

Whose Interest Is Being Served?

An Investigation of a Walker City Council Member's
Conflict of Interest



Iowa Citizens' Aide/ Ombudsman

William P. Angrick II

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Contributors

Investigator

Elizabeth Hart, Assistant Ombudsman

Legal Counsel

Ron Rowland

Deputy Ombudsman

Ruth Cooperrider

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Role of the Ombudsman

The Office of Citizens' Aide/Ombudsman (Ombudsman) is an independent and impartial agency in the legislative branch of Iowa state government which investigates complaints against most Iowa state and local government agencies. Its powers and duties are defined in Iowa Code Chapter 2C.

The Ombudsman can investigate to determine whether agency action is unlawful, contrary to policy, unreasonable, unfair, oppressive, or otherwise objectionable. The Ombudsman may make recommendations to the agency and other appropriate officials to correct a problem or to improve government policies, practices, or procedures. If the Ombudsman decides to publish a report of the investigative findings, conclusions, and recommendations, and the report is critical of the agency, the agency is given the opportunity to reply to the report, and the unedited reply is attached to the report.

Allegations

The Ombudsman received a complaint concerning Bill Smith, a city council member who is also the Walker Fire Department Chief. The complainant stated that Mr. Smith votes regularly as a city council member on matters before the Walker City Council (Council) pertaining to the Walker Fire Department. These actions were alleged to be conflicts of interest in violation of Iowa law.

Investigation

We interviewed Council Members Bill Smith and Margaret Moore, former Mayor Matt Meisheid, City Attorney Robert Hatala, reviewed the agendas and minutes published for the October 2007 through October 2008 Council meetings, and reviewed the letters from the city attorney to the mayor. We also researched relevant Iowa statutes, case law, Attorney General's Opinions, and other resources relating to the issues of conflict of interests.

We provided our initial analysis, conclusions, and recommendations to the Council on July 9, 2009, and requested a written response be delivered to our office by August 15, 2009. The Council requested three additional extensions, which we granted. However, we did not receive a response by the final date given in the last extension.

Background Facts

The members of the Council at the time of our investigation were Mary Anne Burke, Margaret Moore, Nina Norris, Bill Smith, and James Voss. The mayor at the time was Matt Meisheid. Ms. Burke and Ms. Moore are no longer on the Council, and Mr. Meisheid is not currently the mayor.

The following information pertaining to the specific allegations in the complaint was found in the minutes of the Council meetings:

- December 10, 2007: Motion to approve appointment of new fire fighter, Jeff Bolander
 moved and seconded: Zablek, Meisheid
 5 ayes motion carried: Burke, Meisheid, Moore, Smith, Zableck
- January 14, 2008: Motion to go into closed session with mediator to solve appointment issue concerning chief of fire department
 moved and seconded: Voss, Moore
 3 ayes: Burke, Moore, Voss
 2 nays: Norris, Smith
- January 28, 2008: Motion to approve minutes of January 14, 2008, meeting referring to closed session concerning fire department problem
 moved and seconded: Smith, Norris
 3 ayes: Norris, Smith, Voss
 2 nays: Burke, Moore
- March 24, 2008: Motion to approve fire department by-laws and constitution
 moved and seconded: Norris, Smith
 2 ayes: Smith, Norris
 1 nay: Moore
 1 abstained for lack of information: Burke
 Absent: Voss
 Motion dies and tabled until April 14 meeting
- April 14, 2008: Motion to approve by-laws and constitution of fire department
 moved and seconded: Norris, Smith
 3 ayes: Smith, Norris, Voss
 2 nays: Burke, Moore
- April 14, 2008: Motion to approve new firefighter, Jeff Mills
 moved and seconded: Norris, Voss
 4 ayes: Burke, Smith, Norris, Voss
 1 nay: Moore
- May 12, 2008: Motion to approve election by fire department of Bill Smith as fire chief
 moved and seconded: (no names listed)
 3 ayes: Smith, Norris, Voss
 2 nays: Burke, Moore
- June 9, 2008: Motion to approve appointment of Bill Smith as fire chief
 moved and seconded: Voss, Norris
 3 ayes: Smith, Norris, Voss
 2 nays: Burke, Moore

According to the minutes, the “Mayor reported that Council member Smith can vote for the Fire Chief after meeting with City Attorney.”

- July 14, 2008: Motion to approve Curtis Sutcliff as firefighter
moved and seconded: Voss, Norris
4 ayes: (no names listed)
1 nay: (no name listed)
- July 14, 2008: Motion to approve the eagle scout project at the fire station
moved and seconded: Norris, Smith
(no report on ayes and nays)
- July 28, 2008: Motion to approve upgrade charge for fire department EMT call to EMT-1 status
moved and seconded: Norris, Voss
3 ayes: Smith, Norris, Voss
2 abstain: Burke, Moore
- September 8, 2008: Motion to state no need for awnings over fire station because gutters in use
moved and seconded: Burke, Moore
2 ayes: Burke, Moore
2 nays: Norris, Voss
1 absent: Smith
Motion failed

City Attorney Robert Hatala sent a letter on January 23, 2008, to Mayor Meisheid regarding whether Bill Smith could vote on matters related to the fire department (see *Appendix A*). On page three of this letter, Mr. Hatala said there is no conflict of interest because the fire chief is able to hold both positions at the same time, but offered this advice:

I think the better practice is clearly that where the Council addresses matters that affect the Fire Department, that the Fire Chief **abstain from voting**, particularly where the Council is voting whether or not to approve the appointment of the Fire Chief.

