

CITY OF ANN ARBOR
REPORT OF CONFIDENTIAL INVESTIGATION

ATTORNEY-CLIENT PRIVILEGED

To: Kevin S. McDonald, Chief Deputy City Attorney
From: Jennifer B. Salvatore, Salvatore Prescott Porter & Porter, PLLC
Subject: Independent Investigation Report
Date: November 23, 2021

Introduction

I have been retained to investigate a complaint made to the Ann Arbor City Council by the City's Director of Human Resources and Labor Relations ("HR Director") alleging wrongdoing involving the conduct of the City's former Interim City Administrator ("ICA"), John Fournier.¹ The complaint was first made in an email sent to Council on October 1, 2021 and then expanded on in an October 4, 2021 written document provided to Council entitled "Report on Corruption and Wrongdoing by John Fournier."

The October 4, 2021 complaint contains six pages of allegations and four sections of exhibits. It alleges that the Interim City Administrator: (1) violated federal and state employment law by subjecting the HR Director to an illegal background check process upon his hire and compensating him at a level below his peers; (2) engaged in "fraud" by "illegally manipulating and altering city government budgetary documents and accounting records" in his presentation to the Council's Budget and Labor Committee regarding the cost of the paid parental leave benefit in the Teamsters and COAM labor contracts; (3) engaged in "fraud" by "illegally manipulating and altering city government budgetary documents and accounting records for the sole purpose of deceiving the City Council" with respect to the cost and approval of salary adjustments made following a pay equity study done by the HR Director; (4) abused his power by giving staff directives to "intentionally violate state law" regarding the City's vaccine mandate and then retaliating against the HR Director for questioning those directives; and (5) engaged in "unfair treatment" of persons of color under his supervision.

¹ Shortly after the complaint was filed, Mr. Milton Dohoney became Interim City Administrator, resulting in Mr. Fournier resuming his position as Assistant City Administrator. The timing of that transition was unrelated to the filing of the complaint.

Investigation Process

Salvatore Prescott Porter & Porter, PLLC was contacted by the City Attorney regarding this matter on October 1, 2021. After determining that there were no conflicts, the firm was retained on October 6, 2021 to conduct an investigation. Because the HR Director raised a preliminary concern about the City Attorney's decision not to place Mr. Fournier on a leave of absence while the investigation was pending and because the City Attorney was determined to be a fact witness with respect to the allegation of retaliation regarding the vaccine mandate issue, the Chief Deputy City Attorney served as my point of contact on this matter throughout the course of the investigation.²

Between October 6 and November 10, 2021, I conducted interviews with thirteen individuals and also did two follow-up interviews.³ While I would typically begin the investigation process with an interview of the complainant, I was not able to proceed in that fashion due to the HR Director making the decision on or around October 5, 2021 to take vacation time and remove himself from the work environment during the course of the investigation.⁴ I did reach out to the HR Director upon being retained and offered to interview him immediately. However, he did not respond to that outreach until October 19th, at which point we scheduled an interview for October 22, 2021.

Due to the delay in my ability to interview the complainant, I proceeded by interviewing first those witnesses who were clearly identified as having relevant information in the written complaint, including the ICA, the City Attorney and the Deputy City Attorney. Following my interview with the HR Director, I then interviewed an additional nine individuals – all of whom were identified to me by the HR Director as having relevant information. My witness interviews included seven City employees and two members of City Council. Other than my interview with the HR Director, which took place in-person in his lawyer's office, the other interviews all were conducted via zoom from a private location. I did not record the interviews, but I did take detailed contemporaneous notes. I informed each witness that I had been retained by the City to conduct an independent investigation and that I would provide a report to the City regarding my findings. I found all of the witnesses to be cooperative, candid and professional.

In addition to the witness interviews, I also reviewed a number of documents, including emails, Council resolutions, employee salary information, and City policies that were provided to

² I was asked at the outset by Council to provide a second opinion regarding the decision to place Mr. Fournier on a leave while the investigation was pending. I agreed with the City Attorney's assessment that, consistent with past practice and absent evidence of retaliation, a leave was not necessary.

