

**REPORT ON COMPLAINT
INVOLVING ALDERMAN BILL CLAYTON**

DECEMBER 7, 2012

Preliminary Statement

This report is being prepared pursuant to the Amended Code of Conduct for Elected Officials (Resolution 2012-70), which was approved by the City Council on September 4th of 2012. Sub-section B(1) of the Code of Conduct requires the City Attorney prepare and submit to the entire City Council an unbiased fact based investigative report anytime a formal written complaint is filed against an alderman. A copy of Resolution 2012-70 has been attached to this report as Exhibit #1. Since the City Council has the sole jurisdiction over its members conduct, the Mayor directed that I report to Council leadership for guidance on the preparation of this report and the conduct of this investigation. I have updated the Mayor on the status of this investigation, but he has not had input into this report.

On September 17th of this year a written complaint was filed against Alderman Bill Clayton by Peter Wernicke, Janet Smith and Bonnie Redden. The complaint alleged that Alderman Clayton made comments at the Wingnut luncheon which were unbecoming a City alderman. In particular, they were concerned that his comments singled out fellow Alderman Charity Doyle. A copy of the written complaint has been attached to this report as Exhibit #2. Due to the fact that Alderman Doyle was alleged to be the subject of the comments which led to the complaint, she has agreed to recuse herself from participating in the investigation or the disposition of the complaint.

In addition to the formal written complaint above, Bonny Petersen, the Council President, received a complaint regarding Alderman Clayton via email on August 31st. This complaint was from Taisha Walker, a reporter at KOTA in Rapid City. Ms. Walker's email alleged that during a telephone conversation regarding the City Council's upcoming vote on whether or not to take the CPI, Alderman Clayton made comments which she deemed to be offensive. A copy of the email has been attached to this report as Exhibit #3. Even though Ms. Walker's complaint did not come as a formal complaint to the City Attorney's Office it was decided that both incidents should be addressed in this report since both involved allegations which could be characterized as comments which were unbecoming of an alderman and were made at almost exactly the same time as the comments which resulted in the formal complaint.

Witness Summary

In order to complete this report, I interviewed numerous people who were involved or who attended the Wingnut luncheon. I also interviewed Taisha Walker and Alderman Clayton. I recorded the interviews of all the witnesses with the exception of Dale Bartscher who was out of town and therefore interviewed over the phone. What follows is a summary of the witness statements:

Peter Wernicke - 10/11/12.

Mr. Wernicke is one of the complainants and actually drafted the complaint against Alderman Clayton. Mr. Wernicke is a frequent attendee to the weekly "Wingnut" luncheon organized by former State Senator Bill Napoli (this is what Mr. Napoli and the attendees call the meeting). The luncheon is held at the Eagle's Club on Center Street a few blocks east of

Campbell Street and is generally held on Tuesday's at noon. The room where the luncheon is set has tables arranged in a "U" shaped pattern with everyone sitting around the outside of the tables facing towards the middle. Sometimes guest speakers are invited to address the group, or a specific topic of discussion is identified prior to the meeting. On other occasions, Mr. Napoli, or somebody else in attendance, introduces a topic and people are allowed to speak on the subject if they wish to do so. It is also customary for Mr. Napoli to recognize current and former elected officials who are in attendance and allow them to say a few words if they would like.

Mr. Wernicke attended the luncheon on August 28th. He estimates that there were approximately 30-35 people in attendance that day. He was sitting next to Janet Smith and Bonnie Redden and down a few seats from Alderman Roberts and Clayton. They were all sitting on the same side of the table and he did not have a direct view of Alderman Clayton or Roberts. This was Alderman Clayton's first time at the luncheon. When Alderman Clayton was recognized as an elected official he began by making remarks about the City Council's debate over whether or not to take the CPI increase in property taxes. He generally referred to the "six" who were supportive of the increase, but according to Mr. Wernicke quickly turned his sole focus on Alderman Doyle. Mr. Wernicke took Alderman Clayton's comments to be a direct attack on Alderman Doyle and was troubled why the focus seemed to be on her when five other members of the City Council also supported taking the CPI. He said the comments lasted approximately a minute. When questioned, he could not recall if Alderman Clayton referred to Alderman Doyle specifically by name, but indicated that Alderman Clayton had referenced "her" and that she had a blog. Since Alderman Doyle had just started a blog and this is a small community, Mr. Wernicke felt it was very apparent who Alderman Clayton was referring to when he made his comments. Mr. Wernicke could not directly quote Alderman Clayton's comments, but reaffirmed the allegation in his complaint that Alderman Clayton urged those in attendance to contact her blog and let her know she was wrong and drive her from office. He also reaffirmed that Alderman Clayton questioned her mental fitness to hold her position. His main concern was the "tone" and "intensity" with which Alderman Clayton delivered his message. He characterized Alderman Clayton's comments as "harsh," "over the top," and "venomous." Later in the interview he made the observation that if Alderman Clayton had made the same comments, but in a different manner, he might not have felt the same way about it. However, based on the manner in which the comments were made, he felt it was not appropriate. He could not see Alderman Clayton and could not see if he made any gestures while speaking.

