

## **Open Work Session**

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

**May 7, 2019**

Mr. Robert Taylor said he will briefly review why they are discussing this tonight. He explained, as everybody probably knows, Mr. Culver has, apparently, declined to make appointments of Department Heads pursuant to the Charter. He clarified, when he says pursuant to the Charter, he is talking about the sections that require that after each election of the County Executive within six months of the election the County Executive shall, which is not optional but mandatory, according to the language, submit appointments for all of the Department Heads, which has not occurred. He said the six-month deadline happens to be today, and he guesses Mr. Culver could still come in at this meeting and do it, but they will assume he is not going to do that for the purpose of discussion. He said, as Council probably also knows, in last week's newspaper there was a fairly extensive article where Mr. Culver elaborated his argument in reference to last year's referendum vote to amend the Charter. He clarified, when he says amend the Charter, he is talking about adding some additional positions to that group of positions that have to be appointed after every election, but, under Mr. Culver's view of it, somehow that changed the Charter, so he does not have to appoint the Department Heads anymore. He said, at the last meeting, they got into this with Mr. Wilber, and he has advised that is not the case, and that the amendment that was passed last year adds these various offices, and does not take anybody out, so it did not remove the Department Heads. He said, as a result of that article, he did a very short memo analyzing Mr. Culver's argument that somehow it changed the Charter. He said, even if he and Mr. Wilber were wrong on their interpretation of the amendment last year, what was on the table, and by that he means the ballot question that was before the voters last November, could not have removed anyone because that was not part of Council's Resolutions that started the process to amend the Charter, which resulted in the ballot question, so it was not within the cards. He clarified, what was before the voters was either to vote up or down on the amendment that Council had proposed, not to do anything else. He said he just wanted to briefly hit that before they get into where they should go, which is why they are here.

Mr. Taylor said, in his view, Council should try as best it can to conform to the Charter, and proceed as the Charter lays out. He said he understands the appointments have not been presented, but he thinks in this particular instance it would be appropriate and reasonable to assume that whoever is now serving as a Department Head is, essentially, Mr. Culver's appointment, and are serving at his pleasure. He said the only thing Mr. Culver has not done is turn in a list of the names, but they can figure out who the names are. He said, in his view, Council should take the next step under the Charter, which is confirmation or rejection of the Department Heads, and that is, he thinks, where they should go. He said it is logical to proceed as closely as they can to the Charter's mandates and plan for how Department Heads are to be appointed after every election, and confirmed or rejected by Council. He said that would be the next step, in his view, and for Council to consider the Department Heads who are in place as, essentially, his nominees, and pass on them in the same manner as if he had appointed them tonight. Mr. McCain asked what timeframe Mr. Taylor is saying this needs to be done, to which Mr. Taylor responded, normally the Charter provides a 45-day window. He said, in other words, if Mr. Culver had made the appointments on the first of January, Council would have had 45 days to confirm or reject them. Mr. McCain said the Charter also says it has to be done in six months, which is today, to which Mr. Taylor responded, that is correct, but the 45 days is additive to whenever he appoints them, so it would be additive from tonight if they are going to assume it is like he is making the appointments tonight. Mr.

Cannon clarified, it is six months to make the appointments, and then 45 days for Council to confirm them. Mr. Taylor said this is the end of the six-month period, not the 45 days.

Mr. Holloway said the Charter says Mr. Culver is to present the appointments to Council, but he has not done that. He then asked if Mr. Taylor sees any conflict with Council just skipping that step. He clarified, Council is not skipping it, but Mr. Culver is, to which Mr. Taylor responded, he does not see a conflict, and he will tell them the reason. He explained, the Charter sets out a process. He said, in other words, there are supposed to be appointments to be rejected or confirmed by Council, and they know, or at least it is a fair assumption, that there are Department Heads in place right now as his appointees. Mr. Holloway said he appointed them, and Council confirmed them the last time. Mr. Cannon clarified, what Mr. Taylor is saying is the fact they are working in that position is the same as an appointment, to which Mr. Taylor responded, that is correct. He said the only thing Mr. Culver has not done is turn in a piece of paper with the names on it. Mr. Holloway said the sad thing is these folks are out here kind of in limbo, to which Mr. Taylor responded, that is another reason to assure the people who are appointed that everything is going to go on as if he had made the appointments, and Council had acted on them. Mr. Holloway said he is actually kind of surprised they have not lost somebody because of this, to which Mr. Kilmer responded, the problem is going to come if they reject anybody. He clarified, if they approve them, they will go on, but he thinks a person's legal status would be highly questionable if they continue to serve after Council rejects them.

Mr. Cannon said they will follow Mr. Taylor's process, and either approve or reject the individuals who are in these different positions, and he does not anticipate much will change from the Executive Branch. He then asked what happens following that if Council has rejected any of them. He said he is assuming they are still going to be on the payroll, and still getting paid, so exactly how would Council address that. He said that is the key issue. Mr. Taylor said this is addressed in the memo he submitted to Council earlier, but he thinks what would happen is, once they are rejected, they no longer are entitled to serve. He said he knows there is a doctrine called the de facto officer doctrine, and they talked about that at the last meeting, but he thinks that would not apply in the situation they have under their Charter where they have this process of appointment for confirmation or rejection. He said, in other words, there is a discrete time period that an appointment runs for, even if they had been confirmed by Council, so if they had been approved and confirmed by Council after the last election four years ago, then their term would, essentially, end at the end of the six months plus 45-day period.

