



KWAME M. KILPATRICK, MAYOR
CITY OF DETROIT
EXECUTIVE OFFICE

COLEMAN A. YOUNG MUNICIPAL CENTER
2 WOODWARD AVE., SUITE 1126
DETROIT, MICHIGAN 48226
PHONE 313-224-3400
FAX 313-224-4128
WWW.CI.DETROIT.MI.US

August 15, 2008

Mr. Kelly Keenan Esq.
Legal Counsel to the Governor
The Honorable Jennifer M. Granholm
George W. Romney Building
111 South Capitol Avenue
Lansing, Michigan 48909

Re: Mr. Goodman's letter of August 15, 2008

Dear Mr. Keenan,

In response to our letter of August 13th, Mr. Goodman has presented you with his position relative to various issues raised by us, including our request for the Council members to testify. Our response is as follows:

The position of the Special Counsel in his unsupported fact-finding report ("SCR") relies upon statements by members of Council as to violations of procedures that simply do not exist. None of the procedures are in writing because they simply do not exist. If neither Mr. Goodman, nor Council members are required to testify as to the basis for the facts that underlie their request to the Governor, there is no way to challenge those facts. The Respondent has the right to confront witnesses against him, whether the proceeding is administrative or civil. For these reasons and others, we intend to object to the introduction of the SCR in the Governor's hearing, if one should be held. The SCR was developed at an investigation by Council in which there were no due process rights afforded the Mayor: He was not allowed to call witnesses, or to cross examine those called by Mr. Goodman.

If the Governor is going to rely upon alleged verbal policies in making her decision, we certainly have a right to question the petitioners (or at least the fact-finder in the investigative phase, Mr. Goodman himself). If the Council members are present at the hearing and we are not allowed to call them, it presents an insurmountable problem for the Respondent. I recall that Mr. Goodman objected vociferously when the existence of the alleged settlement procedures of the Council were disputed, by counsel to the Mayor, with reference to her former position as an elected member of the Council.



Mr. Goodman complains that the City Council was not shown the "Confidentiality Agreement". As has been previously indicated dozens of times, the "Confidentiality Agreement" was not a final document until signed on December 5th, by all parties. It was not a part of the resolution of the Brown case and the references to any such agreement were removed from the actual settlement agreement, not to hide them but because they referenced matters never considered by the jury. There has been no opportunity for this evidence to be submitted to anyone thus far. Mr. Goodman's continuous references to his own one-sided investigation notwithstanding, his conclusions simply have no basis in fact.

Cases cited by Mr. Goodman suggesting that there is some official standard of "informed consent" that applies to these proceedings are in no way applicable to this matter. Even using the term "informed consent" is prejudicial as that term is applied in the context of a physician telling a patient every possible result that might obtain from a particular medical procedure. It is not argued that disclosure should be denied to City Council of the basis for recommendations to settle lawsuits. The point is that there is simply no standard that has been violated. Again, unless the Council has created an ordinance since December of 2005, when the Mayor's attorney left office as a member of that body, there simply is no standard that has been violated here. Mr. Goodman cannot make it up after the fact.

Let us make ourselves very clear as to the references made by Mr. Goodman that we are required to make some sort of "disclosure" to him: There are indeed facts which bear directly on the allegations made against the Mayor, to which Mr. Goodman is not privy. We are not required to help him with his case. He simply has not asked the right questions of the right people.

Mr. Goodman's reasoning is so circular as to defy clarification: He objects to questioning of the Council members as to their knowledge of the "text messages" and the "confidentiality agreement". It would make no difference, he says, since the alleged wrong committed is the use of public money for improper purposes. Also in paragraph 3 of his letter, Mr. Goodman seems to be admitting that members of Council did indeed know of the "text messages" but says that does not matter since it is the Mayor who should have told them. First, the questions that we plan to ask of the Council members do not necessarily go to the issue of what they knew about text messages or confidentiality agreements. Second, how can Mr. Goodman suggest that the Council members' knowledge, of the things he claims were hidden from them, is somehow irrelevant?

