



MEMORANDUM

ATTORNEY OPINION

Date: January 9, 2017

To: City Council

From: Thomas P. Guarino, City Attorney *TGS*

Re: Exposure to Potential Civil and Criminal Actions

I would ask that each of you please take the time to read this memorandum. It is clear this new Council wishes to act promptly with respect to City finances in an expedited manner. Much of what you wish to do, can be done, if done in an orderly manner, through appropriate legal processes.¹ The manner in which you have acted subjects both the City of Cave Springs, my client to liability claims and yourselves to potential personal liability. I do not and am not by this memorandum advising you as to your potential personal civil and/or criminal liability, but do comment on it as it impacts the City of Cave Springs. **You should seek your own attorney for personal legal advice.**

Ordinance Regarding Cave Springs Municipal Code Section 3.04

If your goal was to limit the purchasing authority of the Mayor by this action, this ordinance would do just the opposite. A.C.A. § 14-58-303 vests exclusive purchasing authority in the Mayor. It permits a City of the Second Class such as Cave Springs to make procedures for purchasing, but the statute says it "may" do so, it does not say it must do so. This means that if the revisions you wish take effect, the Mayor will have unlimited authority to make purchases, restricted by only the limits set by state law. The proposed ordinance is also not in affect at this time, not only because of the Mayors' VETO, but also because it does not contain an emergency clause. A.C.A. § 14-55-203. If, it was your premise that immediate action was necessary because of some urgency, as yet unidentified, please consider the 91-day requirement of A.C.A. § 14-55-203 and the reading requirement of A.C.A. § 14-55-202.

¹ Respectfully, I would remind the Council that the contract with me for City Attorney services requires you provide me all Ordinances and Resolutions for review a minimum of 5 working days prior to presentation to Council. The actions of the Council breach this portion of our agreement.

Resolution Terminating Employees

While the City Council, through the use of the budget process, has the authority to defund positions it does not have authority under state law to terminate department heads and under its own rules has delegated this authority with respect to the non-department heads to the Mayor. A.C.A. § 14-42-110, Cave Springs Resolutions 2015-14 and 2016-5.

There are also some practical concerns with some of the attempted terminations that create the potential for civil actions against the City of Cave Springs and the persons taking action as well as personal liability. I am aware there has been some discussion among the employees of filing suit. When I reported to the Recorder-Treasurer right to sue letters were likely forthcoming regarding the complaints against her, she informed me she has retained counsel to file suit against those employees. I was also told by others that a website (possibly an "fund-me type") had been started for her. I told the Recorder-Treasurer she should discuss with her attorney the possibility of this violating state law gift restrictions.

It is my understanding such actions by the employees terminated, would be not only for improper termination, but would also be for retaliation for filing a workplace harassment complaint. The employees are protected from retaliation under your Personnel Rules (Section 2.5), State² and Federal law. Depending on whether the actions taken were within the scope of the person's duties will impact the issue of the liability of the City of Cave Springs and the attachment of personal liability of those participating and taking such actions. I have briefly inquired of the Arkansas Municipal League regarding defense of such actions. The initial indication, without actually having the suit to look at, is that any defense of the City or others would be under reservation of rights. This means that there could ultimately be exposure for the City and all involved to repay or pay costs of litigation and any judgement.

The allegations as I understand them is that there are multiple EEOC³ complaints against an Elected Official. This official has been actively assisting and advising Council members on terminating these same employees. There are allegations that before the Council meeting of January 4th, this official locked employee out of City Hall, changed lock access, terminated access to their computers and later sought to actively terminate them and have them sign documentation of their termination. This official was not the Mayor, who as noted above has the sole legal authority for terminations. It is also alleged that an Alderman Elect several days before the Council meeting was contacting an employee or employees telling them that it was already agreed who would be terminated. While there may be defenses available to the City of Cave Springs, it is my opinion that anyone wishing to file suit could file in court on these matters.

² The Arkansas Supremes Court has determined in appropriate cases personal liability attaches. *Calaway v. Practice Management Service*, 2010 Ark. 432 (2010).

