



Date: December 11, 2015
To: Councilmember Stephen Holman
From: Jeff Harley Bryant, City Attorney
Subject: City Restriction Regarding Your Employment Choices

BACKGROUND

From recent Facebook posts, I wanted to make sure there was no disconnect between you and I regarding any advice I have given you regarding your choice of employment. You contacted me last May regarding “the sale of glass pipes, bongs, etc.” within Norman and a relative seeking employment with the City of Norman. Your request to meet regarding the sale of glass pipes, bongs, etc. was prompted by increased scrutiny on retailers that sell drug paraphernalia – e.g., the April 2015 raid on McCloudz Pipes and Novelties and subsequent concern expressed by Robert Cox, co-owner of Friendly Market. We met on May 8, 2015, in the City Attorney’s Conference room to discuss this matter. Assistant City Attorney Rick Knighton attended the meeting and we discussed state statutes that prohibit the sale of drug paraphernalia – i.e., 63 O.S. §§ 2-101.2 and 2-405.

On May 18, 2015, you, Mr. Cox, the Police Chief, Captain Glenn Dobry, Captain David Teuscher, and Mr. Knighton met to discuss the sale of glass pipes, bongs, etc. At that meeting, it was conceded that there are no other legitimate uses for the glass products Friendly Market wanted to offer for sale. It is my understanding that the sale of glass pipes was suspended from the Friendly Market in May following that meeting.

You then called me in the fall to discuss a change in your employment. We met on September 4, 2015 at Sergio’s restaurant to address your concern. You advised that you had been offered a job with the Friendly Market as an assistant manager and wanted to know if I thought you should take the job, and whether I felt taking this job would present a conflict of interest with your role as a City Councilmember.

DISCUSSION

First, it is important to reiterate to you that I cannot act as your private attorney. Any advice I give to you regarding your personal matters should not be taken as legal advice, and I have consistently taken great care in making sure you understand this point. Each time we have discussed such matters; you have acknowledged this point and have indicated you have a private attorney advising you on your personal matters.

With that fundamental premise, in response to your question “do I think you should take a job at the Friendly Market”, I have consistently told you I would not personally recommend that you take a job with Friendly Market. Under the City Charter provision describing qualifications for City Council there are no specific restrictions on the type of employment a Councilmember chooses to pursue.

The lack of restriction on employment however, must be tempered with the required oath of office in which you solemnly swear to uphold the laws of the land. It should be noted, that Friendly Market was not selling glass pipes when we met to discuss the potential change in your employment. Because you have been well aware of the issues of whether illegal products are being sold from the Friendly Market, being formally advised of this in May, my suggestion to you was that taking this employment offer could expose you to personal legal issues that could have long term effects on you for the rest of your life. My opinion that you *not* take this job offer was not legal advice, but personal advice to you about how this choice might affect you personally long term.

You have expressed the belief that selling the glass pipes was not illegal in your judgement based on the following (1) the pipes (some of them costing several hundred dollars) could be used for purposes other than smoking illegal substances, such as a flower vase; or (2) you had no control over what potential purchasers might do with the glassware, and so you should not be held accountable for their actions. We have discussed your reasoning. I refer you again to the memorandum previously provided to you that outlines the State law on this topic. The sale of glass tubes, as defined therein, is prohibited under current state law. Possession of drug paraphernalia is also prohibited under current state law. Your attention is specifically drawn to 63 O.S. §2-405(C) that states, in pertinent part, “no person shall deliver, sell, ... drug paraphernalia knowing, *or under circumstances where one reasonably should know*, that it will be used to ... inhale or otherwise introduce into the human body a controlled dangerous substance in violation of the Uniform Controlled Dangerous Substances Act.” (italics added).

Given the facts as I understand them, it is difficult to accept an argument that the glass pipes, whose purchase price is not within the range of a typical flower vase, are being sold for any other purpose than to use to smoke illegal substances. Although you have no control over how ultimate purchasers might use the glass pipes, the statute makes it illegal to sell such products “under circumstances where one reasonably should know” it will be used for illegal purposes. In addition, I have worked for years with the United Way and have supported several local agencies over the years. Some of those agencies deal with families, individuals, or children that have been adversely impacted by illegal drug use, whether it is a family who finds out a son or daughter has become addicted, or a child who has been abused because a parent is addicted to illegal substances, or even a homeless individual who has found themselves all alone or without means of support due to illegal drug use. Having gotten to know you during your time on City Council, and having a greater understanding of the only reasonable use of these glass pipes, it surprises me that you even considered continuing to work in a business that could negatively impact so many lives through enabling illegal drug use. Again, I am not your personal attorney on such matters and I urge you to consult private legal counsel to help guide you on these issues. The District Attorney’s office is charged with prosecuting these types of allegations, to be determined by a District Court judge or jury empaneled for that purpose.

As your employment at the Friendly Market relates to your role as a City Councilmember, your conduct is governed by your Oath of Office to uphold the laws of the land (even the current one you feel should be changed), Council Ethics Ordinance in

Chapter 2 of the Norman City Code, City Charter, and State law regarding fitness to continue as a member of City Council.

