

January 12, 2005

CONFIDENTIAL — ATTORNEY WORK PRODUCT INFORMATION

Factual Report on Harassment Complaint of December 14, 2004

I. Engagement For Investigation

We were retained by the City Attorney to perform an investigation of a Harassment Complaint filed by the Charging Party on December 14, 2004.

The scope of our duties was to gather the factual information from the Charging Party he believed supported the allegations in the Complaint. We then were to obtain Respondent's response or comments regarding the factual information provided by the Charging Party. This report contains the factual information provided by the Charging Party to support the harassment allegations and Respondent's responses or comments to the factual information, where applicable.

Due to the large amount of factual information, it would have been virtually impossible to address each factual matter or item of background information, provided by the Charging Party, with the Respondent. Every attempt was made to obtain, at the very least, Respondent's comments and/or responses to major allegations.

It is important to note that we did not and do not make any credibility determinations regarding the allegations of the Charging Party or the responses of the Respondent. If there are conclusory statements or facts contained in this Report, such were made either by the Charging Party or Respondent during the interviews. We obtained the information and present it in a manner that will allow the reader to be fully informed about the circumstances surrounding the Complaint. This Report is intended to be objective in nature and we believe we

have been committed to and fulfilled that intention.

This Factual Report will be provided to the City Attorney for review. After review, the City Attorney may request that the our role change and that we provide an opinion as to whether the allegations and supporting factual information rises to the level of harassment under applicable law or the policies of the City of Rapid City.

The City Attorney will make the decision as to whether any of the information contained in this Factual Report is disclosed to the parties, the Mayor, or City Council.

II. Contact and Interview of the Charging Party and Respondent

A1. Charging Party

On December 30, 2004, the undersigned and certified legal assistant, Deb Scheele, met with the Charging Party at the City Finance Office regarding the Harassment Complaint dated December 14, 2004.

Prior to that date, the undersigned provided an e-mail to the Charging Party outlining the investigative process. That process was reiterated to the Charging Party at the meeting on December 30, 2004.

The undersigned conferred with the Charging Party and verified the extent of the Complaint. In addition, the undersigned confirmed that the Charging Party was pursuing the Complaint under the Harassment Policy dated May 10, 2003 and the Prohibition Against Retaliation Policy dated November 2, 2002.

Although the Charging Party set forth in writing his Complaint dated December 14, 2004, it was felt by the undersigned that background information should be obtained during the interview so as to put the matters outlined in the Charging Party's Complaint in historical and proper context.

We received copies of various e-mails, memos and other materials at the meeting. In addition, we received a letter from the Charging Party dated January 3, 2005 with some additional information.

Other than the Complaint and the two policies mentioned above, we assert work product privilege over the materials provided to us by the Charging Party.

A2. Respondent

On December 31, 2004, the undersigned and certified legal assistant, Deb Scheele, met with the Respondent at the law firm of Gunderson, Palmer, Goodsell, & Nelson LLP. The Respondent was accompanied by his attorney Talbot Wiczorek.

Prior to that date, the undersigned provided an e-mail to the Respondent outlining the investigative process. That process was reiterated to the Respondent at the meeting on December 31, 2004.

The Complaint was provided to the Respondent and his attorney for review. It is our understanding that this was the first opportunity for the Respondent to review the written allegations made by the Charging Party.

A copy of the Complaint was requested. We declined to provide a copy to the Respondent and his attorney at that time. We advised that they should contact the City Attorney's office to determine if a copy of the Complaint could be obtained. The Respondent and his attorney left the room and reviewed the Complaint.

Upon returning we discussed that the investigation was proceeding under the Complaint and the two policies referenced above. The Respondent indicated that he was unaware of the Harassment Policy dated May 10, 2003. He did not believe it was passed by the City Council. We advised that we would proceed as though the two policies were proper policies and that the validity of the Harassment Policy dated May 10, 2003 would be determined by the City Attorney's office.

There was discussion that the Respondent is an elected official. The Respondent's attorney advised that he and the Respondent believe that the Respondent has no obligation under the City Handbook to participate in the investigation but is willing to voluntarily participate.

No documentation or materials were obtained from the Respondent or his attorney at the interview. We received a letter dated January 3, 2005, with materials from the Respondent's attorney that was referenced during the meeting. As with the materials received from the Charging Party, we assert work product privilege over the materials provided to us by the Respondent.

III. Biographical Information

A. Charging Party

The Charging Party graduated from the University of South Dakota (USD) with a Bachelor of Science Degree in 1973. At that same time he received his ROTC commission in the U.S. Army. In 1976, while in the Army, he attended night school and received a Master's Degree in Public Administration from Webster University.

He received an honorable discharge from the Army in 1976 and then began working at Custer State Park. He worked as the Business Manager at the Park for almost 17 years. In 1977, he joined the South Dakota National Guard. After attending night classes, in 1983 he received his Master's in Business Administration from the USD extension school at Ellsworth Air Force Base. In 1994, he began work at the Custer School District and worked there for two and one half years.

On January 1, 1996, he was appointed as Finance Director for the City of Rapid City, and has served in that position since that time. On May 1, 2000 he was appointed as the Human Resources Director, initially on a temporary basis. Since that time he has served in both capacities.

On June 1, 2003 he retired from the South Dakota National Guard, as a Colonel, after serving in various Command and Staff positions. While in the SDNG he attended the Air War College in 1998 and 1999. He was awarded a Master's Degree in Strategic Studies from the Air War College.

B. Respondent

Respondent is originally from Iowa. He graduated from the University of South Dakota (USD) with a degree in Psychology and Criminal Justice in 1997. He received a Master's Degree in Public Administration from USD in 1998. While attending college he worked at a juvenile treatment facility in Beresford, South Dakota. After graduation he undertook a graduate internship in Crime Scene Analysis.

While attending college he also worked part-time at Gateway Computers as

a phone tech part time. After graduation from college he worked in the Human Resources department at Gateway. His main duty consisted of administration of the Pay for Performance Program at Gateway.

From 1999 until December 2003, the Respondent worked out of his home in Rapid City full time for Gateway. At the end of 2003, his position was eliminated. The Respondent was then re-hired by Gateway to perform financial analyst duties for the company's Country Stores. That position was then phased out in February of 2004. In June of 2004 the Respondent began working as a Vocational Rehabilitation Counselor for the State of South Dakota, a position he presently holds.

The Respondent became interested in politics in approximately the Fall of 2000 when a friend moved from Yankton to Rapid City. The friend became the County Executive Director of the Pennington County Republican Party. At that time the Respondent started going to Republican Party meetings. In July of 2001 the Respondent was appointed to the Rapid City Planning Commission.

The Respondent first ran for election to the Rapid City Council in 2002. Respondent serves a constituency of twelve thousand people and was unopposed in the 2004 election.

IV. Synopsis of Charging Party's Allegations — By Investigator

This synopsis is provided by the Investigator to give an overview of the basis of the Charging Party's allegations. The essence of the Charging Party's claims is that the Respondent sends many e-mails and makes inquiries to the Charging Party and the Finance Office. The Respondent is then provided information in response to those inquiries.

Then during public meetings, the Respondent makes allegations and asks questions that give the public and others the impression that the Charging Party has done something underhanded, illegal, or secretly. The Charging Party believes that the Respondent is intentionally harassing him and attempting to embarrass him publically.

The Charging Party alleges that the Respondent continually brings up

issues that have been addressed in the past during public meetings. When these issues come up, the Charging Party is not prepared to respond to the issues fully because they are not on the agenda. When this happens, the Charging Party feels that the Respondent is attempting to place him in an unfavorable light, to the Council and the public.

V. Synopsis of Respondent's Response To Allegations — By Investigator

The Respondent believes the allegations by the Charging Party are purely "political" in nature. The Respondent believes that his questioning of the Charging Party is his right as an elected official and an obligation to his constituents.

Respondent believes there is a big picture and motive behind the Charging Party's Harassment Complaint. The Respondent and Ray Hadley have started pushing to separate Human Resources from the Finance Office. The Respondent believes that this is the reason for the allegations by the Charging Party. The Respondent believes that the Charging Party is threatened as he and Ray Hadley are trying separate control in City government.

The Respondent indicated that he has never bothered the Charging Party in his personal life or at home. The Respondent only asks questions to serve his constituents.

The Respondent believes there is a "time for a change" in City Hall and that the Charging Party should not continue in his position in City government.

VI. Factual Information From Charging Party and Respondent's Response

A1. Charging Party's Factual Information – Parking Pad at 2402 5th Street (Kirkeby Driveway)

At the January 7, 2002 Council meeting, the Council approved spending money to install a parking pad at 2402 5th Street. At the December 27, 2001 special Council meeting, City Attorney Tamara Pier advised the Council that such action was illegal pursuant to SDCL 9-42-2. As a result, the Charging Party sent a memo to Mayor Munson dated January 10, 2002. The Charging Party advised

that in order for the desires of the Council to be met and in order to comply with State law, he was placing the item on the ballot for the June 4 election. In addition, the Public Works Director was directed to stop construction of the parking pad until a funding source had been properly approved.

The Charging Party, on January 11, 2002 was sent an e-mail by Rick Kreibel which essentially set forth his dissatisfaction with the Charging Party's January 10, 2002 memo. In that e-mail there was reference regarding the Youth & Family Services 2012 funding. The tone and tenor of the e-mail was such that Rick Kreibel apparently felt that the Youth & Family Services 2012 funding should have also been put to a vote. Further, he accused the Charging Party of conduct that was unprofessional and sabotage in nature.

A2. Respondent's Response or Comments

As the Charging Party provided this information as background we did not specifically address with Respondent.

B1. Charging Party's Factual Information – Public Works Employee Matter

In August of 2002, there were two employees who apparently had conflicts with each other in the Public Works Department. One employee visited with Ray Hadley. On August 6, 2002, the Public Works Director called the PW Superintendent and advised that Ray Hadley had advised that there was a personality conflict between two PW employees. The Superintendent met with the Public Works Director and others to discuss the situation.

On August 13, 2002, the PW employees were issued letters of reprimand. On August 19, 2002, Ray Hadley announced during a Council meeting that a City employee had recently discussed some issues with a Council member and received a letter of reprimand. Ray Hadley was adamant that a City employee has the right to speak with Council members concerning concerns and should not be penalized for speaking with Council members.

Apparently the matter, at least with one of the employees, went through the City's grievance process. On October 1, 2002, the employees attended a mediation

and signed an agreement to work out their differences. On October 3, 2002, Mayor Munson directed that the letters of reprimand be removed from the personnel file of the employees.

On October 21, 2002, the Respondent requested that the City Attorney's office draft a resolution stating that City employees should not be reprimanded for speaking with Council members or the Mayor's office. The Charging Party and the Assistant Attorney were vocally opposed to the resolution. Their position was that such resolution implies that something happened that really did not happen; that the union would try to leverage the matter for its personal gain; that it would drive a wedge between the Council members and the Department directors; and lastly, that it was not necessary.

On October 23, 2002, the Respondent discussed the issue with the Charging Party. The Respondent was advised by the Charging Party that the letter of reprimand was not for speaking with a Council member. The Respondent was shown the letter of reprimand. The Respondent made the statement that even if an employee wasn't disciplined for talking to Council members, it was still a good idea to have the resolution to prevent anything from happening. The Charging Party reiterated to the Respondent that he did not believe that the resolution was a good idea.

