



# City of Grand Island

Tuesday, August 14, 2012

Council Session

## Item I5

**#2012-220 - Consideration of Accepting the Resignation of City Administrator Mary Lou Brown**

Staff Contact: Councilmember Chuck Haase

# **Council Agenda Memo**

**From:** Chuck Haase, Ward 5 City Council Representative

**Meeting:** August 14, 2012

**Subject:** Acceptance of City Administrator Resignation

**Item #'s:** I-4

**Presenter(s):** Chuck Haase

## **Background**

The City Administrator appointment is recommended by the Mayor and approved by the City Council. The resignation or termination of the City Administrator has the same un-appointment authority, whereas the Mayor announced his acceptance of the City Administrator's resignation during the June 26, 2012 Regular City Council Meeting.

## **Discussion**

The resolution provided tonight provides for the City Council acceptance of the resignation of Mary Lou Brown, City Administrator effective June 27, 2012, and her advisory role until September 30, 2012 as requested by her resignation letter.

## **Alternatives**

It appears that the Council has the following alternatives concerning the issue at hand. The Council may:

1. Move to approve
2. Refer the issue to a Committee
3. Postpone the issue to future date
4. Take no action on the issue

## **Recommendation**

Councilmember Haase recommends that the Full City Council approve the resolution and accept Mary Lou Brown's resignation as requested.

## **Sample Motion**

Move to approve Resolution 2012-221.

June 27, 2012

Mayor Jay Vavricek  
100 East First Street  
Grand Island, Nebraska 68802

Mayor Vavricek:

Please accept my resignation as City Administrator from the City of Grand Island. Effective today, I will no longer work on a daily basis at City Hall; however, I will continue to be employed in an advisory role until September 30, 2012. During this time period, I will receive my current salary and benefits. I have indicated to Human Resources Director Brenda Sutherland that I will be over-accrued on my vacation time and would appreciate your approval for that accrual to exceed the authorized limit of 240 hours.

I have appreciated the opportunity to serve the community of Grand Island. During my three years with the City, there were many accomplishments. The one of which I am most proud is the sewer extension along Highway 281. This will speed Grand Island's growth to the interstate and enable the community to continue in its current growth mode. Also during my tenure, the following accomplishments were achieved:

- A "quiet zone" was implemented downtown after languishing for several years
- All existing debt was refinanced to take advantage of lower interest rates
- Electronic payments became a reality, whether for utility bills or recreational activities
- The Fieldhouse became an operational success with programming exceeding expectations
- Lincoln Park Pool renovation plans became a reality and grew into a rebuild of the pool
- The IT network was stabilized and disaster recovery abilities have been enhanced
- A new budget methodology was adopted that enabled more intelligent decision making
- Revamped streets and engineering divisions have created the ability to do more projects "in-house" with the Sycamore Street underpass being a prime example
- Groundwork for the renewal of LB840 was completed
- Utility regulations have been addressed and the uranium removal process will soon be operational
- Changes at the waste water treatment plant were considered and implementation of an internal improvement plan was approved
- A city-wide dewatering plan was commissioned and is under study

During my tenure, I also focused on the value and working environment of the City's employees. Accomplishments in this area include the following:

- Implementation of two employee recognition programs
- The first all-employee series of meetings
- Creation of a monthly GITV segment focusing on a group of City employees and their valued contributions
- Emphasis on cleaning and maintenance of City facilities to improve working conditions

I wish the City continued growth and as you would say,

Onward and upward!

*Mary Lou Brown*

**EMPLOYMENT AGREEMENT**  
**MARY LOU BROWN**

This agreement, made upon the approval of the Grand Island City Council, entered and effective this 11<sup>th</sup> day of April 2011, by and between the CITY OF GRAND ISLAND, Nebraska, a Municipal Corporation, hereinafter called the "City", as party of the first part, and Mary Lou Brown, hereinafter called "Employee", as party of the second part, both of whom understand and agree as follows:

**Witnesseth:**

WHEREAS, the City desires to employ the services of said employee as the Administrator of the City of Grand Island, as provided for in the Code of the City of Grand Island; and

