BOARD OF ETHICS JURISDICTIONAL FINDINGS

File Number: 19-BOE-007 and 19-BOE-008

Complainants: Misty Witenberg
City Clerk Devon Reid

Respondents: Mayor Stephen Hagerty (19-BOE-007)
Former Counsel Michelle Masoncup (19-BOE-008)

Date: July 1, 2020

This matter, coming before the City of Evanston Board of Ethics, on the issue of the Board’s jurisdiction, the following findings are made, and IT IS HEREBY ORDERED:

PROCEDURAL BACKGROUND

1. On November 25, 2019, Misty Witenberg and City Clerk Devon Reid ("Complainants") filed identical Complaints against Mayor Stephen Hagerty and former Corporation Counsel Michelle Masoncup (collectively, "Respondents").

2. In addition to their Complaints, Complainants submitted documentary evidence in support of their Complaints.

3. The Board of Ethics ("BOE") held a meeting on March 3, 2020, during which it heard oral argument and received supplemental documentary evidence from Witenberg.

4. After hearing Witenberg’s oral argument and reviewing the Complaints and exhibits, the BOE deliberated on the issue of jurisdiction pursuant to Evanston City Code of Ordinances, § 1-10-8.

THIS BOARD’S JURISDICTION

5. The City Code of Ethics requires a two-factor test to be met in order to exert jurisdiction. § 1-10-8(D)-(E):

(1) Is or was the respondent a person subject to this chapter as defined herein at the time of the alleged ethical misconduct? This question is covered by § 1-10-4(B):

"The provisions of this Chapter shall apply to any officer or employee of the City, whether elected or appointed, paid or unpaid, including members of boards and commissions appointed by the City Mayor or City Council."
(2) Is the ethical misconduct complained of covered by this chapter?

JURISDICTIONAL FINDINGS REGARDING THE COMPLAINT AGAINST
MAYOR HAGERTY (19-BOE-007)

6. The BOE finds that Mayor Hagerty, as an elected officer,¹ is covered by this Code.

7. Turning to the second question on jurisdiction, the Complainants allege that Mayor Hagerty violated the Ethics Code by acting without impartiality and abusing the power of his office, in violation of the City Code of Ethics, § 1-10-4(C)(1), Impartiality, and § 1-10-4(C)(3)(b), Abuse of Power in Office, in the following ways:

1. Re-assigning Reid’s FOIA Officer duties in Resolution 57-R-19.
2. Initiating an investigation into employee complaints against Reid by retaining Robbins Schwartz when the City has never sought to punish other persons for engaging in “inappropriate workplace conversations” which do not expressly violate the City’s Workplace Harassment Policy.
3. Retaining outside counsel to investigate the complaints against Reid when the City has never retained outside counsel to investigate workplace harassment complaints in the past.
4. Seeking a criminal investigation against Reid when the City has never sought criminal investigations against City officials or senior staff for any reason.
5. Failing to provide independent counsel to Reid during the independent investigation.
6. Failing to provide Reid with an opportunity to defend himself by withholding pertinent information against him, including the identity of the complaining witnesses and the substance of the complaints against him.
7. Recommending censure of Reid to the City Council for violating the Healthy Work Environment Policy.
8. Recommending censure of Reid for violating Council rules.
9. Recommending censure of Reid for violating the Open Meetings Act (OMA) when the Mayor and Ald. Fiske were not censured for their violations of the OMA (as found by the AG’s Office).
10. Re-assigning Reid’s staff after he issued an internal memo notifying the City of a possible OMA violation in 2017.

¹ § 1-6-1.
11. Recommending censure of Reid for violations of City policies which do not exist: Hostile Work Environment Policy and Healthy Work Environment Policy.

12. Recommending censure of Reid for violation of “City Strategy,” rather than a policy when the City has never sought to punish other persons for violating “City Strategy.”

13. Retaliating against Reid for his refusal to comply with the Law Department’s directives to close certain FOIA requests and his complaint to the ARDC.

14. Directing Reid to cease and desist the filing of a complaint against Masoncup.

8. Section 1-10-4(C)(1) requires the Mayor to perform his duties with impartiality and without prejudice or bias. He must give every citizen only the consideration, treatment, advantage or favor which is available to every other citizen. Taking the facts alleged in the Complaint against the Mayor at face-value, it is possible that the Mayor acted with an improper motive (prejudice or bias).

