

EDUCATIONAL SESSION
BUDGET, FINANCE AND PERSONNEL COMMITTEE
August 12, 2008
2:00 P.M.

The Educational Session of the Budget, Finance and Personnel Committee was called to order by Councilwoman Berz, Chairman, with Councilmen Rico, Gaines, Bennett, Shockley, and Benson present. Councilwoman Robinson and Councilman Page joined the meeting later. City Attorney Michael McMahan and Shirley Crownover, Assistant Clerk to the Council, were also present. Susan Dubose of the Personnel Dept. also attended the meeting.

Chip O'Dell, Dan Johnson , and Richard Beeland joined the meeting later.

EMPLOYEE DISCIPLINARY HEARINGS

Chairman Berz confirmed that this meeting was for educational purposes only; that the reason for the meeting was that Chairman Bennett had asked her to look further into this policy and the personnel procedures to see if a Charter change was recommended. She stated that there might be a different way that we want to address these appeals. She went on to say that she, herself, had not participated in a Hearing but had read over a case and also the Resolution that adopted administrative regulations for conduct of Employee Disciplinary Hearings. She had asked either Attorney Randy Nelson or Mike McMahan to go over what exists now. She reiterated that there would be no action—that this was education only. After today's session we would determine whether we needed to go further and whether this should be brought up later; that we would look at what we have and see if we understand this or if it needs to be done differently.

Attorney McMahan stated that he was using new software that he was not familiar with and hoped to be able to get through this. He handed out a booklet, which is made a part of this minute material, which contains far broader material. He stated that he would be going over legal constraints and whether we wanted to go another direction. Also he would show what Memphis, Knoxville and Nashville are doing.

He first went over **Section 8.1** of the City Charter that states "*There is hereby created a city council of the City of Chattanooga, Tennessee, and all legislative and quasi-judicial authority and responsibility now vested in and exercised by the board of commissioners shall be vested exclusively in the city council*". He emphasized that the council is to act in a "quasi-judicial" authority, which could have a number of meanings, but it is a judicial function and the council is acting in this capacity primarily as a court or jury.

Section 8.38 states *“It shall be the duty of the mayor to be vigilant and active in causing the ordinances of the city and the laws of the state to be executed and enforced within the city; to communicate to the city council at least once a year a statement of the finances and general condition of the city, and also such information in relation to the same as said council may, from time to time, request;”* Attorney McMahan explained that the duty of the Mayor is executive, and he delegates to administrators to impose disciplinary action on its workforce; that the Police Chief, Fire Chief or Public Works Administrator can decide what rules are necessary for discipline—that the Police Dept. has to be highly disciplined.

Councilwoman Bennett asked him to go further into the differences in departments and how they function and to explain the basis of personnel policies that would apply; that there are different rules and the Council does not work with these rules on a daily basis and that the Council needs to understand these rules.

Councilman Rico added that the Police Dept. was different.

Attorney McMahan explained that the Police Department has a manual and is the only department with a sophisticated manual; however you can’t go to the manual and find a “book and page” for everything.

Councilman Shockley asked if information was available in terms of history on past cases of disciplinary hearings? Attorney McMahan responded that their office maintains a file for the last ten years on all disciplinary cases heard by the Council; that in some years there were only 3-4 and in some 10-12; that the cases were wide in disparity, and it is very difficult to say that this case is different or the same from another employee’s case—that most cases are unique and often we would not see the same disciplinary pattern again; that most cases are not “AWOL” but are discharges.

Ms. Dubose added that it was considered abandonment of a job if an employee made no contact within three days.

Councilwoman Gaines noted that we had had cases where absenteeism contributed to an employee being terminated; however Attorney McMahn stated that most cases involved mis-conduct.

Councilman Benson asked if we operated under the policy of “guilty until proven innocent”?

Attorney McMahan responded that Resolution 21194 provides that administration has the duty of proving that an employee has committed an act of mis-conduct; that the employee’s burden of proof is that the punishment is unreasonable.

Councilman Rico noted that the punishment does not always fit the “crime”.

Attorney McMahn added that mis-conduct can be proved by circumstantial evidence.

Chairman Berz asked if had to be “beyond a reasonable doubt”? Attorney McMahan responded “no”—just preponderance of evidence. Chairman Berz stated that in cases involving Public Works, this gets “fuzzy”. Attorney McMahan stated that councilmembers needed to put themselves in the workplace as either the supervisor or the employee and determine if it is a work offense—whether this is a good employee who did something wrong and what the level of punishment should be; that sometimes it is shown that they are not good employees. Chairman Berz noted that it could be wrongdoing on the part of the administrator and disproportionate punishment.

In the previous case involving Officer Cunningham, Attorney McMahan noted that the Chancellor wants three new councilmembers on the panel—that these people need to be totally independent and not commit the “Rico” offense.

Councilman Rico contended that he had every right and obligation to do his own investigation; that his offense was just that he did not report it.

Councilwoman Gaines noted that in the past the Council had asked for information in advance and asked if there was any rule that the Council could not get information before hand?

