

**Minutes of the Meeting of the Finance and Legal Committees
Held in the Caucus Room of the Municipal Building
On Saturday, April 9, 2016 at 9:30 A.M.**

Committee Members Present:

Ward 2 Councilman Dennis McBride (Chairman, Finance Committee and member of Legal Committee); Ward 1 Councilman Bob Butkowski (Finance Committee); Councilman-at-Large Brian Fischer (Chairman, Legal Committee); Councilwoman-at-Large Tammy Holtzmeier (Finance Committee)

Others in Attendance:

Law Director John Gasior; Residents Jerry Karp, Ed Bradac, Scott Radcliffe, and Norm Incze; Council President Craig Witherspoon; Clerk of Council Ellen Young; Mayor Bryan Jensen

Finance Committee Chairman Dennis McBride called the meeting to order.

Ordinance No. 41-16 – Update Position Description for Clerk of Council

Mr. McBride stated that they were there to discuss Ordinance 41-16 and the Classification Specification for Council Clerk, the issues being what the minimum requirements should be for the position and if the Ordinance should be amended from what was presented at last Monday's Council meeting.

Mr. McBride said that he wants to define this as a professional position, where the person has to meet certain criteria and the position is not subject to overtime and compensatory time. He said that, in the class spec, we should be asking for more than a minimum of a high school degree or GED equivalent. He is not necessarily saying that a 4-year college degree is required but he thinks that we should be looking for that as a preference and saying that we prefer the attainment of municipal clerk certification as we move forward. If we are going to pay the Clerk of Council more than we are paying the Administrative Assistant to the Mayor, then there should be some increased requirements for that position.

Mr. Witherspoon said that he talked to Sandy Conley yesterday on this issue of requiring more of an education than a high school diploma or a GED and she told him that you have to have one or the other. You cannot require the GED or high school education and then require a college education. The reason for that is she said we will find ourselves in a situation where someone will come in and they have the high school education and for some reason, we do not want to hire them, and then a lawsuit ensues because we are discriminating against an individual.

Mr. Gasior said that is right because the current requirements are for a GED or high school education so if you bump that up to a college degree and somebody comes in and does not have that degree, they are going to say, that the job has been performed for years without a college degree; how can you say that it requires one now? What has changed in the job that requires it now? Ms. Conley's point was to use the word "preferred" in all these contexts. You would "prefer" that they have a college education, you would "prefer" that they have the municipal clerk certification or that they get it in two years, etc. but these are not required. The class specs as they are written right now are not that significantly different.

Mr. Gasior stated that the other thing that he discussed with Ms. Conley was the issue that Ms. Berges brought up in the email that she sent out and that is the Fair Labor Standards Act. With the position description being what it is, are we going to expose ourselves to overtime compensation despite the fact

that we label the individual “non-exempt”. Ms. Berges gave him a copy of the definition in the FLSA, which is in short: the FLSA exempts (does not cover) a legislative employee of a political subdivision. So by being not covered, we do not even have to get into the concepts of exempt and non-exempt because they have no meaning if you are simply not covered by definition under the FLSA. To the best of our knowledge, the only position in the City that might not be covered is the Clerk of Council position.

Mr. Gasior stated that we do have an anomaly in our Codified Ordinance 256.10(b) where we talk about employees being paid and we have included that in the language of Ordinance No. 41-16 to some degree. Ms. Conley’s recommendation was that we amend 256.10(b) and insert the word “covered” so that we can distinguish between all the employees in the City that would be covered under FLSA and then those one or two employees that are legislative employees that would not be covered. And then our exempt and non-exempt will only be applicable to our covered employees. In a sense, we are really just making sure that the legislative employees are separated from everybody else in the City and treated differently because that is what the FLSA requires.

Mr. McBride asked if we want to exempt one or two legislative employees from potentially being covered. Mr. Gasior said that we have a situation here where they would be non-exempt. The Clerk’s position, if it was a covered position under FLSA, given the nature of the position, would be a non-exempt position. It is not an executive function; it is essentially a clerical function. It does not have any administrative characteristics to it and so it really would be a non-exempt position under FLSA. What we have right now is that it is not a covered position except for that one word in our ordinance, so if we are heading in the direction of wanting to make the position salaried, and exempt basically, so there is no overtime, we have to amend that Code section and put that word “covered” in so that it is clear that we are dealing only with a covered employee and since the Clerk is not covered, she would not be subject to any of those requirements in 256.10.