(Emphasis added.)

The Council approved new by-laws on April 14, 2008, which removed the mandatory retirement age of 60 for all members of the volunteer fire department. This action allowed the Council to subsequently vote to retain Bill Smith in his position as the fire chief and not force him into retirement. As stated in the Council minutes, the motion to approve Bill Smith as fire chief failed on May 12, 2008, and Mayor Matt Meisheid tabled the motion until clarification was received from the city attorney.

On June 9, 2008, Mayor Meisheid, after discussions with the city attorney, reported to the

Council that Council Member Smith was able to vote on matters concerning approval of his own appointment. The city attorney sent written confirmation of his position on June 11, 2008, to the mayor (see *Appendix B*). He reiterated his belief that Mr. Smith could vote on his own appointment, but that the “better practice” remained to abstain from voting.

Mr. Smith chose not to follow the city attorney’s advice as evidenced by his votes referenced in the minutes above. Of special significance were his votes on May 12 and June 9, 2008, related to approval of his election to be fire chief for the City of Walker, in which his vote effectively broke what would have been a tie. We questioned Mr. Smith about this. He admitted to those actions and asserted the votes were proper.

Analysis and Conclusions

In a 1981 opinion, the Attorney General’s office clearly stated it is improper for a fire chief, who also simultaneously sits as a city council person, to vote on matters pertaining to the fire department. The opinion quoted *Goreham v. Des Moines Met. Area Solid Waste Agency*, 179 N.W.2d 449, 462 (Iowa 1970), to state:

[T]he “integrity of representative government demands that the administrative officials should be able to exercise their judgment free from objectionable pressure of conflicting interests.”

1981 Op. Iowa Att’y Gen. 7-28 at 2.

The opinion then cited *Wilson v. Iowa City*, 165 NW 2d 813, 819 (Iowa 1969), as requiring high standards for public officials, and noted that the rules on conflicts of interest are based on moral principles and public policy. The opinion concluded:

A fire chief who decides the needs and helps make the requests of the fire department and then votes as a council member on those needs and requests does not exhibit the required impartiality. ... Accordingly, a chief of a volunteer fire department who is a city council member **should** abstain from the decision making process and vote of the council on fire department matters.

Id. (Emphasis Added.)

In *Wilson* the Iowa Supreme Court concluded resolutions passed by a city council were void due to the disqualification of certain members under the conflict of interest provision in the Urban Renewal Law. The Iowa Supreme Court in *Wilson* stated:

‘Public policy forbids the sustaining of municipal actions founded upon the vote of a member of the municipal governing body in any matter before it which directly or immediately affects him individually.’

Wilson, at 819 (quoting *Baker v. Marley*, 8 N.Y.2d 365, 208 N.Y.S.2d 449, 450, 170 N.E.2d 900, 901).

The court stated this is because “the participation of the disqualified member in the discussion may have influenced the opinion of other members, and ...such participation may cast suspicion on the impartiality of the discussion.” *Id.* at 820.

Finally, the court set forth the following fundamentals regarding conflict of interest laws:

These rules, whether common law or statutory, are based on moral principles and public policy. They demand complete loyalty to the public and seek to avoid subjecting a public servant to the difficult, and often insoluble, task of deciding between public duty and advantage. . . . It is not necessary that this advantage be a financial one. Neither is it required that there be a showing the official sought or gained such a result. It is the potential for conflict of interest which the law desires to avoid.

Id. at 822. (Emphasis added.)

This is a very clear pronouncement from the Iowa Supreme Court. No exception is carved out for persons in Mr. Smith’s situation to be able to disregard this directive.

In his second letter to the Council concerning this issue, dated June 11, 2008, City Attorney Hatala asserted the 1981 Attorney General’s Opinion was limited by the 2004 statutory amendment to Iowa Code § 372.13(10). This statute allows a city council person to hold both the office of chief of a volunteer fire department and the office of city council person at the same time, as long as the area served by the fire department is over 2,000 people. Mr. Hatala believes that, by allowing for the compatibility of the two offices, the legislature also intended to infer, without specifically stating, that no conflict of interest could arise for the person holding both offices. Mr. Hatala did not cite to any legal authority supporting this assertion.

We disagree. It is our opinion the statutory amendment only addresses the issue of incompatibility. The doctrine of “incompatibility” refers to whether a person can hold two different offices at the same time. This is a separate issue from whether a particular action may constitute a “conflict of interest.” The fact that it may be compatible for a person to serve in two positions simultaneously does not remove all potential for a conflict of interest to occur in certain situations.

The language of Iowa Code § 372.13(10) does not contradict this position. It may be compatible for a person to simultaneously serve as a council person and fire chief; however, this does not preclude conceivable instances in which a conflict of interest could arise. The statute only states that the two offices are compatible. If the Iowa legislature intended that no conflict of interest could arise in a simultaneous execution of both offices, the legislature could have easily specified that when it passed the amendment. It did not do so.

This distinction is also noted in the 1981 Attorney General’s Opinion discussed earlier in this report. 1981 Op. Att’y Gen. 7-28. The Attorney General determined the positions of city council member and chief of a volunteer fire department are not incompatible, thereby allowing

a person to occupy both positions. However, the Attorney General went on to explain that “public policy may require abstinence from voting because of a conflict.” *Id. at 2*. In other words, there may be instances when a conflict of interest arises while a person is holding two offices simultaneously.

