

## **Open Work Session**

### **Discussion on Proposed Legislation Regarding the Employment Status of Certain County Employees August 4, 2020**

Mr. Taylor said this is a continuation of the Work Session Council had at the last meeting regarding the Legislation he was asked to prepare regarding certain personnel matters, primarily personnel who would be confirmed by the County Council for their particular positions, such as Department Heads, and Deputy Department Heads. He said the draft Council saw at the last meeting, basically, had everything thrown in, and was kind of a kitchen sink approach where everything was just in a list with different provisions. He said he took that draft and divided it into three separate draft Bills, the purpose being to conform to the legal requirement that a Bill is only supposed to address one particular subject, and this Legislation addresses several different subjects, which have now been divided.

Mr. Taylor said there are three draft Bills, a long one that is three pages, a shorter one that is two pages, and a very short one that is one page. He said on all three Bills he also added the prefatory, the whereas provisions, as well as a heading for the Bill, so that part is new from the material Council reviewed at the last meeting. He said the language that is down in the action part of the Bill, which is everything after the "now, therefore" provisions, is, essentially, the same language from last time except, as he pointed out, it has been divided into three separate Bills. He said this is what he was asked to do. He said he reviewed these with Mr. Maloney, and, in fact, it was Mr. Maloney's suggestion that Council should consider this type of Legislation. He clarified, there is one substantive difference. He said the fine provision discussed at the last meeting was for \$2,500, but the State Code that applies to what the County Council can and cannot do limits the power of criminal penalty or civil penalty to \$1,000, so the \$2,500 has been reduced to \$1,000, and he thinks that is the only substantive change.

Mr. Dodd asked if Council wants to move forward with this, to which Mr. Hastings responded, they still have the language in there about the incarceration. He then asked if that was supposed to have been pulled, to which Mr. Cannon responded, it still is there, and he believes the reason is because this is supposed to be in concert with the State statute, and is simply reiterating what the Maryland provisions already allow. He clarified, it does not mean that is what is going to happen, it just says that could be the maximum based on Maryland statute, and what they felt was appropriate. Mr. Taylor explained, the first bullet item in the second whereas clause, which is quoting from the Express Powers Act, states that State Code allows the Council to enact local Legislation to enforce ordinances adopted by the Council under the Express Powers Act by criminal fines and penalties for violation, including imprisonment not exceeding six months, and also the \$1,000 fine that he mentioned. Mr. McCain said just because it says that by no means does it mean Council should introduce Legislation that includes incarceration.

Mr. Davis asked how Council can enforce getting someone locked up, to which Mr. Taylor responded, it would be like any other criminal penalty where someone would prefer charges, and it would go before court. Mr. Davis said then the judge would draw the penalty, to which Mr. Taylor responded, Council establishes the penalty just like any other criminal law that is established by a Legislative enactment, but it is enforced and applied by a judge in a criminal trial.

Mr. McCain said, getting back to the whole issue of what is fitting for the situations they are talking about and including any kind of reference to incarceration, he has a serious issue with that. He said, since the last meeting when this was first talked about, he has had numerous people in the community reach out to him particularly on that one issue. He clarified, also about the whole issue in general, but particularly on the incarceration issue. Mr. Taylor said it is up to Council, and all he can do is draft the Legislation, but he will do it any way Council wants him to.

