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February 17, 2022

ICMA Committee on Professional Conduct
c/o Jessica Cowles, ICMA Ethics Advisor
International City/County Management Association
777 N. Capitol St. NE, Suite 500
Washington, DC 20002-4290
JCowles@icma.org

Dear Committee Members:

We represent James Freed as to the February 9, 2022 ICMA Committee on Professional Conduct Recommendation to "publicly censure" Mr. Freed for purported "conduct in violation of Tenet 3". Please consider this letter as Mr. Freed's request that the CPC reconsider its recommendation, and if the CPC does not do so, Mr. Freed's formal request to appeal the decision and for a hearing before the Executive Board as provided in the letter.

In your letter, you kindly invited Mr. Freed or his legal counsel to provide new or clarifying information in support of the above referenced requests. We accept that offer, and as provided below, we believe that based upon the information we are sharing with you, you will be convinced that the recommendation should be withdrawn for the following reasons:

1. Mr. Freed's Listserv emails and Twitter post that formed the basis of your conclusion that he violated the Tenet 3 "guideline on public confidence" were not available to the general public and, thus, cannot form the basis of any claim that Mr. Freed's actions impacted "public confidence" in his "position and profession", the "integrity" of the local government [the City of Port Huron], or the "public trust".

2. The assertion that Mr. Freed's email to employees violated his "commitment to honesty and integrity" because it evidences an intention to "not implement a law" is based upon a faulty premise. Mr. Freed never indicated an intention to not follow a law – in fact, he was fully prepared to follow any COVID related law that may have applied to his employees. I suspect that this assertion is based upon an incorrect understanding of the law and the options available to the City and a lack of knowledge of Mr. Freed's actions.

3. As to the email exchange with another City Manager on the Listserv, it was not a violation of Tenet 3 for Mr. Freed to share his concern in a group response instead of an individual response when the email directly accusing him of violating Tenet 7 was sent to the entire group. A public censure would be counter-productive to the stated goal of Tenet 3 because it would make public a disagreement between members of the Michigan Municipal Executives Listserv email system not otherwise know to the general public.

4. Mr. Freed's private tweet regarding the governor did not violate the dictates or the intent of Tenet 3. If the Committee wishes to ban such tweets, it needs to adopt a rule that bans that type of tweet.

5. The punishments recommended are grossly unfair and disproportionate to the alleged offenses. In the history of all its prior public censures, ICMA has only used this method for the most egregious breaches of the public trust and has never publicly censored a member for conduct as minor as that alleged against Mr. Freed. Broadening it to the minor issues raised in your letter would be a new venture into public shaming and censorship.

Below, we will explain each of these arguments in more detail. However, in reviewing these arguments, I also want to make the Committee aware that Mr. Freed is a highly successful City Manager with 13 years of experience in the field. Although some individuals do not like Mr. Freed's style or his views, and his approach can be occasionally abrasive, he has a well-earned reputation for competence and the highest degree of ethics. Mr. Freed was recently selected by his peers at the Michigan Municipal Executives for the 2022 Community Leadership Award. This award "recognizes professionals that have helped guide their community through a significant event that resulted in a favorable outcome. The event should have been a significant concern for the majority of the citizens and the solution a clear beneficial outcome to the community."

Given these factors and the below stated facts, the recommended course of action would be especially inappropriate in this case.

ADDITIONAL INFORMATION TO CONSIDER/APPEAL OF CONCLUSION OF TENET 3 VIOLATIONS

1. THE ITEMS THAT FORM THE BASIS OF YOUR FINDING ARE NOT AVAILABLE TO THE GENERAL PUBLIC

In your letter, you conclude that Mr. Freed's conduct violated Tenet 3. In specific, you referenced the "Guideline on Public Confidence", which provides "Members should conduct themselves so as to maintain public confidence in their position and profession, the integrity of their local government, and in their responsibility to uphold the public trust".

Past Tenet 3 violations have included highly public situations that have involved criminal conduct, harassment, or other violations of an express law or policy (see, e.g., 2019, a manager pled guilty to two counts of federal program fraud, one count of making a false tax return, and one count of receipt of kickbacks and bribes; 2018, a manager pled guilty to embezzlement of public funds and misappropriation of public funds). The only case in the last five years involving a manager who did not violate an explicit law or policy involves a manager who was publicly censured under Tenets 3 and 7 for publishing numerous newspaper articles, media releases, and other public statements, including to the Legislature, that were overwhelmingly political in nature over the course of several months. The member's comments included calling government officials "anti-government activists," calling a bill "municipal euthanization authorization," and saying that a member of the Democratic party "mindless control[led] the state's political agenda." In any event, when announcing the public censure, ICMA was clear that "ICMA's Code of Ethics does not prohibit members from disagreeing or offering criticism of elected officials."

Each of the three items that form the basis of your conclusion, however, were not publicly available items and were isolated incidents. The Listserv emails are available only to members of the Michigan Municipal Executives Group. Under MME rules, these emails are confidential and not to be shared outside of the MME. The rules provide: "The MME Listserve is a confidential forum for members of MME only" (see Tab 1). Therefore, any email within that system are not available to the public, and, thus, cannot erode "public confidence" or the "public trust" in government.

One of the items you cite in your letter was a Twitter post made by Mr. Freed where he directed a post to Governor Gretchen Whitmer. What you may not have been aware is that Mr. Freed's Twitter posts are "private". That means his Twitter posts are only available to those who "follow" him on Twitter. Only those who he has "accepted" as a "follower" using the Twitter program are able to see his posts. At this time, he has only 449 Twitter followers. If you attempt to do a search on Twitter of James Freed's Twitter posts, you will receive a message which provides "These Tweets are protected. Only approved followers can see @JamesFreed's Tweets. To request access, click Follow" (see Tab 2). Thus, the general public does not have access to his Twitter posts.

2. THE VACCINE MANDATE EMAIL IS NOT AN INDICATION THAT MR. FREED DID NOT INTEND TO FOLLOW THE LAW

It appears that the committee was bothered by Mr. Freed's email regarding the OSHA COVID-19 Vaccination and Testing Emergency Temporary Standard issued on November 5, 2021. This concern is based upon, at the very least, a misunderstanding on Mr. Freed's position and actions with respect to COVID-19 vaccinations and a faulty assumption that Mr. Freed was stating he would ignore any law that he was legally mandated to follow.

First, Mr. Freed is not an "anti-vaxer". Mr. Freed himself received the vaccination as soon as it was made available to him by the St. Clair County Health Department. On April 5, 2021, Mr. Freed set up a "vaccination clinic" at the City's main office to allow on-site COVID-19 vaccinations for all of his employees and their families (see Email attached as Tab 3). Most City employees took advantage of this opportunity.

In the Fall of 2021, Mr. Freed had many employees who made the personal decision that they would not receive the vaccination. After President Biden announced his intent to issue a vaccine mandate on September 9, 2021, several unions and employees spoke up in opposition to a vaccine mandate. Mr. Freed estimated that he had approximately 20-25% of his work force that would quit if a vaccine mandate was issued by the City. The City was already having trouble filling open positions post COVID-19 and its workforce is drawn from an area of the country where many citizens are not just "anti-vax", they are anti-government-telling-them-what-to-do.

Both before and after the OSHA Vaccine ETS was issued on November 5, 2021, Mr. Freed was asked by his unions and employees whether he would be issuing a vaccine mandate. Many employers were losing employees based upon the mere threat of a possible vaccine mandate. Mr. Freed went public with an email the next date to his employees. He then shared this email with the Listserv members so that other members could see the approach his city was taking (see Tab 4). Other City Manager's shared similar views (see Tab 5). That is, of course, the purpose of the Listserv and one of the key reasons why municipal executives become members of organizations such as ICMA and MME. In fact, the availability of shared resources, best practices, and strategies on how to address the COVID pandemic is lauded on pages 15 and 21 of ICMA's FY2021 Annual report. There is obviously nothing wrong with sharing Mr. Freed's strategy with his colleague, yet the committee proposes to discipline Mr. Freed for doing the same.

Moreover, if you look at the email, Mr. Freed told his employees he would not issue a vaccine mandate on his employees. There was no legal requirement that he do so. First, as you are aware, OSHA does not apply to state or municipal employers. 29 USC §652(5)("The term 'employer' … does not include … any State or political subdivision of a State"). The only way the OSHA Vaccine mandate would apply to the City of Port Huron was if MIOSHA issued such a mandate, a fact referenced in his email. While it was reasonable to project MIOSHA would eventually do so, it was not a certainty especially given that the Governor's Office ended all COVID-19 mandates in the Summer of 2021 and MIOSHA had likewise revoked all of its COVID-19 emergency rules because of the public backlash against mandates.

Second, and more importantly, the OSHA Vaccine mandate itself provided employers with a choice: they could issue a vaccine mandate to their employees, or they could choose a "testing option" instead, where an employer could instead require weekly testing for unvaccinated employees (see ETS Subpart U, 29 CFR 1910.501 (d)(2)(" The employer is exempted from the

requirement in paragraph (d)(1)[the mandatory vaccination policy] of this section only if the employer establishes, implements, and enforces a written policy allowing any employee not subject to a mandatory vaccination policy to choose either to be fully vaccinated against COVID-19 or provide proof of regular testing for COVID-19. Even if MIOSHA issued rules following the OSHA ETS, Mr. Freed had every right to choose to not issue a vaccine mandate, which is what his email stated – he told his employees he would not be choosing to issue a vaccine mandate. In fact, as the implementation date of the ETS approached, Mr. Freed took efforts to draft a policy to implement the testing option (see draft policy attached as Tab 6), and he sourced vendors to perform the testing function for City of Port Huron employees, both of which he also shared on Listserv with other members of MME (Tab 7).

