



**CITY OF MINOT**

**REPORT OF INVESTIGATION**

Investigated by  
Patricia R. Monson  
Attorney at Law  
Center for Mediation & Consultation, PLLC  
Fargo North Dakota 58104  
Phone-Office 701-361-5976  
Cell 701-238-8794  
[www.cmcpllc.com](http://www.cmcpllc.com)

## **I. INTRODUCTION**

On March 9, 2020, the Minot City Council voted 5-2 to hire independent counsel to investigate whether a hostile work environment existed within the City, primarily among the department heads, also referred to as the executive team, and the City Manager, Tom Barry. The concern about the hostile work environment emanated from articles/posts written by blogger Rob Port which appeared in his blog “*Say Anything*” on March 3 and 6, 2020 relating to an interrogation conducted by the City Manager of certain department heads on December 9, 2019. The posts included relevant documents obtained through a lawful records request by Port who was critical of the way the City Manager conducted the interrogation of city employees.

## **II. INDEPENDENT INVESTIGATION**

The investigation by independent counsel began on Monday, March 16, 2020, after the full Minot City Council approved an agreement to investigate. The investigation began that day in Minot with an interview of Mayor Shaun Sipma who provided pertinent details of events leading up to the current situation. Thereafter, an initial interview was conducted of the City Attorney who thereafter, along with her staff, assisted in arranging interviews of City of Minot employees. Employees interviewed as part of this investigation include:

- Airport Director
- Chief Resilience Officer-HUD/NDR
- City Assessor
- City Attorney
- City Manager
- City Engineer
- Finance Director
- Fire Chief
- Human Resource Director (hereinafter “HR Director”)
- Librarian
- Administrative Assistant to Mayor/City Manager
- Planning Director
- Former Police Chief
- Public Information Officer

- Public Works Director
- City Clerk

In addition to these city employees, the Mayor and six council members made themselves available for interviews as did some members of the community with knowledge or information about the issues being investigated.

Also interviewed as part of the investigation was John Trombley, a consultant with The Village Family Service Center in Fargo who was retained to conduct three conflict resolution workshops for the city. In all, the investigation included interviews of 25 witnesses, some of whom were interviewed more than once, as necessary, to ensure accuracy and thoroughness.

### **III. FACTS FROM INVESTIGATION**

Blogger Rob Port made the City of Minot the focus of two blogs in October 2019 when he wrote about the City Council's violation of the Open Meetings Law when it conducted a retreat outside of the city. Subsequent Port blog posts continued to cast the City and its City Manager, Tom Barry, in an unflattering light. On November 15, 2019, Port raised suspicions about the late addition to the City's November 18<sup>th</sup> meeting agenda of the City Manager's contract renewal. Port shared his opinion that he, and other members of the community, were not impressed with the City Manager's performance.<sup>1</sup> The vote on the contract renewal was tabled at the November 18<sup>th</sup> meeting to allow for further input.

Port next posted an article on November 22, 2019, this one dealing with a conference of the International City/County Management Association attended by the City Manager and the City of Minot Fire Chief, Kelli Kronschnabel in Nashville, Tennessee from October 20-23, 2019. Port questioned the appropriateness of the expenditure of city funds for the Fire Chief to attend a conference of city managers. After publication of this article, Mayor Sipma and Port met to discuss the negative image he was depicting of the City and the City Manager. Port is alleged to have told the Mayor at this meeting that he had been told by a couple of city employees that they were

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<sup>1</sup> Sometime during the weekend of November 16-17, 2019, the Finance Director reached out to Alderman and Council President, Mark Jantzer, to report the difficulties some city employees were having with the City Manager. Despite knowing the HR Director well, it appears Jantzer did nothing with this information.

dissatisfied working with the City Manager. The Mayor shared this information with the City Manager who interpreted the “couple of city employees” to be “department heads” because they are “the only city employees he works with.”

The City Manager’s contract renewal and amendments were approved at the December 2, 2019 meeting by a vote of 6-1. Alderman Straight was the lone dissenting vote at the meeting where he expressed his concerns about employee issues with the City Manager after speaking to both staff and the City Manager prior to the meeting. No further discussion occurred at the December 2<sup>nd</sup> meeting about these concerns and no questions were asked by the other aldermen.

Two days after the City Council’s approval of a 5-year extension of the City Manager’s contract, the City Manager sent an email message to the entire City Council expressing concerns about the city’s “organizational culture”. He advised that improving the culture at the executive level was a “new task” he had to undertake. Despite the “many team successes” accomplished, the City Manager believed that “a handful” of team members were resistant to the change he was trying to bring to city government. He advised that along with the HR director and the Executive Committee of the Council, comprised of the Mayor, President (Mark Jantzer) and Vice President (Lisa Olson), he would develop an assessment of the organization’s culture and an improvement plan. He promised to move forward with an “enlightening and nurturing approach.” (See, attached Exhibit 1 attached, email dated December 4, 2019 2:51 PM; Tom Barry to City Council; CC: Lisa Jundt).