³ At the time the HR Director's Complaint was made, I was in the process of conducting a follow-up investigation stemming from an earlier investigation regarding allegations of inappropriate comments by the prior City Administrator, Tom Crawford. During the course of that investigation, I interviewed the HR Director, the ICA and other witnesses on issues that overlap in certain respects with the complaint at issue here. I have also considered relevant portions of those interviews in my assessment of the issues raised in this complaint.

⁴ This issue is addressed at the end of this Report.

me by various individuals—including the HR Director, the ICA, the City Attorney, and the Deputy City Attorney.

Relevant Policies

In assessing whether any City policies were violated, I reviewed and considered specifically the following policies:

Employee Standards of Conduct (Policy 2.1)

The City’s March 25, 2021 policy regarding “Employee Standards of Conduct” provides guidelines as to the types of behavior that are not acceptable to the City of Ann Arbor. The policy generally provides that “all employees are expected to behave in a professional and respectful manner at all times and failure to do so will result in disciplinary action up to and including termination of employment.” (Section 4.3).

Section 5.0 of the Policy provides a list of examples of acts of misconduct that may result in disciplinary action, including 5.8 – Failure to behave in a professional and respectful manner; 5.24 – Engaging in any form of harassment in violation of HR Policy 2.2 Employee Discrimination, HR Policy 2.12 Employee Harassment, and HR Policy 2.14 Workplace Bullying; and 5.28 – Engaging in any behavior or action, on or off duty, that is detrimental to the reputation or image of the city or the operations of the workplace.

Anti-Harassment Policy (Policy No. 2.12)

The City’s Anti-Harassment Policy reflects a “zero tolerance” policy towards harassment against any employee on the basis of a person’s protected class under state, federal or local laws. (Section 3.1). Examples of harassing conduct include “obscene, sexist or racist comments or jokes, offensive name calling . . . inappropriate references to a person’s weight, height, or physical appearance” and conduct that would constitute sexual harassment under the law. (*Id.*)

Workplace Bullying Policy (Policy No. 2.14)

The City’s March 10, 2014 Workplace Bullying Policy prohibits “repeated, unreasonable actions of individuals directed towards an employee [that are] intended to intimidate or create a risk to the health and safety of the employee.” (Section 4.0). Examples of bullying include “repeated insulting or derogatory remarks, gestures or actions; repeated rude, vulgar language or gestures; repeated verbal aggression and/or verbal abuse; repeated outbursts or displays of anger directed at others; repeated targeting of an individual through persistent, unwarranted criticism; and repeated public ridicule. (*Id.*)

The bullying policy makes clear that bullying would not include “the normal exercise of supervisory responsibilities, including performance reviews, direction, counseling and disciplinary action where necessary, provided they are conducted in a respectful, professional manner, in accordance with the city’s policies and procedures.” (*Id.*)

Employee Non-Discrimination Policy (Policy No. 2.2)

The City's September 10, 2018 Employee Non-Discrimination Policy addresses discrimination, harassment and retaliation. Generally, the policy "prohibits discrimination against any employee on the basis of a person's protected classification under state, federal or local law." Discrimination "includes bias or prejudice based on a person's protected class, which results in an adverse employment impact, including, but not limited to, discipline, demotion, failure to hire or failure to promote." (Section 3.1).

Potentially relevant portions of this policy include the following: "All supervisors, managers and Service Area Administrators are responsible for ensuring that no discrimination of any kind occurs or persists in the workplace. It is the responsibility of management to create an atmosphere free of unlawful discrimination, and to implement this policy within their area." (Section 4.2).

Whistleblowers' Protection Act Policy (Policy No. 2.7)

The City's March 5, 2020 Whistleblowers' Protection Act Policy encourages "the good faith reporting of violations or suspected violations of state, local or federal law arising out of City business . . ." (Section 2.1). "The Act prohibits an employer from retaliating against an employee for reporting such violations." (Section 3.0). Whistleblowing is defined as "disclosing information that you reasonably believe is evidence of a violation of any law, rule or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety." (Section 5.0).

Equal Employment Opportunity Policy (Policy No. 3.2)

The City's October 30, 2005 Equal Employment Opportunity Policy makes clear that the City of Ann Arbor including management and individual employees "will not discriminate on the basis of actual or perceived race, color, religion, national origin, sex, age, height, weight, condition of pregnancy, marital status, physical or mental limitations, source of income, family responsibilities, educational association, sexual orientation, gender identity, familial status, disabilities or HIV status." (Section 3.1).