³ The U.S. Equal Employment Opportunity Commission (EEOC) is a federal agency that administers and enforces laws against workplace discrimination. The EEOC investigates discrimination complaints including retaliation for reporting, participating in, and/or opposing a discriminatory practice.

Exposure to Criminal Liability

As City attorney I cannot and do not by this memorandum advise you what you should do with respect to criminal liability I observe the following:

I have provided you with a detailed memorandum regarding the Finance Committee and the budget issues. I mention both potential Arkansas Freedom of Information Act issues and local ordinance concerns.

I am concerned that serial meetings have occurred through what I have seen in the e-mails attached to the Finance Committee memorandum, actions of the official participating in the employee issues, meeting serially with the Council members and what I have been told was said on the record at your January 4th meeting with regard to how the budget was completed and agreed to prior to any authorized meeting.⁴

I have been asked by the Mayor and others who enforces the criminal aspects of the law applicable to actions such as I have described in this memorandum. I have briefly discussed this matter with the Benton County Prosecutor. I feel compelled to disclose my understanding. Under State Law a City Attorney is authorized to "file information" for the arrest of any person violating the ordinances of the city. A.C.A. § 14-42-112. Violation of FOIA is a Class C Misdemeanor. FOIA prosecutions would be handled by the Benton County Prosecutor. **You should seek your own counsel to advise you in this regard.**

There, were apparently other actions taken at the January 4th, meeting. Neither the Council or the Recorder-Treasurer have seen fit to inform or advise me of the proceedings. It remains my opinion that the proceedings and actions taken therein are at a minimum subject to legal challenge and are likely not in compliance with State Law and local ordinances.

Time does not permit me to fully research all the issues raised by the Councils actions of January 4th, 2017. However, I do have a few recommendations, that if considered would alleviate many or the concerns of which I have made you aware.

Recommendations

That the Council consider that at this point it is clear what they wish to accomplish and the speed with which the Council wishes to act.

⁴ Taken from the Arkansas Attorney General FOIA Handbook: "(18) A group meeting of the members of a city council, even if less than a quorum, is subject to the FOIA if members of the council discuss or take action on any matter on which foreseeable city council action will be taken. Mayor and City Council of El Dorado v. El Dorado Broadcasting Co., 260 Ark. 821, 544 S.W.2d 206 (1976). The act covers informal, unofficial group meetings for the discussion of governmental business. Id. (19) One-on-one discussions between a city administrator and city board members to approve a proposed real estate purchase violated the FOIA's open meeting requirements. Harris v. City of Fort Smith, 359 Ark. 355, 197 S.W.3d 461 (2004)."

That with a few weeks' patience the Council could legally accomplish many of its expressed goals.

That the Council can take advantage of the Mayor's VETO by letting it stand and wipe clean the slate of potential claims the actions of the 4th created.

That the Council could call a special meeting to discuss what it wishes to do with spending limits, examine cities of similar size for ideas within state law, and develop a revised ordinance to meet its goals.

The Council could also at the same time could adopt its working budget as its budget and revisit reductions in spending when it has an independent reason to do so. This reason would likely be the audit being conducted and expected in the next few weeks. It could be used as a basis to set proper reserves and determine staffing based on knowing what is available. This would alleviate FOIA and other concerns. It would also allow the opportunity to evaluate if cutting all building and planning staff would allow you to also anticipate revenue for the budget where there is no alternative provided to provide the services.

14-58-303. Purchases and contracts generally.

(a) In a city of the first class, city of the second class, or incorporated town, the mayor or the mayor's duly authorized representative shall have exclusive power and responsibility to make purchases of all supplies, apparatus, equipment, materials, and other things requisite for public purposes in and for the city and to make all necessary contracts for work or labor to be done or material or other necessary things to be furnished for the benefit of the city, or in carrying out any work or undertaking of a public nature in the city.

