

## **Open Work Session**

### **Discussion on Confirmation of Department Heads by Council in Accordance with Charter Sections 315 and 413**

**4/16/2019**

Mr. Paul Wilber, County Attorney, came before Council. Mr. Cannon thanked him for being at the meeting, and said Council is looking for some recommendations from him, as the County Attorney, as far as the path Council might need to take. He said, from their understanding, the Executive Branch has stated they will not be forwarding any of the existing names of the Department Heads to Council for approval, as is required by Charter, and he would like to get Mr. Wilber's opinion on this set of circumstances, the legality of it, and what the options or alternatives might be for the County as a whole. Mr. Wilber said, just by way of background, there were Charter amendments passed by the public at the last election in November. He said the two Charter amendments that are the point of discussion were relating to the appointment and confirmation of the Assistant Director of Administration, and Departmental Deputy Directors. He said the legal question that has come up is that Executive Culver has questioned the legal validity of the advertisement, and the ballot question that presented those Charter amendments to the public. He said, as he has indicated to both Council and the Executive, he considers the advertisement and the ballot question to be legally sufficient, so that is the legal question that is facing the County at the present time.

Mr. Kilmer said, setting that legal controversy aside for a minute, the Charter, as it has existed since 2006 when it went into effect, says that six months after an election of each County Executive, Department Heads must be submitted to the County Council for approval. He clarified, that is what the Charter has always said. He then asked if these ballot questions affected that in any way, and did they even touch on that, to which Mr. Wilber responded, the ballot question related to the appointment and confirmation of the Assistant Director of Administration, and the Deputy Department Heads. Mr. Kilmer said the Assistant Director of Administration's name has already been submitted and confirmed, so he is not sure why there is a legal question about this because that has already been complied with, to which Mr. Wilber responded, as far as that appointment, that is a moot question. Mr. Kilmer said he just wonders where the controversy comes up for Department Heads for the confirmation within six months after each election as that was not even a ballot question, so he is at a loss to understand what the controversy is about. He then asked if Mr. Wilber's opinion is that the Executive should submit those names in accordance with the Charter six months after the election, which would be May, as far as the timeline, to which Mr. Wilber responded, yes, but he will answer it in a more roundabout way. He said he thinks Executive Culver's position is that the advertisement and the ballot question create a legal validity question for the entire Charter section. He said, that being said, in his opinion, regardless of any legal decision about the new Charter amendment, the old language, which relates to Department Heads, is in place, and, correspondingly, the names should be submitted.

Mr. Dodd said Mr. Wilber has many years of experience as a County Attorney and with Government municipalities, so he thinks Mr. Wilber's opinion about the ballot question is validated since Mr. Wilber thinks everything is in place. He then asked what the issue is, to which Mr. Wilber responded, of course Executive Culver views it differently, so he thinks he could explain his position in an appropriate forum, but he has stated his position. Mr. Dodd said Mr. Wilber is still the County Attorney, so he appreciates his opinion, and he thinks the Executive should as well, based on experience.

Mr. Holloway said, according to Mr. Culver, he is not going to send the Department Heads to be confirmed. He then asked, if the Department Heads are not confirmed, what is the legality on being able to pay them due to the fact they are not confirmed, to which Mr. Wilber responded, he thought Council might ask that question, so he did a little research on that. He said he is looking at a case that is a 1975 case called Grooms versus Lavale Zoning Board, and there is a good discussion in that case of different categories public officials could fall in. He said one category would be where there has been the appointment and the confirmation, and he will call that the number one category. He said the second category is where there has been what he will call an appointment and a confirmation, but now they have a reappointment and reconfirmation scenario, so the question is where that leaves the Department Heads if the names are not going to be submitted. He explained, this case calls a situation like that an officer de facto, and he will read a couple sentences from that. He read, "The individual claiming the office be in possession of it, performing its duties, and claiming to be such officer under color of right." He explained, color of right in this case would be they received an appointment and a confirmation, and they have been acting in that Department since then. He continued reading, "Since color of right may consist of holding over after the expiration of a term," and he thinks this case seems to go right to the point they are now. He said, per the Charter, they are at a point where a Department Head would be submitted for appointment, and then confirmation of Council, so the question is what category is that Department Head in, and he thinks this language of holding over at the expiration of term is where they would be. He continued reading, "One who is actually in possession of public office by virtue of holding over after the expiration of a previous official term, and who discharges the duties of such office is at least a de facto officer." He said one more sentence talks about "Public offices should be filled at all times without interruption. In accordance with this principle, the Court of Appeals has recognized that an elected or appointed officer may remain in office at the expiration of their term, and is entitled to exercise the powers of the office until his successor qualifies, whether or not the statute creating the office so provides." He said that sounds like a lot of legality, but the bottom line, he would say, is that existing Department Heads who were appointed and confirmed, albeit four years ago, are said to be holding over at this point, and will continue until such time there is a change.