Janet Smith - 10/13/12.

Ms. Smith was at the Wingnut luncheon on August 28th and is one of the co-signers of the complaint against Alderman Clayton. She currently works at the Ellsworth commissary and attends the Wingnut luncheon as her work schedule allows. When she and Peter Wernicke both attend they normally sit together. Bonnie Redden generally sits on the other side of Mr. Wernicke. According to her comments later in the interview the three of them get together socially on a fairly regular basis. Ms. Smith described a similar seating arrangement for the luncheon, but said the tables were more of a rectangle with an opening at one end. She indicated that Alderman Clayton and Roberts were sitting on the same side of the table as she was to the right of Bonnie Redden. Ms. Smith stated that Mr. Wernicke had written the complaint and she had reviewed it before signing. She confirmed she agreed with what was alleged in it.

The concerns that Ms. Smith expressed about Alderman Clayton's comments mirrored those of Mr. Wernicke. She did recollect that the comments lasted 5-7 minutes which is inconsistent with the other witnesses' recollections. She specifically referenced Alderman Clayton's tone of voice. When describing her concerns with his statements about Alderman Doyle's blog she said that "You can encourage people to express their opinion, but you really shouldn't put it out like a call for fire in a crowded theater." She also characterized the comments as "venomous" and was troubled by the focus on one particular Alderman. She later used the term over the top. She said it was one of those things where "Well, you know invective is when you see it or hear it versus just a discussion. It wasn't calm. It was agitated and passionate and you need to go out there and do this." With respect to Alderman Doyle, it came across to her as more personal than political. She stated that Bill Napoli will normally gavel people if they make personal attacks, but he did not intervene during Alderman Clayton's comments. She could not specifically recall Alderman Clayton making any comments about Alderman Doyle's mental fitness, but did feel his comments gave the impression she is out of control and needs to be told she is out of control. Ms. Smith believed this characterization of Alderman Doyle to be extreme. She could not directly see Alderman Clayton and did not observe him making any gestures. She likened the situation to her experience in the military and the requirement that in uniform you need to maintain proper decorum. She feels that as elected officials representing the City, Alderman need to have some decorum too, especially when they have specifically identified themselves as a member of the City Council.

Bonnie Redden – 10/19/12.

Ms. Redden is also a frequent attendee of the Wingnuts luncheon and the third co-signer of the formal complaint. She describes herself as best friends with Mr. Wernicke and Ms. Smith. She was sitting between Peter Wernicke and Alderman John Roberts during the meeting on August 28th. Alderman Clayton was sitting on the other side of Alderman Roberts. She did not recognize Alderman Clayton, or know who he was until he started to speak and introduced himself. Ms. Redden stated that once Alderman Clayton had introduced himself he said he wanted to talk about Charity Doyle which she thought was strange. She alleged he then proceeded to question Alderman Doyle's sanity and state that she has mental problems. He talked about the fact she had a blog and encouraged people to go onto her blog and harass her and tell her to get off the Council. She says that he then stated "in fact we've got to get rid of her." She characterized it as one of the worst character assassinations she has ever seen made in public. She also characterized his statements as venomous several times throughout the interview. Ms. Redden stated that Alderman Clayton did refer to Alderman Doyle specifically by name. She also referred to him pointing at his head with his finger. The manner in which he did it upset her. She stated that it wasn't just resting his finger on his head, but she also cannot remember the specifics of what precisely it looked like. She did not believe that Alderman Clayton meant to advocate that the audience all go get guns and kill Alderman Doyle. She viewed it as a metaphor saying let's get rid of her. Ms. Redden was particularly troubled by the statements questioning Alderman Doyle's mental stability and fitness for office. She believes Alderman Doyle has been through a lot the last few years and she has not personally seen any signs of mental instability.

John Roberts – 10/22/12.

Alderman Roberts is a regular attendee at the Wingnuts luncheon and was in attendance at the August 28th meeting. I showed him a copy of the written complaint and let him review it. He stated that he did not remember Alderman Clayton singling out Alderman Doyle by name. He does recall Alderman Clayton referencing a council member starting a blog to attack the Mayor and advocating that people should post on it. He said Alderman Clayton also observed that they should try to find people to run for office to replace those officials who weren't conservative. Alderman Roberts stated that Alderman Clayton gets a little passionate when he talks about things, but he did not find it to be terribly venomous. While acknowledging Alderman Clayton is passionate, he did not feel that Alderman Clayton's comments on August 28th were out of line. Even if he thought Alderman Clayton had been out of line, he did not believe it was his responsibility to intervene, or to tell Alderman Clayton that he believed him to be out of line. He said that the Council are all adults and are going to say what they want to say. He also observed that many people at the Wingnuts luncheon were passionate and occasionally said things that he wouldn't necessarily say in public. What he got out of Alderman Clayton's comments was that Alderman Clayton did not believe certain Council members were true conservative representatives and the group needed to find conservative people to run against the non-conservative members of the Council. Alderman Roberts was sitting next to Alderman Clayton and did not see him make any gestures during his comments. Alderman Roberts feels that Mr. Wernicke is embellishing the whole thing and that he has a tendency to do that.