On November 4, 2002, Ray Hadley moved that the staff draft a resolution stating that City employees shall not be reprimanded for talking to Council members or the Mayor's office. On December 2, 2002, the resolution was passed by the City council.

On December 9, 2002, an article appeared in the Rapid City Journal implying that City administration had been violating City employee rights by reprimanding them for talking to Council members. On December 10, 2002, the union representative appeared before the PW Committee to see what action the Council would take on the resolution. At that meeting, the Respondent informed the public that the City had been reprimanding City employees for talking to elected officials because he had seen the "paper trail."

The Charging Party advised that he has spoken with the PW Superintendent to determine whether the employees were disciplined for talking to an elected

official and was advised that they were not. Charging Party feels that staff hours were used to defend a false accusation.

B2. Respondent's Response or Comments

In August of 2002, a City employee contacted Ray Hadley and reported an issue. Ray Hadley then called Dan Bjerke regarding the matter. Within two days, two city employees were reprimanded for a violation of the chain of command. The Respondent and Ray Hadley believed that the employees were written up for speaking with a Council member. At the August Council meeting Ray Hadley requested the reprimands be pulled. The Respondent was not present at this meeting as he was in Portland, Maine.

When the Respondent returned to Rapid City he and Ray Hadley talked over the issue and the Respondent felt that free speech allowed City employees to talk to Council members. This situation resulted in the free speech resolution. The Respondent feels that the resolution would allow employees to "whistle blow" so to speak.

The Respondent related that the Charging Party told the Council that the resolution was not necessary. The Respondent believes that the Charging Party was upset because the resolution was passed. The Respondent believes that the resolution was a reaffirmation of State law and symbolic in nature. He believes that the Charging Party, as Personnel Director, was very angry as a result of the resolution being passed by the Council.

The Respondent was asked whether there was any direct evidence that there was any retaliation surrounding the letters of reprimand. The Respondent indicated it was unclear whether there was direct retaliation by the employees' supervisor or whether it was symptomatic of City government that the reprimand was issued. The Respondent believes that the reprimands speak for themselves and show that there was retaliation against the employees for contacting a Council member. The Respondent personally believes that the letters of reprimand were issued because a City employee spoke with a Council member.

C1. Charging Party's Factual Information – City's Insurance Procurement

On October 20, 2004 the Respondent sent an e-mail to the Charging Party regarding the City's liability insurance. The Respondent had received a call from a Farmer's Insurance agent. The Respondent explained that the agent was one of his constituents and was interested in the process to select the City's liability carrier. Respondent had advised the agent that the contract for 2005 was awarded on October 18, 2004. The Respondent indicated that the agent expressed an interest in allowing his company to bid on the contract the following year and he had some questions regarding the process.

The Respondent then listed five questions: (1) Did any member of the insurance committee underwrite the contract or have a financial interest in the contract which was ultimately awarded to St. Paul? (2) To which companies were proposals sent? (3) Was the RFP published in any trade publications, etc.? (4) What are the terms of the insurance committee members and is it possible to post minutes of those meetings to the web along with the other minutes? (5) Does this committee have bylaws?

On October 22, 2004, Gary Drewes sent a letter to the Mayor and Council regarding Liability and Property coverage. Gary Drewes expressed disappointment to learn that his company's premium quote was adjusted upward before it was presented to the Legal and Finance Committee. He expressed that it was difficult to understand why this was done without discussing it with him.

With the letter, he also referenced that "An issue we are hearing much about today is the concern of whether insurance brokers are being objective in providing advise to their clients. (Please see the enclosed article from the Monday, October 18, 2004 USA TODAY newspaper.)" He further stated "The credibility of the POOL, governed by nine local government officials from South Dakota, has been above reproach."

The headline of the article reads "Spitzer eyes possible kickbacks to insurance brokers." The opening paragraph of the article states:

New York Attorney General Eliot Spitzer is widening his insurance industry investigation to examine whether big insurance companies may be paying kickbacks for business

from some of the nation's 300,000 independent insurance agents and brokers . . .

On October 25, 2004, the Respondent sent an e-mail to various City officials, including the Charging Party. The Respondent acknowledges receipt of the letter from Gary Drewes. Respondent then states :

When combined with the separate concern from Rick Thomas of Farmer's Insurance (see e-mail below), it appears that there are serious questions regarding how this contract was awarded and negotiated. I would like a full explanation of this at the next Council meeting. If this contract has not yet taken effect, I ask that we put the effective date of the contract on hold so that this matter can be dealt with.

The Charging Party stated that it was felt the inquiry was such that there was an inference the insurance procurement process was done in an underhanded way. The Charging Party stated that this e-mail upset the Chair of IIARC's City Insurance Committee, Kathy Mcquire, and others including private business people and City staff. In addition, many hours were spent in preparing a response.

In response to the e-mail a rather voluminous packet of material was put together. Included in the material was a seven page letter, dated October 27, 2004, signed by Kathy Mcquire explaining the process undertaken by the Committee and addressing the Respondent's inquiries by e-mail.

C2. Respondent's Response or Comments

The Respondent described the insurance procurement process as a no bid type insurance contract. In addressing this issue, the Respondent indicated that Gary Drewes sent him a USA Today article regarding the New York Attorney General's pursuit of insurance brokers for kickbacks. In addition, Rick Thomas who is an insurance agent questioned why his company could not bid. These matters were forwarded on by the Respondent and he was requesting an explanation.

The Respondent stated that Kathy McGuire gave an explanation and everything was fine.

After the interview, the Respondent's attorney provided additional

information from the Respondent on this issue. After the exchange of e-mail between Respondent and Charging Party, Gary Drewes e-mailed the Charging Party on October 27, 2004. Mr. Drewes advised that Kathy McGuire had called him the day before and was pretty upset. He explained to her that his original contact was with Mayor Shaw of whom he inquired how he could obtain information as to how the quoted price had been changed. He was concerned that a quote given by his company was changed. Mr. Drewes advised that until the day before no one had explained how the quote had been changed – only that adjustments were made and his company's quote was higher than St. Paul's.

D1. Charging Party's Factual Information – Revenue Projections

On December 6, 2002, the Respondent sent an e-mail to the Charging Party inquiring about the revenue stream for 2002. The Respondent indicated that he had been talking to people all over the country who were having serious budget shortfalls. The Respondent inquired as to whether the City needs to look at hiring freezes, etc. that year. The Respondent indicated that the more he and another individual hear from other places, the more they are getting concerned about Rapid City. On December 12, 2002, the Respondent sent another e-mail to the Charging Party inquiring as to the Charging Party's thoughts on the matter.

The Charging Party then sent the Respondent's e-mail on to Mayor Munson inquiring as to what the Mayor's priority on the issue was. Charging Party advised the Mayor that he had been working on personnel issues, technology audit, golf issues and CFAC maintenance. He further advised that he needed to address the energy policy, A/B improvements, the Respondent's accusations on violations of City employees civil rights and employee evaluations as well as the normal meetings and day to day operations. The Charging Party, noted that the Respondent voted to spend funds from the City reserves and could not understand why the revenue projection issue was such a high priority all of a sudden. The Charging Party advised the Mayor that he had been making notes for a response but he was concerned about the time it would take to deal with follow up questions.

In response Mayor Munson advised the Charging Party to advise Respondent that "The Mayor advised that I keep him in the loop of information requests, and he feels this request for a hypothesis based information is ill advised at this time, due to staff inability to devote time to his request and still perform already-outlying duties."

On December 13, 2002, the Charging Party responded to the Respondent regarding the revenue projection e-mail inquiry. The Respondent advised "Sales tax collections through the end of November are about the same as last year. It appears we will not meet our projections." Further, the Charging Party advised the Respondent "The Mayor has advised that I keep him in the loop of information requests, and he feels this request for hypothesis based information is ill-advised at this time, due to staff and the ability to devote time to requests and perform already-outlying duties.

On March 3, 2003, there was a Council meeting. During that meeting, the Respondent stated:

The other issue I have is going back to the denial of public information. You know we have a real issue here where this council, well I asked for the list of building permits that I know that the City Attorney's office has. I was denied the list and was told that the City council needed to ask for the list which is something we did and then we got all this information and this isn't the first time this has happened. This has happened a couple of other times. Back on December 13, this happened and I'll just point out that I sent a message to the finance office asking for some information on sales tax collections. The following response was what I received back: The Mayor has advised that I keep him in the loop of information requests and he feels this request for hypothesis based information is ill advised at this time due to staff inability to devote time to the requests and still perform already outlined duties. I was asking is for what is our revenue stream is looking like for 2002.

Second example is an individual asked for the list of consultants and the amounts paid from 1995 to 2002 and on January 23 at 1400 hours, there was an angry e-mail that went out from the Mayor's office stating that the information would be denied unless it was requested from the council group as a whole. So we have a serious problem with not only how the information requests are handled, but also how

I believe our citizens and also Rapid Valley citizens are being treated. So I would have that we can move forward tonight, deal with this issue, and I think the council needs to look at a policy that treats people equally. If we have some fees that were waived, we need to figure on how to make it right. I don't have a problem with waiving fees, but that policy was a discussion that needed to be had by this council. Thank you.

On March 4, 2003, the Charging Party sent a memo to the Mayor and Council regarding the Respondent's comments made the night before. In the memo, the Charging Party set forth the first paragraph above. The Charging Party also attached correspondence on the subject between the Respondent and himself. The Charging Party noted that the sales tax question was answered but the question on looking at hiring freezes was not because it would have required in-depth analysis. The Charging Party felt that the Mayor and Council should know the whole story.

D2. Respondent's Response or Comments

As the Charging Party provided this information as background we did not specifically address with Respondent.

E1. Charging Party's Factual Information – Rapid City Journal - July 12, 2003 - Forum Article by Respondent

The Respondent provided a July 12, 2003 Rapid City Journal "Forum" article authored by the Respondent. The Charging Party feels this article is another example of the Respondent insinuating that there is improper conduct at City Hall.

E2. Respondent's Response or Comments

We did not specifically discuss this article with the Respondent as the Charging Party provided it as background for the Phil Nichols contract award. In addition, the Respondent was the author of the article so we believed that it speaks for itself.

F1. Charging Party's Factual Information – Lease/Lease Back Matter

At the July 30, 2003 Legal and Finance Committee meeting, the Charging Party advised the Committee that the City had been asked to participate in a long term lease/lease-back proposal. The Charging Party explained what he understood of the proposal and advised the Committee that it was still a work in process and there were concerns about the security of the investment, whether or not money could be borrowed for expansion, and how it would affect obtaining EPA or SRF loans. The Charging Party stated this was the last time he spoke on the lease/lease-back matter except for responding to questions and accusations.

In an October 22, 2003 e-mail to the Respondent, the Charging Party stated "As per your request, I have attached the September 15, 2003, interim drafts that Mr. Endorf referred to in his E-mail message that I forwarded to the Council on October 6, 2003." The subject of the e-mail was "Lease/lease back."

The Respondent on October 23, 2003 inquired of the Charging Party whether he received these documents on September 15th. On that same date, the Charging Party advised the Respondent that he had received the documents on September 17th.

