

## COMMITTEE BILLS ON SECOND READING

**December 1, 2008**

**5:30 P.M.**

Chairman Osborne called the meeting to order.

The Clerk called the roll.

Present: Aldermen Osborne, DeVries, M. Roy, Pinard, Murphy

Messrs.: T. Arnold, J. Gile, Alderman Gatsas

Deputy City Clerk Normand stated before you start I just want to notify the Committee that Item 4 of your agenda is in fact in the Solicitor's Office right now awaiting language for a Charter amendment. The Solicitor's Office advised the Committee on Human Resources at the time it was in Committee and it was referred directly there. The Board of Mayor and Aldermen has not accepted this yet at this point so it should not be on your agenda for consideration tonight. The only item we have is Item 3.

Chairman Osborne addressed Item 3 of the agenda:

Ordinance Amendment:

“Amending Chapter 33: Human Resources of the Code of Ordinances of the City of Manchester by adding a new Section 33.100 Residency Requirements thereby establishing a requirement of residency within the City of Manchester for City Officers and Department Heads.”

Alderman Mark Roy stated even though I disagree with the spirit of the ordinance personally, the job of Bills on Second Reading is to go ahead and read the ordinances for accuracy and I believe it accurately portrays what the Human Resources Committee was looking to do so I move that the ordinance out to pass.

Alderman Pinard duly seconded the motion.

Alderman DeVries stated I would like to hear from the HR Director if I might. If you could just give us a moment to read the information on the legality because that is certainly where my question was going to go.

Alderman Mark Roy stated as I read this letter, which was obviously received September 17, 2008, it would have been nice if this was in our packet. If it pleases the second of my motion, I would like to withdraw my motion.

Alderman Pinard withdrew his second.

Chairman Osborne asked Atty. Arnold do you have something to say?

Thomas Arnold, Deputy City Solicitor, responded I have a quick comment. I believe that this letter was distributed back in September; however, I wanted to make sure that the Committee had seen it so I distributed it again tonight.

Alderman DeVries stated to expend upon what this Committee, Bills on Second Reading, is charged with doing it is my understanding if I can ask the Solicitor that we are also charged to look at the legality of what is before us. Is that not correct?

Deputy Solicitor Arnold replied I quite frankly haven't read the ordinance for awhile but my recollection is that it is referred to this Committee for technical review and beyond that...

Alderman DeVries interjected how can something be technically correct if it is illegal I guess is the question I have.

Deputy Solicitor Arnold responded I believe that would be a problem. Our office has certainly offered our opinion on this particular topic, which has been reinforced by the opinion of the Local Government Center. As was noted in a memo originally done by Mr. Muller that we had distributed to the Board, the NH Supreme Court has ruled that the right to travel is implicated in the residential requirements and consequently residency requirements, pursuant to the NH Constitution, are only permitted or valid where public safety is involved and there is a need to have employees living within the confines of the City. We quite frankly don't think that applies to all department heads. It might apply to certain department heads but not all department heads and consequently we opine that this particular ordinance is probably in violation of the NH Constitution.

Alderman DeVries stated well that being said I was going to ask similar questions of the HR Director and I would assume that you would concur with what you are hearing from the City Solicitor?

Jane Gile, HR Director, replied yes I do concur.

Alderman DeVries stated I am fine then. I had issues because I heard that there were some legal questions and this certainly has answered my question.

Chairman Osborne stated Mr. Arnold I think 20 or 25 years ago when I was an Alderman back then we tried this and I kind of vaguely remember that it was an illegal thing to do. Is it legal or is it not?

Deputy Solicitor Arnold answered as I said, Alderman, the Supreme Court if I can put it in a nutshell has ruled that residency requirements violate the NH Constitution with the exception of issues related to public safety. For instance, I think they have said that you can require firefighters and police officers to live within the confines of the city because there may be a public safety need to have them available for quick response and their decisions have been limited in that respect. So certainly if public safety is not involved then I think it would be in violation of the state Constitution. I would note that there have been a couple of times that Manchester has gone to the Supreme Court on this issue and I believe both times with teachers where some of this case law was laid out so you may very well be correct in your recollection about prior attempts.

Alderman Murphy stated the only other point I would make to caution even limiting it to police and fire is that the facts in the Seabrook Police Association case were very specific to facilities that they had in their towns, most importantly the nuclear power plant. Nothing like that exists in Manchester. I would caution...I guess I don't see how this could be constitutional in any form for the City of Manchester and I would caution against even passing a more narrow version of that and I say that for the edification of all Board members and not just our Committee.

