REPORT OF THE JUDICIARY AND LEGISLATION COMMITTEE ON COMMON COUNCIL FILE NO. 991891

PARTIES AND STATUS OF MATTER

The Ethics Board of the City of Milwaukee ("Board") referred to the Common Council President, by letter dated January 26, 2000, certain of its "Findings and Conclusions" ("Board Findings") in the Matter of the Verified Complaint of Joseph G. Chambers, File No. MEB99-1099. The Common Council opened file 991891 on this matter on March 21, 2000 and referred it to the Judiciary and Legislation Committee for a report. The Board Findings which were referred to the Council under 303-27 related to a violation of sec. 303-5-6. That finding was referred because the Board, by implication, concluded that an official covered by the City's Ethics Code had violated the code and that the conduct rose to the level of misconduct or malfeasance. The Board recommended that the Council reprimand Alderman James N. Witkowiak ("Alderman Witkowiak") for that conduct. The Board also found that Alderman Witkowiak violated 303-7-1-b and admonished him for that violation, but did not find that the matter rose to the level of misconduct or malfeasance and therefore did not refer the matter to the Council under sec. 303-27 (also see Board's February 10, 1999 letter to Alderman Kalwitz). The Board fined Alderman Witkowiak $100 for each violation.

Therefore, only the Board's Finding of the sec. 303-5-6 violation was referred to the Council under sec. 303-27, and this is the only matter which the Council will consider. Alderman Witkowiak is free to pursue other avenues of review of the Board's determination that he had violated sec. 303-7-1-b.

The parties, the Board and Alderman Witkowiak, and their respective attorneys, agreed to a procedure to determine whether the Board proceeded under a correct theory of law and whether its findings supported its conclusions. The parties waived any notice or preparation requirements set forth in 303-29 Milwaukee Code of Ordinances ("MCO"). The parties submitted documents to the committee clerk on March 27, 2000 and made arguments to the committee on March 30, 2000. No testimony was contemplated under the procedure agreed to by the parties and none was taken by the committee on March 30, 2000.

AUTHORITY & JURISDICTION OF COMMITTEE & COMMON COUNCIL

The authority and jurisdiction of the committee and the Common Council emanate from 303-29 MCO and in particular paragraphs 2 and 4. Under paragraph 2, the committee, "in reporting the matter to the common council, may recommend a dismissal of the charges, a reprimand, or a hearing before the common council to determine whether removal from office is warranted under s. 4-28, city charter." Since removal from office is not before the Council or committee, the only options are dismissal of the charges or a reprimand. This is further clarified under paragraph 4 wherein the Common Council is directed to ". . . make a determination in

regard to the recommendation of the committee. Dismissal of the findings by the board of ethics as referred to council, or reprimand by the council shall be by a majority vote."

ISSUE

Whether the Common Council should uphold or dismiss the Board's Findings that Alderman Witkowiak violated 303-5-6 MCO and, if upheld, whether the Common Council should reprimand Alderman Witkowiak for such violation.

303-5-6 reads as follows:

> No official or other city employe, member of an official's or other city employe's immediate family, nor any organization with which the official or other city employe or a member of the official's or other city employe's immediate family owns or controls at least 10% of the outstanding equity, voting rights, or outstanding indebtedness may enter into any contract or lease with the city of Milwaukee involving a payment or payments of more than $3,000 within a 12-month period unless the official or other city employe has first made written disclosure of the nature and extent of such relationship or interest to the board and to the department involved in regard to the contract or lease. Any contract or lease entered into in violation of this subsection may be voided by the city in an action commenced within 3 years of the date on which the ethics board, or the department or officer acting for the city in regard to the allocation of funds from which such payment is derived, knew or should have known that a violation of this subsection had occurred. This subsection does not affect the application of s. 946.13, Wis. Stats.

FACTS

See the facts presented in the Board Findings dated January 26, 2000. These facts will be discussed in more detail in Section B of the Analysis section below.

