



TOWN OF NORTH HAMPTON, NEW HAMPSHIRE
SPECIAL SELECT BOARD MEETING
Appointed by the Rockingham Superior Court

DECEMBER 30, 2019 6:00 PM

NORTH HAMPTON TOWN HALL

Amended and Approved February 26, 2020

APPOINTED SELECT BOARD MEMBERS: Chairman Don Gould, Rick Stanton, Emily Creighton

ALSO PRESENT: Town Administrator Bryan Kaenrath, Town Counsel Stephen Bennett

AGENDA

Chairman Don Gould explained that this is a Special Select Board appointed by order of the Rockingham Superior Court, the purpose of which is to address the application for reimbursement of legal fees by Mrs. Kilgore. He said this Board is sitting here because the three (3) regular Select Board members are all conflicted and are not able to sit.

Chairman Gould said with him is Emily Creighton and Rick Stanton, as well as Town Administrator Bryan Kaenrath and Town Attorney Stephen Bennett. He said he would like to take a minute to thank Town Administrator Kaenrath for the good service he has given the Town, and said he will be missed.

HEARING CONCERNING THE APPLICATION FOR REIMBURSEMENT OF LEGAL FEES

Chairman Gould said the sole purpose of the Hearing, pursuant to RSA 43:4, is concerning the application of Mrs. Kilgore for reimbursement of her legal fees. He said this is not a Public Hearing and there will be no Public Comment. Only the participants, Mrs. Kilgore and/or her representative, may take part, the Town Administrator may have to give testimony, and whoever speaks will be under oath.

Background

Chairman Gould said there was a mass of material consisting of minutes of the 3 Ethics Committee Meetings, the Ethics Code itself, findings of Ethics Committee, submissions from Mrs. Kilgore and Mr. Maggiore to the Ethics Committee, a letter to Mrs. Kilgore informing her of this Hearing and her response to that letter. He said the Special Select Board also recently received advice from Town Counsel concerning a statute that may or may be relevant here, namely RSA 31-105 Reimbursement. He said the Board met with Town Counsel a few weeks ago as a non-meeting under 91-A, which was a meeting between Counsel and his clients, this Special Select Board.

Procedures

Chairman Gould said Counsel advised as to procedures to be followed tonight under RSA 43:4: no Public Comment, and all speakers under oath. He said Mrs. Kilgore can call witnesses to testify under oath confined to the issues in this case. He said they are not going to re-litigate proceedings before the Ethics Committee as that is history and not relevant to tonight. He said the issues for this Board are whether or not we have legal authority to authorize the payment of \$12,000 to Mrs. Kilgore for legal fees she incurred in connection with the Ethics Committee proceedings. To resolve that issue the Board needs to resolve some subsidiary issues.

Chairman Gould said the subsidiary issues are: (1) does RSA 31-105 Indemnification for Damages apply; (2) whether or not Mrs. Kilgore, when she made the comment which gave rise to the Ethics Committee proceedings, was acting within the scope of her duties as a Selectperson; (3) whether or not Mrs. Kilgore in fact paid \$12,000 to her attorney, and (4) whether the attorney fees incurred were reasonable as required by RSA 31-105. He asked his fellow Select Board members for any comments. Mr. Creighton said she had none at this time, and Mr. Stanton said RSA 31-105 applicability it has to be by governing body and asked when the Select Board should address that. Chairman Gould said after the Hearing would be the appropriate time.

HEARING CONCERNING APPLICATION FOR REIMBURSEMENT OF LEGAL FEES

Chairman Gould opened the Hearing at 6:12 pm. He asked Mrs. Kilgore to stand and administered the Oath.

Statement of Mrs. Kilgore

Mrs. Kilgore provided a copy of her cancelled check to confirm payment as was requested. She said she wanted to clarify potential conflicts of interest in tonight's proceedings, and read Section 4.01 of the Town of North Hampton Code of Ethics in that regard. She said she had concerns whether Mr. Stanton could impartially participate in this case, and Mr. Stanton said he believed that he could. Mrs. Kilgore asked the same of Chairman Gould. Chairman Gould said her objection based on a conflict of interest is noted for the record, and if she intends to pursue that the proper place is with the courts. He said he respectfully disagrees that he is biased and is quite confident he can act in an unbiased manner.

Mrs. Kilgore asked if she could address a question to Town Counsel. Chairman Gould ruled that out of order, and said the purpose of her testimony is to present her case and not to engage in conversation with counsel. He asked Mrs. Kilgore if she wanted to say anything in support of her application to be reimbursed in the amount of \$12,000.

