ORDINANCE NO. 2019-0279

AN ORDINANCE AMENDING TITLE 1, CHAPTER 10, SECTION 2(E)(1)(b) OF THE CITY CODE, CITY OFFICERS AND EMPLOYEES

BE It Enacted by the City Council of the City of Muscatine, Iowa:

Section 1.

Title 1-10-2(E)(1)(b), which currently provides as follows:

Any elected official shall deal with City Department Heads and employees, who are subject to the direction and supervision of the City Administrator solely, through the City Administrator, and Council Members shall not give orders to any such Department Heads or employees either publicly or privately. All departmental activity requiring the attention of the Council shall be brought before that body by the City Administrator.

Is amended to provide as follows:

Title 1-10-2(E)(1)(b), is amended to provide as follows:

Any elected official shall deal with City Department Heads and employees, who are subject to the direction and supervision of the City Administrator solely, through the City Administrator, and Council Members shall not give orders to any such Department Heads or employees either publicly or privately. All departmental activity requiring the attention of the Council shall be brought before that body by the City Administrator. Elected officials shall have access to department heads or staff employees for the purpose of open and two-way communications; however, any meetings, issues or concerns raised by department heads, staff or elected officials shall be brought to the attention of the City Administrator.

Section 2. All ordinances of parts of ordinances in conflict with the provisions of this ordinance are hereby repealed.

Section 3. This ordinance shall be in effect from and after the passage and approval and publication of this ordnance, as provided by law

PASSED, APPROVED AND ADOPTED this 3rd day of October, 2019.

By the City Council of the City of Muscatine, Iowa

Diana L. Broderson, Mayor

Attest:

Gregg Mandsager
City Clerk

First Reading: September 5, 2019
Second Reading: September 19, 2019
Third Reading: October 3, 2019
Publication: October 10, 2019

MEMORANDUM

Date: 2019.09.29

To: Mayor Broderson and Muscatine City Council

From: Gregg Mandsager, City Administrator

Re: City Code Change Title 1-10-2(E)(1)(b)

I would ask that you take all of the following items into account before making such a sweeping change to the City Code. The following summary is taken from the noted attachments, additional sources, and are my personal and professional opinions.

Additionally, please see the following attachments:
2019.08.12 (2019.08.15 City Council Agenda) Brick Gentry Memo Re: Role of City Council Members
2019.08.13 (2019.08.15 City Council Agenda) Staff Memo
2019.09.05 City handbook additions (2)
Proposed City Code Amendment

For the following reasons, <u>I recommend that the City Code not be changed or amended</u>. I firmly believe there are better routes to achieve the stated goals of some council members and the primary method to do so would be to make better use of the City Council's In-Depth sessions. By doing so, the entire City Council is able to participate in the discussion and the public is able to witness the discussion.

<u>Mandsager Summary and Comments</u>

See Brick Gentry memo dated 2019.08.12 Role of City Council Members - Key Points

- "The City Council's members, therefore, must act as (a) body to serve the public, and not individually to address concerns of the residents or matters related to City employees."
- "Muscatine's Code of Ethics states "All complaints or concerns about city employees shall be transmitted through the City Administrator..."
- "To avoid potential violations of open meetings laws, elected officials should refrain from the appearance of conducting any business outside the open meetings."
- "...addressing employees one-on-one, the elected officials could lose legislative immunity (and insurance coverage for any litigation). Typically, when an elected

official member acts in their official capacity, he or she has absolute immunity and is covered by the City's insurance policy. But, according to the United States Supreme Court, that immunity can be lost when the official takes actions outside the scope of their duties."

- Attorney's recommendation - "In summary, based on the City Code and Code of Ethics, elected officials should refrain from dealing with individual city employees and report any potential issues to the appropriate Department Head/City Administrator." With this change, the City Council is acting against the advice of counsel.