Mr. Holloway said he did not vote to hire Mr. Maloney, but the rest of the Council did, so he just does not understand Council voting to hire an attorney to come up with a solution, but then when he comes up with one, he guesses people are not happy about it. He said he thinks the incarceration thing is a little over the top, but it also gives it the teeth that would keep people from doing that. He said he thinks the thing about the employees should be more directed toward the person making the payment. He said he has talked to a number of employees who call him asking what happened at the Council meeting because a lot of them do not pay attention to what the Council does, but the person writing the checks knows what the Council does. He said he would be more interested in removing "employee" because, in some situations, an employee could keep getting paid when they were not supposed to be getting paid and not know it. He said the person writing or authorizing the checks and paying the bills knows what is right and wrong, and he thinks they are the ones who should bear the responsibility of any kind of infractions they make. Mr. Dodd asked if Mr. Holloway wants to remove the word "employee", to which Mr. Holloway responded, as he said, there are a lot of employees who are going to be caught in the middle of this whole thing, but he agrees that they should not do it if they know they have not been confirmed. Mr. McCain said they talked about this the last time, and he and Mr. Holloway agreed on this same issue. He said they can easily have employees caught in the middle who have a job and a title, and they are trying to do their job and their responsibilities, but they could get caught into this conundrum. He said that is why he has concerns with someone just simply trying to do their job they were assigned to do when there may be someone else more responsible than them, but having language in the Bill like they have here is some pretty onerous stuff. Mr. Holloway clarified, he does not have a problem with the incarceration part of it because, if somebody is blatant enough to go against the law, there are no ramifications for what they do wrong. Mr. McCain said these ramifications are pretty clear, they are removed from their job. He clarified, this gives the legal authority to remove them from their job, as well as potential fines, etc., so having their job removed is pretty final, to which Mr. Holloway responded, that is after they have spent the money.

Mr. Cannon said he thinks they are overthinking this with the employees. He clarified, this Bill is not saying Council is going to march through the entire Government Office Building and start locking up employees, to which Mr. Holloway responded, he realizes that. Mr. Cannon said this is simply giving Council the flexibility so that if there is one employee out there who is culpable, then Council has some type of recourse. He clarified, that is all it says, just like the laws of the land throughout the United States where every single person here can be held accountable. He said, if any one of them commit murder, they can be found guilty and executed, but it does not mean everyone in the country has to worry about it as if there is a cloud hanging over their head. He said this is just Legislation that will give Council, as the Legislative Body of Government, the authority to take measures if absolutely necessary. He clarified, Council may never have this come about whatsoever, but it establishes the groundwork if circumstances might develop, which they may not be able to comprehend yet. He said Council has been

surprised before, and they could be surprised again. He said, if the employee is culpable, fine; if not, then no employees have to worry about this, but at least it is here. Mr. Holloway said, in the beginning, somebody has to write that check, somebody has to make that payment, and they really should be the ones who are culpable. Mr. Cannon responded, he understands, but, then again, what happens if Council finds out that the employee and the supervisor were both in on it together? He said that is why Council should do this. He said this would cover everybody, but then there is a judiciary process where they can define who truly may be culpable or not. He said this just gives Council the overall larger picture to be able to deal with it if they have to, unfortunately.

Mr. Hastings said he thinks, above all else, what they do not want to have is a chilling effect. He clarified, they do not want to have individuals who could be very qualified candidates look and see if they want to work in Wicomico County, and then see this and then not want to, especially when it comes to a Finance Director, or somebody important. He said he thinks at a bare minimum they should drop the 60 days in jail because that is a little much. He said even seven days would make a point and do what it is supposed to. He said he thinks, whatever way Council goes with this, he just wants to make sure they are not excluding any kind of qualified candidates from wanting to work here.

Mr. Taylor said, to focus on Mr. Holloway's first point about the person who pays the money or authorizes it, on the bottom of the second page of the longer three-page Bill in Section 59-18, Payment of Salary Prohibited; Sanctions for Payment, it covers exactly what he was suggesting. He said there is then another section on the top of page 3, Liability for the Prohibited Salary. He said he will again point out that the only people this really applies to in terms of receiving a salary are those personnel who need to be confirmed by the Council in order to have their position, so they are talking about maybe 15 to 20 people, and he just points that out because he does not want anyone listening to think that this somehow would apply to every County employee because it would not. He said, in fact, a County employee could be discharged, but still come in and still get paid, and this would not apply because it only applies to those who have to be confirmed by the Council. He said he just wants to make clear what the thinking is on that, and also indicate that it addresses people who authorize payment of the salary. He said, bear in mind, this would only be that group of 15 to 20 people, and after their tenure, essentially, has ended, but they have remained. He clarified, in other words, it would not apply in any circumstances other than that, and those circumstances are in the very first part of the Bill.

