CITY OF RAPID CITY

RAPID CITY, SOUTH DAKOTA 57701-2724

OFFICE OF THE CITY ATTORNEY

300 Sixth Street

Joel P. Landeen, City Attorney
City web: www.rcgov.org

Phone: 605-394-4140
Fax: 605-394-6633
e-mail: joel.landeen@rcgov.org

MEMORANDUM

TO: City Council

FROM: Joel P. Landeen, City Attorney

DATE: 03/05/2020

RE: Alderman as City Employees

Alderman Modrick, through her attorney, has asserted that she is a City employee covered by the City's Non-Union Employee Guide. Her attorney has come to this conclusion based on a superficial analysis relying on the cherry picking of certain words and phrases out of the document without regard for the larger context. A more comprehensive and detailed analysis of the question makes very clear that elected officials are not City "employees" nor are they covered by the City's Non-Union Guide.

While there is no South Dakota law or rule which specifically resolves the question of whether alderman are considered employees, there is other guidance which can be used to help determine the answer to this question. While there are times that rules or regulations can treat elected officials like employees, such as for tax purposes (i.e. the City provides alderman with a W2 for the salary they are paid by the City and it is treated as income by the IRS), other rules and regulations such as the Fair Labor Standards Act (FLSA) specifically exclude elected officials. Nick Stroot, the City's Human Resources Director prepared a memo when this issue was first raised which provides a fundamental analysis of what the difference is between an employee and an elected official. In his opinion, the fact there is no mechanism by which the City's management staff, or even the Mayor, can hold an alderman accountable to a set of expectations defined solely by management and remove them from their position if they fail to meet these expectations is incompatible with the normal understanding of what constitutes an employee. The lack of management control and accountability to anyone other than their peers or the electorate is the fundamental difference separating elected officials from being placed in the same category as city employees. His conclusion is that elected officials are not employees of the City.

Consistent with Mr. Stroot's opinion, South Dakota law defines an employee as "a person who is employed to render personal service to an employer otherwise than in the pursuit of an independent calling, and who in such service *remains entirely under the control and direction of the employer*." SDCL 60-1-1. In determining whether an employer has the right of control over an employee, the courts have stated that important considerations are the evidence of direct control, the method of payment, the furnishing of equipment, and the right to terminate the employment relationship. Alderman would clearly fail to qualify under state law as "employees" of the City under both the direct control test and the inability the City to engage in a conventional termination of the employment relationship.

Mr. Beardsley's argument that the Non-Union Guide by its own terms also includes elected officials is also misplaced. The City's Non-Union Guide states that it is intended to provide general information to City employees who are not covered by a union contract. The guide does not specifically define the term "City employee." To support his argument, Mr. Beardsley points to the guide's definition of "active employment." This term is defined as "receiving compensation from the City, not including worker's compensation." Since alderman receive compensation from the City he concludes they fit the definition and are therefore City employees. What he fails to recognize is the purpose of this definition is not to define who constitutes a "City employee" or establish who is covered by the guide, but is meant to define how that term is used within the guide itself. The term is only used in the provisions regarding the Family Medical Leave Act (FMLA). In paragraph 13 of that section, it deals with how to handle an employee who fails to return to "active employment" after exhausting their FMLA leave. I would note that the definition of an "employee" for purposes of the FMLA is the same as the FLSA, so elected officials are also excluded from the definition of an employee under the FMLA. Since the definition citied by Mr. Beardsley does not define who is considered a "City employee" and only defines how the term "active employment" is to be interpreted in relation to the City's FMLA policies, his determination that this definition demonstrates alderman are City employees because they receive compensation is clearly wrong.

Even if elected officials were City employees, Mr. Beardsley's reliance on the grievance process contained in the guide is also misplaced. The policy defines a grievance as:

> A complaint by an employee or group of employees concerning the interpretation, application or alleged misinterpretation or misapplication of the regulations, ordinances, policies or rules of the City of Rapid City, which complaint has not been resolved satisfactorily in an informal manner between the employee and the immediate supervisor.

This process is meant to address alleged violations of the City policies by management. The process requires the employee to attempt to work out any alleged violations with their immediate supervisor and if this fails the grievance procedure provides an appeals process to insure the City is complying with its own rules and procedures. The appeal is then heard by the department director, the Mayor, and ultimately the Dept. of Labor if necessary. For example, if an employee believes they were entitled to premium pay for some of the hours they worked and their immediate supervisor disagreed, they could appeal the decision to their department director, the Mayor, and the Department of Labor. The policy states that it does not create any substantive rights, it simply creates a mechanism to make sure that policies are being correctly interpreted

and followed. Mr. Beardsley makes the conclusion that the Mayor must be Alderman Modrick's supervisor, because nobody else makes sense. The lack of clarity on who her supervisor would be under the policy is primarily a function of trying to shoehorn an alderman into a policy that was clearly not meant to cover them. The Mayor cannot direct her work, set expectations of performance, or discipline her if she does something inappropriate or fails to meet his expectations. Alderman do not have a traditional supervisor and answer only to their constituents and in certain circumstances their fellow alderman. Alderman Modrick is not a City employee and the Mayor is clearly not her supervisor.

I will also note that while the City has general policies prohibiting harassment, allegations of harassment involving employees are not resolved through the grievance process. Mr. Beardsley conveniently ignores the policy provision stating an employee has fourteen (14) days from having knowledge of an occurrence giving rise to a grievance to notify their supervisor. Clearly, Alderman Modrick's notification of the Mayor over three weeks after the incident would prevent her from proceeding under the policy. This further highlights the absurdity of the argument. While it makes sense to say to employees that if you believe there is a mistake with your pay or the interpretation of a work rule you cannot wait and notify management a year later, it makes no sense to say to an employee if they are being threatened or harassed they need to notify management within two weeks or the claim is waived. Alderman Modrick did not appear to be relying on the Non-Union Guide or believe she was filing a grievance when she initially contacted the Mayor. This argument is a transparent attempt by her attorney to engineer a process issue after the fact to distract from the actual facts of what occurred.

By my count, the City's Non-Union Guide contains 43 substantive sections establishing the conditions of employment for the City's employees who are not otherwise in a bargaining unit. Of these 43 Sections, virtually none would be applicable to alderman. They are not entitled to annual or sick leave, discipline, promotion, retirement, or benefits. How can you argue that elected officials are employees and are covered in the guide when 99% of the guide has no application to elected officials? The only provisions in the guide I could find that would apply to elected officials is that they get paid bi-weekly and are required to get paid via direct deposit. In my 16 years of employment with the City we have never applied the Non-Union Guide to alderman, nor can I recall a time where anyone ever asserted that the non-union guide was applicable to alderman.

Based on the foregoing analysis, I am in agreement with the City's Human Resources Director that alderman are not employees of the City and are therefore not subject to the City's Non-Union Employee Guide. I am highly confident that if this issue were litigated the decision would be favorable to the City.