WHEREAS, it is the desire of the City Council to provide certain benefits, establish conditions of employment, and to set working conditions of said Employee for the highest performance to the people of Grand Island; and

WHEREAS, it is the desire of the City Council to: (1) secure and retain the services of the Employee and to provide inducement for her to remain in such employment; (2) to make possible full work productivity by ensuring Employee's morale and peace of mind with respect to future security; (3) to act as a deterrent against malfeasance or dishonesty for personal gain on the part of Employee; (4) to provide a just means for terminating Employee's services at such time as she may be unable to fully discharge her duties or as events may otherwise occur; and (5) to provide a just means for a clearly defined professional voluntary employment separation agreement; and

WHEREAS, Employee desires to accept employment as Administrator of said City pursuant to the laws of the State of Nebraska and the Code of the City of Grand Island.

NOW, THEREFORE IN CONSIDERATION OF THE MUTUAL COVENANTS HEREIN CONTAINED, THE PARTIES HERETO AGREE AS FOLLOWS:

**Section 1 – Duties**

The City of Grand Island hereby agrees to employ said Employee as Administrator of the City to perform the principal functions and duties specified in the City Code for the City of Grand Island and the laws of the State of Nebraska, and to perform such other legally permissible and proper duties and functions as the Mayor and/or City Council shall from time to time assign.

**Section -2 Term and Conditions**

- A. Contract Duration. Commencing on the 11<sup>th</sup> day of April 2011 and expiring at the conclusion of the current term of Mayor Jay Vavricek.

- B. Employment Duration. The administrator shall hold office until the end of the appointing mayor's term of office, and until a successor is appointed and qualified, unless sooner removed, or the ordinance creating the office shall be repealed, except as otherwise provided by law. Nothing in this agreement shall prevent, limit, or otherwise interfere with the right of the City to terminate the services of the Employee at any time prior to the end of the term, subject only to the provisions set forth in Section 3, paragraph A(1) and A(2), of this Agreement.
- C. Expiration after resignation. Nothing in this Agreement shall prevent, limit, or otherwise interfere with the right of the Employee to resign at any time from her position with the City, subject only to the provision set forth in Section 3, paragraph B, of this Agreement.
- D. Exclusive Employment. Employee agrees to remain in the exclusive employ of the City until termination or resignation as provided in Section 3 of this Agreement occurs. The Employee shall not use any confidential information obtained through her position as City Administrator for personal gain. Both parties acknowledge that exclusive employment shall mean that Employee shall not accept any outside employment from any sources whatsoever without first obtaining written approval from the Mayor. Outside employment shall not be construed to include occasional teaching, writing or consulting performed on the Employee's time off. It is further understood that any activity of this nature outside of the workplace cannot represent a conflict of interest or interfere with the Employee's job responsibilities or performance.
- E. Job Performance Evaluation. Employee's job performance shall be evaluated by the Mayor in October 2011 at which time a salary review will be conducted. Thereafter the Mayor, taking into consideration Council feedback, shall evaluate and review the performance of the Employee in October of each year.

### **Section 3 – Termination and Voluntary Resignation**

A(1). Termination for Just Cause. The Mayor, with the approval of the City Council, shall have the right at any time during the term of this Agreement to terminate the Employee for just cause. "Just cause" is defined as (a) a conviction of a felony or misdemeanor involving moral turpitude, (b) breach of this agreement, (c) commission of any dischargeable offense as defined in the Personnel Rules and Regulations for the City of Grand Island.

A(2). Termination for Reasons Other Than Just Cause and Consideration Given for the release of all Claims against the City. In the event the Mayor, with the approval of the City Council, during the term of this Agreement, terminates Employee for reasons other than just cause, the City agrees to pay the Employee in a single lump-sum payment an equal amount to (3) months of the Employee's salary, excluding the City's obligation for retirement, insurance, benefits or allowances for said (3) month period, within thirty (30) days of termination of Employee's employment. Upon payment of such lump-sum payment to the Employee, the Employee does hereby waive and release the City, and its officials, managers, employees, and agents from any and all claims of any nature whatsoever which may arise by

reason of such termination, including, but not limited to, an alleged breach of this contract (or any other express or implied contract), or federal law, state law, or local ordinance, or constitutional due process claim that Employee's termination by the City deprived Employee of a property interest and continued employment with the City and of a liberty interest in the Employee's good name and reputation.