Thus, the conclusion that his email indicated an intention to not follow the law is erroneous. Choosing to not implement a vaccine mandate was allowed under the OSHA ETS. Even if there were no choice, questioning the legality of the ETS is not inappropriate given that many legal scholars had opined that a vaccine mandate was unconstitutional. In fact, those opinions turned out to be correct when the United State Supreme Court found the OSHA vaccine and testing ETS to be unconstitutional. In Michigan, on October 2, 2020, the Michigan Supreme Court had already ruled that the Governor's Executive Orders containing COVID-19 related mandates, at least since April 30, 2020, were unconstitutional (see *In re Certified Questions from the United States District Court, Western District of Michigan, Southern Division (Midwest Institute of Health, PLLC v Governor)* (Docket No. 161492, slip op., p. 2), on the same bases adopted by three of the Supreme Court justices in striking down the OSHA mandate. Therefore, skepticism of the legality of the OHSA ETS was more than warranted and entirely appropriate for a City Manager to raise such an issue.

Thus, if you review Mr. Freed's email with the above supplemental information being provided, I believe you will conclude that there is no basis to find that Mr. Freed's email violated Tenet 3.

3. THE LISTSERV EMAIL IN RESPONSE TO THE CLAIMED TENET 7 VIOLATION WAS NOT A VIOLATION OF TENET 3

The Committee concluded that a November 4, 2021 Listserv email violated Tenet 3. To understand this issue, some background is required. On September 15, 2020, the City of Port Huron was cited by MIOSHA for allegedly violating certain Executive Orders issued by Governor Whitmer relating to COVID-19 containment measures, primarily rules relating to masks for employees. The Michigan Court of Claims had already issued a declaratory ruling on June 4, 2020 barring MIOSHA from imposing penalties for a violation of the rules described in the Executive Orders (see Tab 8). This binding court ruling was ignored by MIOSHA, and blatantly violated in issuing citations to the City of Port Huron and numerous employers throughout the state. Moreover, on October 2, 2020, less than three weeks after the citation was issued, the Michigan

Supreme Court ruled that those Executive Orders were unconstitutional and not enforceable. Despite that ruling, MIOSHA refused to drop the citations against the City and numerous other employers.

The mask claim was also frustrating for the City given that it had masks available for all employees and had written rules in place that fully complied with the mask requirements set forth in the Executive Orders. When the MIOSHA inspector arrived unannounced for the inspection, every employee had a mask and there were extra masks available in plain sight, facts confirmed by the investigator. The investigator did not observe any mask violations during his surprise inspection but was told by two employees that they saw another employee without a mask. The problem with this information was that the Governor's mask rules only required masks when an employee was within 6 feet of another employee and the investigator never tried to discern the basic information of who, what, when and where to determine whether the employee seen without a mask was in compliance with the Executive Order or not. Despite not having this basic information, MIOSHA proceeded with a citation against the City and imposed a $6,300 fine.

Most employers simply pay the fine. The City chose to fight the citation and argued that the MIOSHA citations were faulty from a legal standpoint given the Court of Claims and Michigan Supreme Court rulings, faulty from a factual basis since the City was following the mask rules, and that there was no evidence that the City was in violation of the Executive Orders. MIOSHA chose to not dismiss the findings, and instead publicly announced, using the Michigan State Police Emergency Operations Center system, that the City of Port Huron was cited by MIOSHA (see Tab 9). Governor Whitmer then publicly stated that only the most "egregious" violators of the Executive Orders were cited.

The City could have allowed the defamatory statements to remain unrebutted, and paid the large fine, or it could challenge the citations and clear its name. The City chose to fight and was ultimately successful in November 2021. This is not surprising given the prior court rulings. There is nothing improper about the decision to fight these citations, and it is certainly not a violation of the rules of ethics to fight a citation that is factually false and faulty from a legal standpoint. A City fighting to clear its name is in keeping with Tenet 3 because it helps to enhance the confidence in the governance of the City and dispel the public notion that City Government violated the law.

The case was of interest to other municipalities in the State of Michigan, and other cities were also later cited by MIOSHA. The case was also followed closely by the media, and the City's successful challenge of the citation and some of the practices of MIOSHA were the subject of multiple news articles and editorials. On November 3, 2021, Mr. Freed shared one of those editorials with the Listserv and stated "excellent editorial attached" which is referenced in the complaint against Mr. Freed. Another City Manager thanked Mr. Freed "for keeping us updated on this. I'm still shocked by the entire thing" (Id). However, a third City Manager then responded

with “Please review Code of Ethics, particularly Tenet #7” (Id). This email was shared with all members of the MME Listserv.

Mr. Freed’s response to this email is one of the three items cited by the Committee. This allegation literally requires a proverbial “roadmap” to understand. Mr. Freed made a post, was accused in a group response to his email of violating Tenet No. 7, he then responded by suggesting that the accusation against him may have violated Tenet No. 3, an anonymous complaint was then filed accusing Mr. Freed of violating Tenet No. 7, and this committee then determined that Mr. Freed did not violate Tenet No.7 but violated Tenet No. 3 by suggesting that his accuser violated Tenet No. 3 by falsely accusing Mr. Freed of violating Tenet No. 7.

In your letter you stated that the email was “highly unprofessional”, but did not specify how other than to indicate that the issue was that he sent the response in a group email instead of a private email: “a far more constructive approach to expressing your thoughts would have been a private dialogue with your colleague”. Significantly, this Committee found that there was no violation of Tenet No. 7 by Mr. Freed in his original email. Thus, that means the Committee agrees that the group email from the other City Manager contained a false accusation of a Tenet No. 7 violation against Mr. Freed. The problem with your suggested approach that he should have addressed the false accusation with a private email is that the email falsely accusing him of violating Tenet No. 7 was not a “private dialogue”, it was a group email. When one is falsely accused to a whole group, it is not inappropriate to respond to the accusations to the whole group. Was it a violation of Tenet No. 3 to falsely accuse Mr. Freed of violating Tenet No. 7 in a group email? Was the author of the accusation against Mr. Freed also found to have violated Tenet No. 3 for doing so and subject to a recommendation of an embarrassing public censure? The answer, of course, is no, nor should he be.

It also should be remembered that this email, although a group email, was not shared with the general public – it was an internal MME email, and only in response to a group email that accused Mr. Freed, unfairly, of violating Tenet No. 7. Thus, the proposal by the Committee makes little sense as it would now do a public censure and make the confidential Listserv emails public. It seems to me that the Committee’s approach will do more to violate the spirit of Tenet 3 than Mr. Freed’s non-public email.

In short, a public censure on this issue is wrong, counter-productive, and should be reconsidered by this Committee.

4. THE PRIVATE TWITTER POST DID NOT VIOLATE TENET 3

The final item cited by the Committee is a private Twitter post made by Mr. Freed directed to Governor Whitmer. The post stated: “you shouldn’t mess with a father who cares about the world his little girl grows up in”. The post linked a news article regarding actions by MIOSHA

staff members, i.e., the destruction of documents, which were disclosed during the MIOSHA administrative proceeding. Mr. Freed was speaking to the gross government overreach that resulted in an unfair MIOSHA citation, one that ignored a Court of Claims order, one that Governor Whitmer publicly supported, and of course, the actions referenced in the news article.

The Complaint filed against Mr. Freed stated "I believe a Tenet [sic] 7 violation may have occurred". This Committee concluded there was no Tenet No. 7 violation because it is clear that the language of Tenet No. 7 does not bar this type of post. Instead, this Committee stated "a manager has an ethical responsibility outlined in Tenet 3 to ensure their conduct builds trust and respect with elected officials and the public", and concluded "this post did not reflect the highest standards of ethical conduct and integrity, was highly unprofessional, and was especially inappropriate for a member participating in ICMA's voluntary credentialed manager program".

There are several problems with this conclusion. First, nowhere in Tenet 3 is a member barred from criticizing the actions by an official elected at the state government. The actual provision you claim was violated was the "Guideline on Public Confidence", which provides "Members should conduct themselves so as to maintain public confidence in their position and profession, the integrity of their local government, and in their responsibility to uphold the public trust". The rule requires clearly applies to the "integrity" of local government. Second, this rule does not require that a post "reflect the highest standards of ethical conduct and integrity". What the Committee has done is come up with a new standard not in the ICMA Code of Ethics that is an opinion-based standard, not a rule-based standard.

Moreover, the reaction to the post depends on perspective. If you look at the underlying dispute, a state entity committed questionable acts for which it was subjected to unfavorable newspaper articles and editorials. This Committee has the opinion that Mr. Freed "grandstanded" in his post, making it "highly unprofessional", a subjective standard. However, another vantage point is that Mr. Freed standing up to overreach by a state entity and exposing the truth actually raises the public confidence in local government. I can assure you that in Michigan, that vantage point is shared by a vast majority of the public, and undoubtedly played a role in Mr. Freed's section for the Community Leadership Award.

In short, Mr. Freed's post, distasteful to a majority of this Committee, did not violate the written standard set forth in Tenet 3. As set forth below, Tenet 3 does not apply to this type of action.

5. ADDITIONAL INFORMATION TO CONSIDER/APPEAL OF PUNISHMENT RECOMMENDATION

We also take issue with your recommended penalty. As indicated above, a punishment of a "public censure" would be counter-productive and punitive.

Moreover, if you look at the past use of public censure, it has been directed at members who have committed a highly public, major breach of the public trust that violated a law or specific policy, such as committing a crime, embezzling funds, or an inappropriate relationship with a subordinate, issues that were already public (see, e.g., 2021 public censure including manager accidentally discharging a firearm inside City Hall and bringing a loaded firearm into the office in violation of City policy; 2020 public censure including manager entered a guilty plea to the felony charge of larceny by employee and ordered to pay restitution to the City; and 2019 public censures including a manager participating in awarding a City contract to a company owned by her spouse and leveraging her position for personal gain). These are the type of actions that are true Tenet 3 violations, not the relatively minor issues, with limited distribution, that are the subject of the current Committee recommendation.

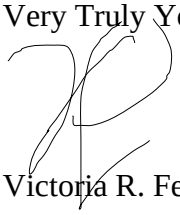
In this matter, the recommendation by the Committee is punitive and has the appearance of being personal. Mr. Freed has a less than friendly relationship with your Ethics Advisors. He has a "brusk" style that may offend people. Finally, he has taken an approach with COVID-19 vaccinations and his opposition to the MIOSHA citations that appear to heavily bother the Ethics Advisor (see Questions presented to Mr. Freed on December 2, 2021, regarding "MIOSHA Investigation and "Comments on Vaccine Mandates", attached as Tab 10). Many of these questions provided to him are an indication that the Ethics Advisor disagrees with his policy decisions on these issues, which is well beyond the scope of this Committee and are issues that fall within the discretion of elected public officials that a City Manager answer to. Some of the questions are also based upon an ignorance of the law, for example, the questions about whether Mr. Freed's positions are subjecting the City to civil liability. Mr. Freed, as a city executive, and the City itself, are protected from tort lawsuits by the Government Liability Act, MCL 691.1401 et seq.

