

CITY OF MILWAUKEE

Form CA-43

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March 29, 2004

Alderman Michael S. D'Amato
Common Council
City Hall - Room 205
200 East Wells Street
Milwaukee, WI 53202

RE: Questions regarding various files amending the City Code of Ethics, Chapter 303 Code of Ordinances, ethics education requirement, and registration and regulation of lobbyists

Dear Alderman D'Amato:

This is in response to your March 9, 2004 letter requesting our further opinion on the particular questions you raise regarding proposed amendments to the City's Code of Ethics (Chapter 303 Code of Ordinances, MCO) and lobbying registration and regulation. Your questions relate to existing "whistleblower" laws and regulations, penalties for failure to file gift disclosure forms and failure to observe ethics education requirements, and for lobbying violations. The Common Council files that you particularly refer to are Common Council File No. 031043, 031025, and 031044, although file 031604 on lobbying registration is also implicated.

First of all, with respect to whistleblowers, you ask whether an ordinance prohibiting retaliation against whistleblowers is necessary and whether or not there are any federal or state regulations that would proscribe such behavior and provide a penalty. We note that the City's current Ethics Code at 303-5-4 MCO does address whistleblower protection in a limited fashion. In particular, this paragraph provides that "this provision shall not be interpreted to prevent such official or other City employee from reporting violations of this chapter or other illegal acts to the proper authorities." The provision is aimed at disclosure of information, so called "insider information," in the hands of the City official or other City employee in the course or by reason of his or her official position or activities and protecting the official or

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employe releasing such. However, it does not provide the broader protections generally thought of in whistleblower statutes. There is also a provision in 310-13-9-b MCO that provides certain protections for service contract employees that make a complaint about their employer to the Department of Public Works.

On the other hand, the Federal government adopted the "Whistleblower Protection Act of 1989", Public Law 101-12 (S20), that makes protections available to federal employees while Wis. Stats. § 230.80 *et seq.*, provides protection for State employees. However, we do not find that the federal and/or State acts protect City officials or employees or that the monitoring federal or State agencies for such acts have jurisdiction that extends to City officials and employees in these matters. In light of this, if the Common Council's intent is to provide comparable protection to City whistleblowers, a substitute ordinance would be necessary.

You next ask about Common Council File No. 031025 that provides for gift disclosure by City officials on a quarterly basis. The legislation proposes that the City's Board of Ethics report the identities of those individuals who did not file the required report. You make the observation that the proposed ordinance appears not to provide a penalty for those who fail to file such gift disclosure.

This gift disclosure requirement would be implemented by creation of a new section in the City's Code of Ethics, 303-14 MCO. It is our opinion that housing such gift disclosure requirement within the City's Code of Ethics would provide the Ethics Board with certain sanctions, under 303-27 MCO, for reporting violations including recommending to the appropriate appointing authority censure, suspension or removal from office, or discipline or discharge. Further, under 303-35 MCO, in addition to any sanction imposed, an individual violating the Chapter would be subject to forfeiture of not less than \$100 no more than \$1,000 for each violation.

Next you ask about Common Council File No. 031044 relating to ethics training for City officials and observe there appears to be no penalty for failure to complete such training annually. In this regard we note that the proposed legislation creates section 350-210 MCO relative to an annual educational requirement. Chapter 350 MCO is the City chapter on employee regulations and benefits, and there appears to be no penalty created for violation of this annual requirement by this new section 350-210. If adopted as is, the only enforcement may be whether there are sanctions imposed if a violation of this requirement is incorporated as a work rule.

Finally, you inquire whether the City could adopt a range of penalties for violations of lobbying regulations similar to Wis. Stat. § 13.69. Wisconsin Statute § 13.69 provides for various sanctions and penalties of subchapter III of Chapter 13 which is the regulation of lobbying by the State. There is no provision that we could find in subchapter III that allows

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the City to adopt regulations in strict conformity with such subchapter nor can the City make violations criminal. However, the City may adopt ordinances under its home rule powers, Article XI, Section 3, Wisconsin Constitution and under 66.0101, Wis. Stats. that regulate its own affairs and are not of statewide concern. We note that currently the City has a penalty provision in place for waste processing contract lobbying 79-63-MCO - providing for forfeiture of not less than \$500 nor more than \$1,000 for a lobbyist or \$5,000 for a principal. We also note that while the City may enforce forfeitures for violation of its ordinances, such forfeitures cannot constitute fines (which are for criminal violations). "A forfeiture may be imposed to affect compliance with an ordinance and deter violations." *Village of Sister Bay v. Hockers*, 106 Wis. 2d 474 (Ct. App. 1982). Further, while the primary purpose of an ordinance cannot be to raise revenue in lieu of taxation, "forfeitures may at least pay the cost of enforcement of ordinances and regulations." *Hockers*, at p. 480.

Therefore, in answer to your question, the City may not propose criminal sanctions for violation of its proposed lobbying registration ordinance. That is not to say, however, that the City could not look at other sanctions adopted by the State legislature for regulation of lobbying and propose such for violation of a City ordinance if there is sufficient basis for such. In addition, any forfeitures proposed by the City should be based on the cost of enforcement.

Should any of these comments require further clarification, please contact our office.

Very truly yours,


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