

APPROVED
Date 4-12-94

MINUTES OF THE METRO COUNCIL GOVERNMENTAL AFFAIRS COMMITTEE

March 22, 1994

Council Chamber

Committee Members Present Mike Gates (Chair), George Van Bergen (Vice Chair), Judy Wyers

Committee Members Absent Roger Buchanan

Other Councilors Present Ruth McFarland, Susan McLain, Rod Monroe

Chair Gates called the regular meeting of the Governmental Affairs Committee to order at 4 04 p m

1. Consideration of March 8, 1994 Governmental Affairs Committee Meeting Minutes

Motion Councilor Van Bergen moved to approve the March 8, 1994 Governmental Affairs Committee meeting minutes as submitted

Vote. Councilors Wyers, Van Bergen and Gates voted aye Councilor Buchanan was absent

2. Communications from Local Governments

No communications

3. Consideration of Draft Resolution No. 94-1932, Establishing Personnel Policies for Council Department Employees

Casey Short, Council Analyst, referenced Draft Resolution No 94-1932 which was distributed to the Committee. This document has been made a part of the permanent meeting record. He said the resolution called for the Council Staff to be governed by the provisions of the Metro Code in the same manner as the rest of Metro employees with the stipulation that the authority of the Presiding Officer would supplant, in most instances, where reference was made to the Executive Officer's authority. He noted the draft resolution provided responsibilities and duties assigned to Department Directors in the Code would be performed by the Council Administrator. Mr. Short said there was a difference in BE IT RESOLVED 3 from the Personnel Rules Code provisions the Council would be hearing on Thursday, March 24, and noted the Code provision stipulated the Presiding Officer would have the responsibility to make appointments to permanent positions. He read from the proposed Code provisions "Direct appointments of staff in the Council Office may be made without going through the normal recruitment and selection process. All appointed staff in the Council Department shall serve at the pleasure of the Council." Mr. Short said BE IT RESOLVED 3 reiterated that with the stipulation that the Council would adopt a resolution in order to waive that procedure. He noted there were certain functions the Executive Officer performed for which no benefit could be determined were they performed by the Presiding Officer as well, such as administering the Pay Plan, establishing classification plans, etc.

Daniel B. Cooper, General Counsel, commented the document presented Mr. Short's recommendations fairly and accurately.

Councilor Wyers asked whether the Council Staff would report to the Presiding Officer or to the Council according to the proposed resolution. Mr. Short and Mr. Cooper concurred the Charter provided the Council Staff served at the pleasure of the Council and reported to the Council. Mr. Cooper said while the appointment process was made by the Presiding Officer, the formal disciplinary process of terminating an employee would be a Council decision. In response to Chair Gates, Mr. Short said grievance procedures were found in the Code and determining appropriate steps and named either the Executive Officer or the Presiding Officer as appropriate, and noted state law governed the treatment of public employees.

In response to Councilor Wyers, Mr. Short noted with regard to chain of command, Council Staff reported on a day-to-day basis to the Council Administrator, i.e. the Department Director, and said the chain of command from the Council Administrator upwards was not as distinct. Mr. Short indicated he would prepare language to address the situation at direction from the Committee.

Donald E. Carlson, Council Administrator, said there were provisions in the Code concerning a hierarchical relationship between the Council Administrator and the Presiding Officer which he felt constituted a reporting relationship.

Councilor Wyers felt the language should be made distinct.

Councilor Monroe felt the Presiding Officer must be well informed and that a reporting relationship should be clearly established.

Chair Gates expressed concern that the sanctity of equality amongst the Council members be maintained, and that the Presiding Officer position not be elevated to that which would be in a sense be editorial or invested with legislative empowerment.

In response to Councilor Van Bergen, Mr. Short said the recruitment and selection process referenced in section no. 3 of the proposed resolution was documented further in the Code. Councilor Van Bergen questioned the use of the term, "The Council may waive that process, by adoption of a resolution." Mr. Short responded that the intent was that the general rule would be that the Council would engage in the same recruitment and selection process as was usual. He said the Code drafted language said the Council had the authority to waive that process. He said the language in the proposed resolution was an attempt to say that the norm would be to go through the same process as was usual, but that the Council could choose to waive that process by adoption of a resolution. He said the resolution would stipulate what portion of the process would be waived, and that the Council would have to vote on the proposal. Mr. Carlson said he understood the intent to be on a case-by-case basis for an individual position that was open. He said if the intent were otherwise, the Council should just amend the Code in the first place.