The conclusions and recommendation by this Committee should not be colored by personal opinions on policy issues or negative opinions of Mr. Freed as a person. At this point, the Committee is dangerously approaching the territory of becoming a censorship board, using an ethics complaint to censure speech or actions taken by Mr. Freed, well beyond the intention of Tenet 3. If that is the purpose of the ICMA, we are not sure many municipal executives would see value in remaining with this organization.

Publicly shaming Mr. Freed serves no purpose, other than to try to harm Mr. Freed's reputation and standing in the community. We ask that you reconsider such an approach. If ICMA wishes to bar the conduct complained of in this case, it should have specific rules that bar such action, and not apply a general "public confidence" standard to confidential emails. For example, many Courts have implemented "rules of civility", which if ICMA believes such rules are necessary, could implement.

Thank you for your consideration, and if you need any additional information, please feel free to reach out to me.

Very Truly Yours,



Victoria R. Ferres

cc: James Freed

TAB 1

Resources

Blog

Each month, a guest blogger is invited to share his/her own unique perspectives and experiences in the manager field.

Code of Ethics
The ICMA Code of Ethics was adopted by the membership in 1924, and most recently amended in May 1998.

E-Newsletter
This is a bi-monthly online publication with information on topics related to the profession and upcoming events.

ICMA (International City/County Management Association)
This worldwide organization provides technical and management assistance, training, and information resources in the areas of performance measurement, ethics education and training, community and economic development, environmental management, technology, and other topics to its members and the broader local government community.

Job Openings
Check the websites on this page for the most up-to-date job openings in professional management.

Leadership Legacy Program
The MME Leadership Legacy Program (MLLP) was created to encourage managers to participate in activities that protect and advance the profession in a meaningful way.

Listserv
The MME Listserv is a confidential forum for members of MME only. Since it utilizes e-mail as the communications mode, participants should be aware that the e-mail address you use when you join the list will be the address where posted messages will be delivered.

Media Room
Provides current press releases on manager related activities.

Member News
Learn about MME members who have recently changed positions or retired from the profession

MME Listserv

Join today

MME Blog


Year-End Wrap Up, Much to Share
January 10, 2022

Winter Institute Set for Troy in January
January 10, 2022

Early Career Outreach Committee Updates
January 10, 2022

Making New Members Feel Comfortable
January 10, 2022

TAB 2

Home
Explore
Notifications
Messages
Bookmarks
Lists
Profile
More
Tweet

James Freed
5,543 Tweets

Follow

James Freed
@JamesFreed Follows you

Daddy to Lucy, Husband to Jessie and City Manager & CAO for Port Huron, Michigan. *Personal account

Port Huron, MI Born March 9 Joined July 2008

1,017 Following **449** Followers

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Let's Play Hockey
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NBA · LIVE
James Harden and Ben Sim address the media on their respective new teams

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Promoted by Samsung Mobile

Trending in United States
Zero Hedge
3,500 Tweets

NHL · Trending
Red Wings
1,909 Tweets

Beijing 2022 · LIVE
Beijing 2022: The United S at the Olympic Winter Gam

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Accessibility Ads info More ···

Todd Shoudy
@ShoudyT ···

Messages

TAB 3

Todd Shoudy

From: Freed, James <james@porthuron.org>
Sent: Monday, April 5, 2021 12:41 PM
Subject: Vaccination Clinic
Attachments: signature_603356394.png; VaccineConsentForm_accessedMarch2021 - Copy.pdf

Dear City Staff, Mayor and Council,

This past year has been very difficult and I lack the words to properly convey to you how proud I am of all the hard work and dedication you all have demonstrated by continuing to work hard and deliver quality services to our residents without interruption or pause. We are blessed to have each of you a part of our City team.

With that said, we have been quietly working behind the scenes to host an on-site vaccine clinic for all of you, your families and loved ones. We can now announce that this opportunity will be available to you.

The City of Port Huron will be hosting an on-site COVID-19 Vaccination Clinic for all City employees, their family members and friends (18 years of age and older).

The clinic is currently scheduled for Thursday, April 15, 2021 at the Municipal Office Center in the Public Meeting Room beginning at 8:30 a.m. The Moderna vaccination will be given. To sign-up and schedule your appointment, contact Reneé Reifert in the Human Resources Department at (810) 984-9723 or via email at reifertr@porthuron.org.

The City will hold a second clinic on Thursday, May 13, 2021 in order to administer the second vaccination dose to all participants.

Prior to the first clinic, please complete the attached form and bring it with you to your appointment in order to expedite the process. If you have health/prescription insurance, please be sure to bring that information with you as well to cover the administer fee. If you do not have insurance, the fee will be waived. Either way, there is no out-of-pocket cost for anyone for this clinic.

Supervisors, please be sure to share this information with employees in your department that do not have email.

Thank you again for your service and dedication to our community. I hope you take advantage of this opportunity to get this safe and effective vaccine. I trust this vaccine with my own health and well being and for my family.

-jf

James R. Freed, ICMA-CM
City Manager
Chief Administrative Officer

City of Port Huron
100 McMorran Blvd<x-apple-data-detectors://2> Port Huron, MI 48060<x-apple-data-detectors://2>

Office: 810.984.9740<tel:810.984.9740>
Fax: 810.982.0282<tel:810.982.0282>
Email: James@PortHuron.org<mailto:James@PortHuron.org>

TAB 4

Todd Shoudy

From: Freed, James <james@porthuron.org>
Sent: Saturday, November 6, 2021 5:16 PM
Subject: Re: Vaccine Mandates

City Staff,

The Court of Appeals issued an injunction.

https://www.reuters.com/world/us/us-federal-appeals-court-issues-stay-bidens-vaccine-rule-us-companies-2021-11-06/

-James Freed

On Nov 6, 2021, at 4:35 AM, Freed, James <james@porthuron.org> wrote:

City Staff,

I know there has been significant news and information floating around regarding OSHA and a forthcoming vaccine mandate for employers with 100 or more employees.

Municipalities do not fall under the jurisdiction of OSHA. However, we do fall under the jurisdiction of MIOSHA, and they will need to promulgate additional rules if they seek to include us in any future mandate.

Hear me now, I will never enforce a vaccine mandate upon my employees. I took an oath to protect and uphold the Constitution when I took this position. I will uphold my oath, come what may.

I earnestly believe that one of the many federal judges across this country will issue an injunction soon. I also believe the U.S. Supreme Court will soundly reject this overreach of the administrative state.

Laws are made by duly elected members of the U. S. Congress, Senate and signed by the President, not unelected bureaucrats.

I hope I have made my position on this issue clear to you.

Have a great weekend!

-James Freed

TAB 5

From: **S. Tutt Gorman (tuttgorman at gmail.com)** managementforum@listserv.mml.org
Subject: RE: Vaccine Mandate email.
Date: November 8, 2021 at 11:26 AM
To: managementforum@mail-list.com

SG

This message was sent by S. Tutt Gorman tuttgorman@gmail.com

It's important to recognize that employers, both private and public, have been discussing a potential federal vaccine mandate since the pandemic onset. When you set aside your personal feelings and bias on the matter, it's always been clear that this is likely not legal and unconstitutional -- especially in its current form. That's why most managers have been saying they would not enforce a vaccine mandate, not because of partisan politics. This is similar to when the SOS announced during the 2020 election that open carry would be prohibited at the polls. While many gushed and supported this action, it was abundantly clear she did not have such authority. It was the same issue with my battle with MSP/Emergency Funding -- they were acting without any legislative authority. Both MSP and the SOS got slapped down for this. There is a process for state and federal government agencies to adopt rules and regulations -- elected officials, both Democrat and Republican, cannot arbitrarily create and enforce new laws without the legislative process (insert "I am just a Bill" cartoon here). Pretending those processes do not exist and then framing the challengers as "anti-science" or similar, is a political strategy and has no place within our association.

Below is a link to a well written (layman friendly) article from Fisher Phillips and I inserted the article's likely legal arguments below it.

Tutt

<https://files.mail-list.com/m/managementforum/65091879.html>

The 7 Most Likely Legal Arguments to be Used to Attack the ETS

As explained, OSHA faces an uphill battle in meeting the justifications of using the ETS statutes. Here are the seven most likely arguments we expect to be launched and the counterarguments we expect OSHA to use as a shield.

Low Death Rate of COVID-19

To be consistent with the *Florida Peach Growers Association *standard, OSHA must show that contracting COVID-19 results in “incurable, permanent, or fatal consequences” to workers. The Attorneys General and other industry challengers lining up to strike down the ETS may argue that, given the death rate of COVID-19, the data does not support that finding. They will find some support for that argument in OSHA’s COVID-19 Healthcare ETS <https://files.mail-list.com/m/managementforum/63500841.html>, where OSHA admitted that it did not have the data to conduct its typical risk assessment. The agency also admitted that it could not definitively state the number of healthcare workers that have contracted COVID-19.

Instead, OSHA asserted that such an assessment “is not necessary in this situation” because the “gravity of the danger presented by a disease with acute effects like COVID-19…is made obvious by a straightforward count of deaths and illnesses.” You can expect the agency to deploy the same justification when defending the vaccine ETS in the coming weeks and months. It is possible, however, that a Circuit Court analyzing a challenge to an ETS with this rationale would find such an argument unpersuasive.

High Numbers of Non-Serious COVID-19 Cases

Further, OSHA appears to be restricted in that it may only be able to rely upon the sheer number of COVID-19 cases in instances where workers have become gravely ill. This would limit any agency justification based upon a general health benefits of avoiding COVID-19, such as remaining at work, or avoiding symptoms such as fever, headaches, fatigue, loss of taste or smell, or other “fleeting effects” on workers’ health.