The Council has authority to approve the election of the fire chief and the adoption of the fire department by-laws and constitution. The council approved new by laws on April 14, 2008, which in part removed the mandatory requirement age of 60 for all members of the volunteer fire department. With this change, Bill Smith could officially be eligible to serve as fire chief. Subsequently, on June 9, 2008, the council approved the election of Bill Smith as fire chief.

The minutes showed Mr. Smith, Mr. Norris, and Mr. Voss to have voted aye, and Ms. Burke and Ms. Moore to have voted nay on all these matters. If Mr. Smith would have followed the law in Iowa and abstained from voting on the measure to raise the mandatory retirement age limit, he would not have been eligible to be retained as fire chief. He clearly benefited from his own actions when he was then appointed as the fire chief. He should have abstained from voting on the by-law change and his appointment.

If a council member seeks to hold another position of responsibility, power, and authority, clearly a conflict of interest arises when he creates an advantage for himself by voting on his own appointment. The statutory and common law concerning conflicts of interest requires that person to avoid even the appearance of impropriety. He should always be acting to further the interests of his constituency, not his own. That is his duty. The people who elected him to that position deserve no less.

City Attorney Robert Hatala also mentioned that, from a practical standpoint, it will be difficult for the city to follow the Attorney General’s Opinion. Walker is a city of 800 people. They have a five-member city council. He asserted the Council would have always been split evenly if Mr. Smith had followed the law.

That may have been the case on fire department matters affecting Mr. Smith or his interests. A review of the voting record of all five members of the Council revealed, on some issues, including those pertaining to the fire department, the same council members usually voted the same way. However, concerning other issues, the votes of the council members did not always align. Furthermore, the composition of the Council has changed since the votes in question and will likely change with future Council elections.

Regardless of what the vote result will be, when a council member stands to personally gain from his vote, he is no longer executing his duty to represent only the interests of his electorate. At that point, common law dictates he must abstain from voting. For that reason it is not only the “better practice,” but the only legal practice to choose at that juncture.

Polarized loyalties on certain matters are no reason to disregard the law as established in Iowa. Polarized loyalties may even be an indication of political in-fighting and more independent thought is not being applied to the matter at hand.

Although Iowa law allows a city council member to also serve as a fire chief of a volunteer fire department, it does not allow that council member to ignore situations that create a conflict of interest. The council member simultaneously holding the fire chief position must abstain from voting on matters pertaining to the fire department, especially when the council member stands to gain something from the vote.

This report identified a number of situations when Mr. Smith voted as a council member on matters affecting the Walker Fire Department and his position as fire chief. We conclude that Mr. Smith was legally obligated to have abstained from voting on such matters, and must do so in the future.

We do not make any determination here as to Mr. Smith's fitness for the position of fire chief or the propriety of any of the matters passed by his votes. There may be very good reasons for the other council members to have voted for such matters' passage. However, because Mr. Smith, as a council member, has a duty to forward only the interests of the people of the City of Walker, he may not simultaneously further his own interests by voting in this fashion.

Iowa Code § 362.6, explicitly deals with situations where a city council member with a conflict of interest improperly votes. It provides:

A measure voted upon is not invalid by reason of conflict of interest in an officer of a city, **unless** the vote of the officer was decisive to passage of the measure. . . . For the purposes of this section, the statement of an officer that the officer declines to vote by reason of conflict of interest is conclusive and must be entered of record.

(Emphasis added.)

Since Mr. Smith's vote was decisive on a number of measures in which he had a conflict of interest, we believe such measures were rendered invalid under this statute.

Summary and Recommendations

The Ombudsman concludes Mr. Bill Smith, in his role as council member, possessed a conflict of interest and acted contrary to law on those occasions when he voted on matters pertaining to the Walker Fire Department, including, but not limited to, voting for his own appointment as fire chief. He should have abstained from voting on those matters and stated his reasons for doing so in the Council minutes. Because he failed to abstain from voting on these issues, and because his votes were decisive, his actions rendered those measures invalid.

The Ombudsman makes the following recommendations:

1. The Ombudsman recommends Mr. Bill Smith be required to act in compliance with Iowa law as stated in *Wilson v. Iowa City*, 165 NW 2d 813 (1969), and the 1981 opinion by the Iowa Attorney General. He should abstain from voting on matters presented to the

Walker City Council concerning the Walker Fire Department, and to state his reasons for doing so in the Council minutes.

2. The Ombudsman further recommends the Walker City Council take remedial action on those matters related to the Fire Department and Mr. Smith's appointment as the fire chief that were rendered invalid under Iowa Code § 362.6, including those actions specifically referenced in this report.