Chair Gates referenced Exhibit A, section no. 2.02.060(b)(1) regarding appointment at or 5% above the beginning salary rate. He questioned whether or not a person could be appointed at a level between the two. Mr. Short read from the Code, which indicated similar language. Chair Gates noted there seemed to be lack of flexibility because of the language.

Mr. Short noted his work on the proposed resolution reflected an attempt to reconcile the conditions existing in that certain Council Staff employees were represented by the union and others were not.

Chair Gates requested clarification in the language in the resolution as discussed be prepared and brought back to the Committee for consideration at its next meeting to be held.

4. Review of Contract Code Provisions

Mr. Carlson addressed the Committee regarding the authority invested in the Council and in the Executive Officer under the Metro Code dealing with contract approval. Mr. Carlson noted the question concerning the authority of the Council with regard to contracts and contract amendments was raised in light of the recent Oregon Waste Systems amendment. Mr. Carlson said the larger issue concerned with separation of powers between the Executive and the Council was also in question.

Chair Gates noted his intent in bringing the item forward on the agenda was to address the larger issue of the separation of powers and the authority available to Council.

Mr. Cooper said concerning separation of powers questions, that, because of his role as the Attorney for the agency, and, not just the Council, he was bound not to answer those questions unless there was a concurrence between both the Executive and the Council on those issues. He said it was troublesome because some of the answers in his mind were relatively simple while others were relatively complex. He said prohibition and the regulation that was agreed to by both the Executive and the Council limiting the function of Legal Counsel did not differentiate between, what he termed, simple questions under ORS 279 about the function of a Contract Review Board and what he termed, the more complex questions in his mind, about the meaning of the Charter concerning allocation of powers between the Executive and the Council. Mr. Cooper indicated he was unable to answer questions related to the power of the Council to legislate major revisions in the Contract Code in the area of approval.

Chair Gates recommended independent counsel be sought to clarify the issues at hand as the discussion proceeded further. Councilor Wyers concurred.

Mr. Carlson discussed the issue and said he believed the functions attributable to administering were the question.

Mr. Cooper commented similar circumstances occurred in the past and the result was the current Metro Code, which he noted did not deal specifically with amendments.

Mr. Cooper said as the Attorney for the Agency, and in the attempt to deal with the question of how does the Charter divide up the contracting authority, that it would be advisable to seek outside legal opinion in this singular instance.

Councilor Wyers expressed concern that these issues were not addressed earlier on in the process when the Charter was adopted. The Committee and Staff discussed the issue further. Mr. Cooper noted before the Charter was adopted that he was of the opinion that the Council could amend the Code to limit the change order authority it had granted to the Executive Officer in the Code. He said it could have been amended prior to adoption of the Charter, and said it could be amended now.

Councilor Wyers recommended that the Council go forward with the matter of amending the Code in a systematic fashion with regard to both contracts and contract amendments. Councilor Monroe said he understood the Council had the authority to pass an ordinance to amend the Code, giving the Council contract review authority and contract amendment review authority. Mr. Cooper said he was addressing the Council's contract amendment review authority, and said he believed the Code provisions on the Council's approval of contract amendments could be made much tighter by the Council, requiring more contract amendments to come before the Council than are currently required. He recalled the approval of contract amendments for Metro Regional Center, which were heard in the Finance Committee. He said review of the rules and their interpretation was undertaken at that time, and noted the previous Regional Facilities Department Director had been confused by those rules. He noted that at his recommendation the Council ratified all of the change orders in question at that time whether or not it had been necessary. He said had the rules been written differently with different limits they would have been valid. He said he did not believe that was a Charter issue or a statutory interpretation issues, but rather, he said, was clear under whatever body of law was being examined, that the Council had the ability to adopt, in either the past or the present tense, different rules for what contract amendments were to come before the Council as a body.

Councilor Monroe recommended the Governmental Affairs Committee introduce an ordinance that would clarify and tighten up the Council's contract review authority, and, in particular the authority of the Council to review all contract amendments toward the end of the budget process.

