



Reavey Law LLC

April 15, 2010

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Re: Mark Loughry

Dear Mayor and Council:

It is with great regret that I send this letter to you. In all of my ten years of serving cities as City Attorney, I have never had to send a letter like this. While it would be much easier for me to not write this letter, my ethical duties as a lawyer run to the governing body of the City, and not to any individual member of the body or any staff member. In other words, in the role of City Attorney, my client is considered the governing body and, therefore, if I become aware of things or conduct that may put the city in legal jeopardy, I am required to disclose those, even if such disclosure may adversely affect a member of staff or an individual member of the governing body.

While I certainly have been open to, and continue to be open to, healthy debate and discussion about any legal issues¹, as set forth in detail below, recent interactions with Mark have left me with the impression he does not respect what the law requires, does not respect my legal opinions, and he prefers to inappropriately take actions without following proper protocol, the purpose of which is to keep items out of the public's view. I have set forth below the bases for my concerns, from oldest to most recent.

¹ In addition to Basehor, I currently serve as City Attorney for 4 other cities: De Soto, Edgerton, Wellsville, and Merriam. I regularly field questions about legal issues and opinions, but I have never been accused of not having the City's best interest in mind nor has my advice been ignored. I only say this to let the governing body know that this letter is not written out of aggravation that someone has disagreed with me.

- ***Misrepresentation of His Pay at Hays (Exhibit A)***

Even before Mark started at Basehor, I had reservations about his credibility given my interaction with him about his current salary at Hays. I never would have had any discussion with him about this topic but, in connection with his hiring, I was tasked with preparing his contract. The direction I was given was the City was prepared to offer Mark the same salary he was receiving at Hays, which was represented to me by the Mayor (as had been reported to the Mayor from Mark) as \$86,000. (A1). In connection with negotiating with Mark on the length of his severance, Mark emailed me a copy of the League of Municipalities Salary Survey of City Administrators. His purpose in sending the survey was to show that typical severance for City Administrators was 6 months as opposed to the 3 months that I had proposed. In looking at the survey (A2-3), I noticed his 2009 salary at Hays was reported as \$76,000, with the next date of salary adjustment being September of 2009. On his application for the position at Basehor, Mark listed his salary at Hays as \$85,000. Lloyd Martley, who was tasked with doing the background check on Mark, also noted the discrepancy in what Mark reported he was making at Hays and his actual salary. (A4). When the Basehor Police Department spoke to the Human Resources representative at Hays about figures she had provided to Basehor about Mark's current salary (A6), which figures Mark also forwarded to me (A5), she indicated Mark had told her to include in the figures pay increases that he had not yet received, but expected to receive in the future.)

To put the issue to rest, I indicated to Mark I thought the consensus of the Council was to match what he was making at Hays and, given this, asked him to send a pay stub and proof of car allowance so there was no debate about what he was making at Hays. (A7). Instead of sending these to me, Mark pointed out to me he wasn't "applying for a loan", his salary from Hays had "no bearing on what [he would] settle on for a salary at Basehor", and then provided the salary numbers from the administrative assistant at Hays. (A5). In advocating to the Mayor for compensation of \$92,000 plus a car allowance of \$6,000, Mark stated the following:

"I would expect to get some combination of salary and benefits that are at least equivalent to the above. I know that some times it is more politically palatable to pay a little more on the benefit side so that the salary does not look so high so I am willing to work with you any way we can."

(A8).

Prior to Mark starting with the City, I shared my concern about the salary issue with the Mayor, but indicated I would take no further action on the issue unless he directed me to do so. Had the more recent issues not occurred, I likely would not have brought this issue to your attention, but instead would have simply chalked it up as unethical negotiation for a higher salary.

- ***Revising His Contract Without Formal Action by the City Council (Exhibit B)***

On Sunday, July 19, 2009, Mark emailed me, indicating he was heading to Basehor and wanted a copy of the contract that was going to be considered by the Governing Body at its meeting on the following day. (B1). Mark indicated he wanted the contract before the meeting so

he could review it, and have his attorney review it. I sent the contract to Mark as he requested. (B2-9). On the afternoon of Monday, July 20, 2009, Mark faxed a copy of his contract to me, with some minor revisions, none of which had anything to do with the language on insurance coverage, which appears in "Section Eleven" of the contract. (B6). On Monday, July 20, 2009, a finalized version of the contract was sent to the Mayor, and copies of the same were brought by me to the meeting that evening for consideration by the Council in executive session -- I provided the copies to the Mayor. (B10-17). On Tuesday, July 21, 2009, after Mark's contract was approved, he requested a "final version" of the contract. (B18). I sent the contract to him as requested (B19-26), and he acknowledged receiving it (B27).

All of the versions of the contract sent to Mark, and reviewed by him, and the version of the contract that was approved by the governing body, had the identical provision for Mark's health insurance. All of the provisions provided that Mark would be treated like all other full time employees with respect to insurance coverage (i.e. the City would pay 100% of his insurance coverage, but not his family's premium). Sometime after Mark started work at Basehor, and apparently in connection with a discussion he had with Mary Mogle about his insurance coverage, he realized his contract did not provide for the City to pay his family's premium for health insurance. Mark's solution to this issue was to enlist the assistance of the Mayor to handwrite a notation into his contract in his personnel file to reflect that the City would cover his family's premium.

The proper way to have addressed this issue would have been to bring it to the Council's attention, and have them take a vote, at an open meeting, to authorize the Mayor to sign the revision to the Agreement the Council had previously adopted. The bottom line is no one has the authority to revise a contract entered into by the City without getting authority to do so from the City Council. Mark should have known that the manner in which he pursued to get his contract changed was inappropriate.