Staff Memorandum dated 2019.08.13

- Please review this memo prepared by staff members. To be clear, this memo was written by staff and was not written by me. This memo was called a "criticizing letter" and staff was essentially called liars as it was said that "..staff didn't write it". I believe staff's issues and concerns should be given significant weight when considering a change to this code section.
- While some of the language has changed in the proposed City Code amendment since the staff memo was written, the signees agree that the points in the letter are still valid and they do not recommend changing the current City Code language.

Code Change to Title 1-10-2(E)(1)(b)

Again, please note that the following comments are taken from the noted attachments, additional sources and are my personal and professional opinions and recommendation.

Key Arguments Against Adopting the Proposed Change:

- The City Council is required to act as a body at the table and cannot act individually.
- The public's business should be conducted in public (open meetings) and should refrain from even the appearance of conducting business outside of an open meeting,
- The council may be acting outside the scope of council's duties (operational v. policy).
- The Council may be violating or perhaps obfuscating the clear chain of command.
- The proposed code change simply reverses the process and I believe that it will only create more problems and confusion making it harder to fix or correct issues of concern later.
- I do not believe that by adopting this change, that the City Council would be acting in a transparent manner.
- I think that while this topic is behind us (Mayor's previous loss of access to staff other than directly through the City Administrator. This action was taken for valid reasons as determined by the former City Council, City Attorney and City Administrator.), I personally believe that it is one of the main reasons this change is being brought forth. I will not be addressing this topic further in public session other

than what is noted above, but I did consult the City Attorney on what I may or may not state).

Additional Arguments Against Adopting the Proposed Change:

- Disruptive to staff and operations.
- Meetings must be at the department's schedule and may not interrupt work.
- City Council members and staff receive the best information when you have the whole story (versus one side).
- Will the information be consistent and available to all?
- Union issues (see handbook changes),
- Staff complaints or issues should be going immediately to a Supervisor, Department Head, Human Resources or the City Administrator.
- Undermining supervisors and department heads.
- Some staff may inappropriately lobby the City Council following a supervisor's decision. Staff doesn't get everything they asked for and while most accept this and may see the big picture, they may not have all of the information to have an informed discussion on their piece of the overall department. So, how do you determine biased information? Department Heads, Human Resources and the City Administrator are closer to the overall issues and personnel matters and have a better or more wholistic picture.
- Regardless of Council's stated intent not to give orders, staff will have trouble differentiating when something is an order or not. Simply being asked to help or do something to assist the public or a council member, or to conduct work will create confusion. This requires direction from their supervisor.
- This code amendment has the potential to further erode the lack of trust and criticizing tone that has arisen/grown as of late between some council members and staff. As I noted earlier, I would encourage Council to consider some team building exercises with staff to improve council/staff relations. I would encourage us all to review the Council's ethics policy and specifically the decorum piece for public meetings.

Mandsager Contract

Lastly, I personally and in my position as City Administrator, need to point out the following potential ramifications of adopting the City Code changes:

Breach of Contract:

- Changing the City Code has the potential to allow the City Administrator to declare a breach of contract for substantially changing the City Administrator's role, powers, duties, authority, and responsibilities of the employee's position that substantially changes the form of government. For a potential breach of contract claim, the City Administrator could argue that the new code language reversing the process by which information is transmitted and allowing Council members to contact employees

directly (i.e. the employee comes to the City Administrator last, not first) substantially changes the City Administrator's role, powers, duties, authority, and responsibilities.

Consequences - Immunity and Insurance

- Council has the potential to lose immunity and insurance coverage when acting outside the scope of council's duties.
- This, in my opinion, was glossed over at the previous discussions (See 2019.08.12 (2019.08.15 City Council Agenda) Brick Gentry Memo Re: Role of City Council Members).

Conflict of Interest

The following needs to be noted for your information and consideration when making a decision on this code change or other topics before the City Council.