On that same date, Respondent then inquired of the Charging Party as to when the City was first approached on the lease/lease-back issue. The Respondent further inquired as to how the value of the WWTF infrastructure was determined. On October 27, 2003, the Charging Party responded:

We were first approached by the SD Municipal League in 2001 to consider discussion of this proposal. This was in conjunction with other municipalities in the State. We presented a laundry list of concerns and expressed no interest in continuing a dialogue. Allco began to address the concerns and held a discussion at the SDML conference in Spearfish. Allco approached members of the Legislature who adopted legislation at the 2002 session to assist in proceeding with such a transaction.

Coleen gave Allco a computerized list of assets owned by both the water and sewer funds, operating statements, information on debt service and operations. Coleen did answer a number of questions. Allco then presented us with an appraised value.

Later on, on October 27, 2003, the Respondent inquired of the Charging Party as to when the appraisal was started and completed. On October 28, 2003, the Charging Party responded to the Respondent and advised that this request was forwarded to Scott Scofield. Further, Charging Party requested the City Attorney to place the question on his list of questions for Allco.

Later on, on October 28, 2003, the Respondent inquired of the Charging Party, "When you say 'We were first approached in 2001' . . . who is 'we'?" The Respondent advised that it appeared to him that some of the issues took place before he was on the Council and requested that the Charging Party forgive his ignorance.

On October 29, 2003, the Charging Party advised the Respondent that "The Finance Office was contacted by SDML." Later on that same date, Respondent sent an e-mail to the Charging Party asking additional questions -- "When did the Finance Office notify the Council of the proposal from SDML/Allco." "When did the Council authorize Allco and the City Finance office to proceed with the appraisal?" "When did Allco present the City with the appraised value."

On October 31, 2003, the Charging Party responded to the Respondent answering the questions. The Charging Party advised that he told the Legal and Finance Committee on July 30, 2003 that the City had been asked to participate in a long term lease/lease-back proposal. He further advised that this was discussed at the August 4th council meeting where it was moved to discuss it at the informational meeting on August 20, 2003.

The Charging Party also advised the Respondent that the Council did not authorize Allco to proceed with an appraisal. Allco received some information from the Finance office and proceeded at their own cost and risk. The Charging Party advised the Respondent that Allco advised the Mayor and Finance office on July 8, 2003, of a preliminary appraised value of \$222 million. This was shared with the Legal and Finance Committee on July 30th.

Later on, on October 31, 2003, the Respondent inquired of the Charging Party as to whether the Mayor or Council was notified in 2002 that an appraisal was taking place. The Respondent further inquired of the Charging Party as to how much staff time was being spent helping Allco with gathering the information

and answering questions regarding the appraisal.

On November 3, 2003, the Charging Party responded to the Respondent advising that the best that could be recalled was that Mayor Munson had received a briefing in June or July of 2002. The Charging Party further informed the Respondent that gathering the information consisted of copying the existing asset list and that the time was minimal. The Charging Party also advised that Finance office personnel answer all kinds of questions daily and do not keep track by subject matter. Charging Party advised Respondent that he believed that very little time was spent on answering questions regarding the appraisal process. The Charging Party then advised the Respondent, "If you have additional questions regarding the lease/lease-back issue, please submit all at one time."

At the November 17, 2003 Council meeting, the Respondent moved that the negotiations on the lease/lease-back cease. The council concurred on a 7-3 vote.

An article appeared in the Rapid City Journal late April or early May 2004, regarding the Respondent's re-election. The Respondent commented on the lease/lease back issue. The article further provides:

[Respondent] said some people at City Hall get upset when the leaseback is referred to as a 'back-room deal,' but [Respondent] said it was not only a backroom deal, but a 'middle-of-the-night, smoke-filled backroom deal, and it would have been the biggest such deal in Rapid City history.'

At the May 3, 2004, Council meeting the article was addressed by Martha Rodriguez. In response to her comments, the Respondent referenced secrecy in the lease/lease back issue, secrecy at City Hall, the Hidden Valley Lane issue, North Rapid redistricting, and surplus vehicles without authorization.

F2. Respondent's Response or Comments

The Respondent believes that allegations of secrecy are valid regarding the lease/lease-back situation. Respondent believes that the Charging Party authorized the appraisal on the lease/lease-back. The Respondent couldn't understand how the appraisal could have been authorized when others are to go through Committee and then through the Council.

The Respondent indicated that he wanted to see the contract before a vote by Council. He indicated that the Charging Party made such request an issue of trust and ultimately there was a vote and it passed.

When the Respondent did see the contract he felt that there were many problems. The Respondent indicated that former Judge Roland Grosshans had appeared at a Council meeting and had indicated that the contract was an abomination. The Respondent believes that the process gave the Mayor and others a black eye.

The Respondent believes that the Charging Party is concerned that the focus will now be on the First Floor as issues on the Second Floor essentially have been addressed. Respondent believes that with the focus on the First Floor, there will be changes. The Respondent believes that the Charging Party sees the Respondent as a ring leader as he gets along well with other Council members. In addition, the Respondent gets calls from City employees who provide him information. The Respondent believes that the Charging Party does not like questions.

The Charging Party was asked questions at a Council meeting on May 4th regarding the lease/lease-back issue. The Respondent indicated that the Charging Party's explanation contained reference to a meeting in Spearfish. Then later, the Charging Party said there was no meeting.

The Charging Party then met with the Mayor and others to discuss the issue¹. At this meeting, Bob Wall's name came up regarding the redistricting issue and gerrymandering was again referenced. At that meeting, the Charging Party denied there was such intent in the redistricting process.

The Respondent was advised that the Charging Party feels he is being harassed because questions come up and surface over and over again regarding past issues. Respondent indicated it was his right as a Councilman and responsibility as a Councilman to ask questions.

We inquired as to why issues were always being revisited that maybe happened a couple of years ago. The Respondent indicated that in an election cycle you bring up what happened in the past two years. As to the Hidden Valley issue,

¹This would be the May 5, 2004 meeting that is addressed in this report.

when that came up in 2004, that opened old wounds regarding the redistricting that had taken place prior in North Rapid.

Respondent describes what he believed to be the big picture. The Respondent indicates that he and Ray Hadley have started pushing to separate Human Resources from the Finance Office. The Respondent believes that this is the reason for the harassment complaint by the Charging Party. The Respondent believes that the Charging Party is threatened as he and Ray Hadley are trying to separate control in City government. The Respondent further indicates that the Charging Party's complaint is an attempt to silence Council members asking tough questions.

The Respondent indicated that he has never bothered the Charging Party in his personal life or at home. The Respondent advised that he asks only questions to serve his constituents.

G1. Charging Party's Factual Information – Surplus Vehicle Matter

At the July 7, 2003 agenda review, Dan Bjerke made the statement that he thought there were three vehicles on the agenda to be surplus that had already been sold. The Charging Party made a note to himself to check on this issue. At 9:00 a.m., Mayor Shaw spoke with the Charging Party, at the Charging Party's office, and advised him that Dan Bjerke was going to be terminated. At that time, the Charging Party's priorities changed and he did not check on the matter regarding the surplus vehicles prior to the Council meeting.

When the Charging Party did have a chance to check on the issue, he discovered that only one vehicle had been sold without being declared surplus by the Council. The Respondent felt that the Charging Party should have said something prior to the vote being taken. Charging Party indicates that he has told the Respondent previously, that he had a lot more on his mind at that time then surplus property. The Charging Party further indicated that if the Mayor felt that some disciplinary action should have be taken then Charging Party was willing to discuss this with the Mayor.

On July 14, 2003, the Charging Party called the Respondent and asked if

the Respondent was willing to stop by the Charging Party's office to discuss an e-mail that the Respondent had sent to the Charging Party on July 11, 2003 regarding the surplus property issue. The Respondent arrived at the Charging Party's office at about 4:30 p.m.

The Charging Party advised the Respondent that he was concerned about the e-mail and started to answer questions raised. The Respondent then interrupted the Charging Party explaining that the surplus vehicle issue was just another example of what was wrong in City hall and how the staff was always bypassing the Council. The Respondent inquired as to what was the Council for if all they can do is rubber stamp action taken by staff. The Respondent then proceeded to advise the Charging Party that this situation was just like the action taken on the Youth & Family Services 2012 matter.

G2. Respondent's Response or Comments

As the Charging Party provided this information as background we did not specifically address with Respondent.

H1. Charging Party's Factual Information – Redistricting Issues

On November 19, 2002, the Respondent called the Charging Party to ask the Charging Party how the ward boundaries were drawn between Ward 4 and Ward 5. The Charging Party explained to the Respondent that the criteria for ward boundaries was based on plus or minus five percent of an equal split of the population; not move any current council member or school board member out of their current ward; be as close to district boundaries as possible, and along an easily identifiable street or boundary.

The Respondent responded by stating that gerrymandering had been going on for two hundred years and that Coleen Schmidt and the Charging Party had deliberately made the Ward boundaries so that Bob Wall could run against Rick Kreibel since the Charging Party and Coleen Schmidt knew that Bob Wall could not defeat Ray Hadley.

The Charging Party advised the Respondent that the boundaries were worked on by a lot of people and that different options were presented to the Council even to the extent of having a laptop and LCD unit available so the boundaries could be adjusted in a Committee meeting. The Charging Party inquired of Respondent why the Council didn't change the boundaries during the November 13, 2002 Legal and Finance meeting. The Respondent advised he did not know.

The Respondent asked the Charging Party if he deliberately manipulated the boundaries for political reasons or knew of anyone else who did. The Charging Party advised Respondent that he tries to stay as far away from the politics as possible and that the Charging Party did not know of anyone who wanted the boundaries drawn for political reasons. The Charging Party advised the Respondent that he resented such accusations.

At the December 15, 2003 Council meeting, redistricting was on the agenda. The Charging Party explained proposals for redistricting. The Respondent inquired of the Charging Party about the process that was used to put a piece of Ward 4 in Ward 5. The Charging Party provided an explanation to the Respondent on that issue.

On February 16, 2004, redistricting was again discussed by Respondent. The matter was again discussed at the March 15, 2004 Council meeting. Rick Kriebel advised that the proposed redistricting was retribution against the people affected by the redistricting for fighting City Hall. He further advised that the proposal was gerrymandering at its finest. At this meeting the Respondent concurred with Rick Kriebel that the people affected by proposed redistricting had fought City Hall and won and the proposal was retribution and gerrymandering.

On March 31, 2004, the Charging Party sent Respondent a memo regarding redistricting. The Respondent had inquired as to "What is the current process for drawing ward/precinct lines?" The Charging Party contacted the Respondent on March 25, 2004 to obtain clarification on the question. The Respondent advised the Charging Party that he was looking for the process that was used to establish the Ward/Precinct lines found in the 2000 Census. The Charging Party then provided the Respondent a summary of the process to the best that he and his

staff could recall. The Charging Party advised that the criteria and proposal had been presented to the Legal and Finance Committee and the Council. The Charging Party advised that Council members were advised that the information was available on the computer in the conference room and they were free to make adjustments and that staff was available to provide technical assistance. The Charging Party advised Respondent that new Wards and Precincts were approved by the Council on February 4, 2002. The map was then amended on April 15, 2002 and again amended on January 6, 2003.

The redistricting issue was discussed again at the March 31, 2004 Legal and Finance Committee meeting.

On May 5, 2004 a meeting was held with the Mayor, Ron Kroeger, Bill Waugh, Ray Hadley, Coleen Schmidt, Charging Party and Respondent in attendance. At this meeting, the Respondent advised those in attendance that "people at the County" had said that one of the criteria that the Charging Party demanded of the redistricting was that Bob Wall be included in the Ward 5 boundaries.

