

ATTACHMENT A

AN ORDINANCE AMENDING CHAPTER 4 OF THE CARRBORO TOWN CODE (PERSONNEL POLICIES) TO CLARIFY THAT THE MANAGER HAS THE DISCRETION TO CLOSE DISCIPLINARY APPEAL HEARINGS TO PROTECT THE PRIVACY RIGHTS OF EMPLOYEES AND TO CLARIFY THAT EMPLOYEES WHO ARE EXEMPT FROM THE OVERTIME PROVISIONS OF THE FAIR LABOR STANDARDS ACT ARE NOT GENERALLY SUBJECT TO DISCIPLINARY SUSPENSIONS WITHOUT PAY OF LESS THAN ONE WORKWEEK

THE BOARD OF ALDERMEN OF THE TOWN OF CARRBORO ORDAINS:

Section 1. The final sentence of Subsection 4-48(a) of the Carrboro Town Code is amended to read as follows: **“If requested in writing by the employee, the hearing shall be open to the public, except that the manager may close the hearing, or portions of the hearing, if and to the extent that the manager concludes that such closure is necessary to preserve the personnel privacy rights of any employee, including without limitation the department head who has recommended or imposed the discipline that is the subject of the appeal.”**

Section 2. Subsection 4-43(a) of the Carrboro Town Code is amended to read as follows:

“(a) Disciplinary action may be taken against an employee by that employee’s department head, except that only the manager may dismiss an employee or suspend an employee without pay for more than five working days. Notwithstanding the foregoing, employees who are exempt from the overtime provisions of the Fair Labor Standards Act shall not be subject to suspensions without pay for any period other than an entire workweek, unless such suspensions are imposed for the violation of safety rules relating to the prevention of serious danger to other employees, town property, or the general public.”

Section 3. All provisions of any town ordinance in conflict with this ordinance are repealed.

Section 4. This ordinance shall become effective upon adoption.

MEMORANDUM

Memorandum to: Carrboro Mayor and Board of Aldermen
From: Mike Brough, Town Attorney
Subject: Amendments to Personnel Ordinance
Date: October 16, 2003

Attached to this memorandum is a proposed ordinance that amends the town's personnel ordinance in two ways.

Section one of the ordinance clarifies that the manager has the discretion to close disciplinary appeal hearings when necessary to protect the personnel privacy rights of any employee under state law. The Board will recall that, several weeks ago, the administration brought to the Board an ordinance amendment that would have deleted from the current personnel ordinance the provision that authorizes an employee to demand that a disciplinary appeal hearing be open to the public. The Board voted not to accept that amendment but did indicate its approval of the concept that the manager should have the discretion to close a hearing, if and to the extent that is necessary to protect the privacy rights of employees other than the employee requesting the hearing. Section one provides the language that accomplishes this objective.

Section two is prompted by a U.S. Supreme Court case that has recently come to my attention. In *Auer v. Robbins*, 519 U.S. 452 (1997), the Court upheld the Secretary of Labor's interpretation that, in order to be exempt from the overtime provisions of the Fair Labor Standards Act, executive, administrative, and professional employees generally cannot be subjected to disciplinary suspensions without pay. The rationale is that, to qualify for the exemption, such employees must be salaried, i.e. they must be paid a "predetermined amount ... which is not subject to reduction because of variations in the quality or quantity of the work performed." The Court concluded that, if the employee is subject to a disciplinary suspension without pay, this is inconsistent with the concept of being paid a salary, and therefore inconsistent with the criteria that qualify such employee for the exemption. While this makes no sense to me, that is what the Court said, and so Chapter 4 of the Town's personnel ordinance, must be amended to clarify that the Town's policies are consistent with federal requirements that establish the criteria for determining which employees are exempt.

The Board will note, however, that the amendment does not preclude all disciplinary suspensions for exempt employees – just suspensions of less than an entire workweek. The reason for this is that the federal regulation that establishes the rules for determining whether an employee is paid on a salary basis, 29 C.F.R. 541.118, also provides in subsection (a) that the policy of not reducing salary "because of variations in the quality or quantity of the work performed" is "also subject to the general rule that an employee need not be paid for any workweek in which he performs no work." The prevailing interpretation of this provision is that a suspension of an exempt employee without pay for an entire workweek (typically, Monday

through Friday) is permissible, although a suspension for three days is not. Thus, under the ordinance as revised, non-exempt employees can be suspended without pay for periods of up to five days by their department heads, but exempt employees can only be suspended without pay for periods of an entire workweek (unless the suspension is for violations of major safety rules).