is not a meeting driven by or run by the public. Rules and time limits for people who wish to address the council at the meeting need to be implemented and enforced. This includes rules addressing behavior of members of the public at the meeting in order to ensure that village business is accomplished. Village council members should be prepared for their meeting by information provided by the village manager well in advance of the meeting. This should include many items on what is called a "consent agenda" wherein village council members are properly informed that further discussion of some of the issues requiring village council approval is no longer necessary and can be consolidated and approved in a single motion at the beginning of the meeting. By having information well in advance, council members can direct questions to the village manager prior to the meeting so all council members are well prepared for the meeting. Items that require more detailed public discussion can be made part of the agenda thereafter. A rule of procedure should allow for a village council member to remove an item from the consent agenda if the council member feels that there is more discussion required on that particular matter.

The next item which the village needs to address is social media policy. The village website along with any social media sites attached to it must have a central administrator who controls content. Further, village officials, including all elected officials, should adhere to the media policy and refrain from commenting separately on village business and personnel such that all information needed by the public regarding the village remains within the purview of the village website and any social media pages which the village website participates in such as Facebook. While there has been much criticism of social media and various venues which I am sure council members are aware of, having at least one social media venue such as Facebook is usually helpful in addition to a website because a large number of the population only view social media sites such as Facebook for information. However, it is not mandatory for the village to have social media sites separate from the official website.

The website policy and social media policy should not prohibit individual elected officials, appointed officials, or employees from engaging in outside political activity whether supporting candidates at a local, county, state or federal level for elective office and similar protected political speech. What can be prohibited is using media sites by individual elected officials, appointed officials, or employees to criticize other appointed officials, employees or other elected officials on a personal basis. Doing so results in a lack of confidence by the public as to village governance as a whole. This detracts and diminishes the ability of the village to serve the citizens of the village which is the primary duty of village government.

It is my understanding that the village attorney has provided village council with draft policies regarding ethics. This can be incorporated either as a policy or as an ethics ordinance. Many ethics ordinances are generally known as “aspirational ordinances.” This means they are intended to encourage and promote the highest standards or ethical conduct and behavior by village officials and employees, but are not designed to be a punitive measure. Such an ordinance could have a board of ethics which can issue an advisory opinion on a dispute. However, the board of ethics would not be an adjudicative body and no finding of the board is to be deemed either conclusive or subject to any municipal official or, if extended to employees, employee penalties. Such a policy or ethics ordinance could be drafted in a manner which is restricted to elected and appointed officials of the village. This is what I recommend. It can also be extended to employees, however, any such ordinances cannot be in conflict with any collective bargaining unit of employees of the village or employee contracts. An ethics ordinance could go one step further and allow for the public censure of an elected official. However, this would not result in the removal of an elected official. To my surprise during my research, ordinances exist which have additional penalties such as forfeiture of office and removal proceedings. I have only seen such provisions involving larger cities, such as Detroit wherein the city charter specifically allows for this. I could find no case law or record where this actually happened in modern times. Absent a charter provision and additional support for such a sanction under existing law for a general law village (which I have yet to discover), such a penalty provision would appear to be unlawful for the Village of Newberry. This leaves the aspirational ordinance or an ordinance allowing for public censure of elected officials as the options.

Such an ordinance can address some of the problems that the village is currently facing due to internal personal disputes between some village officials, employees and the village manager. I suggest the following language which could be incorporated in such an ordinance:

A public servant shall not use any village time or property for his or her own political benefit or for the political benefit of any other persons seeking elective office, provided that the forgoing shall not prohibit the use of property or facilities available to the general public on an equal basis for due consideration pay.

A public servant shall not take any action or create the appearance of making a government decision outside of official channels.

A public servant shall not take any action or create the appearance of impeding government efficiency or economy.

A public servant shall not take any action or create the appearance of giving preferential treatment to any organization or person.

A public servant shall not take any action, or create the appearance, that adversely affects the confidence of the public and the integrity of the village.

A public servant shall not make any policy statements which promise to authorize or to prevent any future action, agreement or contract, when, in fact, the public servant has no authority to do so.

A public servant shall not act on behalf of the village in the making of contracts when, in fact, he or she has no authority to do so.

A public servant shall not make policies that affect the citizens of the community that are not authorized by the local government charter, code of ordinances, governing body, an authorized agency of the local government, or its adopted policies.

Additional provisions should also be provided for other types of conflicts of interest. The goal is to ensure the village council understands, whether it is the village treasurer, the village clerk or the village president, or any trustee, that they can only act as one body. This does not mean that unanimous votes will occur on items brought before the village council. However, when a vote is rendered and a decision is made, even those who voted against the decision must uphold the decision and not attempt to sabotage the same as part of a governmental function. Again, this does not mean that a council member who seeks elective office or wishes to recruit others to run for elective office is prohibited from engaging in political activity. This activity must be separate, though, from village government and if expressed online must be clear that the person engaging in political activity is doing so in their individual capacity as a private citizen and is not speaking or voicing an opinion regarding the village or its employees. Suffice to say such political activity should not include disparaging remarks pertaining to village employees whether on social media or otherwise.

The existing Village Manager Ordinance, as well as Ordinance No. 29 addressing administrative assistants do not contain specific penalty provisions if the ordinance is violated. This would be similar to any ethics ordinance that is adopted. Regardless, the village council should ensure that all elected and appointed officials are following village policies. This includes the village manager and, of course, all village employees as well. It is impossible for legal advice to quell passions which clearly exist amongst the elected officials as well as some employees of the village with respect to past acts and relationships between these parties. For village government to function, these passions must be suppressed with all elected officials, appointed officials, and employees performing their duties as required under existing laws, ordinances, and (as to employees) their respective contracts. If matters remain as they are, the village could be embroiled in additional litigation involving employment matters which will further sap village resources and money to the detriment of the citizens. It is also my

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recommendation that the village council consult with the village attorney to find a separate labor attorney to assist the village in any future disputes involving the council and employees or inter-employee matters. A labor attorney is a specialty that is separate from general practitioners of law. As discussed with Mr. Hitts and based upon a question raised by the village manager, this report includes attached to it a review and opinion by Steven Schwartz, a labor attorney from the Detroit area, pertaining to the evaluation of the village manager. Our firm has utilized Mr. Schwartz on numerous occasions to assist our municipal clients. Mr. Schwartz's firm is called Keller-Thoma and is located in Southfield, Michigan. Mr. Schwartz does have a home in northern Michigan and has been able to serve clients when we have requested his services throughout northern Michigan, which would include the eastern Upper Peninsula.

A final recommendation is that you have the village attorney or a member from his firm physically attend any council meetings that are upcoming to ensure order at the meetings such that village business can be completed. The village attorney could also provide additional training on running the meeting to ensure that village business is done in a manner which is respectful to both the public as well as respectful to the citizens at large by properly accomplishing the business of the village.

Sincerely,

Peter R. Wendling

PRW/tac

cc: Jeff Jocks (via email)