Appendix A

ROBERT E. KONCHAR
STEPHEN C. NELSON
J. SCOTT BOGGUSS
PHILIP D. BROOKS
KEVIN J. VISSER
RANDAL J. SCHOLER
WILLIAM S. VERNON
ERIC W. LAM
MICHAEL McDONOUGH¹
MARK J. HERZBERGER
THOMAS D. WOLLE²
MATTHEW J. KRIGBAUM^{3, 4}
THOMAS N. DEBOOM
ROBERT S. HATALA

Moyer & Bergman, P.L.C. *Attorneys at Law*

CYNTHIA A. SCHERRMAN SUTPPEL
BRIAN J. FAGAN
AMANDA M. DAMICO
SASHA L. MONTHE
MATTHEW J. ADAM
ABBÉ M. STENSLAND
CHAD W. THOMAS
MATTHEW J. HEKTOEN⁵
DAWN M. GIBSON
LARRY G. GUTZ⁶ OF COUNSEL
JENNIFER K. WENDTGEISLER, OF COUNSEL
WILLIAM A. BERGMAN RETIRED

Writer's email: rhatala@moyerbergman.com

January 23, 2008

Mayor Matt Meisheid
City of Walker
City Hall
408 Rowley Street
Walker, IA 52352

Re: Volunteer Fire Department

Dear Mayor Meisheid:

You recently called with questions regarding the City of Walker's volunteer fire department, particularly with respect to the election of the Fire Chief and voting by the Fire Chief on matters related to the Fire Department.

The Election of the Fire Chief

Authorization for municipal fire protection comes from Iowa Code Section 364.16. This section provides that, "Each city shall provide for the protection of life and property against fire and may establish, house, equip, staff, uniform, and maintain a fire department..." The City of Walker has established a Fire Department pursuant to the Iowa Code. See Walker Code Chapter 30. Four sections of the Walker City Code for the Fire Department appear to be relevant for this matter. These are:

30.02 Organization. The department shall consist of the Fire Chief and such other officers and personnel as may be authorized by the Council.

30.03 Approved by Council. No person having otherwise qualified shall be appointed to the department until such appointment is submitted to and approved by a majority of the Council members.

30.06 Election of Officers. The department shall elect a chief and such other officers as their constitution and

☑ CEDAR RAPIDS OFFICE | COMMERCE EXCHANGE BUILDING | 2720 FIRST AVENUE N.E. | CEDAR RAPIDS, IOWA 52402
MAILING ADDRESS: P.O. BOX 1943 | CEDAR RAPIDS, IOWA 52405-1943
TELEPHONE: (319) 366-7331 | FACSIMILE: (319) 366-3669

☐ CORALVILLE / IOWA CITY OFFICE | CITY CENTER SQUARE | 1100 5TH STREET SUITE 205 | CORALVILLE, IOWA 52241
TELEPHONE: (319) 334-1019 | FACSIMILE: (319) 334-1760

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January 23, 2008

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by-laws may provide, but the election of chief shall be subject to the approval of the Council. In case of absence of the chief the officer next in rank shall be in charge and have and exercise all the powers of chief. (emphasis added)

30.09 Constitution. The department shall adopt a constitution and by-laws as they deem calculated to accomplish the object contemplated, and such constitution and by-laws and any change or amendment to such constitution and by-laws before being effective, must be approved by the Council.

I have been provided with three sets of a purported Constitution and By-Laws of the Walker Fire Department. I understand that there is no indication that any have been approved as required by Section 30.09. Only one of the three addresses the election of officers. Because Article II, Section I of this set of By-laws refers to 25 firemen, I am assuming that this is the latest version. (See attached Constitution and By-laws.) The other two versions of the Constitution and By-laws refer to only 19 firemen. The City Council should review and approve or amend the Constitution and By-laws per Section 30.09.

The question as I understand it is: Who can vote in the election for Chief? Chapter 30.06 of the Walker Code provides that the "Department" shall elect the Chief and other officers as the Constitution and By-laws may provide.

According to Article II Section IV of the Constitution and By-laws:

Persons to fill the offices of Chief, Assistant Chief/ Training Officer and Secretary/Treasurer shall be nominated at the regular meeting night in November, elected at the regular meeting night in December, and installed at the regular meeting night in January of each year. THE PERSON TO FILL THE OFFICE OF CHIEF MUST BE APPROVED BY THE MAYOR.

Article II, Sections I through VI, deal directly with the designation and election of officers. Section I provides that the department shall consist of 30 regular members including the five officers and 25 firemen. Based on the manner in which this Constitution and By-laws is constructed, I think that the only reasonable interpretation is that only the 30 regular members of the Fire Department can vote for officers.

Can the Fire Chief as a Member of the City Council
Vote on Fire Department Issues?

It is generally improper and illegal for a member of a municipal council to vote on any question in which he is personally interested or where his personal rights will be affected. Security

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National Bank of Mason City v. Bagley, 210 N.W.2d 947 (Iowa 1926). There are exceptions. Iowa Code Section 372.13(10) provides as follows:

A council member, during the term for which that member is elected, is not precluded from holding the office of chief of the volunteer fire department if the fire department serves an area with a population of not more than two thousand. A person holding the office of chief of such a volunteer fire department at the time of the person's election to the city council may continue to hold the office of chief of the fire department during the city council term for which that person was elected.

It does not make much sense to specifically allow the Chief to sit on the Council but not be allowed to vote on important matters.

Iowa Code Section 362.5 prohibits a city officer or employee from having an interest, direct or indirect, in any contract or job of work or material or the profits thereof or services to be furnished or performed for the officer's or employee's city. A contract entered into in violation of this section is void. However, the provisions of this section do not apply to contracts with volunteer firefighters or civil defense volunteers. Iowa Code Section 362.5(8). A 1980 Attorney General's Opinion concluded that, "No conflict of interest exists by virtue of a city council member being paid for services as a volunteer firefighter. The same 1980 Attorney General's Opinion referred to a prior opinion that held that there was no incompatibility of offices when a city council member serves as a volunteer firefighter.