Mr. Holloway said Mr. Wilber is saying he agrees with the Charter, but Mr. Culver does not agree with the Charter. He then asked if Mr. Culver received that legal advice from someone other than Mr. Wilber, to which Mr. Wilber responded, he thinks that question would be best directed to Executive Culver.

Mr. Kilmer asked, when there is a blatant violation of the Charter in this way, what are Council's options as a Council, to which Mr. Wilber responded, as he has previously indicated, he has a duty under the Charter to represent both the Executive and the Council, so he cannot be involved if there is going to be a court action of some sort to determine the question they are talking about here, which is the validity of the Charter amendments and the Charter language. He clarified, he cannot be involved, and then both Council and the Executive should each have representation. Mr. Kilmer said, as they discussed at the last meeting, outside counsel can only be retained by Resolution by the County Council, to which Mr. Wilber responded, that is what the Charter says, so that is correct. Mr. Kilmer said he guesses the larger philosophical question is, when someone see what the Charter says, but say they do not care, and they are just going to do something else anyway, which seems to be the case here in both instances, what is the remedy, to which Mr. Wilber responded, when two parties have a dispute about what a Charter, or, in a more general sense, a contract says, that requires a judicial decision. Mr. Kilmer said this is a sad situation if that is the case.

Mr. Dodd asked if the case Mr. Wilber read is a County Government, and does it apply to their Government, to which Mr. Wilber responded, this was out of the Circuit Court for Alleghany County,

Maryland. Mr. Dodd said Mr. Wilber said something about a Zoning Board, to which Mr. Wilber responded, correct. He said it involved appointing a Zoning Board.

Mrs. Hurley said, for clarification, Mr. Wilber mentioned that the Department Heads who were confirmed after the last election would be considered holding over, to which Mr. Wilber responded, that is what this case indicates to him. Mrs. Hurley said they have Department Heads who came on board after that election. She then asked how Mr. Wilber would categorize them, to which Mr. Wilber responded, he would say any Department Head who was appointed and confirmed, whether it was four years ago or two years ago, would now be in the holding over category.

Mr. Cannon said he thinks it is somewhat unfortunate they are going down this road with such a pretense that this is even an issue of anything substantial in reference to the Charter. He clarified, he thinks it is very unfortunate because they are, actually, seeing that they are literally jeopardizing the security of the Department Heads in Wicomico County, and they are jeopardizing the security of the County's ability to function as a whole. He said he thinks this pretense of evaluating the Charter one way or another really should come to some type of resolution where they do not have to go any further, or take any major steps. He said it has been suggested that they will have to settle this through arbitration in court. He said he thinks the game should stop, and should stop soon. He then asked Mr. Wilber if he would consider this a misappropriation of funds if the Department Heads are paid without confirmation, if they are funded after that time, to which Mr. Wilber responded, based on the case he is referring to, he thinks it is not a misappropriation of funds to continue to pay Department Heads. He said they continue to act in their capacities, and he thinks the County, correspondingly, is required to pay them. Mr. Holloway asked if that was the only case Mr. Wilber found subject to this matter, to which Mr. Wilber responded, actually, there are many cases cited in this case. Mr. Holloway asked if there have been any cases since then, or more recently than 1975, to which Mr. Wilber responded, he thought this case best stated the categories public officers can fall into.

Mr. Taylor said he has a few questions on what has just been discussed following Mrs. Hurley's questions. He said, as he understands it, Mr. Wilber is saying that the case he cited would apply to employees or an official who has been nominated and confirmed, and that they would hold over, and be entitled to be paid. He said, if they have not been confirmed, then they would not fall within the ambit of that case. He said, in that case, the payments would not be proper. He then asked if that is a fair reading of what Mr. Wilber is reading, to which Mr. Wilber responded, yes, and he would say, based on the cases he read, and it is not just this one, if they have an appointment but no confirmation, that would then place in question this idea of holding over. Mr. Taylor said, in other words, if they have not been confirmed, they are not really holding over in this particular context of this case, to which Mr. Wilber responded, correct. Mr. Taylor said he has a hypothetical question, and he will preface it by saying he agrees with Mr. Wilber on his reading of the Charter amendment and the advertising for it, and he is totally 100 percent on that. He said his hypothetical goes to the argument that is being made by the Executive, and that is, assuming, hypothetically, there were something improper in that advertisement and that referendum process, as he understands the law, what would happen is then the amendment would just be negated, would not have any effect whatsoever, and the Charter would be just like it was before the referendum vote, to which Mr. Wilber responded, that is also his opinion. Mr. Taylor said he thinks there is fairly good authority on this in Maryland. He said, in so many words, he guesses what that means is that, as far as the employees who are already covered by the appointment and confirmation process in the Charter before the referendum vote, that remains the same, and has not been changed, to which Mr. Wilber responded, correct. Mr. Taylor clarified, assuming, hypothetically, that the County Executive has a legal argument, which he does not think he does. Mr.