Mrs. Kilgore listed the reasons she felt she should be reimbursed: (1) the complaint filed claimed she was acting in her official duties as a Selectwoman; (2) to be charged in violation of the Code of Ethics, Section 4.02, the code requires Town officials to be acting in their official status; (3) the opinion of Mr. Janos, a member of the Ethics Committee, that the complaint did not meet the criteria of Section 4.02; (4) the complaint alleged she was acting in her official Select Board duties; (5) at the conclusion of the meeting of May 16, 2019 the Ethics Committee voted to move forward with formal charges of violation of the Code of Ethics, Section 4.02, which requires her to be acting in her official capacity.

Mrs. Kilgore stated that she was the only party denied legal representation, even though Section 4.04 requires that the Ethics Committee retain all legal rights provided under the law. She said she was also

denied the ability to examine the members of the Ethics Committee for conflicts of interest, and had conflicts with the Code of Ethics itself. She stated that the other two (2) parties in the proceedings benefitted from the advice of Town Counsel as follows: (1) the Complainant was provided pre-complaint consultation services by Town Counsel; (2) the Ethics Committee was also provided those services; (3) there were many unanswered questions as to due process throughout the proceedings; and (4) correspondence from my counsel submitted in writing was not afforded representation in meetings or hearings, adding to the cost of her legal representation.

Mrs. Kilgore said in the opinion of Town Counsel, she was never in any danger of being assessed legal fees or fines, since neither the Ethics Committee nor the Select Board has the authority to do so under these circumstances. Mrs. Kilgore said criteria to be met per RSA 31:105 is limited to a claim or judgement resulting in accidental injury to a person. She said defamation of her character is doing irreparable damage to her reputation, career, her ability to hold future Town offices, and her general standing in this and other communities, and stated that she is due reimbursement for the legal fees she incurred in order to defend and protect herself and her reputation.

Mrs. Kilgore said she was charged by the Complainant and the Ethics Committee of violating Section 4.02 of the Code of Ethics acting in her official capacity, even though her right to free speech under the First Amendment is preserved under Section 7.01 Self-Enforcement. She said the Ethics Committee eventually found that she was not in violation of Code of Ethics Section 4.02 as evidence did not support that. She said in closing, her high legal fees are a result of a lack of understanding by the Ethics Committee of the rules in the Code of Ethics, and by the Chairman's refusal to allow her attorney to speak on her behalf. She requested she be reimbursed for these reasonable legal fees because it was alleged she was acting in her official capacity.

Questions:

Ms. Creighton asked Mrs. Kilgore why she responded to her 2 colleagues on the Board, and to the press, that she was not acting in her capacity as a Selectwoman. Mrs. Kilgore said the press asked questions about something that happened at a meeting, and she was speaking about her feelings and not in her official capacity. Ms. Creighton asked why she felt she needed legal counsel, and Mrs. Kilgore said it was a serious matter to her and she needed assistance with the Code.

Mr. Stanton asked Mrs. Kilgore if she voiced an opinion when the Chairman of the Ethics Committee said there would be no representation. Mrs. Kilgore said her opinion was voiced quite a bit by her attorney during the whole proceedings. Mr. Stanton stressed that everybody there subscribed to that rule of no counsel being allowed to present, and Mrs. Kilgore said the Code itself grants her due process under law and upholds her first-amendment rights. Mr. Stanton said that was not his question.

Chairman Gould said during her presentation, Mrs. Kilgore read from RSA 31:105 and asked if they were to understand that she was basing her entitlement to reimbursement and indemnification on that RSA. Mrs. Kilgore said she had not read the complete details and referred to Town Counsel's opinion. Chairman Gould said he understood, but asked for the legal basis for her claim, since this Board needs a legal basis in law for authorizing the payment of \$12,000 to a private citizen. Mrs. Kilgore said she guessed it was RSA 31:105, as it could have done irreparable harm to her.

Chairman Gould explained that RSA 31:105 deals with indemnification and permits a municipality to indemnify people for their legal fees, assuming certain conditions are being met. He said the fees must be reasonable and the person has to have been acting in the course of his/her duties as an officer of the Town. Chairman Gould asked Mrs. Kilgore if at the Ethics Committee Meeting, both in written statement and orally, she stated she was not speaking as a Selectwoman. Mrs. Kilgore replied that she had made that statement. Chairman Gould said letters submitted by Mr. Bottomley and Ms. Schultz in her support also both stated she was not acting in her capacity as a Selectwoman and Mrs. Kilgore agreed.

