

**CITY OF MADISON  
OFFICE OF THE CITY ATTORNEY  
Room 401, CCB  
266-4511**

Date: October 8, 2019

**FORMAL OPINION 2019-002  
ON MANAGERS CONTRACTS**

TO: Mayor Rhodes-Conway  
All Alders

FROM: Michael P. May

RE: Source of the City's Program of Individual Contracts for Managers

Some members of the Council may be unaware of the legal source for the City's ordinance on contracts for managers in Compensation Group 21 (CG-21). This opinion sets out the legal source and examines some of the policy behind this practice.

**Question Presented.**

What is the legal source and the history of the City's program of individual contracts for certain management positions?

**Short Answer.**

The City's program of individual contracts for managers is codified in Sec. 3.54(9), MGO, and in particular, Sec. 3.56(9)(f), MGO, and the incorporated 1988 Report mentioned in that section. The program was enacted as a compromise between the system existing in 1988, when all managers were protected by the civil service regulations, and a system where managers would serve at the pleasure of the Mayor.

**Discussion.**

For purposes of my discussion, I use the term "managers" as synonymous with CG-21 employees, except for the Police Chief and Fire Chief. Because their employment is subject to the control of the Police and Fire Commission, the Chiefs do not have management contracts.

Sec. 3.54(9), MGO is titled "Compensation of Managerial Employees." A key subdivision of the ordinance is sub. (9)(f), which reads in part:

Employment Contracts . All new positions in Compensation Group 21 and all existing positions in Compensation Group 21 as they become vacant shall be filled through the use of employment contracts pursuant to the system outlined in the Substitute Report of the Human Resources Committee Relating to

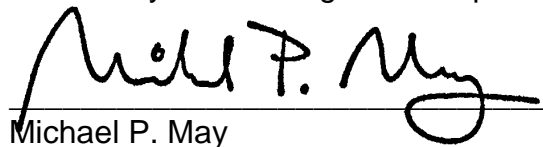
Employment Contracts for Certain Managers, ID No. 3152, adopted August 2, 1988, Substitute Report ID 3152.

To my knowledge, this may be the only place in the ordinances where reference is made to a specific committee report to be used in interpreting and applying the ordinance. Because of the importance of the Report, I attach a copy as Appendix B to this opinion. I also attach as Appendix A the current version of Sec.3.54(9), MGO.

Among other things, the Report details specific terms that must be included in managers' contracts, other items that may be included, and required or optional benefits. It also sets out the procedure for agreement on managers' contracts, placing the authority to negotiate in the Mayor's office. The Report also states that a five-year term is the norm for managers' contracts, although that may be modified in special circumstances.

The 1988 Report and subsequent ordinance were the culmination of a period of unrest between City managers and elected officials. Ordinances adopted in 1984 changed the manner of compensation for managers, and spawned a lawsuit in United States District Court for the Western District of Wisconsin. See *George Austin, et al. v. City of Madison*, Case no. 87-C-234-S. In this case, eighteen members of CG-21 sued the City to roll back the changes in the compensation system. In a ruling by Judge John Shabazz on September 17, 1987, the federal court granted summary judgment for the City and dismissed the managers' complaint<sup>1</sup>.

During this same period, the Human Resources Committee was examining the question of keeping civil service protection for managers or moving to a cabinet style of government where the managers served at the pleasure of the Mayor. The system of managers' contracts, as detailed in the ordinance, was the eventual result. Under this system, the manager hired has the protection of employment so long as the manager does not breach the terms of the contract, up to the five-year period. At the end of the contract, the Mayor has the option not to renew the contract, which provides some ease for the City in releasing an underperforming manager.



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Michael P. May  
City Attorney

SYNOPSIS: Discussion of the legal basis and history of managerial contracts.

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<sup>1</sup> Much of this history comes from files of the Municipal Executives of Madison (MEM), a private organization formed by the group of managers for purposes of the lawsuit. MEM still exists as a Managers group for networking and discussion of mutual issues. Some of the history comes from conversations with former City Engineer Larry Nelson and former Planning and Development Director George Austin.

**APPENDIX A TO FORMAL OPINION 2019-002**

**Sec. 3.54(9), MGO.**

(9) Compensation of Managerial Employees.