Mr. Cannon asked, if Council makes their decision and choose, hypothetically, not to appoint one or two individuals, or whatever that circumstance might be, what happens the next day when that employee shows up for work, to which Mr. Taylor responded, in his opinion, they are not entitled to their position. He then described a case in Maryland some years ago in a somewhat similar situation that involved a municipality, not a County, where the police force was appointed every year. He said, making a historical comment, this was not unusual for back in the day, and often every police officer in a municipality had to be reappointed every year, and, in this case, confirmed by the Town Council. He said, in this case, the mayor appointed several people, and some of them were approved by the Council, and some of them were rejected. He said it went to the Court of Appeals, who said the ones who were rejected were not entitled to serve, so that is pretty close to what they have in the situation which Mr. Cannon just mentioned. Mr. Cannon asked, if Council was to reject anyone, and that individual came to work the very next day, would they then be going to court, to which Mr. Taylor responded, he does not think they necessarily need to go to court. He said he believes what could be done to avoid that, and he mentioned this at the last meeting, is Council could put a condition in the 2020 budget which states funds cannot be paid to anyone who has not been duly confirmed as a Department Head. Mr. Cannon said Council

cannot make itemized cuts, but they have a salaries category, to which Mr. Taylor responded, he agrees, but this would not be a cut, but a condition, and there have been several similar cases in Maryland. Mr. Cannon asked if Mr. Taylor is saying that, by law, they could fund the position, but still put a restriction on the expenditure, to which Mr. Taylor responded, correct. He clarified, in other words, if someone was rejected, and then after that someone else was duly appointed as that Department Head, the salary could be paid, but it could not be paid to somebody who has not been properly confirmed.

Mr. Dodd said he is trying to understand this, as he is not an attorney, although he has been involved in politics for a long time, and he thinks this is the first time he has ever come across a situation like this as far as appointments. He said he wants to stress that Mr. Cannon stated the situation hypothetically, which is what they are discussing right now, a hypothetical situation. He then asked what would happen the day of termination, and he is not saying it is going to happen, but what would happen if a person is paid, to which Mr. Taylor responded, he thinks if Council puts the condition in the budget that they cannot spend money that way for that particular person, he thinks that is an improper expenditure of the appropriated funds. He said he will point out that, back in the 1940s, a County treasurer in Wicomico County was prosecuted for making improper payments, removed from Office, and convicted of a misdemeanor, so there is some muscle here if needed. Mr. Dodd said this is an unfortunate situation, to which Mr. Taylor responded, he agrees. He said it is very unusual.


Mr. Cannon said he is glad Mr. Taylor helped Council with this because, honestly, he thinks putting the restriction on the funding is much more beneficial, if they have to go in that direction, than playing this out in the courtroom. He said the last thing he wants to do is see the County taking the County to court, and it should never be this way, to which Mr. Taylor responded, he could not agree more.

Mr. Holloway said they should not even be having this conversation because it should have been done properly to begin with. He said Council should have gotten the appointment list, and be able to do what they are supposed to do. Mr. Kilmer said they received the appointment list in December, but then Mr. Culver took it back, so the idea that all of a sudden it is against the Charter now to do that seems undercut by the fact Council got it in December, to which Mr. Dodd added, especially after they confirmed two positions. Mr. Kilmer said Mr. Culver thought it was fine back in December, but now it is not. Mr. Cannon said there is often the case, not just in government, but in life, where someone does not like the way things are going to go, but they are still obligated to follow the law and abide by the law. Mr. Taylor said this is the Charter.

Mr. Hastings asked, to be clear, from today are they assuming these are de facto appointees, who Council has 45 days to confirm, to which Mr. Taylor responded, yes, Council has a 45-day window. He said, for example, if Council makes their confirmations and/or rejections at the next meeting, then that 45 days, of course, would be truncated to the next meeting.

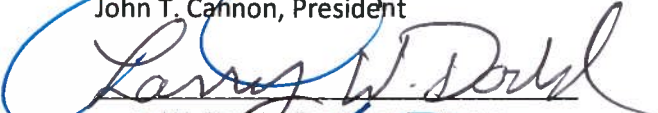
Mr. Dodd asked if, as of midnight tonight, there is a violation in the Charter, to which Mr. Taylor responded, it looks that way to him. Mr. Dodd asked if it is legal for Council to assume, and he is just going to use that term because he does not know legal jargon, that the current employees or Department Heads who need to be appointed are the appointment, to which Mr. Taylor responded, he certainly thinks that would be. He said he will correct one thing that was said, which is that it is a violation of the Charter, but he would call it more of a noncompliance with the Charter. He clarified, the Charter says the Executive is to make the appointments, and he has not done it. He said they can look at it different ways, but he would call it noncompliance.

Mr. Cannon thanked Mr. Taylor, and said he knows it has been a lot of work on his part, and Council appreciates that. There was no further discussion.



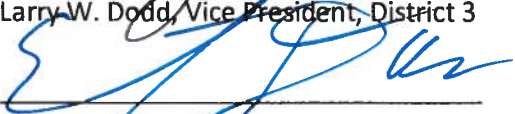
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John T. Cannon, President



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Larry W. Dodd, Vice President, District 3



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Ernest F. Davis, District 1

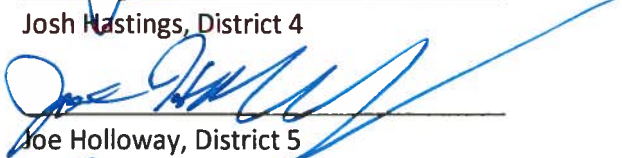
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Marc Kilmer, District 2



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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