Mr. Goodman is also confused on the issue of legislative immunity: It simply does not apply to a situation in which the issue is not legislative nor to a situation in



which the legislator is a petitioner or plaintiff. While we may not be able to inquire into the reasons a legislator voted for a particular ordinance where the ordinance is being challenged, that is not the situation here. Mr. Goodman has cited no case in which a legislator filed an action and was then permitted to assert immunity and avoid testifying. Indeed, such a result is absurd.

Relative to the cases that were cited by us as to the immunity issue, once again, the concern in this matter is that the finding of intent to use the public funds for improper purposes requires the testimony of the only person who can challenge that allegation: the Respondent himself. Mr. Goodman cites a case involving a prisoner in a state prison: Baxter v. Palmigiano, 425 U.S. 308 (no year cited) Clearly that is in no way comparable to these proceedings. Prisoners have very limited due process rights inside of the state prisons. But, more importantly, in Baxter,

“no criminal proceedings are or were pending against Palmigiano”

The Rhode Island Court, in Baxter, also said that the prisoner was protected since under Rhode Island law, “the disciplinary decisions must be based on substantial evidence manifested in the record of the disciplinary proceeding”.

In the cases cited by the Respondent, Gardner and Lefkowitz, the issue is whether there can be “compulsion” directed at the respondent such that he is forced to violate his rights under the Fifth Amendment or forfeit his “job” or “office”. Gardner v. Broderick, 392 U.S. 1968 and Lefkowitz v. Cunningham, 431 U.S. 801 (1977) Necessarily, those cases review the issues retrospectively; they require the review of a statute that allowed a state to take action against someone who refused to testify at a civil hearing (The result was the taking away of existing contracts or a position). The cases held that the THREAT of a loss of the contracts or a position constitutes “compulsion”. Here, that is exactly the point. The threat of the loss of the office constitutes compulsion. In that the Governor accelerated her removal proceedings to take place just days in advance of the criminal proceeding, it is clear that she is forcing the Respondent into a position of waiving his constitutional rights. If the City of Detroit is having a “crisis” as Mr. Goodman suggests, since the criminal prosecution is occurring at the same time as the Governor’s process, there seems to be no basis whatsoever for her to proceed, unless she is intentionally attempting to violate the Mayor’s constitutional rights.

Mr. Goodman, after reasoning that the Fifth Amendment is not violated by compelling the Respondent to testify as to the very same facts underlying the current criminal prosecution, then goes on to suggest that the state has an important interest to protect: the City of Detroit’s functioning “optimally and productively”. The unsupported conclusion that the City is somehow not functioning is one that Mr. Goodman has made from the start of this process, both in his original Special Counsel Report and in his Petition to the Governor to remove the Mayor. He simply avers that we are in a



“constitutional crisis” and that the City is not functioning, without a shred of evidence to support that conclusion; nor do any of the cases that he cited deal with the obviously amorphous conclusions he draws.

In support of his position that a conviction is not required before removal by the Governor, Mr. Goodman cites Dullam v. Willson, 53 Mich 392 (1884), interestingly, a case in which the decision of the Governor to remove a state trustee from his position with a state school for the disabled was **REVERSED**. The Court, to which the Attorney General had applied to remove the trustee who refused to vacate the office, declined to intervene due to the failure of the Governor to provide the trustee with “fundamental procedural safeguards”.

Respondent could not be more clear in his request to the Governor to stay the petitioner’s requested removal proceedings against him: The petitioners are conducting their own removal proceedings parallel to those of the Governor. There is a criminal prosecution that is also in process...ALL of this is proceeding at the same time. Behind the scenes, the three governmental agencies are meeting and conferring....and although we are at the front door of the criminal prosecution, the preliminary examination having been waived, the Governor is being asked to do what the Council process and the Prosecutor’s case are also trying to do, remove him from office. One cannot imagine a less constitutionally permissible scenario.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sharon McPhail".

Sharon McPhail

Counsel to the Honorable Kwame M. Kilpatrick

Cc: William Goodman
James Thomas
James Parkman
Elbert Hatchett
David Whitaker