ANALYSIS

A.
Legal Analysis

The courts look to the rules of statutory construction when opining on ordinances. Schroeder v. Dane County Board of Adjustment, 228 Wis. 2d 324 (Ct. App. 1999). Unless there is some ambiguity found in the ordinance, the interpretation should not go behind the plain meaning of the words, but rather give the language of the provision its ordinary and accepted meaning. Cleaver v. Dept. of Revenue, 158 Wis. 2d 734, 740 (1990).

In paragraph 6, a "contract or lease with the city of Milwaukee" can only mean a binding legal agreement with the City as a party, enforceable against the City, and authorized under Chapter 7 or 16 of the City's Charter or by duly enacted resolution of the Common Council. The "plain meaning" of the ordinance provision is clear and unequivocal on this point. A contract or lease between two non-City parties is not a contract or lease with the City, even if the City provides some or all of the funding for that contract.

Support for this reading of the ordinance is found by reference to the ethical standards of conduct for State public officials in 19.45, Stats., a section which parallels the City ordinance in almost every detail, but makes a critical departure in (6) from the parallel provision in the City ordinance by not tying the provision to contracts with the State. The state provides that "[n]o state public official . . . may enter into any contract or lease involving a payment or payments of more than $3,000 within a 12-month period, in whole or in part derived from state funds . . . ." There is no mention of a requisite "state contract" as an element of an infraction. The only requirements are that a state official enter into a contract funded in whole or in part with state funds. This demonstrates that the state legislature expressly intended to extend the reach of this standard of conduct beyond contracts to which the state itself was a party by making it applicable to all state officials' contracts which had state funds involved. The reach of the City's sec. 303-5-6 is clearly not as broad.

This departure in the City's paragraph 6 from the State's paragraph 6 has existed from the date of adoption of the City ordinance as repealed and recreated in April, 1991, and as initially created in March, 1989. This is a critical distinction between the City and State provisions and reflects a legislative choice by the City to adopt dissimilar, more limiting, language. On the other hand, the remainder of paragraph 6 in the City ordinance is practically word-for-word the same as the State Statute.

Sec. 303-5-6 also expressly states that any contract or lease entered into in violation of this subsection can be voided. This remedy would obviously not be available if the City were not a party to the contract. To have any meaning at all, enforcement of such a remedy requires that the City be one of the parties to the contract.

Finally, the case of Elliott v. Morgan, 214 Wis.2d 253, 260 (1997 Ct of App) stands for the proposition that City funding does not in and of itself transform a contract between two non-city entities into a contract with the City.

B.
Factual Analysis

The Board made ten Findings of Fact in its January 26th Board Findings. Those findings describe the City's contractual relationship to the construction of the Riverwalk Project in question. In Finding 3, the Board references the key City contractual commitment to the Riverwalk Project. This commitment was contained in the May 23, 1994 "Riverwalk Development Agreement for Business Improvement District No. 15" ("1994 Agreement"). (It is not clear whether a copy of the 1994 Agreement was introduced to the Board and made part of the Board record. However, since the 1994 Agreement was referenced in the Board's Findings

and adopted on March 31, 1994 via Common Council File No. 931824, the Common Council takes official notice of the document and incorporates it in its findings and determination). The 1994 Agreement is also referenced in Recital C of the June 25, 1997 "Riverwalk Grant Agreement" ("1997 Agreement") between the City and the Milwaukee Riverwalk District ("MRD") (referenced in Finding 4).

The 1994 Agreement sets forth the City's overall commitment to funding both the privately-owned Riverwalk segments and those Riverwalk segments denominated as "City Segments." The City Segments were located on rights-of-way or tax exempt property which would be ultimately owned by the City. (See Second Recital of 1994 Agreement and Section II.G.).