Mr. McCain said Council has three versions in front of them, so he guesses Council has to pick, to which Mr. Taylor responded, they address different subjects. He clarified, they are not intended to be alternatives, they address three different subjects. Mr. McCain then asked if Mr. Taylor is trying to put all three of these Bills together, to which Mr. Taylor responded, no, he is trying to do three separate Bills to conform to the general principle that a particular Bill can only address a particular subject. He said, while they are on that, the two-page Bill addresses removal from office. He said then there is the one-page Bill entitled Other Rules, and that addresses a situation where someone is paid a salary that is not provided for in the Charter. He explained, they are three completely different topics, and that is why they are in three different draft Bills. Mr. McCain asked if there will be three separate Bills at the end of the day, to which Mr. Taylor responded, yes.

Mr. Holloway said this is a little off the subject, but back in 2007 when they had the incident at the landfill, there were a number of employees involved in that, and Council did not have anything on the books. He said, in fact, when the forensic auditor came in, he made some statements that if they had better laws and had kept better books, that would have never happened. He said there was no fear at that time of doing anything wrong that kept employees from doing what they were doing, and basically all that happened to the employees who were caught was they lost their job.

Mr. Davis asked, if there is an employee who violates one of these Bills, who files the charges, to which Mr. Taylor responded, the County Council could, or anybody could. Mr. Davis asked if Council would file charges against an employee, to which Mr. Taylor responded, if they violate the provisions, yes. Mr. Holloway asked if it would be the State's Attorney who would do that, to which Mr. Taylor responded, Council could probably take it to the State's Attorney. Mr. Davis then asked who would prosecute them, to which Mr. Taylor responded, the State's Attorney. He said they would not actually be County employees in the normal sense because their tenure would have ended, so they would, essentially, be former County employees. Mr. Davis said, when they go to court, the court is not going to abide by this Charter the Council has. He said the court has their own guidelines they go by, so with imprisonment, that judge is not going to want to see the Charter to charge this person, they are going to go by what they have on their books. Mr. Taylor said they would want to see the County Code, to which Mr. Davis responded, no, they are going to want to see the facts of what this person did. He then asked, why would the judge go off an ordinance from the County Council, to which Mr. Taylor responded, there has to be a criminal ordinance specifying a crime and a penalty. Mr. Davis said there has to be a criminal charge. He said, if the person was stealing money from the County, that is the charge, and they do not need an ordinance to see that they stole money. Mr. Taylor said, other than common law crimes, there is a whole big thick book of Maryland criminal laws for all kinds of crimes. Mr. Davis said they are pretty much trying to rewrite the State criminal laws when they are already on the books. Mr. Dodd said he thinks what Council is addressing is something totally different than somebody stealing money. Mr. Davis asked, then what are they addressing, to which Mr. Dodd responded, they are addressing someone working when they were not confirmed. Mr. Davis said that is stealing money, to which Mr. Dodd responded, he does not think the law looks at it that way. Mr. Davis said it is just like what Mr. Holloway said, they are looking at two people, and someone is writing the check for somebody who really should not be working, and that is theft, to which Mr. Dodd agreed. Mr. Davis then asked, then why are they rewriting the laws, to which Mr. Dodd responded, he does not think a judge is going to look at it that way, he thinks the judge is going to look for an ordinance. Mr. Davis said theft is theft, they do not need an ordinance. He repeated, theft is theft, to which Mr. Dodd responded, he does not know that a judge would look at it as theft, but, as he said earlier, he is not an attorney.

Mr. Taylor explained, the State Code allows the Council to define criminal penalties under express powers. Mr. Holloway said Council did that with the dog ordinance and the animal cruelty laws. He said Council set laws and fines, just as they did with the graffiti law where they set penalties for that, so Council can set penalties, and they have done it in the past. Mr. Dodd clarified, this is not a document that says Council is going to go around and pick out employees and have them arrested, it does not work that way. He said he looks at it as a deterrent to prevent stuff that has happened in the past.