Chairman Gould said during the proceedings before the Ethics Committee Mrs. Kilgore was asked on several occasions by the Chair of the Committee whether or not she would be willing to either retract her statement or engage in mediation to greatly shorten the proceedings and she refused. Mrs. Kilgore said that was correct. Chairman Gould said he had no more questions at this time. He asked the Town Administrator to testify with regard to RSA 31:105, which says a Select Board may indemnify a person if the Board had previously adopted an indemnification policy, and asked him whether or not the North Hampton Select Board has at any time adopted an indemnification policy pursuant to RSA 31:105.

Chairman Gould administered the Oath to the Town Administrator, and asked him if he had made an attempt to find out if the North Hampton Select Board has ever adopted such a policy under RSA 31:105. Town Administrator Kaenrath said they had investigated the issue and said there found no evidence to support that the Select Board voted at any time to adopt an indemnification policy as required by RSA 31:105. Chairman Gould asked Mrs. Kilgore if she had any questions for the Town Administrator on that specific subject. Mrs. Kilgore said the Town Administrator is saying the Town had not adopted such a policy to the best of his knowledge and there was no recent history to suggest it.

Witnesses

Chairman Gould asked Mrs. Kilgore if she had any witnesses to speak to the issues, namely RSA 31:105, the reasonableness of the fees, and whether she was acting in the scope of her duties. Mrs. Kilgore called Ms. Laurel Pohl, and Chairman Gould administered the Oath. Chairman Gould asked that she limit comments to the issues, and not rehash the Ethics Committee proceedings.

Ms. Pohl said Mrs. Kilgore should not be held responsible for which law she needs to quote, and said she does not read RSA 31:105 the way it seems to be applied here. She said this Board has the ability to indemnify her, and need only ask 3 questions: (1) was she acting in the scope of her office, (2) was it necessary for her to hire an attorney, and (3) are the legal fees reasonable. She said the answer to question 1 is clearly yes, as it was related to Select Board business and was conducted in public. The answer to question 2 is that the code only applies to officers/officials of the Town, and in Mr. Maggiore's complaint he recognized her as being in her role as an officer. For question 3, yes the legal fees are reasonable.

Ms. Pohl asked if Chairman Gould and Mr. Sanders could be impartial adjudicating Mrs. Kilgore's request. She asked that this matter be settled once and for all and save the Town further embarrassment. She said if this goes to the Supreme Court, the Town will likely lose and incur additional legal fees putting the burden on taxpayers.

Mrs. Kilgore asked to call Mr. Frank Ferraro, who was administered the Oath by Chairman Gould.

Mr. Ferraro said he will make a statement and address RSA 31:105 after that. He said in 4 Ethics Committee complaints filed, 2 were dismissed without a hearing. He said Mrs. Kilgore endured 3 public meetings when she was clearly exercising her First Amendment rights, and the Committee should have

dismissed the complaint at their first meeting. Chairman Gould interrupted Mr. Ferraro, and said he did say that they were not going to rehash the Ethics Committee as it is not relevant, and asked if he wanted to address the RSA 31:105.

Mr. Ferraro said he sees the indemnification of Mrs. Kilgore for legal fees as an award of attorney's fees as in a civil case, and said it is allowed in Civil Rights violations. He said her First Amendment rights were violated by having to endure 3 public meetings, her civil rights were violated, and she had to retain counsel to protect those rights. Mrs. Kilgore was exonerated and should be awarded her legal fees. He said it was not a case of indemnifying a municipal executive for injury or property damage as stated in RSA 31:105.

Chairman Gould asked Mr. Ferraro if he had some legal authority for the proposition that a Select Board can make an award of legal fees. Mr. Ferraro said the Select Board is empowered to pay invoices, and this is essentially an invoice for attorney fees incurred by Mrs. Kilgore. Chairman Gould said it does not sound logical that anybody who submits an invoice should just be paid. Mr. Ferraro said in the case legal action was brought by the Town; Chairman Gould said it was not brought by the Town but by Mr. Maggiore. Mr. Ferraro said this is someone who incurred an expense because of a Town action and is looking to be reimbursed.

Mrs. Kilgore asked to call Casey O'Kane as a witness and the Oath was administered by Chairman Gould. Chairman Gould asked Mr. O'Kane to confine his comments to what is relevant here, the application of RSA 31:105, and said we do not want to hear any more about what went on at the Ethics Committee.