Bill Napoli – 11/16/12.

Bill Napoli organizes the Wingnut luncheon and was present at the meeting on August 28th. Mr. Napoli confirmed that this was Alderman Clayton's first time at the lunch. Mr. Napoli did not know Alderman Clayton prior to the meeting and had only heard about him. Mr. Napoli was not able to recall specifically what Alderman Clayton had said at the meeting. After reviewing the complaint, he made the observation that some people are more sensitive to harsh comments than others. He went on to say that he spent 36 years in the state legislature and he knows how to run a committee. He does not allow bad language and he does not allow slander. He spoke about gaveling many people down and asking two people to stop attending the meetings because of comments that they have made. He is very careful the meeting not get out of hand, but there is a free rein on discussion and what may be venomous to one person may not be to another. He characterized Wingnuts as a hard core meeting where tough questions are stated and answered. He estimated that they had at least a dozen people who used to come to the meeting that have quit because they found it too harsh. Looking at the complaint he said there was hardly a meeting where someone didn't stand up and say they needed to get somebody out of office. On the allegation that Alderman Doyle had been singled out, he observed that she did have a blog and when a politician stands out the most, or is vocal, it tends to put a target on their back. He disputed that Wingnuts ever advocated harassing any politician, but said if you changed the word harass to "contact" them, or to make your opinions known to them, that happens all the time. He did not recall Alderman Clayton ever questioning Alderman Doyle's mental fitness. He also expressed his opinion that if Alderman Clayton had said something truly venomous or out of line in front of Bonnie Redden she would have never let that pass and would have called him out

at the meeting. He said Ms. Redden doesn't let anything get by. He also felt that if Alderman Clayton's comments had been beyond reason he would have remembered them.

Dale Bartscher – 11/16/12

Mr. Bartscher was an attendee at the Wingnut luncheon on August 28th. Both Alderman Clayton and Roberts suggested I speak with him regarding the meeting. He was traveling on the date I spoke with him, so I interviewed him via phone. Mr. Bartscher told me that he was not a frequent attendee to the luncheon and only went occasionally. He further stated that he did not know Alderman Clayton all that well, but he had seen him around at various functions and always found him to be kind and outgoing when they had an opportunity to speak. When asked about Alderman Clayton's comments at the meeting Mr. Bartscher said that he could remember Alderman Clayton being introduced and generally speaking about City related issues, but did not recall a lot of specifics. When I informed him that the complaint alleged that Alderman Clayton's demeanor was "intense, argumentative and venomous," he stated that he had never seen Alderman Clayton speak in that manner. Mr. Bartscher made a point of saying that his political philosophy is to build bridges, not blow them up and if someone in the meeting had spoken in the manner alleged in the complaint he believes he would have remembered it. Since he does not recall the statements, or recall being offended by them, he does not agree with the way they are characterized in the complaint.

Taisha Walker – 11/9/12.

Ms. Walker was interviewed to discuss comments made to her by Alderman Clayton which she found to be offensive. The comments occurred during an interview on August 29th of this year. She informed the Mayor and Council President Bonny Petersen of her concerns with Alderman Clayton's comments via an email shortly after they were made. Alderman Clayton was also a recipient of this email. Ms. Walker is a reporter at KOTA television in Rapid City. She is African American. On August 29th, Ms. Walker was contacting members of the City Council to discuss the upcoming vote on the CPI issue. One of the people she contacted was Alderman Clayton. She left a message and he called her back. She characterized the initial portion of the conversation as jovial. At some point in the conversation, Ms. Walker stated the purpose of her call was to find out how Alderman Clayton planned to vote on the CPI issue at the upcoming City Council meeting for a story KOTA was working on. After she informed Alderman Clayton why she had called, his tone changed. She characterized it as aggressive. Ms. Walker said Alderman Clayton expressed to her he did not believe how he was planning to vote on the issue was anyone's business. Alderman Clayton then asked her how she would like it if he asked her how she planned to vote in November. She responded by saying she did not plan on voting in November because as a journalist she felt it was important to be impartial and believes if she were to choose sides it would influence her reporting. Ms. Walker alleged that after she stated her intention not to vote, Alderman Clayton asked "Are you even American?" and then either asked her "Should we deport you back to Kenya with Obama?" or stated that "We should deport you back to Kenya with Obama." There is a discrepancy between her email and her interview on what specifically Alderman Clayton stated. The email, which was sent shortly after the conversation occurred, contained the question about deportation rather than the statement that she should be deported. Ms. Walker responded to these comments by stating "What?" Alderman

Clayton then cut her off and said that he just thinks she should have an opinion. She responded that she did have an opinion she just chose not to voice it for obvious reasons, to which she said he responded it was his belief you should have an opinion like if you prefer a man or woman in a relationship. She told Alderman Clayton he was taking it too far and that she had just called to find out how he planned to vote. If he did not want to share how he planned to vote before Monday, that's all he needed to say and she ended the call. After she got off the phone there were several people in the newsroom and she discussed what happened with them. She stated her news director told her that she should not let it go, which is what prompted her to contact the Mayor. The Mayor asked her to send him the email and told her to include the Council President.