- (a) Creation. Effective January 1, 1985, there is created a plan for the annual evaluation and adjustment of compensation of certain managerial employees. Except as provided otherwise in these ordinances, the provisions of Sections 3.53, 3.32, and 3.54 shall apply to such employees.
- (b) Positions. This subsection shall apply to the following positions:

Building Inspection Division Director	Fire Chief
City Assessor	Fleet Service Superintendent
City Attorney	Human Resources Director
City Clerk	Information Technology Director
City Engineer	Library Director
City Traffic Engineer	Monona Terrace Director
Civil Rights, Director of Department of Community Development Authority Executive Director	Parks Superintendent
	Planning & Community & Economic Development, Director of Department of Planning Division Director
Community Development Division, Director	Police Chief Public Works Director
Economic Development Division, Director	Street Superintendent Transit General Manager Transportation Director
Finance Director	Water Utility General Manager

(c) Implementation.

1. The evaluation of each managerial employee shall be based on objective criteria which may include but not be limited to critical incident reports and performance in relation to predetermined objectives and measurement standards. The criteria shall be established and may be revised from time to time by the Mayor as administrative procedural memoranda.
2. Evaluations shall be made in the following sequence:
  - a. Employees below the level of Division Head shall be evaluated by Division Heads with review by Department Heads.
  - b. Division Heads and Assistant Department Heads shall be evaluated by Department Heads.
  - c. Department Heads operating under a statutory governing board or commission shall be evaluated by such board or commission.
  - d. Other Department Heads shall be evaluated by the Mayor who shall also review all other evaluations.  
All evaluations shall be written and reviewed with each employee. Employees rated by supervisors other than the Mayor may make a personal and written appeal of their evaluation to the Mayor within three (3) working days after notification of rating. The Mayor shall consider input from the alderpersons and other sources concerning the evaluation of any affected employee.
3. Members of the Common Council may participate in the evaluation process of managerial employees by the following procedure:
  - a. The Mayor shall, at least annually, distribute to the alders a form on which they may provide comments to the Mayor to be used in the evaluation of managerial employees.
  - b. Any comments or information provided by the alders shall be on a confidential basis and, pursuant to Wis. Stats. § 19.36(10), shall not be made available to the public.

- c. At least ninety (90) days prior to the specified renewal date in the contract of a managerial employee, the Human Resources Director shall notify all alders of such renewal date and the expiration date of the managerial employee's contract, and notify the alders that if they wish to provide comments to the Mayor regarding the managerial employee, they should do so promptly.
4. Upon approval by the Common Council of salary adjustments for the other nonrepresented employees, the Finance Director shall calculate an amount of money for salary adjustment of the managerial employees. That amount shall be based on the sum of the percentage represented by the value of the step and longevity increases of all employees eligible to receive such increases, divided by the total salary of all employees other than the managerial employees, plus the percentage salary increase granted to nonrepresented employees other than the managerial employees multiplied by the total salary for the current year of all managerial employees. The Mayor shall recommend an amount for the salary adjustment based on the foregoing calculations or upon such criteria as the Mayor deems appropriate. The Common Council by simple majority vote shall establish the final amount available for the salary adjustment of affected employees and include the sum in the appropriate City budget.

In addition, the Common Council shall adopt appropriate ordinances each year amending Section 3.54 to advance the applicable salary ranges for each such position in a percentage equal to the adjustment granted the other nonrepresented employees in order to maintain the relative placement of the ranges. These ordinances shall maintain a minimum thirty-five percent (35%) increase from the minimum of the range to the maximum.

5. The Mayor shall receive all performance evaluation information and, upon that information, shall assign to each affected employee either a salary increase or decrease, expressed in terms of a percentage of the employee's previous year's compensation.

No employee's salary shall be increased in an amount greater than one hundred fifty percent (150%) of the increase granted to the other nonrepresented employees. The Mayor's decision shall be final.

No employee's salary shall be decreased by an amount in excess of one hundred fifty percent (150%) of the percentage adjustment of the other nonrepresented employee's salaries. In the event of a salary decrease, the provisions of the Personnel Rules shall apply.

6. The Mayor shall not be required to expend all the monies provided by paragraph 4. hereof but shall not exceed that amount in making salary adjustments. All adjustments made shall be effective as of the effective date of adjustments for the other nonrepresented employees and payable as of the first pay period after the Mayor's announcement of the adjustments. The adjusted compensation of each employee shall be the basis for the succeeding year's adjustment.

