



# CITY OF RAPID CITY

RAPID CITY, SOUTH DAKOTA 57701-2724

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### MEMORANDUM

TO: City Council

FROM: Joel P. Landeen, City Attorney

DATE: 12-11-12

RE: Questions posed by Citizen at November 19<sup>th</sup> City Council Meeting Regarding the City's Defense of Mayor Sam Kooiker for Claims Brought in Lawsuit By Randall Meidinger

At the City Council meeting on November 19<sup>th</sup>, a citizen spoke during the open comment period and posed several questions about the City's defense of Mayor Sam Kooiker in the civil lawsuit filed by former landfill scale attendant Randall Meidinger. Mr. Meidinger has sued the City, Mayor Kooiker, Police Chief Steve Allender, Police Lt. Pete Ragnone, former Landfill Superintendent Jerry Wright and former Landfill Scale House Supervisor John Leahy. The allegations against Mayor Kooiker stem from actions he allegedly undertook while still an alderman serving on the City Council. Mayor Kooiker was sued in his "personal" capacity. The other individual defendants were sued in their "official" and "personal" capacities. Since the filing of the initial complaint, the Plaintiff has voluntarily dismissed the claims against the individual defendants in their "official" capacities. Legally speaking, claims against government employees, or officials in their "official" capacities are claims against their employer. Since the City is already a named defendant, the claims against the individuals in their "official" capacities were redundant. At this point, all of the individual defendants are being sued solely in their "personal" capacities.

In lawsuits against public officials or employees, it is common for the Plaintiff to sue the official or employee in their "personal" capacity. For imposition of "personal" liability in a §1983 cause of action, a plaintiff must show that the official being sued was acting "under color of law" and deprived them of a federal right. If a judgment is based on a "personal" capacity claim the judgment may be executed against the official's personal assets. The most frequent claims against City employees for deprivation of federal rights in §1983 causes of action are against police officers. Plaintiffs normally sue employees in their "personal" capacity as a matter

of litigation strategy. Suing officials and employees in their personal capacities tends to put them under additional pressure and stress. The hope of the Plaintiffs is the additional pressure and stress will increase the likelihood of a favorable settlement

From a legal perspective, an elected official is treated no differently than an employee. The City's insurance policy identifies elected officials as "insured's" and "protected persons." Under the terms of the City's insurance contract, Travelers must defend covered "insured's" or "protected persons." Travelers reviewed the claim and determined that there was coverage on the claim against the Mayor. Once they determined there was coverage, Travelers was legally required under the policy to defend him. The Council does not have a veto power over the decision. Keith L'Esperance, the City's Risk Manager has worked for the City for a number of years and is heavily involved when claims are made against City employees or officials. He cannot recall a situation where the City Council was asked to "approve" coverage of any City official or employee when the insurer has made the determination there was coverage. The only situation I can recall of the City "approving" the payment of the defense costs for employees was when the insurer denied coverage of some of the same individuals named in this lawsuit in the original case filed by the City. The City Council approved the payment of these individuals' defense costs so they would not be required to pay them out of pocket. Should Travelers choose not to defend an insured covered under the policy it would potentially subject them to a bad faith claim.

Travelers did issue a reservation of rights letter in connection with its coverage of this claim. A reservation of rights letter is a statement by the insurance company that even though they have agreed to defend the claim, they are reserving their right to deny the claim if the evidence were to show that the actions of the individual were not covered. It is not unusual for an insurance company to issue a reservation of rights letter in a claim they are defending, especially when the government employee or official is sued in their "personal" capacity. Speaking with the City's claim representative from Travelers she stated the following:

There is typically a reservation of rights in almost every 1983 case. I spend a good deal of my time writing those letters. Plaintiff attorneys try to gum up the works by naming defendants in their individual capacities. This triggers a reservation of rights and the defendant becomes frightened they will lose their home or assets and plaintiffs believe that this puts pressure on the insurer to settle the claim. I could not begin to estimate how many of my 1983 cases over the years have ended up with a reservation of rights. A goodly number I can tell you.

She went on to say "How many of those cases over the past 30 years have had coverage pulled after the reservation was issued and investigation revealed that the actions complained of were outside the scope of coverage? I can count those on one hand."

One of the questions posed at the Council meeting is what is an "executive order" and who has the authority to carry out an "executive order?" This term is not commonly used at the City level. The term is more commonly associated with official acts of the President of the United States or official acts of state governors. An executive order is a rule or directive issued

by a chief executive in order to carry out their delegated executive powers. As such, a directive of the Mayor within the scope of his powers as the City's chief executive could be characterized as an executive order. Any City staff member would, or could be responsible for carrying out an executive order.

In light of this question, I think it is important to note that the Mayor played no part in the coverage decision and could not have "ordered" coverage even if he wanted to. The coverage decision was made internally at Travelers. They have coverage attorneys who review the complaint and the insurance policy and issue coverage decisions. The decision to defend Mayor Kooiker in this case was made by the coverage attorneys at Travelers and communicated to me. Mayor Kooiker had no direct communications with Travelers on the subject. The bottom line is this, the City has an insurance policy which covers employees and elected officials, Travelers is solely responsible for making the determination of whether or not there is coverage and once there is a determination that there is coverage, Travelers was legally obligated to provide the Mayor a defense for the claims just like it did for the other employees who were sued in their individual capacities.