

Open Work Session

Discussion on Proposed Legislation Regarding the Employment Status of Certain County Employees July 21, 2020

Mr. Taylor said Council has been provided with three pages of what he calls a discussion draft of possible Legislation. He explained, this is a follow-up on a suggestion that was made by the attorney, Timothy Maloney, as something to be put in place before taking any other legal action regarding the issues Council has with the Executive Branch on certain Department Heads and other personnel for which confirmation by Council is required. He said, using some general suggestions from Mr. Maloney, they attempted to flush out potential ordinance language. He said Mr. Maloney then reviewed it, and he revised it again based on Mr. Maloney's further comments, which is what Council has in the Brief Book to look at. He said he can go through it, but it is an attempt to try to cover all the bases with regards to this group of County personnel in terms of when they can act, when they have to stop acting after their term of office has ended, or if they have been discharged. He said, in addition to that, the State Code provides that the Legislative Body of the County, meaning this Council, can pass Legislation imposing penalties, including removal from office, if the local law, meaning this potential Legislation, is violated. He said it provides for a removal procedure, and it specifies in the particular parts of the new ordinance language which violations could be subject to removal, so it covers that base as well. He said, in addition, and this was something Mr. Maloney suggested, it provides for a misdemeanor penalty in certain cases as well. He said that is everything, and he will certainly concede that it is a rather strong ordinance, but it seems to him that the Council's general impression was that strong measures are needed, and that is the background for it.

Mr. McCain said it is ironic that Mr. Taylor uses the word "strong" because that was his reaction when he read this. He said, to be frank, he was like, wow. He said, as Mr. Taylor just mentioned, this incorporates things, such as that their conduct can be considered a misdemeanor, and they can be fined and incarcerated. He said this has incarceration in here, so strong might be a little light in this description. He said he thinks they certainly need to give some thought to that because, unfortunately, there can be an individual who can be caught in the middle, but then this talks about taking them and making them liable for their pay, they can be incarcerated, and they can be fined. He said there is no question it is heavy-handed, but it may be a little too much.

Mr. Taylor said he will point out that the provision he has labeled XX-1 right at the start of the first page has three subparts, and it is intended to make clear in the particular situations that are addressed in those subparts when the person has to stop acting. He said it removes this notion of de facto authority, which, again, was Mr. Maloney's suggestion, so they can get that off the table and provide that it just does not apply. Mr. McCain said he is pretty comfortable with Section XX-1. Mr. Taylor said bear in mind they are only talking about certain personnel who have to be confirmed by the Council, who know the story going in, and if they do not, they can certainly find out by looking at the Code, so it is not like they are talking about all County employees by any means. He said they are probably talking about somewhere between a dozen to two dozen people at the most. Mr. McCain asked what Mr. Taylor's point is, to which Mr. Taylor responded, the point is for that group of people to be very clear about when they have to stop acting and when they are authorized to act. Mr. McCain said the language is strong whether they are talking about 1 or 100.

Mr. Cannon said he was under the impression that the language in here is nothing Council has created, but is simply what has already been allowed to Council through the Express Powers Act. He then asked if that is correct, to which Mr. Taylor responded, it is new in terms of these penalties, the removal from office and the misdemeanor. He said that is new, and they do not have that in the Code right now. He said the State Enabling Legislation, the Express Powers Act, provides that a Legislative Body can put that in the local laws, and that is what they are intending to do with this, or what this is intended to do subject to Council approval.

Mr. Hastings asked if what is drafted is based off of any other Counties, to which Mr. Taylor responded, none that he knows of. Mr. Hastings asked where the penalties came from, to which Mr. Taylor responded, they were Mr. Maloney's suggestion, so he stayed with it.