In her initial email to the Mayor and Council President, Ms. Walker requested that Alderman Clayton apologize. This was Labor Day weekend and Alderman Clayton called Ms. Walker on Tuesday morning and apologized. She sent a second email to the Mayor and Council President letting them know Alderman Clayton had apologized and that she considered the matter resolved. When asked about the apology she characterized it as half hearted. Her characterization seemed to be related to the fact that while Alderman Clayton told her he was sorry and that what had occurred did not represent his character, he did have some disagreement with the portion of her email describing the statement involving having a preference for a man or a woman in relationships. Alderman Clayton asked to meet with her, the Mayor and Council President to discuss the matter. She did not want to meet at that time. She did end up meeting with Alderman Clayton at his lawyer's office and he apologized again, but she said she felt it was full of excuses and he really did not take accountability for what he said and did not realize it was wrong until after she made light of it which she did not believe was OK.

Ms. Walker is not interested in Alderman Clayton performing a public mea culpa in front of the Council and she would prefer not to make this matter public. She really just wanted Alderman Clayton to understand that what he said was hurtful and not OK. Her family is from Jamaica, but she was born in the United States and found it extremely offensive to have her patriotism attacked and have it implied she didn't care and should be deported.

Bill Clayton – 12/12/12.

Alderman Clayton's interview took place at the office of his attorney Patrick Duffy. Alderman Clayton was confirmed he was present for the August 28th Wingnuts luncheon. He also confirmed this was the first Wingnut meeting he attended. Upon arriving, he recalls being approached by Bill Napoli who introduced him to group, which was approximately 40 people. At this point, Mr. Clayton states he was asked to comment on current issues facing the City Council. To this, he responded by speaking on the Council's pending review of the annual budget. According to Alderman Clayton, he mentioned an ongoing disagreement among the Council members of whether the City should implement the CPI tax increase which has been customarily done on an annual basis. Mr. Clayton described the relevant portion of his comments accordingly; "there are 6 people who seem to take any path they can to defame the Mayor and there are 4 of us who think we should not take the CPI. As a matter of fact, one of the Council people has a blog and on that blog she has talked about the budget and gone on to use terms and make statements meant only to defame the Mayor."

Alderman Clayton is in clear disagreement with the alleged content and characterization of his statements in the complaint. Several times during the interview, Alderman Clayton explained that he was very careful not to mention specific names during his comments due to political considerations. He admits to providing the blog's web address to Bill Napoli and suggesting the attendees "take the time and ask this person the tough questions." However, at no time did he mention the name of the Alderperson who maintained the blog. In addition, Mr. Clayton flatly denies he made any comments encouraging the attendees to "drive her/remove her from office" or addressing Ms. Doyle's mental stability or mental fitness.

In addition, he is disagreement as to the tone in which these comments were delivered. Although, Alderman Clayton admitted he was passionate about the pending CPI and the Alderman's blog, he did not agree with the allegation that he was "attacking" Alderman Doyle. He felt his comments were well received by the majority of the attendees and the identity of blog host remained anonymous. Despite the passage of time, Alderman Clayton said he clearly remembers his comments and the allegations contained in the Complaint, describing his demeanor as "intense," "argumentative," and "venomous" are inaccurate and over-exaggerated. In addition, Mr. Clayton denies he used a hand gesture suggestive of pointing a gun to his head while speaking about Ms. Doyle. Admittedly, he did not recall making any hand gestures while speaking, but due to his extensive experience with firearms and firearms safety, he opposes this type of behavior and did not believe it to be accurate. Alderman Clayton stated his opinion that the mischaracterization of his behavior and the Complaint were politically motivated and did not reflect what took place.

Following a short break, the interview resumed to address the unofficial complaint filed by Taisha Walker. Mr. Clayton's attorney explained that he and Alderman Clayton had met with Ms. Walker and they believed she considered the issue resolved and did not wish to add any additional comments for the report.

Legal Analysis

The formal complaint is based on statements allegedly made by Alderman Clayton about a fellow alderman which were perceived by the complainants to be discourteous and unbecoming for someone in an elected position. Since the allegations of inappropriate conduct involve speech, it is important to consider the potential legal ramifications should you choose to take any formal disciplinary action against Alderman Clayton based on his comments. Speech is constitutionally protected by the First Amendment to the United States' Constitution and Article VI, §5 of the South Dakota Constitution.