- (d) The adjustments to compensation based on performance shall be in lieu of any automatic step increase or longevity increase. The managerial positions listed in Subdivision (b) hereof are excepted from such increases.
- (e) No incumbent's salary shall be changed by the adoption of this ordinance. The salaries of any incumbents of included positions which exceed the maximums of the base ranges provided by this ordinance, shall not be reduced by adoption of this ordinance. Further, and notwithstanding any other provision hereof, the salaries of any incumbents which exceed the maximum of the base range shall constitute the range maximum for that position as of adoption of this ordinance. When the incumbent of the position at time of adoption vacates the position, the range maximum for that position shall be re-established as the maximum of the base range for the position according to Section 3.54(9)(c) hereof.

The salaries of incumbents of covered positions which do not exceed the maximums of the base ranges provided by this ordinance at the time of adoption may, by the merit provisions hereof, advance to the maximum of the base range established by adoption of this section.

Adjustments to compensation shall be cumulative and shall increase base salary until the employee's salary reaches the maximum of the employee's range as adjusted for the subsequent year. Employees whose salaries have reached the maximum may be granted salary adjustments pursuant to these provisions but any such adjustment which exceeds the employee's base range maximum as adjusted shall not be cumulative and shall apply only to the year in which granted.

- (f) Employment Contracts. All new positions in Compensation Group 21 and all existing positions in Compensation Group 21 as they become vacant shall be filled through the use of employment contracts pursuant to the system outlined in the Substitute Report of the Human Resources Committee Relating to Employment Contracts for Certain Managers, ID No. 3152, adopted August 2, 1988, Substitute Report ID 3152. Incumbents of positions in Compensation Group 21 as of the effective date of this ordinance may enter into such employment contracts at their option. Notwithstanding any other provisions of these ordinances, those incumbents of positions in Compensation Group 21 at the effective date of this ordinance who do not opt to enter into such employment contracts shall be subject to the reappointment procedures to terms in effect at the time of their respective most recent appointments to the five-year term. This subdivision shall not apply to the positions of Fire Chief or Police Chief. If the employment contract so states, then in the event any provision of the employment contract directly conflicts with any City ordinance, resolution, regulation, rule or policy, the provision of the employment contract shall apply, except that nothing in any employment contract shall be interpreted as modifying the provisions of Sec. 3.35. This paragraph shall also apply to all non-civil service positions in Compensation Group 19 filled by employment contracts where performance incentives are an integral part of the service provided. All contracts described herein shall be approved by resolution of the Common Council. If there are any changes in the duties of a position that would affect the classification, compensation, or training and experience requirements of the position between the time of initial posting of the position opening and the time of selection, the position shall not be filled; rather, the position as changed shall be posted again and a new application and selection process will be started.

**APPENDIX B to FORMAL OPINION 2019-002**

**Substitute Report of the Human Resources Committee Relating to  
Employment Contracts for Certain Managers, ID No. 3152,  
adopted August 2, 1988, Substitute Report ID 3152.**

Copy Mailed  
to Aldermen \_\_\_\_\_

City of Madison, Wisconsin

A SUBSTITUTE RESOLUTION \_\_\_\_\_

approving the concept of negotiated employment contracts for managers and directing the City Attorney to prepare the necessary ordinances and documents to accomplish this end.

Presented May 17, 1988  
Referred \*Human Resources Committee,  
CCOC, Board of Estimates,  
Personnel Board

Rereferred \_\_\_\_\_

Reported Back June 7, 1988

Adopted 8-2-88 POF \_\_\_\_\_


Rules Susp. \_\_\_\_\_ Tabled \_\_\_\_\_

Public Hrg. \_\_\_\_\_

\* \* \* \*

APPROVAL OF FISCAL NOTE BY THE  
COMPTROLLER'S OFFICE IS NEEDED

Approved By:

  
Comptroller's Office

\* \* \* \*

Drafted by: Larry W. O'Brien  
Assistant City Attorney

Date: June 3, 1988

Fiscal Note: No current impact.

ID No. 370

SPONSOR(S): Mayor F. Joseph Sensenbrenner,  
Jr., Alds. Bauman, Miley, Szwaja, and Truehl  
Substitute Resolution No. 44,847

WHEREAS, the Human Resources Committee has studied the advisability of implementing a system of negotiated employment contracts for all new managerial positions in Compensation Group 21 as they are filled and to make such contracts available for all members of Compensation Group 21 at the option of those existing members; and

WHEREAS, the Committee believes that employment contracts provide specificity of terms and conditions of employment for both the manager and the City, certainty of continuation of terms and conditions of employment for the entirety of the term, predictability of base costs for the term of the contract, flexibility in dealing with special recruitment difficulties, openness of terms and conditions of the contract and the process itself, and clarity of the City-manager employment relationship; and

WHEREAS, the Committee recommends implementation of such a system as outlined in its Report Relating to Employment Contracts for Managers.