Chair Gates noted other contracts were of regional import and felt the matter should be resolved as quickly as possible.

Mr. Short indicated it was part of his personal work plan to address a rewriting of the contracting code as soon as the budget process was completed, and noted there were time constraints due involvement with the current budget process. Mr. Short concurred legal opinion from outside counsel would be beneficial.

Councilor McLain commented regarding her concerns as an elected official with the recent solid waste contract amendment that was recently heard in the Solid Waste Committee. She discussed the issue of the definitional problems with the contract amendment and how the matter was to be handled with a waiving of previous claims against the agency rather than by refining the definitions. Councilor McLain expressed concern that the amendment had been placed under Committee review and was subsequently removed from that process.

Councilor Wyers referenced a memorandum from herself and other Councilors directed to Mr. Cooper containing questions regarding the Forest Grove waste, and said she was concerned how that waste would be handled. Councilor Wyers referenced also the Code sections regarding designated facilities, which she noted stipulated that any contract of any designated facility was to be approved by the Council, and asked that Mr. Cooper address the matter.

Mr. Cooper said Councilor McLain had spoken to him about a series of questions for which she desired a response. He said he felt he should answer her questions one-on-one for the sake of clarity, and said it was possible to bring the answers before the Committee or the Council if so desired. Mr. Cooper said Mr. Sadlo was working with Waste Management regarding the definitional issues raised by members of the Committee. He said he did not believe there was disagreement about how those should be resolved, but to date they had not been resolved. Mr. Cooper said he would find out where in the process the matter stood. Mr. Cooper said a detailed written response was being prepared for the Council by himself and Mr. Sadlo. Mr. Cooper discussed designated facilities provisions in the Metro Code, and noted the Executive Officer had not signed an amendment to the designated facility agreement with Waste Management. He said she had signed the original bid document contract from 1988 providing for the delivery of waste from Metro's transfer stations, which he noted were also designated facilities, to the landfill at Metro's expense. He said the designated facilities agreement covers the responsibilities of the landfill to report and pay to Metro fees generated out of waste they receive other than transfer station waste output.

Councilor Van Bergen recalled previous Council deliberations with the Executive Officer, the result of which was the current A/B contract designation. He felt the opinion of Senior Assistant Counsel Todd Sadlo involved the area of division/separation of powers as it made a determination regarding where authority rested, i.e. between the Council and the Executive. Councilor Van Bergen felt the question remained and said resolution of the question should be addressed in a timely manner. Councilor Van was concerned regarding the potential for irreparable harm. He said if resolution affirmed authority rested with the Council, then he would consider the contract amendment as signed by the Executive Officer void and not susceptible to any interpretation. He said if, as a result, Waste Management changed their position, then Metro could be liable for irreparable harm.

Motion Councilor Van Bergen moved that outside legal counsel be retained to resolve these issues at this time.

Councilor Wyers seconded the motion.

Councilor Wyers requested Mr. Cooper or Mr. Sadlo provide a legal understanding regarding the difference between the two contracts, the designated facilities and the disposal contract. Councilor Wyers asked Mr. Cooper why the Executive Officer asked the Council to approve the contract amendment, and asked was there any discussion of a legal basis for that approval.

Mr. Cooper said Mr. Sadlo's work had met with his approval and concurrence, and said Legal Counsel had advised the Executive Officer that she had the authority to sign the contract amendment without referring it to the Council. Mr. Cooper said he could not and would not answer why the Executive Officer referred the contract amendment to the Council for approval. He suggested the Executive Officer be asked that question.

Chair Gates said referenced the motion on the floor, and said he presumed the Committee did not have the authority to expend Metro funds for the pursuance of an outside legal opinion, but rather that the Committee could recommend such action to the full Council. Mr. Carlson concurred.

Chair Gates opened a public hearing.

Edward Snook, representing Liberty Network, a concerned citizens' group from Milwaukie, addressed the Committee. He said the group believed the contract amendment had state constitutional problems and felt it would violate the Sherman Anti-Trust act. He said Liberty Network felt Waste Management intended to monopolize. He supported the concept of retaining outside legal counsel for the purpose of resolution. Mr. Snook said although a short term positive budget impact might be felt, his group believed that over the long term there would be a negative budgetary impact.