(b) (1) (A) Except as provided under § 14-58-104, the municipal governing body of any city of the first class shall provide by ordinance the procedure for making all purchases which do not exceed the sum of twenty thousand dollars (\$20,000).

(B) Except as provided under § 14-58-104, the municipal governing body of any city of the second class or incorporated town may provide by ordinance the procedure for making all purchases.

(2) (A) (i) Except as provided under § 14-58-104, in a city of the first class where the amount of expenditure for any purpose or contract exceeds the sum of twenty thousand dollars (\$20,000), the mayor or the mayor's authorized representative shall invite competitive bidding on the purpose or contract by legal advertisement in any local newspaper.

(ii) Bids received pursuant to the advertisement shall be opened and read on the date set for receiving the bids in the presence of the mayor or the mayor's authorized representative.

(iii) The mayor or the mayor's authorized representative shall have exclusive power to award the bid to the lowest responsible bidder, but may reject any and all bids received.

(B) The governing body by ordinance may waive the requirements of competitive bidding in exceptional situations where this procedure is deemed not feasible or practical or as provided under § 14-58-104.

(c) (1) In a city of the first class, a city of the second class, or an incorporated town, the governing body by ordinance shall have the option to make purchases by participation in a reverse Internet auction, except that purchases and contracts for construction projects and materials shall be undertaken pursuant to subsections (a) and (b) of this section and § 22-9-203.

(2) The ordinance shall include, but is not limited to, the following procedures:

(A) Bidders shall be provided instructions and individually secured passwords for access to the reverse Internet auction by either the city or the town, or the reverse Internet auction vendor;

(B) The bidding process shall be timed, and the time shall be part of the reverse Internet auction specifications;

(C) The reverse Internet auction shall be held at a specific date and time;

(D) The reverse Internet auction and bidding process shall be interactive, with each bidder able to make multiple bids during the allotted time;

(E) Each bidder shall be continually signaled his or her relative position in the bidding process;

(F) Bidders shall remain anonymous and shall not have access to other bidders or bids; and

(G) The governing body shall have access to real-time data, including all bids and bid amounts.

(3) The governing body may create by an additional ordinance reverse Internet auction specifications for the anticipated purchase of a specific item or purchase.

(4) (A) The governing body is authorized to pay a reasonable fee to the reverse Internet auction vendor.

(B) The fee may be included as part of the bids received during the reverse Internet auction and paid by the winning bidder or paid separately by the governing body.

(5) The governing body retains the right to:

(A) Refuse all bids made during the reverse Internet auction; and

(B) Begin the reverse Internet auction process anew if the governing body determines it is in the best interest of the city or town.

(d) For purposes of this section:

(1) "Reverse Internet auction" means an Internet-based process in which bidders:

(A) Are given specifications for items and services being sought for purchase by a municipality; and

(B) Bid against one another in order to lower the price of the item or service to the lowest possible level; and

(2) "Reverse Internet auction vendor" means an Internet-based entity that hosts a reverse Internet auction.

Acts 1959, No. 28, § 5; 1979, No. 154, § 1; 1985, No. 745, § 3; A.S.A. 1947, § 19-4425; Acts 1995, No. 812, § 1; 2001, No. 508, § 1; 2005, No. 1435, § 2; 2005, No. 1957, § 1; 2009, No. 756, § 24.

SECTION 3 GENERAL EMPLOYMENT POLICIES

3.1 "AT-WILL" EMPLOYER

The City of Cave Springs is an at-will employer. This means that the City or any of its employees may terminate the employment relationship at any time for any reason with the understanding that neither has an obligation to base that decision on anything but his or her intent to discontinue the employment relationship.

No policies, comments, or writings made herein or during the employment process shall be construed in any way to waive this provision or shall be construed to constitute a contract for employment.

This Handbook is not intended to create any contractual or other legal rights. It does not alter the City's at-will employment policy nor does it create an employment contract for any period of time.

For purposes of interpreting this Handbook, the term "City" will include an employee's supervisor, the department head, the Mayor, or the Cave Springs City Council acting for and on behalf of the City of Cave Springs.