Attorney McMahan responded that the council is still acting like a jury, which gets a list of exhibits beforehand; that they have to maintain neutrality; however both sides can agree to give everyone a packet; that it would be improper for the employee or administrator to provide such information.

Councilwoman Bennett asked if the Council would be expected not to look at it; not to discuss the case or to consider prior information.

Attorney McMahan explained that in actual court cases they only use about one-half of the material; that when cases are actually tried, they often do not go through all the exhibits; that they focus on the evidence and the hearing should not be prejudiced by material.

Councilwoman Robinson stated that what she did not like was to be asked to make “shoot from the hip” decisions. She questioned if they could not read affidavits, why give them any paper; that they did not have the opportunity to read them in advance or consider them beforehand and were just at the mercy of listening to two lawyers.

Attorney McMahan suggested that the Council needed to get a Chairman of the committee, and this chairman could say that the panel would like a recess to read the affidavits. He urged to not let the attorneys push them around.

Councilwoman Robinson stated that she could come across something in the affidavit and could have a question.

Attorney McMahan suggested that this could be read before the council panel comes into the room and then they could ask questions. He noted that these hearings are usually set up on Monday and can be wildly perplexing.

Councilman Benson asked for some discussion regarding “Ex Parte” Communication; that one of members of the panel could hear before the hearing that “this man is a crook”.

Councilman Page stated that this could go both ways—that they could have calls “in favor” and calls “not so favorable”.

Attorney McMahan noted that Administration needs a similar session such as this and so advised Susan Dubose.

Councilwoman Robinson noted that very often the panel will ask “show me the paper”, and it is not there, with Councilman Benson adding that Administration often does not know “due process”. Councilwoman Robinson stated that Councilman Benson would never vote to uphold Administration and always asked “show me the paper”. Councilman Benson mentioned a case where a person could be a good employee but just later on their paperwork.

Chairman Berz stated that this was the second piece—Administration does not always have the paperwork.

Councilwoman Robinson added that if the “paper” is not there—some would say the employee is not “out”.

Chairman Berz added that there was no paper trail, with Councilwoman Robinson asking in this incidence, could the Council just say “we won’t hear your case”?

Councilman Page asked if Tennessee was a right-to-work State; that we could have no discrimination—that in the private sector, they could let a person go for no reason.

Attorney McMahan explained the difference between government and the private employer—that in the private sector it could be a good reason, bad reason, or no reason at all; that in order to discharge public employees, we need to show “just cause”, and this can range from excess absenteeism, insubordination, and inefficiency; that this also can get into crimes where employees have taken money or failed to report money.

Chairman Berz noted that in the discussions regarding the Last Chance Agreement that Attorney Nelson defined “just cause”.

Councilman Shockley wanted to talk about the “paper trail” idea, stating that this should be two-sided—both Administration and the employee; that both parties should acknowledge in writing and try to find a resolution.

Susan DuBose stated that sometimes employees refused to sign, with Councilman Benson stating that this could constitute insubordination. Ms. DuBose stated that documentation is an ongoing challenge; that administration tries to build cases. Councilman Benson stated that everyone needed to do what is right.

Chairman Berz noted that their signature could just acknowledge that they have knowledge of the issue—not they agree to the issues when they sign.

Attorney McMahan mentioned scheduling of the hearings, with Councilman Benson noting that attorneys don’t always understand procedures. Attorney McMahan noted that their office generally represents administration. Councilman Benson thought it would be helpful if we had consistency with attorneys and maybe “farm” it out under a contract. Attorney McMahan stated that the Council could set rules on this.

Councilwoman Bennett asked of Susan DuBose about the preliminary hearing of an employee before they made an appeal to the Council? She wanted to know if this had been “vetted” with the Personnel Department and if Personnel had determined whether Administration had followed the proper procedures.

Ms. DuBose responded that she knew there were hearings prior to termination; that Public Works does their own hearings and paperwork.

Attorney McMahan added that municipal jobs have property rights and employees are given the opportunity to explain their side of the story. If they are charged with being disrespectful to a customer, they need to give an explanation; that employees have to be given the chance to express themselves, mentioning “Loudermill” vs the Board of Education.

Councilwoman Bennett wanted to be sure that Administration had followed the proper procedures before the cases came to the Council.

Attorney McMahan explained that the Police Dept. and Public Works are used to handling this; that sometimes smaller departments will ask the Personnel Dept. about this.

Ms. DuBose noted that they were called throughout the process; however the Council is the ultimate authority.

Chairman Berz asked about **Paragraph 4** of the Ordinance “Duties of the Chair” in regards to the Chair issuing subpoenas for witnesses. She wanted to know if this was happening? Also the Chair shall arrange for an attorney to be present during the proceeding to advise the Council with respect to legal matters.

Attorney McMahan explained that this attorney had to be someone not in their office; that we often used Cash, Walter Williams or Stulce because they had relative experience and knew what they were doing.