Councilor Van Bergen noted he had requested an opinion from Legal Counsel on the issue as related to the Sherman Anti-Trust laws and had received same. He requested another copy from Legal Counsel to provide to Mr. Snook, and suggested the Liberty Network contact him as he had not been previously aware of the group.

Mr. Snook said the group was about 5 months old and just under 200 members. He said the group was just now getting publicized. He said a goal of the group was to hold public officials accountable to their oath of office.

Chair Gates asked that the opinion referenced be made available to all Councilors.

Bob Ziemer, an editor at the Oregon Spectator newspaper, testified before the Committee, referenced the newspaper's special edition concerning the contract amendment issue. Mr. Ziemer referenced the Charter and said it gave dominant power to the Council. He noted the Executive has authority in Charter to veto, and noted the Council could, by a 9 member vote, override the Executive. He felt Councilor McLain was correct in her assessment that the Committee had just started to get to the questions when the contract amendment was signed by the Executive. Mr. Ziemer said he reviewed a resolution passed by the Council and signed by Presiding Officer Mike Ragsdale authorizing the Executive Officer to sign a contract with Waste Management. He felt if Council action were necessary to sign the contract, Council action ought to be necessary to amend it. Mr. Ziemer questioned what additional powers did the Executive have. He said when the voters passed the Charter in 1992, the expectation was that the Council would set the policy, and felt the issue at hand was a serious policy decision, and emphasized Council accountability.

Councilor Wyers asked Mr. Carlson to check with Mr. Houser regarding the budget and whether there would necessarily be a budget amendment involved in the matter.

Councilor McLain urged the matter of the timing to be considered within the framework of the motion on the floor, if approved, be made of import.

Councilor Van Bergen expresses concern regarding the potential for a change in position by Waste Management in the matter, and said if they were to, as he termed it, abandon Adams County as a bad scenario and found themselves unable to recover the funds thus far expended, he could foresee the possibility of substantial damage claims. He said emphasized the urgency of the timing, and said he was concerned. Councilor Van Bergen felt the Oregon Waste Systems amendment should be explored as executed within the context of the authority to do so.

Mr. Carlson reiterated questions to be posed to outside legal opinion would include 1) the authority to execute that contract amendment, and, 2) does the Council have the authority to approve contracts explicitly under the Charter as well as existing Metro Code ordinance.

In response to Councilor Van Bergen, Mr. Cooper said he did not feel he needed to enter into the framing of motion, but rather, he said he would assist in the process of selecting an attorney and making sure the attorney knew what the questions were.

Chair Gates asked if the matter could be put before the full Council on Thursday, March 24, 1994 as an additional agenda item.

Councilor McLain commented for the record that she would not go to outside legal counsel if she did not feel it was important to the overall policy making abilities of this Council, not only with regard to this particular contract but to

contracts that might follow. She said it was not a question of politics to her, but rather of services rendered to the public in the best manner possible.

Chair Gates commented he felt the matter at hand was one of an extremely serious nature, and noted a threat on the horizon testing the existence of Metro, he personally felt this to be the nexus issue, e.g. how it was resolved and carried forward and with what timeliness. He commented that if the elected representatives of Metro; i.e. the Council members, did not have the superior authority within the agency to conduct agency business, there was no need for a Council.

Chair Gates restated the motion: it was moved that the Council accept the Committee recommendation to retain outside legal counsel charged with review of the authority for contract amendments as well as contract provisions.

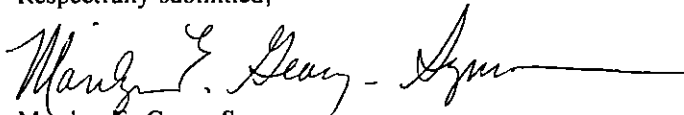
Vote Councilors Wyers, Van Bergen and Gates voted aye.

The vote was unanimous and the motion passed.

Councilor Wyers affirmed the matter would be on the agenda before the full Council meeting to be held starting at 4:00 p.m., Thursday, March 24, 1994.

There being no further business, the meeting adjourned at 5:30 p.m.

Respectfully submitted,

A handwritten signature in cursive script, reading "Marilyn E. Geary-Symons". The signature is written in dark ink and is positioned above the printed name of the signatory.

Marilyn E. Geary-Symons
Committee Recorder