

## MEMORANDUM

**TO:** Robert West, Senior Assistant City Attorney

**From:** Stephen K. Postema, City Attorney

**Re:** Personnel Action

**Date:** January 13, 2010

### ISSUE

This discipline concerns your arrest for Operating Under the Influence of Alcohol, OWI, on October 25, 2009. While this incident occurred on a weekend and off the work site, this has tarnished the reputation of the City of Ann Arbor and the Office of the City Attorney. As you know, I have the highest standards for this office. As a prosecutor for the City, you are a very public representative of the City and this office.

### FACTS

I have discussed this matter with you, reviewed the Sheriff's report, and reviewed the videotape of your arrest. I have also discussed this matter with the Police Chief and others involved in law enforcement.

Around 8:00 p.m. Sunday, October 25 you were arrested by a Washtenaw County Sheriff's Deputy. You had been drinking during the day while helping your parents at their home, you also had two drinks at a friend's home, and then you were attempting to drive home. You drove through a construction area containing two sets of lights near the intersection of Baker and Jackson Roads in Scio Township. You went through the second light, which was red, crossing through this construction zone. (Evidently, according to the Deputy on the videotape, other non-impaired individuals also ran through this light.)

Sheriff Deputy Keith Mansell pulled you over. He suspected that you were intoxicated. He arrested you and processed you at the U of M DPS unit.

You were cooperative and apologized to the officer. You answered about your level of drinking when asked. You voluntarily submitted to a preliminary breath test and then a chemical test at the police station. The results of both tests indicated a result of .12 blood alcohol content.

It is clear that you did not believe that you had had enough to drink to cross the .08 threshold. You initially asked for the deputy to simply allow you "a break" and to walk home or allow your wife to pick you up. (Evidently, based on my discussions with police, many impaired drivers commonly ask to be released, and enforcement officials do have the theoretical discretion over the arrest of an individual.) At a later time, you again

discussed whether you could simply be let go. Nevertheless, the deputy properly arrested you (as it is likely that the Sheriff's policy limits any such discretion) and never really had any intention to release you as made clear in the videotape.

The only delay in your processing was because the deputy correctly determined that, for safety reasons, it would be improper to process you at the County facility. The deputy waited for further instructions from a supervisor. Dispatch evidently then called the Ann Arbor Police Department and the AAPD correctly declined to process you to avoid any conflict.

The deputy finally processed you at the U of M PD facility. There is no indication that you continued to be anything but cooperative.

You came in first thing Monday, October 26<sup>th</sup> explained the situation to me with great remorse. You also apologized to the office for this matter.

You pled guilty to the charge and will be sentenced this month.

You have no prior record concerning impaired driving.

As a first time offender, you likely face the following standard legal consequences:

- Expensive fines (over \$1,000).
- Restriction of driving privileges for 90 days depending on the outcome of a Secretary of State hearing.
- Community Service
- Possible jail time under the statute (although unlikely for a 1<sup>st</sup> offense).
- Alcohol assessment and treatment of some manner

As an attorney, you may also have sanctions imposed by the attorney grievance commission of the State Bar Association.

### **Disciplinary Issues**

You have a high profile and public position in the City and in this Office. As Senior Assistant City Attorney you are in charge of the 15<sup>th</sup> District Court prosecutions, including the OWI prosecutions as well as the sobriety court. You also handle high profile civil litigation for the office.

This infraction took place off-duty on a Sunday. The applicable standard of conduct in the City Human Resources Policies and Procedures Manual is Policy 2.1, Section 5.25:

Off duty misconduct which is detrimental to the reputation or image of the City.

Clearly your conduct is detrimental to the reputation or image of the City, particularly given your position.

I have set very high standards for the employees in this Office, particularly because we enforce the law. In my view, conduct in this office must be equal to or above any department in the City, including the police, in all legal matters.

### **Appropriate Discipline**

In my view your arrest must be characterized as an “example of major acts of misconduct, which may result in suspension without pay or immediate discharge from employment.” Policy 2.1, p. 4.

The City has a general progressive disciplinary policy, Policy 2.6. However, I have the ability to begin disciplinary action, which is out of sequence, up to, and including discharge. Section 3.6, Policy 2.6.

Section 6.3 of Policy 2.6 lists the following factors that I should consider and I have outlined my consideration of the relevant factors below:

#### **1. The Nature and seriousness of the misconduct**

Operating a vehicle while under the influence of alcohol is a serious offense and it has been dealt with firmly by this office in prosecutions. I view all impaired driving as a severe peril to the health and safety of the public. It is the potential harm that makes this such a serious issue. You are aware of the danger and clearly misjudged your level of intoxication, as many people do. There was no injury or even accident in your case and other (non-impaired) drivers evidently also have gone through this second red-light.

#### **2. Overall work record**

You have worked at the City for almost 15 years. You have an excellent work record. In 2009 alone, you tried over 60 bench trials and 3 jury trials in the 15<sup>th</sup> District Court with excellent results. The judges of the 15<sup>th</sup> District Court have high regard for you as do the Judges of the Washtenaw County Circuit Court. None of the judges I have spoken with have noticed any change of work habits or standards recently or at any time. I interviewed the judges to make sure that there was not a broader problem affecting your work.