I found nothing addressing whether the exception for volunteer firefighters also applied to the Fire Chief. Although the statute and opinions referred to above along with the provision in the Iowa Code providing that the volunteer Fire Chief can serve on the city council suggest there is no conflict of interest, I think the better practice is clearly that where the Council addresses matters that affect the Fire Department, that the Fire Chief abstain from voting, particularly where the Council is voting whether or not to approve the appointment of the Fire Chief.

Is Voting When There is a Conflict of Interest a Misdemeanor?

It has been suggested that voting on a matter where there is a conflict of interest is a misdemeanor. I have not extensively researched this, however, this suggestion may come from Iowa Code Section 400.2 which applies to a civil service commissioner entering into a contract with the city. A situation that is inapplicable here.

Iowa Code Section 362.6 indicates that a measure voted upon is not invalid by reason of a conflict of interest in an officer of the city, unless the vote of the officer was decisive to passage of the measure. If a specific majority or unanimous vote of a municipal body is required by statute, the majority or vote must be computed on the basis of the number of officers not disqualified by reason of conflict of interest... Note also that if there is a violation of an interest

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in the public contract provision of Iowa Code Section 362.5, any contract is void. There is no mention of any criminal penalties attaching.

Hopefully this resolves this matter. I anticipate attending the Council meeting on January 28, 2008, and this can be discussed further.

Sincerely,

MOYER & BERGMAN, P.L.C.



ROBERT S. HATALA

RSH:jw

Enc.

letters/Mavor/Jan 23, 2008.doc

Appendix B

ROBERT E. HONCHAR
J. SCOTT BOGGS
PAUL D. BROOKS
KEVIN J. VIBBER
RANDAL J. SCHULZ
WILLIAM B. VERNON
ERIC R. LAM
MICHAEL McDONOUGH
MARK J. HENNINGER
THOMAS D. HIGLEY
THOMAS N. GIBSON
BRUCE J. PAPAN
MATTHEW J. ADAM

Moyer &
Bergman, P.L.C.
Attorneys at Law

CYNTHIA A. JOE
TARA F.
STEPHEN D. H.
LARRY J.
MATTHEW J. JOE
WILLIAM A.

Writer's email: cmoy@cmoybergman.com

June 11, 2008

Mayor Matt Meisheid
14 Mill Street
Walker, IA 52352

Re: Fire Chief and Council person

Dear Mayor:

I received an email from Margaret Moore regarding the issue on whether the Fire Chief can v on Fire Department matters. A short review may be helpful.

Iowa Code Section 362.5 prohibits a City officer or employee from having an interest, direct or indirect, in any contract or job of work or material or the profits thereof or services to be furnished or performed for the officer's or employee's City. Volunteer firefighters are specifically exempted from this provision by Iowa Code Section 362.5(8).

In 1978, the Iowa Attorney General found that the position of chief of a fire department was incompatible with that of a city council member. However, in 1981, the Iowa Attorney General Office reversed itself finding that the chief of a volunteer fire department is not incompatible with the position of city council member because the chief did not hold a public office. There was a reference to Section 362.5 in the opinion, 1981 WL 315341(Iowa A.G.). The 1981 opinion went on to conclude that a chief of a volunteer fire department who was a city council member should abstain from the decision making process and voting on fire department matters.

At the time that the Attorney General gave its opinion in 1981, Iowa Code Section 372.13(10) did not exist. In 1990, Iowa Code Section 372.13(10) was added as follows:

A council member, during the term for which that member is elected, is not precluded from holding the office of chief of the volunteer fire department if the fire department serves an area with a population of not more than 2,000, and if no other candidate who is not a city council member is available to hold the office of chief of the volunteer fire department.

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MAILING ADDRESS: P.O. BOX 1942 | CEDAR RAPIDS, IOWA 52402-1942
TELEPHONE: (319) 399-1231 | FACSIMILE: (319) 399-2999

CORALVILLE / IOWA CITY OFFICE | CITY CENTER SQUARE | 1100 5TH STREET SUITE 200 | CORALVILLE, IOWA 52241
TELEPHONE: (319) 334-0119 | FACSIMILE: (319) 334-7182

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June 11, 2008
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One result of the 1990 legislation was to limit the finding of the Iowa Attorney General in its 1981 opinion. Where the Iowa Attorney General found that there was no incompatibility between being a council member and being chief of the fire department, the 1990 legislation allowed one person to hold both positions only where the fire department served an area with population of not more than 2,000 and only if no other candidate not a city council member was available to hold the office of chief of the volunteer fire department.

In 2004 the Iowa Legislature amended Iowa Code Section 372.13(10) to provide as follows:

A council member, during the term for which that member is elected, is not precluded from holding the office of chief of the volunteer fire department if the fire department serves an area with a population of not more than 2,000. A person holding the office of chief of such a volunteer fire department at the time of the person's election to the city council may continue to hold the office of chief of the fire department during the city council term for which that person was elected.

The effect of the amendment was to allow one person to hold both the position of council member and volunteer fire chief so long as the area served was less than 2,000 in population. The legislation removed the additional restriction that there be no other person available to hold office of chief of the volunteer fire department.

The Iowa Code mandates that fire protection be provided. By exempting the firefighter/council position from the conflict of interest statute and specifically allowing one person to hold both positions where the area served is less than 2,000 in population, the Legislature implicitly allow the person holding the two positions to vote on fire department matters. It makes no sense to me that the Iowa Legislature would exempt volunteer firefighters from the conflict of interest statute and allow a person to hold both positions would then expect that person to abstain from any votes affecting the fire department. The Legislature apparently recognized that in some communities it could be difficult to find enough qualified people to fill all positions.