Paragraph 5 dealt with subpoenas and Attorney McMahan asked that the Council read **Paragraph 6** for themselves, which dealt with Ex Parte Communication.

Chairman Berz asked about the Chair issuing subpoenas. Attorney McMahan explained that the Council panel acts as a jury; that another party issues the subpoenas, and the Chair of the committee signs them.

Councilman Page asked in regards to Paragraph 6; that he had the understanding that the Council would receive a packet of information before the hearing. Attorney McMahan stated that would be the case if both parties agreed. Councilman Page stated that he was trying to put something together in our policy and procedures of things that would be helpful to both parties, and he would request that this be done. Attorney McMahan stated we could make an addition to this paragraph. Councilman Page stated that he thought the Council panel should have the information at least three days in advance. Councilman Rico stated that even a day in advance would help.

Chairman Berz mentioned **Paragraph 7** which pertains to the Chair directing the parties and/or the attorneys for the parties to appear for a conference to consider—simplification of the issues or providing for pre-hearing dissemination of pertinent personnel file documents, etc. Attorney McMahn stated that this had not been used. Councilwoman Berz stated that if the panel had the information ahead of time, these hearings may could be narrowed down. Attorney McMahan agreed that this could be very reasonable—that Judges do it all the time. Chairman Berz stated that it seemed to her like this would simplify things—that the punishment might be unjustified; that she thought we should use these Pre-Hearing conferences.

Councilwoman Gaines mentioned the last hearing relating to a drug pipe and drugs; that the Council panel did not know there was a second note from a doctor and at the end of the hearing there was a second test that showed positive—that this could have been a “make or break” point; that the decision was based on the second test.

Attorney McMahn stated that the Council might consider some of the changes in **Section 7** and get information ahead of time—that he did not know how much this would help.

Chairman Berz stated that we could get a statement of what the case is about at a Pre-Hearing Conference. Attorney McMahn noted that the Chair would have to arrange for a Pre-Hearing Conference. Chairman Berz stated that whomever is Chair would be able to read this and maybe could simplify matters.

Councilwoman Gaines asked if the entire Council could not get this a day ahead of time.

Attorney McMahan explained that the concern would be that getting the information could be prejudicial; that you would have to get it from both parties and it could not be ex parte communication; that we could do this under Section 7 of the Ordinance or we could re-write the policy.

Councilman Shockley noted that it had been said that the panel could also call a recess and look further at the evidence.

Attorney McMahan stated that this could be done if the panel needed time to read; that they could just read the document and not discuss or deliberate because this would be a violation of the sunshine law.

Chairman Berz noted that we had about ten more minutes.

Attorney McMahan stated that we had covered Ex Parte Communication—which meant panel members could not be contacted by administration or an employee and if this happened they had to make a written report and turn it in.

Councilwoman Bennett asked who they were supposed to turn this in to? Attorney McMahan responded the Chair of the committee or the Chairman of the Council.

Chairman Berz noted that when the hearing is set, that we need to appoint the Chairman.

Attorney McMahan noted that in Councilman Rico’s case, he was contacted and did not file a report and was questioned about this and due process was violated.

Councilwoman Bennett noted that we have some high profile cases. Attorney McMahan stated that what the media reports is not to be considered—just what is presented at the hearing. Councilman Benson noted that we read things in the newspaper.

Attorney McMahan stated that this was considered just “hearsay” and not evidence; that once you are in the room, you only consider what you hear there.

Councilman Rico stated “then someone is lying”. Attorney McMahan stated there were different kinds of lies.

Attorney McMahan went over the last section of his booklet that dealt with Knoxville, Nashville, and Memphis and Civil Service Boards—that these boards do disciplinary proceedings and oversee the Personnel Department and disciplinary proceedings. He noted that all of this was included in **Sections (9), (10), and (11)** of the booklet

Chairman Berz asked how the forms of government differ? Attorney McMahan noted that Nashville has 40 councilmen—that Knoxville is much like us. She wanted to know who appoints the Civil Service Board? Attorney McMahan stated that it would be appointed by the Mayor and City Council—that it would be Blue Ribbon people who knew a lot about personnel issues.

Chairman Berz asked if there were any other questions?

Councilman Page stated that he would formally like to consider a Civil Service Board.

Chairman Berz wanted to know if the Council wished her to go forward with this.

Councilwoman Bennett stated that we needed to look at some alternatives.

Attorney McMahan pointed out that the 19th is not far away; that they could draft something; that we could go with the 19th or wait until two years from now.

Councilwoman Robinson noted that four and one-half years ago, we appointed a nine-member panel to discuss this procedure and whether the City Council could operate in a judicial capacity—that they mentioned a panel of retired judges when their report came back but indicated that it would take an act of congress, and we needed a Charter amendment to change it; that we need people with experience in this area, and the Council was told this would be a good thing.

Chairman Berz asked that Councilmembers review this and jot their thoughts down and if needs be it could be on the agenda the next work session.

The meeting adjourned at 3:00 P.M.

