

TOWN OF NEWMARKET, NEW HAMPSHIRE
TOWN COUNCIL NON-PUBLIC SESSION, RSA 91-A
JUNE 5, 2013
TOWN COUNCIL CHAMBERS

PRESENT:

Council Chairman Gary Levy, Council Vice Chairman John Bentley, Councilor Dan Wright, Councilor Phil Nazzaro (arriving at 5:42 p.m.)*, Councilor Larry Pickering, Councilor Dale Pike, Councilor Ed Carmichael

Town Administrator Steve Fournier

Council Chairman Levy opened the meeting at 5:36 p.m.

Council Vice Chairman Bentley moved to enter non-public session under RSA 91-A, and Councilor Carmichael seconded. Town Administrator Fournier polled the Council. Motion carried unanimously, 6 – 0.

TOWN CLERK OFFICE STAFFING

As the present Town Clerk, Becky Benvenuti, has accepted a position in Portsmouth, the Deputy Town Clerk, Donna Dugal, by state law automatically becomes Town Clerk until the March election. Donna had indicated she would nominate Terri Littlefield from the Assessor's office as Deputy Town Clerk. Town Administrator Fournier recommended giving each a temporary bump in salary for the extra duties each would perform during this period, and hiring an additional part-time employee, most likely the former Town Clerk, Judi Harvey. He felt it was necessary to have another part-time person to keep up with the work load. Donna's salary would go from \$47,361 to \$52,000 for an approximate 10% increase; and Terri's from \$33,900 to \$39,000 for an approximate 13% increase, each pro-rated on an 8 month basis. The increases were based on the average beginning salary for each position. Current salaries and benefits for the 3 full-time positions are about \$214,920, and with the recommended salary increases, that figure would drop to \$140,896 for a savings of about \$74,000. The current Town Clerk earns approximately \$60,000 and the Deputy earns \$47,361. He said that Terri intended to work toward certification as a Town Clerk/Tax Collector, and he anticipated a smooth transition.

The Council discussed the implications of the salary increases and the necessity to emphasize that this was temporary and would end with the March election. The Town Clerk recommends salaries, but the Council votes to approve them. Town Administrator Fournier said he was working on a salary survey to see where Newmarket fit with area towns, and he felt the Town Clerk elected in March would be paid somewhere between the high \$40,000's and the low \$50,000's. Although it is possible for a town administrator to also be the tax collector, this would require an amendment to the Town Charter. Council Chairman Levy said, from experience he knew that once a salary increase has been given, it is difficult to take back, and he personally felt that \$5,000 was too high and any increase should be handled as a bonus and not as part of a salary. Town Administrator Fournier said he had discussed his recommendations with all parties, not mentioning any dollar figures, and explained that any increase would be temporary and based on each holding a new position. Depending on the March election, each could return to former positions and former salaries; also, the Town Clerk recommends department staff to the Council for its approval. He said they both understood that the raises were temporary. The current Deputy Town Clerk had indicated that she wouldn't run for Town Clerk in March, and would prefer to return to her position as Deputy after the election.

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Council Vice Chairman Bentley said he had seen such temporary salary increases in industry, and recommended that the circumstances and conditions of the increases be put in writing. Councilor Pickering asked if department employees knew each other's jobs. Town Administrator Fournier said they did not and that Donna knew probably about 97% of the position, Terri knew more about the election side of the position and about assessing, while Debbie worked part time primarily in processing. The recommended additional part time person would work 20 hours a week and earn about \$20,000, but not be eligible for health benefits. Adding that salary to the other 3 in the department would bring the total to about \$244,000 and still realize a savings of about \$70,000. The 2 salary increases would not be actual raises but would be due to a temporary change in responsibilities and classification. Town Administrator Fournier will put all this in the language of the document along with an ending date based on the March election. Neither person will receive merit bonuses in addition to the increase in pay as there is no history of performance in the new positions.

