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Law Offices

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February 17, 2005

CONFIDENTIAL

Jason E. Green
City Attorney
City of Rapid City
300 6th Street
Rapid City, SD 57701

RE: City of Rapid City - Personnel matter
Our File No.: 427.200402

Dear Jason:

Please accept this letter in response to your inquiry dated February 11, 2005.

Question No. 1: Based upon the investigation you conducted, does the complaint state a cause of action for harassment?

Response:

The answer to your question depends upon whether there is a City policy or applicable law which sets forth the standard to which the allegations of the Charging Party may be judged. You have indicated that the "General Harassment Policy" was not adopted by the City Council so it is inapplicable. The only remaining policy is what we refer to as the "Retaliation Prohibition Policy" approved by the City Council on December 2, 2002. Lastly, there is Federal or State law that is applicable to allegations of harassment. Those laws deal with situations where an individual is subjected to harassment based upon that individual's race, color, religion, gender, national origin, age or disability. The ultimate question in this case becomes whether the allegations made by the Charging Party against the Respondent rises to the level of "prohibited harassment" in violation of City policy or applicable law.

As such, generally there are two types of harassment. The first is harassment that is legally inappropriate and is actionable through administrative or legal procedures. A second form of harassment is usually referenced as bullying, intimidation, or when an individual is undermined publically by the alleged offender.

This type of harassment usually is not actionable through legal recourse, but may be actionable through administrative or grievance procedures adopted by the entity or institution. The basis for such action by the employee is usually based upon the alleged violation of an institutional or entity policy which forbids such conduct. Either type of harassment can be direct or indirect.

When applying the legal standards relating to harassment claims, there is usually a subjective and objective component to such claims. In this particular case, subjectively or objectively, the Charging Party has not made any claim that is based upon race, color, religion, gender, national origin, age or disability. It is our opinion that the allegations of the Charging Party are such that he alleges that he has been subjected to intimidation and has been undermined publically by the Respondent.

Objectively, if the "General Harassment Policy" had been adopted by the City Council, it is our opinion, based upon the factual investigation, that the Charging Party has submitted facts that would result in a "probable cause" determination that the "General Harassment Policy" had been violated. A "probable cause" determination does not conclusively mean that Respondent is guilty of harassment. It merely means a sufficient factual basis exists to allow an adjudicative body to consider all the evidence and make the ultimate determination as to whether, indeed, a policy has been violated by the Respondent.

But, since there is no policy forbidding the conduct of the Respondent as alleged by the Charging Party, it is our opinion that no cause of action or claim for harassment exists.

Question No. 2: The City's Non-Union Personnel Policy requires a violation of a City policy before a grievance can be sustained. The General Harassment policy has not been approved by the Council. If the complaint does not state a cause of action for harassment, based upon the investigation you conducted, does the complaint state a cognizable grievance relating to a condition of employment?

If so, what options are available to the Rapid City Common Council to remedy the situation?

Response:

You preface the question with a statement "The City's Non-Union Personnel Policy requires a violation of a City policy before a grievance can be sustained."

In answer to your question, since there is no policy that we are aware of which forbids the conduct of the Respondent as alleged by the Charging Party, the complaint, in our opinion, does not state a cognizable grievance relating to a condition of employment.

Question No. 3: In light of your opinion on these questions, what is your recommendation to the Rapid City Common Council for resolution of this matter?

Response:

We believe first of all there may be a misconception that needs to be cleared up. That misconception would be that a City employee could not validly state a complaint against a City Council member for harassment. Under the law regarding harassment, the liability for a claim of harassment is placed upon the employer. Usually there is no personal liability of the alleged offender if prohibited harassment has taken place in the employment setting. When harassment complaints are viewed by the courts, the courts look at the factual claims of harassment, the status of the alleged offender, and the response of the employer regarding the complaint made by the charging party.

The ultimate consideration is whether the harassment is illegal or prohibited and whether it has the purpose or effect of creating an intimidating, hostile, or offensive work environment which unreasonably interferes with a person's work performance or otherwise adversely affects employment opportunities. In most cases, if the employer

takes appropriate action in investigating the complaint, makes a determination as to whether the complaint has merit, and if it has merit, takes appropriate remedial action, then there is usually no legal liability on the part of the employer.

That being said, it is our opinion that the City Council has sole jurisdiction over its own members to determine whether there was any type of conduct that requires discipline of a member. SDCL 9-8-5 states in pertinent part "The council shall be the judge of the election and qualification of its own members. It shall determine its own rules of procedure, punish its members for disorderly conduct, and, with the concurrence of two-thirds of the alderman elected thereto, may expel a member. . . ."

It is our opinion that SDCL 9-8-5 gives the City Council the authority to determine, by majority vote, whether the Respondent should be subjected to disciplinary action. The forms of disciplinary action may include:

1. Private warning;

2. Remedial or educational training on the subject, which is intended to avoid or prevent future conduct;

3. Public warning;

4. Public censure, to include a letter of apology and/or a written resolution of the City Council of apology to the affected person.

Any variation of the above or other discipline determined to be appropriate by a majority of the City Council, should take into consideration the seriousness, duration, and/or repeated nature of the member's conduct.