Mr. O'Kane said he thought the discussion of 31:105 is misplaced here, and said indemnification is generally an agreement reached before the fact to indemnify/insure someone from harm that might arise, which is not the case here. He said an easier way of resolving the issue is by relying on the general authority the Board has here to manage the prudential affairs of the Town under RSA 41:8.

Mr. O'Kane said he would address why Mrs. Kilgore needed an attorney, and said first there is Mr. Maggiore's request of Town Counsel on how to file an Ethics Complaint. He said there were many cases where the Town, the Ethics Committee, Town Counsel used information in a way that was uniformly adversarial to Mrs. Kilgore. Chairman Gould said they were rehashing the Ethics Committee again and asked Mr. O'Kane to move on. Mr. O'Kane said Mrs. Kilgore needed an attorney because there was an attorney working against her.

Chairman Gould disagreed and said the Town and the Ethics Committee relied on the advice that was given to them by Town Counsel on how to proceed, but to characterize his activities as being adversarial was inaccurate. Mr. O'Kane said the written findings of the Ethics Committee were also drafted by Town Counsel, and provided no basis for why Mrs. Kilgore had not violated the Code of Ethics, only saying that she was exonerated. He reiterated that he thought the Board should just rely on their general powers to manage the prudential affairs of the Town and said he did not think RSA 31:105 was relevant.

Chairman Gould said before they end the hearing and go into deliberations, in the hopes of avoiding any further painful consideration of this sordid history that has transpired, would Mrs. Kilgore consider withdrawing her request for indemnification. Mrs. Kilgore asked on what basis, and Chairman Gould said he was asking in an attempt to avoid further difficult deliberations. He said no matter what the Board decides, people will be unhappy, and said he was trying to avoid that as Chairman Pinette had done during the Ethics proceedings to either mediate or retract your statement and end this right now, and say you

would like to withdraw with prejudice. Mrs. Kilgore said she would not withdraw her request for reimbursement of \$12,000.

Chairman Gould ended the hearing at 7:14 pm, and said they would take a short break and be back in 2 minutes to begin deliberations.

Hearing Deliberations by Board Members

Chairman Gould said they were ready to begin deliberations, and said it was now up to the Board to discuss this and make a decision. He said the issues are (1) does RSA 31:105 apply, (2) whether or not Mrs. Kilgore was acting within the scope of her duties as a Selectperson when she made her comments to the press, (3) and whether the legal fees are reasonable. He said he felt they should cover all 3 of them, even if they think the first issue is a dispositive, in the event this is appealed to the Supreme Court.

Ms. Creighton said she was looking at RSA 31:105 in terms of the scope of Mrs. Kilgore's duties, and said there is no way she can dissociate her speaking to the press about a meeting and her speaking as a civilian. She said the press recognized her as a Selectwoman and she did as well. As far as RSA 31:105, she said she did not feel comfortable addressing that, but added that nothing was found in the records. Town Administrator Kaenrath said that is correct, and according to the review they were able to do in the short amount of time available, there is no evidence to suggest that occurred.

Ms. Creighton said whether or not an indemnification policy needs to be adopted by the Select Board is a whole other issue that needs to be addressed. She said at the same time she cannot help stepping in the shoes of the person who feels they have been damaged in one way or another, but understands the Town cannot pay everyone who has a problem and hires a lawyer. She said that she could not say that the legal fees seemed to her to be reasonable.

Mr. Stanton said if there is no record of the Town accepting 31:105 it is important and is the basis for granting a financial award. He said he had a problem with "by reason of negligence or other act resulting in accidental injury to a person". He said he sees nothing that demonstrates there was negligence involved, and there was certainly no personal injury: reputation injury was possible but had not been established and said he has difficulty with that sentence in the statute.

Mr. Stanton said as to whether or not Mrs. Kilgore was acting as a Select Board member, she stated twice that she was not. He said he felt some of it was due to knowing you have the right to freedom of speech and can say anything you want, but by calling somebody a name in a Town opens you up to the Ethics Code, so if you use your first amendment rights you won't be found guilty of an ethics charge. He said you can't have it both ways and felt Mrs. Kilgore was acting as a Select Board member.

Mr. Stanton said as far as the fees being reasonable, he would never have paid that amount nor agreed to it. He said Mrs. Kilgore's attorney had just joined the bar and was a relatively new lawyer, and said he did not know that they get \$275/hour. He said there was no financial penalty from the ethics violation, and he did not feel the attorney fees were reasonable in his personal opinion.

