RUDMAN WINCHELL MEMO

TO: HALLOWELL CITY COUNCIL
FROM: Erik Stumpfel, City Solicitor
DATE: June 25, 2014

RE: City Council's Role in Pending Personnel Investigations

I am providing this memo at Mike Starn's request, to provide a general summary of the statutes, case law and City Charter provisions that define the City Council's role in pending personnel investigations. This memo will also address Freedom of Access law and confidentiality issues.

City Charter

Article VI, section 6 of the Hallowell City Charter provides that "The City Manager shall be the administrative head of the City and shall be responsible only to the City Council for the administrative management of all departments of the City."

In general, this language means that administrative investigations of allegations of employee malfeasance or misconduct, as well as initial disciplinary action in any case that results in employee discipline, fall within the Manager's direct responsibilities, and not the City Council's. The primary exceptions to this general are:

(a) Investigations and / or disciplinary hearings with respect to City officials who are appointed directly by the City Council under Article VI, section 1(a) of the City Charter;

(b) Disciplinary matters referred to the City Council in cases where the City Manager is the immediate supervisor of the City employee(s) concerned, but is unable to act due to personal involvement in the matter;

(c) Grievance appeals hearings conducted by the City Council's Personnel Committee or full Council under the City's published personnel policies, following initial disciplinary action or review by the City Manager.

The Charter's phrase "responsible only to the City Council" means, with respect to employee disciplinary matters, that no other officer or employee of the City may reverse or modify action that has been taken or reviewed by the City Manager under the City's personnel policies.

In addition, this phrase gives the City Council a general oversight role with respect to investigations and employee disciplinary matters that entitles the Council to inquire of the Manager concerning the *status* of any such matter. However, for the reasons discussed below,

any determination of the *merits* of a particular charge or accusation against a City employee must be left, in the first instance, to the City Manager and the normal appeals process applicable to employee disciplinary cases.

Freedom of Access / Confidentiality

Maine's municipal employee personnel records statute, 30-A M.R.S. section 2702, provides that:

> **1. Confidential records.** The following records are confidential and not open to public inspection. They are not "public records" as defined in Title 1, section 402, subsection 3. These records include:
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> * * * * *
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> **B.** Municipal records pertaining to an identifiable employee and containing the following:
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> **(5)** Complaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action. If disciplinary action is taken, the final written decision relating to that action is no longer confidential after the decision is completed if it imposes or upholds discipline. The decision must state the conduct or other facts on the basis of which disciplinary action is being imposed and the conclusions of the acting authority as to the reasons for that action. . . ."

Under this provision, the City **is prohibited** from publicly releasing any information concerning a pending investigation or hearing of complaints, charges or accusations of misconduct against a City employee. No information about any such matter may be shared with the public or the press while the matter remains pending. This prohibition applies to all City officials and employees. The City Council has no discretion to over-ride the statutory requirement "in the public interest".

Applying the policy of the statute, any public discussion of the *status* of an investigation or hearing should also be avoided, especially press interviews or other public discussion by individual Council members. Although public discussion of the *status* of a pending investigation does not, strictly speaking, fall within the direct prohibition of section 2702, it is extremely difficult to separate the status of an investigation from information concerning the content of the complaint, charge or accusation, release of which is prohibited, when speaking with the press or members of the public. What starts as a statement concerning the status of a pending matter often inadvertently becomes a prohibited disclosure of confidential information.

The privacy concerns protected by section 2702 may, in some cases, be waived by the employee concerned. For example, a City employee who is the subject of a complaint may choose to release information or make statements concerning the complaint to the press or the

general public. No action should be taken against the employee concerned when the disclosure consists of information relating solely to that employee.

However, no City employee has the right to release confidential information concerning another City employee. A public statement by an employee who is the subject of a misconduct complaint does not open the door to responsive comments by other City employees, Council members or officials. A "no response" policy is best in these situations.

Executive Sessions

The City Council may conduct executive sessions under 1 M.R.S. section 405(6)(A) to receive information concerning the *status* of any pending investigation or hearing. Executive sessions are available for this purpose, in part to protect the same privacy concerns that are addressed in 30-A M.R.S. section 2702. The City's legal counsel need not be present at executive sessions conducted for this purpose.

If the executive session is properly limited to a status update, at which the underlying information or merits of the complaint, charge or accusation are *not* discussed, the employee concerned is not entitled to be present.

However, section 405(6)(A) expressly provides that when an executive session is conducted for the purpose of "hearing of charges or complaints against a person or persons", certain additional rights apply. Among these rights are the following:

- The person charged or investigated is entitled to be present at the executive session. Case law under the statute has held that this includes the right to have the person's attorney present with them.

- The person charged or investigated may request in writing that the investigation or hearing be held in public. If this request is made, *it must be honored.*

- Any person bringing the charges, complaints or allegations *is also entitled to be present.*

If the City Council chooses to hold an executive session to receive a status update on a pending investigation or hearing, without the employee and accuser present, it is critically important that *no evidence be considered* and *no discussion of the merits of the underlying complaint charge or accusation be held.*

Due Process

In its 1985 *Loudermill* decision [*Loudermill v. Cleveland Board of Education,* 470 U.S. 532], the U.S. Supreme Court held that a non-probationary municipal public employee has a constitutionally protected property interest in his or her continued employment by the public body.

The effect of this decision is that every municipal public employee is entitled to pre- and post-termination due process hearings in disciplinary cases that extend to loss of employment. A pre-termination "Loudermill" hearing may be very abbreviated in nature, consisting of notice of the contemplated disciplinary action, and an opportunity to present information that may refute the basis for the proposed discipline. Typical *Loudermill* hearings are conducted with the individual employee by the first-line supervisor who has authority to terminate the employment. In Hallowell, this is usually the department head or City Manager.

However, even after a *Loudermill* hearing, the employee must have an opportunity for a full evidentiary hearing concerning the factual basis for the disciplinary action, before a neutral finder of fact. The full due process hearing may occur as a post termination appeals hearing, but it must be provided at some point in the process.

Under Hallowell's published personnel rules and regulations, a terminated employee's opportunity for a full due process hearing consists of a grievance appeal hearing by the City Council's Personnel Committee.

This means that the members of the Personnel Committee must remain entirely neutral with respect to any situation that may result in disciplinary action. It is especially important for this purpose that members of the Personnel Committee refrain from any personal investigation, statement-taking, review of police or investigative reports, or other investigative activities with respect to pending investigations or disciplinary hearings. As part of the grievance appeal process, an employee's due process rights include the right to have the grievance appeal decided based *solely upon* information presented to the Committee at the hearing, to which the employee has had an opportunity to respond. Fact-gathering by Personnel Committee members in advance or otherwise outside of the hearing process will invalidate the grievance appeal hearing as satisfying *Loudermill* due process requirements. At a minimum, such independent fact-gathering may necessitate a full re-hearing before a different fact-finder. In an extreme case, independent investigative activities, especially if undisclosed, may trigger civil rights damages liability under the federal civil rights statute [42 U.S. Code section 1983].

<u>Summary</u>

The City Council, through its Personnel Committee, may ultimately become part of the disciplinary hearing process in the form of a grievance appeal hearing. In order to preserve the integrity of that process, and to comply with privacy protections under Maine law, City Council members should not engage in any independent factual investigation, make public statements, or disclose information concerning pending employee investigations or hearings.

Considerable restraint may be required in this regard, if the matter concerned is already being played out in the press and is the subject of negative public comments or criticism. However, Maine and federal law are clear on the points outlined above.

EMS