Mr. McBride stated that, setting aside FLSA for a minute, does the Clerk’s position remain as is or do we want to professionalize it, not that Ms. Young has not been a professional, and give that Clerk’s position a fair amount of autonomy. Mr. Butkowski asked Mr. McBride what the position would look like in his opinion and Mr. McBride responded that there would be research; there is a lot of research that the Clerk could be doing for the Law Clerk in terms of Ordinances, drafting ordinances, etc. as Ms. Young has done in the past. And she has gone out and gotten quotes, done a lot of things for us that are really almost outside of the normal Clerk’s duties, almost being a pseudo Clerk/project manager for Council, which sets that position apart from the Mayor’s Administrative Assistant and thereby we can separate the salaries. It has always been a baseline in the City that the Clerk and the Mayor’s Administrative Assistant are on equal footing.

Ms. Young stated that one of the reasons that Mayor’s Administrative Assistant and the Clerk of Council have been kept parallel is because they are the only two full-time employees that work at City Hall that are not covered by union contracts. So the positions can be tenuous, but where there is a difference is that the Clerk of Council attends meetings, which is where the overtime would come in. She said that if you keep the person at hourly, she still thinks that overtime is going to have to be important. If you are going to make the person salaried, you have to take time for meetings into consideration. The Clerk of Council’s job is unique; it is autonomous just because of the fact that there is not a supervisor for the Clerk working in the building so the supervisory aspect of the job is a trust issue. As far as whether a person is exempt or non-exempt, she would hope that you would continue to offer them all the benefits that are afforded to all the people that are covered. She considers that a part of her wages that she has PERS and part of her health care is paid. That is enormous and she would be careful to keep that in.

Mr. McBride said that he thought that the clocking in and clocking out, the overtime, the comp time, etc. were all clutter that we do not need in the position. If you have the right person, it is not an issue. He thought that the salary needs to set at a range where it is a good wage and meetings are part of the job duties. We could write in as part of the Council rules that the Clerk comes in late on Mondays, or that if the Clerk obtains a certified municipal status that it is an additional amount of dollars of salary, etc. Mr. Witherspoon felt that we do not have to write that in; if the new hire would become certified, we should value their effort and increase their salary. Ms. Young suggested that that could be part of the job offer. Mr. Butkowski added that those are more of the expectations which are stated through the interview process and the hiring, saying to the person that they would start at this point but the expectation is that within a certain time period, they would be at this level, and with that there would be a commensurate salary change. He asked Mr. Gasior if we would be opening ourselves up to any potential issue down the road if we do not cover that position but yet offer benefits and Mr. Gasior answered that the position is not covered under FLSA, period. The only reason that the overtime issue comes up is because of Ordinance 256.10 and the ordinance specifically says that all full-time employees who are paid an hourly rate will receive all of these benefits. If you amend this ordinance to say, all full-time covered employees get these benefits, then you have kind of excluded the Clerk of Council from those benefits. But if you look at our Clerk's ordinance, it states the pay and says, in addition said employee shall receive all other benefits of a full-time unclassified, non-bargaining unit employee, which is almost like a reference back to 256.10. If you want to exempt just the overtime provision then he would suggest that you specifically say, "except for overtime". No matter what we do here, we cannot change federal law and turn an uncovered position into a covered position under the federal Fair Labor Standards Act. But we can still give that employee those benefits by just saying that they will get the benefits of a covered employee and that is what we have done.