As noted on the Iowa League's website and according to the Iowa Supreme Court, "...the basic premise and purpose of all conflict of interest requirements, is "to avoid subjecting public officials to the difficult and often insoluble task of deciding between their duty to the public and their own private interest or advantage."

According to the Iowa Municipal Policy Leader's Handbook, "...a conflict of interest exists when a mayor or council member has a personal or pecuniary (that is, a reasonable likelihood or expectation of financial gain or loss to the member or another person with whom the member is associated) interest in a measure under consideration". A personal interest is defined by the Iowa League as a personal interest or advantage that conflicts with a public duty). See: https://www.iowaleague.org/members/Pages/ConflictofInterest.aspx.

If a Council member has a conflict of interest, the conflict is for the council member to declare. However, if that member fails to divulge a conflict or one is discovered at a later date, the vote becomes void if the vote of the officer was decisive to passage of the measure.

When determining if one has a conflict, the Iowa Ethics Board recommends the following in summary:

- That the member has no access or contact with the person or issue creating the conflict,
- When possible, try to avoid the problem/conflict or even the appearance of a problem/conflict, and
- When looking to determine if there is a potential conflict of interest, the following are good questions to ask oneself:
  - Who is your master?
  - Do you have a conflict?
  - Is it best for the City, your buddy, or your employer?

BRICK GENTRY P.C.
ATTORNEYS & COUNSELORS at LAW

BROOKE S. VAN VLIET
ATTORNEY

T: 515-274-1450
F: 515-274-1488
brooke.vanvliet@brickgentrylaw.com

MEMORANDUM

FROM: Brooke Van Vliet
TO: Matthew Brick
DATE: August 12, 2019
SUBJECT: Role of City Council Members

Currently, Muscatine City Code Section 1-10-2-b states that "[a]ny elected official shall deal with City Department Heads and employees, who are subject to the direction and supervision of the City Administrator solely, through the City Administrator, and Council Members shall not give orders to any such Department Heads or employees either publicly or privately. All departmental activity requiring the attention of the Council shall be brought before that body by the City Administrator." This section is being considered for revision to allow the elected officials access to department heads or staff employees to discuss work issues but not to give the employees work-related orders. The purpose of this memo is highlight potential issues for the elected officials if the Code section is changed.

As stated in Muscatine's City Council's Ethics Policy, Section 1.001 and 1.003, the Role of the City Council is to adopt legislation or policy in the best interest of the public. Individual council members have very limited authority outside of these actions which are narrowly defined by certain exceptions. The City Council's members, therefore, must act as body to serve the public, and not individually to address concerns of the residents or matters related to City employees. If a resident or employee has a grievance related to a city employee or department, the elected official does not have authority to take action outside the scope of their role on the City Council as a body. This is not an uncommon situation because, as the leaders of the City, people often will first raise their

concerns with the elected officials individually. However, due to the fact that their role is limited and based on the Code of Ethics, the individual elected officials should direct that resident to the appropriate person to handle such matter (*i.e.*, Department Heads and/or the City Administrator). Specifically, the City of Muscatine's Code of Ethics states "All complaints or concerns about city employees shall be transmitted through the City Administrator who shall be charged with investigating those complaints. Any complaints about city employees should be made in writing, signed and dated. (See Subsection 2).

Chapter 11 of the City of Muscatine's Rules of City Council state "meetings conducted by the City Council shall be held in accordance with the Iowa Open Meetings Law (Iowa Code Chapter 28A). The principle behind holding open meetings is that government officials should conduct the public's business in public. This principle is rooted in the idea that "government is and should be the servant of the people." Open meeting laws facilitate that service by "promoting the free flow of information so that news media may report events accurately rather than relying on potentially biased or inaccurate leaks." The purpose of the law is to allow the public to become more involved in the decision-making process and affords them a better understanding of the nuances of modern government. *See, e.g.,* Michael A. Lawrence, *Finding Shade from the "Government in the Sunshine Act": A Proposal to Permit Private Informal Background Discussions at the United States International Trade Commission,* 45 CATH. U. L. REV. 1, 9–10 (1995). To avoid potential violations of open meetings laws, elected officials should refrain from the appearance of conducting any business outside the open meetings.