3.2 AUTHORITY TO HIRE AND FIRE

The City Council establishes the number and compensation of all City employee positions. All personnel operations are hereby assigned to the Mayor or the Mayor's designee. Job descriptions, job titles, job classification, and annual pay rate are determined by the City Council and will not be exceeded, unless otherwise authorized.

The Mayor shall have the power to appoint and remove all department heads, and all department heads shall serve "at will." (see Ark. Code Ann. § 14-42-110)

State law does not indicate who has the specific authority to hire and/or fire other non-department head employees. Since the Mayor is charged of the day-to-day operations of the City, the City of Cave Springs chooses to vest the authority to hire and fire employees with the Mayor. The Mayor shall hire and fire non-department employees, unless he specifically delegates the hiring to the appropriate department heads.

3.3 JOB POSTING AND ADVERTISING

An application for employment will be accepted from anyone who wishes to apply for employment on forms provided by the City. Application forms are available at City Hall.

14-42-110. Appointment and removal of department heads.

(a) (1) Mayors in cities of the first class and second class and incorporated towns shall have the power to appoint and remove all department heads, including city and town marshals when an ordinance has been passed making city and town marshals appointed, unless the city or town council shall vote by a two-thirds majority of the total membership of the council to override the mayor's action.

(2) Provided, however, that in cities of the first class and second class with civil service commissions, the governing body of the city may delegate by ordinance the authority to appoint and remove the heads of the police and fire departments to the city's civil service commission.

(b) City managers in cities having a city manager form of government shall have the power to appoint and remove all department heads. In cities with a city manager form of government and with civil service commissions, the civil service commission shall have the power to override the city manager's appointment or removal of the police or fire chief by a majority vote of the total membership of the commission.

(c) The provisions of this section shall not apply to department heads not under the control of the governing body of the city and shall not apply to cities having a city administrator form of government.

Acts 1981, No. 795, §§ 1, 3; A.S.A. 1947, § 19-1013.1; Acts 1995, No. 534, § 1; 1995, No. 914, § 1.

14-55-203. Voting requirements for passage -- Effective dates.

(a) On the passage of every bylaw, ordinance, resolution, or order to enter into a contract by the council of any municipal corporation, the yeas and nays shall be called and recorded.

(b) To pass any bylaw, ordinance, resolution, or order, a concurrence of a majority of a whole number of members elected to the council shall be required.

(c) (1) (A) The effective dates for ordinances of a general or permanent nature and other local measures of a general or permanent nature of cities of the first class, cities of the second class, and incorporated towns shall be upon publication or posting as is otherwise required by law, but not before ninety-one (91) days after passage by the governing body of the city or town.

(B) In the event that the governing body of the city or town has by ordinance fixed the deadline for filing referendum petitions upon ordinances or other local measures at not less than thirty (30) days nor more than ninety (90) days after passage of an ordinance or measure, then the effective date shall be the day next following the deadline fixed in the ordinance.

(C) An ordinance containing an emergency clause shall go into effect immediately upon passage or at the time specified by the emergency clause, regardless of publication or posting, but an emergency clause shall not be effective to impose any fine, penalty, forfeiture, or deprivation of liberty or property until after the ordinance has been published or posted as is otherwise required by law.

(2) The effective date of an ordinance that is not of a general or permanent nature of a city of the first class, city of the second class, or incorporated town is the date of passage of the ordinance unless a later effective date is provided in the ordinance.

Acts 1875, No. 1, § 29, p. 1; C. & M. Dig., § 7528; Pope's Dig., § 9588; A.S.A. 1947, § 19-2403; Acts 2001, No. 1187, § 1; 2005, No. 1552, § 1.

14-42-112. Municipal attorneys for cities of the second class or incorporated towns.

(a) (1) All cities of the second class and incorporated towns within the State of Arkansas may elect a municipal attorney at the time of the election of other officers of these cities of the second class and incorporated towns, if it is not established by ordinance that the office of the city attorney will be appointed.

