

TO THE CITY OF SPRINGFIELD , MISSOURI

Report of Hearing Examiner Regarding Councilmember Kristi Fulnecky

Background

The undersigned was nominated as Hearing Examiner by the Mayor of Springfield, Hon. Robert L. Stephens, and was confirmed as such by Resolution passed by the Springfield City Council on December 14, 2015, pursuant to City Code Sec.2-60(o). Council Bill; 2015-321, Resolution No. 10253 gave the Hearing Examiner a list of “Matters Referred” with seven questions relating to the propriety of the conduct of Councilmember Fulnecky. See City Code Sec. 2-60(p). That same Section of the City Code requires written findings of fact and conclusions of law regarding the matter submitted.

All of the seven questions inquire whether Councilmember Fulnecky made audio recordings of a closed meeting and disclosed, distributed or discussed information of the content of the closed meeting of the Springfield City Council on November 24, 2015, to non-members of the City Council without permission or authorization of the City Council. In doing so, the “Matters Referred” asks, did she knowingly violate Sec. 610.020.3 RSMo., or City Code Secs. 2-60(1), 2-60(h)(1), or 2-60(h)(2).

Findings of Fact and Conclusions of Law

Findings of Fact

Sometime in late October, 2015, the Mayor was advised by five Council members of allegations that Councilmember Fulnecky had unpaid business license fees when she assumed office in April of 2015. On November 3, 2015, City Attorney Dan Wichmer advised the Mayor and City Council to obtain outside counsel, as he could not generally represent the City Council and at the same time represent the interests of council members who are adverse to each other.¹ Sometime shortly after November 5, 2015, Mr. Kevin O’Keefe was employed to represent the City in matters adverse to Councilmember Fulnecky.

¹ Mr. Wichmer obviously did this to insure his own compliance with Missouri Supreme Court Rule 4-1.7, regulating the conduct of attorneys and conflicts of interest among clients.

A few days prior to November 24, 2015, the Mayor directed the City Clerk to schedule a closed special meeting with Mr. O'Keefe. The City Clerk then conferred individually with Councilmembers, other than Councilmember Fulneky, for their availability, and checked for available meeting space. The City Clerk scheduled the meeting with Mr. O'Keefe for 9:30 a.m. on November 24, 2015 in Room L45 of the Busch Municipal Building, a City Office Building immediately north of City Hall.

Notice to the Public of Meeting of November 24, 2015

The City clerk testified that consistent with her past practice regarding closed special meetings, she posted a notice of a closed meeting on a bulletin board near her office door about 9:30 p.m. on November 20, 2015. The Notice in this case did not have the date on which it was posted. However, consistent with her practice, such notices are posted under signs for each weekday. In this case, it was posted under the sign for the day "Tuesday," which would have been November 24, 2015. The Notice listed the date of "Tuesday, November 24, 9:30 a.m., Busch Municipal Building, L-45 Conference Room."

The document was titled "**SPECIAL COUNCIL MEETING**" and listed three items, which constituted the agenda:

1. **ROLL CALL**,
2. **CLOSED SESSION**, City Council will hold a closed meeting to discuss legal actions, causes of action, litigation, privileged and confidential communications pursuant to Section 610.021(1), RSMo. 2014; and this meeting, record and vote shall be closed and the City Council shall stand adjourned at the end of the closed session.
3. **ADJOURN**.

Notice to Councilmembers of the Meeting of November 24, 2015

The standard practice for notifying Councilmembers of special meetings called by the Mayor was for the City Clerk to send an email to the Mayor and each Councilmember addressed to the email address assigned by the City. Cell phones were provided to each Councilmember by the City. These email messages are referred to as "e-vites."

In this particular instance the Clerk sent an e-vite to the Mayor and all Councilmembers, except Councilmember Fulnecky. Councilmember Fulnecky was not included among persons who were designated "required attendees." The City Clerk made the decision to omit any notice to Councilmember Fulnecky. No direction to omit such notice was given by the Mayor or any other Councilmember.

On its face, the e-vite does not include a date or time when it was sent. But based on the City Clerk's recollection and confirmation responses of invitees, it was sent between about 9:30 p.m. on November 20, 2015, but no later than about 9:00 a.m. on Saturday November 21, 2015. The subject line of the e-vite said only, "Meeting with Kevin O'Keefe." The e-vite did not indicate if the meeting was to be an open or closed meeting. Other than meeting with Mr. O'Keefe, no purpose was disclosed suggesting the meeting would be closed for any reason specified under Chapter 610.021 RSMo. The e-vite did not include any agenda. The e-vite did not explain why Councilmember Fulnecky was not invited. Specifically, the e-vite did not indicate the subject of the meeting was to discuss privileged or confidential information with counsel on matters adverse to Councilmember Fulnecky. The City Clerk indicated this was the first time in her nineteen years as City Clerk that any Councilmember had been excluded from the notice of a Council meeting.