B. Notice Period for Voluntary Resignation and Employee Compensation Settlement. In the event the Employee voluntarily resigns her position with the City before the expiration of the aforesaid term of employment, then Employee shall give the City sixty (60) days written notice in advance, unless the parties otherwise agree. Employee's final compensation will be determined and defined by the City of Grand Island personnel rules at the time Employee's official resignation is effective.

#### **Section 4 – Salary**

The City agrees to compensate employee for her services through the tenure of her employment rendered pursuant hereto an annual salary initially established at \$112,072.48 which is step 1 of the pay range for the City Administrator position, as established in the City's pay plan. In addition the City agrees to increase said salary or other benefits or both of Employee in such amounts and to such an extent as the Mayor and City Council may determine that is desirable to do so for all employees. The annual salary shall be established in the annual budget and any salary adjustment shall conform to the City's pay plan.

#### **Section 5 - Hours of Work**

It is recognized and understood by Employee the expected work week for City employees is forty (40) hours per week. It is further understood and recognized by Employee that she is the City Administrator and, as such, is expected to and shall devote whatever time is necessary and desirable to her employment activities in order to promote and carry out her job and the duties associated therewith.

#### **Section 6 - Vacation Leave, Medical Leave and Holiday Pay**

Employee shall be entitled to receive the same vacation leave, sick leave, and holiday benefits accorded to other employees of the City pursuant to the Personnel Rules and Regulations, including provisions governing the accrual and payments therefore on termination of employment, provided that the Employee shall earn a minimum of twenty (20) days of vacation leave per calendar year. The employee will not be restricted from the use of vacation leave during her introductory period as City Administrator. Upon termination Employee will be paid for all accrued vacation leave. Additionally, upon termination the value of all accrued medical leave shall be deposited in the Employee's VEBA account.

#### **Section 7 – Disability Health and Life Insurance**



Employee shall be entitled to receive the same insurance coverage for life, accident, sickness, disability income benefits, and major medical as is accorded to employees pursuant to the Personnel Rules and Regulations for the City of Grand Island.

#### **Section 8 – Retirement/Pension Contribution**

Employee shall be entitled to receive the same retirement benefits and pension contribution as are accorded to other employees of the City per the City of Grand Island personnel rules and Regulations.

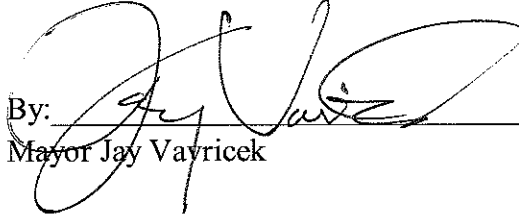
#### **Section 9 – Other Terms and Conditions of Employment**

- A. Conditions of Employment. The City Council shall fix any such other terms and conditions of employment, as it may determine from time to time, relating to the performance of Employee, provided such terms and conditions are not inconsistent with or in conflict with the provisions of this Agreement, the City Code, or any other law.
- B. Personnel Rules and Regulations Applicability. The provisions of the Personnel Rules and Regulations of the City of Grand Island as they now exist or hereafter may be amended shall apply to the Employee as they would to all other employees of the City with the exception of any conflicting items specifically referenced in this agreement.

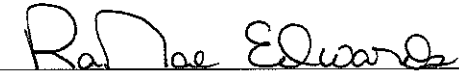
#### **Section 10 – General Provisions**

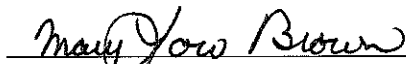
- A. The text herein shall constitute the entire agreement between the parties.
- B. This agreement shall be binding upon and inure to the benefit of the heirs at law and personal representative of the Employee.
- C. This agreement shall become effective commencing the date herein as approved by the City Council through the expiration of the below referenced Mayor's current term of office, however, employment as the City Administrator shall continue until a successor is appointed and qualified as outlined by Grand Island City Code §2-35.
- D. In order to promote long term stability in the position, sustain the leadership and use of institutional knowledge of the Employee, maintain administrative and Council member interaction, and consistency in service to the people of Grand Island, the terms and provisions of this Agreement are deemed to be extendable with the mutual consent of the Employee and re-elected Mayor Jay Vavricek or the Mayoral successor, upon approval of the City Council.

