

Ethics Review Board Meeting Minutes
March 6, 2020
5:00 p.m.

Members in Attendance: Board members Julie Pignataro and Ross Cunniff; Councilmembers Susan Gutowsky, Emily Gorgol; Carrie Daggett, City Attorney; Jeanne Sanford, Paralegal, Delynn Coldiron, City Clerk.

Public in Attendance: Mayor Wade Troxell; Mayor Pro Tem Kristin Stephens; Complainant Rory Heath and his attorney, Andrew Bertrand and approximately 30 members of the public.

A meeting of the City Council Ethics Review Board (“Board”) was held on Friday, March 6, 2020, at 5:00 p.m. in the CIC Room, City Hall West.

The meeting began at 5:00 p.m. The Board reviewed the Agenda which contained the following items:

1. Selection of Presiding Officer for Alternate Ethics Review Board as it considers the pending complaints.
2. Review and Approval of the December 16, 2019 Minutes of the Ethics Review Board.
3. Consider in accordance with City Code Section 2-569(d)(1) whether a complaint filed on January 21, 2020, by Rory Heath, making various allegations regarding the conduct of the Councilmembers below, warrants investigation:
 - a. Mayor Wade Troxell
 - b. Mayor Pro Tem Kristen Stephens; and
 - c. Councilmember Ken Summers
4. Other Business.
5. Adjournment.

The first item on the agenda, selection of a Chair, was discussed. Councilmember Ross Cunniff made a motion to approve Councilmember Pignataro as Chair. Councilmember Emily Gorgol seconded the motion. The motion to appoint Councilmember Pignataro as Chair was adopted by unanimous consent.

The approval of the December 16, 2019 Minutes of the Ethics Review Board was next on the Agenda. Councilmember Cunniff made a motion to approve the December 16, 2019 Minutes and Councilmember Emily Gorgol seconded the motion. The Minutes of the December 16, 2019 Ethics Review Board were approved by unanimous consent.

City Attorney Daggett explained the background materials, including of Rory Heath's Complaint, were provided with an introductory Agenda Item Summary ("AIS"), accompanied by three sections pertaining to each part of the Complaint. The allegations against Mayor Troxell were contained in AIS 3a, Mayor Pro Tem Kristen Stephens's portion in AIS 3b and Councilmember Ken Summers's portion in AIS 3c.

The Board decided to give the Complainant and respondent 5 mins to speak in turn and allowed 5 minutes of rebuttal for each.

City Attorney Daggett discussed the overview of the complaint and the structure of the materials presented. City Attorney Daggett explained supplemental materials received on March 5, 2020, were given to all members of Council and included Ken Summers's statement and an email exchange with Complainant regarding his procedural concerns. These documents were also posted on the public website.

Complainant Rory Heath introduced his attorney, Andrew Bertrand, and then spoke for 5 minutes, in which he asked the Board for consideration for a more judicious process. Mr. Heath stated he felt his complaint, along with all exhibits referenced and highlighted were not given to the Board.

Councilmember Pignataro assured Mr. Heath they all received the complaint with highlighted exhibits the day he filed the complaint contained on a jump drive which was given to all Councilmembers.

Mr. Heath stated he felt Council was not given the full scope and key ethics laws were not furnished by the City Attorney. Mr. Heath stated that Professor Wade Troxell is an employee of CSU which fits within all applicable Colorado Revised Statutes definitions highlighted in his materials. He asked the Board to consider outsourcing this Ethics Review Board as he felt the process was biased as was the checklist supplied by City Attorney Daggett.

Mayor Troxell next spoke and pointed out previous documents related to conflict of interest with his employment at CSU. Mayor Troxell talked about City Council Resolution 2014-107 wherein he asked for a review regarding the CSU stadium issue. Mayor Troxell read one of the Whereas clauses in that Resolution which stated the attached advisory opinion concluded Mayor Troxell did not have a conflict of interest with the CSU stadium issue considering his employment by CSU.

Mayor Troxell stated as it relates to the previous Ethics Review Board (in December, 2019), two determinations were made. The Board voted unanimously that further investigation of a complaint was not warranted and there was no financial or personal conflict of interest and no violation of any state or city violation of ethics. Mayor Troxell further stated that in this complaint, there is no financial benefit or detriment in this matter; this is a rezoning issue which is more administrative in nature. It does not fit within the definition of financial benefit. Regarding a personal benefit, Mayor Troxell stated he has no direct or substantial personal benefit. The state ethics provisions exclude institutions of higher education, so directorship means fiduciary member; Mayor Troxell stated he is only a faculty member.