In addition, the City's Code of Ethics states that no council member, board member, officer or employee, directly or indirectly or by others on his/her behalf or his/her request or suggestion, shall: represent any private party before the public body on which the official sits or over which the official has appointment or budgetary powers or grant or influence the granting of any special consideration, advantage or favor, to any person, group, firm or corporation, beyond that which is the general practice to grant or make available to the public at-large (See Code of Ethics Section 4 in

part). Specifically, the Code of Ethics states that "[a]ccepting a position as a public official and or employee carries with it the acceptance of trust that the official or employee will work to further the *public interest.* City Council Members shall work for the common good of the people of Muscatine, Iowa, and not for the private person or personal interest."

The City's Code of Ethics is similar to and in line with the general common law principles of the fiduciary duties all board members owe to their organization. A "fiduciary duty" is a duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law. Iowa statutory and common law demands that councilpersons exhibit complete loyalty to the public and seek to avoid subjecting a councilperson to the difficult and often insoluble task of deciding between public duty and private advantage. See *Wilson v. Iowa City, 164 N.W.2d 813 (Iowa 1969).* Their duty under the principles of equity is to serve their cities honestly, faithfully, and without negligence. Council members, like a corporation's officers and directors occupy fiduciary relation to the citizens they serve, and hence their acts must be closely scrutinized by the courts and must be in utmost good faith and fair.

One of the reasons for the language of the existing City Code and Code of Ethics is that, in addressing employees one-on-one, the elected officials could lose legislative immunity (and insurance coverage for any litigation). Typically, when an elected official member acts in their official capacity, he or she has absolute immunity and is covered by the City's insurance policy. But, according to the United States Supreme Court, that immunity can be lost when the official takes actions outside the scope of their duties. *See Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (council members only have immunity from civil rights liability for all actions taken "in the sphere of legitimate legislative activity").

Even actions taken collectively by the full council can lack immunity if the actions relate to specific citizens/employees instead of furthering general city policy. Some states have gone so far as to view unsanctioned acts by council members outside of their official duties involving employees as

an invasion of the employee's privacy. For example, in California, a city council member was subject to censure by the council and a lawsuit for removing documents from a city employee's personnel file and revealing them to the press. Employees can thus argue that improper review and/or disclosure of employment information can result in personal liability for invasion of privacy. See *Braun v. City of Taft*, 154 Cal. App. 3d 332, 338-40, 347-48 (1984); *see also Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1, 35-38 (1994).

In summary, based on the City Code and Code of Ethics, elected officials should refrain from dealing with individual city employees and report any potential issues to the appropriate Department Head/City Administrator. If the City Code and Code of Ethics are revised to allow such individual contact, the elected officials should still make sure not to act unilaterally but instead act as part of the full council—and act pursuant to the requisite formalities that will ensure legislative immunity applies to the elected officials actions. If city residents object to the conduct of particular employees (or employees object to issues within the City), the Council can respond by asking the City Manager to investigate and take appropriate action regarding the objections. See *A City Council Member's Role With Respect to Individual City Employees - Western City Magazine (March 2007).*

August 13, 2019

To: Members of City Council

This letter is being written independently by the letter signers based on our concerns for the proposed change in the City Code which would allow for individual City Council members to have "unfettered access" to any employee of the City. We also have concerns with some of the items brought up by individual Council members during the discussion at the meeting.