As a result, my opinion was back on January 23, 2003, and is now as follows:

Although the statute and opinions referred to above along with the provision in the Iowa Code providing that the volunteer fire chief can serve on the city council suggests there is no conflict of interest. I think the better practice is clearly that where the Council addresses matters that affect the fire department that the fire chief

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abstain from voting, particularly where the Council is voting whether or not to approve the appointment of the fire chief.

In conclusion, my opinion is that:

1. One person can hold the position of Council member and chief of the volunteer fire department.
2. The person holding both positions can vote on all matters affecting the fire department.
3. Even though council member/volunteer fire chief can vote, the better practice may be to avoid it.

I hope this clears up this question.

Sincerely,

MOYER & BERGMAN, P.L.C.



ROBERT S. HATALA

RSH:jw

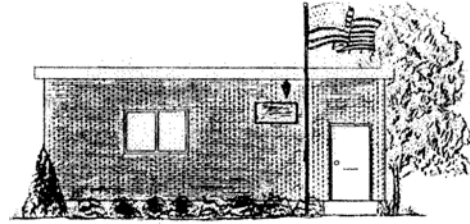
Enc.

cc: Judy Lahné, Clerk

Replies to the Report

City of Walker

PO Box 161
408 Rowley St.
Walker, IA 52352
319-448-4359



27 April 2010

William P. Angrick II
Citizens' Aide/Ombudsman
Ola Babcock Miller Building
1112 East Grand Avenue
Des Moines, IA 50319

Dear Mr. Angrick,

In reference to your April 15, 2010 letter, "Whose Interest is Being Served", the Walker City Council has decided to bring three issues back before the city council for review.

The three issues directly related to your first recommendation on page 7 include:

1. The April 14, 2008 motion to approve the by-laws and constitution of the fire department.
2. The May 12, 2008 and June 9, 2008 motion to approve the appointment of Bill Smith as Fire Chief.
3. The July 28, 2008 motion to approve upgrade charge for fire department EMT call to EMT-1 status.

These issues will be on the May 24, 2010 city council meeting agenda.

Sincerely,

Phillip J. Auld
Mayor
Walker, Iowa

May 16, 2010

William P. Angrick II
Citizens Aide/Ombudsman
Ola Babcock Miller Building
1112 East Grand Avenue
Des Moines, IA 50319

Dear Sir:

This is my personal reply to your report. If by law you must give each person involved a chance to reply; that should have been done at the beginning. I do not agree with your findings as I believe your office has conducted an incomplete investigation. Enclosed you will find the city attorneys reply to your findings in his letter to the city council. I believe we have two different opinions concerning this situation. I acted according to the city attorney's opinion because that is what we pay him for. Since the new council has been seated I have not voted on Fire Department matters. I voted according to the need, Ms Moore had conducted a vendetta against the Walker Fire Dept. and my-self. If I had not voted, new members would not have been added, equipment not repaired or replaced. At the time I voted the city attorney had rendered his opinion. Ask yourself where the personal gain is coming from when the job has no pay and actually cost me money from my pocket to perform.

On page 1 the investigation paragraph you state that you interviewed me. To the best of my knowledge that never happened. The only time I recall talking to Ms Hart is when I personally called her. She was asked how she could come with an opinion without talking to all the parties involved, she stated that "she didn't have to do that". The conversation was short and not sweet and I would not consider it an interview. Council members Nina Norris and James Voss also called Ms Hart and we're treated in the same manner. If this is your interview process I believe it is flawed and should be reviewed. I believe our due process was violated and we were not given a chance to present our case. Norris and Voss both were told they were council members and Ms Hart could not talk to them. When Ms Hart was informed that Moore was also a council member Ms Hart did not respond.

On page 6 2nd paragraph concerning adoption of the By-Laws and constitution is a gross untruth. We had removed the age requirement in 2004 or 2005 because we were receiving FEMA and other federal assistance grants. The Grant process prohibits bias on age, sex, religious, race and several other discriminations. Failure to follow those guidelines removes us from all federal grants and loans. I was already 62 when the council voted on the new By-Laws & Constitution. This was a new By-Law & constitution not a amended one as the paragraph seems to point toward, there were several other changes in the new document not just this one. The new By-laws and constitution took several months to prepare; it was reviewed by the Fire Dept. personnel, members of the City Council and the city attorney before the council vote was taken. As stated earlier the age requirement was not enforced after 2004. It took longer than

expected to write and get the new by-laws passed. Age discrimination and sexual discrimination were strong components of this situation. It included how the department functioned in all areas not just one or two.

I have addressed what I feel are two main area's of your report. I will not get into all the legal statements in your report. I voted because of the need to get things done not because of personal gain

Thank you,
William J. Smith

A handwritten signature in cursive script that reads "William J. Smith". The signature is written in black ink and is positioned below the typed name.



