



STAFF REPORT – CITY COUNCIL MEETING

May 17, 2022

TO: Honorable Mayor and City Council Members

FROM: Nancy Diamond, City Attorney

PREPARER: Nancy Diamond, City Attorney

DATE: May 13, 2022

TITLE: **Corrective, Preventative, and/or Remedial Actions the City May Take in Response to April 12, 2022 Investigation Report Concerning Allegations of Sexual Harassment Made Against Councilmember Brett Watson.**

RECOMMENDATION:

It is recommended that the Council provide direction on the corrective, preventative, and/or remedial action(s) to take in response to the results of the April 12, 2022, investigation report concerning allegations of sexual harassment made against Councilmember Brett Watson.

INTRODUCTION:

In September 2021, the City received a report that Councilmember Brett Watson (“Watson”) engaged in sexually harassing conduct towards a staff member. Thereafter, the City retained Karen Kramer of Kramer Workplace Investigations (the “Investigator”) to investigate the allegations brought to the City’s attention. The Investigator provided the City with her investigation report on or about April 12, 2022 (hereinafter, the “Investigation Report”). The City is duty bound to take corrective, preventative, and/or remedial action(s) in response to the results of the Investigation Report. Through the City’s participation in its self-insurance risk pool, CIRA (California Insurance Risk Authority) and ERMA (Employer’s Risk Management Association), assigned special employment counsel, Mr. Thomas O’Connell (“Employment Counsel”) has researched available remedies for the City Council’s consideration, and provides his analysis and recommendations below (in the staff report). Employment Counsel asks the City Council to provide direction on how it would like to fulfill the City’s obligation to take corrective, preventative and/or remedial actions. Employment Counsel recommends, at a minimum, that the City pursue a restraining order against Councilmember Watson.

DISCUSSION:

1. Investigation:

The Investigation Report indicates that from December 14, 2021, through January 12, 2022, the Investigator identified and interviewed potential witnesses and received several hundred pages of notes, emails, and text messages related to the allegations. The Investigator notes in the Investigation

Report that she did not interview Watson as part of the investigation. Regarding this, the Investigation Report states the following:

Watson was not interviewed as part of the investigation. Efforts to secure his participation began on January 21, 2022, when the undersigned sent Watson's attorney, Amelia Burroughs, an email requesting to schedule Watson's interview at a mutually convenient date and time. On February 8, 2022, Burroughs advised that she was no longer representing Watson. On February 14, 2022, Watson's new attorney, Linda Mitlyng contacted the undersigned and on March 1, 2022, after exchanging several emails in an effort to schedule Watson's interview, Mitlyng notified the undersigned that she no longer represented Watson. On March 8, 2022, the undersigned learned that Watson was represented by attorney Elan Firpo. Counsel for the City communicated directly with Firpo to attempt to secure a date for Watson's interview, but on March 25, 2022, Firpo notified the City's attorney that she was no longer representing Watson.¹

Relying on the witness testimony and several hundred pages of documentation, the Investigator issued several conclusions, including the following:

It is undisputed that Watson engaged in conduct attributed to him by [employee] and that his conduct was motivated by romantic interest in [employee]. It is also undisputed that Watson abused his power as a City Councilmember by expecting [employee] to spend time with him outside of City Hall; to respond to his calls and text messages outside of regular work hours; to engage in communications of a personal nature with him; and to hug him each time they met in his capacity as a Councilmember and her capacity as the City Manager. The credible evidence presented during the investigation establishes by a preponderance of the evidence that the allegations against Watson are sustained.

On April 26, 2022, the City—through Employment Counsel's office—notified Watson of the results of the investigation. Therein, Watson was advised that “as a result of the findings of this investigation, the City is duty bound to take any and all actions necessary to protect [employee] from the complained of behavior and to ensure that such conduct does not repeat itself.” Watson was also advised that “in the course of the aforementioned investigation, the City became aware of additional allegations of inappropriate conduct by you towards other staff members including, but not limited to, engaging in further sexual harassment and create [sic] a hostile work environment.” Based thereon, the City stated the following:

... [I]n order to protect the City and you from any further liability while the secondary investigation is ongoing, the City asks that you immediately cease: (i) meetings with any staff outside of City

¹ After being notified of the results of the Investigation Report on April 26, 2022, Watson was told that he still may participate in the investigation and, if he does so, the Investigator will issue an amended report based on his participation. Neither Watson nor his new attorney has advised Employment Counsel or the Investigator that he would like to participate in the investigation.

Hall; (ii) in person meetings with staff members outside of city council meetings; (iii) communications with [employee] in any way outside of city council meetings; (iv) communications with any staff members outside of working hours; (v) communications with any staff that are personal in nature; (vi) physical contact (i.e., hugs) with any staff members. As such, the City requests that you please sign below acknowledging receipt of investigation findings and agreeing to abide by the City's requests identified herein.

Watson has declined to execute the acknowledgement and has declined to stop engaging in the aforementioned communications or interactions with staff. Watson has advised Employment Counsel that he has engaged a new attorney to represent him related to this matter.