NOW, THEREFORE, BE IT RESOLVED that the Common Council of the City of Madison approves and directs the use of employment contracts for all new managerial positions in Compensation Group 21 as they are filled, and approves the making available of the option to existing members of Compensation Group 21 to enter into employment contracts with the City



pursuant to the system outlined in the Report of the Human Resources Committee Relating to Employment Contracts for Managers;

BE IT FURTHER RESOLVED that the City Attorney is directed to prepare the ordinances and documents necessary to accomplish this end.

City of Madison, Wisconsin

AGENDA ITEM NO. \_\_\_\_\_

THE SUBSTITUTE REPORT OF \_\_\_\_\_

Presented June 7, 1988  
Referred to \_\_\_\_\_

Rereferred to \_\_\_\_\_

HUMAN RESOURCES COMMITTEE

Reported Back August 2, 1988

Adopted Aug. 3, 1988

Rules Suspended \_\_\_\_\_

Placed on File \_\_\_\_\_

Date: June 3, 1988

~~FILE~~ NO. 3152

To the Mayor and Common Council:

RE: Report of the Human Resources Committee relating to the creation of employment contracts for certain managers.

The Human Resources Committee recommends the concept of negotiated employment contracts for members of Compensation Group 21 be implemented as described in this Report. The procedures are intended to provide firm guidelines for implementation but should not be considered mandatory where the spirit and intent or of the concept are not served by a strict interpretation, except for fiscal matters which are to be considered mandatory. These procedures shall be used for all new managerial positions in compensation group 21 as they become vacant. Existing compensation group members may, at their option, enter into similar employment contracts with the City but shall not be required to do so during or at the end of their respective terms.

I. EMPLOYMENT CONTRACTS PROVIDE:

- A. Specificity of terms and conditions of employment for both the manager and the City;
- B. Certainty of continuation of terms and conditions of employment for the entirety of the term;
- C. Predictability of base costs for the term of the contract;
- D. Flexibility in dealing with special recruitment difficulties;
- E. Openness of terms and conditions of the contract and of the process itself;

F. Clarity of the City-manager employment relationship.

## II. STEPS IN FILLING A CONTRACT POSITION

- A. Upon a management vacancy, the job description would be reviewed and, if necessary, updated as is done at the time of the vacancy.
- B. Each applicant would be provided information concerning the nature of the contractual relationship of employment with the City which would include lists of various items categorized into negotiable and non-negotiable items and the stated base salary ranges.
- C. A committee comprised of the Mayor or Mayoral representative, the Board of Estimates, and a representative of the Human Resources Department Classification and Compensation Service will set the upper limits on the total dollar value of the salary and benefit package. This Compensation Committee may consider the dollar value of such benefits, without limitation due to enumeration, as paid leaves, health insurance premiums, sick leave accumulation and payoff, vacation, paid professional dues, usage of City cars, daycare expenses, and the like. This upper limit would remain confidential.
- D. The selection and screening process of candidates will occur as it does for all employees. The appointing authority, presumably the Mayor, will, as usual, be provided a list of qualified candidates.
- E. The Mayor, who will be in charge of the negotiations, or his/her designees from the City's professional staff will then begin negotiations with the candidate of choice on the negotiable items from the following list. The Mayor may include on the negotiating team representatives of the City Attorney, the Labor Relations service, the Personnel service, and the Common Council, and the manager of the department involved when a division head is to be hired. As these contracts are as separate and distinct as the various union contracts, the list of negotiable items is to be open-ended. The City's negotiator is empowered to negotiate with the candidate to the limit of the total value of the salary and benefits.
- F. If no agreement is reached within the package limits, the Mayor may return to the committee to increase the benefits or end the negotiations with the first choice candidate and open them with the next in line.
- G. When the negotiations are completed, the candidate will be appointed, subject to confirmation by the Council and execute the contract in the normal fashion. If the Common Council disapproves of the contract, the contract will not be amendable by the Common Council but returned as a whole to the Mayor for reconsideration and renegotiation.