Mrs. Acle asked if this is for the actual employee, not for the County Executive, to which Mr. Taylor responded, it could apply to the County Executive. He clarified, he is talking about the State Enabling Legislation, and it could be applied under appropriate circumstances to the County Executive. Mrs. Acle said Mr. McCain said there could be an employee caught in the middle, and for some reason they are still acting because of a fiduciary responsibility. She clarified, she is thinking hypothetically, and not something they currently have. She said, if there is a fiduciary responsibility with these different professions, they cannot just stop, to which Mr. Taylor responded, that is what A, B, and C of the first section are intended to do. He clarified, in other words, there is the situation of the Department Heads who have to be reappointed every four years, and there are six months after the election of the County Executive when he or she has to appoint or reappoint the Department Heads, the Director of Administration, and the Assistant Director of Administration. He said the people who are in office at the time of the election can continue to serve until they or their successor are reappointed again by the County Executive, and then for another 30 days after that. He said it seems to him that there needs to be some finite end to things, and that is what this does; it makes it very clear that after the 30 days, and after the six months, so, essentially, seven months, they either have to be reappointed, or they are out. He said that is certainly enough time for the County Executive to appoint somebody because they are talking about seven months. He clarified, he is saying, in other words, that it is intended to not automatically just say after the election that they are out. He said it does not do that, it provides for that continued period of time, but then it ends.

Mr. Dodd asked if this Legislation Mr. Taylor is working on with Mr. Maloney is basically a deterrent, to which Mr. Taylor responded, it can be looked at that way, and it clarifies things. He said right now they have the situation where there is a dispute about somebody staying on serving in a de facto basis, and he will not get into who is right or wrong on that, but this ends that discussion because it says, essentially, they are not going to use that doctrine here. Mr. Dodd asked if this is the teeth that had been discussed at many previous meetings that Council needs, to which Mr. Taylor responded, he thinks that is true. He clarified, they did not discuss the penalties or the removal until very recently. He said the whole idea of this is ending somebody's period of service, and not just going on, and on, and on until the County Executive gets around to reappointing someone who is confirmed by the Council.

Mr. McCain said he thinks, as a Council, they need to give further consideration to this. He said they need something with teeth, which this starts out in that direction, but then it morphs into some serious, serious penalties. He said the fact that it gets very clear that Council has the authority to cease and desist, and that in itself means they cannot do it. He said, legally, they are giving a cease and desist order, and then they have to cease and vacate, and they are expressing that, but then it takes it on beyond that where it says what is new is the fact they are introducing incarceration and fines, and they are liable for their pay. He said, getting back to Mrs. Acle's point, they could be solely trying to just simply do the job they were told to do, or given to do, so cease and desist in itself is significant.

Mr. Holloway said he agrees with what Mr. McCain said, and he guesses an example of this would be if Council did not approve someone, but they go back to their office and the County Executive says they have not been approved, but they are not leaving, and they are going to get paid and they have a job. He then asked who the guilty party is at that point? He asked if it is the person who stays and receives the paycheck and goes to the bank and cashes it, or the person who directs them to stay who hired them in the first place. He said that is where they get into the weeds on all of this. Mr. McCain said that is a good question, and they need to incorporate that in here somehow. He said Mr. Holloway is making the point that the weight should be on the person who is directing this individual, but this does not necessarily address the individual. He said, when someone works for somebody, they are following direction. Mr. Cannon said, to that point, some of the employees work at the will of both the Executive and the Legislative Branch, and there is a willful disregard for what the Council has stated, so he thinks they are equally culpable. He said he recognizes Mr. McCain's concern that it is a little harsh, but he thinks it is just like any law where they state what could be the harshest and most egregious punishment, but it does not necessarily mean that is the route anyone is going to take.

Mr. Cannon asked Mr. Taylor, no matter how much teeth they put into this, is this still going to be subject to the judiciary somewhere along the line? He said right now they do not care what the Charter says, and then they move one step further and say they do not care what this says. He then asked if this is part of the Code, to which Mr. Taylor responded, the misdemeanor part is, obviously, subject to court. Mr. Cannon said that is what he is getting at. He then asked how much teeth can they actually put into this because they are just laying another gauntlet down, but not necessarily because he does not see where the enforcement is going to come in where they have the authority to bring the Sheriff in, to which Mr. Taylor responded, but they have the right to specify the crime or the misdemeanor, and then the charge would be in court and decided in court. He clarified, he will distinguish between that and the removal, and the removal is really, hopefully, designed to avoid having to go to court, and the removal has been structured with discussions with Mr. Maloney as, basically, an administrative remedy that is administered by the Council. Mr. Cannon asked how Council would make the removal happen, to which Mr. Taylor responded, it provides for a hearing with the Council. He said there are some due process rights, and then, if Council decides on removal and the person continues, it then becomes a misdemeanor, so it winds up that way. Mr. Holloway asked who makes the charges, to which Mr. Taylor responded, Council would. He said the charges can be referred by anyone, and they are criminal charges. He clarified, Council would not try the case, that would be done in court.