After the May 5, 2004 meeting the Charging Party contacted the County Auditor regarding the allegation that someone from the County Auditor's office had stated that the Charging Party had specified one of the criteria for redistricting was to place Bob Wall in Ward 5. The County Auditor advised the Charging Party that the only person who said anything to her about an attempt to redraw lines to place Bob Wall in Ward 5 was the Respondent. The County Auditor advised that none of her staff had said anything to her about the claims being made.

On June 22, 2004, the Respondent sent an e-mail to the Council, the Charging Party, and others referencing an Ordinance from Sioux Falls which requires a redistricting commission to handle Ward/Precinct lines. The Respondent felt that such a commission should be considered in Rapid City. An exchange among Council members took place when one member asked "When did we become Sioux Falls?" The Respondent responded by indicating "Tom, I'm not sure how to take your question. Quite frankly, I wish we were more like Sioux Falls in terms of recognizing the problems that can occur when redistricting occurs in a vacuum. I think we can learn a lot from Sioux Falls."

On June 28th another council member responded "Do you really think that our redistricting was done in a vacuum? I believe it was done as a response to changing election dates and done the very best we could given all the State and County criteria we need to follow. These type of inflammatory comments are unneeded."

At the October 13, 2004 Legal and Finance Committee meeting the discussion on redistricting was tabled.

H2. Respondent's Response or Comments

The issue of redistricting was discussed with the Respondent. The Respondent agreed that redistricting was a collaborative effort between the County, School District, and City Finance office with the City Council having the final authority.

The Respondent explained that the area around Central High School used to be within Ray Hadley's Ward. Apparently Ray Hadley had run against Bob Wall in a previous election. As a result of redistricting, that area was moved into an area that was in Rick Kreibel's Ward. Ray Hadley was apparently upset and wanted to get the area back into Ward 4. The Respondent indicated that someone at the County level told him that the City Finance office had set up the criteria for redistricting. As a result, the constituents had to drive across town to vote.

The Respondent indicated that Rick Kreibel and Ray Hadley had publically stated that the redistricting was politically motivated. Apparently it was alleged that during the redistricting process inquiry was made as to where council persons lived when going through the redistricting process. In addition, it was alleged that inquiry was made as to where Bob Wall lived during the redistricting process, and also where school board members lived during the redistricting process.

The Hidden Valley redistricting issue came up because apparently the Charging Party first proposed that the voters be placed in Ward 3 which was not contiguous to where the new voters lived. Rick Kreibel felt there was a retaliation because these people had fought City Hall and won. The Respondent indicated that the Charging Party fought tooth and nail against putting the Hidden Valley people

in Ward 5. The Respondent indicated that the County Auditor came up with the solution and that was to put the Hidden Valley in Ward 5.

The Respondent felt that the Charging Party was involved in gerrymandering the Hidden Valley redistricting process. The Respondent indicated he wanted an explanation of how the redistricting was done and feels that he never got one.

When the Hidden Valley annexation took place there were four voters. The Respondent stated that Julie Pearson, County Auditor, came up with the solution to the Hidden Valley redistricting and that was to place them in Ward 5.

The Respondent provided some background on this issue. He indicated that the Hidden Valley area was on the way to Black Hawk. The Respondent indicated that the Charging Party originally proposed that the area be included in Ward 3. This apparently would have necessitated voters to drive to Red Rocks which is twelve miles away.

The Respondent directed us to the March 15, 2004 Minutes. Respondent indicated that Rick Kreibel expressed that he thought there was retaliation against these individuals because they had contested a platting issue with City Hall. Respondent indicated that gerrymandering was alleged.

When the Hidden Valley issue arose, the Respondent indicated this dredged up the Ward 4 and 5 issue regarding North Rapid that had taken place previous.

II. Charging Party's Factual Information – Mayor's Salary

When Mayor Shaw came into office, the Charging Party made the recommendation to place the Mayor's salary at Step E. This was based upon the salary schedule that was adopted by the Council. In determining where to place the Mayor's salary, the Charging Party felt he had two options. One was to place him at Step A thereby not giving any credit for four years of previous service or give him credit for four years of service and place him at Step E. The Charging Party did not feel it would be appropriate to start the Mayor at a salary less than the former Mayor who had half as many years of experience.

I2. Respondent's Response or Comments

As the Charging Party provided this information as background we did not specifically address with Respondent.

J1. Charging Party's Factual Information – YFS 2012 Funding

The City Attorney's office and Council approved the Youth & Family Services 2012 transaction. The Charging Party was advised by the Respondent that he, prior to Council approval, had discussed the matter with an individual at Legislative Audit for the State of South Dakota and had been advised that the transaction was illegal. The Charging Party then had his assistant contact the individual at Legislative Audit. She explained the steps involved regarding the transaction and it was apparently determined there was no problem. Later, the transaction was pulled and random sampled for the 2002 audit and no issues were raised.

J2. Respondent's Response or Comments

The Respondent stated that he and Ray Hadley talked to Mayor Shaw right after Mayor Shaw came into office. Respondent advised that they had told the Mayor that the transaction was illegal as there was use of taxpayer money to fund private groups. Respondent told the Mayor that the transaction put the Council in a bad position and was unfair to Youth & Family Services.

The Respondent referred us to a City Attorney's Opinion in May, 2003, regarding the issue. We obtained a copy of the Memorandum dated May 13, 2003 from the present City Attorney.

Respondent stated that the process regarding 2012 money allocation changed after Mayor Shaw came in the office.

K1. Charging Party's Factual Information – CIP Changes

On August 13, 2003, the Respondent sent an e-mail to the City Attorney regarding the affect of a motion that was made on July 7th regarding CIP. The City Attorney responded on that same date. The Respondent then sent an e-mail to the Charging Party inquiring as to when the actions for the July CIP meeting would come forward for final approval by the Council. The Charging Party responded on August 14, 2003 and also copied the e-mail to other members of the Council.

Later on that same day, August 14, 2003, Rick Kreibel sent an e-mail to the Charging Party and to the Respondent which was copied to other individuals in Rapid City government. Rick Kreibel advised that the committee should have to operate the same way as 2012 and that a "verbal report" was not enough. Further he advised that there was no good reason that the Committee should not be a recommending body. He then advised that it was his intent to make this a very political issue later on. In addition, the Charging Party stated in capital letters "WHEN 3 STAFF AND 2 COUNCIL PEOPLE CAN DELAY PROJECTS WITHOUT COUNCIL APPROVAL,, WELL,, THAT'S BAD GOVERNMENT,, AND ALL WHO SUPPORT THIS ARE BAD COUNCIL PEOPLE!!! AND BAD STAFF AS WELL."

K2. Respondent's Response or Comments

As the Charging Party provided this information as background we did not specifically address with Respondent.

L1. Charging Party's Factual Information – One Hour Rule

At an October 6, 2003 Council meeting, an issue arose regarding Council members asking staff for information. At that meeting a motion was made and seconded to set a policy that before a Council member requests of a staff member or department head, information that will take more than "one hour" to put together, that request must be directed through Council leadership and the Mayor. The motion carried on an 8-2 vote with the Respondent voting in favor of the motion.

L2. Respondent's Response or Comments

The Respondent was asked his understanding of the "One Hour Rule." The Respondent indicated he believed that came up under Mayor Munson. He advised that he does not know what precipitated the rule. He understands that if a request is made to an employee of the City and a response would take more than an hour, Council leadership needs to approve the request.

M1. Charging Party's Factual Information – Partridge Meeting

On November 19, 2003, the Charging Party and Respondent met Jeff Partridge at the La Costa restaurant. Jeff Partridge wanted to clear the air between the Charging Party and the Respondent. Jeff Partridge asked the Respondent what his concerns were. The Respondent responded by indicating a lack of trust he has for the Finance Office. Respondent stated that the Finance Office was not forthright. Respondent then proceeded to give examples regarding surplus items, lease/lease-back, the Catron project, and the September 15 lease/lease-back proposal. The Charging Party explained his position on each of the examples given by the Respondent.

Charging Party then advised the Respondent that he did not trust him and that the Charging Party had to be careful with his words or the Respondent would take them and twist them around to meet the Respondent's theory. The Charging Party advised the Respondent that he puts a negative spin on everything and makes a big deal out of nothing.

The Charging Party advised the Respondent that his distrust of him went back to the resolution against retaliating against City employees for talking to members which the Charging Party believed the Respondent forced through. The Charging Party advised Respondent that eight of ten counsel members felt that there was nothing to the letters of reprimand. The Charging Party advised the Respondent that the Respondent had advised the Charging Party that no harm

would come from the resolution. However, Charging Party advised the Respondent that he had referenced the resolution several times insinuating that the Charging Party would allow retaliation against employees.

The Charging Party then began to review his workday up to that point for the Respondent. Respondent then indicated that he did not want to hear that and just wanted to hear about important items. The Charging Party felt that Respondent never defined what important items were. The Charging Party went on to advise Respondent that the Finance office makes a thousand decisions a week and inquired as to what the Respondent wanted to know about. Charging Party stated that the Respondent told him he was busy and getting burned out lately.

Jeff Partridge advised the Respondent that it was a management decision as to when to share information about the lease/lease-back matter. He advised the Respondent that if he had been told earlier about the situation, then individuals would have been inundated with e-mails about the issue. He further told the Respondent that all the other Council members were too busy to shift through all the raw material.

The Charging Party advised Respondent that he was high maintenance because Respondent had sent the Charging Party fourteen e-mails in a ten day period which Charging Party felt was an interrogation disguised as seeking information. Charging Party advised Respondent that answers to Respondent's questions are triple checked because of accusations that if they are wrong, it is a conspiracy. Jeff Partridge told the Respondent that the Finance Office did a good job of keeping the Council on track.

During the meeting, Respondent told Jeff Partridge that he had asked for a sales tax report and that the Charging Party had told him to "go pound sand." The Charging Party challenged the Respondent on this statement and advised him that he had a copy of an e-mail which would prove that the statement was false. Charging Party indicates that the Respondent started to back-track at that time.

The Charging Party's view of this meeting was that it was an ugly meeting.

M2. Respondent's Response or Comments

We did not specifically discuss this issue with the Respondent. The Charging Party provided this as background information.

N1. Charging Party's Factual Information – Stoney Creek Booster Station

At the January 5, 2004 Council meeting, Ted Vore updated the Council on the Stoney Creek Booster Station. Ted Vore gave a bit of history as to how Phil Nichols and Associates obtained the project.

On August 30, 2004, Coleen Schmidt returned a telephone call to the Respondent. The Respondent was upset because the Finance office was unable to locate someone to do the qualitative audit on the Stoney Creek Contract. The Respondent accused Coleen Schmidt of not trying hard enough and not caring for the City. This upset Coleen Schmidt.

The Charging Party believes that Respondent is engaging in bullying and unprofessional behavior and such behavior causes good employees to leave the City of Rapid City and needs to stop. It was his intent to address the issue at an executive session at the September 7, 2004 Council meeting. It was Charging Party's intent to request that the Council take whatever steps necessary to insure that the Respondent direct all questions and concerns to the Charging Party involving the Finance Department.

The Charging Party believes that as a result of this request to the Council that the Respondent is now retaliating against him.

