

June 18, 2014
Executive Session

Minutes of **Executive Session** of a Regular meeting of the Board of Commissioners of the Town of West New York, in the County of Hudson, State of New Jersey, held in the Court Chambers, Municipal Building, West New York, on Wednesday, June 18, 2014.

Present: Commissioners Frias, Rodriguez, Vargas, Wiley and Mayor Roque
Absent: None
Also Present: Corporation Counsel Donald Scarinci, Town Clerk Carmela Riccio, Town Administrator Joseph DeMarco, Mark Raso, Esq. and Robert Levy, Esq.

Note: Closed Session commenced at 12:41 p.m.

Corporation Counsel Donald Scarinci advised that there are several items to consider as follows:

1. Christian Amaro vs. WNY:

He advised that there are settlement concepts to be discussed. He introduced his law partner and Chief of Litigation, Robert Levy, Esq., who is a certified trial attorney and certified criminal trial attorney in the State of NJ. He further advised that Mr. Levy was formerly the Chief of the Official Corruption Unit in the Attorney General's office for 10 yrs. Mr. Levy introduced himself and commented that this is the first time meeting the Commissioners. He explained that he and Mr. Scarinci were adversaries in a NJ Legislative case prior to joining Mr. Scarinci's firm. He further advised that he is now working on several cases on behalf of the Commissioners. He commented "certain things jumped out at me" while reviewing this matter and that the liability on behalf of the Town was clear and evidenced by disciplinary actions sustained for conduct which formed the basis for the civil law suit. He referred to "fee shifting" and explained that if the jury finds liability against the Town, the Town would have to pay for damages and attorney fees. He further explained that attorney fees usually exceed the amount of damages and that damages were sustained and would be able to be proved to the jury which would enable the attorney to get his fees. He advised that in January 2012, Summit Risk made a proposal. Comm. Frias interrupted and requested that all cell phones be removed from the court room. Everyone complied at 12:45 p.m. Mr. Scarinci took possession of everyone's cell phone and handed them to the chief of police who was outside the meeting room at the time. Mr. Levy continued to explain that in January 2012 an offer was made for \$60,000 to the then Town Attorney to settle this matter and Summit Risk sent a letter to the Town Attorney via e-mail recommending settlement. The claim wasn't settled and in July or August 2012, Town Attorney sent a response that case will proceed to trial. Summit Risk sent another letter that they would not pay over \$60,000 due to policy provisions. He further explained that at that point, the settlement would have included attorney fees. Comm. Frias inquired as to when the case initiated. Mr. Levy responded I don't know the exact date but it was in 2011. Town Administrator DeMarco commented that facts of case pre-date May 2011...end of 2010 or beginning of 2011. He further advised that the Complaint was filed prior to this Administration and that the person was disciplined in August 2011 and then lawsuit followed. Comm. Frias commented "It was prior to us and we inherited it". Mr. Levy further explained that since the 2012 offer, the case continued and that he doesn't know if the former Town Attorney communicated the settlement offer to the Commissioners but it was rejected. He stated "The Town Attorney took a no pay position on the case". He explained that there was a motion for discovery, that a lot of work has been done on this case and that all attorneys' fees have increased since offer of 2012. He further advised that he contacted Mr. Amaro's attorney to negotiate a settlement and that said attorney proposed a settlement of \$180,000 which would include his attorney fees. He counter-offered \$97,000. He explained that he contacted the town's insurance carrier to request letter calculating their attorney fees and that there is no more

