

Open Work Session

Discussion with County Attorney on Hiring Outside Legal Counsel

April 2, 2019

Mr. Paul Wilber, County Attorney, came before Council. Mr. Cannon informed Mr. Wilber that some Councilmembers have questions in regard to this matter, and he thinks they are similar questions that Council reviewed with Mr. Wilber previously, to which Mr. Wilber responded, he thinks they touched on this a year or two ago. Mr. Kilmer said the question is, if they are hiring outside legal counsel, the Charter seems to say that can be done with County Council consent. He then asked if that is Mr. Wilber's position, to which Mr. Wilber responded, just to introduce the discussion, his thought was to talk about the Charter provision put in back in 2006. He said, in the Legal Department section, there is a paragraph about special counsel, and one sentence says "The County Executive may, with the approval of the Council, employ special legal counsel to work problems of an extraordinary nature when the work to be done is of such character or magnitude as to require services in addition to those regularly provided by the Department of Law." He said, from his checking, historically, he thinks special counsel have primarily been used in four areas since 2006 and forward. He said one of those areas is bond counsel, another is pension counsel to advise them about the pension plan, another was in negotiating an FOP contract, and then in the employment law area. He explained, the Law Department, whether it was Mr. Baker or himself, does a lot of work with employment law, but, when they see a situation that looks like it is going to be a claim that will be covered either administratively or in court, they always contact LGIT, and then they tend to assign an attorney to it. He said, in some employment law matters, they can see that coming almost immediately, and the cost of that attorney is adjusted to the deductible the County has to pay for any type of claim. He said that is the way, historically, other counsel has come in, and he has looked, but does not see where Resolutions have been done in the past for those types of things. He said there has been money budgeted for bond counsel, pension counsel, and FOP representation on the contract, so there has been approval of budget monies, but no specific Resolutions, and that is the history. He said they know what the section says, and they see how it has been implemented since 2006. Mr. Holloway said he believes Council approved the FOP by Resolution. He said they would have to go back and check, but he remembers the discussion, to which Mr. Wilber responded, he is not saying his search was comprehensive. Mr. Dodd said, just because history says it was done in the past, that does not make it right. Mr. Wilber said he thinks, with that background, the question is how they go forward.

Mr. Kilmer said money is being taken from the Human Resources Department to pay a law firm without Council approval. He then asked how that works when money is taken out of the Human Resources Department operating expenditures to hire a lawyer without Council approval, to which Mr. Wilber responded, he thinks those, generally, are for personnel matters, and he thinks those matters, generally, fall into what he describes as LGIT coordinated matches. Mr. Kilmer asked if they still should have had Council approval under the Charter, to which Mr. Wilber responded, he guesses the question is whether that is where they are because they have not done that in the past. Mr. Kilmer asked if that is what the Charter says to do, to which Mr. Wilber responded, it says "problems of an extraordinary nature." Mr. Dodd asked what the problem was that was extraordinary, to which Mr. Cannon responded, probably a personnel matter. Mr. Kilmer said, again, it says "extraordinary nature for services provided in addition to those provided by the Department of Law," so, if Mr. Wilber is not doing it, that seems like the extraordinary nature that requires Council approval, and that seems to be the plain reading of that provision. Mr. Wilber said he thinks, given the history, some matters have lead time to them, such as legal opinions about a pension issue, or bond counsel, but some personnel matters need attorney attention quickly. Mr. Cannon asked who is to determine that? He said he understands that most of the