SIMMONS PERRINE MOYER BERGMAN PLC

ATTORNEYS

Robert E. Konchar
 Darrel A. Morf
 J. Scott Bogguss
 James E. Shipman
 Stephen J. Holtman¹
 Iris E. Muchmore
 Philip D. Brooks
 James A. Gerk
 Roger W. Stone
 Kevin J. Visser
 Randal J. Scholer
 William S. Vernon

Eric W. Lam
 David W. Kubicek
 Matthew J. Brandes
 Michael McDonough²
 James M. Peters
 Leonard T. Strand
 Mark H. Ogden
 Webb L. Wassmer
 Mark A. Roberts
 Chad M. VonKampen
 Gregory G. Williams
 Nicolas Abou-Assaly

Allison M. Heffern
 Lynn W. Hartman
 Kathleen A. Kleiman¹
 Thomas D. Wolle
 Paul P. Morf
 Philip A. Burani¹
 Christine L. Conover
 David J. Zylstra^{3,4}
 Thomas N. DeBoom
 Jason M. Steffens
 Matthew J. Adam
 Robert S. Hatala

Amanda M. D'Amico
 Jacob R. Koller
 Jeffrey K. McGinness¹
 Mark J. Herzberger
 Brian J. Fagan
 Kerry A. Finley⁵
 Abbe M. Stensland
 Kyle W. Wilcox⁶
 Christopher J. Vocci⁷
 Jeffrey A. Stone
 Matthew J. Hektoen¹
 Dawn M. Gibson

Susan H. Willey¹
 Sarah E. Swartzendruber
 Louis E. Ebinger
 Carrie L. Thompson
 Travis J. Schroeder
 Diana Okoeva⁸

COUNSEL
 Larry G. Gutz²
 David A. Hacker
 Richard G. Hileman, Jr.
 Lorie Reins-Schweer

OF COUNSEL
 Stephen C. Nelson
 James R. Snyder

RETIRED
 William A. Bergman
 John R. Carpenter

REGISTERED PATENT
 ATTORNEYS
 Gregory G. Williams
 Christopher J. Vocci¹
 Carrie L. Thompson

Writer's email: rhatala@simmonsperine.com

April 30, 2010

Mayor and Council
 City of Walker
 City Hall
 408 Rowley Street
 Walker, IA 52352

Re: April 15, 2010, Ombudsman Report

Dear Mayor and Council:

I have had the opportunity to review the Ombudsman's report. I suggest the following:

1. The City of Walker will advise the Ombudsman's office that Bill Smith will abstain from voting on certain matters involving the Walker Fire Department including the appointment of a Chief, if he is involved. This will have to be clearly defined. I do not agree that the Chief must abstain from all matters presented to the Walker City Council concerning the Walker Fire Department as this would include the budget itself, which is probably the single most important matter to come before the Council.

2. For those votes that the Ombudsman claims are rendered invalid under Iowa Code Section 362.6, the new Council should reaffirm those actions without Bill Smith voting.

We may want to respond to the report on these issues:

1. The Ombudsman's analysis ignored the fact that Iowa Code Section 362.5, which prohibits a city officer or employee from having an interest, direct or indirect, in any contract or job of work or material or the profits thereof or services to be furnished or performed for the officer or employee's city exempts volunteer firefighters.

2. The Ombudsman ignores the history of Iowa Code Section 372.3(10) regarding the compatibility/incompatibility of being a council member and chief.

3. Finally, the Ombudsman makes a distinction between incompatibility and conflict of interest. Although the concepts may be different in most instances, the only reason here is that there might be incompatibility between the office of council member and chief is due to a

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April 30, 2010

Page 2

potential conflict of interest. By doing away with compatibility, the legislature may have also been doing away with conflict of interest.

In any event, please let me know how the City should respond. If you have any questions, let me know.

Sincerely,

SIMMONS PERRINE
MOYER BERGMAN, P.L.C.



ROBERT S. HATALA

RSH:jw

P.S. The deadline for responding is within 30 days of receipt of the Ombudsman's letter. When did the City receive it?

Ombudsman's Comment

Ombudsman's Comments to City Council Member Bill Smith's Reply

Council member Bill Smith responded to our report on May 20, 2010. He raised several points.

Mr. Smith states he was not interviewed. Our office has a different perspective. Interviews related to our investigations may be conducted informally. On March 9, 2009, Mr. Smith called our office and discussed this matter with Ms. Hart. He told Ms. Hart that he based his actions on what the city attorney told him. He stated he would continue to vote this way because he saw no conflict. He saw the complaint as a vendetta against him. He stated he believed his votes on his fire chief reappointment and fire department matters were proper; he reasoned that his vote was necessary to make decisions related to fire department and that he himself did not realize any financial gain. Ms. Hart discussed with him the relevant legal authorities that she believed support our position.

Mr. Smith also asserted that the council members were not given due process and the opportunity to "present their case." Investigations by our office do not determine legal rights or duties, and therefore the procedures traditionally associated with the judicial process are not required. *Citizens' Aide/Ombudsman v. Rolfes*, 454 N.W. 2d 815 (Iowa 1990). Furthermore, the council members were aware of our investigations and were given the opportunity to respond prior to publication of this report. In our February 18, 2009 letter to Mayor Meisheid apprising him of the investigation and our specific concerns, we invited comment and any information the city would like to submit. On July, 9, 2010, our office sent a formal letter to the city discussing Mr. Hatala's legal analysis and detailing our position with recommendations and again requesting the city's response. We asked the city to provide any reasons they were relying upon to reject our conclusions and recommendations. We never received a reply to this letter, even though we gave two extensions, initially until September 4, 2009, and then again until November 2, 2009.