In Mr. Heath's rebuttal time, he stated he was glad Mayor Troxell brought up the previous ethical situation with the stadium as this speaks to a larger problem. Mr. Heath stated it would be of interest how a court of law would interpret this; it is unfair for Councilmembers to judge their peers. This is not fair as Mayor Troxell collects a paycheck which says CSU no matter how one wants to look at it. Mr. Heath explained this is a first piece of a larger piece if the zoning goes through.

Andrew Bertrand spoke to the financial benefit per dwelling payment to CSU in the current development contract for this land being rezoned which is very different than the CSU stadium situation and should be considered as such.

Mayor Troxell then gave his rebuttal, stating that Rory Heath had made no case and these broad allegations did not relate to him. Mayor Troxell asked if Mr. Heath was talking about the CSU system, CSU Fort Collins, or CSU Research Foundation. Mayor Troxell stated he is a faculty member of the College of Engineering and is not involved with the Board of Governors and these conversations. Mayor Troxell also spoke to Mr. Heath's allegations regarding donations to his campaign, and noted there is nothing to substantiate that allegation. Mayor Troxell stated Mr. Heath is factually wrong and his broad-based innuendos do not relate to him.

Councilmember Pignataro brought the issue back to the Board. Ms. Pignataro stated the City Attorney's Office will be coming to Council with ideas for a different Ethics Review Board structure to hear a complaint against a Councilmember sometime this summer.

Ms. Pignataro asked City Attorney Daggett if the Board was missing the full ethics laws as Mr. Heath alleged.

City Attorney Daggett stated she had a hard time picking out what statutes Mr. Heath was suggesting were not provided. She noted Colorado Revised Statutes Section 24-18-108 only applies to state officers and excludes City officials. City Attorney Daggett stated she did not provide that statute to Councilmembers as it did not apply and that she believed all others had been provided.

Councilmember Ross Cunniff discussed Article XXIX to the State Constitution (also referred to as "Amendment 41") regarding prohibiting an *appearance* of a conflict of interest. Mr. Cunniff stated the City needs to update its code to reflect this as he feels the City has not adequately addressed the issue of the appearance of conflict.

City Attorney Daggett stated Amendment 41 adopting Article XXIX of the Colorado constitution was passed in 2006 and the City has not made amendments to its local provisions intended to match that provision. She noted the exception language allowing home-rule cities to adopt their own local ethics provisions, and further noted that the extent of this exception is currently being litigated.

The Board discussed the best way to bring this issue to Council and asked the City Attorney to provide further information to Council on this for further consideration.

Councilmember Gutowsky stated she felt Councilmember Cunniff brought up a good point, expressing that optics and how things look are very important. She has listened to constituents' comments and while this may not be against the Code of Ethics, people feel the way they feel, and it should be a natural decision to recuse yourself if your employer is involved in an issue. She hears the public's voice; it is all about impression.

The Board discussed the listed City and statutory ethics provisions, and in particular whether CSU was defined as a "business or other undertaking." City Attorney Daggett stated the Colorado Independent Ethics Commission has specifically looked at the question of whether a public body is a "business or undertaking" and has found that a public body is not a "business or other undertaking."

Chair Pignataro then went through the checklist attached to the AIS 3a.

Councilmember Cunniff made a motion that the Board find that having reviewed the allegations of Mr. Heath's Complaint and the applicable laws, the Board has determined that the Complaint fails to allege that Mayor Troxell has a financial or personal interest or conflict related to the decision on the Hughes Stadium property rezoning and no further investigation is warranted. Councilmember Pignataro seconded the motion and the motion passed by unanimous voice vote.

The Board moved to AIS 3(b) relating to Mayor Pro Tem Stephens.

Rory Heath spoke that this was the same issue, different person. Mr. Heath stated he felt the materials from the City Attorney's Office were very biased. Asked again that this issue be reviewed instead by an independent panel of outside experts.

Andrew Bertrand spoke that this is very similar to the last argument and that Amendment 41 has been glossed over. The issue is about optics.

Mr. Heath spoke about financial benefits and drew a correlation with UNC announcing possible layoffs. If the development deal does not go through, CSU can experience those same realities. Mr. Heath stated he feels CSU is a business or other undertaking.