circumstances Mr. Wilber was referencing were pretty much large issues, but even if Council had not approved it, they were aware of it, and it was probably an initiative taken on by the Executive Branch, whether it was the current Administration or the prior Administration, and they can recognize that. He said he thinks where it is beginning to get out of control is when Council finds out after the fact that Department Heads are now hiring attorneys, and, at that stage, he thinks they are losing some type of structure in this County as to just how they are spending their funds, especially when he thinks the true intent of the Charter is to try to put some particular regulations on how those funds are going to be spent. Mr. Wilber asked if Department Heads are hiring outside legal counsel, to which Mr. Cannon responded, from what he understands. He then asked Mr. Kilmer if this was initiated through a Department Head, to which Mr. Kilmer responded, it says Human Resources Department operating expenses, but he does not know, unless someone else wants to answer that. He said, again, Council is kept in the dark over what seems to be a very clear violation of the Charter, and they get no answers except a response citing sections of the Charter, and he believes Mr. Wilber has seen the letter dated March 29th. He then asked if Mr. Wilber agrees with the legal analysis in the March 29th letter about why this Charter provision is inoperable, to which Mr. Wilber responded, he thinks the March 29th letter is not a direct answer to the question that was asked, and Mr. Cannon added, not at all. Mr. Kilmer said he guesses the question is whether this sort of thing should have Council approval going forward, in Mr. Wilber's opinion. He clarified, the past is the past, and they cannot control that, but, going forward, to which Mr. Wilber responded, in a perfect world. He said his hesitancy is because, if they go through a Resolution process on a matter that needs immediate attorney attention, he thinks there is going to be a timing issue. He said he thinks this is, ideally, something that there should be communication between the Executive and Council about. Mr. Dodd said communication is the key, to which Mr. Wilber responded, it is the key to everything. Mr. Kilmer said, in theory, they could have a Resolution that would say "Immediate personnel matters are done by engaging law firm "X" for "X" amount of dollars if there is an immediate need," so Council can pass a Resolution that does those contingencies, and he thinks that was what was offered last August. He said there could be a Resolution that sort of preauthorizes those sort of emergency situations that Mr. Wilber mentioned, to which Mr. McCain responded, he thinks Mr. Wilber's point is that something could happen tomorrow, and immediately something needs to be addressed. He said it might be a serious personnel matter, but Council does not meet for two more weeks, so he guesses the question becomes what happens if they need that help tomorrow, or during that interim. Mr. Cannon said there are always going to be exceptions. He said Council meets almost every two weeks, and he does not know how there are any emergencies that can be established over the last few years where they could tell any of Council that this had to have been done right away, and there was no time to address this with the County Council because he does not really buy that. He clarified, he does not think there has been any emergency that would warrant that. He said the exceptions, he thinks, would be for catastrophic events, to which Mr. Wilber responded, some of the personnel matters have been quick trigger. Mr. Cannon said, what they are looking at, though, is what is supposed to be defined as the exception to the rule is now becoming the rule.

Mr. Kilmer said, to Mr. McCain's point, Council can authorize the use of any sort of law firm in any sort of emergency by Resolution. He clarified, they could do that by Council consent ahead of time if there are exceptions, and then be told about it afterwards, but what they have right now is this happening, and then it is being shielded from any sort of public or Council view by the idea that this is some sort of personnel matter. He said it did not even say it was an emergency, but was just shielded for a personnel matter, and Council does not know if that is true or not because they have no way to check whether it was an actual emergency or not, and that gives carte blanche to do whatever, when, clearly, the Charter says "Council approval." He said, if there is a Charter amendment Council wants to offer to say "except in extraordinary circumstances," that is fine because they have put Charter amendments before the