While OSHA may cite to “long-haul COVID cases” for more permanent or lasting examples of COVID-19 danger, it may run into the same issue it did

lasting examples of COVID-19 danger, it may run into the same issue it did in the *Color Manufacturers Association* case where the Court said any emergency temporary standard must be supported by evidence that shows more than some possibility that exposure may cause workers to become gravely ill.

Limited Time Impact if ETS Implemented

The *Asbestos Information Association* case likewise limits the period of harm that a court can consider when determining the justification of the impending ETS. Any appeals court can only examine the six-month period that the ETS will be in place, which will impede the “benefit” side of the cost-benefit analysis balanced against the expected economic impact of the emergency rule.

Timing of ETS

Timing will also be a major factor to be kept into account when determining the survival odds of the ETS. As we have seen with the peaks and valleys accompanying various waves of COVID-19, OSHA will have a data-based challenge with any declining rates of infections, hospitalizations, and deaths. When President Biden unveiled plans for the ETS in early September, the number of daily COVID-19 cases <https://covid.cdc.gov/covid-data-tracker/#trends_dailycases> was at the peak of the Delta-fueled surge. In the intervening month, daily cases have plummeted by a significant degree and appear to be trending downward for the foreseeable future. Of course, we’ve lived through several such rollercoaster rides and it’s hard to predict where we will stand at the time a court is examining this data.

Further, OSHA’s lack of a previous general ETS on the subject of COVID-19 in the workplace could provide another basis for the Attorneys General, or other industry groups, to argue that OSHA’s delay shows this is not a true “emergency” standard.

General Applicability

Importantly, OSHA’s prior ETS on COVID-19 was specific to the healthcare industry <https://files.mail-list.com/m/managementforum/47545009.html>. This could leave the general ETS open to collateral attack from general industry groups claiming that the vaccine ETS is too broad and not designed to limit the virus where actually needed.

Arbitrary Size Determination

Similarly, by being directed solely at employers with over 100 employees, industry groups could argue that this potentially “arbitrary” figure does not meet the emergency requirements of the ETS statute. After all, if workers are subject to “grave danger” because of COVID-19, why would someone at a 99-employee business not be deserving of the same protection of a company next door with a 100-employee headcount?

Cost-Benefit Analysis

Finally, as for the cost-benefit analysis, the ETS as currently outlined will be far-reaching, impacting the economic and market conditions of almost every industry. As some industries have seen with their own vaccine requirements, some employees would rather quit their jobs than be required to be vaccinated, resulting in worker shortages (although these fears may be a bit more overblown than many employers believe <https://files.mail-list.com/m/managementforum/29546190.html>).

Even if a mass exodus of employees does not occur, there will still be a substantial financial impact due to the cost of weekly testing for those employers choosing that route <https://files.mail-list.com/m/managementforum/19331140.html> and for those employees with a bona fide religious or health exemption — a burden that will fall to employers.

On Sat, Nov 6, 2021 at 9:48 AM James Freed jamesfreedmlgmalistserv1_at_gmail.com <managementforum@listserv.mml.org> wrote:

> This message was sent by James Freed jamesfreedmlgmalistserv1@gmail.com
>
> Below is the email I sent two days ago to our more than 430 employees:
>
> City Staff,
>
> I know there has been significant news and information floating around regarding OSHA and a forthcoming vaccine mandate for employers with 100 or more employees.
>
> Municipalities do not fall under the jurisdiction of OSHA. However, we do fall under the jurisdiction of MIOSHA, and they will need to promulgate additional rules if they seek to include us in any future mandate.
>
> Hear me now, I will never enforce a vaccine mandate upon my employees. I took an oath to protect and uphold the Constitution when I took this position.
> I will uphold my oath, come what may.
>
> I earnestly believe that one of the many federal judges across this

Truncated 388 characters in the previous message to save energy.

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S. Tutt Gorman

TAB 6

COVID-19 Vaccination, Testing and Face Covering Policy Template

The OSHA COVID-19 Emergency Temporary Standard (ETS) on Vaccination and Testing generally requires covered employers to establish, implement, and enforce a written mandatory vaccination policy (29 CFR 1910.501(d)(1)). However, there is an exemption from that requirement for employers that establish, implement, and enforce a written policy allowing any employee not subject to a mandatory vaccination policy to either choose to be fully vaccinated against COVID-19 or provide proof of regular testing for COVID-19 and wear a face covering in lieu of vaccination (29 CFR 1910.501(d)(2)). Employers may use this template to develop a policy that provides employees the choice of COVID-19 vaccination or regular COVID-19 testing and face covering use.

Employers using this template will need to customize areas marked with blue text and modify (change, add, or remove sections of) this document to accurately represent their policies. Text that is italicized is sample language employers may use when developing their policies; however, that text is not comprehensive and not all of that text will be applicable to all workplaces. Employers will need to add to or revise the italicized text to ensure the final policy matches the specific procedures that will be implemented in their workplaces.

Lastly, employers using this template should consider incorporating their policies and procedures for non-employees (e.g., visitors, customers) and for employees of other employers (e.g., contractor employees).

[Employer name]'s Vaccination, Testing, and Face Covering Policy

Purpose:

Vaccination is a vital tool to reduce the presence and severity of COVID-19 cases in the workplace, in communities, and in the nation as a whole. [Employer Name] *encourages all employees to receive a COVID-19 vaccination to protect themselves and other employees.* [Consider inserting additional statements about the impact of vaccination of employees on the safety of workers' families, customers and visitors, business partners, and the community.] *However, should an employee choose not to be vaccinated, this policy's sections on testing and face coverings will apply. This policy complies with OSHA's Emergency Temporary Standard on Vaccination and Testing (29 CFR 1910.501).*

Scope:

This COVID-19 Policy on vaccination, testing, and face covering use applies to all employees of [Employer Name], *except for employees who do not report to a workplace where other individuals (such as coworkers or customers) are present; employees while working from home; and employees who work exclusively outdoors.* [Identify specific groups of employees or job categories, if any, that are not covered by this policy because they fall under these exceptions.]

All employees are encouraged to be fully vaccinated. Employees are considered fully vaccinated two weeks after completing primary vaccination with a COVID-19 vaccine with, if applicable, at least the minimum recommended interval between doses. For example, this includes two weeks after a second dose in a two-dose series, such as the Pfizer or Moderna vaccines, two weeks after a single-dose vaccine, such as Johnson & Johnson's vaccine, or two weeks after the second dose of any combination of two

doses of different COVID-19 vaccines as part of one primary vaccination series. Employees who are not fully vaccinated will be required to provide proof of weekly COVID-19 testing and wear a face covering at the workplace.

Some employees may be required to have or obtain a COVID-19 vaccination as a term and condition of employment at [Employer Name]*, due to their specific job duties (e.g., public facing positions). Employees subject to mandatory vaccination requirements should follow all relevant vaccination procedures in this policy and are not given the choice to choose testing and face covering use in lieu of vaccination.* [Identify specific groups of employees or job categories, if any, that are subject to a mandatory vaccination requirement.]

All employees are required to report their vaccination status and, if vaccinated, provide proof of vaccination. Employees must provide truthful and accurate information about their COVID-19 vaccination status, and, if not fully vaccinated, their testing results. Employees not in compliance with this policy will be subject to discipline.

[Insert additional information on potential discipline for workers who do not follow the policy (e.g., unpaid leave, termination)]

Employees may request an exception from vaccination requirements (if applicable) if the vaccine is medically contraindicated for them or medical necessity requires a delay in vaccination. Employees also may be legally entitled to a reasonable accommodation if they cannot be vaccinated and/or wear a face covering (as otherwise required by this policy) because of a disability, or if the provisions in this policy for vaccination, and/or testing for COVID-19, and/or wearing a face covering conflict with a sincerely held religious belief, practice, or observance. Requests for exceptions and reasonable accommodations must be initiated by [insert relevant instructions]. *All such requests will be handled in accordance with applicable laws and regulations and* [insert reference(s) to the employer's applicable policies and procedures].

[Note that employers should consult other resources for information about federal laws, including the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964, that may entitle employees to reasonable accommodations. See *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* and *Vaccinations – Title VII and Religious Objections to COVID-19 Vaccine Mandates*.]

Procedures:

Overview and General Information

Vaccination

Any [Employer Name] *employee that chooses to or is required to be vaccinated against COVID-19 must be fully vaccinated no later than* [Date]*. Any employee not fully vaccinated by* [Date] *will be subject to the regular testing and face covering requirements of the policy.*

To be fully vaccinated by [Date]*, an employee must:*

- *Obtain the first dose of a two dose vaccine no later than* [Date]*; and the second dose no later than* [Date]*; or*
- *Obtain one dose of a single dose vaccine no later than* [Date].

Employees will be considered fully vaccinated two weeks after receiving the requisite number of doses of a COVID-19 vaccine as stated above. An employee will be considered partially vaccinated if they have received only one dose of a two dose vaccine.

[Describe how employees may schedule their vaccination appointments, e.g., through an on-site clinic, through their own medical provider, or with a mass-vaccination clinic. Also, mention who will be maintaining this policy, e.g., human resources or a designated coordinator, and provide any other general information employees need that is not addressed in the sections below.]

Testing and Face Coverings

All employees who are not fully vaccinated as of [Date] *will be required to undergo regular COVID-19 testing and wear a face covering when in the workplace. Policies and procedures for testing and face coverings are described in the relevant sections of this policy.*

Vaccination Status and Acceptable Forms of Proof of Vaccination

[This section should provide information on how the employer will comply with 29 CFR 1910.501(e) to determine each employee's vaccination status and require vaccinated employees to provide acceptable proof of vaccination.]

Vaccinated Employees

All vaccinated employees are required to provide proof of COVID-19 vaccination, regardless of where they received vaccination. Proof of vaccination status can be submitted via [insert how employees can submit vaccination information, e.g., the employer's vaccination portal or in-person at the HR office].

