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December 23, 2020

Via E-mail Only

Mercer Island City Council
c/o Bio Park, City Attorney
Bio.Park@mercergov.org

RE: City Council Deliberations/Action Following Hearing Examiner Findings/Recommendations

Mayor Wong and Mercer Island Councilmembers,

It is my understanding that (1) the City's hearing examiner recently issued findings, conclusions, and recommendations following a hearing on an alleged ethical violation by a City official, and (2) it is the City Council's duty to consider the hearing examiner's submission and reach a final decision on the matter. Pursuant to MICC 2.60.050, the City Attorney has asked me to provide guidance to the City Council on the manner and process by which that final decision should be made by the Council, according to the City Code, state law, and general legal principles. Please accept this memorandum as my analysis and opinion on the matter.

What Action is the Council Authorized to Take?

Following a hearing on an ethics complaint, the City's hearing examiner must issue findings of fact, conclusions of law, and recommended disposition of the ethical complaint. *MICC 2.60.070.B.2*. The City Code then requires "final City Council action to decide upon" a resolution of the matter. *MICC 2.60.070.C*. Under *MICC 2.60.070.D*, the Council is allowed to resolve the matter in one of seven different ways:¹

- Dismissal
- Referral

¹ Each of these options are explained at *MICC 2.60.070.D*.

- Admonition
- Reprimand
- Censure
- Removal²
- Civil Penalty

Aside from limiting Council action to one of the explicitly-listed alternatives, the City Code does not appear to otherwise restrict the Council’s authority to resolve the matter as it chooses. Although the Code does not appear to require that the Council resolve the issue in the specific manner recommended by the hearing examiner, under MICC 2.60.070.D, the Council’s decision must nevertheless be “based on the... recommendations from the hearing examiner as appropriate.”

On What Bases May the City Council Take Final Action?

The Code itself – as well as general legal principles – do offer guidance regarding the bases on which the Council’s final determination must be made.

Importantly, the City Code requires that any final decision by the Council be “based on” the findings of fact, conclusions of law, and recommendations of the hearing examiner. *MICC 2.60.070.D*. This language is important. The term “finding of fact” is a legal term of art indicating that the “fact finder” has made a conclusive determination as to what actually occurred; *i.e.*, “the facts.” Similarly, “conclusion of law” is a legal term of art indicating that the decision-maker has made a conclusive determination as to how the law applies to the facts that have been established. Importantly, the City Code makes clear that only the hearing examiner is authorized to make findings of fact and conclusions of law regarding an ethics complaint. *See MICC 2.60.070.B.2*. So, while the Council may reject the hearing examiner’s recommendations – as “recommendations” are, by definition, optional – the Council may not reject or alter the hearing examiner’s factual findings or legal conclusions; it must consider those as firmly established, and must use those as the bases for its ultimate decision on the matter.

This interpretation is consistent with generally-accepted legal principles. For example, when an appeals court is hearing an appellate matter, it may come to a different conclusion than the lower court, but it must accept the lower court’s factual findings as conclusively established. The general reasoning is that the lower court actually saw the witnesses, heard the testimony and arguments, reviewed the evidence, and is in the best position to make the credibility and other determinations necessary to support a factual finding. The same is true here; the City Code appears to recognize that the hearing examiner, having seen and heard the witnesses, reviewed the evidence, and heard the arguments, is in the best position to make the appropriate factual findings

² There are three different removal option, based on whether the city official is a member of a board or commission, a Councilmember, or the Mayor/Deputy Mayor

in the matter, and that those findings and conclusions should not be revisited by the Council.

Given those principles, there are several examples of how the Council may justifiably decide on a different resolution than recommended by the hearing examiner, while still exercising deference to his/her factual findings and legal conclusions. For example, the hearing examiner may find (1) that a city official took a particular action (a “finding of fact”), (2) that the particular action is prohibited by local or state ethics laws (a “conclusion of law”), and therefore (3) recommend the official be censured. The Council may decide that the official’s actions was inadvertent, or the violation was relatively minor, and concluded that a lesser penalty (or none at all) is more appropriate than censure. Such a decision is authorized under the Code because it accepts the findings and conclusions as true, even though it rejects the recommendations. However, the Code does not allow the Council to simply decide the official did not take the action at issue (finding of fact), or that the action is not a violation of the law conclusion of law). Again, only the hearing examiner may make such findings and conclusions, and the Code requires the Council to take those findings and conclusions as established.

Based on the above analysis, it is my opinion that any decision to resolve the matter differently than recommended by the hearing examiner should be approached cautiously. It should be (1) consistent with both the factual findings and the legal conclusions made by the hearing examiner, and (2) accompanied by some explanation as to why, based on those findings and conclusions, the Council has decided a different resolution is more appropriate. In this way, the Council can comply with both the letter and spirit of the City Code, while also maintain the public trust and accountability so important to these decisions.

Finally, it should be noted that regardless of the outcome, the decision of the Council appears discretionary, and generally “not subject to further review or appeal[.]”³ As a result, the only “penalty” for final Council action that is contrary to the requirements of the Code as outlined above appears to be a political one; either through a recall action for violating City Code or lost votes in a subsequent election cycle.

What Process Must Be Followed?

Finally, having analyzed the bases on which the Council must make a final determination, I will briefly address the specific process required.

The City Code presumes that prior to any final resolution, the Council will deliberate,

³ There is an exception for imposition of a monetary penalty, which is appealable as explained at MICC 2.60.070. Also, a Council decision may be subject to review “as otherwise provided by law.” *MICC 2.60.070.D*. In general, actions by a local legislative body may be the subject of writ or mandamus actions, or even common law tort claims. However, the extent to which the Council’s action on an ethics complaint may implicate such claims is beyond the scope of this memorandum.

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taking time to fully discuss the findings, conclusions, and recommendations from the hearing examiner, and the extent to which his/her recommended resolution may be sufficient or insufficient based on the factors discussed above. To encourage full and frank discussion, such deliberations may take place in executive session under RCW 42.10.110(1)(f) (*see MICC 2.60.070(C)*), and the subject of the complaint should not be present. *MICC 2.06.070.C*.

Any final action by the City Council must be by majority vote, and occur during an open public meeting. *MICC 2.60.070.C*. The specific agenda actions that may be necessary to conduct such a vote, and the particular language required for a final determination, are outside the scope of both my expertise and this memorandum, and I will defer the advice of the City Attorney on those issues.

Conclusion

I hope the above analysis is helpful as you move forward on this matter, and I thank you again for the opportunity to serve the City Council and citizens of Mercer Island. Should you have any additional questions or concerns, or would like clarification on anything addressed in this memorandum, please don't hesitate to contact me. I would be happy to assist.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Culumber', written in a cursive style.

Jeremy W. Culumber

JWC