Alderman Gatsas asked can you explain to me how they are doing it in Portsmouth? Is it more legal or constitutional to do this in Portsmouth than it is in Manchester because the department heads in Portsmouth are required to live in the town.

Deputy Solicitor Arnold answered I couldn't speak on the Portsmouth ordinance.

Alderman Gatsas asked but isn't the constitutionality the same across the state?

Deputy Solicitor Arnold answered yes.

Alderman Murphy stated I think if you look at it from just an economic perspective for the City of Manchester, you can technically pass any ordinance you want but every individual that didn't want to comply with that ordinance could then bring a lawsuit and the City would have to show a compelling interest in passing the ordinance and I don't think that any compelling interest that the City could articulate would outweigh the potential harm for employees.

Alderman Gatsas responded if you take a look at this document that was passed out, if you come up to the third line in the first paragraph where it says "Muller's letter dated April 12, 2000 regarding residency restrictions for all employees" now I agree with that. There is no way you could put all employees under the same letter of the law but I think when you are talking about department heads, I think that is a whole different issue because in here if you take a look it says for all employees. In every one of these instances, they were trying to do it for all employees and not just department heads. I think it says it again on the second page and let me just read it because it has been awhile since I looked at it.

Alderman Murphy stated you can certainly bring that issue before the Supreme Court but I would rather not see it litigated if it is a gray area. I would rather just not see the ordinance passed.

Alderman Gatsas replied well as I said it happens in Portsmouth now.

Alderman Murphy stated well fortunately we don't live in Portsmouth.

Chairman Osborne asked could this all be defined by the City Solicitor's Office before it is brought before the Committee like this to hash out? Couldn't this be taken care of at the Solicitor's Office, all of these legal, non-legal, employees, department heads or whatever it is and what we can do and what we can't do legally before we sit here and decide? We are not all lawyers here.

Deputy Solicitor Arnold answered I think we have already done that.

Chairman Osborne asked you have and it is legal for department heads as long as it is a safety issue? Is that what you are saying?

Deputy Solicitor Arnold replied within certain restrictions. As I said, the Supreme Court has said that the right to travel is implicated and that there can be certain exceptions based on a need that is based on public safety. I guess I would say that the right to travel is an individual right to every person and, therefore, you would have to justify a restriction on that right looking at that individuals particular circumstances and whether he is necessary to the public safety in certain instances or not.

Chairman Osborne asked so mainly it would be up to the Aldermen in this situation?

Deputy Solicitor Arnold answered I'm sorry I don't know what you are asking.

Chairman Osborne stated if we vote up or down on this, it is up to this Committee or the full Board whether we want to go this route or we don't. Is that what you are saying?

Deputy Solicitor Arnold replied yes. It is an ordinance so you can pass it or not pass it.

Alderman DeVries stated I have a question for the Solicitor because the 1971 ruling was, I think as you had already stated, the City of Manchester versus a certain school employee and that was held to be invalid and that certainly doesn't take in any of the safety sectors. You are saying that the opinion of the Solicitor's Office as well as the Local Government Center's legal opinion is that this is likely to be found invalid if it is brought to court? Is that correct?

Deputy Solicitor Arnold responded I think that is a fair statement; yes.

Alderman Mark Roy stated I would like to request the Solicitor to put together a list of department heads that he feels would stand up under the Seabrook language and I believe he is going to come up with a list of police, fire and health and that is it but I would like when this comes up again to have that list in front of us to see what department heads the Solicitor's Office would feel comfortable defending. I can't see any way that our HR department head would be needed in an emergency situation in the City of Manchester so I disagree with the ordinance. I believe it is technically written correctly but it is not constitutional and we shouldn't pass it.

Alderman DeVries moved to table. Alderman Pinard duly seconded the motion.

Alderman DeVries stated I would like to have the Solicitor weigh in on this at our next meeting.

Deputy Solicitor Arnold stated I guess I would ask what you want. We sent around the memo that was done by our office sometime prior...

Alderman DeVries interjected we didn't receive it in this Committee.

Deputy Solicitor Arnold replied I believe, again, that it was passed out to the whole Board but I will distribute it again. That is no problem.

Alderman Mark Roy asked Tom are you questioning what my request was?

Deputy Solicitor Arnold answered no.

Chairman Osborne called for a vote on the motion. There being none opposed, the motion carried.

There being no further business, on motion of Alderman Roy, duly seconded by Alderman DeVries, it was voted to adjourn.

A True Record. Attest.

Clerk of Committee