Acceptable proof of vaccination status is:

1. *The record of immunization from a health care provider or pharmacy;*
2. *A copy of the COVID-19 Vaccination Record Card;*
3. *A copy of medical records documenting the vaccination;*
4. *A copy of immunization records from a public health, state, or tribal immunization information system; or*
5. *A copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s).*

Proof of vaccination generally should include the employee's name, the type of vaccine administered, the date(s) of administration, and the name of the health care professional(s) or clinic site(s) that administered the vaccine. In some cases, state immunization records may not include one or more of these data fields, such as clinic site; in those circumstances [Employer name] *will still accept the state immunization record as acceptable proof of vaccination.*

If an employee is unable to produce one of these acceptable forms of proof of vaccination, despite attempts to do so (e.g., by trying to contact the vaccine administrator or state health department), the employee can provide a signed and dated statement attesting to their vaccination status (fully vaccinated or partially vaccinated); attesting that they have lost and are otherwise unable to produce one of the other forms of acceptable proof; and including the following language:

> *"I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties."*

An employee who attests to their vaccination status in this way should to the best of their recollection, include in their attestation the type of vaccine administered, the date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine.

[Describe documentation procedures for employees who are fully vaccinated, employees who are partially vaccinated, and employees who have not yet been vaccinated.]

All Employees

All employees, both vaccinated and unvaccinated, must inform [Employer name] *of their vaccination status. The following table outlines the requirements for submitting vaccination status documentation.*

Vaccination Status	*Instructions*	*Deadline(s)*
Employees who are fully vaccinated.	*Submit proof of vaccination that indicates full vaccination.*	
Employees who are partially vaccinated (i.e., one dose of a two dose vaccine series).	*Submit proof of vaccination that indicates when the first dose of vaccination was received, followed by proof of the second dose when it is obtained.*	
Employees who are not vaccinated.	*Submit statement that you are unvaccinated, but are planning to receive a vaccination by the deadline.*	
	Submit statement that you are unvaccinated and not planning to receive a vaccination.	

[Employers can set their own internal deadlines to allow for processing. OSHA requires employers to collect all information about employee vaccination status by January 10, 2022.]

Supporting COVID-19 Vaccination

[This section should provide information on how the employer will comply with 29 CFR 1910.501(f) and provide support for employee vaccination, including by providing up to four hours paid time at

the regular rate of pay for each of their vaccination dose(s) and reasonable time and paid sick leave for recovery from side effects experienced following any vaccination dose.]

An employee may take up to four hours of duty time per dose to travel to the vaccination site, receive a vaccination, and return to work. This would mean a maximum of eight hours of duty time for employees receiving two doses. If an employee spends less time getting the vaccine, only the necessary amount of duty time will be granted. Employees who take longer than four hours to get the vaccine must send [their supervisor] an email documenting the reason for the additional time (e.g., they may need to travel long distances to get the vaccine). Any additional time requested will be granted, if reasonable, but will not be paid; in that situation, the employee can elect to use accrued leave, e.g., sick leave, to cover the additional time. If an employee is vaccinated outside of their approved duty time they will not be compensated.

Employees may utilize up to two workdays of sick leave immediately following each dose if they have side effects from the COVID-19 vaccination that prevent them from working. Employees who have no sick leave will be granted up to two days of additional sick leave immediately following each dose if necessary.

The following procedures apply for requesting and granting duty time to obtain the COVID-19 vaccine or sick leave to recover from side effects:

[Describe how an employee should obtain necessary approvals, how to submit requests, how leave is being granted, etc.]

Employee Notification of COVID-19 and Removal from the Workplace

[This section should provide information on how the employer will comply with 29 CFR 1910.501(h), which provides that employers must (1) require employees to promptly notify the employer when they receive a positive COVID-19 test or are diagnosed with COVID-19; (2) immediately remove such employees from the workplace; and (3) keep those employees removed until they meet return to work criteria.]

[Employer Name] *will require employees to promptly notify [their supervisor] when they have tested positive for COVID-19 or have been diagnosed with COVID-19 by a licensed healthcare provider.*

[Describe how employees will communicate with the employer if they are sick or experiencing symptoms while at home or at work.]

[Describe any leave policies (e.g., sick leave, Family Medical Leave Act, other policies) that the employer will implement for employees who test positive for or are diagnosed with COVID-19.]

Medical Removal from the Workplace

[Employer name] *has also implemented a policy for keeping COVID-19 positive employees from the workplace in certain circumstances.* [Employer name] *will immediately remove an employee from the workplace if they have received a positive COVID-19 test or have been diagnosed with COVID-19 by a licensed healthcare provider (i.e., immediately send them home or to seek medical care, as appropriate).*

[Describe the employer's policies for removing employees from the workplace and any relevant procedures for working remotely or in isolation.]

Return to Work Criteria

For any employee removed because they are COVID-19 positive, [Employer name] *will keep them removed from the workplace until the employee receives a negative result on a COVID-19 nucleic acid amplification test (NAAT) following a positive result on a COVID-19 antigen test if the employee chooses to seek a NAAT test for confirmatory testing; meets the return to work criteria in CDC's "Isolation Guidance"; or receives a recommendation to return to work from a licensed healthcare provider.*

Under CDC's "Isolation Guidance," asymptomatic employees may return to work once 10 days have passed since the positive test, and symptomatic employees may return to work after all the following are true:

- *At least 10 days have passed since symptoms first appeared, and*
- *At least 24 hours have passed with no fever without fever-reducing medication, and*
- *Other symptoms of COVID-19 are improving (loss of taste and smell may persist for weeks or months and need not delay the end of isolation).*

If an employee has severe COVID-19 or an immune disease, [Employer name] *will follow the guidance of a licensed healthcare provider regarding return to work.*

[Describe the employer's policies for employees returning to work following removal from the workplace.]

COVID-19 Testing

[This section should provide information on how the employer will comply with 29 CFR 1910.501(g) and address COVID-19 testing for employees in the workplace who are not fully vaccinated.]

All employees who are not fully vaccinated will be required to comply with this policy for testing.

Employees who report to the workplace at least once every seven days:

> *(A) must be tested for COVID-19 at least once every seven days; and*
>
> *(B) must provide documentation of the most recent COVID-19 test result to [the supervisor] no later than the seventh day following the date on which the employee last provided a test result.*

Any employee who does not report to the workplace during a period of seven or more days (e.g., if they were teleworking for two weeks prior to reporting to the workplace):

> *(A) must be tested for COVID-19 within seven days prior to returning to the workplace; and*
>
> *(B) must provide documentation of that test result to [the supervisor] upon return to the workplace.*

If an employee does not provide documentation of a COVID-19 test result as required by this policy, they will be removed from the workplace until they provide a test result.

Employees who have received a positive COVID-19 test, or have been diagnosed with COVID-19 by a licensed healthcare provider, are not required to undergo COVID-19 testing for 90 days following the date of their positive test or diagnosis.

[Describe how employees can fulfill the weekly testing requirement, including where they can get tested, the required schedule for testing (this should address any differences between employees who regularly come to the workplace versus those who do not), and who will cover the costs.]

Face Coverings

[This section should provide information on how the employer will comply with 29 CFR 1910.501(i), which generally requires employers to ensure that each employee who is not fully vaccinated wears a face covering when indoors and when occupying a vehicle with another person for work purposes.]

[Employer name] *will require all employees who are not fully vaccinated to wear a face covering. Face coverings must: (i) completely cover the nose and mouth; (ii) be made with two or more layers of a breathable fabric that is tightly woven (i.e., fabrics that do not let light pass through when held up to a light source); (iii) be secured to the head with ties, ear loops, or elastic bands that go behind the head. If gaiters are worn, they should have two layers of fabric or be folded to make two layers; (iv) fit snugly over the nose, mouth, and chin with no large gaps on the outside of the face; and (v) be a solid piece of material without slits, exhalation valves, visible holes, punctures, or other openings. Acceptable face coverings include clear face coverings or cloth face coverings with a clear plastic panel that, despite the non-cloth material allowing light to pass through, otherwise meet these criteria and which may be used to facilitate communication with people who are deaf or hard-of-hearing or others who need to see a speaker's mouth or facial expressions to understand speech or sign language respectively.*

Employees who are not fully vaccinated must wear face coverings over the nose and mouth when indoors and when occupying a vehicle with another person for work purposes. Policies and procedures for face coverings will be implemented, along with the other provisions required by OSHA's COVID-19 Vaccination and Testing ETS, as part of a multi-layered infection control approach for unvaccinated workers.

[Describe how employees will obtain face coverings (e.g., purchased by employer or self-provided) and instructions about when and how they should be worn or used.]

The following are exceptions to [Employer name]*'s requirements for face coverings:*

1. *When an employee is alone in a room with floor to ceiling walls and a closed door.*
2. *For a limited time, while an employee is eating or drinking at the workplace or for identification purposes in compliance with safety and security requirements.*
3. *When an employee is wearing a respirator or facemask.*
4. *Where* [Employer name] *has determined that the use of face coverings is infeasible or creates a greater hazard (e.g., when it is important to see the employee's mouth for reasons related to their job duties, when the work requires the use of the employee's uncovered mouth, or when the use of a face covering presents a risk of serious injury or death to the employee).*

New Hires:

All new employees are required to comply with the vaccination, testing, and face covering requirements outlined in this policy as soon as practicable and as a condition of employment. Potential candidates for employment will be notified of the requirements of this policy prior to the start of employment.
[Describe how new employees must comply with this policy, including any deadlines for submitting vaccination documentation or COVID-19 test results.]

Confidentiality and Privacy:

All medical information collected from individuals, including vaccination information, test results, and any other information obtained as a result of testing, will be treated in accordance with applicable laws and policies on confidentiality and privacy.

Questions:

Please direct any questions regarding this policy to [e.g., Human Resources Department].

This model plan is intended to provide information about OSHA's COVID-19 Emergency Temporary Standard. The Occupational Safety and Health Act requires employers to comply with safety and health standards promulgated by OSHA or by a state with an OSHA-approved state plan. However, this model plan is not itself a standard or regulation, and it creates no new legal obligations.

TAB 7

From: **Mark Vanderpool (mvanderpool at sterling-heights.net)** managementforum@listserv.mml.org
Subject: RE: OSHA Vaccine ETS
Date: January 4, 2022 at 3:46 PM
To: managementforum@mail-list.com

MV

This message was sent by Mark Vanderpool mvanderpool@sterling-heights.net

James,

Thanks for sharing. This is very helpful.