Council Chairman Levy referred to a previous discussion about a policy or language that stated a person's pay could not be decreased if he was put in a position with less responsibility. Town Administrator Fournier said he had not been able to find such language in any town document he checked. Council Vice Chairman Bentley said that when he first started on the Council, the members had been shown this paper by Julie Glover, and it was suggested that the Town Administrator contact her. Council Chairman Levy recommended, to prevent any future trouble, that the Town Attorney review the document before it is given to Donna and Terri. The Council consensus was to agree with the Town Administrator's recommendations for the temporary salary increases. To Councilor Pickering's question, Town Administrator Fournier said that Donna had a good understanding of the job, but just needed the confidence to know she could do it on her own.

DISCUSSION ON HIRING A GENERAL TOWN ATTORNEY

The Council had interviewed 3 law firms at a May 8th non-public session: Matthew Upton and Keriann Roman from Drummond Woodsum; Walter Mitchell, Judith (Jae) Whitelaw, Laura Spector-Morgan and Stephen Whitley from Mitchell Municipal Group; and John Ratigan, Kate Miller and Chris Hilson from Donahue, Tucker & Ciandella (DTC). Council Chairman Levy said that although he would participate in the discussion, he would recuse himself from the vote as he used DTC and he wanted to avoid any possible conflict of interest. Town Attorney Fournier said prior to the interviews he had ranked DTC first, Mitchell second and Drummond third, but after the interview process, although he still ranked DTC first, he had switched Mitchell and Drummond's positions. He added that DTC offered a retainer option, which he thought could benefit the town.

Council Chairman Levy had contacted references for Drummond and Mitchell, while Council Vice Chairman Bentley had contacted references for DTC. Council Chairman Levy explained that Hampton has its own full-time attorney and uses Drummond for labor issues. Merrimack's reference liked Drummond also and felt the firm was honest and gave good opinions, but added an unsolicited opinion that she liked DTC better. . Overall, the feedback emphasized the firm's strength in labor issues. Council Vice Chairman Bentley said he heard nothing negative about DTC. He said many he talked to used both firms, and he was told they might be splitting hairs between the 2 firms. He had asked about labor issues and promptness in getting opinions. He said one reference had cautioned that a retainer looks good, but there were some hidden fees and exclusions. He said the range of experience and expertise was good, as were the timing and professionalism.

Councilor Pickering agreed that they would be splitting hairs between the 2 firms. He read from DTC's list, all the surrounding towns that they represent, and said that since they were local, there would be less to pay for travel time. He added that Drummond presented very well and that 80% of their business was with municipalities, but they represented fewer towns in the area. He added that Attorney Upton had said he likes to keep towns out of court. Council Chairman Levy said he felt that it should have been brought up that the majority of Drummond's business was in Maine, although they had an office in Portsmouth with 2 or 3 attorneys. Town Administrator

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Fournier said that Drummond was in the process of opening up in New Hampshire and Attorney Upton had been practicing in New Hampshire for a long time. They had also hired an attorney who was known as one of the best in labor law. He pointed out that not all the towns listed by DTC used the firm as their general attorney, but used the firm for special purposes. Council Vice Chairman Bentley said that Drummond had mentioned training sessions and he wondered if some would be free. Councilor Carmichael said he was leaning toward DTC, and Attorney Ratigan had said he would be representing the town. Town Administrator Fournier said in his experience in North Hampton, he had Attorney Ratigan and he was always able to get him. He also, when working with Drummond, was always able to get Attorney Mitchell.