N2. Respondent's Response or Comments

In March of 2003, the Public Works Department authorized a \$101,000.00 contract to Phil Nichols. The Respondent felt that the consultant selection process (CSP) was not followed. The Council approved the contract based upon Dan Ejerke's representation that the CSP was followed.

Respondent stated that he met with Mayor Shaw and Ted Vore in November/December 2003 regarding the City's contract with Phil Nichols. The Respondent believes due to his inquiry, Mayor Shaw appointed a committee to

review changes in the CSP.

The Respondent then requested the Finance Office look into Phil Nichols qualifications and to determine whether he was paid too much for the contracted services. In August 2004 the Respondent spoke with Coleen Schmidt at the Finance Office. He related that he called her to say that he could not believe someone couldn't be found, anywhere, to do a review. The Respondent believes that Coleen Schmidt then told the Charging Party of the conversation and the Charging Party took it very personal.

The Charging Party then reported the issue to the Council requesting that the Council reign in the Respondent and reprimand him. The Respondent stated that he believes the Charging Party's concern was that Coleen Schmidt had been disrespected and that problems and issues weren't going through him. After that, the Charging Party requested all complaints regarding his department be directed toward him.

The Respondent stated he did apologize to Coleen Schmidt indicating he was frustrated by the lack of checks and balances that were available.

The Respondent was directly asked whether he had any allegations that the Charging Party wasn't up front and he was holding back information regarding the Stoney Creek Booster Station project. The Respondent was also asked whether he believed that the Charging Party made efforts to impede the inquiry process and the Respondent responded in the negative to both inquiries.

O1. Charging Party's Factual Information – New Hire Inquiry

On January 26, 2004, the Respondent sent an e-mail to Kathy Druckrey and Keith L'Esperance. The subject was "Employment Ads (adjusting the scale)." The Respondent inquired and commented that "Seems to me that qualifications above the minimum simply give the applicant a natural edge in the hiring process rather than a monetary one, and I am surprised that we state that the scale could be adjusted on an ad hoc basis." Respondent further stated "How often have we started someone above the first step since the implementation of the Condry study? I am wondering how common a practice this is. The definition of internal

'special ability or experience beyond the minimum' is vague."

On January 28, 2004 Keith L'Esperance responded as Cathy Druckery was out of the office. He advised that 3 new hires had started above Step A of the current wage scale implemented January 1, 2002. This was 3 out of 120 new benefited hires and the 120 number did not include police hires.

On February 2, 2004, Keith L'Esperance sent an e-mail to the Respondent. The Respondent, on the previous Friday, had apparently requested the titles of the positions and the step at which new hires were placed for those positions that started at a higher step than Step A since the inception of the new pay plan. Keith L'Esperance responded listing three positions that had began at Step C.

On February 6, 2004, the Respondent responded and inquired "I believe the Mayor's pay raise should have been included on this list? Or was there different criteria in that case? Did we miss anyone else?"

On February 6, 2004, Keith L'Esperance responded stating "Because it is an elected position the assumption was that you were inquiring about hired positions only, I didn't include the Mayor in the requested information. If you want to include the Mayor's placement on the pay scale, then there have been four since implementation of the new scale." In addition, Keith L'Esperance advised "I am not aware of anyone else who may have been missed in the reply to your inquiry. According to payroll records and the HR employee data base, those positions listed below are the only hired positions that have started above Step A since implementation of the new pay scale 1-1-02." Keith L'Esperance, after sending the e-mail to the Respondent forwarded his response to the Charging Party.

02. Respondent's Response or Comments

We did not specifically discuss this issue with the Respondent. The Charging Party provided this as background information.

P1. Charging Party's Factual Information – Engineering Staff Spaces

On February 17, 2004, Ted Vore sent an e-mail to the Respondent requesting him to call when he found the time to discuss how to best accommodate the staff that will be displaced in the reorganization.

On February 17th, the Respondent responded to Ted Vore thanking him for the message and advised that he would try to call later that day. Respondent went on to state “My viewpoint is that you are moving to the quietest corner of the building and the need for remodeling should be unnecessary at best, and limited at worst.” The Respondent further stated “Marcia’s crew will be doing most of the customer service functions and I understand the need for her request for changes.” Respondent further stated “But I don’t see why PW can’t make do with what they currently have for space - - or make minimal changes. I understand your need for space and I disagree that you will be unduly ‘displaced.’ One of the main complaints about City Engineering has been a lack of accountability and approachability. Allowing for closed door offices simply advances the fiefdom mentality we have been trying to get away from. I am starting to get concerned about the rising costs of the reorganization, but more importantly, I think the reorg needs to re-emphasize and move toward the main goals: customer service and accountability.”

On February 18, 2004, Ted Vore forwarded the Respondent’s e-mail to all council members and stated:

If this is the feeling of all council members than I must know and direct my efforts likewise. My staff must continue to be able to work effectively for the City, and it is my personal opinion that thrusting them into open areas will not suffice.

On February 18, 2004, Council member Thomas Murphy responded to Ted Vore’s e-mail and the response appears to have also gone to all Council members. Thomas Murphy provides his opinion as to the motives of the Respondent on this issue.

P2. Respondent's Response or Comments

We did not specifically discuss this issue with the Respondent. The Charging Party provided this as background information.

Q1. Charging Party's Factual Information – Acting Director Salary

On February 24, 2004, Respondent sent an e-mail to Coleen Schmidt inquiring "When an individual assumes the position of acting as the director of a department, do they keep their existing pay or does it increase? If it goes up, what's the process for that?" Coleen Schmidt responded on February 25, 2004 advising "The standard practice for many years has been to average a salary of the person assuming the position of acting director and that of the person leaving the position of director. At the time the new director assumes the position, the acting director goes back to the salary he would have been presumed to be receiving in his original position."

Respondent then responded on February 25, 2004, inquiring "Is this authorized by ordinance or resolution?" Coleen Schmidt responded by stating "To my knowledge it is a determination made by the Mayor. I know it was the agreement made with me on three different occasions when we did not have a finance officer for several months and dating back to when Keith Carlyle was in office in my case. I doubt if it is addressed in an ordinance or resolution, although I could ask that Jason research this if you wish."

On February 25, 2004, the Respondent responded to Coleen Schmidt and stated "I am concerned about this, particularly in light of the petition that Council members received on Friday signed by two dozen public works employees who are concerned about management issues and compensation issues. I still haven't heard back on the legal authority for the other pay increases that happen for new hires over the last year who were bumped up in the pay scale one or more grades. One of the complaints by the employees who signed the petitions is that they are bumped in grade, but not in pay. And it sounds like they know about the other increases that have taken place and are unhappy about it. We are going to end up with an employee relations nightmare if the practice of arbitrary wage increases

doesn't change - - especially if firm legal ground can't be found. Can you check into the legal authority for these increases?"

On March 9, 2004, the Respondent sent an e-mail to Coleen Schmidt stating "Can we start linking the bill list to the agenda on the internet? Makes it easier to access it. Nice for archival purposes also - - doesn't clog up e-mail." Charging Party responded to the Respondent's e-mail on March 11, 2004 stating "It is possible to link the bill list to the agenda. It would take staff about 10-20 minutes longer to do this as opposed to sending the bill list through the e-mail process. It will reduce the amount of information on the e-mail system. Sometimes the bill list is not available when the agenda is ready, but we can attach at a later date. If council wants us to proceed in this direction, we can start April 5th."

After the aforementioned e-mail was sent, Kay Rippentrop sent an e-mail to the Mayor stating "Mayor - - Sam called again on this [Bill list], he and Rick intend to make a big deal out of this come Monday night (Sam's words) that they can see no reason not to do that and do not believe that Finance is telling them the truth when they claim it would take 10-20 minutes to do this. Sam wants you to administratively tell Finance they have to do this as it should not take direction from the Council as [Charging Party] suggests to get it done."

During an executive session meeting on November 1, 2004, Respondent apparently inquired if Ted Vore had received a 5% raise for assuming the acting position of Public Works Director. Charging Party explained to the council that Ted Vore was placed half-way between his current salary and that that existed of the former Public Works Director as of July 7, 2003. Respondent inquired as to where it was written that this could be done. The Charging Party responded that it was not written but had been the practice long before the Charging Party had become the Human Resources Director. According to the Charging Party, the Respondent began to fuss how this could be done without City council authority. At that time, apparently the Mayor and other council members advised the Respondent that if the way it was done needed to be changed then it should be added to an agenda. The matter was added to the December 1, 2004 legal and finance agenda.

On November 5, 2004, the Respondent sent a request to Kay Rippentrop asking what Ted Vore's salary was and how much it went up when he became acting director. Kay Rippentrop advised the Respondent that she was forwarding the request to Kathy Druckery. Kathy Druckery responded to Kay Rippentrop, the Mayor, and the Charging Party that Ted Vore was making \$72,841.60 in his former position and it went up to \$81,848.00 when he was appointed to the temporary position.

On November 7, 2004, the Respondent requested a copy of the written policy that allowed for the adjustment. On November 8, 2004, Kathy Druckery replied to the Respondent, Kay Rippentrop, the Mayor, Charging Party, the Council, and the City Attorney stating ". . . we do not have a written policy dealing with this issue."

On November 9, 2004, the Respondent responded by stating "So there is no written policy in place to handle salary adjustments for employees who assume acting roles? Also I would like to get a copy of the form that authorized the change. Thanks for the info."

On November 10, 2004, Kathy Druckery forwarded a copy of the payroll change notice to all. On that same day, the Respondent responded "I appreciate the info. So there is no written policy in place to handle salary adjustments for employees who assume acting roles?" Kathy Druckery replied "The City does not have a written policy dealing with salary adjustments for employees who are assuming duties in a role as an 'acting' position."

On November 12, 2004, the Respondent responded stating "Please send me a list of all the salary adjustments that have occurred in the last three years where someone was given a raise beyond the established step and grade for assuming an 'acting' role."

At the November 15, 2004 Council meeting, the Respondent, with a number of AFSCME union representatives in the audience, asked the Charging Party if there was a written policy for employees serving in an acting position. The Charging Party advised Respondent and Council that there was no written policy. The Respondent then inquired about those employees who work in the field. After conferring with Kathy Druckery, the Respondent responded that they are paid out

of class and that this was in the union contract.

On November 16, 2004, the Charging Party responded to the Respondent's November 12, 2004 e-mail indicating "We can provide the information for acting department directors immediately, but it will take several days to compile this information for all employees who are paid out-of-class. We have some employees who work out-of-class a few hours a day several times a year. I will need Mayor Shaw and President Kroeger's permission to commit this amount of time."

On November 16, 2004, the Respondent responded "I find it remarkable that when I asked if there was a 'written policy in place to handle salary adjustments for employees who assume acting roles,' I was told that about the City 'does not have a written policy dealing with salary adjustments for employees who are assuming duties in a role as a 'acting' position.' Please provide a copy of the written policy that we now know exists.

On November 17, 2004, the Charging Party responded advising "We do not have a written policy for an employee who assumes an acting role such as when Ted assumed the duty of the Public Works Director which is where this all started and has been addressed several times. Working out-of-class is covered in the union contracts. Cathy will forward a copy of the portion of the union contract that deals with out-of-class." Additionally, in the e-mail the Charging Party requested "Mayor Shaw/Ron Kroeger, please advise as to what information do you think Sam wants."

On November 23, 2004, the Charging Party received an e-mail from the Respondent which stated "Please provide the City council with a copy of the policy that Ritchie is referring to, which is apparently is the policy you previously indicated does not exist."