On the same day at the exact time, the City Manager sent an email message to all department heads, with a copy to his Administrative Assistant and the Public Information Officer, giving notice of a meeting to be held on Monday December 9<sup>th</sup>. The meeting was to address what the City Manager described as the deterioration of “the organizational culture at the executive level” and to lay out a plan of improvement. The email was sent several days in advance of the meeting to allay any “anxiety” on the part of the attendees. Again, a promise was made by the City Manager to address the issue in an “enlightening and nurturing” approach. (See, Exhibit 2 attached).

Also, on December 4<sup>th</sup>, the HR director contacted a consultant at the Village Family Service Center in Fargo to inquire about the possibility of conducting team building workshops for the City’s executive team. A telephone conference was scheduled for December 12<sup>th</sup> between the consultant, the HR director and the City Manager to discuss a plan for these workshops.

The following day, December 5, 2019, Port published another article again criticizing the City Manager, this time reporting there were city employees who were having difficulties working with him. A couple of the employees, Port stated, had informed him of the late addition to the Council agenda of the City Manager's contract renewal about which Port had written on November 15th.<sup>2</sup> The pertinent part of the December 5th article reads as follows:

"I've heard from city employees who have difficulties working with Barry. In fact, a couple of city employees were among those who alerted me to the initial last-minute addition of Barry's contract renewal to the council's agenda last month. Usually, these employees would feel like they could go to their mayor with their problems, but it's widely known that Barry and Sipma are buddies."

Port did not identify the employees to whom he was referring, yet the City Manager made certain assumptions and proceeded with consequential actions based on those assumptions.

The meeting of Monday, December 9, 2019 was held in a conference room at the City's Police Department. Present, as required, were all department heads including: the City Attorney, Finance Director, Public Works Director, Assessor, Airport Director, Director of Engineering, Fire Chief, Librarian, Former Police Chief and the Director of Community Development. Also present were the Public Information Officer and the City Manager's Administrative Assistant. The Chief Resilience Officer-HUD/NDR was absent from work that day so did not attend.

At the outset, the City Manager reprimanded those he believed were making disparaging remarks about him outside of work and providing information to the media which he said put him in an unfavorable position, tarnished his reputation and attempted to sabotage his contract. He shared that these actions had humiliated and harmed him and his family. The City Manager then spoke from a script he prepared of "talking points" focusing on comments he believed were made by some team members and grievances taken to a "local blogger", referring to Rob Port. Specific reference was made to Port's acknowledgement that city staff had provided information to him which allowed him to develop three separate posts. The City Manager's assessment was that providing information to Port was an act of betrayal and had serious consequences to the City and himself, all of which he set out and addressed in his "talking points" on December 9<sup>th</sup>.

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<sup>2</sup> The revised agenda for the November 18<sup>th</sup> Council meeting at which the contract renewal was to be discussed, was published at 4:30 p.m. on November 15<sup>th</sup>.

The executive team assembled was also told at that meeting that some of them had violated city personnel policies and protocols for filing grievances. No policies were identified or provided of any policies that were alleged to have been violated. Likewise, there was no information or explanation of how or which grievance protocols were violated.

Language used by the City Manager, and ostensibly approved by the City Council, *vis a vis* the executive team, included such words as “perpetrators”, “complacent enablers”, “underhanded antics”, “sabotaging”, “Do not speak about these issues with anyone”, “choose your peers and those you associate with wisely, for their actions reflect on you as well.’

The City Manager then released four members of the executive team: the Community Development Director, the Fire Chief, the Librarian, and the Police Chief from the meeting. The City Manager advised the remaining team members that an investigation of the personnel policy violations would follow and that each team member would be taken separately into the Police Department briefing room where they would be asked a series of questions. The Public Information Officer was not questioned but was told to remain in the Police Department conference room during the individual questioning. Each of the remaining team member was taken into the briefing room individually and was questioned by the City Manager.

Present in the briefing room during the questioning process, were the City Manager and the HR director who was there as a witness. When the HR director was questioned, the Public Information Officer was in the room as a witness. The “Internal Investigation Questionnaire” which had been prepared by the City Manager, was read to each witness by the City Manager. The Questionnaire listed the “Source and Probable Cause” of the investigation as the Port article on December 5, 2019 covering the Council’s approval of the City Manager’s \$1million contract. The instructions, like the rest of the document, was read by the City Manager; it contained words such as “alleged conspiracy”, “to disparage and defame”, and violation of “multiple personnel policies.” As before, no policies were identified or provided to the witnesses before or while being questioned. The City Manager warned all witnesses that if they did not tell the truth, they were subject to discipline including termination.

Seven department heads and one staff member were interrogated by the City Manager on December 9<sup>th</sup>.<sup>3</sup> The City Manager refers to these eight employees as “The Group” because of their

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<sup>3</sup> The Chief Resilience Officer-HUD/NDR was subsequently interviewed on December 10<sup>th</sup>.

close association and friendship outside of work.<sup>4</sup> After reading the questions to them, the City Manager noted their answers on the form. All witnesses answered in the negative when asked about providing information to Port, knowing anyone who did, or about making disparaging remarks about the City or its leaders. Finally, all were instructed not to share any information about the investigation with anyone.