General Comments by Investigative Team

In light of the extensive report prepared for the City Council, we feel compelled to

comment on what we believe to be at the core of the allegations made by the Charging Party regarding the conduct of the Respondent. It was readily apparent that the relationship of the parties has eroded over time to the point there is a total lack of trust. The Charging Party distrusts the Respondent's motives regarding requests for information and proposals. By the same token, the Respondent distrusts the Charging Party's response to requests for information or the proposals made by him as a City official.

First of all, it is readily apparent that at the foundation of the allegations made by the Charging Party is the use of e-mail in the communication process between the Charging Party and Respondent.

The problem with e-mail communication is that it is easily misunderstood. Its most attractive attributes - - speed and convenience - - are linked to its chief drawbacks. Operating within its culture of quickness and immediacy, writers tend to fire off hastily composed messages that are disorganized, incomplete and ambiguous. By the same token, there exists a sense of immediacy by the recipient to respond. In some cases, the need for immediate response does not allow the recipient to fully gather informative information and relay such information in a responsive or informative manner.

In addition, by its nature e-mail communication encourages a personal, informal style of writing, which may lead to misinterpretation. Writers get into trouble when they assume that readers can actually hear the inflection of their voices. Although e-mail may be more like oral communication than traditional forms of written communication, it is still writing, not speaking.

We found with interest a statement made by an author, regarding the use of e-mail in the employment setting. The writer stated:

> . . . . Technology is wonderful and seductive. But it is also insidious, especially if it chips away at our appreciation at the value of constant human

> contact - - because without these moments of face-to-face exchanges, we lose a vital regulator in our lives. Human contact controls our behavior. Remove it and people's baser instincts appear. It is the reason an executive can walk into my office and complain in the most vicious way about a colleague. But if I invite that colleague into our meeting, the complaining executive will totally change his tune. He may not back down completely, but his tone and choice of words become more civil. He won't repeat to the colleagues face what he is willing to say behind his back.
>
> Remember this as you march into the future with your laptops, PalmPilots, and digital communicators. No matter how tempting it is to hide behind technology, there is more to be gained by looking into another person's face than staring at a screen.

In our opinion e-mail communication between the Charging Party and Respondent led to a serious breakdown in communication which snowballed to a point that there became a significant amount of distrust exhibited between both the Charging Party and Respondent. For example, during e-mail exchanges concerning the lease-back proposal, the word "appraisal" was used during the e-mail exchange. We had the advantage of reviewing the e-mails and the context of all the communications and it became clear that one writer's definition of "appraisal" was not consistent with another writer's definition of "appraisal." When the Charging Party advised that the company who was proposing the lease-back concept had performed an "appraisal" the Respondent clearly assumed that a formal "appraisal" had been undertaken by a third party vendor. The Respondent then naturally inquired as to when the City Council had approved such an appraisal and if the City Council had not approved such an appraisal why was an appraisal undertaken. We believe that this is but one example of communication by e-mail which snowballed into a situation where there became public accusations of distrust by the Respondent.

Secondly, we believe that perhaps a policy should be adopted or good judgment should be used when matters of significant public importance may be at issue. Perhaps some sort of formal procedure should be adopted for informational requests or requests for background information. For instance, if there is a matter of significant public importance that a particular Council member wishes to explore, a formal written request may be made to the Mayor who becomes the responsible individual to delegate the task to obtain the information. Then once the Mayor obtains the information, the information can be disseminated to the inquiring member or to the full City Council. We believe that such a procedure would allow for the individual member or the City Council to be provided with the all the facts in proper context, rather than bits and pieces of information inevitably viewed out of context which usually leads to misinterpretation on a particular issue.

An example would be the materials prepared and put together on the City's liability insurance award process. Once the information was fully prepared and documented, the Respondent was apparently satisfied with the information.

Lastly, we are cognizant of the fact that as elected officials, City Council members have a duty, under the established form of government and to the citizens of Rapid City, to publically address issues of significant public importance. Yet, a City Council member also must balance that duty with the fact that there are individuals who work in City government that have to exercise some discretion in carrying out the policy of the City. When the City Council member engages in political campaigning or public rhetoric, he or she must be cognizant of the fact that innuendo, accusations, and comments directed at the administration of City government will have, and does have, a significant effect on the morale and resulting productivity of those individuals who must carry out the administrative tasks of City government. This is true whether the Council member is directing public comments toward an individual or toward the institution of government.

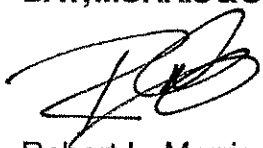
In this regard, it may be wise for the City Council to consider formulating a "Code of Conduct" for its members which recognizes an elected official's inherent duty, yet

also balances that inherent duty with the need for respect of individuals who are charged with carrying out the administrative function of the City. It is our opinion that if such balance is recognized and attained, that there will exist a work environment with high morale, resulting in a satisfying and productive public service employment setting.

We again thank you and the City Council for retaining our services in this matter. Please advise if you or the Council wish us to perform any additional services. Should you have any questions or comments, please do not hesitate to give me a call.

Very truly yours,

DAY, MORRIS & SCHREIBER, LLP



Robert L. Morris

RLM/cjb