The First Amendment prohibits laws abridging the freedom of speech which generally means that the government cannot restrict expression because of its message, its ideas, its subject matter or its content. The proposition that freedom of expression on public questions is secured by the First Amendment is well settled. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). The First Amendment was fashioned to assure the unfettered exchange of ideas in order to bring about the political and social changes desired by the people. *Id.* The Supreme Court went on to state that "It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions and this opportunity is to be afforded for

vigorous advocacy no less than abstract discussion.” *Id.* The Court recognized that there is a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open and that such expression may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. *Id.* At 270. Generally, only speech such as obscenity, “fighting words” and speech which is meant to incite or produce imminent lawless action (a riot) are not protected by the First Amendment.

Elected officials enjoy a high degree of protection in exercising their freedom of speech. The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy. *Id.* Speech of elected officials is provided the same protection afforded to the speech of private citizens. Any infringement of the freedom of speech by the government based on the content of the speech is subject to a level of review entitled “strict scrutiny.” This means that any restriction imposed on speech must advance a compelling governmental interest, must be narrowly tailored to achieve that interest (i.e. not overly broad) and be the least restrictive alternative to achieve that interest. It is firmly settled that under the Constitution the public expression of ideas may not be prohibited merely because the ideas are offensive to some of those who hear it. *Kucinich v. Forbes et.al.*, 432 F.Supp. 1101, 1110-1111 (1977). Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office. *Id.* At 1113.

While the statements of elected officials have constitutional protection, the Courts have usually found that certain actions do not violate the constitutional rights of elected officials. Courts have taken the view that a public censure, in the absence of any actual sanction accompanying it, does not violate a legislator’s First Amendment rights. *Phelan v. Laramie County Community College Bd. Of Trustees*, 235 F.3d 1243 (2000). In order for governmental action to trigger First Amendment scrutiny, it must carry consequences that infringe upon protected speech. A discouragement that is minimal and wholly subjective does not impermissibly deter the exercise of free speech rights. *Id.* at 1247-48. While the government may not restrict, or infringe on an individual’s free speech rights, it may interject its own voice into the public discourse. *Id.* At 1247. In situations where a governing body has publicly censured one of its members and not taken any additional action to discipline the person being censured, the Courts have tended to view the action as the body exercising its right to express its view and that any stigma which may arise from this action is not a sufficient deterrent to speech to trigger First Amendment protections.

When faced with a law or rule that attempts to regulate conduct, that law must be viewed under the Doctrine of Overbreadth. This established doctrine states a law or regulation will be deemed unconstitutional if it carries the impermissible risk of inhibiting constitutionally protected speech or behavior, while regulating unprotected speech. Owing to the apparent difficulty in crafting restrictive language to address only unprotected speech and avoid all protected speech, the doctrine offers an expansive remedy to challenge regulations. *State v. Stark*, 802 N.W.2d 165 (S.D., 2011). Of course, the precise reach of a particular law can rarely be known and courts are cognizant of this, but to be upheld such laws must advance a compelling governmental interest can carry *de minimis* effects on the exercise of free speech.

The current situation brings to surface the often overlooked implications policies regulating conduct or behavior. Although these laws can provide effective management of non-speech related conduct, most often they carry the undesired effect of impermissible regulating protected speech. Beyond the categories of unprotected speech listed above, the overwhelming majority of speech remains constitutionally protected. Even when a majority finds certain speech reprehensible and offensive, the courts have given strong protections to speech, regardless of the speaker. The Code of Conduct, as it applies to current circumstances, runs the risk of overbreadth.

Conclusion

The following provisions of the Amended Code of Conduct appear to be the most relevant to the allegations contained in the complaint:

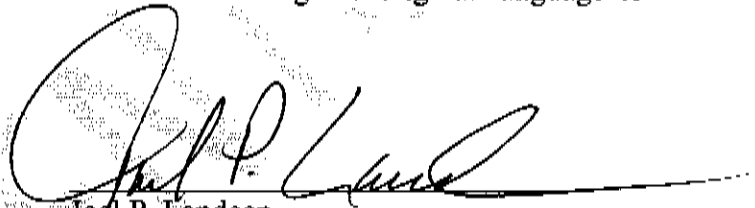
1. The City of Rapid City expects each elected official to demonstrate the highest standards of conduct, personal integrity, and honesty in all of their activities in order to inspire public confidence and trust in elected officials.
4. The provision of governmental service requires elected officials to interact with the public. Given the unique relationship between the government and its citizens, each elected official is expected to treat members of the public with the respect and courtesy due to citizens from public servants. However, no elected official shall be expected to endure personal hostility or abuse, regardless of the source.