CITY OF GRAND ISLAND, NEBRASKA  
A Municipal Corporation

By:   
Mayor Jay Vavricek

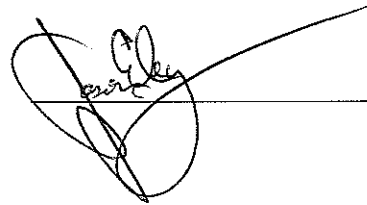
Attest:

  
City Clerk

  
Employee

Date: 4/5/11

Approved by the City Attorney:



**From:** Robert Sivick  
**Sent:** Friday, August 10, 2012 1:10 PM  
**To:** Mayor Vavricek  
**Subject:** RE: Request for legal opinion

Dear Mr. Mayor:

On August 7th I provided an opinion on the matter to Councilman Haase who added the item to the agenda. When I provided it I was and still am working on limited knowledge of what the agenda item is attempting to do. As such, my opinion is not all inclusive as amendments may be made at Tuesday's meeting and I reserve the right to add to my opinion based on any amendments that may be made. Below you will find the relevant text of my opinion along with the attached documents referenced in that opinion.

*I previously provided you and other elected officials with the attached memorandum on June 20, 2012. That memo, specifically paragraph I, lays out the Council's limited authority over City personnel matters. As I stated, there are six items listed setting forth specific Council authority over personnel matters. I would note as a result of the passage of Ordinance 9390 on July 10, 2012, item three should now read "[a]pproving the hiring of statutory officers (Administrator Attorney, Clerk, Public Works and Finance Directors) and certain Department Directors (Building, Human Resources, Parks and Recreation, Utility, Fire, and Police) and the removal of statutory officers."*

*It appears you are attempting to terminate Ms. Brown's employment effective June 27, 2012. I also previously provided you and other elected officials with the attached City Attorney Opinion 2012-06. That opinion details Ms. Brown's employment and how it could end either as a result of termination or resignation.*

*Sec. 3B of Ms. Brown's employment contract (which the Council approved on April 5, 2011) sets forth the procedure for Ms. Brown's departure from the City's employ as a result of resignation. Nowhere in that section is the Council explicitly or implicitly authorized to accept or alter any terms of resignation.*

*By way of analogy consider my situation as like Ms. Brown I am a statutory official. On June 14, 2011, the Council approved Mayor Vavricek's appointment of me as City Attorney. Pursuant to Neb. Rev. Stat. Sec. 16-309 and Grand Island City Code (Code) Sec. 2-30 I may serve until the end of the Mayor's term (December, 2014). However, I may resign at any time prior to December, 2014. I would do so by submitting a letter of resignation to the Administrator or Mayor stating when such resignation takes place. If I were to submit such a letter tomorrow setting the date of my resignation as December 31, 2012, neither the Mayor or Administrator could alter that date without my consent. They could not extend my resignation to say June 30, 2013 as the thirteenth amendment to the US Constitution bans involuntary servitude with very narrow exceptions. In addition, they could not*

alter that date without my consent by making it effective say August 31, 2012. To do so would constitute my removal and would have to be carried out pursuant to the State and City laws cited above. In Ms. Brown's case she may also be removed or terminated for just cause or other reasons pursuant to Secs. 3A(1) and 3A(2) of her employment contract.

As you know, on June 27, 2012 Ms. Brown submitted a letter of resignation to the Mayor effective September 30, 2012. That date stands unless Ms. Brown agrees to alter it or the Mayor terminates Ms. Brown's employment sooner and the Council approves such termination pursuant to State law, City law, or her employment contract. It is the Mayor and not the Council that agrees to the date of resignation on behalf of the City as he is Ms. Brown's supervisor and the City's personnel rules provide supervisors be they division chiefs, department directors, the Administrator, and ultimately the Mayor make those decisions.