Of those interviewed, the City Manager determined “probable cause” existed to warrant further investigation of two employees: the Assessor and the Finance Director. As was later disclosed by the City Manager, the probable cause giving rise to the additional inquiry was the reaction each had when being questioned; i.e. the Finance Director asked if he should have a representative present and the Assessor became indignant that he was being accused in such a manner. As it turned out, no further investigation was conducted of either individual or of the issues raised at the December 9<sup>th</sup> meeting.

Following the meeting on December 9<sup>th</sup>, the City Assessor asked the HR director to provide him the specific sections of the personnel manual that the City Manager and the HR Director believed were violated when information was given to Mr. Port. The policies provided to him were:

Chapter 6, Section 4D-Substantive Regulations

- 1) Misconduct, 2) Insubordination, 5) Inefficiency, incompetence, or negligence

Chapter 7-Section 1-Grievance Procedure

Chapter 11-Section 2-City of Minot Ethics Policy for City Officials and Employees

Chapter 11-Section 3-Employee Responsibilities

Chapter 11-Section 5-Social Media Accountability

(The policies are included in the email which is attached to this report as Exhibit 3). There were no facts nor any explanation of how those policies were relevant or had been violated by any of those interrogated.

The scheduled conference call between the Mayor, City Manager, the HR Director and the Village consultant, John Trombley (hereinafter “Consultant”) took place on December 12<sup>th</sup> at

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<sup>4</sup> From time to time, the “group” has included the Finance Director, the HR director, the Assessor, the City Attorney, the Public Works director, Airport director, City Engineer and the City Manager’s Administrative Assistant.

which time the City Manager shared with the consultant the “egregious” conduct of some department heads; that there was sabotaging and undermining of leadership by team members, they were not being forthright and honest, that this caused harm to the City and to him. The City Manager described a small group of department heads that socialized and complained in public unconcerned that what they said might be overheard. The HR Director informed the Consultant that these team members had been through a lot together; that they had “to carry a lot of water” for the City in the past and that led to “solid personal relationships” among some. During this telephone conference, the Mayor shared that changes in City government and his relationship with the City Manager may also have had an impact on issues at the executive level.

The City Manager has acknowledged that this “group” is the “dominant social after hours network” of city employees so “disrupting it is disconcerting” to them. It is his opinion that the “group” intentionally isolates other department heads and sets certain expectations to remain in the “group.” He has no specific information about which department heads this involves. Those department heads who socialize after work, i.e., the “group”, deny these accusations and call them childish.

As agreed during the December 12<sup>th</sup> telephone conference, conflict resolution and team building workshops were conducted by the Consultant in Minot; the first on December 18, 2019, and others on January 6 and 27, 2020. The assessment by the Consultant, after conducting a conflict inventory during the second workshop, was that there was “a clear lack of trust at the executive level across the board and that it would take time to rebuild it.” Since the January 27<sup>th</sup> workshop, no further workshops or team building sessions have been held.

During approximately this same time period, the City Manager was conducting 2019 performance evaluations of the department heads. The reviews of the individuals who were interviewed in the Police Department briefing room were all conducted after the December 9<sup>th</sup> meeting.<sup>5</sup> In many of these reviews, there were noticeable differences between the 2018 and the 2019 evaluations. In general, all received lower than average evaluations; most were lower than when evaluated in 2018. The evaluations contained admonitions about associating with a small group of department heads who, according to the City Manager, had been heard making complaints

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<sup>5</sup> The City Manager completed several evaluations on December 17 & 19, 2019 while others were not completed until January 2020.



outside of work of “disparagement, dissension, undermining of peers and the City’s leadership and projects.” Association with this group, in nearly all instances, impacted the performance evaluations by the City Manager. For most of the employees who associated outside of work, their performance was assessed at a markedly lower level, i.e. some who received a “4” (Highly Effective) in 2018 received a “2” (Needs Improvement) in 2019 in the same categories of performance<sup>6</sup>.

The City Manager relied on what other staff, who were “peripherally involved” in some off-work conversations, reported to him to support these lower performance evaluations; he did not rely on specific or verified information<sup>7</sup>. For instance, no explanation was given about what was said that was “disparaging.” In his 2017 and 2018 evaluations of several of these “group” employees, the City Manager encouraged them to step up and immediately report to him when others made “disparaging” comments about him. Refusal to do so was later taken into consideration and negatively impacted their evaluations. This occurred most notably in 2019 after the December 9<sup>th</sup> meeting.

This “group” of department heads became friends many years ago, prior to the City Manager’s tenure, and socialized outside of work, primarily after City Council meetings.<sup>8</sup> The venue was usually at one of several popular bars which is crowded and very noisy. As described by the City Manager, there are sometimes 200 people in the bar, “it is so loud you have to shout to hear one another.” Others have described the group, at times, as consisting of department heads, their spouses, friends and other people from the community, some representing companies who have contracts to do work for the City and who engage in the conversations as well. Topics of discussion included family, kids, sports, general venting about work, and/or actions taken by the City Council. The City Manager agreed that the group discusses matters of public concern involving the City of Minot.