Mr. Taylor said he has a thought, and he is not suggesting Council does this, but there seems to be angst about the imprisonment part, and a way to finesse that would be to leave the part about the fine in, but then if somebody is removed and does not remove themselves, and stays on after their tenure has ended, but there has been a removal procedure, and they still continue to come in and act as a County employee, then in that case the imprisonment provision would kick in. He said that would be a way to maybe play the card a little bit differently. Mr. Dodd said in that case they would have two parties involved, to which Mr. Taylor responded, assuming they were being paid, yes, the person who is paying them would also be involved. Mr. Dodd said that is what Council is trying to prevent. He said Council has been talking about having teeth for the past year, but now they want to tear this apart. Mr. Taylor said there would have to be a pretty egregious set of circumstances before any of this would apply, to be honest. Mr. Dodd said he does not see that happening, and he looks at this as a deterrent, to which Mr. Taylor responded, he agrees, and he thinks that is what the thinking was from Mr. Maloney.

Mr. McCain said he would like to see all of the references to incarceration not to exceed 60 days be struck. He said they actually asked for that the last time, but it is still in there. Mr. Dodd then asked Mr. Davis how he feels about that, to which Mr. Davis responded, take it out. Mr. Dodd asked Mr. Holloway, to which Mr. Holloway responded, it does not matter one way or the other. Mr. Dodd asked for a yes or no answer, to which Mr. Holloway responded, strike it. Mr. Dodd then asked Mrs. Acle, who responded, yes, she wants to strike it. Mr. Dodd said that is four for striking it, so there is no need to go any further.

Mr. Cannon asked, if they are going to strike it, could they replace it with just reemphasizing the Maryland Code again so that Council would have that authority without having to specifically state it, to which Mr. Taylor responded, if they do not specify it as the penalty, theoretically, then it is not within the court's jurisdiction. He clarified, in other words, Council would be defining the parameters for the court. Mr. Cannon said he agrees with the fact that it sounds terrible, but there may be some day that some Council may wish this had been done before. He clarified, it does not sound great, but there might be someone in the future who might be very glad if Council did this, to which Mr. Dodd responded, he feels exactly like that. Mr. Taylor said, as he said before, the only thing he can think of is to retain the imprisonment for someone who does not remove themselves after being removed. He said, in other words, this would be after their tenure has ended but they have stayed on, and Council has brought on a removal procedure, and decided to formally remove them under the second Bill, but then they still show up and are occupying their office and doing whatever. He said, at that point, the imprisonment would kick in, and that would just be a way to finesse that or play that card a little bit differently. Mr. Dodd said they would know they are violating the Charter, to which Mr. Taylor responded, exactly. He said it is pretty egregious, and not like somebody is just not going to know what the law is. Mr. McCain pointed out that Mr. Dodd just asked the Councilmembers about this, and four people have already said they would like to see that struck. Mr. Taylor said he was just thinking of leaving it in that one instance.

Mr. Holloway said they keep talking about the person showing up, but if they are not getting paid, they are not going to show up, and that is where it goes back to the person writing the checks. He said the person creating the problem is ultimately the person writing the checks, not the person showing up when they have not been confirmed. Mr. Dodd said it could also be the person approving writing the checks.

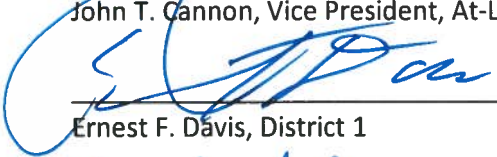
Mr. Dodd asked if everyone is good with the rest of the Bill, and if there is any opposition, to which there was none. He asked if everyone is good with moving on with it, to which there was a general consensus. There was no further discussion.



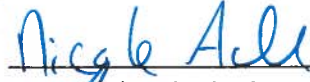
Larry W. Dodd, President, District 3



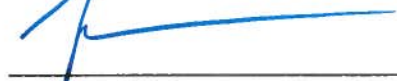
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Josh Hastings, District 4

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Laura Hurley, Council Administrator