One of the difficulties of a complaint such as this, is the subjective nature of the prohibited conduct. While the language in the City's Code of Conduct is not all that different than many codes of conduct, what actually constitutes "the highest standards of conduct and personal integrity" may vary from person to person. As the witnesses' perceptions of what was said at the meeting demonstrate, many people can view the same event and come to very different conclusions. The members of the City Council must review the report and decide if the conduct alleged violates the Code of Conduct. I will not provide an opinion on whether any statements violated the Code of Conduct. It is up to the members of the City Council to look at the Code and reach their own conclusions. My role is to provide guidance on the procedures to be followed and identify any potential legal ramifications which may arise from this process.

Pursuant to the Amended Code of conduct the City Council may use the executive session at which this report is discussed to 1) become fully informed; 2) discuss if there appears to be a violation of the code of conduct; 3) seek resolution without further action; 4) if necessary, discuss scheduling the matter for a public hearing for a final determination regarding whether a violation occurred and 5) if necessary, discuss what sanction, if any, may be most appropriate. Essentially, the City Council needs to first determine whether they believe any violation of the Code of Conduct occurred. If the City Council determines the allegations do not constitute a violation of the Code of Conduct, than no further action is required. If the City Council determines the allegations do constitute a violation of the Code of Conduct, than the City Council must decide how to proceed. Even if the Council determines it is likely that the Code of Conduct was violated, the Council is not required to take any formal action.

The City Council should also be cognizant of the potential legal implications if it determines there was a violation of the Code. The freedom of speech is a fundamental right and any governmental entity should be very cautious about taking action against someone on the basis of what they said or because the body disagrees with that person's message. If the City Council decides to take a formal action against Alderman Clayton, you should be clear that his statements, in particular those made to the Wingnuts luncheon, almost certainly have legal protection under the state and federal constitutions. While courts have traditionally concluded that the act of censuring a legislator does not in itself violate that legislator's first amendment rights, any action which actually imposed a sanction on Alderman Clayton would be unconstitutional. Even if a public censure on its own did not violate Alderman Clayton's constitutional rights, the language contained in the current Code of Conduct could be challenged as overly broad and potentially be overturned. The recent amendment to the policy focused on the procedural aspects of the policy and not the language of the original policy itself. In my opinion, there is a significant possibility that the Code of Conduct would not survive strict scrutiny analysis. No matter how this particular complaint is decided, I would recommend that the City go back and review the entire Code of Conduct including the original language to determine its enforceability and practicality.

Dated this 7 day of December, 2012.



Joel P. Landeen
City Attorney

RESOLUTION #2012-070

A RESOLUTION AMENDING THE RAPID CITY CODE OF CONDUCT FOR ELECTED OFFICIALS IN ORDER TO INCORPORATE DUE PROCESS

WHEREAS, the City of Rapid City (the "City") has previously adopted various policies and procedures pertaining to the conduct expected of its elected officials; and

WHEREAS, the adopted policies and procedures address a number of specific requirements pertaining to the City's expectations regarding the conduct of its elected officials; and

WHEREAS, in November, 2006, the City adopted by resolution a Code of Conduct for Elected Officials (the "Code of Conduct"); and

WHEREAS, the Code of Conduct did not replace other City policies and procedures pertaining to the conduct expected of its elected officials, but augmented any and all City policies and procedures regarding the City's expectations of its elected officials; and

WHEREAS, the Code of Conduct does not currently incorporate a due process procedure in the event an allegation is made pursuant to the Code of Conduct; and

WHEREAS, a due process procedure would provide notice and an opportunity to be heard to any elected official affected by an allegation under the Code of Conduct; and

WHEREAS, the City of Rapid City deems it is in the best interests of the City and its elected officials to incorporate a due process procedure into the Code of Conduct.

NOW, THEREFORE, BE IT RESOLVED by the City of Rapid City that there is hereby established an amended Code of Conduct for Elected Officials, which in its entirety reads as follows:

RAPID CITY CODE OF CONDUCT FOR ELECTED OFFICIALS

In order to maintain excellence in government and to facilitate the efficient provision of services to the public, the City of Rapid City adopts this Code of Conduct for Elected Officials. This Code of Conduct is in addition to all other policies of the City of Rapid City.

A. The Code:

1. The City of Rapid City expects each elected official to demonstrate the highest standards of conduct, personal integrity, and honesty in all of their activities in order to inspire public confidence and trust in elected officials.

2. The City of Rapid City expects each elected official to undertake their duties in a fair and impartial manner, refraining at all times from discrimination or the dispensation of special privileges.
3. The City of Rapid City strives to maintain a workplace that facilitates the growth and performance of its employees. To that end, each elected official is charged with the responsibility to insure that the workplace is free from hostility or harassment in any form and that the workplace is conducive to the provision of services in an efficient and effective manner.
4. The provision of governmental service requires elected officials to interact with the public. Given the unique relationship between the government and its citizens, each elected official is expected to treat members of the public with the respect and courtesy due to citizens from public servants. However, no elected official shall be expected to endure personal hostility or abuse, regardless of the source.

B. Due Process:

Except as provided in Section (B)(1)(a)(i), (ii), and (iii) herein, any time a violation of this Code is alleged, the affected elected official(s) shall be entitled to notice of the alleged violation(s) and a public hearing on the merits of the allegation(s).