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coverage for fees, experts, etc. for this case. Comm. Wiley commented that the remainder will come from tax dollars to which Mr. Levy responded "Yes, that is correct." Comm. Rodriguez inquired whether the \$97,000 was in addition to the \$60,000 insurance coverage. Mr. DeMarco explained that \$60,000 has already been spent on legal fees so the insurance carrier will not pay anything toward settlement. Mr. Levy added that he had his Associate evaluate our policy, etc. and he agrees with carrier's position. He advised that he has already prepared a settlement agreement and release which has been signed by Mr. Amaro but must be approved by Mr. Amaro's attorney. Mr. Amaro releases the Town but Town has not released him. Comm. Wiley inquired as to whether Mr. Amaro is still employed by the Town to which Mr. DeMarco responded "No, not since May 2011". Mr. Levy explained that there will be no "admission of liability" by the Town and the case will be dismissed with prejudice. He further advised that the court has already dismissed the case but it will be revived if it is not settled and that payment must be made within 30 days and that there would be a "confidentiality agreement" as to terms of settlement. He explained that it would be subject to OPRA. He further explained that Mr. Amaro can agree to keep settlement confidential and that he has already agreed that depositions will also remain confidential. Comm. Frias inquired as to whether Mr. Amaro is requesting "privacy" to which Mr. Levy explained that it is the Town who is requesting it but that Mr. Amaro has agreed to it. Comm. Frias inquired "If it is disclosed, are we liable?" Mr. Levy replied "No, if we didn't release the information, but OPRA would make it disclosable". Mr. Scarinci joined conversation and said "To be clear, it is not subject to OPRA...depositions and discovery in this case by us and by them. What is disclosable is settlement agreement and Minutes after matters are concluded. I caution dialogue back and forth to remain confidential after vote. Terms and substance is not discoverable." Mr. Levy referred to prior settlement offer made to former Town Attorney and commented that he was not aware what information had or had not been disclosed to the Commissioners. Comm. Rodriguez requested "Can you re-visit prior offer and how it was rejected and why we are stuck with paying \$97,000 instead of zero?" Mr. Levy explained that an attorney has an obligation to disclose all settlement offers, etc. to client and client either accepts or rejects it. (At this point, Mr. Scarinci requested the Town Clerk to stop taking notes but Comm. Wiley requested that Clerk continue. Mr. Scarinci agreed.) Mr. Scarinci commented that there is a six (6) year statute of limitations to bring an action against former Town Attorney. Mr. Levy continued to explain that if Town had settled back in 2012, it would only have been responsible for 20% and that on July 11, 2013 former Town Attorney sent e-mail stating "Town will continue with litigation." He advised that he spoke with Summit Risk to negotiate more coverage but that because of Town's refusal to settle in 2012 and because of town's co-pay obligation, there is no further obligation to pay by insurance carrier. This is recited in letter dated 6/4/14 from insurance carrier. Mr. Scarinci inquired of Mr. Levy "Are you satisfied that \$97,000 is fair and you recommend it?" Mr. Levy replied "Yes, if we go to trial, judgment and fees will far exceed \$97,000." At this point, Mr. Scarinci advised Mr. Levy to move on to discuss the O'Malley case.

2. O'Malley and Geneux cases:

Mr. Levy commented that these cases are both "fee shifting" cases i.e. if we lose liability we will be responsible for legal fees. He explained that the Town took "no pay position and no settlement offer". He further explained that these matters have been heavily litigated with motions, depositions, etc. and that there had been an attempt to consolidate the matters. In addition, the plaintiffs tried to bring in additional defendants. He explained that these matters deal with the discharge of both employees who were civil servants and that the Town didn't comport with Civil Service process or progressive discipline. He further advised that when he received the cases, discovery was already completed and trial scheduled. He advised that he has spoken to Peter Paris, Esq., who he finds to be cooperative, in