Investigation Report

The City of Ann Arbor hired John Fournier in September of 2018 to work as Assistant City Administrator. Beginning in April of 2019, Mr. Fournier also served as Interim Director of Human Resources and Labor Relations following the departure of the City's prior HR Director Robin Wilkerson. Mr. Fournier served in both capacities until the hiring of Tom Guajardo as Director of Human Resources and Labor Relations in or around January of 2021.

In July of 2021 Mr. Fournier was asked to serve as Interim City Administrator following the resignation of the former City Administrator, Tom Crawford. He served in that role until Milton Dohoney began his employment with the City on October 25, 2021, at which time Mr. Fournier resumed his role as Assistant City Administrator. All of the concerns raised and investigated in this

matter involve issues that occurred either during Mr. Fournier's recent tenure as ICA or during his prior tenure as Interim Director of Human Resources and Labor Relations. I address and analyze each allegation in turn below.

1. Allegations of discrimination regarding background check process and compensation of HR Director

Mr. Guajardo alleges that Mr. Fournier discriminated against him based on race by subjecting him to an illegal background check process during Mr. Guajardo's hiring process – a process that he says no other non-public safety employees of the City were subjected to. Mr. Guajardo initially rescinded his acceptance of his employment offer with the City due to his concerns with the background check process. He points out that the process (which was conducted by the City's police department) contains a number of questions that are irrelevant to the job for which he was hired and could have the effect of discriminating against minority applicants. Mr. Guajardo says that he notified former City Administrator Tom Crawford and City Attorney Stephen Postema of the illegal background check used by Mr. Fournier but no coaching, counseling, or corrective action was issued to Mr. Fournier.

Based on the witness interviews I conducted and the documents I reviewed, I do not find that the allegations of discrimination made against John Fournier with respect to the background check process have merit. While it is true that Mr. Guajardo objected to and initially rescinded his acceptance of employment with the City due to his concerns about his background check process, and while Mr. Guajardo's concerns about the process were legitimate for the reasons he points out, the evidence does not support that Mr. Guajardo was singled out for use of this process based on his race, nor does the evidence demonstrate that Mr. Fournier was the one responsible for the use of this process. In fact, according to multiple witnesses including those with first-hand knowledge of prior hiring processes, the same police-conducted background check process was used during the hiring processes for both John Fournier and Howard Lazarus, both white males.⁵ And this process was until recently the process typically used for the hiring of higher-level management employees at the City.⁶

Mr. Guajardo also alleges that Mr. Fournier engaged in race discrimination with respect to the setting of Mr. Guajardo's compensation. This is a topic that has come up both in this investigation and in a prior investigation that I was in the process of conducting when the instant complaint was made. Notably, when interviewing Mr. Guajardo on this same topic on August 31, 2021 for that investigation (just weeks prior to his report to Council on October 4th), Mr. Guajardo did not express the view that Mr. Fournier was the individual responsible for discriminating against

⁵ Mr. Guajardo claims that two individuals with knowledge of past hiring processes told him that he was the only person who had ever been subjected to this particular background check process. Both of those individuals denied this, saying they would not have said that because it was not true. I found both witnesses credible in this regard.

⁶ The City, under Mr. Guajardo's leadership in the HR Department, has since changed its use of this background check process. Mr. Guajardo is correct in his assessment that to the extent this process was used for non-public safety positions it contained some inappropriate and unnecessary questions that could result in discrimination against minority applicants.

him with respect to his compensation. Rather, in that interview he noted that with respect to his initial starting salary he “didn’t know if John Fournier had authority” to set his salary. Rather, at that time he expressed the view that Tom Crawford was responsible for what he perceived to be various inequities in his hiring process, including the compensation that he was offered. Likewise, in an August 27, 2021 email to Mr. Fournier, Mr. Guajardo described his salary offer as, “an illegal act of pay discrimination based on my race, as initiated by Mr. Tom Crawford . . .”