voters before, but, if the Charter says it needs to have Council approval, then it needs to have Council approval. He said he does not think there is an extraordinary situation exception in the Charter for that. He then asked if Mr. Wilber disagrees with that, to which Mr. Wilber responded, in terms of bringing a Resolution forward, that would come from the Executive to Council, so he will certainly discuss that with the Executive. Mr. Cannon said the Executive is here if he wants to discuss it, to which Mr. Bob Culver, speaking out from the audience, responded by asking if they want to know the truth, or if they just want to make accusations. Mr. Cannon said Mr. Culver is here, and he is welcome to speak. Mr. Culver then came before Council, and said Council has a copy of two bills, one for \$3,000, and the other for \$2,000. He said one of them is still very much an ongoing situation with a personnel problem for which they are being charged daily, and they are going to end up in court with it and be litigated against. He said the other one was when they all passed a Bill for the Deputy Directors to become appointed and approved, and they differed on the fact that they became at-will, so that was when he called Mr. Karpinski. He said Mr. Karpinski charges probably close to \$300 to \$500 an hour, so they do not have a whole lot of hours in here, but they are still disagreeing on the fact of the way the amendment was written. He said they all came back then, and made the Deputy Directors merited again, and that was why Mr. Karpinski was even called in the first place because that left the Deputy Directors in a position where they may end up suing the County because it was not part of their contract. He said the only ones that were going to be at-will were going to be the Department Heads. Mr. Cannon then asked, under what circumstances did Mr. Culver define that as an emergency where it did not need Council approval for that expense, to which Mr. Culver responded, it was an employee question that came up. Mr. Cannon said, whether it is an employee or not is not the issue, to which Mr. Culver responded, it says extraordinary, which means, to him, where something happened, and they are being sued all of a sudden, or something like that. He said this is a normal employment operation they go through every day here. Mr. Cannon said it could have been something that could have been addressed with Council, even in Closed Session, if he was concerned about a personnel issue, to which Mr. Culver responded, he asked Council to do a Closed Session, and they said no. Mr. Cannon asked Mr. Culver for clarification on what topic he had asked for a Closed Session for, to which Mr. Culver responded, on the amendments, and all of that part of that which was being done. Mr. Cannon said, not to his knowledge, to which Mr. Dodd added, he does not remember that. Mr. Culver said he does not set their schedule because Mr. Cannon sets the Agenda, but his point is that he needed to tell Council that this was how Mr. Karpinski looked at it. Mr. Cannon then asked, if they do not do a Closed Session, will Mr. Culver violate the Charter anyway, to which Mr. Culver responded, he did not violate the Charter, and Mr. Cannon needs to back up just a minute. Mr. Cannon clarified, that is what they are saying, to which Mr. Culver responded, he did not violate the Charter. He said he went out and contacted the employment attorney, and there is money in the budget to contact the employment attorney. He said there is money in every budget for the pension, there is money for FOP, and there is money for Mr. Karpinski. He said it is in the Human Resources Department budget, and that is where he contacted him from, and that is why it was taken out of their particular thing, to which Mr. Cannon responded, it does not make any difference where it came from. He clarified, the same Charter that establishes the budget also establishes the restrictions to how Mr. Culver is supposed to spend those funds. Mr. Culver then asked Mr. Cannon what he would call extraordinary, but then said he does not care what Mr. Cannon would call extraordinary, and he is just saying that this was not extraordinary, but an employment question they had, so that is why he went to the employee attorney.

Mr. Cannon said Mr. Wilber asked for clarification, and now they have some clarification. He then asked Mr. Wilber how he thinks this could possibly justify an extraordinary circumstance where there was not enough time to have approval from the Council for those type of expenditures, to which Mr. Wilber responded, if there is time to bring a Resolution forward, he thinks it should be brought forward, but, if they have a circumstance primarily in a personnel area, he thinks it is hard to get a Resolution through in