As I stated in my attached June 20, 2012 memo, the personnel rules are structured so the Administration and not the Council makes the vast majority of personnel decisions. Having the Council exercise this authority over more than five hundred City employees would be cumbersome at best and utter chaos at worst. In addition, there is a separation of powers issue to consider. The Council is a legislative body charged with making law and policy. The Mayor and his administration are charged with the day to day operations of City government. Again by way of analogy, it is not the Congress that runs the United States government but the President and the numerous departments, bureaus, and agencies overseen by him.

I know the preceding portion has been lengthy but I wanted you to be fully aware of the legal issues involved. Like any client, you are free to accept or reject your lawyer's advice. If you wish to move forward, what you are attempting would take the form of a resolution. I will not draft such resolution or approve its contents as I am ethically prohibited from taking action that is illegal. I believe what you are attempting is illegal pursuant to State and City law and violates Ms. Brown's contract to which the City is a party. However, pursuant to Code Sec. 2-6 any member of the Council may place items on meeting agendas and I will insure any item submitted by you is included on the August 14, 2012 agenda. I would ask you be mindful of the work load of City staff and submit your resolution as soon as possible.

Given my limited knowledge as to what may be said or issues raised at Tuesday's meeting, my opinion is limited as well to the above text and the attached documents. As to your question if an item "can be legally discussed and voted upon by Council", the answer is yes. I can only offer advice to clients, I cannot force them to accept it. As such, the Council is free to take any action legal or illegal as it chooses. Let me know if you need anything else.

*Robert J. Sivick*

Robert J. Sivick  
Grand Island City Attorney

Grand Island City Hall  
100 East First Street  
Post Office Box 1968  
Grand Island, Nebraska 68802-1968  
(308) 385-5444, Extension 130  
(308) 385-5427 (Facsimile)  
(308) 227-0673 (Cellular)  
[rsivick@grand-island.com](mailto:rsivick@grand-island.com)  
[www.grand-island.com](http://www.grand-island.com)

The woods are lovely, dark, and deep,  
But I have promises to keep,  
And miles to go before I sleep,  
And miles to go before I sleep.

Stopping by Woods on a Snowy Evening  
Robert Frost (1923)

**From:** Mayor Vavricek  
**Sent:** Friday, August 10, 2012 12:29 PM  
**To:** Robert Sivick  
**Cc:** Mayor Vavricek  
**Subject:** Request for legal opinion

Bob,

I have some concerns regarding the item on the agenda regarding the City Administrator's resignation. Would you please give me your legal opinion regarding the legality of the item? I understand the item can be on the agenda, but is it an item that can be legally discussed and voted upon by Council.

Jay

OPINION OF THE GRAND ISLAND CITY ATTORNEY (2012-06)

TO: Jay Vavricek, Mayor of the City of Grand Island  
Members of the Grand Island City Council  
FROM: Robert J. Sivick, Grand Island City Attorney  
RE: Legal Issues Regarding the Tenure of City Administrator,  
Mary Lou Brown  
DATE: July 23, 2012

Earlier this evening I received an email from Councilmember Chuck Haase requesting my legal opinion regarding the tenure of City Administrator, Mary Lou Brown. Since the evening of Friday, July 20, 2012 I have been contacted by five separate members of the Grand Island City Council (Council) each making individual but similar requests for such information.

Neb. Rev. Stat. §16-319 states in part, "[t]he city attorney shall be the legal advisor of the council and city officers.... He shall attend meetings of the council and give them his opinion upon any matters submitted to him, either orally or in writing as may be required." Grand Island City Code §2-40 mirrors the language of the State statute cited above.

The position of Grand Island City Attorney is quite difficult given I serve as legal counsel to eleven different elected officials who are often at great odds on numerous and various matters. I have tried to navigate this minefield with varying degrees of success. It has become apparent over the last three days the Council believes it has not received sufficient information regarding the tenure of Mary Lou Brown. Accordingly, I have decided to draft this opinion to answer the questions received. I do so because it is my duty as a lawyer and a requirement under State and City law I provide my "opinion upon any matters submitted" regardless of political or personal consequences.