By the way, Mark never disclosed to me that he and the Mayor had changed his contract. I only learned of this long after the fact when Mary Mogle indicated to me Mark and the Mayor came to her and asked for Mark's contract to make a change to it. According to Mary, the explanation given for the change was a "screw up" by the City Attorney. Had I been advised of the issue, I could have pointed out to Mark that to change the contract it would need to go back before the Council.

- ***Opposition to Having Council Take Action in Open Session on Separation Agreement with Mary Mogle (Exhibit C)***

When I learned the Mayor and Mark were going to move forward with letting Mary go, I indicated to Mark that any pay given to Mary in connection with her being let go should be conditioned on her entering into an Agreement to release the City from any liability. Given Mary's long tenure with the City, I anticipated she would seek legal advice over her termination and possibly would pursue a legal claim against the City. As it turned out, Mary did retain a lawyer and, in connection with negotiating a Separation Agreement, Mary's lawyer requested certain promises from the City. As with the Separation Agreement entered into by the City with Carl Slaugh and Dustin Smith, I indicated to Mark the Separation Agreement with Mary (C1-3)

would need to be approved by the City Council. (C9). Thereafter, Mark continually questioned why this had to be, indicated the Council was well aware Mary was being paid \$11,000, the \$11,000 was within the Mayor's spending authority (a fact I'm unaware of), and there was no need to take the issue before the Council. (C6-8). In a telephone call with Mark, he indicated he needed to listen to the City Attorney's advice but then proceeded to argue with me for an extended period of time against placing the Agreement on the Consent Agenda for formal approval by the City Council, about his view that if the Mayor can suspend someone he can also pay them, etc., etc. I ultimately reiterated to Mark what I had previously indicated to he and the Mayor via an email (C4-5), namely that the issue was not something I was going to change my opinion on just to appease him and the Mayor so the issue would not have to be discussed in public. I still hold the opinion that the Agreement with Mary should be authorized by the Council as an agenda item. As you all know, the City Council can take no action in executive session, and this would include authorizing the Mayor to enter into an Agreement that binds the City. Moreover, the Agreement qualifies as an Open Record and, in the event it is requested by anyone, they will question how the Agreement was entered into by the City without ever being placed on the Agenda or acted upon by the governing body. A quick call to the League will confirm that the Agreement at issue should be approved in open session. To alleviate Mark's concern that I was putting up an unnecessary obstacle to how he wanted to handle the issue, I repeatedly told him we handled Carl and Dustin's terminations in the identical fashion (i.e. first notified the council of their impending terminations, negotiated Separation Agreements, and then followed with formal approval of the Separation Agreements at an open meeting).

Any issue pertaining to the Open Meetings Act should be taken seriously by Mark given that individual Council members now can be subject to criminal penalties for any violation.

- ***Opposition to Legal Advice Given on Annexation of Lots in Cedar Falls (Exhibit D)***

On repeated occasions, I have given Mark and Mitch my legal opinion that state statutes prohibit the City from unilaterally annexing three lots within Cedar Falls. (D5-10). Mark disagrees with my opinion on this issue, and has let me know of his disagreement on more than one occasion. I have spent several hours, billed to the City, repeatedly trying to explain to Mark why his position likely would not be upheld by a Court. As explained to Mark, it makes no sense for the City to embark on an annexation that the City likely will have to litigate, spend thousands of dollars on attorney's fees, and lose in the end. (D6 and D9). In an effort to be tactful with Mark, and not make this an issue between him and I, I suggested the City request an opinion from the Kansas Attorney General's office. (D9). While Attorney General Opinions are not binding on Courts, it would be persuasive to a Court if we had an opinion from the Attorney General indicating the three lots could be unilaterally annexed by the City.

In requesting an opinion from the Attorney General, it makes no sense to advocate for a position, without also pointing out what any attorney representing the annexed landowners would argue in Court. Additionally, the legal interpretation by Mark does not account for published Kansas cases that suggest what he wants to do is not permitted. As much as I have the City's best interest in mind, I am not prepared to risk my reputation and appear incompetent to the Attorney General's office by arguing for a position, without also acknowledging statutes and

published cases that appear to answer the question being posed. With this in mind, I prepared a letter to the Attorney General to have the question answered. (D2-4).

On Tuesday, I received an email from Mark, which he copied to the Mayor and Mitch, wherein he accuses me of “represent[ing] the property owners of Cedar Falls”, and questions whether I am representing the City’s interests -- obviously, if I was acting out of self-interest, keeping the City out of litigation would be counter to such self interest. (D1). Mark goes on to say he thinks “we should proceed with the annexation without the AG letter and leave it up to the home owners in Cedar Falls attorney to determine if we can or can’t do it.” (D1). This concerns me as it suggests Mark really doesn’t care what the law says, what my opinion is, or the fact that the City Council, at least according to him and communicated to me (D11), directed him to seek an opinion from the Attorney General on the issue. Additionally, it is concerning to me that Mark would make these accusations against me, and share them with the City Engineer, without first discussing them privately with me.²

As much as I have enjoyed serving the City of Basehor as City Attorney, I do not intend to compromise my ethics, or filter my legal opinions through Mark, in order to appease Mark. Unless I receive some assurance from the governing body that Mark will immediately cease engaging in the type of conduct reflected above, I, in all due respect, have no interest in continuing to serve as City Attorney for Basehor.

Thank you for your attention to this, and please do not hesitate to contact me with any questions.

Sincerely,



Patrick G. Reavey

cc: Mark Loughry

² Back in February, Mark communicated to all of you, without first discussing the issue with me, that he disagreed with me on another issue pertaining to the Attorney General. (See E1-2) (“Council I am not exactly in agreement with Patrick’s take on this. I do not believe the County is looking for a way to back out of what they have already agreed to they are just trying to find out if the City can expand the boundaries of our existing NRP without going to them for approval.”).