(2) (A) All municipal attorneys elected under the provisions of this section shall be regularly licensed attorneys of this state.

(B) When no attorney resides within the limits of the city or town or when no resident attorney has been elected as municipal attorney, the mayor and city or town council may appoint any regularly licensed attorney of this state to serve as the municipal attorney.

(b) Any municipal attorney elected or appointed under the provisions of this section shall subscribe to the oath of office as all other officers of these cities or towns.

(c) All municipal attorneys are authorized to file information for the arrest of any person for the violation of any ordinance of the city or town or of the laws of this state which are violated within the limits of the city or town.

(d) (1) The duties of the municipal attorney shall be to represent the city or town in all actions, both civil and criminal.

(2) (A) It shall be the duty of the municipal attorney to:

(i) Advise with all city or town officials at any time needed;

(ii) Prepare all legal papers, blank forms, etc.;

(iii) File a complete report of his or her work with the city or town council at the end of each year; and

(iv) If requested to do so, furnish all information in his or her possession to the state courts for the prosecution of cases in the state courts.

(B) Nothing in this section shall prohibit the city or town council from prescribing other duties, and they are authorized to prescribe such other duties as they desire which shall be done by proper ordinance by the council.

(e) The term of office for an elected municipal attorney shall be four (4) years.

Acts 1923, No. 153, §§ 1-5; Pope's Dig., §§ 9752-9756; Acts 1975, No. 161, §§ 1, 2; A.S.A. 1947, §§ 19-911 -- 19-915; Acts 1993, No. 1306, § 8; 1995, No. 1256, § 20; 1995 (1st Ex. Sess.), No. 13, § 4; 1997, No. 645, § 1; 2005, No. 133, § 1.

14-55-202. Reading requirement.

All bylaws and ordinances of a general or permanent nature shall be fully and distinctly read on three (3) different days unless two-thirds (2/3) of the members composing the municipal council shall dispense with the rule.

Acts 1875, No. 1, § 86, p. 1; C. & M. Dig., § 7502; Pope's Dig., § 9562; A.S.A. 1947, § 19-2402.

3. Restore the complainant's working environment.
4. Take steps to prevent retaliation and repetition of the harassment.
5. Educate, sanction, or discipline the harasser consistent with the seriousness of the offense.

It is every employee's and official's responsibility to ensure that his conduct does not imply harassment in any form. If, however, harassment or suspected harassment has or place:

1. An employee must immediately report the harassment or suspected harassment writing, to Human Resources Officer (or the designee) immediately. If the employee is the source of the alleged harassment, or is so closely associated with the harassment that the employee does not feel comfortable reporting to the employee may report the complaint to the Chief of Police or to the City Attorney. Employees should not wait to report the harassment or discrimination until the acts become so pervasive or offensive that they create a hostile work environment.
2. Any supervisor or department head that learns of or receives a complaint of harassment is obligated to report it to the Mayor.
3. Each complaint shall be fully investigated and a determination of the facts and appropriate response will be made on a case-by-case basis. If it is determined that harassment has occurred, the City shall take appropriate corrective disciplinary action, which may include but not limited to, verbal and/or written warning, probation, suspension, demotion and/or termination.

No employee shall be subject to any form of retaliation or discipline for pursuing a harassment complaint, and no witnesses shall suffer retaliation as a result of their involvement in the investigation. The City will not tolerate harassment or any form of retaliation against an employee who has either instigated or cooperated in the investigation of alleged harassment. Disciplinary action will be taken against those who are found to have violated the City's policy against such retaliation.

If the investigation does not find that harassment occurred or that the alleged incident(s) did not constitute harassment, the matter shall be referred back to the Mayor or the Mayor's designee for further appropriate action. For example, if workplace misconduct may have occurred but not harassment, the City shall determine the manner in which to act upon the findings set forth in the investigation report.

An employee found to have reported harassment in bad faith or intentionally or willfully falsely reported harassment shall be subject to disciplinary action.