Councilor Pike said he also was leaning toward the local firm, DTC, and pointed out that its rates seemed better. Town Administrator Fournier said the town had always spent more than the retainer proposed retainer amount, but the Council will have a separate discussion about payment options. Councilor Wright felt that Attorney Ratigan gave a quick response and good example to Council Chairman Levy's question about being put in an uncomfortable situation, whereas the other 2 firms had given wishy-washy answers. He said the answers were the deciding point for him and he favored DTC. Councilor Nazzaro said he thought both of the firms looked great, but he did not consider Portsmouth to be very far away, and did not think travel distance should be a factor. He said he trusted the Chair's judgment in recusing himself, but felt, because of past happenings in Newmarket that, all things being equal, they should choose a firm that no one had a relationship with. Council Chairman Levy said that in the past they had been given some inaccurate information. He would not use DTC for anything related to the town, but only for his business, so he didn't believe there would be a conflict of interest. Councilor Nazzaro said he was not suggesting that there was a conflict, but given past experiences, he felt it important to avoid anything that could be misconstrued as a conflict. Council Vice Chairman Bentley said he felt they would be pleased with either firm, but from his experience, he understood what Councilor Nazzaro was saying. To his question, Town Administrator Fournier said he had more recently worked with DTC and towns that he called had no issues with either firm.

Councilor Pickering and Council Vice Chairman Bentley both thought it would be worthwhile to ask if per hour prices were firm, even for travel time or training sessions. Council Chairman Levy felt the answer he received from Attorney Upton to his question about an uncomfortable situation was rather squiggly and when he asked him about a mistake or decision he regretted having made, he felt he gave a look that suggested that he never made mistakes. He said that DTC had always given him good advice, and he felt Attorney Ratigan had been forthright and given a good example of being mistaken in not having an expert testify in the tax abatement suit that he subsequently lost. He stressed that it was most important that Newmarket get good legal advice. Town Administrator Fournier said, in relation to Councilor Nazzaro's comments, that he was sensitive to anyone on the Council having a relationship with anyone being considered. However, he emphasized that as Town Administrator he would be the point person with the Town Attorney, and if a Councilor, board member or employee contacted the attorney directly, the attorney would immediately contact him. That had been his experience with both firms, and Attorney Ratigan had confirmed this during his interview.

Councilor Pike said it seemed that the majority were leaning toward DTC because they are local and their costs are lower. He said both firms looked good on the video, but they had to decide if the concerns about how this might look to someone outside outweighed their inclinations. He said he was inclined to choose DTC. Council Chairman Levy said he appreciated Councilor Nazzaro's point, and had not interviewed DTC. He said he would not choose them because they are closer, but because he felt they were extremely ethical and gave good advice. He said he would never call Attorney Ratigan on town business, and he knew that he would not respond to such a call. Councilor Nazzaro said the concern was what this would look like on the outside and he did not think there was any impropriety, but he felt it was important to prevent the possibility of that perception. Council Chairman Levy felt it was most important to have good legal counsel, and he said the reaction Attorney Upton had when asked about any deficiencies or mistakes, showed that he didn't understand how the question

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pertained to him. In addition, he said that Attorney Ratigan would have said something if he thought there was a conflict of interest. Councilor Carmichael said he was trying to look at this as a regular citizen, and felt there should be no problem, as the Town Administrator, not the Council Chairman, would be having direct contact with the attorney. He asked to move to a vote. Town Administrator Fournier said that if this did become a problem, they could always change to another lead attorney, and he would recommend they use Drummond for labor negotiations.

Council Vice Chairman Bentley pointed out that Attorney Upton charged \$175 and Attorney Roman charged \$160. He said he understood Councilor Nazzaro's concerns with integrity and Council Chairman Levy's concerns about credibility, and said in the past he had heard some crazy accusations. Council Chairman Levy said all the firms interviewed agreed that they would leave if asked, and he felt they could exercise that option if there was a problem. Town Administrator Fournier said it sounded as if the Council wanted him to negotiate rates, and he wondered if that would be for a retainer as well as for an hourly fee. Council Chairman Levy said that with the exclusions in DTC's proposal, if they came to litigation, they could kiss the retainer goodbye. He said Attorney Ratigan had mentioned working with the Charter Commission on his own, and Town Administrator Fournier said he would confirm this, but he thought that would only happen if he was on retainer. Council Chairman Levy said that no one likes to be upside down with a retainer, and he felt if this did not work out for the attorney, the deal would have to change the following year. Town Administrator Fournier said that this year they had budgeted \$70,000 for legal fees for general counsel and so far spent \$67,825, not including EPA work. Last year they had budgeted \$50,000 and at this time of year had spent \$99,100. He will get the number of hours billed for the Council.

