

PORTSMOUTH POLICE COMMISSION
INTERIM MINUTES OF THE OCTOBER 7TH, 2015 SPECIAL MEETING

8:15 a.m. Public Session – Eileen Dondero Foley Council Chambers, City Hall

John F. Golumb, Chairman
Brenna Cavanaugh
Wayne Lehman

- I. **CALL TO ORDER:** The October 7th, 2015 special police commission public session was called to order at 8:30 a. m. in the Eileen Dondero Foley Council Chambers of city hall.

Present during the public session: Commissioners Golumb, Cavanaugh, and Lehman, Mayor Robert Lister, City Manager John Bohenko, City Attorney Robert Sullivan, City Negotiator Attorney Tom Closson, Exec. Assistant Kathleen Levesque, members of the public and the press.

- II. **PLEDGE OF ALLEGIANCE:** Mayor Lister led a moment of silence and the Pledge of Allegiance.

The Chair reminded everyone the Mayor and the City Manager are non-voting members of the police commission.

- III. **NEW BUSINESS:**

1.) Amended Separation Agreement for Chief Stephen DuBois – The Chair turned the floor over to city negotiator Tom Closson to briefly explain the changes to the existing agreement. Upon completion of Attorney Closson’s review of the amendments to the document, the Chair opened the floor for public comment.

PUBLIC COMMENT:

Mr. Joe Onosco, 27 Shaw Road – Reading from a prepared statement, Mr. Onosco said that in the Monday night city council meeting, he felt the entire town demanded that Chief DuBois should leave. Mr. Onosco referenced his opinion that Judge Cassavechia’s decision blistered the command staff. He

shared his opinion as to why the action's of command staff at the time were taken, saying he sought the opinions of other attorneys as well. Mr. Onosco shared the views of the attorneys he spoke with as to what they thought the outcome of a superior court proceeding might be, should Chief DuBois be terminated and pursue that avenue of relief as proved for by statute.

Ms. Jane Zill, 27 Shaw Road – Ms. Zill, reading from a prepared statement said she felt the city was making an extraordinary effort to make a golden path for the Chief's exit. She said the Robert's Report criticizes all levels of command, and she revisited the history of the Goodwin Webber matter. Ms. Zill talked about the anonymous letter of allegations against Commissioner Cavanaugh and stated her belief the Department administration was somehow linked to this. Ms. Zill scolded the commission and the city for being overly concerned with law suits that might result from taking certain actions.

Mr. Tom Coakley, 236 Bartlett Street – Mr. Coakley said he is a lifelong citizen of Portsmouth, and is running for police commission. He has been out in the community talking with people. He feels the commission is not doing its job. He said he wants to move the city forward. Mr. Coakley referenced the 'gag order', and was concerned that if elected it would affect his freedom of speech. He asked Commissioner Golumb to consider stepping down after the November election.

Mr. Brendan DuBois, Exeter, NH – Mr. DuBois reading from a prepared statement, reminded those present of the response and actions of then Deputy DuBois when Greenland Police Chief Michael Maloney was murdered and DEA agents were shot in April of 2012. Mr. DuBois said he was a professional writer and author of nearly 20 books and had done many ride-alongs with federal, state and local police departments, and that Portsmouth should be very proud of its police department. He said this was overshadowed by the public dialogue about the department pushed by politicians, would-be politicians and a biased press, all of whom who were on a witch hunt. Mr. DuBois noted that at the last police commission meeting, the Chief reported crime in Portsmouth was down across many fronts from last year, yet the Police Commission did not even acknowledge this proof of effective police work. He reminded everyone that most of the decisions in the Goodwin-Webber matter were made by the previous administration, and that subsequent decisions were not made in a vacuum by one man, but were made with the input of legal counsel from the city. He closed his remarks by referencing the Army-McCarthy hearings of the 1950's and how Senator Joe McCarthy damaged the careers and reputations of

many people with his accusations, aided by a compliant press. He rhetorically addressed the Chief's accusers present by quoting from those McCarthy hearings, saying, "Haven't you done enough harm – have you no sense of decency?"