On November 24, 2004, the Charging Party forwarded a copy of Appendix B from the non-union policy which addresses out-of-class pay for those non-union employees below a division director.

On November 27, 2004, Mayor Shaw received an e-mail from the Respondent stating that "the raise for Ted Vore was in direct violation to a written council policy established on April 15, 2002. What are we going to do about this?"

On November 30, 2004, the Charging Party returned a telephone call to a KEVN reporter. The reporter had questions regarding Item number 7 (wage scale for management personnel) on the December 1, 2004 Legal and Finance agenda. The reporter wanted to film the Charging Party and ask a few questions. The Charging Party inquired as to why she picked this item to do a story. She responded that she reviewed the agenda and did not understand the item. The Charging Party inquired if someone asked her to do the story on this item and she responded no.

Later on, on November 30, 2004, the reporter went to the Charging Party's office. She asked questions about what the Council was trying to achieve regarding Item number 7 on the December 1, 2004 Legal and Finance agenda. The Charging Party explained that the Council wanted to have something in writing that reflects what the City has been doing for fifteen years as to compensation for those employees serving in an acting department director position. The reporter inquired specifically about Ted Vore and the Charging Party advised her that he could not talk about individual situations as such were personnel issues.

Later on, on November 30, 2004, the reporter called the Charging Party with a follow-up question regarding Item number 7. The reporter referenced Appendix B from the non-union policy that she had received from the Respondent. The Charging Party advised the reporter that the Respondent had not read the whole Appendix which clearly outlines that this was a guideline provided to Division Directors and Department Directors, not guidelines to the Mayor. After several similar questions, the Charging Party believed that the reporter understood that the Appendix did not cover compensation for Department Directors.

The reporter advised the Charging Party that Richie Nordstrom had told her that it was unfair for Ted Vore to get this type of raise. The Charging Party again advised the reporter that he could not talk about individual situations but he would disagree with the analysis that it was unfair because employees, usually assistant directors, serving as acting directors not only do the job of the Department Director, but continue to do their own job, for less money than the departing Department Director received in compensation. The Charging Party also

advised the reporter that acting directors do not receive overtime, stand-by pay, call back and night differential.

The Charging Party inquired of the reporter why the union steward was getting involved with an issue that does not concern union members. She advised the Charging Party that the union steward thought it was unfair. The Charging Party advised the reporter that he didn't think the union steward should get involved in a Mayor-Council issue.

During a November 30th KEVN newscast about acting directors pay, Respondent and Ray Hadley were complaining about the compensation of acting directors. Ray Hadley stated he was tired of asking forty questions to get one answer. Charging Party has no idea of what was being referred to.

At the December 1, 2004 Legal and Finance Committee meeting, the resolution to amend the Non-Union Personnel Policy-Appendix G was adopted. The Charging Party passed out Appendix B from the non-union policy book and explained to the members of the Committee that the Respondent had misread Appendix B. Charging Party explained that Appendix B was is a guideline provided to Division Managers and Department Directors not a guideline to the Mayor. Tom Johnson commented that a lot of this could have been avoided if the Council had been notified when the salary adjustment was made for Ted Vore.

A meeting was held on December 3, 2004. The Charging Party, Coleen Schmidt, Cathy Druckery, Marcia Elkins, and Mayor Shaw were present. The purpose of the meeting was to become informed about the salary situation regarding Ted Vore. Mayor Shaw advised that Respondent had called him while he was in Indianapolis and again on that date on his way into town from the Airport.

Mayor Shaw was provided a packet of information that the Finance Office had compiled dealing the Ted Vore salary issue. Mayor Shaw had advised the Respondent that he had not had time to think about the issue and would visit with him on Saturday. Mayor Shaw hoped that he could visit with the Respondent and address the issue prior to Monday night's Council meeting.

There was discussion that Respondent had not read the Appendix B correctly and there was no policy for non-union Department Directors or Division

Managers in an "acting" position. Charging Party reminded Mayor Shaw that the City Attorney had addressed the issue back in March in an e-mail informing the Respondent and others that the salary is set by the Mayor.

There was discussion regarding on going harassment from Respondent to employees, Department Directors, and others at lower levels. The Charging Party reminded Mayor Shaw of a discussion in an executive session when the Charging Party advised the Council that they needed to stop Respondent from the continued questions to staff and to stop the treatment he had exhibited toward the Finance Office staff.

The Charging Party expressed that Respondent's conduct was harassment and if it continued he would have no other choice than to file a harassment claim that Mayor Shaw would have to investigate. The Charging Party advised that no one should have to be worried about losing their job over a mistake. That with perhaps the thousands of decisions a Department head makes, an occasional error can be expected.

There was discussion as to how far back the issue had been cooking. Coleen Schmidt felt it stemmed back to the issue of the Mayor's salary. Marcia Elkins spoke of the Respondent wanting the Human Resource Director's position and that perhaps he could be appeased by offering to create such a position.

The situation was reviewed and there was discussion as to what, if anything could be done to stop the ongoing treatment of the Respondent towards the staff. Mayor Shaw felt it was very much a political situation and it did not matter what the issue was that it boils down to the politics at hand. As the meeting ended, Mayor Shaw hoped that he could discuss the issues with the Respondent at the Saturday meeting.

On December 6, 2004 the Council addressed the "Resolution to Amend the Non-Union Personnel Policy Appendix G. During that meeting there was extensive discussion. From verbatim² minutes, the following statements were made:

* * * *

²We have set forth the verbatim minutes exactly how there were transcribed.

Respondent

If I could draw your attention back to April 15, 2002 resolution which is attached, the top of it says the resolution to amend the non-union personnel policy. When [Respondent] mentioned earlier regarding you know the example Coleen taking over from him, I think the lines are being blurred between salary and hourly. You know there salary employees and hourly employees, and if you look at the paragraph in the guidelines, the paragraph is pretty clear. If an employee is temporarily assigned to perform out of class duties in a position at a high grade, then there is a 5% increase. And I guess I'd ask the, and that is in the guidelines in the last paragraph in the outline that was just submitted to us; I'd just ask the City Finance Officer a question, then I'd like to have the floor back. Are you a department director?

Charging Party

Am I a department director? Yes.

Respondent

Then the following guidelines on Appendix B, which passed April, 2002, the following guidelines are provided to division managers and department directors for placing non-union employees on step within grade for new position. I guess the real concern here is, there was a policy in place for non-union employees. Two weeks ago we had been informed that there was no policy covering non-union employees and we have that in e-mail and also on public record. Then there was a statement made by a department head to a local media station stating that it was just a guideline and that it is not a thou shall it just a give them an idea if they go over 5% then they need the Mayor's approval. And now we're being asked to pass a new policy to justify essentially what was previously done; and I agree with the Mayor that its essentially two or more classes of employees because the resolution, in addition to its other problems, the resolution that we're considering tonight actually says department directors and division managers. Division Managers are not appointed by the Mayor; the regular City employees are not confirmed by the Council. You have essentially created two and a half, three classes of City employees. You have department heads, you have division managers, and then you have regular employees. The other point that I would like to make that Alderman Hadley had made, was that earlier this year, not to belabor the point, earlier this year we had asked for a list of pay increases beyond the established step and grade; and this one was left over the list. And so, I support the motion on the floor currently and if we don't go with that motion, I'd just like to continue this for further consideration.

* * * *

Charging Party

There's a couple of things I would like to address. First off, [Respondent] insinuating that I lied about not having a policy. I guess personally I resent that and I would think that Council, who would probably resent for somebody like that to indicated that here while they're sitting up her on the dais. The question that Sam had asked was - is there a policy for acting directors. My answer was no. And then he asked if there is something for the unions. And that is when I said yes there was, if you recall that conversation. Based on this document, the way Mr. Green has interrupted, and the way I drafted it, or help draft it, interrupted, this was for those employees all at the division manager level. To sit up here and say while I lied when there wasn't a policy for all employees, the question was - is there a policy for the acting positions. Again, there is an acting position that's when somebody fills a division manager's position or department director's position. There is out of class and that is after two hours. Now the other point that was brought up, we're creating different classes of employees. We already have different classes of employees. We got employees that are union, we got employees that are paid hourly and are eligible for overtime, and we got employees that are salaried and are not eligible for overtime. So I don't see by implementing policies for different classes, that I'm creating different classes of employees. I guess the other thing is, it does say these are guidelines to those employees working for division managers, department directors. Thank you.

* * * *

Respondent

I think it's important to clear up something that is the question that I asked is in an email sent on November 10, 2004 at 12:57 around 12:50 p.m. - I appreciate the info, so there's no written policy in place to handle salary adjustments for employees who assume acting roles. The response from Finance/HR was - [Respondent], the City does not have a written policy dealing with salary adjustments for employees who are assuming duties in the role of an acting position. If you go back and look at the minutes of two weeks ago, essentially the same thing was said on the public record. I'm in favor of moving forward on this item, but the other point that you know that is a concern is, we had ask for a list of the increases earlier this year. Alderman Hadley pointed that out, I pointed that out, and so I guess that is an

important clarification. I do support the motion on the floor to continue this item, and I would also thank the brave grapes on the grapevine that brought this issue forward to myself and Alderman Hadley and I think we're going to have solution out of this. Thank you.

* * * *

Charging Party

Mayor, I'm sorry to take more time, but I feel I have to defend myself with the last comment that [Respondent] made. On November 5th, 2004 Sam sent a request to Kay Rippentrop asking for how much the acting department director's salary was. She forwarded that request to one of my individuals. And we responded with the numbers. Two days later, he asked for the written policy that allows us to do that. This was for the acting department director. Two days later off the same e-mail, so it's not like we're starting November 10th. Again, she replies that we have no written, we do not have written policy. So that's on November 9th, that's when Sam asked the question again. So there's no written policy in place to handle salary adjustments for employees who assume acting roles. I guess we're playing word got `ya games or something like that, maybe he got us on that one because it was just going in sequence here and he changed the wording a little bit to make it look like we were answering the questions for all the individuals, but the initial e-mail started out with asking about the acting director's position. So I don't anybody to leave here with that misunderstanding. Thank you.

* * * *

Respondent

You know all the e-mails aside, there's the public record from two weeks ago and you know facts are stubborn things, but there's a specific question asked whether there was policy for employees who assume acting roles and the answer was no; and then when an employee pointed out there was a policy then we found out indeed yes there was a policy and so we can debate this for a while, but I believe that the facts are on the side of Alderman Hadley and myself in this matter. Thank you.