a day or two. Mr. Kilmer clarified, it says "work done in extraordinary circumstances in addition to those regularly provided by the Department of Law," and that is what it is. He said the extraordinary nature means they have to go out and hire an extra attorney or a specialist, and that is when this kicks in. He again read "The County Executive may, with the approval of the County Council, employ such legal counsel to work problems of an extraordinary nature when the work is to be done." He said, even if it is extraordinary in nature, Council has to approve the legal counsel. Mr. Culver said he has an example. He said they all voted on that, and have to wait two weeks to go ahead and do it, but then he has to put in a request to be able to call Mr. Karpinski, or any employment attorney, to get the money to be able to pay them, so the same night they are voting on it, he is asking them for money to contact an employment attorney to say he is right or wrong, and that does not make sense, to which Mr. Kilmer responded, but that is what the Charter says. Mr. Cannon clarified, it is not up to Mr. Culver, it is the Charter that says that is exactly the rule that he is supposed to follow whether he likes it or not. Mr. Kilmer said, to Mr. Culver's point, if he thinks they are getting into legal trouble and the County is in some legal jeopardy, then it is in Council's interest to approve special counsel to do that, so he sees the point that it does not make sense. Mr. Culver said he will go a step further and be honest with all of this. He said they all are in trouble still, and he found this out from Mr. Karpinski when they all changed the Resolution to make it say that the Deputy Directors became merited. He then asked if they all remember that Bill, and said they crossed out "at-will," and crossed out everything to do with Department Heads, so, as of April 1st, all personnel are merited now, and there are no at-will employees in Wicomico County. Mr. Cannon said they are really talking about authority to spend funds for attorneys without authorization from Council, to which Mr. Culver responded, this affects every employee they have, every Department Head, and every Deputy Director. Mr. Cannon responded, he knows that, but that is not the topic. He clarified, the topic they are talking about is a violation of the Charter whereas Mr. Culver is spending funds that are not authorized, and that is what the law is. Mr. Culver then asked how Council got the money to authorize a forensic auditor several years ago to come in without any approval from Council. He said there was not a Resolution, and there was nothing public about that, to which Mr. Kilmer responded, they did pass a Resolution on that. Mr. Culver asked if that is public, to which Mr. Kilmer responded, yes. Mr. Cannon clarified, they passed a Resolution. Mr. Culver asked if that was before they got the money because he would like to see that. He said they were here investigating before Council ever passed a Resolution, to which Mr. Kilmer responded, he believes that was brought to their attention, and they admitted it. Mr. Culver said Council sees him do things, and then they amend things so they are covered.

Mr. Cannon said he thinks what they are trying to do is just establish this so it does not continue, to which Mr. Culver responded, he has no problem with that, but he just feels like this is something that comes out of the Human Resources budget, and they have problems every day with different personnel who want to sue Wicomico County, and Council. He said, just because they disagree with him on this, they are going to require everything to come before Council, to which Mr. Cannon responded, Mr. Wilber can handle a lot of it, and, if Mr. Wilber cannot handle it, then, yes. He clarified, Council is not demanding it, but the public is demanding it because the public voted on the Charter, and the Charter is the law. Mr. Culver said he does not consider employment an extraordinary requirement, but it is day to day operations. He said extraordinary is when they have to hire a specialist, whether it be a medical attorney or something like that for a case where someone has said they have tripped, or fell, or whatever, and that is extraordinary, and not day to day operations with their personnel. Mr. Cannon asked if extraordinary circumstances also require approval, to which Mr. Kilmer responded, it says special counsel for work done in addition to the Department of Law needs approval. He said, again, with the employment stuff, and the sort of stuff Mr. Culver is describing, obviously, he does not think they need a Resolution for every single incident, but he thinks they could have one that would say "in the regular course of duties." Mr. Wilber said he thinks what Mr. Kilmer is saying is a Resolution that has a

general authorization so they do not get into a tight time lock, and he thinks that is a reasonable solution. Mr. Kilmer said, as was pointed out before, they are all living under a Charter that is relatively new. He said it is only 13 years old, and they are all learning to live with it, and stuff has been done in the past that has not been proper to do, and they are trying to adjust to that. He said Council is not perfect, as Mr. Culver has pointed out to them numerous times, but, in the instances they have needed to pass a Resolution to hire counsel, they did so, and this is their attempt here to say they think this is a violation of the Charter. He said they talked about it last August, and said they would get it harmonized so they are all working on the same page, and working within the Charter. He said Council can pass general Resolutions that authorize that sort of stuff, and that is kind of what he is talking about, and that is where he would like to see things go. Mr. Culver said, if they consider it extraordinary, then he has no problem working within the confines, but he does not consider this extraordinary, he considers this day to day operations. He said it is almost like him calling Mr. Wilber, and Council calling Mr. Taylor, to which Mr. Cannon responded, that is okay because it is authorized, and Mr. Culver can call Mr. Wilber whenever he wants. Mr. Culver clarified, he does not consider this extraordinary, and they are still going to disagree. He said, if they want to come to some kind of mediation and sit down and go over it, he is more than happy to work with it because he wants to move forward. Mr. Wilber said he will take a shot at a Resolution to present to everybody, and then they can hammer away at it.

