

December 9, 2014

Dear Mayor and Vice Mayor,

At the Board of Commissioners (hereinafter referred to as the “Board”) meeting on November 18, 2014, the Board voted to terminate the City Manager. Subsequently, at the same meeting, within an hour of making the motion to terminate the City Manager, the same Commissioner who made the motion to dismiss the City Manager made a motion to retain her for 3 months and then revisit her employment status at the end of the 3 month period. The motion passed. You both have asked if the various motions made during the meeting gave the City Manager a three month contract or if firing and rehiring her requires the City to enter into a 12 month contract with the City Manager.

On November 24, 2014, I requested a copy of the employment contract between the City (hereinafter referred to as the “City”) and the City Manager that was in effect prior to the vote to terminate the City Manager at the November 18, 2014 Board meeting. On November 25, 2014, a copy of the attached contract was emailed to me. The portion of the contract that is relevant to your inquiry reads:

The term of City Manager's employment with the City pursuant to this Agreement shall begin on January 1, 2012, and continue through December 31, 2012. This Agreement may be terminated at that time by either the City or City Manager provided that at least sixty (60) days prior to the expiration of the initial term or any renewal term thereafter, written notice should be given by the party desiring to terminate the agreement at the end of the then term. The provisions of this Agreement will remain in full force and effect during any extension due to either party's failure to execute a new agreement, it being understood, however, that the City Manager serves at the will of the governing body (Board of Commissioners) of the City at the expiration of the term of this Agreement or the term of any renewal Agreement.

Assuming that the contract executed in 2012 is the most recent contract entered into by the City and the City Manager, the City Manager was an at will employee at the time of the November 18, 2014 meeting. Based upon the information that I have reviewed, it appears that the Board entered into a new employment agreement with the City Manager for a definite period of 3 months at the November 18, 2014 meeting.

The initial issue discussed by the Board at the November 18, 2014 meeting was whether to “retain or release the present City Manager.” Commissioner “A” moved that that Board “dismiss ‘Person X’ as City Manager.” The motion was seconded and passed. This occurred approximately 39 minutes into the meeting. After the vote, the City Manager spoke about her accomplishments and asked the newly elected Commissioners to work with her for a few months before making any decision regarding her employment. Similarly citizens and other City officials made the same request. After almost an hour of public comment, Commissioner “A” questioned whether or not he could rescind his original motion and was told that he could either rescind it or make a motion contrary to the one made before. He then made a motion to “give ‘Person X’ 3 months” and for the Board to then decide on her employment status. The motion passed.

Pursuant to Section 1-103 of the City's Municipal Code, the Board is required to conduct its meetings in accordance with Robert's Rules of Order, unless the rules conflict with the charter or code. Based upon Robert's Rules of Order Newly Revised (hereinafter "Robert's Rules"), once the Board voted to terminate the City Manager and she was notified of the termination through her presence at the meeting, a motion to rescind the vote to terminate could not be made. Robert's Rules provide that motions to rescind are not permitted when, "a person has been elected to or expelled from membership or office, and the person was present or has been officially notified of the action." (Robert's Rules of Order Newly Revised, 11<sup>th</sup> ed. p. 308 (Da Capo Press, 2011)). While Commissioner "A" did not use the word "rescind" in his motion to "give 'Person X' three months," it appears based upon his comments that his intent and the effect of his motion was to rescind or reverse his previous motion to terminate her as City Manager.

In *Irene Neighborhood Association v. Quality Life, LLC*, 2002 WL 1050264 (Tenn. Ct. App. May 24, 2002), the court examined whether the Shelby County Board of Commissioners had the authority to reconsider an issue that was voted on at a previous meeting. The Petitioners argued that the Board could not reconsider whether or not to approve a development because pursuant to the Board's Permanent Rules and Robert's Rules, reconsideration could only take place at the meeting in which the original motion was brought. *Id.* at \*4. The Board argued that there was a conflict between the language in the Permanent Rules and Robert's Rules and because the Permanent Rules superseded Robert's Rules when there was a conflict, "the applicable Robert's Rule must be disregarded." *Id.* Ultimately, the court determined that the Board could reconsider its action despite the provisions in Robert's Rules. *Id.* at \*5. In its analysis, the court relied heavily on its decision in *Ferguson v. The Metropolitan Employee Benefit Board*, 1985 Tenn. App. LEXIS 3067 (Tenn. Ct. App. August 1, 1985). In *Ferguson*, the Metropolitan Employee Benefit Board approved a claim for disability benefits at a meeting on May 9, 1982. *Id.* at \*2. Then, on June 13, 1982 after a portion of the benefits were paid to the former employee, the Board rescinded approval of the claim. *Id.* at \*3. The former employee filed a writ of certiorari claiming that based upon Robert's Rules, the Board only had the authority to reconsider its action at the meeting on May 9, 1982. *Id.* In determining that the Board had the power to reconsider its actions at the June 13, 1982 meeting, the court in *Ferguson* held that "[i]n the absence of some legislative restriction, administrative agencies have the inherent power to reopen or to modify and to rehear orders that have been entered. Of course, the power must be exercised reasonably and application seeking its exercise must be made with reasonable diligence." *Id.* at \*4-\*5. The *Ferguson* court concluded that during the 60 days in which a writ of certiorari can be sought, an administrative agency has the power to reconsider its actions. *Id.* at \*8. The *Ferguson* court concluded with "[t]he provisions of Robert's Rules do not displace that power [to reconsider its actions] ... Robert's Rules governing the mechanics of conducting business in a deliberative body should not displace the quasi-judicial power to reconsider unless the statutes creating the board compel that conclusion." *Id.* at \*9. Relying upon the decisions in both *Irene* and *Ferguson*, it appears that despite the restrictions set out in Robert's Rules related to motions to rescind, the Board had the authority to reverse its decision to terminate the City Manager.

Based upon the discussion that occurred between both votes and the question asked and comments offered by Mr. "A" before he made the second motion, it appears that the Board's second vote to retain the City Manager for 3 months and then review her employment rescinded the initial vote to terminate her. Additionally, given the short time frame between each vote, there does not appear to have been a break in service in the City Manager's employment. At no point during the November 18, 2014 meeting, did the City Manager relinquish any of the duties of employment that she assumed in January 2012 when she initially began working for the City. As such, Section 6-21-101(b)(1) of the City's Charter which reads, "[t]he city manager may not be removed within twelve (12) months from the date on which the city manager assumed the duties of the city manager, except for incompetence, malfeasance, misfeasance, or neglect of duty," is not applicable in my opinion, and therefore, the City is not required to enter into a new 12 month contract with the City Manager based upon the votes taken at the meeting on November 18, 2014. As previously stated, it appears that the City entered into a new 3 month employment agreement with the City Manager at the November 18, 2014 meeting.

With warmest regards,

Elisha D. Hodge  
MTAS Legal Consultant