- H. When division or unit heads are to be selected, the supervising department head will perform the duties assigned to the Mayor herein, subject to the guidance and approval of the Mayor and the Compensation Committee.
- III. THE FOLLOWING STANDARD CLAUSES ARE INCLUDED IN EACH CONTRACT WITHOUT NEGOTIATION.
- A. Nothing herein shall prohibit the City, in its discretion, from establishing the organization of City departments and divisions. Notwithstanding this authority, either party may request that the contract be reopened when the manager's duties change significantly. If there is no agreement, the contract shall not be reopened. A "significant" change in managerial duties is defined as that degree of change in duties which would qualify a civil service position for reclassification pursuant to standard City personnel practices. Factors which may be considered include the addition or deletion of duties, changes in departmental or division services and the addition or deletion of programs. The contract changes, if any, and resulting reclassification of the position shall not be deemed the creation of a new position so as to require competition.
- B. After the first renewal, managers will, at the discretion of the Mayor, be eligible to take a voluntary demotion into any vacant or newly created non-represented position for which they are qualified.
- C. All standard liability protections provided by statute or ordinance apply to managers.
- D. Where the contract does not mention a particular item, any applicable statute would control.
- E. The manager agrees to give the City a minimum of ninety (90) days notice of termination. If the manager gives less than ninety (90) days notice, the manager will forfeit any accumulated sick leave payments, vacation usage or payments and all other benefits. This forfeiture of benefits shall not occur if the manager retires (including a disability retirement) before the expiration of a term nor if the manager had been a City employee before his/her appointment as manager.
- F. The manager will receive the normal notice of renewal or non-renewal of contract. Failure to give timely notice of the contract gives an extension of the existing contract for a maximum of ninety (90) days, without change in anniversary date.

IV. THE FOLLOWING CITY STANDARD BENEFITS ARE INCLUDED WITHOUT NEGOTIATION. THERE IS NO OPTION TO REDUCE OR ELIMINATE THESE BENEFITS IN FAVOR OF MORE MONEY AND NO NEGOTIATION BEYOND CITY STANDARD FORMULA FOR PREMIUMS OR CONTRIBUTIONS.

- A. The same rights provided all disabled employees.
- B. Disciplinary/discharge procedures during the term as provided by Sec. 3.35(16) M.G.O., or successor sections.
- C. Duties and job description.
- D. Freedom from standard hours.
- E. Holiday, military, jury and bereavement leave and paid time off.
- F. Life insurance options.
- G. Establishment of reporting relationships, including reporting to boards and commissions. Reporting relationships are established by ordinances and cannot be changed by contract.
- H. Sick leave accumulation and payoff, subject to the forfeiture provisions contained above.
- I. Wage insurance option.
- J. Wisconsin Retirement Fund.
- K. Deferred Compensation option.
- L. Health Insurance option.
- M. Worker's Compensation.
- N. Bi-weekly payment of salary.
- O. Moving expenses (per existing Administrative Procedure Memorandum.)

V. THE FOLLOWING ITEMS ARE NEGOTIABLE UP TO THE LIMITS OF THE TOTAL BENEFIT PACKAGE.

- A. Contract term. A five year term is the norm. The actual term may be negotiable based on special circumstances.
- B. Starting salary. This is to be stated as a range. Anything above the minimum is negotiable.
- C. Method of salary adjustment. Adjustments may be based on merit, a guaranteed minimum, tied to a stated index, the existing system, etc.

- D. At an appropriate time after the decision to renew the contract and notice and before the expiration of the contract term, the Mayor shall submit the manager's name to the Common Council for reconfirmation and the granting of authority to reopen the contract for renegotiation. At the Mayor's discretion, the renegotiation range could be from a change of component distribution without increase in dollar value to a total package increase not to exceed twenty percent. Increases beyond twenty percent must be approved by the Compensation Committee. There shall be no reduction in the total value of the package at contract renewal/renegotiation periods since interim adjustments have already been determined and the decision to renew already made.

Upon agreement, the Mayor will bring the new contract back to the Common Council for approval and authority to execute.

In the event of a renewal of a division or unit head, the supervising department head shall perform the duties assigned to the Mayor, subject to the guidance and approval of the Mayor.

- E. Non-renewal severance benefit.
- F. Permission or limitations on outside consulting or other work.
- G. Guidelines on leave without pay.
- H. Sick leave/Vacation benefit at expiration. The manager must take a minimum of two weeks vacation per year. Balances may be carried over into the successive contract period.
- I. Amount of vacation/floating holidays.
- J. Occurrence at abolishment of position or department by council. The contract shall provide for the event of abolishment of position and/or of the whole division or department. Because those events occur solely at the City's instance, such provisions should be outside the total benefit package accounting.
- K. Paid professional dues.
- L. Usage of City car.
- M. Day care expenses.
- N. Continuing education expenses.
- O. Maternity/Paternity leave.
- P. Number of paid seminars.
- Q. Sabbatical leave.