The 1994 Agreement also recognized that the construction of both the private segments and the City Segments would be undertaken by the BID Board No. 15 ("BID Board") through various contracts and subcontracts. The 1994 Agreement provided that the Commissioner of the Department of City Development was to approve all "contracts and subcontracts to undertake . . . the construction of . . ." all riverwalk segments. Section I.D.7. of the 1994 Agreement. However, the 1994 Agreement went on to expressly state:

> "The Board and its contractors or subcontractors shall be solely responsible for the completion of and [sic] each Project Segment and the City Segments. Nothing contained in this paragraph shall create or affect any relationship between the City and any contractor or subcontractor employed by the Board [i.e., the BID Board] in the construction of a Project Segment or a City Segment."

Section V.A. of the 1994 Agreement.

In Finding 3, the Board found that the BID Board's obligations under the 1994 Agreement had been transferred to the MRD via a June 29, 1994 agency agreement. Since MRD was obligated to fulfill the BID Board's 1994 Riverwalk Obligation, the City contracted directly with MRD in 1997 when the Common Council determined that an additional $325,000 should be made available " . . . to make certain additional improvements and enhancements beyond those originally contemplated in 1994." (Finding 4).

The 1997 Agreement was a further amendment, Recital C reflects five other such amendments, to the 1994 Agreement. The 1997 Agreement, like the 1994 Agreement, required the DCD Commissioner's approval of MRD's construction contracts (Section 3.c. of the 1997 Agreement and finding). However, the 1997 Agreement did not change the relationship, or lack thereof, between the City and contractors or subcontractors retained by MRD as originally set forth in Section V.A. of the 1994 Agreement.

In Findings 5 and 6, the Board describes how MRD fulfilled its obligations under the 1997 Agreement. First, it entered into an agreement with Trammel Crow to manage the work (the City was not a party to this agreement). Then Trammel Crow, with the assistance of DCD personnel, determined that Aqua-Doc should be approached to perform the construction of a floating dock at an alley abutting the Milwaukee River. This would be a City Segment under the

terms of the 1994 Agreement. Alderman Witkowiak was the president and principal owner of Aqua-Doc (Finding 1).

Aqua-Doc provided a quote for the dock work to MRD and MRD forwarded a purchase order to Aqua-Doc describing the work and stating the $17,534 purchase price. These two documents form the basis of a contract between MRD and Aqua-Doc; however, neither document reflects any contractual involvement of the City or an intent on the City's part to deviate from the City's 1994 established posture of non-involvement.

Aqua-Doc performed the work and invoiced Trammel Crow which paid for the work from funds received under the 1997 Agreement (Finding 10).

The above recitation of facts, as found or referenced by the Board, indicates that there was nothing in the various levels of contractual involvement underlying the construction of the dock work at issue to evidence an intent on the City's part to create a contractual relationship between the City and any contractor or subcontractor retained by MRD to undertake the work. In fact, the 1994 Agreement, which the 1997 MRD Agreement amended, reflected just the opposite.

C.
Conclusion

Based upon the above legal and factual analysis of the Board's Findings, it is hereby concluded and reported that:

1. In order for there to be a violation of sec. 303-5-6, MCO, it is necessary that there be a contract or lease entered into between the City and the affected official involving payments of more than $3,000 over a 12 month period.

2. The Board's Findings demonstrate that no contract or lease was entered into between the City of Milwaukee and Aqua-Doc, Aqua-Doc being an organization of which Alderman Witkowiak was president and principal owner.

3. The Board's Findings do not support the determination that Alderman Witkowiak violated 303-5-6 MCO, and the charges under 303-5-6 should be dismissed.

RECOMMENDATION AND ACTION

Based upon the Conclusions and Findings above, the Common Council hereby finds and concludes that Alderman Witkowiak did not violate sec. 303-5-6 and, therefore, the Board Findings with respect to the violation of that provision are dismissed, and no reprimand is recommended. In addition, the forfeiture paid by Alderman Witkowiak related to the violation of 303-5-6, MCO, is to be returned to him. The committee recommends that the full Common Council approve this report.

29309