

December 3, 2009

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**CONFIDENTIAL
ATTORNEY CLIENT COMMUNICATION**

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



**RE: City of Rapid City - Code of Conduct Violation Allegation Investigation
Our File No.: 427.200903**

Dear Jason:

Please accept this letter in response to your inquiry dated November 19, 2009.

Question No. 1: What is [my] opinion as to the existence of probable cause to believe that Alderman Kooiker has violated the Code of Conduct as alleged by Mr. Sagen?

Response to Question Number 1:

It is my opinion, based upon the investigation as outlined in the document titled "City of Rapid City Code of Conduct Violation Allegation Factual Summary Report" that probable cause exists to support Mr. Sagen's allegation that Alderman Kooiker violated the "Rapid City Code of Conduct for Elected Officials," adopted by the City Council on November 6, 2006. More specifically, it is my opinion that probable cause exists to believe that Alderman Kooiker violated the following sections of the Code of Conduct:

- 1) The City of Rapid City expects each elected official to demonstrate the highest standards of conduct, personal integrity, and honesty in all of their activities in order to inspire public confidence and trust in elected officials.
- 2) The City of Rapid City expects each elected official to undertake their duties in a fair and impartial manner, refraining at all times from discrimination or the dispensation of special privileges.

- 3) The City of Rapid City strives to maintain a workplace that facilitates the growth and performance of its employees. To that end, each elected official is charged with the responsibility to ensure that the workplace is free from hostility or harassment in any form and that the workplace is conducive to the provision of services in an efficient and effective manner.

(Exhibit 3 to Factual Summary)

The Process

The City Council has determined through its policy making authority that elected officials must adhere to a Code of Conduct for Elected Officials. It is clear that violation of the Code of Conduct by an elected official, in and of itself, is not legally actionable through legal or civil process. Instead, a violation of this policy is actionable through the administrative or grievance procedures adopted by the City of Rapid City. As such, the employee has no legal remedy against the elected official for violation of the Code of Conduct and only the City Council can fashion a remedy for the violation or discipline the council member.

Definition of “Probable Cause”

When performing an investigation, the undersigned gathers the facts and summarizes those facts for the legal or public entity. Every attempt is made to remain objective and present the facts in an objective manner without asserting any conclusions or judgmental statements regarding the facts. Once the factual investigation is completed, if the entity wishes, the undersigned can be requested to determine if there exists “probable cause” to believe that there has been a violation of a policy or in other words, whether there exists some merit to the allegation made by the Charging Party.

In determining whether “probable cause” exists, the undersigned uses a variation of the definition as approved by the South Dakota Supreme Court in *Erdahl v. Groff*, 1998 SD 28, 576 NW2d 15. In investigations undertaken for clients such as the City of Rapid City, the

undersigned defines “probable cause” as “more than suspicion in that there exists an apparent state of facts found upon reasonable inquiry which would induce a reasonable, intelligent and prudent person to believe that the allegations of the Charging Party have merit, whether the success on the merits is great or small, that the Respondent violated the Code of Conduct for Elected Officials.”

Facts Indicating Probable Cause Exists

It is the undersigned’s opinion that the facts supporting the probable cause determination include, but are not limited to, the following:

- On September 2, 2009, at 9:42 p.m., the Respondent sent an e-mail to the Mayor, Kevin Thom, and Robert Ellis. The e-mail contained a cut and pasted portion of another e-mail and the author was anonymous. It directed the reader to the Milo Barber Transit dumpsters alleging \$30,000 of route maps had been thrown away in the trash. The e-mail would infer the Charging Party was responsible for such conduct. (Exhibit 5, pg. 4; Exhibit 1, Sagen Complaint Material 00094).
- On September 3, 2009, at 7:42 a.m., Mr. Ellis responded to the Respondent advising that he would look into the issue and report back. Mr. Ellis inquired as to whether there was any chance this person would allow him to make contact directly to discuss the concerns. (Exhibit 5, pg 3).
- On September 4, 2009, at 6:40 p.m., the Respondent advised Mr. Ellis that he would check and then inquired what Mr. Ellis had found out concerning the matter. (Exhibit 5, pg. 3).
- Mr. Ellis then responded to the Respondent’s inquiry on September 8, 2009, at 7:47 a.m. Of importance, regarding the route maps, Mr. Ellis states, *“There were many that were thrown away after the routes were tweaked. It’s unfortunate but staff went into this change feeling confident in the new routes and they were as disappointed as anyone when they had to be tweaked. I’m not sure how many were thrown since we had distributed thousands, but only \$3K were printed.”* (Exhibit 5, pg.3)
- On September 9, 2009, at 9:32 p.m., the Respondent sent Mr. Ellis another e-mail. (Exhibit 5, pg. 2)