Council Meeting of November 24, 2015

Councilmember Fulnecky, the Mayor and other Councilmembers gathered for the meeting at the designated time and location on November 24, 2015. Councilmember Fulnecky claims to have learned of the meeting sometime on November 23, 2015. Although Councilmember Fulnecky did not announce that she was doing so, she recorded a portion of the proceedings on a cell phone. The entire recording lasted about 15 minutes, including a few minutes when she stepped out of the room to confer with Councilmember Hosmer. The recording was of extremely poor quality and the persons speaking were not clearly identified. However, by stipulation an eight-page transcript was prepared and presented.

The meeting began with the City Clerk calling the roll. The Mayor and five Councilmembers announced, "Here." Mr. O'keefe was introduced as special counsel in regard to "conduct alleged" on the part of Councilmember Fulnecky. No motion was made and no vote was taken to close the meeting as was the

Council's usual practice. Instead the Mayor announced the purpose of the meeting was in regard to the obligations and options of the Council regarding conduct of Councilmember Fulneky. He then said, "[W]e ask at this time that Ms. Fulneky leave the room." She responded;

"[T]his is a closed meeting for litigation, is that what you said? This is for an administrative hearing which is under city charter. It's not litigation under the sunshine laws. So I would suggest we call [Attorney General] Chris Koster's office. If you have any doubt [] as to which way to have, open or closed, it should always be open... So I'm not leaving. We can wait and call the Attorney General's office if you like."

Then the following exchange occurred between Mr. O'Keefe and Councilmember Fulneky:

O'Keefe: [T]he purpose of this meeting is for Council []to consult with legal counsel, special counsel, me...-- on a matter adverse to your interests. While I respect your opinion as to the propriety of the notice of the meeting, I believe it is called in full accord with the Sunshine Law. [T]he question is whether or not you will insist on continuing to attend or will leave voluntarily.

Fulneky: Well if you can show me case law or anything that says I have to leave then I'll leave.

Mr. O'Keefe made clear he was not in a position to give Councilmember Fulneky any legal advice and said he did not want to do so. She then expressed her desire to contact her attorney about the matter. Who she asserted he was on vacation. Councilmember Schilling then inquired, "Well, Kristy(sic), don't you think it's just ethical?" Councilmember Fulneky replied, "Well I think it's unethical that you call a meeting without telling me." All the above quoted exchanges occurred in the first three pages of the transcript (the first five minutes of the recording).

After an additional colloquy among the Councilmembers, and Mr. O'Keefe, Councilmember Hosmer and Fulneky left the room briefly and spoke to each other. When Councilmember Fulneky returned she inquired of the Mayor, "Am I being kicked out of the meeting?" The Mayor replied, "We're asking you

to leave.” She responded, “So I’ve been asked to leave, which I’ll leave.” She then departed. The recording ended.

Disclosure of the Recording

After the meeting, the recording was provided to a Stephen Herzog, a newspaper reporter. There was apparently no formal authorization for said release by the Springfield City Council.

CONCLUSIONS OF LAW

Councilmember Fulnecky’s claim at the November 24 meeting that the meeting could not be closed because it did not involve “litigation” was misplaced. In addition to litigation, the closing of a public governmental meeting is authorized if the meeting relates to “confidential or privileged communications between a public governmental body [] and its attorneys.” Sec. 610.021(1) RSMo. The existence or threat of litigation is not a prerequisite. Perhaps Councilmember Fulnecky confuses her privilege² to have notice of the meeting with the right of the other City officeholders to exclude her from consultations with counsel on matters adverse to her.