Mr. Guajardo’s belief in August that Tom Crawford determined his original salary level of \$125,000 is supported by the evidence I reviewed. Mr. Fournier originally drafted the offer letter to Mr. Guajardo with a salary of \$128,000, which was consistent with City policy of setting starting pay at or below the mid-point of the salary range for a particular candidate.⁷ According to Mr. Fournier, Mr. Crawford, after reviewing the letter, instructed him to lower the starting offer to \$125,000 and gave Mr. Fournier instructions not to give away any more in salary than he needed to when negotiating with Mr. Guajardo.

Mr. Fournier recalls that the day after the offer letter was sent, Mr. Guajardo asked if the salary could be increased to \$130,000. Mr. Fournier says that he was in the process of explaining the City’s compensation policy when Mr. Guajardo interjected and told him that it was “OK. I’ll take the \$125,000.” Mr. Guajardo recalls this exchange slightly differently – claiming that he did not request a specific number but simply asked whether there was room to go higher on the salary.⁸ He says that Mr. Fournier stated that he would have to go back to Tom Crawford and he “didn’t think it’s going to work.” Only at that point, according to Mr. Guajardo, did he tell Mr. Fournier that he would accept the offered salary of \$125,000. The Deputy City Attorney, who reviews and is kept apprised of hiring matters, recalls that Mr. Fournier reported back at the time of the offer to Mr. Guajardo that he was surprised that Mr. Guajardo “didn’t negotiate” his offer. Mr. Fournier also noted that he had been making \$125,000 at his prior job. Based on these facts, I do not find that Mr. Fournier engaged in any discrimination with respect to Mr. Guajardo’s starting salary.

Mr. Guajardo also alleges that he had to make “countless requests” to Mr. Fournier for a subsequent equity adjustment to his compensation and that Mr. Fournier then placed him “at the lowest possible equity point in comparison to [his] peers.” In fact, however, the contemporaneous emails and witness recollections support that Mr. Fournier raised Mr. Guajardo’s pay from \$125,000 to \$143,500 on August 29th, 2021 – only nine days after Mr. Guajardo first asked for an equity adjustment based on the pay equity study he had conducted and just two days after Mr. Fournier received the written pay equity report from Mr. Guajardo. I do not find that Mr. Fournier’s nine-day delay or expressed desire to review the written report before increasing Mr. Guajardo’s pay to be unreasonable or discriminatory. Moreover, Mr. Guajardo (at his insistence) was among the very first employees whose compensation level was increased following the pay equity study. And his increase from \$125,000 to \$143,500 brought him to the same compensation level as the

⁷ The salary range posted for the HR Director position was \$115,00-\$132,000 and \$132,000 was the actual midpoint.

⁸ I note that in my previous 8/31/21 interview with Mr. Guajardo he told me that he requested \$130,000.

IT Director – who is the most comparable similarly-situated employee to the HR Director in terms of grade and responsibilities.⁹

2. Allegations of fraud/misrepresentations to City Council regarding cost of the paid parental leave benefit

Mr. Guajardo next alleges that Mr. Fournier misrepresented to the City’s Budget and Labor Committee at its June 2, 2021 meeting the true cost of the paid parental leave benefit that had been negotiated as a part of the COAM and Teamsters contracts. Both in a PowerPoint presentation at that meeting and in response to questions from a Council member at that meeting, Mr. Fournier represented that the benefit would not result in additional expense to the City. In reality, as Mr. Guajardo correctly points out, the paid parental leave benefit does have some potential to cost the City additional money in the form of the possible costs associated with hiring temporary employees or paying additional overtime pay to staff members filling in for individuals on parental leave. It is also possible that the policy could result in the pay-out of additional accrued leave time to City employees upon retirement.¹⁰