This document constitutes my opinion. Its subject matter is limited to legal issues and does not touch on policy or personal views of any City official or employee. Finally, it is my understanding Mayor Jay Vavricek will be speaking at noon on Tuesday, June 24, 2012 before the Grand Island Rotary Club. Presumably his remarks will address this issue. This opinion is written without the knowledge of what those remarks may be nor do I deign to speak for the Mayor.

I. CHRONOLOGY OF EVENTS

December 7, 2010 - The Council approved Resolution 2010-354 appointing Ms. Brown as Interim City Administrator.

April 5, 2011 - The Council approved Resolution 2011-78 appointing Ms. Brown as City Administrator and approving her employment contract.

June 26, 2012 - Mayor Vavricek announced he requested and received Ms. Brown's resignation as City Administrator.

June 27, 2012 - Ms. Brown submitted a letter of resignation stating in part, "[e]ffective today, I will no longer work on a daily basis at City Hall; however, I will continue to be employed in an advisory role until September 30, 2012. During this time period, I will receive my current salary and benefits."

July 10, 2012 - Mayor Vavricek announced his intention to appoint Marlan V. Ferguson to serve as Interim City Administrator beginning August 6, 2012. Mayor Vavricek further announced his intention to submit Mr. Ferguson's appointment to the Council for approval at the meeting scheduled for July 24, 2012.

II. THE PRESENT STATE OF AFFAIRS

Since Ms. Brown's resignation is effective September 30, 2012 she continues to serve as City Administrator until that date. There is nothing illegal about her not working from City Hall. With regard to issues concerning hours worked, that is a matter for her superior, in this case Mayor Vavricek, to consider.

Since only one person may serve as City Administrator and the effective date of Ms. Brown's resignation has not been altered, no person, other than Ms. Brown, may serve as City Administrator or Interim City Administrator until after September 30, 2012.

III. LEGAL AUTHORITY CONTROLLING MS. BROWN'S DEPARTURE AS CITY ADMINISTRATOR

There are three separate legal authorities controlling Mr. Brown's departure as City Administrator. I will address each in turn.

A. State Statute

Neb. Rev. Stat. §16-308 lists the administrator as an appointed officer. That statute states in part,

"appointed officers may be removed at any time by the mayor with approval of a majority of the council." That means removal or termination of Ms. Brown must begin with the Mayor and requires the approval of the Council. Neither the Mayor nor Council may remove or terminate Ms. Brown or any statutory officer unilaterally.

B. City Code

Grand Island City Code (Code) §2-30 mirrors the language of the State statute cited above.

C. Employment Contract

Ms. Brown's employment contract with the City of Grand Island (City) provides for three possible avenues for her departure as City Administrator. I will address each in turn.

1. Termination for Just Cause

§3A(1) of Ms. Brown's employment contract states in part, "[t]he Mayor, with the approval of the City Council, shall have the right at any time during the term of this Agreement to terminate the Employee for just cause." Here, just like in the State statute and City Code cited above, the termination of Ms. Brown's employment must begin with the Mayor and requires the approval of the Council. Neither the Mayor nor Council may terminate Ms. Brown's employment unilaterally.

2. Termination for Reasons other than Just Cause

§3A(2) of Ms. Brown's employment contract provides "[t]he Mayor, with the approval of the City Council..." may terminate Ms. Brown for reasons other than just cause. If such occurs, Ms. Brown is entitled to receive three months salary, excluding benefits, in exchange for a release of claims against the City. As in the previous scenarios, the termination of Ms. Brown's employment must begin with the Mayor and requires the approval of the Council. Neither the Mayor nor Council may terminate Ms. Brown's employment unilaterally.

3. Voluntary Resignation

§3B of Ms. Brown's employment contract provides if Ms. Brown resigns she "shall give the City sixty (60) days written notice in advance, unless the



parties otherwise agree." Ms. Brown has given approximately ninety days written notice pursuant to her letter of resignation tendered on June 27, 2012. The effective date of resignation is in effect until Ms. Brown and the City agree to alter it or her employment is terminated pursuant to one of the scenarios described above.

If you need any additional information do not hesitate to contact me.