9. The BOE finds that it has jurisdiction over Complainants’ allegations that the Mayor was not impartial or acted with an improper motive in initiating the investigations, conducting or interfering with the investigations, or retaliating against him administratively.

10. Therefore, the BOE finds that it has jurisdiction over the following allegations referred above (numbered paragraphs refer to the paragraphs above):

2. Initiating an investigation into employee complaints against Reid by retaining Robbins Schwartz when the City has never sought to punish other persons for engaging in “inappropriate workplace conversations” which do not expressly violate the City’s Workplace Harassment Policy.

3. Retaining outside counsel to investigate the complaints against Reid when the City has never retained outside counsel to investigate workplace harassment complaints in the past.

4. Seeking a criminal investigation against Reid when the City has never sought criminal investigations against City officials or senior staff for any reason.

5. Failing to provide independent counsel to Reid during the independent investigation.

6. Failing to provide Reid with an opportunity to defend himself by withholding pertinent information against him, including the identity of the complaining witnesses and the substance of the complaints against him.
10. Re-assigning Reid’s staff after he issued an internal memo notifying the City of a possible OMA violation in 2017.
13. Retaliating against Reid for his refusal to comply with the Law Department’s directives to close certain FOIA requests and his complaint to the ARDC.
14. Directing Reid to cease and desist the filing of a complaint against Masoncup.

11. However, the Mayor’s legislative and political actions are not subject to the BOE’s scrutiny. The BOE’s purpose is not to be a pawn in political maneuvers between the Mayor and City Clerk or to be an unauthorized board of appeals for all legislative decisions of the City Council. Rather, the purpose of the BOE is to evaluate, make findings of fact, and issue advisory opinions for the City Council on questions of possible unethical conduct or conflicts of interest,\(^2\) and to interpret the Ethics Code consistent with the State ethics statutes.\(^3\)

12. Therefore, the BOE does not assert jurisdiction over the Mayor’s legislative actions before the City Council, including his recommendation that Reid be censured and his presentation of the FOIA and Censure Resolutions. If the Complainants disagree with the Mayor’s actions on the City Council, they may pursue political remedies at the ballot box.

1. Re-assigning Reid’s FOIA Officer duties in Resolution 57-R-19.
7. Recommending censure of Reid to the City Council for violating the Healthy Work Environment Policy.
8. Recommending censure of Reid for violating Council rules.
9. Recommending censure of Reid for violating the Open Meetings Act (OMA) when the Mayor and Ald. Fiske were not censured for their violations of the OMA (as found by the AG’s Office).
11. Recommending censure of Reid for violations of City policies which do not exist: Hostile Work Environment Policy and Healthy Work Environment Policy.
12. Recommending censure of Reid for violation of “City Strategy,” rather than a policy when the City has never sought to punish other persons for violating “City Strategy.”

13. Section 1-10-4(C)(3)(b)(2) of the Ethics Code prohibits the Mayor from using the power of his office “to engage in any transaction” which to a reasonable person would appear to be in conflict with his or her official duties, or would appear to be to his

\(^2\) § 1-10-2(C).
\(^3\) § 1-10-11.
"private benefit.” None of the allegations against Mayor Hagerty allege that he engaged in “any transaction” which would be in conflict with his duties or be to his “private benefit.” There is no allegation that Mayor Hagerty or his family privately benefited from creating additional FOIA officers, hiring outside counsel to investigate the complaints against Reid, recommending censure of Reid, seeking a criminal investigation against Reid, or otherwise retaliating against Reid. There are no allegations that link the alleged conduct to a transaction or to a private benefit. Therefore, the Complaint against the Mayor has not demonstrated a possible violation of § 1-10-4(C)(3)(b)(2), Abuse of Power, and the BOE finds that it does not have jurisdiction over such claims.

JURISDICTIONAL FINDINGS REGARDING THE COMPLAINT AGAINST MASONCUP (19-COE-008)

14. The BOE finds that Masoncup is no longer an employee or official of the City.

15. Therefore, the BOE finds that it does not have jurisdiction over the Complaints against her pursuant to § 1-10-4(B).

CONCLUSION

16. The Complaint against the Mayor may proceed to a hearing on the merits pursuant to § 1-10-8(E) of the Code of Ethics only on the issues identified in these Findings and Order. The Mayor will be given notice of the Complaint and this Order, and a hearing scheduled on the merits.

17. The Complaint against Masoncup is dismissed in its entirety based on lack of jurisdiction.

Date: July 1, 2020

Entered:

/s Carrie Von Hoff
Acting Chair