On January 23, 2020, an opinion piece written by Port appeared on the “*Say Anything*” blog and in The Forum referencing the City Manager’s December 9<sup>th</sup> meeting and interrogation. Some of the Council members, after reading the piece, became concerned that the City Manager had not acted in an “enlightening and nurturing” manner as he told the Council he would. Nothing,

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<sup>6</sup> On a scale of 1 (Unsatisfactory) to 5 (Exceptional).

<sup>7</sup> Those staff were those who the City Manager did not include in the December 9<sup>th</sup> interrogation.

however, was done by the Mayor or the Council to act on these concerns until another Port article was published several weeks later on March 3, 2020. This publication included documents Port received pursuant to a lawful open records request including the City Manager's "talking points", the questionnaires and two of the handwritten "probable cause" notes.

On March 6, 2020 Port published another post which included notes written by the City Assessor shortly after his interview on December 9<sup>th</sup> to memorialize his conversation with the City Manager. Those handwritten notes were provided to the HR Director when the records request was made and then furnished to Port. The notes made immediately after the interview describe the City Manager during the interrogation as "threatening," "bully," "angry," "paranoid," "immature," "culture building" not done "by interrogating in a police station," "you run this place like the Gestapo."

It was after Port's March 3<sup>rd</sup> post that certain members of the City Council became concerned enough about the City Manager's treatment of city employees that they arranged a meeting on March 6<sup>th</sup> with the City Attorney for confirmation of what occurred at the December 9<sup>th</sup> meeting. The City Attorney had been present and was interviewed by the City Manager on December 9<sup>th</sup>, so had first-hand knowledge of what had occurred. After meeting with the City Attorney, these City Council members called a special meeting of the full Council to address what they considered to be unacceptable conduct by the City Manager toward city employees.

The Council met on March 9<sup>th</sup> to consider whether an investigation should be conducted into what one alderman described as a "serious situation" existing within the City that could create liability. Concerns expressed included whether the Council should wait until an actual complaint was filed by an employee; whether going straight to an investigation would be missing a step/looking for problems if none existed, i.e. wait until a grievance is filed; and whether anyone on the Council had spoken to any employees about issues involving the City Manager. Some members of the Council admitted to having knowledge of internal issues; others having knowledge did not acknowledge the fact. Two city employees addressed the Council stating that employees do not use the formal reporting process because it doesn't work.

## IV. AUTHORITIES

### A. **First Amendment-Public Employee's Right to Free Speech**

While there is no direct proof of what was said, who said it or whether something was said, if any of member of this group was heard to make a comment in public about a matter of “public concern” it would be regarded as protected speech under the First Amendment. See, *Pickering v. Board of Education*, 391 U.S. 563 (1968). City employees off the clock/off work speaking as private citizens about matters of public concern are entitled to freedom of speech under the First Amendment. What constitutes a matter of “public concern” can include a myriad of things such as expenditure of public funds, politics, public issues garnering media attention, matters of public and health and safety, etc.

City employees meeting outside of work, off the clock discussing matters of public concern such as why the City Manager's contract, which wasn't up for renewal until August 11, 2020, had been placed on the agenda late on Friday, November 15 for the Council meeting on Monday, November 18, 2019; the terms of the contract or whether sending the Fire Chief to an out of state conference for City Manager's was an appropriate use of city funds would be engaging in free speech. These are matters upon which all private citizens have a right to speak about freely. If they do not hold themselves out in any official capacity, city employees have the same right.

Complaints made by public employees outside of work about supervisors or general working conditions may not be covered by the First Amendment, even though they relate to a public concern, if they interfere with the government's interest in efficiency, workplace harmony and the satisfactory performance of employees' duties. These governmental interests must be balanced against the public employees' right to free speech. See, *Connick v. Myers*, 461 U.S. 138(1983). The government must maintain the efficient operation of the public's business; therefore, a public employee may be disciplined if their public speech undermines the integrity of the office or disrupts the operation of the workplace. The city employees' right to free speech will depend upon whether it caused any disruption to the operations and efficiencies of the city's work.

### B. **Public Employees Relations Act N.D.C.C. Chapter 34-11.1-05 (4)**

The Public Employees Relations Act provides in pertinent part that no agency, appointing authority, organization, or employee may directly or indirectly:

Subsection 4. Restrict or attempt to restrict after-working-hour statements, pronouncements, or other activities of any agency employee not otherwise prohibited by law which pertains to matters of public concern, if the employee does not purport to speak or act in an official capacity.

Again, there is no information obtained in this investigation that this group, when meeting after work hours in a Minot bar was either acting or speaking in an official capacity.

### **C. City of Minot Employee Manual -Personnel Policies**

#### **Chapter 5-Hostile Work Environment and Protection Against Retaliation**

The Statement of Philosophy in Minot’s Employee Manual reads, “It is the policy of the City to provide a positive work environment that is free of ...all forms of harassment. This policy is a measure to ensure that all employees will enjoy a safe workplace free from unreasonable interference, intimidation, hostility, or offensive behavior on the part of the council, department heads, supervisors, co-workers or visitors. All employees are responsible for compliance with this guideline, as the City of Minot will not tolerate unlawful...harassment”.