Mark Vanderpool | City Manager
City of Sterling Heights
40555 Utica Road, Sterling Heights, MI 48311
Tel: 586.446.2301 | mvanderpool@sterling-heights.net
sterling-heights.net

-----Original Message-----
From: managementforum@listserv.mml.org <managementforum@listserv.mml.org>
Sent: Tuesday, January 4, 2022 3:25 PM
To: managementforum@listserv.mml.org
Subject: OSHA Vaccine ETS

This message was sent by James Freed jamesfreedmlgmalistserv1@gmail.com

Assuming the Supreme Court does not overturn the 6th Circuit, the new OSHA ETS will soon go into effect. Given that we are a OSHA+ state, MIOSHA will quickly follow suit. This would force all of us to implement either a" mandatory vaccine policy" or "vaccine or test policy". I will be issuing a "vaccine or test policy" here, as about 20%-30% of my staff has informed management that they plan to resign and seek employment elsewhere if we force a vaccine mandate. We can hardly fill openings as it is.

With that said, standing up a testing and reporting operation is cumbersome and a big task. Luckily, there are firms prepared to provide these services. Here is a link to a list of those providers for those who are considering a similar course of action: <https://files.mail-list.com/m/managementforum/43261490.html>

Attached, is also a sample vax or test policy template.

Truncated 302 characters in the previous message to save energy.

TAB 8

STATE OF MICHIGAN

COURT OF CLAIMS

ASSOCIATED BUILDERS & CONTRACTORS OF MICHIGAN, and DJ'S LAWN SERVICE, INC., d/b/a DJ'S LANDSCAPE MANAGEMENT,

Plaintiffs,

v

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan, DANA NESSEL, in her official capacity as Michigan Attorney General, and ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services,

Defendants.
_____/

OPINION AND ORDER REGARDING PLAINTIFFS' MAY 21, 2020 MOTION FOR IMMEDIATE DECLARATORY JUDGMENT ON COUNT I

Case No. 20-000092-MZ

Hon. Christopher M. Murray

Pending before the Court is plaintiffs' May 21, 2020 motion for immediate declaratory judgment on Count I of their complaint. For the reasons that follow, the motion is GRANTED. In light of the informative briefing submitted by the parties, and because the motion addresses pure legal issues, this matter will be decided without oral argument. See LCR 2.119(A)(6).[1]

I. BACKGROUND

This case arises out of Executive Order No. 2020-97. The order is one of many executive orders issued in response to the COVID-19 pandemic. Amongst other things, the order states that

[1] Plaintiffs' motion to file a reply brief in excess of the page limitations is granted.

"businesses must do their part to protect their employees, their patrons, and their communities," and imposes a number of duties and obligations on businesses that the Governor has permitted to re-open. Section 1 of the order contains 18 specific steps that must be followed by any business that requires employees to leave their homes or residences for work. The order also contains numerous industry-specific obligations. Section 11 of the order declares that the substantive provisions of the order:

> have the force and effect of regulations adopted by the departments and agencies with responsibility for overseeing compliance with workplace health-and-safety standards and are fully enforceable by such agencies. Any challenge to penalties imposed by a department or agency for violating any of the rules described in sections 1 through 10 of this order will proceed through the same administrative review process as any challenge to a penalty imposed by the department or agency for a violation of its rules.

The order continues in § 12 by declaring that any business that violates the substantive provisions of the order "has failed to provide a place of employment that is free from recognized hazards that are causing, or are likely to cause, death or serious physical harm to an employee, within the meaning of the Michigan Occupational Safety and Health Act, MCL 408.1011." In effect, the order declares that a violation of the order is a per-se violation of the Michigan Occupational Safety and Health Act (MIOSHA). MIOSHA provides a range of penalties for violation of the statute, including fines ranging up to $70,000 and a felony conviction punishable by up to three years' imprisonment. MCL 408.1035.

Plaintiffs filed a six-count complaint in this Court. Their motion for declaratory relief focuses exclusively on Count I, which alleges that, to the extent § 12 of EO 2020-97 incorporates MIOSHA's penalty provisions, it imposes penalties in excess of what the Governor is permitted to authorize under her statutory authority to issue executive orders in response to an emergency situation. Count I also asserts that § 11 of EO 2020-97 violates the Administrative Procedures Act

(APA), MCL 24.201 *et seq.*, because the dictates of the order did not undergo the formal notice-and-comment procedures mandated by the APA, yet the order purports to give the order's requirements the force and effect of rules and regulations adopted by departments charged with overseeing workplace-safety standards.

II. STANDING

Defendants first oppose the request for injunctive relief by asserting that plaintiffs lack standing to challenge EO 2020-97. "[A] litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." *Lansing Schs Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). Here, plaintiffs seek declaratory relief under MCR 2.605. There must be a "case of actual controversy" in order for a litigant to obtain relief under MCR 2.605(A)(1). "An 'actual controversy' . . . exists when a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve that plaintiff's legal rights." *League of Women Voters of Mich v Secretary of State*, __ Mich App __, __; __ NW2d __ (2020) (Docket Nos. 350938; 351073), slip op at 7. In the case of organizations seeking to advocate on behalf of their members, an organization is deemed to have standing if the members of the organization have a sufficient interest. *Lansing Schs Ed Ass'n*, 487 Mich at 373 n 21.

The Court concludes an actual controversy exists. Initially, it cannot be discounted that plaintiff DJ's Lawn Service is one of the few entities that, until very recently, has been able to operate within this state. The same is true of plaintiff Associated Builders and Contractors, which represents hundreds of construction-related firms. Thus, plaintiffs are or represent some of the few entities that are—or were at the time of its issuance—actually subject to EO 2020-97. Furthermore, plaintiffs have established an actual controversy because they are subject to the

penalties incorporated into the Executive Order, even for inadvertent violation of one of the many standards imposed in the order. As explained by the Court of Appeals in *Strager v Olsen*, 10 Mich App 166, 171; 159 NW2d 175 (1968), "[a] declaratory action is a proper remedy to test the validity of a criminal statute where it affects one in his trade, business or occupation." A litigant need not be arrested in order to obtain declaratory relief regarding the validity of an act, nor does a litigant need to violate the statute in order to seek declaratory relief. *Id*. See also *Kalamazoo Police Supervisor's Ass'n v City of Kalamazoo*, 130 Mich App 513, 518; 343 NW2d 601 (1983). Plaintiffs seek a declartion of their rights before an alleged violation of the Executive Order—which order allegedly contains penalties beyond what the Governor has statutory authority to employ—gives rise to the imposition of impermissible penalties against plaintiffs and/or plaintiff's members. This is sufficient for purposes of a standing inquiry, and it defeats defendant Attorney General's assertion that this case is not ripe for adjudication. See *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 496-497; 815 NW2d 132 (2012). The threat of enforcement, combined with the far-reaching effects of the order, the swiftness with which the order was enacted, the ambiguous nature of certain provisions of the order,[2] and the constantly changing landscape created by the Governor's Executive Orders, convince the Court that plaintiffs have asserted a risk of enforcement that is more than merely hypothetical. See *Strager*, 10 Mich App at 172.

[2] Plaintiffs submitted an affidavit from Ken Misiewicz, the president and chief executive officer of a mechanical contractor that is a member of plaintiff Associated Builders and Contractors. Mr. Misiewicz highlighted his concerns with his company's perceived inability to comply with some of the provisions of the order. Thus, and notwithstanding the above, the Court would find that Mr. Misiewicz, at a minimum, has established a substantial risk of enforcement of EO 2020-97's penalty provisions to his company, and that plaintiff Associated Builders and Contractors has standing as a result. See *Lansing Schs Ed Ass'n*, 487 Mich at 373 n 21.

III. PLAINTIFFS ARE ENTITLED TO DECLARATORY RELIEF

Turning now to the merits of the motion, plaintiffs argue that the Governor exceeded her statutory authority by effectively bootstrapping into EO 2020-97 penalties that are found in MIOSHA. The Court agrees. Executive Order 2020-97 indicates that it was issued pursuant to two statutes: (1) the Emergency Powers of Governor Act (EPGA), MCL 10.31 *et seq.*; and (2) the Emergency Management Act (EMA), MCL 30.401 *et seq.*[3] The EPGA unambiguously provides that the violation of any order issued under the Act "*shall be punishable as a misdemeanor*, where such order, rule or regulation states that the violation thereof shall constitute a misdemeanor." MCL 10.33 (emphasis added).[4] Likewise, the EMA makes violation of an order issued pursuant to the Act a misdemeanor. See MCL 30.405(3) (providing that "[a] person who willfully disobeys or interferes with the implementation of a rule, order, or directive issued by the governor pursuant to this section is guilty of a misdemeanor."). Neither act sets forth an express length of imprisonment or the precise amount of the fine associated with a misdemeanor conviction; hence, the default punishments of 90 days' imprisonment and a fine of not more than $500 apply. See

[3]The only question presented by this motion is the validity of penalties beyond those provided in the EMA and EPGA.

[4] Defendant Attorney General's briefing highlights that a violation of an order issued under the EGPA is only a misdemeanor "where such order . . . states that the violation thereof shall constitute a misdemeanor." The Attorney General notes that the statute is silent as to greater penalties, and infers from this silence that greater penalties may be enforced if the Governor chooses to do so. The Attorney General misreads the statute. The qualifying language in the EPGA states that violation of an order constitutes a misdemeanor if, and only if, the order declares the same. This language, which specifies the only time a criminal penalty may attach to a violation of the order, does not invite the imposition of a greater penalty than the only penalty expressly listed. If the Legislature wished to authorize a penalty in addition to the misdemeanor penalty expressly stated in the statute, it could have expressly done so, and the Court declines to infer the same from silence. See *Pohutski v Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (explaining that "courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature.").

MCL 750.504 ("If a person is convicted of a crime designated in this act or in any other act of this state to be a misdemeanor for which no punishment is specially prescribed, the person is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $500.00, or both.").