Cannon asked if what Mr. Taylor is saying is that even if there were proof to discount the amendment, the original Charter would still be in place, and the recommendations would have to come forward for confirmation, to which Mr. Taylor responded, yes. He said that is the net effect of an amendment not being valid. Mr. Kilmer said, if that was the legal position, which does not seem supported by any facts, then why submit the name for the Assistant Director in compliance with this Charter amendment if the thought was that the Charter amendment was invalid. He then asked if that undercuts any sort of legal argument if Mr. Culver complied with the law, which he thinks is invalid, to which Mr. Wilber responded, he would say that would be a question for the Executive. Mr. Kilmer clarified, he is asking legally. He said, one can raise an objection to a law, but, if they comply with it in part, and then do not comply with it, can Mr. Wilber elucidate that sort of situation, to which Mr. Wilber responded, that is a difficult position to defend.

Mr. Holloway asked if that same case applies to someone who is working in a different capacity, such as an employee who was confirmed as one Department Head, but, in the meantime, was changed to another Department, but has not been confirmed, to which Mr. Wilber responded, that would place a public official in a different category for that second position. Mr. Dodd asked if that would be a hold over, to which Mr. Wilber responded, if he is understanding the question, in the example they have a public official who was appointed and confirmed in one Department, and would be holding over, in his opinion, in that Department, but a public official who has been appointed, but not confirmed is not a hold over situation. Mr. Holloway asked, if that public official is being paid, would Mr. Wilber consider that improper, to which Mr. Wilber responded, the public official should be paid in the first instance of appointment, confirmation and hold over, but the second instance is certainly more problematic.

Mr. Cannon said the takeaway would be, in Mr. Wilber's opinion, that it is a Charter violation for the Executive not to submit the names of the Department Heads for confirmation by the County Council, to which Mr. Wilber responded, in his opinion, the appointment and confirmation process for Department Heads is in place in the Charter, and it should be complied with.

Mr. McCain said the challenge is that the Charter does not address what happens in this situation, so the question for Council is where they go from here, to which Mr. Cannon responded, that is a good point. He then asked Mr. Wilber if the Charter violation is a misdemeanor, to which Mr. Wilber responded, no.

Mr. Kilmer said he thinks the deadline is May, which is six months from the swearing in, to which Mr. Wilber responded, six months from the date of the election is the critical date, which is May 5<sup>th</sup> or 6<sup>th</sup>. Mr. Kilmer said there is still hope that it could happen, and there has not been a violation quite yet. He said this is not a legally supportable argument, he does not think, by anybody's means, so it would be his hope that calmer thinking prevails, they go forward like the Charter says, they move into budget season, and everything goes smoothly and works great. He said that would be nice if that would happen, and he guesses they will find out at the May meeting.

Mr. Taylor asked Mr. Wilber for the citation to that case, to which Mr. Wilber responded, *Grooms versus Lavale Zoning Board* 27 Maryland App 266.

Mr. Cannon said he thinks it should be recognized that the Charter is not what one would call a code of honor, but is, actually, the law, to which Mr. Wilber responded, it is the Constitution of the County. Mr. Holloway said they have all taken an oath to uphold that Constitution.

Mr. Dodd said he thinks Mr. McCain suggested they need to work on the Charter to help rectify this in the future, but right now this situation has to be remedied, to which Mr. Kilmer responded, but it is just going to be ignored. He clarified, they can write whatever they want in there, but it is just going to be ignored. He said they have a situation where it is just blatantly ignored, so he does not know that putting something in there saying this really has to be followed would change anything. He said he agrees that it needs to be done, but, if it is just going to be blatantly ignored, he is not sure what to do in that situation. There was no further discussion.

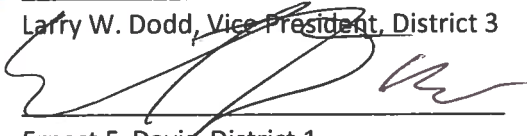


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John T. Cannon, President

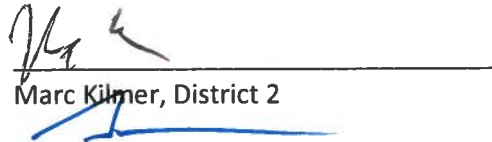
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Larry W. Dodd, Vice President, District 3



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Ernest F. Davis, District 1



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Marc Kilmer, District 2

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Josh Hastings, District 4

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Joe Holloway, District 5



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William R. McCain, At-Large



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Laura Hurley, Council Administrator