- Also on September 9, 2009, at 9:46 p.m., approximately 14 minutes after the Respondent sent his e-mail to Robert Ellis, Ritchie Nordstrom sent an e-mail to Robert Ellis. (Exhibit 5, pg. 1)
- On September 14, 2009, at 6:13 a.m., the Respondent sent to Mr. Ellis, and cc'd to the Mayor; Kay Rippetrop; and Public Works Committee Group an e-mail inquiring if Mr. Ellis had a chance to look into the issues addressed by the Respondent in his September 9, 2009, 9:32 p.m. e-mail. (Exhibit 5, pg. 2)
- Then, prior to Mr. Ellis being able to respond the Respondent, at the September 15, 2009, Public Works Committee Meeting, the Respondent makes the following public statements:

Item 6a: Update on New Bus Routes – Alderman Sam Kooiker.

Kooiker – I just wanted to make the Committee aware briefly that there have been concerns raised by city employees regarding a number of very expensive multi-color flyers that were thrown away regarding the new routes and I wanted to make aware that I have requested copies of the receipts. I believe it is public information so I don't think a motion is necessary; but very, very serious concerns have been raised regarding the new routes and the fact that multiple boxes of the old flyers were thrown away and apparently the cost is in the tens of thousands of dollars. So I look forward to getting those receipts and there are some other questions that go along with that, and I believe that the Committee and Council will have answers on that soon unless Robert has something to add today.

Kooiker – As just a clarification, the information that I've received from multiple and credible sources, and Robert we can talk about this later, is that it was three thousand dollars worth of signs that were changed; but it was thirty thousand dollars and dozens of boxes of brand new multi-color flyers that were thrown away in the dumpster, and I have pictures. So I am asking for the receipts, I'm asking for a full accounting of this, I think it's a fair question, and there are multiple people that have raised this concern to me – not one, but more than one. There is a very serious morale problem in this department as a result of this and other related issues, and I am simply asking that it be addressed and that the receipts and invoices be provided. Thank you.

(Exhibit 1, Sagen Complaint Material 00104 - 00105).

It is clear that the Respondent apparently distrusted the information provided by Robert Ellis, a Department Head and the Director of Public Works, that the value of the route maps was at most, no more than \$3,000.00. Instead of taking the word of a Department Head, the Respondent continued to apparently listen to rhetoric and anecdotal information provided by employees and union representatives, whose motives clearly should have been questioned by the Respondent.

While aware that the Director of Public Works was in the process of obtaining the document information on the actual value of the discarded route maps, and aware that the Director advised that the value of the route maps was no more than approximately \$3,000, the Respondent made public statements in a public meeting on September 15, 2009 that he has received information from *“multiple and credible sources”* that *“it was thirty thousand dollars and dozens of boxes of brand new multi-color flyers that were thrown away in the dumpster, and I have pictures.”*

The Charging Party alleges the aforementioned statements placed the Charging Party’s personal integrity, character, and credibility into question and violated the Code of Conduct. The aforementioned factual information, in the undersigned’s opinion provides “more than suspicion in that there exists an apparent state of facts found upon reasonable inquiry which would induce a reasonable, intelligent and prudent person to believe that the allegations of the Charging Party have merit, whether the success on the merits is great or small, that the Respondent violated the Code of Conduct for Elected Officials.”

The City Council is the Ultimate Judge of the Merits of the Charge

We would point out that a probable cause determination does not mean that Alderman Kooiker, “more likely than not” violated the Code of Conduct. The probable cause determination merely means that the Charging Party’s allegations, if the facts are deemed to be true and accurate as summarized, have merit and the Complaint is not summarily dismissed as lacking merit. As addressed more fully later, the City Council as a body, must make the determination as to whether it is “more likely than not” that the Respondent violated the Code of Conduct as alleged by the Charging Party. That determination is solely within the purview and the power of the City Council.