The definition of “Workplace harassment” is “any unwelcome conduct” that is “disparaging, bullying, threatening or disrespectful...when such conduct has the...effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive work environment.” P. 22

#### **Chapter 5-Complaint Procedures**

The complaint procedures define a process that involves first confronting the harasser with a request that the harassment stop. If it doesn’t stop, or the employee cannot confront the harasser, the report is made to the supervisor. If the complaint involves the City Manager, the report is made to the HR Director for investigation. Of interest, and creating some difficulty in the reporting process, is the City Manager is the HR Director’s supervisor.

### **CONCLUSIONS**

Forty hours of interviews conducted during this investigation revealed a significant level of distrust existing within upper management at the City. Most of the City’s department heads do not trust the City Manager largely because of his authoritarian management style imposed upon them during his tenure at the City; this has escalated over the last 6 months. Credibility

determinations of all witnesses were made as a critical part of this investigation. In determining a witness's credibility, a neutral investigator looks at demeanor, consistency of memory, bias and motive to falsify, character and opportunity to observe relevant facts, circumstances and occurrences. These factors were considered in determining the credibility of all witnesses interviewed in this investigation.

- Prior to being hired by the City of Minot, the City Manager worked for the City of Meridian, Idaho as its Public Works director overseeing a department of fifteen; he had no experience as a city manager.
- At the time he assumed the position of City Manager in December 2016, he oversaw employees, the majority of whom were long-tenured employees of the city who had worked through several hardships the city had endured and as a result became a close knit group.
- Many of the city department heads had worked under previous city managers whose management styles were criticized by the current City Manager as providing no leadership. His assessment was the department heads were left to manage their departments however they chose. He believed they did not welcome the oversight that the City Manager was bringing as part of his management style.
- According to the City Manager, from day to day the department heads are doing a good job and getting things done; none of them had been insubordinate and most of them “have blossomed.”
- As his tenure with the city progressed, the City Manager became preoccupied with what he described as his “biggest issue within the City.” That issue was the “culture of leadership” which he related directly to a “clique” or “group” of 6-8 long-tenured employees who socialized outside of work.
- The City Manager treated his department heads disparately depending on their association with this “group” as he refers to them.
- Beginning in 2017 and continuing in 2018, the City Manager rated some members of this “group” lower on their performance evaluations because of their association in the group and suspected conduct outside of work.
- In the 2019 performance evaluations of some department heads in the group, the City Manager considered their association outside of work to their detriment. That resulted in

significantly lower evaluations than they received in 2018. These lower evaluations were retributive and retaliatory and based on outside activities rather than on work performance.

- The City Manager also took into consideration refusal by some members of the “group” to report to him any negative or disparaging remarks made by others about him as he directed them to do. This refusal worked to their disadvantage on their evaluations even though making such a report was not, nor should it have been, a part of their job descriptions. These lower evaluations again were retributive and retaliatory and based on their outside activities rather based on their work performance.
- Many of the 2019 evaluations of members of the “group” contained language either identical or substantially similar to the following:

This employee “is part of a small group of Department Heads that are holding back the City’s potential. There have been many complaints of disparagement, dissension & undermining of peers & City leadership by this group. Association with the group is impacting (the employee’s) effectiveness & credibility & holding back the City potential”.

- The City Manager has no substantiation for these harsh assessments other than what he described as “constantly churning background noise” which he hears from four other department heads, three of whom he did not interrogate on December 9, 2019.
- City Council members who were aware that a group of employees socialized after work, particularly after Council meetings, saw nothing wrong with it. In fact, they encouraged it as part of team building. One Council member reported that, at the retreat held in October 2019, the City Manager embraced the notion of socializing outside of work as an important part of team building.
- In the fall of 2019, after the publication of two blogs by Rob Port, the environment at work between the department head members of the “group” and the City Manager became increasingly stressful.
- Port articles on November 15, 2019 about the last-minute addition of the City Manager’s contract renewal to the City Council’s agenda and another on November 22, 2019 relating to a conference in Nashville attended by the City Manager and the Fire Chief fueled the City Manager’s anger and frustration with his staff.

- The City Manager believed someone from the “group” had spoken to Port and provided information upon which these articles were based. He was angry about the effects that information might have on his personal life and his contract renewal negotiations with the Council.
- The City Manager, however, waited until after his 5-year contract renewal was approved by the City Council on December 2, 2019, before beginning a campaign of retribution against those department heads he suspected, without substantiation, of providing information to Port.
- By enlisting the support of the HR Director, his subordinate, the City Manager attempted to reform his personal dispute into a joint mission. The HR Director had no choice but to do as she was asked or directed to do by her supervisor.
- The City Manager reviewed personnel policies with the HR director for possible violations and determined that, by providing information to Port, some city policies were violated. Armed with what he “felt” were violations, he proceeded with the investigation.
- The personnel policies that these team members were accused of violating were never identified, produced or explained to them. Only the City Assessor was emailed a list when he demanded to know what he was being accused of by the City Manager.
- At no time material to this investigation, did the City Manager produce any evidence or information to support what he “felt”; i.e., that personnel policies had been violated by any member of the group.
- The City Manager did not approach the meeting on December 9<sup>th</sup> in an “enlightening and nurturing” manner. He approached it as depicted in the documents released and the statements given by those interviewed; as intimidating, threatening and an attempt to coerce information to which he had no right. As some council members described their reaction after reading the published documents, he had an “authoritarian” approach.
- Prior to going into the December 9<sup>th</sup> meeting, the City Manager had already concluded who the guilty parties were; as a result, their answers on his questionnaire were irrelevant. Furthermore, his choice of words in his “talking points” shows an attitude of anger, not nurture. His release of four employees from further interrogation, who he assumed, but could not be certain, had nothing to offer, likewise, shows he considered the remaining eight to be the “perpetrators” in “underhanded antics.”