Examining the plain language of the EMA and the EPGA, as the Court must do, see *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 85; 878 NW2d 816 (2016), it is readily apparent that one, and only one, penalty is permitted for a violation of an executive order issued under either act. If there are to be penalties imposed for violation of an executive order issued under these statutes, then both acts only permit misdemeanor penalties for the violation of any such executive orders. There is simply no room within the unambiguous statutory language for adding additional penalties, let alone incorporating different, and more severe, penalties from a separate statutory scheme such as the felony charges and increased fines set forth in MIOSHA.[5] "Michigan recognizes the maxim *expressio unius est exclusio alterius*; that the express mention in a statute of one thing implies the exclusion of other similar things." *AFSCME v Detroit*, 267 Mich App 255, 260; 704 NW2d 712 (2005) (citation and quotation marks omitted). Here, the Legislature's decision to expressly limit the range of available penalties for violation of an executive order issued under the two emergency statutes indicates a clear intent to prohibit the imposition of any other penalties. The incorporation of MIOSHA's felony charges and increased fines for a violation of the executive order was plainly outside the Governor's authority under the EMA and EPGA. Any penalties or fines beyond those for misdemeanors that are incorporated

[5] None of the defendants dispute this interpretation of §§ 11 and 12, i.e., that the order incorporates the penalties contained within MIOSHA.

into the executive order are void. See *Senghas v L'Anse Creuse Pub Schs*, 368 Mich 557, 560; 118 NW2d 975 (1962) (discussing *ultra vires* acts). Section 12 of EO 2020-97 must be stricken from the order.

In arguing for a different result, defendants make little effort to engage the plain language of the EMA and EPGA. Rather, they argue that activity which violates EO 2020-97 will always be a violation of MIOSHA, thereby rendering plaintiffs' concerns irrelevant. This argument may or may not be true as a practical point, but it surely does not address the legal issue presented. If there is indeed overlap between what is a violation of the executive order and of MIOSHA[6], then any violation of the order must be punishable by a misdemeanor, while any violation under MIOSHA will be subject to the penalties available under that separate statutory scheme.

Defendant Attorney General's contention that the EPGA and EMA are irrelevant to the analysis because the Governor possessed general, undefined constitutional authority to issue EO 2020-97, misses the mark. According to the Attorney General, the Governor merely provided guidance to executive branch departments and agencies as to how they should interpret and enforce MIOSHA. See Const 1963, art 5, § 8 (providing that each principal department "shall be under the supervision of the governor" and that the Governor "shall take care that the laws be faithfully

[6] Adopting defendants' position would mean that EO 2020-97 was essentially a hollow exercise by the Governor. If MIOSHA already covered the entirety of the rules outlined in EO 2020-97, the order would serve little meaningful purpose. Moreover, defendants' assertions about the redundant nature of EO 2020-97 are belied by a review of the order. The order contains numerous requirements that are specific to COVID-19 and the related challenges faced by particular industries. Compare EO 2020-97, with MCL 408.1011 and Mich Admin Code, R 408.10001 *et seq*. For instance, EO 2020-97 has provisions about water-coolers that do not have a comparable counterpart in MIOSHA. Defendants have made no effort to explain how this or other COVID-19-specific facets of the order are already incorporated into MIOSHA.

executed."). EO 2020-97 did much more than provide guidance and ensure that the law was faithfully executed. Indeed, the order created scores of new restrictions and demands and attempted to make these new restrictions and demands subject to penalties beyond what the Legislature granted. The Governor's "real control over the executive branch," see *House Speaker v Governor*, 443 Mich 560, 562; 506 NW2d 190 (1993), as set forth in the Constitution does not include the power to issue orders containing penalties beyond what the authorizing legislation permits. The Attorney General's reference to the Governor's control over the executive branch fails to address the relevant concerns presented.

Finally, and because the penalties imposed under MIOSHA cannot be incorporated into the order, no penalties may be imposed "by a department or agency for violating any of the rules described in" the order, contrary to what § 11 of EO 2020-97 dictates. Instead, the only penalty that may be imposed for a violation of the order is that which is expressly stated in the EMA and in the EPGA: a misdemeanor, criminal violation. The penalty may only be rendered through the appropriate criminal procedures. See MCL 30.405(1)(a)("This power does not extend to the suspension of criminal process and procedure."). Any other attempt to incorporate different penalties or enforcement methods into EO 2020-97 is beyond the authority granted to the Governor under the EMA and EPGA. Section 11 of EO 2020-97 must be stricken as well.

IV. CONCLUSION

IT IS HEREBY ORDERED that plaintiffs are entitled to immediate declaratory relief on Count I, which contains their claim that the Governor's incorporation of MIOSHA's penalties into Executive Order No. 2020-97 was an impermissible act. Thus, to the extent §§ 11-12 of EO 2020-97 purport to make a violation of the same a per se violation of MIOSHA, thereby incorporating

impermissible penalties and/or enforcement methods into the order, the same are null and void. EO 2020-97 otherwise remains enforceable and in effect.

This is not a final order and it does not resolve the last pending claim or close the case.

Dated: June 4, 2020

Christopher M. Murray
Judge, Court of Claims

TAB 9

NEWS RELEASE
STATE EMERGENCY OPERATIONS CENTER

FOR IMMEDIATE RELEASE
No. 357 – October 2, 2020

For more information contact:
Jason Moon
517-282-0041

State Cites 10 Businesses, for COVID-19 Workplace Safety Violations

MIOSHA again encourages employers to take advantage of guidance and consultation services to prevent citations and assure workplace safety

LANSING, MICH. To maintain a commitment to putting worker safety and health first, the Michigan Occupational Safety and Health Administration (MIOSHA) inspected and issued COVID-19 "general duty" citations to 10 different businesses with serious violations for failing to protect workers and follow workplace guidelines.

The MIOSHA "general duty" clause requires an employer to provide a workplace that is free from recognized hazards that are causing, or are likely to cause, death or serious physical harm to the employee. A general duty clause citation carries a fine of up to $7,000.

On-site inspections conducted by MIOSHA's general industry and construction industry enforcement divisions determined 10 companies allegedly committed serious violations by failing to implement necessary precautions to protect employees from contracting COVID-19. Deficiencies included a lack of health screenings, face coverings, employee training, cleaning measures and overall preparedness plans.

The cited companies will have 15 working days from receipt of the MIOSHA citations to contest the violations and penalties. The citations include suggestions to fix the hazards to protect employees. Employers must provide proof to MIOSHA that abatement has been completed.

A cited employer may choose to enter into a Penalty Reduction Agreement (PRA) with MIOSHA and agree to abate noted hazards by the abatement date provided within the citation and will receive a 50% reduction in penalties. By entering into the PRA an employer must also agree to not seek an appeal.

MIOSHA cited the 10 below companies for a serious violation of the general duty clause for the following issues**:**

- **Cops and Doughnuts** located in Bay City, MI was fined $1,500 for violations of COVID-19 workplace safety requirements including lack of a preparedness and response plan, failing to train employees on COVID-19, not conducting daily self-screening protocols for COVID-19, not placing posters in the languages common in the employee population that encourage them to stay home when sick and to use proper hand hygiene practices, not enforcing social distancing, and assuming that patrons who are not wearing a mask had a medical condition for not wearing one. An inspection was initiated due to complaints, view the full citation document.

- **Tel-12 Cloverleaf BP Inc.,** a gas station located at 28995 Telegraph Rd, Southfield, MI was fined $2,100 for violations of COVID-19 workplace safety requirements including the lack of a preparedness and response plan, failure to require face coverings for employees when social distancing could not be maintained, and failing to conduct the daily health screening including a questionnaire. The inspection was initiated as part of the COVID-19 Retail State Emphasis Program, view the full citation document.

- **City of Port Huron** in Port Huron, MI was fined $6,300 for violations of COVID-19 workplace safety requirements including failure to require face coverings, not conducting daily entry self-screening protocols for employees, not training employees on COVID-19, and failing to maintain records of the daily entry self-screening protocols. The inspection was initiated in response to a complaint, view the full citation document.

- **Madco Truck Plaza Inc.** in Romulus, MI was fined $400 for violations of COVID-19 workplace safety requirements including lack of a preparedness and response plan, failing to train employees on COVID-19, failing to properly clean and disinfect high-touch surfaces, not conducting daily self-screening protocols for COVID-19, failing to designate an onsite supervisor to monitor COVID-19 control strategies, lack of social distancing, and not posting signs at store entrances. The inspection was initiated as part of the COVID-19 Retail State Emphasis Program, view the full citation document.

- **Saginaw Housing Commission** in Saginaw, MI was fined $500 for violations of COVID-19 workplace safety requirements including failing to conduct daily health screening and failure to conduct facility cleaning and disinfection on high-touch surfaces and equipment. The inspection was initiated in response to a complaint, view the full citation document.

- **Hertz** located at 8600 Garfield Rd, Freeland, MI was fined $6,300 for violations of COVID-19 workplace safety requirements including failing to develop and follow a preparedness and response plan, failing to install physical barriers at service counters, failing to conduct the daily health screening, failing to train employees and require the use of facial coverings. The inspection was initiated in response to a complaint, view the full citation document.

- **Meritage Hospitality Group Inc., dba Wendy's #202** located at 18001 E 9 Mile Rd., Eastpointe, MI was fined $4,000 for violations of COVID-19 workplace safety requirements including failing to conduct daily health screening, failure to require face coverings for employees when social distancing could not be maintained, failing to train employees and failing to designate an onsite supervisor to monitor COVID-19 controls. The inspection was initiated in response to a complaint, view the full citation document.

- **Brandon Martinez**, a residential construction company based in Grand Rapids, MI was fined $2,100 for violations of COVID-19 workplace safety including failure to require face coverings for employees when social distancing could not be maintained, failing to train employees and failing to develop and follow a preparedness and response plan. A programmed inspection was conducted at a Plainwell, MI jobsite, view the full citation document.

- **Musselman Home Improvements, LLC** based in Kalamazoo, MI was fined $2,100 for violations of COVID-19 workplace safety including failure to require face coverings for employees when social distancing could not be maintained, failing to train employees and failing to develop and follow a preparedness and response plan. A programmed inspection was conducted at a Mattawan, MI jobsite, view the full citation document.