Question No. 2: **Given [my] response to question 1, what advice do [I] have for the Council as to their options given the opinion [I] have provided?**

Response to Question Number 2:

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 my opinion that SDCL 9-8-5 gives the City Council the authority to determine, by majority vote, whether it is “more likely than not” that the Respondent violated the Code of Conduct and if so, whether the Respondent should be subjected to disciplinary action. The forms of disciplinary action may include, but not be limited to:

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 Charging Party.

Any variation or combination 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 Respondent’s conduct.

Comments and Observations

In light of the extensive summary report prepared for the City Council, the undersigned feels compelled to make some general comments and observations concerning the factual information developed, as follows:

- **E-mails** - - It is apparent that the Respondent's use of e-mails as his primary means of communication has a significant impact upon certain City employees being able to carry out their duties. Based upon the investigation, the e-mails tend to be prolific and there tends to be many follow-up questions concerning a particular subject matter. It is apparent that the Respondent has personal motives for using e-mail as his primary means of communication and it appears that his motive is for purposes of documenting and archiving information. It is believed that if issues are of significant public importance, then face to face or telephonic communication on a particular issue with City employees may allow for more productive and informative exchange of information. Meeting fact to face and having telephone conversations will also create less interference with City employees carrying out their assigned duties.
- **Policy Maker Meeting with Employees and Union Representatives** - - A City Council member is a policy maker. The Mayor, his/her appointed officials, and the employees of the City of Rapid City, carry out the policy established by the City Council. There should be significant concern by the City Council about one of its members meeting with employees and union representatives outside a publically convened meeting. Such meetings may call into question whether a member is expressing in such meetings, the policy of the Council, personal ideology or feelings, or other messages which would or may be misinterpreted by employees and union officials. In addition, the policy maker must make every attempt to remain objective in dealing with specific groups and special interests. Most importantly, employees and union representatives may believe they have an ally in a particular member who attends meetings and other sessions thereby creating

the potential that the member is unable to make credibility determinations or properly filter information provided to him or her. When that happens, and the member is given a public forum in which to publically speak, the member needs to be concerned about the credibility of the information provided; the motives behind the individuals providing the information; and whether the information is merely anecdotal or has been independently corroborated to lend credibility to the information which the member intends to publically disseminate. Otherwise the member is merely publically disseminating rumor, innuendo, hearsay, and/or false or untruthful information.

- **Declining to Disclose Anonymous Individuals who Provide Information to a City Council Member** -- The Respondent, when asked to provide names of certain individuals, declined to do so maintaining that he had promised confidentiality to the individuals providing him the certain information. This writer believes this is a dangerous precedent and a slippery slope. First of all, a policy maker using confidential obtained information and then disseminating or challenging other governmental employees with that information, creates a situation where the governmental employee who has been challenged lacks the ability to challenge the credibility, veracity, and truthfulness of the information because the source is unknown. This may also implicate various types of due process rights that governmental employees may have within any grievance or a civil process. Lastly, any policy maker who engages in a process where he or she is injecting herself into employment and administration matters, exposes him or herself to losing the cloak of various privileges and immunities that he or she possesses under the law due to his/her position as a policy maker.
- **Circumvention of the Collective Bargaining Agreement** - - There should also be concern regarding the interaction between a policy maker, employees subject to a Collective Bargaining Agreement (CBA), and union representatives. Contained within the CBA is a grievance process where facts are presented by the employee and by management regarding particular issues. Credibility determinations can be made as to the

information provided and about the parties providing such information. It is clear that various issues have been taken to the Respondent, because employees and union representatives are fully aware such issues probably would not be successful as grievable issues. Nonetheless, if an issue is of enough importance to bring to the attention of a policy maker, perhaps such issue should be grieved so that a full factual basis can be ascertained. If so, truth, veracity, and credibility determinations can be made regarding such information, whether the particular issue is a valid grievable issue or not. Also, employees and union representatives bringing issues to policy makers appear to create significant management problems. This process does not allow department heads to adequately address issues and maintain morale. In fact, it would seem that morale is lowered because some employees follow a chain of command structure and others do not. It is clear that at least one department head feels that employees always being able to go to a policy maker with any issue, affects his ability to properly manage and deteriorates the purposes of a chain of command within the workplace.

If the City Council wishes for me to appear and discuss any aspect of the investigation or this letter, please advise. 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 LAW FIRM. LLP

A handwritten signature in black ink, appearing to read 'R. Morris', with a stylized flourish at the end.

Robert L. Morris

RLM/cjb