The right of confidential consultation with legal counsel who is free from conflict is deeply rooted in our system of justice. But the lines are not always bright as to when a conflict exists for attorneys representing a legal entity, such as City, and is left in the first instance to the judgment of the lawyer, guided by the considerations outlined in the comments and rules that make up to the Missouri Rules of Professional Conduct (MRPC). For example, the MRPC, Rule 4-1.7(a)(1) forbids an attorney from undertaking representation if that representation will be “directly adverse” to “another client.” The extensive comments under that Rule regarding “common” and “organizational” representation are indicative of the thicket of situations that may arise which prohibit the same lawyer from being legal counsel for the individual or minority members of an entity and the entity itself. MRPC 4-1.7, comments (29)-(34). The prohibition against such dual representation when interests become adverse

² The term “privilege” as used in this context, means the privileges accorded a member of an assembly as developed in Robert’s Rules of Order. *See* Springfield Code of Ordinances Sec. 2-41 (adopting Robert’s Rule of Order on matters of procedure “unless otherwise specified or changed.”) The right to seek legal counsel free of conflicting obligations to other clients is quite different.

extends both to litigation and non-litigation matters. MRPC 4-1.7, comment (26). The right to seek and obtain independent confidential consultation with legal counsel chosen and paid for by either the entity or individual member of the entity must be respected.³ That is especially important when the matter is very contentious one between the individual member and the entity and will possibly will lead to litigation. Clearly, the City Council, or at least those members other than Councilmember Fulneky, could seek and obtain confidential legal advice on the duties and obligations of the City in response to allegations adverse to her without her being present, and to do so in a closed meeting. But making arguments that were misguided to the point of being specious, does not equate to a violation of either Chapter 610 RSMo. or City Code Sec. 2-60.

Section 610.020.1 RSMo provides in relevant part:

All public governmental bodies shall give notice of the time, date, and place of each meeting, and its tentative agenda, in a manner reasonably calculated to advise the public of the matters to be considered.... Reasonable notice shall include making available copies of the notice to any representative of the news media who requests notice of meetings of a particular public governmental body ***concurrent with the notice being made available to the members of the particular governmental body*** and posting the notice on a bulletin board.... (*emphasis added*)

Section 610.022 permits closing of meetings in either of two ways. First by a vote, setting forth the specific statutory reason for closing the meeting. RSMo § 610.022.1. Second, by giving notice of the time date and place of the closed meeting along with the specific statutory exception allowed for closing the meeting. RSMo § 610.022.1. The same statute goes on to provide in relevant part:

6. In the event any member of a public governmental body makes a motion to close a meeting, or a record, or a vote from the public ***and any other member believes that such motion, if passed, would cause a meeting, record or vote to be closed from the public in violation of any provision in this chapter, such latter member shall state his or her objection to the***

³ No constitutional provision, statute, charter provision, ordinance or case law requires the entity to pay attorney fees for individual or minority members who employ counsel of their own choosing.

motion at or before the time the vote is taken on the motion. The public governmental body shall enter in the minutes of the public governmental body any objection made pursuant to this subsection. (*emphasis added*)

The last quoted provision of RSMo § 610.022 gives any member of a governmental body the privilege to object to the closing of a meeting, regardless of which method of closure is used. The statutes are silent on how that privilege to object has any meaning if, as happened here, a closed meeting is called by the Mayor and no vote to close is taken. The answer is found in the City Code.

The City Code makes provision for calling special meetings of City Council, such as the meeting held on November 24, 2015. City Code Sec.2-32 provides:

Sec. 2-32. - Special meetings. The mayor shall call special meetings of the city council whenever in his opinion the public business may require it, or at the express written request of any three members of the council. Whenever a special meeting shall be called, a summons or a notice in writing signed by the mayor or mayor pro tempore shall be served upon each member either in person or by notice left at or mailed to his place of residence, stating the day and hour of the meeting of the council, at least three hours before the time set for such meeting; provided that such notice may be waived in writing either at, before or after such meeting by any member of the council and *the attendance of any member of the council at such special meeting shall be deemed to be a waiver of any such notice.* (*emphasis added*)

The notice of the special meeting given here was deficient in at least three respects. (1) The Mayor did not “sign” the notice, (2) the notice was not delivered by email or otherwise to Councilmember Fulnecky, and (3) the notice of the meeting to the other Councilmembers did not disclose that the meeting would be closed or the statutory reason for closing the meeting.⁴ The Mayor could delegate the giving of the notice of a special meeting to the City Clerk, and designate electronic mail as the means of delivery of such notices. But acting on her own the City Clerk did not have the power to dispense with the content of the

⁴ In hindsight, one solution to these problems would have been to attach the posted notice of public meeting to the notice sent to Council Members and include all Councilmembers on the distribution list. Another solution would have been to follow the usual prior practice of a motion, second and vote to close the meeting once roll was taken.

notice required by statute, or the requirement of the ordinance that notice be served on “each member.” Despite those deficiencies, a first glance at the italicized language would suggest that by Councilmember Fulneky’s appearance at the meeting, the issues of notice are waived. But members of the City Council are not powerless to challenge the Mayor’s action by merely attending a special meeting that was not convened pursuant to proper notices.