Mr. Arthur Clough, 431 Pleasant Street – Mr. Clough cited a past job interview his wife had gone to where he had accompanied her because she did not speak English that well at the time. He used the anecdote to dismiss Mr. DuBois' remarks, saying he understood about family connections. Mr. Clough referred to what he believed were inconvenient facts that he believed had been repeatedly confirmed. He said he has been afraid to report crimes to Chief DuBois for fear of retaliation. He offered his opinion that the Goodwin-Webber matter was retaliation against Attorney Ritzo for two other unrelated cases. Mr. Clough urged the commission to dismiss Chief DuBois and let him defend himself. He asked the separation agreement before them not be approved.

Mr. Bill Downey, 67 Bow Street – Mr. Downey felt we have a police chief who allowed this (Goodwin-Webber matter) to happen and actually endorsed it. Mr. Downey recounted what he felt was misleading behavior, and asked the commission to reject the agreement and do the right thing.

Mr. Joe Plaia, 93 Spinnaker Way – Mr. Plaia said he has spoken to a few citizens and a few officials since Monday night's council meeting. He feels the legalities discussed Monday night, while not inaccurate, were misleading. Mr. Plaia said he spoke with other labor attorneys and wanted to clarify a couple of things. If the city decided to fire Chief DuBois for cause, the Chief would not remain in his position while the due process ran its course, which would take about 60 days. He would be out the day he was fired. He said this was not made clear on Monday night. Mr. Plaia said he was running for police commissioner and expected to win the election. He believed he would then be subject to the 'gag order' and he is not okay with that and felt the other candidates running for the position also would not be okay with that if they were elected. Mr. Plaia said that if the commission approves this agreement, the public will be outraged. He said he felt the current contract with the Chief is sufficient.

Mr. Mark Brighton, 285 Union Street – Mr. Brighton used the Walt Disney Corporation as an example of fighting something because it is the right thing to do. He felt Councilor Lown was wrong in stating the city should accept the separation agreement and get things moving along. Mr. Brighton said he did

not care if taking different action resulted in messy lawsuits, and repeated that sometimes it is necessary to fight something because it is the right thing to do.

Ms. Bess Mosley – Ms. Mosley said she left Monday night’s meeting believing there was no alternative to the separation agreement. She gave three suggestions she felt would be good ideas to consider. Ms. Mosley said that as a result of this morning’s comments she has changed her mind and just wants Chief DuBois to go.

Mr. Rick Becksted, 1395 Islington Street – Mr. Becksted echoed the sentiments of previous speakers and felt the city used scare tactics to get the council to accept the agreement. He felt the agreement would not help the city move on, and does not want this commission to decide this issue. He urged a no vote on the amended agreement.

Ms. Kathleen Logan, 21 Blossom Street – Ms. Logan wanted to focus on a statement that is on the city’s website; she said she was appalled that citizens are being urged to contact Mike Pardue regarding the investigation into the anonymous letter written about Commissioner Cavanaugh. She asked where the statement was directing people to the investigators of the Webber-Goodwin matter. Ms. Logan said there should be an 800 number on the site for people to call the Attorney General’s office, and an 800 number for Portsmouth police officers to contact officials and tell their story. She said she is sure there are many officers that are afraid to tell their story. Ms. Logan said she didn’t know any of the deceased Mrs. Webber’s neighbors until two years’ ago, and she felt they were wonderful people and concerned citizens.

Chairman Golumb asked if there was anyone else who wished to speak who did not have a chance to sign in.

Ms. Mary Beth Campbell, 52 Laurel Lane, New Castle – Ms. Campbell gave some background on her board affiliations in New Castle and Portsmouth. She said she wanted to come and put faces with names as she has been reading about things in the paper. Ms. Campbell said she also wanted to meet Commissioner Cavanaugh.

Mr. Justin Nadeau, 507 State Street – Mr. Nadeau said he was an attorney and a lifelong city resident. He teaches business and contract law at UNH. Attorney Nadeau asked if the separation agreement and the Chief’s employment contract were in the public domain. He contrasted the termination language in the

agreement with the language in the employment contract and indicated the language in the agreement was of a lower standard than that of the employment contract, citing only malfeasance as the basis for dismissal. Attorney Nadeau suggested the commission should follow the terms of the employment contract.

There being no other persons wishing to speak, the Chair closed the public comment session.

The Chair asked Attorney Tom Closson to clarify article #15 of the separation agreement, that it was not a gag order. Mr. Closson said he would not consider it a gag order. The anti-disparagement language in article #15 provides both parties with the instruction not to speak negatively about the other so the relationship can end and both parties can move forward. Attorney Closson said it specifically does not apply to the city council. He said he would also like to clarify a statement made during the public comment session indicating Officer Aaron Goodwin is not challenging his termination. Mr. Closson said that is not correct. Officer Goodwin is working through his union to challenge his termination.

