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**QUESTIONS AS TO MR. CARROLL McDONALD'S
ELIGIBILITY TO SERVE ON THE EUB**

As a result of an Open Records Request from James Clark, Channel 11, for any contracts and/or payments made to Carroll McDonald by the City, I was presented a current contract between the City and Mr. McDonald whereby he is paid \$2500.00 per month as delayed payment for work he performed while he was the independent contractor consulting for LP&L. The contract was signed on January 18, 2005. It appears that members of the EUB signed it as officers of the City. Mr. McDonald, in pertinent part, was to be paid "Additional Compensation" at the rate of \$2500.00 per month. In essence, the contract calls for delayed payments after Mr. McDonald is no longer consulting for LP&L ("Additional Compensation"). Although the consulting has terminated, the contract is still in full force and effect and he is being paid monthly as per the contract. This presents a problem in that Mr. McDonald was appointed as a member of the Electric Utility Board. The fact that Mr. McDonald has a current contract with the City while appointed as a member of the EUB, presents a Charter problem. Given the Following Charter provisions, I cannot find a way to legally warrant the appointment of Mr. McDonald to the EUB as long as the contract exists. Given the mandates of the Lubbock City Charter Mr. McDonald would not presently be eligible to serve on the EUB. The applicable Charter provisions are as follows:

Article IX, Sec. 4

"The Mayor, Councilmen, **and other OFFICERS** and employees shall not be indebted to the City; shall not hold any public office of emolument **and shall not be interested in the profits or emoluments of ANY CONTRACT,** job, work or service **for the municipality**.....; nor shall any **member** of the city council **or the ELECTRIC UTILITY BOARD HAVE A SUBSTANTIAL INTEREST IN ANY PUBLIC UTILITY OPERATING WITHIN THE CITY OF LUBBOCK**.....

A substantial interest shall mean substantial interest as defined by the laws of the State of Texas regulating conflicts of interest of officers of municipalities. **ANY OFFICER OR EMPLOYEE OF THE CITY WHO SHALL CEASE TO POSSESS ANY OF THE QUALIFICATIONS HEREIN REQUIRED SHALL FORFEIT HIS OFFICE OR POSITION,** and any contract in which any officer or employee shall or may become interested may be declared void by the Council.

The Charter specifically states that a member of the EUB cannot be interested in the profits or emoluments of ANY contract for the municipality. One must ask the question, "Is this a contract

for the municipality?” Another question might be, “Does it make a difference that the contract is for work he has already performed?” Perhaps another question might be “What if the contract is terminated by paying him the remainder of the money he is owed in lump sum instead of monthly payments?”

Is this contract “for” the municipality?

The contract was for payment to Mr. McDonald for services he performed for LP&L as an independent contractor and therefore **it would be for services he performed for the City.**

Does it make a difference that the contract is for work he has already performed? It does not make any difference when the work was performed. The language of the contract is controlling. The contract contemplates that the work will be performed, but the City will pay, in part, some of the money it owes in monthly installments that will transcend into the future. The contract makes sure that the provision that describes future payments is for work done during the term of the contract. That is, payment will be made in the future for work actually performed during the time period that Mr. McDonald was actually acting as an independent contractor. In fact the contract states on page 4 section C.

“It is understood and agreed to by all parties that any Additional Compensation outlined above due and owing to Consultant is consideration for services rendered by Consultant during the term of this agreement.”

Even though he has already earned the money, the “Additional Compensation” being paid is for services performed as per the contract. There is no doubt that the contract is for delayed payments of services performed for the City. Suppose the City quit paying on the contract. Could Mr. McDonald sue the City for breach of contract? The answer is “Yes”. He could sue us for not paying him for money owed to him as a result of services rendered on behalf of the City. The consulting has ended but the obligation of the City as per the contract has not ended. He has a contractual right to receive payments and we have a contractual duty to pay him for services performed for the City. In essence he has performed his duties under the contract and we are still performing our duties as per the contract.

As a result of the contract as hereinabove described, Mr. McDonald is not eligible to serve on the Electric Utility Board.

What happens if the contract is terminated? If the contract is terminated, then Mr. McDonald is no longer in violation of the previously discussed provision of the Charter. That is, he is no longer interested in the profits or emolument of a contract for services performed for the City. This does not mean that he would automatically be back on the Board. Since he was not eligible

to serve, he forfeited the office. In order for Mr. McDonald to be eligible to serve, he would have to again go through the appointment process.

Does Mr. McDonald have a conflict of interest because he is receiving pension benefits from Southwestern Public Service?

Even if the hereinabove contract was terminated and Mr. McDonald was no longer in violation of that portion of the Charter, we would have to look at the rest of the Charter provision that states that **“nor shall any member of the city council or the Electric Utility Board have a substantial interest in any public utility operating within the City of Lubbock.....”** Further, the Charter states **“A substantial interest shall mean substantial interest as defined by the laws of the State of Texas regulating conflicts of interest of officers of municipalities.”** This is important because Mr. McDonald used to work for Southwestern Public Service (Xcel). He is presently receiving a pension as a result of his previous employment. He last worked for them more than 15 years ago. We must examine if he indeed has a substantial interest in a public utility operating within the city limits of Lubbock.

Another utility operating within the City

There is no doubt that in the northern most part of the City there is a small area within the city limits of Lubbock where LP&L and Xcel are dually certificated. That means that we have a public utility, other than LP&L, operating within the city limits of Lubbock. Mr. McDonald worked for Southwestern Public Service, which is part of Xcel. He is presently receiving a pension check as a result of his service for Southwestern Public Service. Does this present a conflict of interest for Mr. McDonald?

Chapter 171 of the Local Government Code addresses issues of conflicts of interest. The Charter states that in looking at substantial interest in a utility that operates within the city limits of Lubbock, we must look at state law. Since Mr. McDonald was receiving pension benefits from a former employer that still operates within the city limits of the City, an examination of potential conflict of interest is proper. One must look at Chapter 171 of the Local Government Code, specifically 171.002 (a) (2). It states:

For purposes of this chapter, a person has a substantial interest in a business entity if:

- (1)**
- (2) funds received by the person from the business entity exceed 10 percent of the person’s gross income for the previous year.**

No other section is relevant to the discussion.

Mr. McDonald has cooperated completely and has even shared some very personal information with this office. He has wanted everything to be above board and was willing to abide by my opinion, whatever it was.

Mr. McDonald provided me with his previous year's income, his 1099-R from his pension, and even had his CPA give me information. After a careful assessment of the facts I was presented, it is my opinion that Mr. McDonald does not have a conflict of interest as is contemplated by the statute.

Conclusion

It is my opinion that Mr. McDonald is not presently eligible to serve on the Electric Utility Board because he still has a contract for services for the City which is prohibited by the Charter. If Mr. McDonald can terminate the contract he can then become eligible to serve as a member of the EUB. He would have to go through the normal appointment process. If appointed, he would not have a conflict of interest based on the pension he is receiving.