Mr. McCain said the County has used Mr. Karpinski in the past for personnel matters, and they keep talking about extraordinary assumptions. He then asked if this "special" legal counsel since they have used them in the past. He said, to him, this is a question of whether this even is special legal counsel. He said, before they start getting into semantics, he thinks they could have a simple Resolution that permits the use of Mr. Karpinski's firm for personnel matters, or something to that affect, and with some kind of cap to it, obviously. Mr. Wilber said that law firm represents LGIT on many things, and the County has used that law firm in conjunction with LGIT probably since 2006 to deal with personnel matters. Mr. Holloway asked, if it is used by the insurance company, how come Mr. Karpinski is billing the County, to which Mr. Culver responded, he bills the County until the claim comes in. Mr. Holloway asked if they call LGIT first to make sure, to which Mr. Wilber responded, they notify LGIT of a potential claim as soon as they are aware of it, and their defense, essentially, starts when a formal claim is filed. He said, until then, he would be working on the County's nickel, but, when a claim is filed, that money is all counted against the deductible the County has to pay, so the County would be out that money anyway. Mr. Culver said that goes back to the fact that, when that ordinance was passed about Deputy Department Heads, he felt at the time like they were making a mistake, and that is why he called the employment counselor to make sure they were okay, and what they had to do to make it right. Mr. Holloway asked Mr. Culver if he usually consults with Mr. Wilber first before doing that, to which Mr. Culver responded, sometimes. Mr. Holloway asked why not all the time since he is the County Attorney, to which Mr. Culver responded, Mr. Wilber is an excellent government attorney, but he is not when they get into a labor specific contract, or pension, or FOP. He said, as far as governmental law with what goes on, and what is allowed, Mr. Wilber is an excellent attorney. Mr. Holloway said, if they have a County Attorney hired, everything should go to him first for him to make the distinction between if it should go further, or if it is something they can handle in-house. He said he cannot understand just bypassing the County Attorney and jumping right to an outside attorney, to which Mr. Culver responded, that probably was his choice only because of the fact that, if he goes to Mr. Wilber and they work three or four hours on it, he owes him. He said then Mr. Wilber will say it has to go to LGIT because it is going to be a claim, so why would he not go ahead and bring LGIT into it in the beginning, and be done with it. Mr. Holloway clarified, he is not saying to hire Mr. Wilber for three or four hours, but he is saying to pick up the phone and call him, and he is sure he gets paid for that too, but he can tell Mr. Wilber he has an issue, and ask what he thinks. He said he thinks that would be the ideal thing to do on any case, to which Mr. Culver

responded, then that is Mr. Holloway's choice. Mr. Holloway said it makes no sense to jump past somebody they already have retained, to which Mr. Culver responded, when Mr. Holloway becomes Executive, he can make that choice. He said he made that choice because that was how he was going to do it, and he did not want to waste money talking to Mr. Wilber. He said he knew if it turned out to be a claim he would have to go to LGIT anyhow, so he went to that person.

Mr. Davis asked if a claim has been filed, to which Mr. Culver responded, on the other issue, yes, and it is a lawsuit now. Mr. Davis asked if LGIT is looking into it, to which Mr. Culver responded, they will be picking it up, yes. He said he cannot tell them which bill it was because he does not have the numbers, but one of them is a definite lawsuit against Wicomico County. Mr. Davis asked if it has been claimed and filed, to which Mr. Culver responded, yes, but he does not know if the bill in question was either one of those bills. He said they can check Munis because Human Resources pays all of the bills to Mr. Karpinski, so, if they want to search back further, they will find that Mr. Karpinski has been paid several times this year in different amounts.