- These eight city employees who were interrogated all answered the City Manager’s questions honestly.
- The “probable cause” language the City Manager added to the questionnaires of David Lakefield and Kevin Ternes was done as a defensive reaction because of comments made by these employees during the interrogation. The City Manager has not provided facts to support the “probable cause” finding and as later disclosed, none existed.
- Port later publicly confirmed that he had never spoken to any of these employees including David Lakefield and Kevin Ternes.
- The directive issued by the City Manager at the conclusion of the December 9<sup>th</sup> meeting, that no one speak about the meeting, was to intimidate these eight employees into silence about something they had a right to speak out about. (See, Chapter 5 of City of Minot Employee Manual, discussed below).
- The City Manager’s purpose in holding this meeting and interrogation was to tell this group that they had “crossed the line”, to give them “a jolt” and inform them that providing information to the media would “impact their employment.”
- The City Manager’s investigation was the antithesis of collaboration and team building.
- Other actions taken by the City Manager over his 3-year tenure that have been intimidating toward the department heads he considers members of the group who socializes are:
  - Mentioning repeatedly that the Council has given him authority to fire three department heads and then threatening to fire them.
  - Telling the HR Director that the Council and her co-workers do not trust her.
    - That he has a picture of her taken in a bar.
  - Asking them to report to him on what others say about him outside of work.
  - Advising them during their one-on-one meetings that their conduct outside of work would be considered on their performance evaluations.
  - Manipulating their conduct at work based on lawful outside activities.
  - Evaluating them for failing to take advantage of “leadership opportunities” which he described as standing up to those who make disparaging comments about him and reporting back to him.
  - Repeatedly telling some that certain members of the City Council do not trust them and want them terminated.



- These actions had a chilling effect on the group’s right to report the City Manager’s conduct to the Council or Mayor, resulting in an offensive work environment and one of bullying and distrust of one another and the City Manager.
- The City Manager believed the group’s conduct outside of work interfered with their work. In fact, it was the intimidation and control exerted upon them and the accusations of outside association, by the City Manager that affected their work, if in fact, their work was affected.<sup>9</sup>
- The difficult working environment and relationships that existed between co-workers and the City Manager were exacerbated by the City Manager’s conduct on and after December 4, 2019, as discussed in detail within this report.
- These are not the actions of a manager committed to a style of collaboration and team building.

### **Discussion and Application of Authorities**

#### 1. Free Speech under the First Amendment

As city employees, department heads/members of the “group”, have a right to speak as private citizens about matters of public concern. This investigation revealed no evidence that specific statements were made publicly by any specific city employee. However, the Port article of November 15, 2019 about the late addition of the City Manager’s contract to the Council’s agenda and the article of November 22, 2019 about the Nashville trip taken by the Fire Chief and the City Manager were matters of public concern. They both involved the expenditure of public funds and compliance with city process and procedure.

Again, there was no evidence established in this investigation that any member of this group spoke in public, at a bar after work, about either or both issues and, if they had, that it was in any official capacity. These employees had a right to speak publicly about the contract renewal issue and the Nashville trip when doing so as private citizens as they were matters of public concern. (See, *Pickering*).

This right to speak on matters of public concern, however, must be balanced against the City’s interest in the efficient disruption-free operation of its business. See, *Connick v. Myers*. In this

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<sup>9</sup> As reported by the City Manager, and confirmed by council members, there were no concerns about employees’ performance until after the November 22, 2019 Port post on the Nashville trip.

matter, the investigation has established the only disruption to the operations of the City was caused by the reaction of the City Manager to what he was told, and believed, were unfavorable remarks made about him.

As early as 2017, the City Manager sought to enlist the help of some department heads to obtain information said about him by other department heads. This caused a serious rift between those who reported and those who were reported upon. Suffice it to say this does not engender good workplace dynamics among employees and between employees and their supervisor. Of the sixteen city employees interviewed for this investigation, no one offered any complaints that the outside activity of this group affected the operations of the City or undermined the integrity of the city other than the City Manager. His concerns, however, appeared to be primarily personal.

Those employees who were “peripherally involved” when asked if the group’s public speech created any disruption in the city’s operations, replied as follows:

- “These department heads are very professional and good at their jobs.”
- “I’m not able to make any observations about whether their socializing has any impact on their work.”
- “They are helpful when I need help. When I ask, they are always ready to help.”
- “I believe the team members get along well at work.”
- “I saw no effort to undermine the City Manager.”
- “This was typical bar talk.”
- “From an operational standpoint, there is no problem with these department heads.”
- “I saw no disrespect by department heads toward the City Manager at meetings.”