City Staff:

The current City Department Directors and the City Administrator are all professionals in their respective fields. Most have at least 4-year degrees, many have master's degrees, and all have decades of experience either in their current positions in the City organization, previous positions with the City, or experience in other communities. They manage millions of dollars in funds in their operating budgets as well as numerous capital improvements in the community. These operations and projects are done even given budget constraints and related staffing levels of the City. All Department Directors and the City Administrator take pride in what they do and what is accomplished with the goal of making the community a better place to live for its residents now and into the future.

City Department Director responsibilities include seeing the "big picture" for their departments as well as for the City as a whole. However, due to the relatively small size of the City organization, current Department Directors interact regularly with many of their staff members and understand the roles each of them play in the organization. As department heads, we value the role of the City Administrator so it is clear who we report to, and that we can do our jobs free of political influences and so we do not need to deal with seven Council members individually that may all have different perspectives on City issues. Staff understands that City Council is the decision-making body for the City; however, it takes a majority of Council for any action and getting majority decisions should be done publicly in open sessions of City Council meetings.

Some of the Staff Concerns with Council City Code Change Proposal:

1. In recent months, it appears that some members of City Council are questioning the integrity of staff members, the reliability or lack of trust in the information presented by departments for Council consideration, and whether staff may have "hidden agendas". Department heads, with their relevant staff members involved in each project/proposal, review and discuss recommendations included on Council agendas. There is further discussion at the City staff meeting held prior to each regular Council meeting to get additional input prior to the item being considered on the Council agenda. Many of the agenda items have already been included in the budget or 5-Year Capital Improvement Plan approved by City Council. We believe that City Council is being given honest and reliable information by the current department heads and city staff.
2. Each department has their own chain of command, organizational structure, standard operating procedures, policies, and/or internal controls to follow. If each of the 7 Council members (both current and any future Councils if the City Code would be changed) would want to meet with individual staff members during the work day, it would be disruptive to that department, could

lead to undermining of supervisors and department heads, could lead to employees trying to personally advance by undermining their chain of command, and would likely detract from ongoing work and services provided by that department. Individual workers may not be aware of the reasons for department procedures or recommendations while their supervisors and department heads would be in better positions to provide better overall responses to questions. Deliberately excluding supervisors, department heads, or the City Administrator, that all would be more knowledgeable, from discussions with individual employees may not be in the best interest of either the City Council or staff. Department staff sharing information with only specific individual City Council members would also detract from the full City Council being able to act as a group to make informed decisions.

3. Individual Council members, it appears, want "unbiased opinions" of employees and that employees "would be afraid for their jobs" if they say what they think. Again, it appears that some Council members believe they are getting biased information and that Council members are unaware that employees frequently provide feedback to their supervisors or department heads and they are frequently asked for their input. This is done within the current organizational structure. Council presumptions that appear to be based on former employers of individual Council members should not be assumed to be the case for the City. The presumptions that employees would be "afraid for their jobs" also does not take into consideration that many employees are part of union groups and/or are covered under Civil Service provisions which give them added job protection.
4. Many employees appreciate a structured environment, knowing who they report to, what is expected of them, and also knowing that they can talk to HR if they have any issues they can't resolve other ways. The presumption that employees would welcome speaking to individual City Council members during their work hours, may in fact not be the case, and likely would make many feel awkward and uncomfortable.
5. Individual Council members wanting to talk individually with employees without their supervisor, department head, or City Administrator being present, makes us question the motivation. Although it was stated this was not a "witch hunt", it gives the appearance of being one. We believe that this would not be a transparent process with both other department staff as well as with other Council members. Council members should each receive information that they can use to make informed decisions as a group. Having individual Council members gathering information separately, based on conversations with individual employees that may not have the knowledge level of their department management staff, is not a transparent process.
6. The specific Code section proposed to be changed currently states (underline added):
   "Any elected official shall <u>deal with</u> City Department Heads and employees, who are subject to the direction and supervision of the City Administrator solely, through the City Administrator, and Council Members shall not give orders to any such Department Heads or employees either publicly or privately."

