



Seattle City Attorney

Thomas A. Carr

Suzanne M. Skinner, Chief Civil Attorney
206.684.8228

suzanne.skinner@seattle.gov

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Wayne Barnett, Executive Director
Seattle Ethics and Elections Commission
700 Fifth Avenue, Suite 4010
PO Box 94729
Seattle WA 98102-4729

Re: Payment of Councilmember McIver's SEEC fine

Dear Mr. Barnett:

Thank you for your letter yesterday. Pursuant to your request, I have instructed the accounting officer responsible for the Judgment Claims Fund to credit the fine paid on behalf of Councilmember Richard McIver. My instruction should not in any way be construed to mean that Councilmember McIver has not paid the fine levied by the Commission in its order of July 22, 2008. The Councilmember fulfilled his obligation as defined under the defense and indemnification provisions of the Seattle Municipal Code. It is the Seattle Ethics and Elections Commission (Commission) that is refusing to accept his payment.

You requested an explanation for why Councilmember McIver relied on the Judgment Claims Fund to pay his fine. The answer is that a plain reading of the City's broad defense and indemnification provisions authorizes the Fund to pay administrative fines incurred by officers and employees in the course and scope of their City employment. SMC 4.64.016 covers defense and indemnification of City officers and employees before administrative tribunals, including the Commission. Defense and indemnification of City employees and officers depends upon whether the actions subject to the administrative charges occurred within the scope and course of City employment. After receiving a request for defense and indemnification, reviewing the facts, and the recommendation of Council President Conlin, I decided that Councilmember McIver's participation in the award and administration of the City contract to Griffin, Hill and Associates occurred within the scope and course of his City employment. That decision is consistent with past City practice and controlling case law. Once the scope call is made to represent a city employee, the SMC leaves no ambiguity as to whether the City will pay any resulting fine or judgment. SMC 4.64.016 clearly directs: "If the determination is made that the City will defend in administrative proceedings, the City will indemnify the officer or employee with respect to any monetary penalty imposed." (emphasis in original).

The only exception to this directive to indemnify where actions are within the scope of employment is limited to “claims and/or litigation arising from any dishonest, fraudulent, criminal or malicious acts or omissions of officers or employees of the City.” SMC 4.64.015. While the Commission found the Councilmember to have violated SMC 4.16.070(1)(a), the Commission made several significant findings that dispel any question that the reservations of SMC 4.64.015 apply to this situation. The Commission in particular determined that: “...(b) Councilmember McIver did not obtain any private benefit from his decision to enter the original or amended contracts; [and] (c) Councilmember McIver did not select GHA in order to benefit Ms. Francis...” *In the Matter of Councilmember Richard McIver*, Case No. 07-1-1019-1, Determination, Findings of Fact, Conclusions of Law and Order at 11 (July 22, 2008). Without any indication of fraud or dishonesty (the only provisions of SMC 4.64.015 remotely applicable here), the mandatory language of SMC 4.64.016 applies with full force: “the City will indemnify the officer or employee with respect to any monetary penalty imposed.” *Id.*

It may well be that the Commission was aware of the straightforward directive of SMC 4.64.016 in penning its tempered request that Councilmember McIver “*should* pay from his personal funds a penalty...” *Id.* at 12, paragraph 3 (emphasis in original). While the Commission might prefer that the Councilmember pay the fine from his own pocket, his actions by the City’s own determination in making the scope decision were done for and on behalf of the City and its citizens. Nor does the Commission’s review of the matter undermine that conclusion. The Commission itself found that “Councilmember McIver’s decision was strongly motivated by a desire to increase the City’s use of minority business enterprises, which was an appropriate, even laudable, City goal.” *Id.* at 11, paragraph 25. But the Commission’s preferred outcome here is not consistent with a plain reading of SMC 4.64.016. Sparing you a long-winded discussion of the rules of statutory construction, I simply draw your attention to the cardinal rule: the plain meaning of a statute or ordinance is all that should be considered in its construction if that meaning is plain. *Densley v. Dep’t. of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007)(court looks first to plain language of statute, if it is clear it need not go further).

The language of SMC 4.64.016 is indeed plain. If the contested acts fall within the scope and course of City employment, and outside of SMC 4.64.015, the City will pay the fine of any officer or employee who incurs an administrative fine. Nor is this reading of SMC 4.16.016 anything but consistent with the spirit of the ordinance, given the laudable goal Councilmember McIver achieved in overseeing the letting of a City contract to an unquestionably qualified, minority owned business. The purpose of all defense and indemnification statutes is to protect public employees when they act consistently with what they believe are the interests of the City and its employees. If those well-meaning and well-considered actions never resulted in liability, there would be no reason for defense and indemnification.

I trust that this discussion explains why I respectfully decline your request to reconsider this application of SMC 4.64.016. I note further that SMC 4.64.016 prohibits

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any appeal of a scope determination once made. *Id.* Reconsidering the effect of that scope decision could be construed to be an appeal of the scope determination.

The purpose of this letter is not to put oil on this fire but to explain my reading of the applicable code provisions. The Assistant City Attorneys assigned to represent you and the Commission will zealously assist your goals whether that involves further litigation or legislation.

Thank you for this opportunity to address this complex issue. If you have any further questions, or the Commission wishes me to address their concerns in-person, please contact me.

Very truly yours,

THOMAS A. CARR
Seattle City Attorney



Suzanne M. Skinner
Chief Civil Attorney

cc: Councilmember Richard McIver
Council President Richard Conlin
Councilmember Tim Burgess
Councilmember Sally Clark
Councilmember Jan Drago
Councilmember Jean Godden
Councilmember Bruce Harrell
Councilmember Nick Licata
Councilmember Tom Rasmussen
Bill McGillin, Assistant City Attorney
Jeff Slayton, Assistant City Attorney

Barnett response