Returning to the matter of the language in Chief DuBois' employment contract and separation agreement, Attorney Closson indicated there is both an agreement and a statute, and it is the statute that would apply after the contractual due process is finished. Attorney Closson read directly from the statute. He agreed the burden of proof would be on the Chief, should he be terminated, to show there was no substantial cause.

The Chair asked if there were any other questions for Attorney Closson.

Chairman Golumb said he would entertain a motion.

Action: Commissioner Cavanaugh moved to accept the agreement for discussion. (Bring the agreement to the floor)

Seconded by Commissioner Lehman.

On a voice vote: The motion passed unanimously to bring the agreement to the floor for discussion.

Commissioner Cavanaugh said she would speak to the motion. She said on Monday when everyone unanimously agreed to a three-month separation agreement, it was pointed out by the council the commission shouldn't have voted without public input. The commission heard from the public this morning, and based on that public input, she has changed her vote and will not be supporting the agreement.

Commissioner Lehman thanked everyone for their comments. He said he counted 23 people in the room, but there are 20,000 people in Portsmouth. The audience began to murmur. Mr. Mark Brighton spoke out from the audience and said he didn't have to listen to Commissioner Lehman. Commissioner Lehman noted that he had listened to everyone who commented this morning, and asked Mr. Brighton to extend the same courtesy to him. Mr. Brighton, who stood up and stepped into the aisle, replied aloud that he didn't have to. Commissioner Lehman noted that Mr. Brighton was welcome to leave. Mr. Brighton then left the room, and Commissioner Lehman continued with his comment. He noted there was a big difference between 23 and 20,000 and the commission needed to take everybody's comments into account. Commissioner Lehman thanked everyone for their input.

Commissioner Cavanaugh asked if commission approval had to be unanimous. Attorney Closson said it was his opinion that because of the way the process had gone thus far, the agreement needed to go back to the council, and it was clear to him the council would not support the agreement unless it was unanimous.

Commissioner Lehman then said he would either abstain or vote no. Because the council wanted a unanimous decision, and that wasn't going to happen, bringing the agreement to a vote again this morning would be a waste of time in his view.

Mayor Lister said this might be a good time for the commission to table the motion.

Commissioner Cavanaugh noted she found it highly unusual that a government body was directing another government body how it needed to vote. She asked how could she as a commissioner to vote her conscience if she is being told how to vote. Commissioner Cavanaugh said she felt this negotiation process had been unclean because of the non-meetings with counsel. She stated she would not attend any further non-meetings with counsel.

The Mayor corrected the record saying he was not telling Commissioner Cavanaugh how to vote. He said the Commissioner had changed her mind several times, and simply could not continue to change her mind at each turn of negotiations. He said the commission needed to get this finished.

Attorney Closson noted RSA 91:A has provided two exceptions to the definition of a meeting. They are to strategize negotiations, and to meet with legal counsel. He said one simply cannot conduct negotiations by their very nature, in public; it cannot be done. It would be like trying to buy a car when you have to tell the salesman in advance what your top buying price would be before you begin to work out a price.

Commissioner Lehman observed it is a commissioner's responsibility to meet in public, non-public, and non-meetings. He said it was just part of the job; that is how we get from "A" to "Z".

Commissioner Cavanaugh asked if the commission could meet with counsel in a non-public meeting because at least then there would be minutes.

Attorney Closson explained that in a non-meeting, legal counsel is free to speak candidly, without concern the opinion will be disclosed. If a commissioner discloses advice or information from a non-meeting, s/he releases the privilege. It is not okay to waive the privilege for things you're okay with disclosing. You don't pick and choose what part of the privilege you waive. Commissioner Lehman said he sees no reason why things discussed in non-public or non-meetings should be in the press. He said he had a problem with that.

Commissioner Cavanaugh asked Attorney Closson if he just said that in non-public and non-meetings, an attorney-client privilege exists, and the client has the privilege. Attorney Closson replied that it is the client's privilege, and the client can certainly waive the privilege...

Commissioner Cavanaugh replied, "Thank you."

Attorney Closson continued, saying the privilege exists for the commission as a body. One commissioner cannot release the privilege for the commission. The other commissioners should have a say as to whether or not their privilege is waived.