Mr. Gasior continued by saying that the way this ordinance is written, it is fine now because we have not changed 256.10. Once we change 256.10 we may want to put something in here to say if you want the Clerk to have all of those benefits, which includes overtime, then you might want to say, "all benefits of a full time covered employee under 256.10." Ms. Young asked, so if you say covered and they are salaried, you have to pay them more for going to the meetings? Mr. Gasior said, that is what Ms. Berges is talking about. He thought everyone understands this "covered/uncovered FLSA"; now there is a concept of "exempt" and "non-exempt" for covered employee purposes. So now we have covered employees, and we have to find out, are they exempt or non-exempt because a covered employee does not automatically get overtime for handling a salaried position. There is nothing in the class spec for the Clerk of Council to warrant them being considered an exempt employee. So that would mean that they would be eligible for overtime regardless of whether you pay them a salary or pay them hourly because they are basically not doing anything other than clerical administrative type work. The only reason we are in this situation is because technically they are not covered under FLSA, but we have been paying them overtime and doing it legally because our ordinance said we were going to do it. We were going to pay the Clerk all the benefits of a full time employee in the City of Avon which under 256.10 included the overtime. So really the issue here is, is our new Clerk of Council going to be eligible for overtime, regardless of whether we put them on salary or leave it as hourly.

Mrs. Holtzmeier stated that she looked up the Ohio State Bar Association regarding overtime for exempt employees under the FLSA and what caught her eye was, when do an employee's duties trigger an administrative exemption? She wanted to discuss whether we thought that the duties of the Clerk would trigger the administrative exemption, specifically the last bullet point where they talk about that the positions require independent judgment and they meet the needs of their employers without

specific instruction and deal with significant matters. Our Clerk does exercise a great degree of autonomy; the position as a rule does. So even if this role is a legislative position, does this administrative exemption apply? Mr. Gasior said that just because a person is unsupervised does not mean that they are meeting all those other criteria. The Clerk has to make up their own schedule within the confines of their duties. When it comes to overtime he thought that there is a problem because they could be directing their own overtime.

Mr. Witherspoon said the question is, do we want to pay overtime or not and his thinking is that we do not so how can we address this. Mr. Gasior said that we will just add that to the hiring ordinance that they will be eligible for all of these benefits in 256.10 except for overtime. Mayor Jensen added, but you are not really saying that you do not want them to have overtime. You are basically saying that you are going to incorporate within their salary the anticipation of extra hours and that is what we do with all our Department Heads.

Mr. McBride stated that he was ok with the class spec but he would like to see added that a 2-year or 4-year degree was preferred. Mr. Butkowski said that for him it is qualifications that are determined during that interview process; he does not want to exclude qualified candidates that do not have that particular degree. Mr. McBride said that we would not be excluding because we would just say that it is preferred. Mr. Witherspoon stated, if you say "preferred", does that eliminate the numbers of people that will apply for the job if they see that? Mr. Butkowski added, and that is where he would rather have the largest pool of candidates to start with and we can narrow it down through the interview process. Mr. Fischer asked if the word "supplemental" would help with clarification. He noticed that other things stated, "GED supplemented with additional college type coursework".

Mr. Gasior said, in regard to Mr. Butkowski's comment about trying to get a large pool of candidates and not narrowing it down by using the "preferred" language in the application, that is where discrimination kind of comes in and you have to be very careful there. If you have no preferred language in that application process and then you decide to go with the person that has the 2 or 4-year degree, the person who has the high school diploma with 12 years of experience, may claim age discrimination because you passed that person over for a younger individual with a college degree and you did not "prefer" up front. There is a risk when you are fishing in that bigger pool that you can run into that discrimination category, whereas if you tell everybody up front what you are really looking for, what is preferred, then when you hire, no one is going to complain that they did not get hired with a college degree if you hire the person with 12 years experience and a high school diploma. He said that Ms. Conley is recommending that we stay away from things that can create that discrimination claim down the road.

Mrs. Holtzmeier said, so we seem to agree that the certified municipal clerk designation is something that would set some candidates above and beyond others regardless of whether or not they have a college degree. And so if there is something to prefer, maybe we want to prefer that particular language. There was then discussion about types of degrees, experience, computer skills, etc. that candidates might have. Mr. Butkowski stated that he was ok with the current spec the way that it reads with the understanding that we are looking for an experienced candidate. Mr. McBride added that he was good other than the thought that we need to specifically say in the spec that medical and pension benefits are provided. Mr. Gasior said that is not in the job spec but it will be in the ordinance that sets the pay and the benefits, which is Ordinance No. 42-16. He thought that what will happen is a candidate will ask what "unclassified" means and it will be explained to them that there is no Civil Service coverage for this position, non-covered means that they are not eligible for any overtime, but

we do have a benefit package in our pay ordinance for this job. He said that all of that is in the class spec and is readily explainable to the applicant.