The Council discussed the wording to of the motion to retain legal counsel. Since a vote to hire has to occur in public session, it was decided to do this at the very beginning of the business meeting to follow. Council Vice Chairman Bentley and Councilors Pickering, Pike, Carmichael and Wright indicated support of DTC. Councilor Nazzaro said he intended to vote for Drummond Woodsum and Council Chairman Levy said he would recuse himself.

Town Administrator Fournier said now they had to decide whether they preferred an hourly rate or a retainer. He had spoken with the Peterborough Town Manager, and she said they were pleased with the retainer. The attorney would attend meetings, review contracts and the Department Heads felt comfortable calling for legal advice. She felt there was no reduction in services and they sought legal advice more often. Council Chairman Levy asked what was not included in the retainer. The list included telecommunications, utility municipalization, environmental work, collective bargaining and representation before the US district, federal and supreme courts. The rate for excluded items would be billed at the hourly rate, \$160. The retainer would include representation before superior court, zoning and planning issues, land use enforcement, routine employee issues and work with the Charter Commission. The retainer was set at \$78,000 per year, and Town Administrator Fournier asked for a not-to-exceed price for his negotiations. He said he intended to start at \$70,000 and suggested he would go to \$75,000, which was the budgeted amount. Councilor Nazzaro said it didn't seem prudent to spent the entire legal budget on a retainer.

He said he felt the town's legal budget had been mismanaged in the past, and Council Chairman Levy agreed. This year they are very close to the budgeted amount. Town Administrator Fournier pointed out that last year they had labor negotiations which had added to the cost, but they would not have any negotiations in the coming year. Councilor Nazzaro said that if they spent the entire budget on a retainer and excluded issues came up, they would be over budget. Town Administrator Fournier said the exclusions represented issues that rarely came up, such as EPA, or firings. In the latter case, he felt the town's insurance company had legal staff that they could use. Council Chairman Levy said he was concerned about using a retainer, as he had heard that someone was intending to take his case before the Supreme Court. He said he would not be adverse if the

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Council wanted to try the retainer for a year. There is a 5% retainer increase per year built into the proposal, but the Council can change the payment option at the end of the year. Town Administrator Fournier asked for Council direction before beginning negotiations.

Council Chairman Levy said he could live with a retainer for a year as he felt there would be a benefit in using legal services more often, and Councilor Pike said he could support a retainer as he felt the odds favored it costing less. Councilor Carmichael said he could support a retainer, and Councilor Pickering said he thought they should try a retainer as they could change to an hourly scale at the end of a year. Council Chairman Levy suggested Town Administrator Fournier ask Attorney Ratigan if they could change to an hourly rate during the year if they found they hadn't used legal services as much as they anticipated. Councilor Nazzaro said he was on the record as being against a retainer. Council Vice Chairman Bentley and Councilor Wright were also against the retainer. Council Chairman Levy said he was in favor of a retainer as he felt the Charter Commission would need a great deal of help.

The Council discussed whether the vote to appoint should be taken before negotiations were complete. Town Administrator Fournier suggested that they agree on a figure of \$70,000 not to exceed \$75,000, but not make the amount a part of the motion. The motion would be to enter into a legal services agreement with DTC and to authorize the Town Administrator to negotiate a retainer fee. He said he knew what the Council agreement was on the fee.

Council Vice Chairman Bentley moved to leave non-public session and Councilor Nazzaro seconded. Motion carried unanimously, and the session closed at 7:00 p.m.

Respectfully submitted,

Ellen Adlington, Recording Secretary