Mrs. Acle said, if there was a Public Works Director in the midst of a project who signed off on the plans, and the Council does not confirm them, but the Executive does not release them to sign off plans to

another engineer, they are stuck. Mr. Taylor said he has provided in there that somebody can continue the job on a selective basis. He explained, if there would be a project where someone had so much institutional knowledge that, if he or she walked out, it would be very difficult for someone to replace them. He said he can give a good example; as far as he knows, the Bayland Aviation case is still set for litigation in court this fall. He said Mr. Wilber has been the County's Attorney on that, and he does not know all of what Mr. Wilber has done, but, from his experience, Mr. Wilber has probably done some depositions, some discovery, and has a file on it, so for somebody else to come in a week or so before that case goes to litigation, he or she would have to, essentially, duplicate that, and certainly would have to read everything, and would probably have to research things. He said, just from the standpoint of practicality and money, to avoid having to pay someone to get up to speed just to go into court when Mr. Wilber is already up to speed, that could be an exclusion, and that is built into this as well.

Mr. Dodd said, in reference to the comments about employees getting caught in the middle of this, Mr. Cannon stated that the employees work at the discretion of the County Executive through confirmation of the Council. He said, if these employees continue to work and they have not been confirmed, at some point they need to take ownership and realize they themselves are in violation of the Charter. Mr. Taylor said it seems to him that it is very clear because it is in the Code, and if Human Resources is doing its job, they would point this out to the employee, even though they might not be reading everything that is in the Code all the time. Mr. Holloway asked if that then gets into a situation of a misappropriation of funding for whoever is paying these folks, or whoever writes the paycheck, to which Mr. Taylor responded, that is in here. Mr. Dodd said that is a good point.

Mr. Dodd asked where they go from here. He said he knows something was mentioned about getting this ready for the next meeting of August 4, to which Mrs. Hurley responded, if Council is comfortable with the proposed language, they can put it in Legislative Bill form. Mr. Cannon said that is fine. Mr. Taylor said, if there is anyone who is concerned about language, or they think incarceration is too hard, they can email Mrs. Hurley. Mr. McCain said he would like to see this toned down. Mr. Taylor said his own feeling on drafting Legislation is that he does not generally like to make changes just because one person wants it. He said it is a Council matter, and, obviously, if four people do not want it, then it becomes obvious. Mr. Holloway said, if one person wants it and the rest of the Council has no opposition to it, that is just like the grant Legislation where no one had a whole lot to say about it, but Mr. McCain wanted something changed, and no one had a problem with it. Mr. Taylor said the only problem with that is, how do they really know? He said the best way to do it is to speak up, and, if there is not support for a change, he would not do it, but if there is support he would do it. Mr. Cannon clarified, he thinks what Mr. Taylor is saying, which is a good point, is to keep it in the same form that it is, bring it forward to Council, but, if there are Councilmembers who really have a concern, do the Council a favor and email the other Members so they can think through that process before they get to the table in two weeks. He said that would be a big help. Mr. McCain said he will just tell Council right now that he is going to email them because he is telling them now that he thinks this is too strong. Mrs. Hurley clarified, Council can email individual Councilmembers, but cannot do a group email. Mr. Taylor said that was why he said to just send their emails to Mrs. Hurley, and then they can talk. Mr. Dodd said, if this is expected to be introduced August 4, he would like to see this worked out before they come back, and he does not want Council to go back and forth like they are doing right now, so it would be nice to have this already finalized before the introduction.