City Code Sec 2-34 provides:

Sec. 2-34. - Presiding officer. [The Mayor] shall decide all questions of order, *subject, however, to an appeal to the council, in which event a majority vote of the council shall govern and conclusively determine such question of order.* Such appeal shall be immediately presented and voted upon by the council. (emphasis added)

Applying the above ordinances and statutes, and construing them in harmony with each other rather than in conflict, the original notice sent by the City Clerk, was defective and subject to “appeal,” as City Code Sec 2-34 provides, or “objection,” as the Section 610.020.6, provides, to be voted on by the entire Council membership. Of course the privilege to appeal or object must be asserted in a timely fashion. Giving notice of the objection or appeal at the first opportunity when the meeting is convened is certainly timely. Once the Mayor and the Council were on notice of the basis of the objection or appeal, a vote must be taken. While the Mayor can and should limit or even eliminate debate on questions of order, such questions must be resolved before going into closed session if the privileges granted members by ordinance and statute are to be given meaning. While not well articulated, Councilmember Fulneky clearly let those present know she objected to the closing of the meeting, that she objected to being eliminated from any notice of the meeting, and objected to being asked to leave the meeting. However, she left without insisting on a vote, thereby abandoning her objections/appeals.

Assuming one could conclude that pre-hearing notice was sufficient or that a complete waiver resulted from her appearance at the meeting, a second question is whether Councilmember Fulneky violated Sec. 610.020.3 RSMo -- by disclosing confidential information acquired in a closed meeting. She did not disclose any confidential attorney client information. None was imparted to her. The information she acquired during the few minutes she stayed after being asked

to leave did not include any confidential attorney-client communication and occurred before any substantive discussion occurred.

Disclosure of “Confidential Information”

As a final matter, there is insufficient evidence to conclude any violation of the Code of Ethics of the City, Sec. 2-60(h) occurred. That allegation is the only stand-alone ethics violation unrelated to the closed meeting provisions of Chapter 610 RSMo. Sec. 2-60(h) provides:

Confidential information.

- (1) No councilmember shall, without prior formal authorization of the public body having jurisdiction, disclose any confidential information concerning any other official or employee, or any other person, or any property or governmental affairs of the city.
- (2) No councilmember shall use or permit the use of any confidential information to advance the financial or personal interest of himself or any other person.

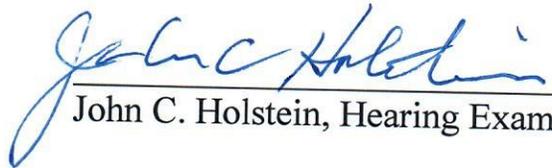
Clearly, Councilmember Fulnecky had no “formal” or even tacit authorization from the City to record or disclose any portion of the Council proceedings on November 24, 2015 on her cell phone. To conclude on this record that holding her cell phone in the air amounted to a “formal” authorization to record or to pass the recording on to the news media would be sophistry. However, no section of the constitution, relevant statutes or City Code prohibits recording of open meetings or interaction among council members, or disclosing it to third parties, provided no confidential information is disclosed.

The only arguable confidential information involved here would be confidential attorney client communication. As previously noted, no such communication occurred during the portion of the November 24 meeting Councilmember Fulnecky attended and that she recorded. The second issue is whether she used any confidential information to advance her personal or financial interest. Since no confidential information was imparted during the recorded portion of the meeting, no violation of that portion of the Code is implicated. To be sure, her unannounced recording of conversations with fellow councilmembers without asking or receiving permission to do so, and disclosing

the recording to a news reporter was disrespectful to her colleagues on City Council. But it did not amount to a violation of the Code.

Conclusion

Of the seven questions presented for this hearing, all are premised on whether the meeting of November 24 was a closed meeting. Questions 4, 6 and 7 are premised on disclosure of "confidential information." Since at the time of the audio recording, the meeting was not duly noticed and closed, as provided by statute and ordinance and no confidential attorney-client communication occurred while Councilmember Fulneky was present, there was no violation of any provision Chapter 610 RSMO. For the same reasons, there was no violation of City Code Sec. 2-60(h).


John C. Holstein, Hearing Examiner

Dated May 4, 2016