MEMORANDUM

TO: City of Grand Island Elected Officials  
Mary Lou Brown, Grand Island City Administrator  
FROM: Robert J. Sivick, Grand Island City Attorney  
RE: Council Action on Personnel Matters  
DATE: June 20, 2012

On June 19, 2012 I was contacted by Mayor Jay Vavricek who requested I address the concern of a member of the Grand Island City Council (Council) regarding a possible discussion in either open or executive session of recent personnel issues covered in the local news media.

What brought this issue to a head was an article in the Sunday, June 17, 2012 edition of the *Grand Island Independent* entitled, "Previous fire chief was subject of insubordination charges". That article centered on an interview of former Grand Island Fire Chief Troy Hughes who alleged he was disciplined twice for insubordination, those actions were without merit, and ultimately resulted in his departure from employment with the City of Grand Island (City). These statements are in contrast with public statements made by Hughes last Autumn in which he stated his decision to accept the Fire Chief position in Los Alamos, New Mexico was driven by higher pay, better benefits, and the opportunity to lead a larger department charged with protecting the Los Alamos National Laboratory, a Federal facility specializing in nuclear weapons research.

There appears to be two main issues in this matter. One is whether and to what extent the Council has authority over the management of City employees, the employee grievance process, and the employee discipline process. The other is whether the Council can or should discuss former Chief Hughes, other employees, or personnel policy in general in open or executive session. I will address each in turn.

I. COUNCIL AUTHORITY OVER PERSONNEL MANAGEMENT, GRIEVANCES, AND/OR DISCIPLINE

The Personnel policies for City employees are set forth in the City of Grand Island Personnel Rules and Regulations (Personnel Rules). The Personnel Rules were adopted by the Council on June 22, 1987. In addition, sworn members of the Grand Island Police and Fire Departments are also governed by the City of Grand Island Civil Service Rules

and Regulations (Civil Service Rules). These rules center on the hiring, firing, and discipline of police and fire personnel and are not as detailed as the Personnel Rules. In addition, the Civil Service Rules arise out of Chapter 12 of the Grand Island City Code (Code) and the Nebraska Civil Service Act, codified at Neb. Rev. Stat. §§19-1825 to 19-1848.

For City employees who are members of bargaining units or unions, provisions set forth in their respective contracts are applicable only to members of those unions.

With the exception §1.01 of the Personnel Rules which notes they were adopted by the Council, nowhere else in the Personnel or Civil Service Rules is the Council mentioned let alone charged with any authority or responsibilities. In addition, Code §2-19(3) restricts the actions of the Council or its individual members with regard to City employees. Specifically, it permits inquiries of City employees regarding municipal activities. For all other matters, the Council must deal with the Administrator directly and is prohibited from giving orders to any subordinate of the Administrator, which includes all City employees.

Overall, the Council's authority regarding personnel is limited to the following:

1. Adopting or amending Personnel Rules (Code §2-19(4));
2. Approving the appointment of members of the Civil Service Commission (Civil Service Rules, Art. I, §A);
3. Approving the hiring and/or removal of statutory officers (Administrator, Attorney, Clerk, Public Works and Finance Directors) (Code §2-30);
4. Approving City FTE schedules;
5. Approving City union contracts; and
6. Approving salary ordinances.

It is my professional opinion the Council is limited in its ability to control the day to day management of City employees for efficiency reasons. As a ten member body with widely differing opinions, allowing City employees to appeal to the Council regarding personnel management,

grievances, or discipline would not only undermine the authority of Department Directors and the Administrator but would make management of the City workforce difficult if not impossible.

## II. DISCUSSION OF PERSONNEL MATTERS IN OPEN OR EXECUTIVE SESSION

### A. OPEN SESSION

Code §2-6 states in part, "[t]he city clerk shall place upon the agenda of any regular, special, or study session meeting only those matters which have been directed by one council member, or authorized by the mayor or the city administrator." As such I see no legal prohibition to an agenda item for the purpose of discussing personnel in general or even a particular employee. However, if the discussion involves a past or present employee, I consider it my duty to publicly voice my objection to such action and recommend discussion not take place as it will prove detrimental to my client, the City of Grand Island. That detriment will arise from potential civil liability if City officials discuss particular employee personnel issues publicly.

