

**TOWN OF WINCHENDON
BOARD OF SELECTMEN
EXECUTIVE SESSION MINUTES
MONDAY, APRIL 6, 2015
MMHS, Room 144
3 Memorial Drive, Winchendon, Mass.**

Present: Fedor Berndt, Chairman
Elizabeth R. Hunt, Vice-Chair
Robert O'Keefe
Keith Barrows

James M. Kreidler, Jr., Town Manager
Linda A. Daigle, Executive Assistant

Guest: Marc Terry, Esq. - Mirick O'Connell –Town Labor Counsel

List of Documents Presented at Meeting:

- Draft Second Amendment to Town Manager Contract dated 4.6.15 (not executed)
 - Legal Opinion dated April 3, 2015 to Chairman Berndt from Marc L. Terry, Esq. regarding “Enforceability of Arbitration Provision in Town Manager’s Employment Agreement”
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EXECUTIVE SESSION: 6:08 p.m.

Exemption No. 2 to conduct strategy sessions in preparation for negotiations with non-union personnel or to conduct collective bargaining sessions or contract negotiations with non-union personnel: Subject: Town Manager

Kreidler stated the purpose of this meeting is consideration of a second amendment to his contract. It had been reasonably believed that when the amendment was done on March 23rd it would be more readily accepted out in the community and people would look at it as a victory. He has heard that may not be the case. Additionally they have heard some discussion about the arbitration provision perhaps not being valid. This second amendment addresses those two points and Atty. Terry will speak about them with you.

One point Kreidler said, if there is a failure to appropriate tonight, there is language in the contract that goes back to 2010 that says failure to appropriate is considered a breach and that breach would entitle the Town Manager to either a year’s severance or the balance of the contract, whichever is greater. In this case, it would be the balance of the contract which is thirty-nine months. This language was not addressed as it was believed it was not necessary. With there being questions now, it is important to make sure people fully understand the liability if a certain action takes place. Atty. Terry has to advise the body letting them know they can do as they please, but they need to be aware of what their actions, either way, mean.

Atty. Terry said the Town Manager did a good job laying out the background. He reviewed the document with them.

Paragraph No. 1 on Page 2 starts basically reaffirming the fact that prior employment agreements in 2010 and subsequently reaffirmed in October 2014 that if Town Meeting fails to appropriate funds sufficient to fund the contract agreement it shall be deemed a breach of the agreement. When they did the amendment a couple weeks ago and put this new provision of \$299,000 figure, it made sense to him after the fact and he should have thought

of it before to be clear to everyone that this is still part of the employment agreement; it's the amended agreement. If part of Town Meeting tonight fails to appropriate, basically it is a breach of contract just like it was for the contract in place two months ago, three years ago, four years ago, etc. He is trying to be clear that it is never the intention to undo language but to just restate what the effect of failure to appropriate is. He will state clearly at Town Meeting if they fail to appropriate \$300,000, it is a failure to appropriate the funds of an employment agreement that has had this language in place for a long time, than it is a breach. Mr. Kreidler would then be entitled to the greater of twelve month's severance or the remaining portion of the contract which in this case is thirty-nine months, approximately \$650,000.

Additionally, Atty. Terry explained, the provision that would allow, because it's the intent of the Board and Jim as the negotiating party to provide this benefit, that if this fails tonight and he claims breach, the parties, the Board and Town Manager will go to court and say we agree. This was one of the negotiations and failure to appropriate language. We don't want to spend money fighting about it and have this matter dragged out; rather we agreed to enter a consent judgement. The important part of this is that it is one of the few exceptions of Town Meeting vote. It's not required to fund something like this. It comes back and factored into the tax bills for the next year. Terry referenced Chp. 44 in the Municipal Finance Statue that says if a court orders it and issues a judgement against a municipality, then the municipality has to pay it regardless of what Town Meeting does. What we are saying here is that a process is in place so we don't have to spend time and energy fighting about this. Kreidler felt it important to point out if it is not funded tonight and he declares breach under the contract of 2010, he's entitled to \$650,000. What he is saying in this second amendment is that he is willing to forego that \$650,000 that he'd be entitled to and go back to the \$299,000 that they agreed to if the parties agree jointly. This minimizes the liability to the town. Kreidler hoped in the Executive Session there would be a vote of the Board to make this as an offer because they can't vote to do it in Executive Session and would need to do in Open Session, that they will make this as an offer and adjourn Executive Session to a time certain being the time after the town meeting tonight and that they reconvene in Open Session. For the purpose of the town meeting it doesn't exist except that you have offered it to him. If after the Town Meeting, we don't need it, there is no need to execute.