Based on the applicable law and the statements provided in this investigation, it is my opinion that the City Manager’s actions were an attempt to restrict the “groups” speech on issues of public concern to which they have a First Amendment right.

## 2. Public Employees Relations Act

North Dakota law makes it unlawful for any political subdivision of the state, i.e. a city, or any agent or employee of the city to “restrict or attempt to restrict” “after-working-hours statements...or other activities which pertain to “matters of public concern, if the employee does not purport to speak or act in an official capacity.” N.C.C.C. §34-11.1-05(4).

The same analysis applies here as does under the First Amendment. Prior to the actions taken by the City Manager beginning on December 4<sup>th</sup>, all facts discovered during this investigation

support the conclusion that no member of the “group” under suspicion was speaking in any official capacity. In fact, there is no support for the accusation that they spoke, if they did, as anything other than private taxpayers concerned as any other private citizen would be about the expenditure of their tax dollars. Again, both posts by Port on November 15<sup>th</sup> and November 22<sup>nd</sup> pertained to matters of public concern about which city employees were free to comment in public, outside of work while not holding themselves out in an official capacity. The City Manager’s attempts to restrict their speech is a violation of the Public Employees Relations Act for which the City or its agent could be charged with a class B misdemeanor. §34-11.1-05(4).

3. Employee Manual-Personnel Policies

**A. Policies the City Manager accused the group of department heads of violating:**

Chapter 6, Section 4D-Substantive Regulations

- 1) Misconduct-deliberate violation of City policy, etc.
  - City Manager admits that no facts exist to show a violation.
- 2) Insubordination-unwillingness to submit to supervisory authority
  - City Manager admits that no facts exist to show a violation.
- 5) Inefficiency, incompetence or negligence
  - City Manager admits that no facts exist to show a violation.

Chapter 7-Section 1-Grievance Procedure

This section applies to those employees who have been adversely affected by a decision of their immediate supervisor and desire a review of the decision. Notwithstanding the fact that the procedure is difficult to follow, it does not apply to the situation into which the City Manager placed these employees. At the time of the December 9<sup>th</sup> meeting, none of the employees had an adverse employment decision for which they could seek review. There was nothing to grieve so the procedure was inapplicable. Despite that, the City Manager used this policy as a means of giving the group a “jolt.”

Chapter 11-Section 2-City of Minot Ethics Policy for City Officials and Employees

There were no complaints by the public that any city employee violated any personal responsibility or ethical obligation to the citizens of Minot or to perform their official duties on a “best efforts” basis. The only complaints were by the City Manager about conduct that occurred outside of work which facts show were not done in any official capacity. Based on this investigation, Chapter 11-Section 2 was not violated.

#### Chapter 11-Section 3-Employee Responsibilities

Attitude-No facts were established to show a violation of this subsection.

Public Responsibilities-This subsection pertains to the appearance, behavior and attitude of City of Minot public employees outside of working hours and the office and being judged by the public. As with the other personnel policies, no evidence suggests a violation of this subsection.

### **B. Policies Applicable to City of Minot *vis a vis* City Manager**

#### Chapter 5- Hostile Work Environment Policy

The City’s Harassment Policy affords its employees with a work environment free of all forms of harassment. The City is obligated “to maintain” a workplace “free of harassing, abusive, or disruptive conduct.” Included in the definition of “harassment” is any unwelcome conduct such as bullying and disrespectful behavior which has the purpose **or** effect of creating an intimidating, hostile or offensive work environment. (Emphasis supplied). This policy applies to all employees, even supervisors.

It is the opinion of this investigator, relying on credible witness statements, that the City Manager violated the City’s Harassment Policy most notably by his conduct after the December 2, 2019 City Council meeting when his contract with the City was renewed for five years.

Chapter 5 also contains a reporting procedure that applies to all employees and elected officials and a complaint procedure that requires investigation once a complaint of harassment is reported. (Employee Manual, pp. 23-24).

#### Notice

The Mayor and some members of the City Council expressed concern that there were no reports made of a hostile work environment within the city or issues reported by department heads.

The investigation revealed that some members of the Council and the Mayor had either actual or implied notice of issues involving the City Manager.

David Lakefield had spoken to Alderman Jantzer on either November 16 or 17, 2019, about issues with the City Manager, prior to the council vote on his contract renewal. Lakefield reported to Jantzer that the City Manager was making it so stressful for some department heads that they considered leaving or retiring early. He was afraid the city would be losing good employees because of the City Manager. Under the City's complaint process, Lakefield's complaint should have been immediately reported to the HR Director for investigation. Although he had a duty to the employees of the city to see that they had an environment safe from harassment and to comply with the City's policies, Alderman Jantzer did not report this to the HR Director so it could be investigated.