We have previously discussed the City's Ethics Ordinance that would preclude you from voting on or participating in the discussion of any item in which you have a pecuniary interest. For Council action items in which you do not have a pecuniary interest, but there may be an appearance of a conflict of interest, you are required to disclose such a conflict. For example, Council discussion of the purchase of a Police Rescue vehicle would neither require you to abstain nor to disclose due to your employment at Friendly Market. However, if an Ordinance change were being discussed that would legalize use of marijuana or crack cocaine and a large percentage of the Friendly Market sales are from glass pipes that one should reasonably know would be used for smoking these substances, you would likely have an obligation to disclose your employment there to avoid an appearance of a conflict of interest. If you had an ownership interest in the Friendly Market, or if your pay or other employment consequence were tied to additional sales of glass pipes that would be triggered by legalization of currently illegal substances, then you would have an obligation to abstain from discussion or voting on such an item under the City's Ethics Ordinance.

Although you believe that selling glass pipes is not illegal under state law, the provisions for removal from office of a Council member can be found in Article IX Section 3 as follows: "The Mayor or any Councilmember shall be subject to removal from office in the manners and for the same cause or causes as provided by the laws of the State of Oklahoma for the removal of county officers, it being intended hereby to provide cumulative procedures and cause for removal." Under 51 O.S. § 93(3), county, city, and municipal officers may be removed from office for committing any act constituting a violation of any penal statute involving moral turpitude. The issue of what is an action involving "moral turpitude" is discussed in the case of *Ballard v. Indep. School Dist. No. 4 of Bryan County*, 2003 OK 76, 77 P.3d 1084, which involved a certified question for the 10th Circuit Court of Appeals to the Oklahoma Supreme Court on this particular issue of Oklahoma law. There the Court stated:

The history of the attempts to meaningfully define this term is long. In his dissent to *Jordan v. De George*, 341 U.S.223, 71 S.Ct. 703, 95 L.Ed. 886, Justice Jackson complained of the vagueness attached to the word, and the unfairness of the application of the definition. Our Court has defined this term as "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man." *In re Williams*, 1917 OK 459, ¶ 6, 167 P. 1149, 1152. *Bancroft v. Board of Governors of the Registered Dentists of Oklahoma*, 1949 OK 216, ¶ 10, 210 P.2d 666, 668, cited *In re Williams* as holding that moral turpitude is "anything done contrary to justice, honesty, modesty, or good morals." In *State ex rel. Oklahoma Bar Ass'n v. Jones*, 1977 OK 118, ¶ 7, 566 P.2d 130, 132, the Court observes, "Moral turpitude implies something immoral in itself, regardless of the fact whether it is punishable by Law. . . . In the concept behind the phrase 'moral turpitude,' the element of intent and knowledge are regarded as

important.” The Court has made the additional observation that, “Moral turpitude is admittedly an elusive concept incapable of precise definition. Its definition may change with the times and vary from community to community.” *State ex rel. Oklahoma Bar Ass’n v. Denton*, 1979 OK 116, ¶ 5, 598 P.2d 663, 665.

Finally, any elected or appointed state or county officer or employee who, during the term for which he or she was elected or appointed, is, or has been, found guilty by a trial court of a felony in a state or federal court of competent jurisdiction shall be automatically suspended from the office or employment. 51 O.S. § 24.1(A). Automatic suspension under 51 O.S. § 24.1(A) creates a vacancy in office notwithstanding the fact that a suspended officer retains the right to reinstatement should the conviction be reversed on appeal.¹

CONCLUSION

Based on the above discussion, it was not my personal recommendation that you accept employment with the Family Market. The fact of your employment at the Family Market alone does not disqualify you as a City Councilmember under City Charter provisions. Your employment at the Family Market may raise some ethical concerns as outlined above. Criminal activity involving an act of “moral turpitude” may put you in a position of facing an ouster proceeding as outlined above. A conviction of a felony will automatically suspend you from office.

xc Mayor and City Councilmembers
Steve Lewis, City Manager

¹ In addition, there are similar provisions found in Title 22 Okla. Stat. §1181. The process under which such an action for removal can take place was noted by the Supreme Court in *L’Acquarius v. Hampton, et al.*, 1982 OK 34, 642 P.2d 1143:

Proceedings to remove public officials and officers may be had only in the following manner: (1) Impeachment under the provisions of Art. VIII, § 1, Okla. Const., 51 O.S. § 51 et seq.; (2) accusation for removal from office presented by a grand jury pursuant to 22 O.S. § 1181 et seq., (3) in case of a county or township officer, an accusation presented by the county commissioners, 22 O.S. § 1194 ; and (4) proceedings instituted by the Attorney General under the provisions of 51 O.S. § 91 et seq., at the direction of the Governor or upon notice in writing verified by five or more reputable citizens of the county.

The number of citizens referenced in 51 O.S. § 94 was amended in 2004 to require the greater of 15 citizens or 1% of the registered voters that voted in the previous election for the political subdivision of which the officer who is the subject of the complaint is an official.