Chairman Gould said in answer to whether the RSA applies, the answer is clearly no. He said they received an opinion from Town Counsel saying that in order for it to apply there must have been a prior vote of the Select Board to adopt an indemnification provision, and based on the testimony of the Town Administrator there has been no such vote. He said it was clear in his judgment that it does not apply, and said he does not believe this Board or any Select Board has the authority to just start issuing checks to

private citizens because they incurred legal fees as there has to be some statutory basis. He said I conclude that RSA 31:105 does not apply.

Chairman Gould said in answer to the question whether or not Mrs. Kilgore was acting in the scope of her duties, she said she was not, several witnesses said she was not, and I conclude that she was not. In answer to whether or not the fees were reasonable, he said he came to the same conclusion as Mr. Stanton but for different reasons. He said Mrs. Kilgore could have ended this on day one, and would not have incurred those fees, had she agreed to mediation or to retract her statement. He reminded his fellow Board members and the public, that while it was true Mrs. Kilgore was found not to have violated the Code of Ethics, the Ethics Committee also determined that her charge of sexism was not accurate and Mr. Maggiore's conduct was not sexist. He said it could have been easily ended without legal fees.

Decisions of Board Members

Chairman Gould said the Board would now take a separate vote on each of the three issues.

(1) Does RSA 31:105 apply in this case?

Motion: That RSA 31:105 does not apply to this case.

Motioned: Mr. Stanton

Seconded: Chairman Gould

Discussion: Ms. Creighton said she thought some parts of the RSA do apply.

Vote: Motion approved 2-1, motion carries; RSA 31:105 does not apply to this case.

(2) Was Mrs. Kilgore acting within the scope of her duties as a Selectperson when she made the "sexism" comment to the newspaper?

Motion: To move that Mrs. Kilgore was acting within the scope of her duties when she responded to the reporter.

Motioned: Ms. Creighton

Seconded: Mr. Stanton

Discussion: Chairman Gould said he was a little nonplussed by the conclusions of his fellow Board members that Mrs. Kilgore was acting within the scope of her duties, given her admission and testimony that she was not. Ms. Creighton said she was speaking as a Select Board member about a specific Select Board issue. Chairman Gould said there are clearly instances where officers engage in activity not part of their normal duties, and the law has to make the distinction between the two.

Vote: Motion approved 2-1, motion carries; Mrs. Kilgore was acting within the scope of her duties when she made the comment.

(3) Are the fees claimed by Mrs. Kilgore reasonable?

Motion: That the fees claimed by Mrs. Kilgore in the amount of \$12,000 for legal representation are reasonable.

Motioned: Mr. Stanton

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Seconded: Ms. Creighton

Discussion: Chairman Gould said he was again in the minority, as he did not think the fees were reasonable.

Vote: Motion failed 2-0, with 1 abstention; motion does not pass.

Motion: That the fees claimed by Mrs. Kilgore in the amount of \$12,000 were not reasonable.

Motioned: Chairman Gould

Seconded: Mr. Stanton

Discussion: Ms. Creighton said she had difficulty determining whether the fees were reasonable or not, and did not feel able to make that decision.

Vote: Motion approved 2-0, with 1 abstention; motion carries; the fees claimed by Mrs. Kilgore in the amount of \$12,000 were not reasonable.

Chairman Gould said that ends the deliberations and ends the work of the Special Select Board, but they will have to meet again to approve the minutes. He said they will also need to have a written opinion drafted and the decision delivered to Mrs. Kilgore. Town Administrator Kaenrath said the minutes would be ready within a week and asked if the Board wished to have Town Counsel draft the findings. Mr. Stanton said Town Counsel has sat in on this meeting and felt Town Counsel should do the first draft to be circulated to them for their comments.

Chairman Gould said Town Counsel will make an initial draft of the discussion, provide it to the Interim Town Administrator to circulate to us, provide our comments separately to Town Counsel through the acting Town Administrator, and Town Counsel will provide a final draft for our approval. He suggested allowing 2 weeks before the next meeting, and Town Administrator Kaenrath said he would take care of finding a date.

ADJOURNMENT

Mr. Stanton made a motion to adjourn the meeting which was seconded by Ms. Creighton.

Chairman Gould polled the Board and the motion to adjourn was approved by a vote of 3-0, and the meeting adjourned at 7:42 pm.

Respectfully submitted,

Patricia Denmark, Recording Secretary