The City of Arcata maintains a zero tolerance policy against discrimination and harassment. Through such policy, the City affirms that it will "take all reasonable steps to prevent and prohibit discrimination/harassment in the work environment" and that it "strongly disapproves of and will not tolerate discrimination/harassment of employees by managers, supervisors, co-workers, clients or vendors, City Council members, and Committee or Commission members." The Investigator has identified facts and circumstances that, if true, would qualify as both quid pro quo sexual harassment and hostile work environment harassment. Consequently, in order to protect itself and its employees, the City is duty bound to take any and all reasonable steps necessary to take corrective, preventative, and remedial action in response to the findings of the Investigation Report.

2. Available Corrective Actions:

Under normal circumstances, corrective, preventative, and remedial actions that an organization may take could include, but are not limited to:

- 1) Training for the harasser;
- 2) Verbal reprimand of the harasser;
- 3) Written reprimand of the harasser;
- 4) Suspension, demotion, transfer, and/or reduction in salary of the harasser; and/or
- 5) Termination of the harasser.

However, when taking corrective, preventative, and remedial action related to a City Councilmember, many of the aforementioned options are not available. The options that the City or City Council may take related to a City Councilmember include, but are not limited to, the following:

- 1) Training for the Councilmember;
- 2) Public admonishment of the Councilmember;
- 3) Censure of the Councilmember;
- 4) Limitations on Councilmember activities, removal from committees and other assignments, and/or eliminating access to City facilities except during regular business hours;
- 5) Recall of the Councilmember by public.

Due to the procedural complexity involved in a censure and limiting Councilmember activities, Employment Counsel's analysis below focuses on the requirements for these options.

A. Censure

A City Council, as a body, has the right to express its opinion about the propriety of the actions of any individual Councilmember. While a public admonishment is an informal statement of the opinion of one or more Councilmembers, a motion to censure is a formal statement of the opinion of the majority of the City Council. A censure is generally understood to be “an official reprimand or condemnation; an authoritative expression of disapproval or blame.” (Black’s Law Dictionary 10th Ed. 2014). Neither the California statutory law applicable to general law cities such as Arcata nor Arcata’s Municipal Code provide an explicit censure procedure. However, the judicially created decisional law, or common law, contains certain guidelines which should be followed including:

- Providing notice to the Councilmember of the cause of the proposed censure;
- Placing the proposed motion for censure on the agenda for a public hearing during an open session at a City Council meeting;
- Providing an opportunity for public comment on the censure at the City Council meeting for which the censure has been noticed; and/or
- Providing an opportunity for the subject Councilmember to be heard regarding his/her censure.

Consequently, should the City Council choose to censure Watson, it is recommended that the City Council at a minimum take the following actions to initiate the process:

- Initiate the censure process by a majority vote of the City Council. The motion should provide the specific facts and grounds for the proposed censure (i.e., what behavior(s) of Watson and/or findings of the Investigator merit censure);
- Provide public notice of the censure hearing meeting date, time and location no less than 72 hours in advance;
- Provide written notice of the meeting date, time and location directly to Watson and the specific facts and grounds for the proposed censure.

At the public hearing on the motion for censure of Councilmember Watson, it is recommended that the City Council conduct the proceeding in the following manner:

- The hearing shall begin by a reading of the motion for censure against Watson.
- After reading the motion for censure, members of the public may speak in favor of or in opposition to the motion for censure, subject to City Council policies and the Brown Act.
- After public comment on the proposed censure, Watson must have an opportunity to present his arguments against the motion for censure. Such arguments can be presented either orally or in writing.
- After Watson’s presentation, the remaining City Councilmembers shall have the opportunity to ask Watson questions regarding his presentation.
- Thereafter, the City Council shall openly deliberate on the passage of the motion for censure. The voting Councilmembers shall not recess to closed session for deliberation. Passage of the motion for censure shall require a majority vote of the City Council.

B. Limitations on Watson's Activities

As noted above, on April 26, 2022, the City notified Watson of the results of the investigation and requested that he immediately cease certain activities related to City staff members (hereinafter, "Restricted Activities"). Each of the Restricted Activities identified in the April 26 letter were directly linked to activities where the Investigator found that Watson was motivated by romantic interests or otherwise abused his power as a City Councilmember to commit sexual harassment and/or create a hostile work environment that not only unreasonably interfered with the affected employee's work performance, but also has or potentially has interfered with the work performance of many other individuals and the City in general.² Said differently, agreeing to the Restricted Activities would protect the complainant and others from allegedly harassing conduct by Watson, would eliminate any possibility that Watson could be accused of such activity, and would allow Watson to continue to serve as a City Councilmember. Watson has not consented to the City's request.