The December 14, 2004 Public Works Meeting verbatim³ minutes reflect the following:

* * * *

Respondent: I guess my concern over all this is not so much the increase, it's the fact that we weren't told about the increase. In the Spring of '04 when we were discussing pay increases beyond the established step and grade, we asked and received a list of four increases one I believe is the Civic Center, one was the Airport, one was Community Development and then the other was the Mayor's increase from last year. But this, for some reason was not disclosed and that is what troubles me. In addition, in November when this topic came up at a City Council meeting I asked, you know, we asked if there was a written policy for employees who assume acting roles and we were told that the non-union, or that it was covered in union contracts, but there was no policy covering the non-union employees and then um on November 15 in a interview with a local media station, there was a statement made that these are just guidelines and there is not a thou shalt, it's just to give an idea and if they go over 5 percent they need the Mayor's approval. I'm just concerned about the inconsistencies and how this situation is handled and also how this situation was disclosed. I have in the last year during the discussion regarding the Mayor's increase which was over a year ago, we were told that during the budget discussion that the City Finance Officer had authorized the pay increase for the Mayor but when it came up a few weeks ago regarding the recent increase for the acting public works director, the statement that was given to a local media was that the Mayor makes the approval. So I guess what I'm confused about is that I have both forms one with the Mayor's increase from May 7, 2003 and one with the other increase from July 8, 2003 and the irony is, is that the Mayor and [Charging Party's] signatures are on both forms. So how can it be that the City Finance Officer authorized one of the increases, which was the Mayor's increase and how can it then be that the Mayor um authorized uh Ted's increase. I just don't understand the inconsistencies, all I want, you know what, all I want for Christmas is open government. All I want is for us to disclose what happened. If a mistake

³We have set forth the verbatim minutes exactly how there were transcribed.

was made, then admit that a mistake was made, so that we can create or you know, have a solution and that way we can move on. But, often where there is smoke and mirrors there is often fire and I think that since it appears that a high level management official down here verbally reprimanded a City employee for exercising their right to express concerns on this issue is evidence that there is perhaps more than meets the eye. So I tell you what I'm going to expect at some point and I believe that I have a right to expect it as a representative of the tax payers and a tax payer myself, why the policy was violated and how often similar violations have occurred and what is going to be done to make this right.

Charging Party: Mr. Preston: Thank you Mr. Chairman, there are a lot of accusations there, so I'm not sure if I'm going to cover all these. First one [Respondent] mentioned was out-of-class pay and acting pay. He uses those as if they mean the same thing. Acting pay, that is for somebody that assumes an (interrupted by Alderman Hadley and asked to move to the podium). Ok, as I explained, there is a difference between out-of-class and what I tried to explain last Monday night is that out-of-class pay is for the union member, also some non-union members and the out-of-class is for a lot of cases when somebody is assigned to perform functions at a higher level for two hours or more.

* * * *

Q2. Respondent's Response or Comments

Dan Bjerke was let go in June or July of 2003. Ted Vore was appointed as acting Public Works Director. The Respondent felt that there wasn't an issue about his salary and presumed that the 5 % policy applied to active acting department heads. The Respondent indicates that he did not find out until this year that Vore had received more than a 5% increase in pay when he became acting Public Works Director. The Respondent indicated that information was leaked by City employees that Ted Vore had received a 12½ % increase authorized by the Charging Party and the Mayor.

The Respondent stated that he brought the issue up at the November 15, 2004 meeting inquiring as to what the policy was for compensation of individuals in acting roles. Respondent indicated that the Charging Party said there was no written policy and that the practice was to go half-way between old salary and new salary.

The Respondent and three other Council members advised that the Charging Party and the Mayor violated City policy regarding the salary for Ted Vore. The Respondent believes that the particular policy referenced was a guideline for department heads and apparently should not have been used for a guideline for salary to place someone in an acting department head position.

Respondent believes the Complaint filed by the Charging Party is timed perfectly because focus is now moving from the Second Floor to the First Floor. The Respondent indicated that he has stated that there is a "time for a change" which he means that it is time to replace the Charging Party.

When inquired as to why the Respondent has taken such a position, he responded that it is a combination of lack of trust and not carrying out City policy properly or effectively.

After the interview, the Respondent's attorney provided additional information provided by the Respondent. Prior to November 21, 2004, the Charging Party had sent an e-mail to Ritchie Nordstrom asking him to forward his questions reference management salaries to Charging Party. Ritchie Nordstrom sent on e-mail on November 21, 2004 listing various questions and comments on Ted Vore's pay as not being fair or consistent. Respondent then requested, on November 23, 2004, that Charging Party "Please provide the city council with a copy of the policy that Ritchie is referring to, which apparently is the policy you previously indicated does not exist."

R1. Charging Party's Factual Information – Employee Pay Scale

On March 18, 2004, the City Attorney sent an e-mail to the Respondent in an apparent response to questions concerning the pay scale issue. The City Attorney stated:

You have asked a couple of questions regarding the authority of the Mayor and Personnel Director in regard to pay scale decisions. My understanding of the first question is 'What is the legal authority for the Mayor and Personnel Director to place new hired employees at a step on the pay scale other than Step A?' I have reviewed City Ordinances and State Law regarding the authority of the Mayor, Personnel Director, and the Council. Based upon that review, I can tell you that there is no explicit provision of either State Law or City Ordinance that addresses this issue directly. However, there are several provisions that address the question indirectly.

The City Attorney then goes on to describe the several provisions that address the question indirectly. The City Attorney went on to advise the Respondent:

While the Council has not specifically approved a policy that allows deviations from Step A on the salary scale for newly hired employees, that has been the practice of both the Mayor and Personnel Director. This is not a new action, but rather a continuation of the past practice. Decisions about the placement of newly hired employees have been the responsibility of Mayor and Personnel Director. It is my understanding that this has been the standard operating procedure for many years. The Council could certainly change that by ordinance or resolution. However, at present, and in the absence of any authority to the contrary, the system in place is consistent with both State Law, City Ordinance, and current Council policy.

I believe you also had a concern with the practice of increasing the pay of acting directors of departments. This practice is consistent with the authority of the Mayor and Personnel Director to manage employees. It is very similar to the practice of paying other employees what is know (sic) as "Out of Class pay". When employees take on additional responsibilities, or take over the additional duties assigned

to another position, it is appropriate to provide them additional compensation.

If the Council is inclined, they can certainly change these long standing administrative practices. However, absent action from the Council, these decisions are properly made by the Mayor and Personnel Director.

R2. Respondent's Response or Comments

As the Charging Party provided this information as background we did not specifically address with Respondent.

S1. Charging Party's Factual Information – Steve Condry Contact

On April 20, 2004, the Charging Party returned a call from the Respondent. The Respondent inquired as to whether the Charging Party was alone and Charging Party responded that he was. Respondent then inquired when the Charging Party and the Mayor visited with Steve Condry about going to the fourth step for a new hire. Charging Party advised Respondent he would have to check and get back to him. The Respondent then proceeded to berate him for two to three minutes for contacting Steve Condry and getting a professional opinion without running it through Council. The Respondent was very angry and it was hard to follow what he was trying to insinuate.

The Respondent's line of thought was along the line that the Charging Party did it different than the way the Respondent would have done it therefore it is wrong; since it was wrong it is therefore illegal; and since it is illegal, Charging Party must have conspired to accomplish it.

The Respondent asked the Charging Party when this was all going to stop and Charging Party responded that he was not sure what he wanted Charging Party to stop. The Charging Party then asked if all the Respondent wanted to know was when the telephone call was with Condry. The Respondent said yes and then hung up.

The Charging Party's opinion is that the Respondent enjoys talking down to others and he felt that the call was nothing but harassment.

S2. Respondent's Response or Comments

As the Charging Party provided this information as background we did not specifically address with Respondent.

T1. Charging Party's Factual Information – Secrecy at City Hall

On May 4, 2004 the Respondent called the Charging Party to advise that he was trying to set up a meeting with the Mayor and Charging Party to talk about secrecy in City Hall. The Respondent suggested Wednesday afternoon and Charging Party indicated that would work fine for him.

The Respondent advised the Charging Party that he may not have been at the meeting in Spearfish, but that the Respondent was tired of all the secrecy in City Hall. The Charging Party alleges that the Respondent then harassed him for about five minutes switching from the secret meetings that Coleen Schmidt and Charging Party allegedly had with ALLCO on a lease/lease-back to the alleged secret phone call that the Mayor, Coleen Schmidt, Marcia, Kathy and Charging Party had made on January 9, 2004. After five minutes the Charging Party advised Respondent that he had been talking for five minutes straight and that they should wait until the next day when there was someone reasonable present.

T2. Respondent's Response or Comments

We discussed the allegations of secrecy and back-room deal allegations regarding the lease/lease-back. The Respondent responded that the council was kept uninformed and was kept out of the loop regarding the ALLCO meeting with the South Dakota Municipal League. Further, the Respondent felt that the appraisal process was undertaken without council approval. The Respondent also believed that there was a violation of the one-hour rule because staff had spent weeks or months on the project and the council only was notified when the

matter wanted to be pushed through a vote.

The Respondent indicated that the Charging Party is on the record many times advocating this was good for the City.

The Respondent indicates that he formed his own opinion that there was secrecy and back-room negotiations taking place.

When we inquired of the Respondent as to whether he had any direct evidence regarding his allegations concerning the lease/lease-back issue, the Respondent indicated that there had to be meetings and that Allco officials had to have met with someone. Further, the council had no notice that there was a meeting in Spearfish on the issue with the South Dakota Municipal League.

The Respondent believes that the council was not told the full story. He further believed that Allco considered the matter to be a done deal. Respondent believes that the Charging Party was behind it all as he authorized appraisal of the facility and the Finance Office provided information to Allco. In addition, there was no request for formal approval by the council for an appraisal.

U1. Charging Party's Factual Information – May 5, 2004 Meeting

A meeting was held on May 5, 2004. In attendance was Mayor Shaw, Council President Ron Kroeger, Vice-President Bill Waugh, the Respondent, Councilman Hadley, Charging Party, and Assistant Finance Officer Coleen Schmidt.

Respondent remarked that at Monday night's Council meeting the Charging Party had misrepresented facts regarding a meeting in Spearfish relating to the lease/lease-back issue in contradicting the Respondent's remarks by the Charging Party advising he was not aware of such a meeting. The meeting referenced was apparently an information, non-agenda discussion held by Allco at the State Municipal League Conference in Spearfish in 2001. Neither the Charging Party nor Coleen Schmidt attended the discussion.

The Charging Party advised that he did not attend a meeting in Spearfish regarding the lease/lease back. The Respondent indicated that the Charging Party's remarks made while defending himself at Monday's meeting gave the impression that Respondent was wrong and not telling the truth about that meeting. The Respondent indicated that if the Charging Party apologized publically at the next Council meeting and would indicate that the meeting had been held, that the other problems with Charging Party would not be publically discussed.

The Charging Party indicated he was not going to apologize for saying he was not at a meeting which he did not attend as that was the truth. Charging Party advised that he felt he was being harassed and slandered by the Respondent on a continuing basis. The Charging Party then inquired of the Respondent what other problems he was referring to.

The Respondent then referred to redistricting, lease/lease-back, unauthorized pay increases, a secret conference call with Condry, surplus vehicles, employee retaliation, use of 2012 money for the Youth & Family Services, the Kirkeby drive way issue, and Council minutes that at times appeared to cast the Respondent in a negative light. The Respondent indicated that these and other problems relate to the Charging Party's secrecy and lack of dialogue.

The Respondent then indicated that "people at the County" had advised that one of the criteria that the Charging Party demanded of the redistricting was that Bob Wall be included in Ward 5 boundaries. Ray Hadley expressed his concern with the redistricting and the fact that a portion in Ward 4 had been moved into Ward 5. The Mayor intervened indicating that there was no collusion involved in where Bob Wall was placed in the redistricting. The Mayor was upset that Wall's name had been publically used; no apology had been issued, and he pointed out that the Council - - not the Charging Party - - was responsible for drawing district boundaries and that if current boundaries are not satisfactory to a majority of Council members, they are the ones responsible for developing new boundaries and should do so. The Mayor

advised that the Charging Party had nothing to gain by changing Ward boundaries.