However, even assuming that is the case, there is no evidence that Mr. Fournier’s representations on this issue amounted to “fraud” (which requires an intent to deceive) or that he engaged in any “manipulation” or “altering” of city government budget documents, as is alleged. Indeed, Mr. Fournier pointed out and other witnesses confirmed that the City’s finance department conducts an analysis of the financial impact of all labor contracts on the City budget and that the paid leave benefit had been analyzed by the finance department and a report was provided on June 2, 2021, which nowhere identified any additional costs arising from the paid parental leave benefit. Indeed, because the City’s reserved fund balance is set aside for paying out accrued leave banks, any cost associated with potentially higher payouts of accrued leave time necessarily does not come out of the City’s operating budget. Moreover, because the leave banks are capped and most employees exceed their caps well in advance of retirement, Mr. Fournier did not view the potential for an increased leave pay-out as a material cost to the City.¹¹ Based on the above, I do not find Mr. Fournier’s representations to Council to constitute fraud. Nor is there any evidence that Mr. Fournier had any intent to deceive or that he manipulated any budget documents in connection with this representation. To the extent that others might view the “cost” question differently, or believe that Mr. Fournier’s

⁹ Mr. Fournier says that Mr. Guajardo specifically asked to be paid comparably to the IT Director, and that Mr. Fournier honored that request (despite the fact that the IT Director had significantly more tenure with the City than Mr. Guajardo). Mr. Guajardo claims that he did not specifically ask to be paid comparably to the IT Director, but rather says that was Mr. Fournier’s suggestion and he responded, “that would be a good start.” I do not find this discrepancy to be material to my analysis.

¹⁰ Such leave time is banked and paid out to employees at the rate of pay they are earning at retirement. Thus, to the extent that an employee has a higher leave bank as a result of not having to use sick time for parental leave, and to the extent the employee hasn’t otherwise maxed out his or her leave bank – which is capped at a certain level – an employee could see a higher payout for his or her accrued leave time upon retirement than if no paid parental leave benefits were used.

¹¹ The parental leave policy (which was already in place for other employees) requires a hiring manager to reallocate the responsibilities of an absent employee among existing staff before hiring temporary employees.

view on the cost to the City of paid parental leave is incorrect or should take into account more than the effect on the operating budget, that is a matter of legitimate debate—presumably with the Finance Department, which is the department responsible for determining whether and how particular labor concessions affect the City budget. In short, while Mr. Fournier’s technical answer to Council may have been debatable, I do not find any evidence of a willful intent to deceive.

3. Allegations of fraud and deception with respect to the equity adjustments given to City staff in September of 2021

Mr. Fournier is also accused of doing “creative accounting” and finding a way to “break-up, hide and re-allocate funds in other areas of the budget so they would not hit thresholds that would require him to report the [salary increases made in September of 2021 following the pay equity study] to City Council.” However, it is undisputed that Mr. Fournier on August 29, 2021 sent an email to all City Council members attaching a four-page memo detailing the specific pay equity issues identified by Mr. Guajardo’s pay equity study and providing an outline of “steps that will be taken to correct pay equity issues that exist among the larger non-union group of employees.”

In this memo, Mr. Fournier advised Council that “the initial cost of making these equity adjustments is roughly \$200,000 in annualized salary cost, plus additional expenses and related benefits.” He wrote that he would be working with the CFO and HR Director to better refine these figures and identify a strategy to fund these adjustments with “as little impact on our budget as possible.” He wrote that: “I also intend to move very quickly to make these adjustments. However, I also want to be transparent with the Council that I view these adjustments as critical to improving the culture of our organization and ensuring our future success as a City. With this in mind, I may be bringing a budget amendment forward to address these issues at a future Council meeting.”

Ultimately, Mr. Fournier did not bring the issue before Council for a budget amendment because the CFO advised that there were sufficient funds in the existing budget to cover the expense of the salary adjustments. Both the current CFO and the prior CFO/City Administrator, Tom Crawford, confirmed that it was not a requirement to seek a budget amendment for a cost—even a reoccurring cost—that could be covered by funds available within an existing budget. While Mr. Crawford acknowledged that he “has seen it happen both ways,” and “as a long time CFO, [he] tended to recommend to the City Administrator that it’s advisable to go to Council if it’s a recurring charge . . .,” he said, “there is room for interpretation” and he has “seen administrators go in different directions” on this practice. Accordingly, Mr. Fournier’s decision not to bring the issue to Council for a budget amendment was not illegal, fraudulent or indicative of any intent to deceive – particularly where he provided a written explanation to Council in advance regarding the expense and his thought process on the raises. The Council members I interviewed, while they took issue after-the-fact with Mr. Fournier not seeking a budget amendment, admitted that they received his memo on August 29, 2021 and that they did not respond or note any objection to his plans at the time.