Mr. Cannon said there is probably a really simple solution. He said Council meets, for the most part, every two weeks, so they are pretty accessible. He said, if they do not meet every two weeks, they hold special sessions, and he believes they had one last month, so that can be arranged to try to cooperate with this. He said he would like to think that at least now they have all the cards on the table, and they all recognize where they stand and what the restrictions are, to which Mr. Culver responded, he would be happy to work with Council on it. Mr. Cannon said that would be great, and he would think, too, that if there are any existing cases right now that Mr. Culver is aware of, Council should know by their next meeting, to which Mr. Culver responded, no, they should not know because it is personnel. Mr. Cannon said they can hold a Closed Session, to which Mr. Culver responded, that has not really helped a whole lot sometimes in the past. Mr. Cannon said, again, this is what they are required to do, to which Mr. Culver responded, Council is not required to do anything with personnel, they are required to be Legislatures. Mr. Cannon said he is quite familiar with the Charter, and he is not suggesting they hold a personnel issue as a Council issue because he knows that is the Executive's responsibility; however, if Mr. Culver is going to hire outside legal counsel, it is the Council's authority to approve that. He said, if Mr. Culver would like to have that in Closed Session so they can discuss it first, that would be fine, or, if Council is willing to, they could approve it in Open Session so they are following the Charter as required. He clarified, they would be glad to accommodate either Open or Closed Sessions to make that happen, but, if there are any ongoing procedures right now, they would need to know that so they can get a Resolution, and he does not know whether Mr. Culver would introduce the Resolution for Council so they can make sure they are all on the same page and doing things right. Mr. Kilmer said they do not necessarily need to know names, and he understands what Mr. Culver is saying about personnel issues, which can be touchy. He said it would seem, though, if the County is having lawsuits, that is something Council should be aware of too, even if they do not know the specific names. He clarified, Council does not need to know the inner workings of personnel, but, if the County is getting sued, that seems like something he believes Council should be aware of so they know. Mr. Culver said Council will remember a couple years ago they got involved in another one where a Councilmember was involved, and they ended up having to settle with LGIT, so that is all he is going to tell them about that. He said he does not mind letting Mr. Wilber know, and, if Mr. Wilber wants to let Mr. Taylor know, they will keep through that, and he has no problem with that, but, to notify the entire Council and then go read it on a blog or something, he is not going to put that at risk. Mr. Cannon said Mr. Culver is making an assumption, to which Mr. Culver responded, it is a pretty damn good assumption. Mr. Cannon said that is Mr. Culver's assumption, but, either way, they are required to approve these, and all they are asking him to do is follow procedure. Mr. Culver asked if Council is considering any case with Mr. Karpinski or any other

attorney extraordinary, to which Mr. Cannon responded, he thinks Mr. Wilber can help Mr. Culver with that, and he is going to let him take the lead on this as he thinks he is more aware of the requirements of the Charter than anybody in the room, to which Mr. Wilber responded, he will work on the Resolution for everybody to see. Mr. Kilmer said it should be that any special counsel outside of the Department of Law needs to be approved by the County Council. Mr. Culver asked, when they go to pension and when they go to bond sale, does Mr. Kilmer want to approve that every year, to which Mr. Kilmer responded, he thinks that is what is required, but they can have a continuing Resolution that would do that. He said Mr. Culver knows that most Resolutions gets passed 7 to 0, so stuff like that would be kind of a pro forma sort of thing, to which Mr. Culver responded, as long as they do it at the beginning of the year, or with the budget so they do not have to come back every two weeks or every month. Mr. Kilmer said, again, Council does not necessarily need to know of every instance, to which Mr. Wilber responded, they should look at this as doing it as a batch, and get it done, and get this issue behind them.

Mr. Taylor said he will offer just an observation. He said he thinks part of the services Mr. Culver has described are what he would call general legal services. He said, yes, they might involve personnel broadly, and, apparently, it had something to do with the Charter amendments that were made. He said he thinks when Mr. Culver gets an opinion like that, be it from Mr. Wilber, Mr. Karpinski, or anyone, it ought to come to Council. He said, if it is something to do with the Charter or the Code, then Council is entitled to that information. He said the money being paid to these attorneys is providing services to the County, and the Council should get that information without having to ask for it, if it is significant, as Mr. Culver suggested it was. There was no further discussion.



John T. Cannon, President




Larry W. Dodd, Vice President, District 3



Ernest F. Davis, District 1



Marc Kilmer, District 2



Josh Hastings, District 4



Joe Holloway, District 5



William R. McCain, At-Large



Laura Hurley, Council Administrator