Commissioner Golumb added that non-meetings with counsel are used by departments throughout the city; the school department uses them as do others.

City Manager John Bohenko clarified that there is no vote in a non-meeting with counsel. While a vote can be taken in a non-public meeting, there is no provision for the body to vote in a non-meeting with counsel.

Attorney Sullivan added that a body can only go into a non-meeting for certain things. The purpose of the non-meeting is purely for securing counsel.

Commissioner Cavanaugh said she would like to speak to the Mayor's statement that she had changed her mind several times. The Commissioner recounted her thinking since

Monday. She said the commission was directed to seek public input, which they did at this meeting, and it was the public input that changed her mind.

The chair referred to the mayor's suggestion to table the item. The mayor said the commission should consider whether tabling the motion jeopardizes the agreement going forward. He noted a lot of time has been spent to get to this point on the agreement. Attorney Closson said if consensus is not reached, he felt it would be impossible to tell what would happen going forward; it would be very difficult to negotiate a further agreement, given the back and forth with the other side.

Commissioner Lehman felt the issue becomes, the council wants all three commissioners on board; one of the alternatives is that we already have a contract with the chief until 2017.

Commissioner Cavanaugh said she is perplexed as to why her signature is so important to this. The commission voted and the current agreement passed by two-thirds. Commissioner Lehman said the only pressure on Commissioner Cavanaugh is the pressure she is placing on herself, and that she should stand behind her convictions.

Mayor Lister said the situation is way beyond who the bad guys are, who is going to meetings and who is not. The side issues are not important here. Given the impasse, the two options are vote the agreement down now, or table it. Attorney Closson indicated that in terms of the negotiation process, tabling it would be the more helpful way to go.

Mayor Lister continued, saying this issue is draining the entire town. He asked everyone to get on the same page. He said there is other business the city needs to attend to, and we need to move on. He was emphatic the commission needs to move forward – if the commissioners are going to table it, then do it – and be sure to address the matter quickly afterward.

Action: Commissioner Lehman moved to table the motion.

Seconded by Commissioner Cavanaugh.

On a Voice Vote: The motion passed unanimously to table the separation agreement.

The chair asked Attorney Closson if it was necessary to postpone to a time certain. Attorney Closson replied it would automatically come back on the agenda on whatever date the commission schedules to next meet. If no date is set, the item is just out there in limbo. He cautioned the commission should include notes as part of that meetings' agenda so the previous context of the item is clear when the commission takes it up again.

Action: Commissioner Lehman moved to table the motion until October 20th.

The city manager suggested another option would be to just continue the present meeting to a specific day. The commission could continue this meeting with the tabled item as the only item on the next agenda, after the commission has come together to determine what its final disposition would be.

Commissioner Cavanaugh asked if there was a date the commission could meet. Mr. Bohenko suggested they should meet before the end of the day next Wednesday; they should caucus about a date now, or adjourn and instruct the clerk to post another meeting. There was some discussion about next available dates. Mr. Bohenko said he cannot over emphasize the importance of this matter. He said there should be a non-meeting with counsel soon to work this out. He felt holding a meeting on October 20th would be counter-productive. He suggested the commission recess for five minutes and arrive at a decision.

The city attorney said the procedural aspects of the meeting had become cluttered, as there were now two motions on the floor. He suggested the commission withdraw the motions on the floor.

Action: Commissioner Lehman moved to withdraw the two motions on the floor.

Seconded by Commissioner Cavanaugh.

On a Voice Vote: The motion passed unanimously to withdraw the two motions currently on the floor.

It was suggested the commission take a five minute recess to discuss a date, but they would have to remain in public view for that discussion.

The commission recessed at 9:45 a.m. The commission came back into session at 10:05 a.m.

Chairman Golumb said he would entertain a motion.

Action: Commissioner Lehman moved to table the agreement until October 20th, 2015.

Seconded by Commissioner Cavanaugh.

On a Voice Vote: The motion passed unanimously to table Chief DuBois' separation agreement until 6:00 p.m. on October 20th, 2015.

Commissioner Cavanaugh asked if there would be public comment at that time. The mayor said there would not be public comment on the 20th because it would be a continuation of this present meeting.

The meeting was continued at 10:09 a.m.

Kathe

*Respectfully Submitted By Kathleen Levesque, Executive Assistant
Reviewed By Commissioner Cavanaugh, Clerk of the Commission*

Brenna Cavanaugh