The Circuit Court judges interviewed have commented on your excellent work product, preparation, and professionalism. Recently, one of the judges has commented on your excellent work on behalf of the City in her court. She also noted your ability to work well with those in trouble and your ability to communicate with defendants and jurors.

In addition to firmly and fairly handling the 15<sup>th</sup> District Court docket you also have had excellent success defending the City in all manner of high profile litigation. You have saved the City literally million of dollars by your vigorous defense of the City and the police. You have had successful trials on significant false arrest and wrongful death lawsuits. You have also obtained numerous successful summary dispositions in wrongful death, excessive force, discrimination and injury cases.

The police officers and even Uof M officers who have observed you have uniform praise for your ability and the job you do for the City.

Without a doubt, you have been an excellent public servant. (You have also further served the community as a tireless mentor to the Community High Mock Trial team.)

**3. Length of Employment**

You have served the City for almost 15 years. You have been a good colleague within this office. You have also helped morale within the City by sponsoring employee activities.

**4. Disciplinary Record**

You have no relevant disciplinary record.

**5. Did the employee know, or should the employee have known, what was expected.**

Yes.

**6. Consistency and uniformity in the enforcement of standards.**

It is important for any discipline to be somewhat comparable to other similar disciplines. There is no applicable comparison in this office. But a relevant point of reference for me is discipline within in the police department. The police are properly held to a high standard of off-duty conduct and individual officers have been disciplined for OWI. The most applicable case was where an officer was given 8 days of suspension for an OWI. He had a .11 Datamaster chemical blood alcohol test. The officer was close to his home. The officer evidently twice asked if he could simply walk back to his home. The officer was not fully cooperative with the arresting officer, twice refusing to take a PBT and twice refusing to get out of the car when requested by the officer. The officer ultimately complied with taking a PBT. In contrast, your conduct was more fully cooperative, as you offered to take a PBT instead of a FST.

While the police analogy is useful, it is not determinative. Had the officer above displayed your behavior it is possible he would have received a discipline of less than 8 days suspension. But as our office advises the police and actually prosecutes the public for violations of the law, I believe our office has even a higher standard than the police.

**7. Extenuating or mitigating circumstances**

There are none.

**Discipline**

While the City's discipline policy provides latitude in discipline, the discipline must fit these facts.

I initially note that it is clear that you will face the same court penalties as all first time offenders. As an attorney you will face additional penalties not faced by the general public. Finally, as a public figure you clearly will face the public scrutiny that members of the general public simply do not have to face. This is perhaps as it should be: entrusted to protect the public, we are held up high for any failings which could cause harm to the public.

Because of the serious nature of impaired driving and your position, it is clear that a suspension, without pay, is in order. This discipline emphasizes the seriousness of the matter and the highest standards of this office. It also is in line with the police suspension noted above.

1. Your unpaid suspension shall be for 8 days. This obviously has a financial consequence (one that members of the general public may not face under the same circumstances.) However, because I am unwilling to cause hardship to the office and jeopardize any on-going legal work, this suspension shall be arranged at an appropriate time(s) to deal with scheduling issues in order to minimize disruption to this office.
2. You have already been removed from the OWI driving docket and will remain off of this docket until further notice, except for times when unavoidable conflicts in scheduling so requires. You have been and are removed from the sobriety court docket.
3. This suspension is given without knowledge of the outcome of any sentencing in your drunk driving case (which is set for later next month). If anything arises in that sentencing relevant to your position, I will re-visit my determination.
4. You will also need to comply with all terms that the judge imposes in that case. Any failure to comply with any court imposed terms will result in the reconsideration of this discipline.

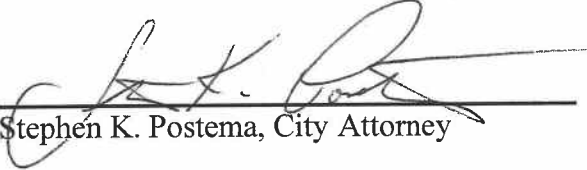
5. Likewise, this suspension is given without full knowledge of the results of the attorney grievance commission. You will have to comply with all terms imposed by the State Bar Association. Failure to comply with any terms imposed by the State Bar grievance commission will result in the reconsideration of this discipline.

6 I will also re-visit the situation in 6 months to make sure that there has been no impact on your delivery of services to the City as needed by this Department and that all relevant information about this situation has been received. If necessary, I will re-visit my determination at this time.

7. Any further violations will result in further discipline, up to and including termination. And, I am confident that there will be no such further incidents.

I request that you not let this aberration define your career. You have already defined it by your excellent record of public service.

You and I have discussed this and you are in agreement with this discipline.

  
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Stephen K. Postema, City Attorney

11/13/10

I have reviewed this document and agree with it and to abide by the conditions:

  
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Robert W. West, Senior Assistant City Attorney

11/13/10