   It appears to us that several City Council members are making an extremely literal interpretation of the City Code indicating that they think they can't even speak to employees with normal "small talk" or even in passing. Common sense has been used in the past and should be used going forward. This extremely literal interpretation (or misinterpretation) should not be an excuse to go to the other extreme and have "unfettered access" to any and all employees by each of the 7 Council members.
7. The current system has served the City well for over 50 years during 5 or more City Administrators and dozens of different City Councils.

8. Council plays a significant role in the City organization under the current Code. That same Code delegates the "day to day operations" of the City to the City Administrator. Individual City Council members meeting with individual employees is getting involved in "day to day operations" of the City. While Council may be more comfortable trying to have a direct operational role in the City operations, that should not be the role of Council.

Summary:

We strongly value the current structure of the City and the role of the City Administrator for the efficient operation of the City. This structure has resulted in little turnover in key positions with the City and has resulted in tremendous improvements in the community. Opening the door to individual Council members "dealing with" individual employees would have the potential of causing disruption and detracting staff from their department missions and operations and detract from services provided by those departments.

Key department heads understand that City services need to be prioritized within budget constraints and it is the role of the City Administrator to present a balanced budget to the City Council each year – which means departments do not get everything they request, but do get the essential items to continue to provide the existing service levels to the community. The current City staff and Administrator work well as a team under the organizational structure that has been in place. This has resulted in little turnover in key positions with the City. Also, turnover is generally low and retention high in most positions in the City which demonstrates job satisfaction with the current organizational structure.

Many of the current City Council members have not had to deal with the extremely tight budgets that the City has had in the past, but during those extremely tight budgets, services need to be prioritized between essential services and those that serve only small portions of the community. Having individual department heads or employees going around the established process to "lobby" for their own operations does not serve the City as a whole or its residents.

Again, we believe that the proposed City Code change is not needed and may even do more harm than good for the community and the services the City provides to its residents.

Nancy A. Lueck, Finance Director

Jerry Ewers, Fire Chief

Brian Stineman, Public Works Director

Brett Talkington, Police Chief

Stephanie Romagnoli, Human Resources Manager

Pam Collins, Library Director

MEMORANDUM

September 4, 2019

TO: Gregg Mandsager, City Administrator

FROM: Stephanie Romagnoli, HR Manager

SUBJECT: Policy Changes – Employee Handbook

On the agenda for City Council's consideration this week are suggested changes to the employee handbook. Should the Council decide to proceed with the Code change being proposed related to their contact with staff, these policies are being recommended to provide guidance to employees about what is expected of them.

1) An addition to the union section of the employee handbook ensuring clarity that City Council members may not engage with union members (and vice versa) related to any items of negotiation. This is being recommended to stay in compliance with Chapter 20 of the Iowa Code.
2) The intent of the Non-retaliation policy is to provide employees from protection from retaliation should employees choose to speak or not to speak with Council members. Employees are free to make a choice about discussions with City Council members. This policy also provides guidance for reporting avenues if they believe retaliation has occurred.

At this time, Council may choose to adopt these additions to the employee handbook.

If there are any questions or additional information related to these policies required, please let me know.

Union Policy Addition

"Pursuant to Iowa Code Chapter 20, the City Attorney is the designated representative for union negotiation matters. As such, it is a violation of Iowa law for any employee to negotiate or attempt to negotiate directly about union matters with any elected official."

Retaliation Policy Addition

"It is important to foster an environment that makes employees unafraid to speak—or to choose not to speak—about City-related issues. Employees who choose either to share or not share information with elected officials or citizens—including to report misconduct or suspected violation shall be protected from retaliation.

As such, if an employee is approached by an elected official and/or citizen, and the employee feels uncomfortable with the interaction—the employee shall take his/her concerns to the City HR Manager or the City Administrator. In the event the concerns involve the City HR Manager and the City Administrator, then the employee shall to take his/her concerns to the City Attorney."