1. Any complaint of violation of this Code shall be made in writing to the Office of the City Attorney. The City Attorney or his or her designee shall examine the complaint and shall also review any signed written submissions by the person(s) or entity(ies) that are directly involved. Pursuant to SDCL § 1-25-2(1), the complaint may be heard in executive session, and upon completion of the review, the City Attorney's Office shall submit in executive session an unbiased fact-based investigative report to the Common Council. All laws pertaining to executive session shall apply, and the Common Council shall not take any action regarding any alleged violation of this Code in executive session.
 - a. At least ten days prior to the scheduled executive session, any affected elected official(s) shall be notified in writing of the complaint and the scheduled date of the executive session discussion, and shall be provided copies of the materials reviewed by the Office of the City Attorney, along with the report produced by the City Attorney, or his or her designee.
 - i. This provision of notice shall be required, except in cases in which the affected elected official(s) has been accused of criminal wrongdoing, or in cases in which notice to the affected elected official(s) would jeopardize an on-going criminal investigation by any local, state, or federal law enforcement agency.

- ii. The City Attorney shall make the determination as to whether the above-enumerated notice exception applies, and shall document the file as to the reason(s) therefore.
 - iii. In cases of alleged criminal wrong doing or on-going criminal investigation, the subject complaint of violation of this Code shall be suspended until such time as the City Attorney deems the criminal allegation and/or criminal investigation has been resolved, either by prosecution, or a determination that no criminal charge(s) are warranted against the affected elected official(s).
 - b. In the event the notice exception above does not apply, the matter shall proceed and any affected elected official(s) shall have an opportunity to respond and be heard during the scheduled executive session.
 - c. The Common Council will utilize the executive session to:
 - i. Become fully informed;
 - ii. Discuss if there appears to be a violation of this Code;
 - iii. Seek resolution without further action;
 - iv. If necessary, discuss scheduling the matter for a public hearing for final determination regarding whether a violation occurred; and
 - v. If necessary, discuss what sanction if any may be most appropriate.
- 2. Any elected official(s) affected by a complaint of violation of this Code may be represented by counsel of his or her choosing at the scheduled executive session.
 - a. Counsel present under this section is allowed to attend only that portion of the scheduled executive session where the complaint at issue under this Code is discussed.
 - b. Counsel under this section means an attorney at law licensed to practice in the State of South Dakota.
- 3. Any elected official(s) affected by a complaint of violation of this Code may at any time during the process, at his or her option, choose to have the matter heard at a public hearing.
 - a. Election of a public hearing must be made in writing to the City Attorney.
 - b. The public hearing shall take place at the next regularly scheduled or special Common Council meeting after written notice has been received,

provided however that written notice is received at least ten days prior to the next regularly scheduled or special Common Council meeting.

4. Official action by a concurrence of two-thirds of the elected aldermen shall be required for a determination that a violation of this Code has occurred, and likewise, a concurrence of two-thirds of the elected aldermen shall be required in order to impose sanction.

C. Effect of Violation:

1. Neither an alleged nor confirmed violation of this Code of Conduct by itself provides a basis for challenging the validity of any final action, enactment, ordinance, resolution, decision, determination, or recommendation of the Common Council.
2. Under SDCL § 9-8-5, the Common Council is the judge of the qualification of its own members; any sanction available under state law, including but not limited to public reprimand and public censure, shall be available to the Common Council in judging its members.

a. Definitions.

- i. Public reprimand as used in this Code means a public declaration made by resolution at a Common council meeting announcing that an elected official's conduct was improper and describing the impropriety under this Code.
- ii. Public censure as used in this Code means an official public condemnation made by resolution at a Common Council meeting denouncing an elected official's conduct as a violation of this Code and the reasons therefore.

DATED this _____ day of _____, 2012.

CITY OF RAPID CITY

Mayor

ATTEST:

Finance Officer

(SEAL)

September 17, 2012

Office of City Attorney
300 Sixth Street
Rapid City, SD 57701

Attn: Joel Landeen

Mr. Landeen,

We, the undersigned, wish to bring the following to the city's attention.

The incident occurred at the August 28th luncheon meeting of Wingnuts, a conservative open forum discussion group run by former state representative Bill Napoli. There is no formal membership with this group and anyone can attend.

On that date, Councilman Bill Clayton, who has never attended a prior wingnuts meeting, and Councilman John Roberts, who regularly attends, were acknowledged by Mr. Napoli. As it is custom to recognize all past and present government officials at the beginning of the luncheon, they were allowed to say a few words and share their thoughts.

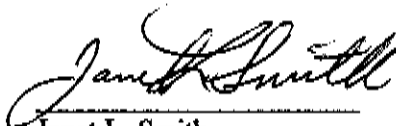
Mr. Clayton proceeded to admonish the majority of the city council for supporting the CPI tax increase but singled out Councilwoman Charity Doyle, who was not in attendance and in the past has attended the luncheons, for particular criticism.