The Respondent further indicated that on the issue of what Ward Hidden Valley Lane would vote, Charging Party wanted Hidden Valley Lane in Ward 3, Precinct 2 because, as Rick Kreibel had stated at a recent Council meeting, those people fought City hall and won and were therefore being punished by forcing them to vote in Ward 3 rather than the closest precinct to their home. The Respondent further advised that an individual at the Secretary of State's office had indicated that plan violated the most basic rules of redistricting. Bill Waugh expressed his frustration regarding the apparent lack of communication between the City and County Auditor's office in this one specific instance of Hidden Valley Lane. The Charging Party explained that the County Auditor was at the Legal and Finance Committee meeting.

Respondent referenced a "secret conference call" to Condry on January 9, 2004 and claimed that the Charging Party had decided to give himself authority to establish wages based upon the call with Condry. The Mayor advised that there was nothing secret about the call. The Mayor explained that himself, the Charging Party, Coleen Schmidt, Marcia Elkins, and Kathy Druckery had called Steve Condry regarding qualifications and wages when it became evident that a problem existed in filling the Development Service Center Coordinator position. Condry had recommended going as far as mid-point in the scale to attract qualified applicants. The Mayor and the Charging Party were not comfortable with that level (9 on the 18 Step plan) and determined to go no higher than Step D. The Mayor explained that the Mayor's authority to hire at a level higher than Step A was a practice in place for many years and such authority to do so had not been questioned. The Mayor explained that a resolution was now in place that legislatively granted such authority. The Mayor further advised that since the Council adopted the Condry study, only 3-4 exceptions have been made from approximately 160 new hires.

Ron Kroeger and Bill Waugh then inquired of Respondent as to what he was attempting to achieve by continually bringing forth questions and

allegations that had already been answered. Both were angered by the statements made by the Respondent in his press release announcing his candidacy for a second term. It was believed by these individuals that the statements made the entire Council, the Mayor and staff look like they were involved in secrecy, shady deals, back room negotiations in smoke-filled rooms, and bad government in general. These individuals advised this was wrong and that the accusations were continual and must stop.

Respondent said that his statements were true and that he was interested in only open government. He reiterated that he felt the lease/lease-back deal was a shady, back room deal. He further alleged that the Charging Party had requested authority for the Charging Party and the Mayor to sign the agreements without the Council even seeing the agreements. The Charging Party and the Mayor both indicated this did not happen - - the representatives for Allco were the ones that made such request.

At the conclusion of the meeting, the Respondent expressed his distrust of the Charging Party had begun only two weeks after his election when he was advised about untruths concerning the legality of the Youth & Family Services transaction. The Respondent stated that this transaction was illegal and that the City will be criticized in audit. Coleen Schmidt advised that the City Attorney and City Council had approved the Youth & Family Services transaction, and when Respondent had previously indicated than an individual at Legislative Audit had told him the transaction was illegal, that she called that individual and explained the steps that had been followed. After explanation, the individual at Legislative Audit had no problem with the transaction. In addition, the transaction was pulled in the audit sampling for 2002 and no issues were raised.

Respondent then questioned why Human Resources specialist Keith L'Esperance had not been aware of the grievance issue discussed by the Council at executive session Monday night and alleged that the Charging Party hid issues and did not discuss them with his Human Resource professionals. The Charging Party stated that Human Resources specialist Kathy Druckery

had been the contact on the particular issue and that she had presented it professionally at the session on Monday night. The Respondent advised that the retaliation resolution he had instigated was the reason the particular employee had not been dismissed and that was also true of an employee of the Solid Waste Division. The Charging Party stated that he had advised the Mayor that he had informed him at the time that this response would be made by the Respondent. "I told you this would happen."

The meeting ended with all leaving except Mayor Shaw and Respondent, who were to visit further.

U2. Respondent's Response or Comments

As the Charging Party provided this information as background we did not specifically address with Respondent.

VI. Charging Party's Factual Information - Verbatim Minutes

After a special Council meeting on June 30, 2004, Respondent sent the Charging Party an e-mail stating "Due to the extraordinary circumstances of today's meeting, I am requesting verbatim counsel minutes for the special council meeting that was held on 6/30/04. Please advise if this is possible."

The Charging Party responded on July 1, 2004 stating "Are you requesting that the official minutes be verbatim or that you would like a verbatim transcribed copy of the entire meeting? It will be fairly expensive to publish verbatim minutes. It will take approximately three hours (at overtime) to prepare a verbatim copy of the one hour meeting. It is the directive of the council that any requests that would take longer than one hour to complete be funneled through council leadership and the Mayor (October 6, 2003). Therefore, I am awaiting direction from the Mayor, President Kroeger and Vice-President Waugh.

On July 1, 2004 the Respondent responded "Yes, I am requesting official verbatim minutes. Why do you say it is overtime? When you did the verbatim minutes for Jeff Partridge for the 3/15 meeting on Hidden Valley Lane, was that

overtime?”

This exchange was sent to the Mayor, Ron Kroeger, and Bill Waugh by the Charging Party wherein he stated “It would be fairly expensive to publish verbatim minutes. What are your directions?”

V2. Respondent’s Response or Comments

As the Charging Party provided this information as background we did not specifically address with Respondent.

W1. Charging Party’s Factual Information – November 2004 Lakota Journal

In the November 5-12, 2004 weekly Lakota Journal, an article was authored by Nestor Ramos, a Lakota Journal staff writer. The headline was “Walking the Line - - Councilman says Rapid City has its own Redistricting Mess.” The opening paragraph states “While a controversial ruling on the disenfranchisement of Indian voters across South Dakota considers to ensnare State legislatures, municipal redistricting practices in Rapid City are drawing the ire of some councilmen and others.” The Respondent was quoted in the article “Its another example how City hall has not been open and honest in their dealings.” The Respondent was further quoted “It is a real concern that the Finance Office refuses to explain. What happened? They cannot tell us.”

W2. Respondent’s Response or Comments

The Respondent was asked about the Lakota Journal article and how it came about that he was interviewed for the story. At first the Respondent indicated that he was called by the reporter and really could not recall who contacted him. Upon further inquiry the Respondent indicated that he e-mailed or contacted the reporter and advised that due to the issues down in Martin, South Dakota, they may be interested in a local issue.

The Respondent’s attorney supplied information subsequent to the interview. Respondent’s attorney advised that upon reflection over the weekend

after the interview, the Respondent recalled that Serenity Banks, from the Lakota Journal, and he were walking together during October in a domestic violence walk. While they were walking, they were discussing various issues and she brought up some of the redistricting issues surrounding the lawsuits against the State. The Respondent then discussed the various redistricting issues that had occurred in Rapid City and brought up the Hidden Valley Lane discussions. Ms. Banks later had a reporter telephone the Respondent. The Respondent believes this was the impetus for the story.

The quote from the article was read to the Respondent regarding the redistricting. He advised that he would have to read the article to verify that the quote that I read out of the charge was accurate. He did indicate if it was accurate, that is his opinion.

The Respondent feels that the question of how a piece of Ward 4 became part of Ward 5 has never been answered. As a result, the Respondent has proposed that a commission of City members not one office, be involved in drawing up redistricting lines. When asked about whether the quote in the paper was directed at the Charging Party, the Respondent denied that it was and indicated that it was directed at City Hall as a whole.

The Respondent advised that Julie Pearson was a friend and knew that she was involved in the redistricting process. The Respondent stated that he and Ray Hadley received information from a County office that there were political aspirations that were considered in the redistricting process. When asked about specifics, the Respondent indicated that private conversations with Julie Pearson would stay private.

The Respondent expressed that he does not disagree that it is necessary to consider where officials live in the redistricting process but to consider where Bob Wall specifically lived was improper. He doesn't know if the individuals involved in the redistricting had any political motivations but his main concern is that an explanation hasn't been forthcoming how everything took place. The Respondent did indicate that word on the street is that Bob Wall is tied in closely

with City Hall and the Charging Party.

The Respondent believes that political motivation regarding Bob Wall stems around the ability of Bob Wall to run against Rick Kriebel. If Bob Wall is in, Rick Kriebel is out. Respondent indicates that this goes back to the Kirkeby driveway issue.

The Respondent commented that he does not know why he is being singled out as many of the Council members have as many questions as he does.

X1. Charging Party's Factual Information – Deer Issue

On December 16, 2004, the Respondent sent an e-mail to the Charging Party stating "How much did the deer lift for the City truck cost and when was it authorized by the council? Also, I would like to know if the calculated costs of killing a deer includes the cost of transportation, etc. Can you provide a breakdown as to how the cost of killing a deer was calculated?"

X2. Respondent's Response or Comments

As the Charging Party provided this information as background we did not specifically address with Respondent.

VII. Respondent's Comments - "Time For A Change"

The Respondent at various times, in regard to the Complaint by the Charging Party indicated "this is politics." The Respondent believes that his questioning of the Charging Party in a public forum is merely a public official asking questions of another public official. Respondent indicated there are no personal motives behind engaging in a political or public debate with the Charging Party.

We discussed with the Respondent his reference to a phrase "time for a change." The Respondent has advised the Mayor that he believes that there is a time for change in the Finance office. The Respondent indicated that the Mayor

is getting displeased and the Mayor has stated that such matter will wait until second floor organization is complete.

The Respondent indicated that he has asked the Mayor to replace the Charging Party. The Respondent indicates that other Council members have also asked the same of the Mayor. Respondent indicated that he has asked for replacement of the Charging Party because policies and procedures aren't followed and you have to ask questions many times to get an answer.

The Respondent believes the Charging Party has a very linear perspective and only answers questions he wants to answer. The Respondent believes this is evidenced by the Ted Vore issue when he represented that a policy was interpreted to be a guideline.

Respondent also brought up the issue regarding the Mayor's pay increase. The Respondent indicates that the Charging Party is the one who authorized the Mayor's pay increase. Respondent indicates the Charging Party is now telling the media that the Mayor is the one who authorized the Vore pay increase.

Respondent indicates this is but another example about questions that are asked over and over until an answer comes out. The Respondent stated that the "ballot box" is the final answer.

VIII. Respondent's Comments – Charging Party's Allegation That Respondent Has Accused Him Of Lying

Discussion was undertaken about whether the Respondent felt that the Charging Party has lied to him or the Council. The Respondent stated that when stories change three times then the person is lying.

The Respondent indicated that the Charging Party does not like the Respondent or the questions he asks. The Respondent further indicated that questions asked of the Charging Party hit home. The Respondent also indicated that policies have changed.

The Respondent believes that the no retaliation policy was a big change

and that is allowing the Council to receive information directly from employees. It allows the Council to bring the information up at Council meetings and ask for an investigation.

Inquiry was made of the Respondent why information that is provided to a Council member must be brought out publically in a public forum rather than going to the Department head. The Respondent responded that people have a right to speak out. The Respondent also feels it is his right and obligation to bring these issues out during public Council meetings. The Respondent indicated that it drives the Charging Party crazy that employees can get a hold of Council members.

The Respondent indicated that he believes that questions on the public record can't be used as an allegation of harassment against him. The Respondent believes his questions are about politics and not harassment. The Respondent believes he has the right to ask questions as a Council member. The Respondent asserted that he has no motive when engaging in a public debate.

Respectfully submitted to the City Attorney for the City of Rapid City.

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