Mayor Pro Tem Stephens talked about the factual allegations and stated she does not take an oath to CSU. Ms. Stephens stated as far as Mr. Heath's statement about career opportunities, this is not relevant. Mayor Pro Tem Stephens does not believe she has personal or financial interest in the CSU Hughes Stadium rezoning issue. Ms. Stephens insisted she is a state classified employee in the Statistics Department, and as a State classified employee, her pay is awarded by the state; CSU has no say in her pay raises.

Rory Heath rebutted this as follows. Mr. Heath stated Mayor Pro Tem Stephens is an employee on a one-year contract renewal who has to "sing for her supper" every year. There is a method for reward – better position, etc. Andrew Bertrand stated based on public perception, Mayor Pro Tem Stephens should have recused herself.

Mr. Heath stated we need to fix this hole in the system before voting on this. We need to address it now, not in the future.

Mayor Pro Tem Stephens' rebutted his comments. Mayor Pro Tem Stephens stated she is not on a one-year contract. Mr. Heath's facts are not true. Mayor Pro Tem Stephens stated she works for the State; there is no benefit or money involved in a rezoning and this is a City administration decision.

Councilmember Cunniff stated the Ethics Review Board is not free to ignore the City Charter or Code or adopt State rules in lieu of a City process. Doing so would be a violation of our Code to shift this decision to a group of other people. While members of this Board have expressed sympathy, we have to change the Charter by a specific process. This Board is required to follow City Code, Charter and State laws as they now apply.

Chair Pignataro directed the Board to go through the checklist attached to AIS 3b.

Chair Pignataro then made a motion that the Board find that having reviewed the allegations of Mr. Heath's Complaint and the applicable laws, the Complaint fails to allege that Mayor Pro Tem Stephens has a financial or personal interest or conflict related to the decision on the Hughes Stadium property rezoning and no further investigation is warranted. Councilmember Gorgol seconded the motion. The motion passed by unanimous voice consent.

Chair Pignataro directed the Board to AIS 3c, relating to Ken Summers's alleged personal, business-related conflicts of interest.

A statement Councilmember Summers had submitted to the Board was noted. Chair Pignataro asked City Attorney Daggett to read the statement.

Rory Heath stated this matter was a little more difficult. Councilmember Summers' website advertises that he helps influence decisions. Mr. Heath stated the Board should subpoena the records of Councilmember Summers including any and all clients he has had. Mr. Heath stressed an investigation is needed here; this billboard is still up for the public to see.

Andrew Bertrand stated he was not sure how anyone voted, but doesn't care; he cares about how it looks. Now is the time to deal with it – not after Hughes gets decided.

Councilmember Cunniff stated he would like to know if Councilmember Summers has received any revenue on this website.

City Attorney Daggett explained it was unclear in Mr. Heath's complaint if this was tied to Hughes Stadium or a more general complaint. Ms. Daggett explained if the complaint warrants further investigation, there will be a need to schedule a further hearing for more evidence to be presented. At that time, the Board would have power to subpoena more information if it chooses to. City Attorney Daggett explained that this process would next go to the hearing step where a decision would be made as to whether the Complaint alleges a violation specifically related to Hughes Stadium or otherwise.

The Board asked Rory Heath if this complaint was related to Hughes Stadium.

Mr. Heath replied it was intended to include everything – including Hughes Stadium.

The Board discussed next steps in this process. City Attorney Daggett stated the Board could continue its screening review if that would be helpful or find that the allegation warrants further investigations.

Councilmember Cunniff stated the allegations of the Complaint are broader than Hughes and need further investigation, although regarding a specific complaint on Hughes, there is no evidence to sustain an allegation Councilmember Summers has acted unethically.

Councilmember Gutowsky did not agree with this and stated the Complaint cast doubt in her mind.

Councilmember Cunniff made a motion that the Board find that the allegation that political consulting and lobbying activities could constitute a potential ethics violation, if true, and that further Ethics Review Board investigation and review is warranted on the specific issue of whether Councilmember Summers has carried out political consulting or lobbying activities that constituted an ethics violation. Councilmember Gorgol seconded the motion. The motion was passed by unanimous voice consent.

City Attorney Daggett discussed the timing of the next meeting to review the one remaining allegation and stated her office would get started on scheduling the next meeting.

Under Other Business, the Board briefly discussed Amendment 41 of the State Constitution and stated this process was already in motion.

Meeting adjourned at 7:56