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an attempt to negotiate settlement. He advised that he evaluated both cases and determined that Civil Service requirements were not followed and that prior allegations against Ms. Geneux and Mr. O'Malley in Administrative Law matter were withdrawn as they could not be substantiated by Town. He commented that the Town violated Civil Service regulations and no proof was uncovered to corroborate firings. He concluded that there is a liability problem and the potential of a lot of punitive damages to punish Town for wrong doing. Comm. Wiley referred to a similar matter in Hoboken where plaintiffs "came back and then sued". Mr. Levy advised that he shouldn't be concerned about punitive damages. He commented about an economist's report for damages for lost wages and advised that both parties are now employed. He further advised that both parties are also entitled to "front pay" had they not been fired and explained the issues of salary increases, etc. to which they are entitled, which are not covered by town's insurance carrier; therefore, Town is responsible to pay for said damages. He advised that O'Malley's damages total \$334,481 and Geneux's damages total \$330,000 which does not include emotional distress and attorney fees. He gave an example of same situation which occurred in another municipality which resulted in significant money verdict against that municipality. He estimated that if these two cases continue, combined damages could total \$1.2 million. He further commented that he does not feel that going to trial is in the best interest of the Town and that negotiations should have taken place earlier to mitigate damages. He further advised that attorney representing the Town did not depose the plaintiffs' expert and that the Town did not retain an expert on its behalf, for which the insurance carrier would have paid. Comm. Wiley inquired as to which attorney represented the Town to which Mr. Levy responded "Melissa Paoletta from Florio and Kenny". Mr. Levy advised that he received a call from the Judge that he (Mr. Levy) has not right to come into the case on behalf of the Town at this point in time. Mr. Levy stated "Given the facts and the Town's budget and in order to avoid a trial and an outrageous settlement, I met with Mr. Paris." Mr. Paris advised him that Mr. O'Malley and Ms. Geneux "liked working in WNY and they did a good job" and that damages cannot be eliminated if they are both re-employed by the Town. He further advised that insurance carrier can contribute to "emotional damages and attorney fees" to offset amount Town will have to pay. He proposed the following offer of settlement: \$220,000 to O'Malley, \$209,000 to Geneux which would include all issues i.e. pension, medical, etc. He recommended going back to insurance carrier and demanding more money from them towards settlement i.e. \$75,000 for each case, and if the Town re-employs both of them, it would not violate the existing hiring freeze. Comm. Frias inquired as to whether they would return to same positions previously held to which Mr. Levy replied "Yes, same positions, same titles". He explained that \$170,000 would be spread over time. Comm. Rodriguez inquired "Did they request lump sums?" Mr. Levy replied "yes". Mr. Scarinci added "We are looking at paying \$1.2 million now". Mr. Levy added that lump sum would be paid by insurance carrier and pension payments would have to be made up front and that they would get paid back over time with higher salaries. Comm. Rodriguez inquired "Do they want to come back?" to which Mr. Levy responded "Yes, they are excited to return. O'Malley comes back at top of his range." Comm. Frias expressed her concern about their return to the same department now that they are husband and wife and inquired if there are any other options. Mr. Levy responded that there is nothing in town's ordinances which prohibits husbands and wives working together. Mr. Scarinci added that we don't have a policy against that and lacking no policy and no policy for progressive discipline system i.e. first notice requirement, etc. prior to termination, "we are now dealing with a corpse" and "we have to resolve with minimum impact on budget". Mr. Levy explained that settlement proposal is based upon 4 yr. spread and that salary ordinance must be amended. Town Administrator DeMarco explained that town's auditor will review current salary ordinance and make other recommendations as there are other ranges which need modification. Mr. Scarinci explained that the Mr. Levy is

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looking for Commissioners' authority to settle cases subject to exact numbers and then pass a resolution at the July meeting. Mr. Levy commented that there is one more thing that the Commissioners should know i.e. that even with spreading out payments, there will be a deficit after insurance payments and that it will require next year a lump sum payment \$30,000 each year for each plaintiff. Discussion ensued between the Commissioners and Mr. Levy. Comm. Frias inquired about spreading over 7 or 8 yrs. Mr. Levy explained the Town's obligation to pay "short fall over next 4 yrs." which approximates to \$30,000 per yr. cash payments. Mr. Scarinci added that if the Commissioners authorize Mr. Levy to proceed, in July a resolution and settlement agreement must be adopted and an Ordinance to amend salary ranges would have to be introduced. Mr. Scarinci also explained that both parties would return to work in August and that their return may also require other transfers, etc. in that department. Mr. DeMarco added that "It might be overstaffed in that department" due to their return. Discussion ensued about potential transfers, etc. Mr. Levy inquired "Do I have your authorization to enter into agreement? Trials are scheduled for Tuesday. I don't want to try these cases." Mr. Scarinci inquired "Do we have consensus?" He requested Town Clerk Riccio to record informal vote. Commissioners Rodriguez, Vargas, Frias and Mayor Roque said "yes"; Comm. Wiley "abstained". (Presentation by Mr. Levy finished at 1:40 p.m.)