Ms. Young noted that in the current class spec, we have “must be willing to attain designation” and she thought that it should say, “certified municipal clerk designation within a x number of years preferred”. Mr. McBride felt that we should require that they attain that within x number of years; we want someone who is actively going to work toward it. Mr. Gasior said that right now, it says “must be willing to attain CMC designation within five years.” He would just strike the “must be willing to attain” and then just put “CMC designation preferred” and then you follow it in the interview process. You just say, we prefer that you have it, we want to see you start to work on it as soon as you are hired and have it within three years. And then if the person is not moving toward that goal, then that reflects on their continuing in the position itself.

Ordinance No. 42-16 – Amend Compensation for Clerk of Council from Hourly to Salary and Establish Salary Range

Mr. Witherspoon stated that we set up \$55,000. - \$70,000. as a salary range. His thinking behind that was that Ms. Young currently makes \$55,000. and if we set the range at \$55,000. - \$70,000., we are going to get the qualified people in to interview. But that is open for discussion.

Mr. Fischer said that he was fine with it just so we have taken care of the issue that Ms. Berges had stated in her email and Mr. Gasior said that they had. Mr. Fischer stated that she also had something in her email about the salary. Ms. Young noted that was for bargaining purposes. Mr. Gasior said that Ms. Berges had listed a range of \$45,000. - \$70,000. and Mrs. Holtzmeier read Ms. Berges’ email: “companies will usually hire someone at a salary between the minimum and the mid-point. The current ordinance has a minimum salary of \$55,000. which is what Ms. Young is making with years of experience. My recommendation is to have the minimum at \$45,000. so we have some flexibility if we actually need it.”

Mr. McBride stated that he thought that we need something in writing someplace about an increase in salary when certification is attained. Mr. Gasior said he thought that could clutter the class spec a little bit because there are so many different certifications that a Clerk can obtain. Mr. Witherspoon agreed; he said that there are different degrees of certification and you would have to go in and figure out each certification and each increase. Mr. Gasior said it would be better to leave it up to Council to review; the President does a review over the course of the year and can determine what the Clerk has achieved in that time period in terms of outside educational experience. And Council has that pay ordinance every year. Mrs. Holtzmeier asked if a probationary period has to be in the specification and Mr. Gasior answered that a six month probationary period is in the Code. Ms. Young stated that she thought that the \$45,000. figure is low and will not encourage the kind of experience or education that we are looking for.

Mr. Witherspoon then asked what the decision was on the salary. Mr. McBride said to keep it at the range of \$55,000. - \$70,000. and everyone agreed.

Mrs. Holtzmeier asked Ms. Young if she could prepare an “operations digest” of how she does things before she leaves as Clerk of Council and Ms. Young responded that, yes, she can do that for a lot of situations. She added that we are trying to get this Ordinance for the new Clerk passed so that we can get somebody in and she can start working with them.

There was discussion about the Clerk attending the annual public records class as Council's designee. Mr. Gasior asked if it would be wise to make that part of the spec and Ms. Young said she had intended to put that in. Mr. Gasior stated, so you have "certified municipal clerk designation preferred" and then he would say, "proficiency in matters involving public records law preferred". Ms. Young said she agreed that it should be in the class spec and that Council should confirm that by motion for whoever the new person is because the auditors are going to look for that. Mr. Gasior said, yes, that is another point; the auditors are going to make sure that within a certain period of time of that new hire, that they have that training.

Mr. Gasior stated, to recap everything: we are going to leave the \$55,000 – \$70,000. salary range in the compensation ordinance. He will bring a new Ordinance No. 47-16 that is going to put the word "covered" in front of "employees" in 256.10 (b) and he was going to amend the pay ordinance to also exclude overtime because of the new designation. And in the class spec, we are going to take out "must be willing to attain" and we are just going to say "certified municipal clerk designation preferred" and then "proficiency in matters involving public records law preferred."

A motion was made by Mr. Butkowski and seconded by Mrs. Holtzmeier to have Mr. Gasior write the Ordinances as he stated above in his recap and the vote was all in favor.

Adjourn

The meeting was adjourned by Mr. McBride.

Transcribed by Gail Hayden, Assistant Clerk of Council