Paragraph 2 Atty. Terry explained here that the amendment is not invalidated if Kreidler files a breach of contract action within sixty days if the town fails to approve. The intent is to give them the ability with this agreement to affect what you tried to negotiate the first time even if there is a failure to appropriate. They would then have to meet after town meeting tonight to execute the document.

The third part addresses the argument that the arbitration provision is not valid. There are some people that are saying the Charter is final and binding and the arbitration provision takes that away from the Board of Selectmen and is a conflict with the Town Charter. He feels this is an extraordinary weak argument and offered his opinion that was explained in detail in his email to Chairman Berndt and a copy provided for them this evening. It's quite clear to him, the arbitration provision negotiated with the Town Manager and the Board of Selectmen originally in 2000, if there is a dispute that the Town Manager would have an arbitrator rule and deal with the dispute. Here we are trying to just be specific with this. Marc said it's important to recognize that the reason why these folks are likely attacking this particular provision because it has language that says Mr. Kreidler has full salary and benefits while the arbitration is proceeding. He feels the arbitration agreement is solid and feels the intent of the parties negotiating that was if there was a dispute and there is a fight, Kreidler will get paid full salary and benefits while this works out. By a small chance this argument is found by a judge to have merit, we've at least expressed the clear intentions of the parties that just because arbitration vanishes the commitment at Town Meeting to Mr. Kreidler to maintain his salary and benefits for a period of time doesn't go away. The Town will have to pay that while the court process goes through. This is being emphasized only because people have made this comment publicly and wanted to make sure of the interpretation.

Jim pointed out nearly on the bottom of Page 3, it does say "initial arbitration, trial or other proceeding on the merits" wanting to be clear that if this was to go all the way to the SJC and it takes seven years, that he wouldn't

be getting full salary and benefits through the whole court proceeding. It is just the initial trial, what they believe will be arbitration. In the off chance that arbitration is booted, it would be for the initial trial and not beyond that.

Atty. Terry said this is consistent with the phrasing in 2000 forward and they are just expanding on the language here.

O’Keefe asked about the references to “court” in the document and asked if we are going to arbitration should that term be used. It was explained that the court would have to affirm any award in arbitration. With the Board of Selectmen and the Town Manager being in agreement, there would be no need for arbitration.

Paragraph 4 – Is a commitment to cover the Town Manager’s attorney’s fees if there is a breach. This is just like it is in existing agreements.

The remaining parts of the amendment are largely boiler plate provisions you will find in the first amendment.

Paragraph 5 talks about the ability going into court and getting an injunction order. If something happens, if somebody doesn’t adhere to this, the Town Manager has the ability to go to court and ask the judge for an injunction.

Paragraph 6 is similar to other agreements if some part of the amendment is found to be invalid or unenforceable, this covers same scenarios as we saw in the first amendment which talks about the option to invalidate the amendment and now the Second Amendment giving Jim the same options he had under the First Amendment.

Paragraph 7 talks about disputes for the Commonwealth of Massachusetts versus another state.

Paragraph 8 speaks of this document being construed from the original agreement and amended to the one we did a few weeks ago.

Atty. Terry concluded saying this Second Amendment is about clarify intentions and putting them clearly on paper. It is just saying the Board is comfortable with this and it is available to go forward if it is needed. He asked if they had any questions.

Barrows asked about the language in No. 8, “This second amendment shall be construed as an amendment to the Agreement and Amendment.” If we are saying that the amendment would be invalidated by a failure to appropriate, how do we tie the two together? Atty. Terry replied this is an amendment but remember there are a lot of triggers inside where Jim has the option to declare an invalidation. This is saying this is an amendment to the basic agreement done in October and also to the one done a few weeks ago and it really only serves to clarify and make the intent more clear than the prior ones. He doesn’t believe it really changes anything substantively. This document rises or falls depending on whether Jim ultimately exercises should the need occur the right to invalidate as set forth in the Second Amendment.

Barrows moved the Board offer the document titled “Second Amendment to October 15, 2014 Employment Agreement between the Town of Winchendon and James M. Kreidler, Jr.”; O’Keefe seconded. By roll call vote of all aye, the motion carried unanimously.

Kreidler just informed the Board they received Opening Comments by Labor Attorney Marc Terry for Special Town Meeting. It is not appropriate for Executive Session but wanted them to have a copy for the meeting next.

Barrows moved to adjourn Executive Session to enter back into Open Session; Hunt seconded. By roll call vote of all aye, the Executive Session adjourned back into Open Session at 6:33 p.m.

Respectfully submitted,

Linda Daigle
Executive Assistant