Personnel matters for any employer, including the City, are confidential. These matters may include allegations or items of a criminal, medical, and/or sexual nature that if revealed or discussed publicly by City officials will expose the City and ultimately its taxpayers to massive civil liability. During my tenure as City Attorney I appeared in Court on behalf of the City more than once to prevent third parties from gaining access to personnel records for use in criminal and divorce proceedings. It is the policy of the City to safeguard this information not only to protect the City from potential liability but so past, present, and future employees are confident embarrassing matters such as a past criminal record, substance abuse issues, or mental health problems are not improperly revealed publicly.

I am well aware of the beating the City has taken in the local newspaper which characterizes the City's policy of not discussing personnel issues (which incidentally is the policy of every reputable public and private employer) as a shield or excuse for hiding

information. I am also aware of past and present employees who freely discuss personnel issues publicly and in so doing criticize and even attack the City and its officials. I will go so far as to say those employees take such action knowing the City is unable to respond. As the Mayor stated in the recent article regarding former Chief Hughes, the City would be able to respond to these attacks if employees were willing to sign waivers of their right to confidentiality of personnel records. As of this date, I have not been contacted by any past or present employees wishing to waive their right to confidentiality and I do not expect such.

I am also aware of the pressure you are under from the public regarding this matter as I once served as a member of the Omaha City Council. However, taking rash action by publicly discussing these matters will as I said previously, expose the City to civil liability. Our courts will not look kindly on the City revealing confidential information in response to political pressure, attacks from past or present employees, or criticism from the news media.

#### B. EXECUTIVE SESSION

Executive or closed sessions of a public body are highly regulated activities as set forth in the Nebraska Open Meetings Act, codified at Chapter 84, Art. 14 of the Nebraska Revised Statutes.

Neb. Rev. Stat. §84-1410(1)(d) permits an executive session for the "[e]valuation of the job performance of a person when necessary to prevent needless injury to the reputation of a person and if such person has not requested a public meeting". The problem here is if the executive session is to discuss former Chief Hughes, such session would be illegal as Hughes is no longer a City employee and his job performance is no longer an issue for any City official to evaluate. An executive session to discuss the job performance of a present employee would also be illegal as the Council has no authority to evaluate City employees with the exception of statutory officers as listed above. Even then, the Council's function is limited to the approval of removing statutory officers and only when requested to do so by the Mayor.

## RESOLUTION 2012-220

WHEREAS, the City council, in the Employment Agreement, states the following: it is the desire of the City Council to: (1) secure and retain the services of the Employee and to provide inducement for her to remain in such employment; (2) to make possible full work productivity by ensuring Employee's morale and peace of mind with respect to future security; (3) to act as a deterrent against malfeasance or dishonesty for personal gain on the part of Employee; (4) to provide a just means for terminating Employee's services at such time as she may be unable to fully discharge her duties or as events may otherwise occur; and (5) to provide a just means for a clearly defined professional voluntary employment separation agreement and

WHEREAS, under Section 5 of Mary Lou Brown's employment agreement, the City Council clearly states a goal to clearly define a separation agreement; and

WHEREAS, on June 27, 2012 Mary Lou Brown submitted a termination letter which was accepted by the Mayor on June 26<sup>th</sup> as stated in the City Council regular meeting, and

WHEREAS, the City Council accepts the resignation of Mary Lou Brown as of June 27<sup>th</sup> and her consulting arrangement through September 30, 2012; and

WHEREAS, the City Council is a required approver on appointment, the City Council shall also be in a position to accept or reject her resignation as submitted; and

WHEREAS, Mary Lou Brown has submitted her resignation, the Mayor having accepted her resignation.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF GRAND ISLAND, NEBRASKA, the City Council accepts the resignation and terms provided in the employment agreement and resignation document dated June 27, 2012.

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Adopted by the City Council of the City of Grand Island, Nebraska, August 14, 2012.

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Jay Vavricek, Mayor

Attest:

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Brenda Sutherland, Acting City Clerk

Approved as to Form	☐ _____
August 16, 2012	☐ City Attorney