- **Merlo Construction Company, Inc.** based in Milford, MI was fined $5,600 for violations of COVID-19 workplace safety requirements including failure to require face coverings for employees when social distancing could not be maintained, failing to train employees and failing to develop and follow a preparedness and response plan. A programmed inspection was conducted at a Livonia, MI jobsite, view the full citation document.

A set of online resources at Michigan.gov/COVIDWorkplaceSafety provides posters for employees and customers, factsheets, educational videos, a sample COVID-19 preparedness and response plan, best practices that employees need to follow and a reopening checklist to help businesses put safeguards in place.

To enhance MIOSHA's consultative services, the newly launched MIOSHA Ambassador Program will send safety and health experts to businesses statewide now to offer education and support, with a focus on workplaces with a higher risk of community transmission. To request consultation, education and training services, call 517-284-7720 or online at MIOSHA Request for Consultative Assistance.

For more information about MIOSHA's safety and health guidelines to protect Michigan's workforce during the pandemic, visit Michigan.gov/COVIDWorkplaceSafety.

Employers and employees with questions regarding workplace safety and health may contact MIOSHA using the new hotline at **855-SAFE-C19 (855-723-3219).**

To report health and safety concerns in the workplace, go to Michigan.gov/MIOSHAcomplaint.

Information around COVID-19 is changing rapidly. The latest information is available at michigan.gov/coronavirus and CDC.gov/Coronavirus.

###

TAB 10

CONFIDENTIAL: To be opened by addressee only
Sent with permission to: jamesfreed1@gmail.com

INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION
777 N Capitol St. NE, Ste. 500
Washington, DC 20002-4290
202.962.3680 | 202.962.3500 (f)
icma.org

December 2, 2021

Mr. James R. Freed, ICMA-CM

Re: Ethics Inquiry

Dear Mr. Freed:
Thank you for taking the time to speak with me regarding the ethics complaint a member wishing to remain anonymous filed with ICMA. As you know, the complaint raised concerns about your recent posts to your personal social media account and your commentary on the Michigan Municipal Executives (MME) listserv. Specifically, the complaint alleged the following on the basis of the enclosed materials:

A. The Michigan Occupational Safety and Health Administration (MIOSHA) reportedly cited Port Huron for workplace safety violations relative to state COVID-19 regulations and the city appealed the violation. When the city was successful in its appeal as indicated in the complaint materials, you shared two personal social media posts that were grandstanding in nature: (1) a link to a local media article with the caption "Lucy will at least know her dad fought government abuse and overreach" and (2) your response to another media article about MIOSHA's investigation directed to Gov. Gretchen Whitmer, "@gewhitmer you shouldn't mess with a father who cares about the world his little girl grows up in."

B. When you shared a local media editorial regarding the workplace safety violation on the MME listserv, a colleague replied to you, "Please review Code of Ethics, particularly Tenet 7." According to the complaint, "When another manager cautioned him on Tenet 7, he then ripped said manager" over the MME listserv:

> "Nothing about that editorial or my comments to the media are even remotely close to a violation of Tenant 7. You should be ashamed. False flagging and accusing a manager of an ethics violation in a public forum, among peers, could very well be considered a violation of Tenant 3.
>
> More remarkable, is that you Chair the MME Member Success Committee, which is charged with providing moral support to fellow managers."

C. You posted to the MME listserv your personal commentary on COVID-19 vaccine mandates in the workplace, "luckily it was just stayed by the Court of Appeals. Cheers to those who defend liberty." You then shared an email on the MME listserv you had sent to all city staff regarding COVID-19 vaccine mandates:

> "I know there has been significant news and information floating around regarding OSHA and a forthcoming vaccine mandate for employers with 100 or more employees.
>
> Municipalities do not fall under the jurisdiction of OSHA. However, we do fall under the jurisdiction of MIOSHA, and they will need to promulgate additional rules if they seek to include us in any future mandate.
>
> Hear me now, I will *never* enforce a vaccine mandate upon my employees. I took an oath to protect and uphold the Constitution when I took this position.

I will uphold my oath, come what may.

I earnestly believe that one of the many federal judges across this country will issue an injunction soon. I also believe the U.S. Supreme Court will soundly reject this overreach of the administrative state.

Laws are made by duly elected members of the U.S. Congress, Senate and signed by the President, not unelected bureaucrats.

I hope I have made my position on this issue clear to you."

D. Your post on your personal social media account of a picture of the Ben Shapiro book, "The Authoritarian Moment - How the Left Weaponized America's Institutions Against Dissent" with the caption "a must read" may have violated Tenet 7.

These allegations about your conduct do raise ethical concerns regarding Tenets 2, 3, 5, 6, and 7 of the ICMA Code of Ethics (Code). As you are aware, the first step in the ethics enforcement process is to obtain your written perspective. ICMA has an obligation to find out what transpired to clarify whether a potential violation of the Code occurred. ICMA's ethics peer-review process always presumes ICMA members conduct themselves ethically unless the facts prove otherwise. There is also an understanding the information complainants relay to ICMA may be inaccurate or incomplete.

If the information is true, and depending on the circumstances, your conduct may be a possible violation of Tenets 2, 3, 5, 6, and 7 of the Code.

Tenet 2. Affirm the dignity and worth of local government services and maintain a deep sense of social responsibility as a trusted public servant.

Tenet 3. Demonstrate by word and action the highest standards of ethical conduct and integrity in all public, professional, and personal relationships in order that the member may merit the trust and respect of the elected and appointed officials, employees, and the public.

Guideline on Public Confidence. Members should conduct themselves so as to maintain public confidence in their position and profession, the integrity of their local government, and in their responsibility to uphold the public trust.

Tenet 5. Submit policy proposals to elected officials; provide them with facts, and technical and professional advice about policy options; and collaborate with them in setting goals for the community and organization.

Tenet 6. Recognize that elected representatives are accountable to their community for the decisions they make; members are responsible for implementing those decisions.

Tenet 7. Refrain from all political activities which undermine public confidence in professional administrators. Refrain from participation in the election of the members of the employing legislative body.

Guideline on Personal Advocacy of Issues. Members share with their fellow citizens the right and responsibility to voice their opinion on public issues. Members may advocate for issues of personal interest only when doing so does not conflict with the performance of their official duties.

Please take this opportunity to provide your perspective by completely explaining the circumstances surrounding your conduct. Specifically:

MIOSHA Investigation

1. Is it accurate MIOSHA cited the city for violation(s) of COVID-19 workplace regulations? If so:
    a. What violations did MIOSHA allege occurred?
    b. What was the associated fine?
    c. Is it accurate the city incurred legal expenses in appealing the violation that exceeded the fine levied for the workplace violation(s)? If so:
        i. What is the city's annual budget for legal expenses?
        ii. Does the city have in-house legal counsel or does the city contract with an outside attorney(s) for legal services?
        iii. What was the total legal expense the city incurred in this matter?
        iv. Did this approach require governing body approval? Please provide the meeting minutes reflecting the governing body's approval of this approach. If not, was it your decision as the manager to appeal the MIOSHA violation?
    d. Did any other federal, state, or local agency cite the city for COVID-19 workplace regulation violation(s)? If so, please describe the circumstances.

2. Please explain what you meant in your posting "Lucy will at least know her dad fought government abuse and overreach" and why you felt this comment was important to publicly share.

3. Please explain what you meant in your posting "@gewhitmer you shouldn't mess with a father who cares about the world his little girl grows up in?"
    a. Why did you publicly mention Gov. Gretchen Whitmer in this post?
    b. Do you think this approach was appropriate?

4. Are these social media postings still active? If not, why did you delete them?

5. Do your personal social media accounts identify you as the Port Huron city manager?

6. Did the governing body provide any public statements about this matter? If so, when? Please provide a copy.

7. Did the governing body direct you to provide comments to the media on behalf of the city on this issue? If so, when, and by what method did this guidance occur, i.e., in writing or orally? If in writing, please provide a copy.

8. Did you privately reach out to your colleague before you posted your reply on the MME listserv? If not, why not?

9. What consideration, if any, did you give to the ICMA Committee on Professional Conduct's (CPC) prior advice to you to ensure your future dialogue comports with your professional obligation to treat all colleagues with respect outlined in Tenet 3?

Comments on Vaccine Mandates

10. Why did you send the email to city employees? Why did you share it with your colleagues on the MME listserv?

11. Does the city have a policy and/or regulation concerning mandatory employee vaccination, excluding the COVID-19 vaccine? If so, please provide a copy.

12. Has the governing body adopted a statement and/or policy regarding mandatory COVID-19 vaccine requirements for city employees? If so, please provide a copy.

13. Please answer the following questions regarding whether you think your commentary on vaccine mandates could:
    a. Conflict with your risk management responsibilities as the CAO;
    b. Undermine the city's current or future response to workplace safety during the COVID-19 pandemic;
    c. Expose the city to future liability; and
    d. Send the message to your employees you have no intention of implementing a law as required to do in a CAO position?

14. What consideration, if any, did you give to the CPC's prior guidance to you regarding Tenets 5 and 6 of the Code that clearly delineate the roles of local government managers and elected officials in the public policy advising, decision making, and implementation process?

Personal social media comment on the book, "The Authoritarian Moment - How the Left Weaponized America's Institutions Against Dissent"

15. Why did you post this picture with the caption "a must read?"

16. Is this posting still active? If not, why did you delete it?

17. What consideration, if any, did you give to the value of political neutrality as expressed in Tenet 7 of the Code when you made this post? Did you consider the personal advocacy guideline to Tenet 7 prior to posting this message?

18. What other considerations, if any, did you give to the Code in your conduct?

19. Are there any additional comments or information you wish to submit to the CPC regarding these matters?

Please send your written response within 30 days upon your receipt of this letter (as outlined in the Rules of Procedure for Enforcement, §V.B.3). Your response will be shared with the CPC for the CPC's review and decision. The ICMA Code of Ethics and Rules of Procedure are included for your information.

Please contact me if you have any questions.

Sincerely,

Jessica Cowles

Jessica Cowles
ICMA Ethics Advisor
(202) 962-3513
JCowles@icma.org

Enclosed: (A) Complaint materials and (B) ICMA Code of Ethics and Rules of Procedure for Enforcement

cc: Members, Committee on Professional Conduct