Codified public policy establishes an explicit requirement that employers provide a safe and secure workplace, including a requirement that an employer maintain safe and healthy workplaces free from "danger to the life, safety, or health of employees as the nature of the employment reasonably permits." (Labor Code §§ 6300, 6306.) To this end, in 1994, the Legislature enacted the Workplace Violence Safety Act, codified at Code of Civil Procedure section 527.8, to provide California employers with a legal option to prevent violence in the workplace by petitioning the courts for what is commonly referred to as a Workplace Violence Restraining Order ("WVRO").³ That law provides that "[a]ny employer,⁴ whose employee has suffered unlawful violence or a credible threat of violence from any individual, that can reasonably be construed to be carried out or to have been carried out at the workplace, may seek a temporary restraining order and an order after hearing on behalf of the employee and, at the discretion of the court, any number of other employees at the workplace, and, if appropriate, other employees at other workplaces of the employer." (CCP § 527.8(a).)

Under the statute, a basis for the issuance of a WVRO is based on an inappropriate "course of conduct" defined as:

A pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an employee to or from the place of work; entering the workplace; following an employee during hours of employment; making telephone calls to an employee; or sending correspondence to an employee by any means, including, but not limited to, the use of the public or private mails, interoffice mail, facsimile, or computer email. (CCP § 527.8(b)(1))

²As described by the Mad River Union, May 6, 2022, the investigation report "tells an increasingly unnerving tale of obsession and near stalking, with one person's reckless misbehavior taking a toll on many other individuals as well as city business."

³Other statutory grounds for a restraining order may be available. Under the circumstances, a WVRO restraining order appears most appropriate and is therefore discussed in depth without foreclosing the option of seeking a restraining order on any justifiable basis if so directed by the City Council.

⁴The statute defines "employer" to include a city, county, district, or any public agency thereof or therein. (CCP § 527.8(b)(3).)

When an employee expresses, or the employer otherwise gains knowledge of, the aforementioned course of conduct, the employer may petition the court on an emergency basis for an immediate restraining order. Thereafter, and regardless of whether a request for a TRO is granted or denied, the court will set a hearing to take place within 21 days. At the hearing, the court will evaluate whether there is clear and convincing evidence that the respondent engaged or is a threat to engage in an unlawful course of conduct against the employee. If the court finds that the respondent engaged or is a threat to engage in an unlawful course of conduct, the court will issue an order tailored to prohibit and prevent further conduct. A restrained person who intentionally disobeys a WVRO faces criminal prosecution pursuant to Penal Code section 273.6.

Based on the sustained allegations in the Investigation Report and Watson's choice not to acquiesce to the Restricted Activities, Employment Counsel would recommend that the City Council seek a restraining order. That restraining order may include some of, all of, or more than the following items:

- Watson cease communicating and meeting with complainant in any way outside of City Council meetings.
- Watson cease communicating and meeting with any staff members outside of City Council meetings.
- Watson cease communicating with any staff members at any time regarding topics that are personal in nature.
- Watson cease physical contact with any staff members at any time.

3. Specific Council Direction:

Some measures discussed above could be implemented immediately upon Council authorization, others could be initiated immediately, but would require further action for full implementation. Below is a summary of potential actions the City Council could take to initiate implementation of and/or implement immediately the different measures:

- Censure: Motion to initiate a censure process based on [specified grounds] and to conduct a censure hearing at an open session meeting on [date]; and, direct Employment Counsel to provide written notice to Councilmember Watson, prepare the staff report, and prepare other supporting documentation for the censure hearing;
- Restraining Order: Motion authorizing and directing Employment Counsel and staff to prepare and file an application for a restraining order with the Humboldt County Superior Court;
- Limitation on Activities, Assignments: Motion to remove Mr. Watson from [see list below] and appoint [named Council member]:
 - 1) Redwood Region Economic Development Council (RDDEC);
 - 2) Humboldt-Del Norte Hazardous Materials Response Joint Powers Authority;
 - 3) Humboldt County Local Community Benefit Indian Gaming Committee;
 - 4) Covid-19 Economic Recovery Collaborative;
 - 5) Homelessness and Housing Working Group; and

- 6) North Coast Unified Air Quality Management District (Note that this appointment is made by the Mayors' Select Committee, Government Code section 50270 et seq.)
- Limitation on Activities, Access to City Facilities:
 - 1) Motion to recall City Hall key and remove Councilmember Watson's code from City facility key code pads.

BUDGET/FISCAL IMPACT:

If the City Council chooses to pursue a restraining order, Employment Counsel estimates that the Temporary Restraining Order will cost between \$7,500 and \$15,000 to prepare and argue. It is difficult to ascertain the remaining fees and costs associated with an action seeking a permanent restraining order at this time as numerous circumstances related to this matter may affect the fees and costs (i.e., Watson's opposition to the order or mootness of the requirement of the injunctive relief if Watson is not reelected). At this time, Employment Counsel estimates that the remainder of the injunctive action will cost between \$40,000 and \$80,000.

ATTACHMENTS:

Watson Investigation Report _Redacted (PDF)
Anti-Discrimination-Harassment Zero Tolerance (PDF)