4. Allegation of abuse of power and retaliation related to vaccine mandate

The thrust of this allegation is that Mr. Fournier improperly proceeded with plans to implement the City's vaccine mandate for City employees (1) following the Governor on September 29, 2021 signing into law a bill with boilerplate language that purported to prohibit local governmental entities from mandating employee vaccination; and (2) following City Council's September 27, 2021 resolution seeking a legal opinion on the legality of the new state law.

Mr. Fournier's challenged conduct includes sending out an email to all staff on September 30th noting that City Council had unanimously approved moving forward with the vaccine mandate while neglecting to mention that Council had also sought a legal opinion seeking clarification of the law;¹² instructing Mr. Guajardo to proceed with collective bargaining with the unions on the mandate "even though he was well aware that this was now against the law;" and asking Mr. Guajardo to prepare letters for the eventual administrative suspension and dismissal of City employees who did not comply with the planned vaccine mandate. Mr. Guajardo also accused Mr. Fournier of retaliating against him by attacking and harassing him about manufactured performance issues during the afternoon of October 1, 2021 after Mr. Guajardo raised concerns about Mr. Fournier's actions with the City Attorney earlier that day.

On the first issue, I do not find that Mr. Fournier abused his power or violated the law or City policy by proceeding in various ways with the planning for an eventual vaccine mandate despite Council requesting a legal opinion on the new law that purported to prohibit it. Indeed, Mr. Fournier's communications to employees were consistent with the Resolution passed by Council, which made clear that Council supported a vaccine mandate for City employees. The request for a legal opinion did not instruct anyone in the City to halt plans to implement the mandate. To the contrary, the Resolution itself and the discussion around the Resolution make clear that its intent was to determine how the City could proceed with its plans for a vaccine mandate despite the new law.

In any case, by October 1, 2021 – the day that Mr. Guajardo raised concerns about Mr. Fournier pressing forward with planning for the vaccine mandate – the City Attorney's office had received a preliminary legal opinion from outside counsel that the law banning vaccine mandates did not apply to local municipal entities. Thus, Mr. Fournier was at no time instructing City employees to violate the law or to move forward with conduct that was illegal. Even if the outside legal opinion had not been provided or local governments were not exempted from the bill, the overall legality of the bill generally was very much in debate -- with Governor Whitmer's office publicly expressing the view that the ban on vaccine mandates was illegal. Finally, even if the bill applied to local governments and was determined to be legal, nothing was improper about Mr. Fournier's actions in planning for an eventual implementation of a vaccine mandate that was not yet in effect and whose legality had not been clearly established.

With respect to the claim of retaliation, Mr. Guajardo believes that an email exchange he had with Mr. Fournier on the afternoon of October 1, 2021 was overly harsh, manufactured performance

¹² It is noted that Mr. Fournier sent a copy of this planned communication to Mr. Guajardo and to the Deputy City Attorney the day before sending it to all employees. Mr. Guajardo did not raise any objections to its contents at that time.

issues where none existed, and came in retaliation for him raising a concern with the City Attorney that morning about Mr. Fournier's actions described above. This claim too I find to be unsupported by the evidence.

As a threshold matter, I do not find the content of the emails at issue from Mr. Fournier to be harassing, abusive or bullying on their face. Mr. Fournier, who at the time was Mr. Guajardo's supervisor, was expressing dissatisfaction with an aspect of Mr. Guajardo's job performance. Mr. Guajardo took offense to Mr. Fournier's tone and content and responded with a message asking Mr. Fournier to "cease and desist" from what he perceived to be harassing and retaliatory conduct. While the communications in question are direct in tone and clearly convey dissatisfaction, I do not find them to be unprofessional or harassing. Moreover, after detailed witness interviews and examination of emails and phone records from the City Attorney on October 1, the evidence does not support that Mr. Fournier was even aware of the fact that Mr. Guajardo had raised concerns with the City Attorney that morning at the time he sent the emails that are alleged to be retaliatory.¹³

5. Allegations of discriminatory treatment of persons of color

Finally, Mr. Guajardo's complaint raises a general concern (with little detail) about both his treatment by Mr. Fournier as well as Mr. Fournier's treatment of another minority employee. Mr. Guajardo claims that he has witnessed Mr. Fournier be "confrontational, disrespectful and combative on more than one occasion towards a person of color on staff." When interviewing Mr. Guajardo, he gave some specific examples of what he meant by differential treatment. He also provided a number of witnesses who he felt would corroborate his observations in this regard.