On October 22, 2019, the Mayor met with a member of the community to discuss city matters. During the meeting, it was brought to his attention that some long-time city employees were having issues with the City Manager; they were not being treated well and some considered leaving. Again, when the Mayor met with Rob Port on November 24, 2019, he was told that some city employees were dissatisfied working with the City Manager. This was enough information to give the Mayor implied notice of issues between the City Manager and some city employees. At a minimum, it required an inquiry of employees about their working relationships with the City Manager. To ensure that no city policies were being violated, a report to the HR Director should have been made.

The many instances of workplace harassment by the City Manager are well defined and set out above. The City Manager's treatment of the eight employees he suspected and accused of providing information to the media, and then interrogated in an intimidating location in a threatening manner, clearly establishes violations of the city's Harassment Policy. Moreover, and perhaps most troubling, is the paranoia which took hold of the City Manager after the Port publications which he interpreted to disparage his personal and professional reputation. Without any factual support, the City Manager retaliated against a group of department heads for associating outside of work, engaging in free speech and speaking while off work as private citizens on matters of public concern. The City Manager's conduct violates these employees' freedom of speech guaranteed under the First Amendment and the Public Employees Relations Act.

### Damages for Violations

Employees who suffer adverse employment actions in retaliation for engaging in free speech are entitled to receive damages for lost wages, compensatory damages, i.e., pain and suffering and in some cases, punitive damages. Here, the retaliation consisted of intimidating conduct and lower scores on the 2019 performance evaluations of the department heads the City Manager suspected of talking to the media and outside of work. The lower performance scores may play a factor in any prospective employment these employees seek, but that is not definitive enough upon which to determine damages. Without further evidence, at this time, it is my opinion that no employee has suffered an adverse employment action that is compensable.

That is not to say, however, that there are no other damages that have been inflicted on city employees over the past three years and more profoundly the past six months. Any lack of trust that existed between the City Manager and certain city employees in late 2017 intensified dramatically in 2019. Some employees report feelings of anxiety and depression they never had before and for which some are now being medicated. At least one long time, loyal city employee found the work environment so intolerable he took an early retirement, forgoing significant benefits, so to avoid working under the supervision of the City Manager.

These issues of distrust and fear are not the result of “team building” and “collaboration”, but of conduct that is threatening, intimidating, suspicious and offensive.

### **RECOMMEDATIONS**

#### 1. City Manager

It is the opinion of this investigator that there is little, if anything, to salvage of the working relationship between the City Manager and many of the department heads he supervises. The scores from the Kraybill Conflict Style Inventory conducted by the Consultant at the January 6, 2020, workshop show there are clear trust issues. It was only after the City Manager’s arrival in December of 2016 that issues arose largely due to his request that employees spy on one another for him. The City Manager’s conduct toward eight of his direct reports in 2019 effectively destroyed any trust they had in him and permanently impacted their ability to work productively with him.

The City Manager’s conduct constitutes harassment as defined in the City’s Employee Manual. The Employee Manual also provides that an “employee who is found to have engaged

...in acts of ...unlawful harassment... retaliation, shall be subject to disciplinary action: including but not limited to, suspension, loss of salary increment, demotion and termination.”

The only appropriate resolution of the inhospitable work environment created by the City Manager is his removal from the position of City Manager. A suspension, demotion or reduction of his salary is not practicable nor will not have the desired outcome of relieving the workplace of the stress and tension he has created. Termination is the only appropriate solution. This, however, comes with considerable cost to the City. With the recent renewal of the City Manager’s contract, the City agreed to pay the City Manager a full year’s salary if he is terminated before the actual termination date of the agreement which is August 11, 2025. The only escape from this Early Termination clause is if the City Manager is found to have engaged in self-dealing at the City’s expense, i.e. embezzlement or conviction of a felony, neither of which apply here.

The City Council will have to engage in a cost/benefit analysis of this recommendation to resolve the hostile work environment existing within City Hall keeping in mind the ongoing exposure to liability it has by maintaining the *status quo*.

## 2. Organizational Chart/Order of Reporting

The current organizational chart is unworkable from several standpoints. Initially, the City Attorney should not report directly to the City Manager who essentially has little knowledge about the work done for the city by its lawyer. This position should be independent of the City Manager and report to the City Council. This order of reporting would also give Mayor and Council would benefit of impartial and candid opinions.

Until matters involving the City Manager’s position are resolved, the HR Director’s position should report to the City Attorney.

Finally, the City Council must give attention to when and how performance evaluations are conducted of the City Manager. Information obtained regarding evaluations conducted over the past three years of the current City Manager show inconsistency in how, when and by whom they were done. In order to accurately and adequately determine the performance of the City Manager, this evaluation process must be better defined and implemented.

Submitted this 20<sup>th</sup> day of April 2020.

**CENTER FOR MEDIATION &  
CONSULTATION, PLLC**

*/s/ Patricia R. Monson* \_\_\_\_\_

Patricia R. Monson

Attorney at Law ND# 3564

4254 Coventry Drive South

Fargo, ND 58104

Phone: Office (701) 361-5976

Mobile: (701) 238-8794

[pmonson@cmcpllc.com](mailto:pmonson@cmcpllc.com)

[www.cmcpllc.com](http://www.cmcpllc.com)