3. A.J. Richards & Son (Tax Appeal):

Mark Raso, Esq. advised that trial regarding years 2010-2014 is scheduled for 7/9/14 before Judge Brennan. He explained that in March 2014 when case was still under control of town's prior tax appeal attorney, the Judge permanently removed the case from "stipulation calendar" (he explained what a stipulation calendar is), and stated he has never seen that happen before. Comm. Frias inquired "What led to this?" Mr. DeMarco explained that during transition period, prior counsel didn't "forcefully appear on town's behalf" and that the Judge felt "disrespected". Mr. Scarinci explained that in December 2013, even though Mr. Raso was hired, the prior tax appeal attorney continued handling this particular matter. He explained that tax appeal cases should be handled in that manner i.e. new tax appeal attorney should have handled all matters. He commented that there was a "miscommunication" between the Judge and former tax appeal attorney, and that now Mr. Raso is handling all Town tax appeals and has entered an appearance on behalf of the Town. Mr. Raso commented that he feels hopeful that all will be resolved with the Judge and that the Town must act now or go to trial on 7/9/14. His presentation explained detailed analysis of appraisal report prepared by plaintiff's appraiser. Comm. Frias inquired "What system are you referring to? Do we have any options?" Mr. Raso explained that it is the State's system and thinks it is unfair as it leans toward commercial. He stated "This goes back to 2010 to try to "Split the baby". He was in process of explaining the Appraisal and Settlement Analyses process when Comm. Rodriguez inquired "What is your recommendation?" He replied "Take the proposal". He advised that he and Asst. Tax Assessor Michael Jaeger both agree it is in best interest of Town given the circumstances of the case and recommended approval of settlement. He presented proposed resolution to Town Clerk to be placed on agenda after conclusion of closed session and resumption of regular session. Mayor Roque inquired "Any way we can pay over time?" Mr. Raso replied "One year from date of judgment". Mr. Scarinci inquired "Can it be spread out?" Mr. DeMarco replied "Yes, as per CFO we can do short term bonds". Comm. Frias inquired as to what result might be if Town proceeds to trial to which Mr. Raso advised that we do not have an expert's report. Mr. DeMarco commented "We will lose". Mr. Scarinci explained to the governing body the details contained in the resolutions regarding the Amaro case and this matter and requested that Town Clerk place same on agenda when regular session resumes. (Mr. Raso exited at 2:00 p.m.)

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4. Personnel matters:

Mr. Scarinci requested Mr. DeMarco to advise the governing body. Mr. DeMarco thanked everyone and advised that he received an offer from Bayonne to be its Town Administrator and that he would be making his decision shortly. He further advised that during transition, he would always be available and do whatever needs to be done. Comm. Rodriguez wished him the best. Mr. Scarinci advised that after the Bayonne Run-off election, he discussed the issue with Joe and began looking for a new Town Administrator for West New York with the assistance of the NJ League of Municipalities. He further advised that the Commissioners will have an opportunity to meet with the candidates and welcomed any recommendations from them. He advised them not to be concerned and that hopefully someone will be appointed at the July meeting.

Motion was made by Comm. Frias, seconded by Comm. Vargas, to **close executive session at 2:05 p.m.**, was carried by the following vote:

YEAS - Commissioners Frias, Rodriguez, Vargas, Wiley and Mayor Roque
NAYS - None
ABSENT - None

Commissioner FiorD' Aliza Frias

Commissioner Caridad Rodriguez

Commissioner Ruben Vargas

Commissioner Count J. Wiley

Mayor Felix E. Roque
Board of Commissioners

Attest: _____
Carmela Riccie, RMC
Town Clerk