Mr. Clayton ridiculed her by questioning her mental fitness to serve on the council, urged citizens to harass her by contacting her by phone and through her newly established blogsite, and encouraged the public to drive/remove her from office. Mr. Clayton's demeanor was intense, argumentative and venomous. At no time did he direct his diatribe at any other councilperson. Councilman Roberts made no such attacks against any other councilperson, but did not address, correct or admonish Councilman Clayton's outburst. Both Councilmen Roberts and Clayton left the meeting shortly afterwards.

We believe this conduct is unbecoming of a councilman. While political discourse is expected, it should occur in a non-threatening, civilized manner and should not involve personal attacks.



Peter M. Wernicke
4127 Pleasant Drive
Rapid City, SD 57702



Janet L. Smith
240 St. Francis Street
Rapid City, SD 57701



Bonnie Redden
728 North Spruce Street
Rapid City, SD 57701

Cc: Bonnie Petersen, City Council President

Landeen Joel

From: Petersen Bonny
Sent: Tuesday, September 04, 2012 12:44 PM
To: Doyle Charity; Landeen Joel
Subject: FW: Alderman Bill Clayton

FYI see below.

Bonny Petersen
Rapid City Ward 5
Home 342-6245 or Cell 484-1550

From: Petersen Bonny
Sent: Tuesday, September 04, 2012 12:43 PM
To: taishawalker@kotatv.com; Kooiker Sam
Subject: RE: Alderman Bill Clayton

Thank you for letting us know about this. I am glad that you have cleared the air.
I will also be speaking with Mr. Clayton.

I also want to commend you for bringing this forward as you are in a difficult position. It was the right thing to do.
I am sorry that this all happened in the first place.

Bonny Petersen
Rapid City Ward 5
Home 342-6245 or Cell 484-1550

From: taishawalker@kotatv.com [taishawalker@kotatv.com]
Sent: Tuesday, September 04, 2012 8:43 AM
To: taishawalker@kotatv.com; Kooiker Sam
Cc: Petersen Bonny
Subject: Re: Alderman Bill Clayton

I just wanted to inform you that Bill Clayton called Tuesday morning to apologize. As my prior email stated I just wanted him to clear the air, which he did today.

----- Original Message Follows -----

From: taishawalker@kotatv.com
To: mayor@rcgov.org
Cc: bonny.petersen@rcgov.org, bill.clayton@rcgov.org
Subject: Alderman Bill Clayton
Date: Fri, 31 Aug 2012 12:43:08 -0600

> Dear Mayor Kookier:
>
> I would like to inform you about an encounter I had over the phone
> with Ward 1 Alderman Bill Clayton on Wednesday, August 29, 2012.
>
> On the said date I called four council members -- Alderman Clayton
> being one of them -- to find out how they were planning to vote on the
> CPI veto for a news story I was working on for KOTA Territory News. I

> called Alderman Clayton at (605)718-2580 at 4:29 p.m., and received a
> call back from him 11 minutes later on a different number,
> (605)863-0109. Alderman Clayton identified himself to me over the
> phone, as did I, and he even made a joke about me calling Alderman
> Steve Laurenti before him. What began as a jovial conversation soon
> turned insulting once I informed the Ward 1 alderman the nature of my
> call.
>
> Alderman Clayton told me he was not sharing his vote with me and
> didn't feel it was anyone's business, which is
why
> he said he didn't return the voice-mail my co-worker
left
> for him a few days ago concerning the same matter. He then went on to
> ask "how would you like it if I asked how you plan to vote in
> November?" I told him I didn't plan to vote in November because as a
> journalist I wanted to stay impartial in the stories I cover. Alderman
> Clayton then responded "Should we deport you back to Kenya with
> Obama?" followed by "Are you even American, are you American?" He then
> said that I should have an opinion, similar to when I choose a man or
> a woman in a relationship.
>
> I expressed to Alderman Clayton that I didn't appreciate the direction
> in which the conversation was heading, since I only called to find out
> how he planned to vote the following Tuesday. I told him he could have
> answered my initial question in a more respectful manner rather than
> the approach he took. He said "okay," and our
conversation
> ended.
>
> Mayor Kookier, I would like Alderman Clayton to be held accountable
> for his egregious comments. Alderman Clayton was elected by the people
> to represent the voice of the people. I'm confident the people of
> Rapid City would be outraged and would find his "birther" comments and
attack
> on my patriotism appalling. As an elected official, who is in the
> public light, I would request that Alderman Clayton do what's right
> and issue me an apology - written or verbal --for his offensive
> comments made August 29, 2012.
>
> Thank you in advance for looking into this matter. I await a response
> on what course of action, if any, will be taken.
>
> Regards,
>
>
> Taisha L. Walker
> Reporter/ Producer/ Anchor
> KOTA-TV
> (605)721-5756
>