Mrs. Hurley said she needs clarification from Mr. Taylor on one section. She said, in letter XX-1, B, it talks about if they are discharged from a position for which confirmation by the County Council is required, they no longer have the de facto power or the authority to continue to serve in that position. She said then it continues to say that they may not exercise the authority of such a position, either generally or in the supervision or management of a Department or Agency of the Executive Branch that is assigned or attributed to that position by the Charter, except by approval of the Council by Resolution. She then asked Mr. Taylor to explain exactly what that means, to which Mr. Taylor responded, this goes to when somebody is discharged, not when their term of office ends under the six months after the election appointment provision, which is addressed in another subpart. He clarified, this is where somebody is just discharged, either by the Executive, because he can discharge people, and the Council can in the case of the County Attorney, so it really is to address that particular situation. Mrs. Hurley then asked, if she is understanding this correctly, they would not be able to serve in another County position if they are discharged and not confirmed by Council, to which Mr. Taylor responded, they would not be able to serve in a position where it is subject to confirmation by Council, but yes, they could serve in another position. Mr. Hastings asked if they would be removed, essentially, from a position of confirmation to just a general position, to which Mr. Taylor responded, part of the language of this section is to try to address a situation where somebody is operating, essentially, as a Department Head, but has not been confirmed as a Department Head. He clarified, in other words, that can occur. He clarified, whether it is occurring, or has occurred or not, he does not know, but it certainly could occur, and it is written to address that as well. Mr. McCain said, to Mrs. Hurley's point, he thinks what she is trying to make clear is she is interpreting that as if they could be nominated for something else. He said they might not be nominated by this Council because they may not think they are qualified for that job, but they might be qualified for something else. Mr. Dodd asked if something should be in here about them moving to another position that is open instead of creating a position, to which Mr. Taylor responded, he thinks this pertains entirely to the position from which they have been discharged, and if they continue to act in a capacity that is really that position. He clarified, in other words, they have been discharged, they have not been reconfirmed to the position, but, nevertheless, are administratively acting as if they are in that position. He said that is what this is aimed at, and it is not aimed at whether they can take some other position, and does not have anything to do with them taking another position. He said, obviously, if they had to be confirmed to the other position, then they would have to be confirmed. Mr. McCain suggested Mr. Taylor discuss that with Mrs. Hurley because, obviously, if she is having to ask this question, it might not be as clear as it could be.

Mr. Hastings suggested there could be a waiting period to clearly delineate from when a stop has occurred for employment to then go into something else. He said he thinks things could get further complicated if they were to say someone should be removed from a position, and Council determines they are not serving in that position, but then they get pushed off to another position and are still receiving funds and continue to be employed. He said it could get further complicated, but he does not have any strong feelings on that, to which Mr. Dodd added, as long as there is an open position. Mr. Cannon said of course the Council's authority as the Legislative Body would be only to reject them from that initial appointment, but what may happen after that he does not think is the Council's authority. Mr. Taylor asked if Mr. Cannon is talking about what may happen after that in terms of them working for the County, to which Mr. Cannon responded, yes. Mr. Taylor said they would be free to work for the

County, but, if it was a position in which they had to be confirmed, they would have to be confirmed. Mr. Cannon said the only position the Council has authority over is a position where they have to be confirmed, and, if they rejected that confirmation, Mr. Hastings has a really good idea about having to wait 90 days before they could be employed in another area, but he does not think Council has that authority. He said that would be a bit of an overreach on the part of the Legislative Branch. He clarified, he thinks it is a good idea, but it may not work.

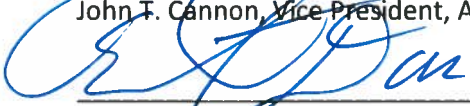
Mr. Dodd said, if Councilmembers have any comments after this, please submit them to Mrs. Hurley so they can try to get this worked out ahead of time. There was no further discussion.



Larry W. Dodd, President, District 3



John T. Cannon, Vice President, At-Large

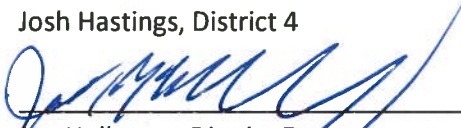


Ernest F. Davis, District 1

Nicole Acle, District 2



Josh Hastings, District 4



Joe Holloway, District 5



William R. McCain, At-Large



Laura Hurley, Council Administrator