Mr. Smith also objects to language on page six, paragraph two, concerning the adoption of the by-laws and constitution as a "gross untruth." He states:

On page 6 2nd paragraph concerning adoption of the By-Laws and constitution is a gross untruth. We had removed the age requirement in 2004 or 2005 because we were receiving FEMA and other federal assistance grants. The Grant process prohibits bias on age, sex, religious, race and several other discriminations. Failure to follow those guidelines removes us from all federal grants and loans. I was already 62 when the council voted on the new By-Laws and Constitution. This was a new By-Law and constitution not a amended one as the paragraph seems to point toward, there were several other changes in the new documents not just this one. The new By-laws and constitution took several months to prepare; it was reviewed by the Fire Dept. personnel, members of the City Council and the city attorney before the council vote was taken. As stated earlier the age requirement was not enforced after 2004. It took longer than expected to write and get the new by-laws passed. Age discrimination and sexual discrimination were strong components of this situation. It included how the department functioned in all areas not just one or two.

In consideration of his comments, we have amended that paragraph in this report as follows:

The Council has authority to approve the election of the fire chief and the adoption of the fire department by-laws and constitution. The council approved new by laws on April 14, 2008, ~~to remove which in part removed~~ the mandatory requirement age of 60 for all members of the volunteer fire department, ~~thus making Bill Smith.~~ With this change, Bill Smith could officially be eligible to serve as fire chief. Subsequently, on June 9, 2008, the council approved the election of Bill Smith as fire chief.

Mr. Smith's objections and our revision do not alter the effect of his actions at issue nor do they impact our conclusions or recommendations in this report.

Mr. Smith appended to his response a letter dated April 30, 2010 from the city attorney to the mayor and council. Mr. Hatala states in that letter that our office has "ignored the fact that Iowa Code section 362.5, which prohibits a city officer or employee from having an interest, direct or indirect, in any contract or job of work or material or the profits thereof or services to be furnished or performed for the officer or employee's city exempts volunteer firefighters."

This section was not included in our analysis because we do not believe it impacts the issue involved. Section 362.5 generally prohibits city officers or employees from contracting for goods or services to be provided to the city. The "interest" prohibited by this section is a financial or pecuniary interest. Subsection 8 provides an exemption for contracts with volunteer fire fighters, who are neither officers nor employees of the city. This effect of this exemption is to provide that a city employee or officer is not prohibited from being a volunteer fire fighter and to receive payment for their services in that role. See, 1980 Op. Att'y Gen. 699, and Op. Att'y Gen. #93-8-2(L). We are not questioning Mr. Smith's ability to serve as a volunteer fire fighter or to be paid for his service, if the City compensates him; rather, we are concerned with him making decisions as a council member which benefit his interests as the fire chief or the fire department he oversees.

Mr. Hatala also states in his letter of advice to the mayor and council, in response to the issuance of our report, that we ignored the history of Iowa Code section 372.3 (10). [This appears to be a typographical error, because that section deals with home rule charter; we assume Mr. Hatala intended to refer to section 372.13 (10).] This provision was added to the Code of Iowa in 1990. There is no legislative history that explains what the Iowa Legislature intended. However, we note the immediate preceding subsections (8) and (9) contain similar language dealing with the eligibility of city council members to serve in another city position, depending on when the person was elected, when the position was created, or when compensation for the position is increased. We believe it is reasonable to infer that subsection (10) pertaining to the fire chief likewise addresses these matters related to compatibility and compensation and not the potential for conflicts of interests.

Despite the enactment of this statute granting compatibility, the maxim remains: Allowing two offices to be served simultaneously by the same person does not rule out the possibility and occasion that a conflict will arise. 1993 Op. Att'y Gen. 4-28. To the contrary, allowing

compatibility can jeopardize impartiality; because of this, extra care must be taken to avoid even the appearance of conflict. *Id.* “Public policy demands that even the potential for conflict is to be avoided. “*Id.*

Mr. Smith disagreed with our recommendation that he abstain from voting on matters affecting the interests of the fire department. We note that he did abstain from voting on fire department matters during the April and May, 2010, council meetings. However, given his position in his reply to our report and without his affirmation that he will abstain in the future, we assume he has not accepted recommendation #1.

Ombudsman’s Comments to the City’s Reply

Our office received a letter dated April 27, 2010, from current Mayor Phillip Auld that the city decided to address 3 of the 12 motions we discussed in our report, specifically:

- The April 14, 2008 motion to approve the by laws and constitution of the fire department.
- The May 12, 2008 and June 9, 2008 motion to approve the appointment of Bill Smith as Fire Chief.
- The July 28, 2008 motion to approve upgrade charge for fire department EMT call to EMT-1 status.

The mayor told us these issues would be on the May 24, 2010 city council meeting agenda. We heard nothing more from the city.

On June 2, 2010, Ms. Hart contacted Mr. Robert Hatala, city attorney, to inquire if the city intended to respond to our report. Mr. Hatala sent an email to Mr. Auld stating it was his understanding the city did not want him to file a response on their behalf. Mr. Auld sent an email to Ms. Hart. In this email he stated those three motions were reconsidered and all passed 4-0. Mr. Auld reported that Mr. Smith abstained from voting on all three motions. We subsequently reviewed the minutes and confirmed this.

We have determined that the remaining nine motions pertain more to procedural matters or are close in substance to the three motions that were reconsidered, such that the concerns we had with them have been adequately addressed. For this reason, we consider the city’s actions to constitute an acceptance of our second recommendation.

We appreciate the city’s response in taking action in follow up to recommendation #2.