After interviewing seven witnesses whose names were provided by Mr. Guajardo – including the person of color who Mr. Guajardo felt was treated in a discriminatory manner by Mr. Fournier, I do not find that the evidence substantiates this allegation. At most, Mr. Fournier was described as having a "certain way of managing people," and at times being "demeaning," but no one I interviewed (including the minority staff member who Mr. Guajardo believes was treated badly) said that Mr. Fournier manages in a way that is racially discriminatory or treats individuals differently based on race. Those who had observed the interactions between Fournier and Guajardo that Mr. Guajardo felt were harassing had a different perspective – calling the interactions "firm," but "not crossing a line." In fact, several individuals whose names were provided by Mr. Guajardo felt strongly in the other direction – that Mr. Fournier cares a lot about equity issues, was excited about and supportive of Mr. Guajardo's hire, and is a good manager.

¹³ Mr. Guajardo also alleges that Mr. Fournier's actions in copying him on an email on Saturday, October 2 in relation to a work-related issue that arose over the weekend and participating in a zoom staff meeting on Monday morning October 3 in which Mr. Guajardo was in attendance were retaliatory or had the potential to be retaliatory. Mr. Guajardo believed that Mr. Fournier had at that point been instructed to have no contact with Mr. Guajardo. However, the instruction given to Mr. Fournier by the City Attorney was not unequivocal and did not prohibit incidental contact related to necessary operational functions of the City. I do not find anything retaliatory about Mr. Fournier's actions in either of these two incidents that weekend.

Conclusion

Based on the above analysis of the facts, law, and relevant City policies, it is my determination that Mr. Fournier has not engaged in conduct that violates the law or any City policy. The misconduct that Mr. Guajardo alleges and attributes to Mr. Fournier is simply not supported by the evidence.

Additional Observations

In terms of moving forward, there is clearly a breakdown in the relationship among two important members of the City's Executive team. This is problematic for the City and will need to be thoughtfully addressed.

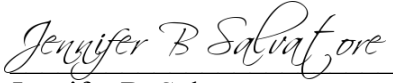
I was also troubled to learn during the course of this investigation that two members of City Council reached out to and met with Mr. Guajardo soon after he filed his complaint against Mr. Fournier. During that meeting, Council members disclosed to Mr. Guajardo some of what transpired in a closed-session Council meeting the evening prior—specifically, discussions related to legal advice being given to Council by the City Attorney's office regarding whether John Fournier should be placed on administrative leave during the pendency of the investigation. Not only did Council members potentially disclose privileged and confidential communications from the closed session with this communication, but they did so to an employee whose complaint against another high-level City employee was the subject of a pending outside investigation.

Even more troubling, the characterization of the closed session discussion that was given to Mr. Guajardo led Mr. Guajardo to conclude that the City's legal department had pre-judged the merits of his complaint. And what was relayed at that meeting seems to be the contributing cause of Mr. Guajardo feeling the need to suddenly remove himself from the work environment on October 5, 2021 – an act that, while perhaps understandable in context, was disruptive to City business. Indeed, the portrayal of what happened in closed session that was given to Mr. Guajardo was, I believe based on witness interviews and a review of the legal memo that was discussed, a mischaracterization and/or misunderstanding of what was communicated by legal counsel. And it had the effect of damaging the working relationships of key city officials, causing Mr. Guajardo unnecessary emotional distress, frustrating the work of the City, and potentially interfering with the investigation process.

While this issue is outside the scope of what I was asked to investigate, I raise it because I feel it has had an impact on this investigation process and has affected Mr. Guajardo's perceptions of how he is viewed by his colleagues. It certainly did not help things to have his colleagues' actions called into question by Council members, who should not have contacted any witnesses during an external investigation.

Thank you for the opportunity to work with the City on this matter. If you have questions or would like follow-up on any issues, please let me know.

Respectfully submitted,



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