

These pending minutes have been approved by the Utah Prosecution Council.

SPECIAL UTAH PROSECUTION COUNCIL MEETING

Monday, November 20, 2017

**5272 College Drive
Murray, Utah**

Via Telephone Conference Call

APPROVED MINUTES

UPC via Conference Call :

Steven Garside, Chair, Layton City Attorney
Haley Christensen, UPAA Chair, Utah County Attorney's Office
Robert Cosson, St. George City Chief Prosecuting Attorney
Jann Farris, Morgan County Attorney
Stephen Foote, Duchesne County Attorney
Scott Stephenson, Deputy Director of P.O.S.T (*designee of Commissioner Keith Squires*)

UPC in person:

Greg Ferbrache, Deputy Utah Attorney General (*attending for Spencer Austin, designee of General Reyes*)

EXCUSED:

Sim Gill, Salt Lake District Attorney
Barry Huntington, Chair-elect Garfield County Attorney
Commissioner Keith Squires, Utah Department of Public Safety
Scott Sweat, Wasatch County Attorney

UPC STAFF IN PERSON:

Bob Church, Director
Marilyn Jaspersen, Training Coordinator
Ronald Weight, IT Director

I. WELCOME AND ROLL CALL

- A. The Council members were welcomed and the meeting convened via telephone conference call.
- B. Roll call by phone included Steven Garside; Haley Christensen; Robert Cosson; Jann Farris; Stephen Foote; and Scott Stephenson. Greg Ferbrache attended in person.

II. BERKOVICH GRAMA REQUEST - SEPTEMBER 2017

Bob stated that back in September 2017 Mr. Berkovich filed a GRAMA Request asking for a copy of the memo and the exhibits that were provided at the October 21, 2015 Council meeting where Mr. Berkovich's employment was discussed. Haley, Greg, Robert and Scott were not in attendance at that meeting. For purpose of this discussion that does not matter.

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The memo was very detailed - 29 pages long. It included a summary of incidents that happened between Bob and Ed; between Marilyn and Ed, it summarized all of the enclosures that Bob provided to the Council for their consideration.

Lonnie Pehrson, AG GRAMA Attorney, responded to Mr. Berkovich claiming that the documents were protected the under attorney-client privilege as well as client confidentiality. Mr. Berkovich then filed an appeal with the State Records Committee and they have set a hearing for December 14, 2017.

Last week, Bob met with Lonnie who provided a recent opinion from the State's Record Committee of, *Davidson vs. the Attorney General's office*. He also referred Bob to a 2008 Utah Supreme Court case. With those two cases, Lonnie indicated that it would be highly unlikely that UPC would prevail at the State Records Committee.

Bob summarized the Davidson case and why did not support keeping his Memo protected. Bob indicated that Lonnie asked him if while preparing the memo and enclosures if UPC anticipated any litigation. Bob's answer was that he was not anticipating any litigation just simply to determine Mr. Berkovich's continued employment status. There was the discussion of the possibility that if Mr. Berkovich were let go he would sue. But if asked by the Records Committee Bob would honestly say that these documents were not prepared in anticipation of litigation or for an administrative hearing.

Bob then summarized the Supreme Court case, *South Western Wilderness Alliance vs. Automated Geographic Reference Center*, and again why it did not support keeping his Memo protected. Regarding the attorney-client privilege, Lonnie asked Bob what was his relationship to the Council. Was Bob the Council's employee or does he provide legal advice. Bob could argue to that effect but Lonnie's opinion was that, based on past cases, the Records Committee would not agree.

In further research, Bob found that under GRAMA, if the AG's office had categorized these documents as a record of a closed meeting, they might be protected. At that point, Mr. Berkovich wanted to challenge the legality of that closed meeting he could take us to district court and get a court order ordering that those records be reclassified as public. Lonnie indicated to Bob that in his response memo to the Board that Bob could raise this as a new issue since the government can reclassify records at any time. That maybe a better argument.

Bob asked the Council's guidance on whether to draft a response to Mr. Berkovich's memo and argue this before the state's Records Committee with the likely possibility that we would loose and Mr. Berkovich would prevail. Also, Bob indicated that he had discussed this matter with Steve Garside and Barry Huntington last week and they recommended convening the Council, that is why we are meeting today.

Steve Garside mentioned that he thought the Council was locked into the classification of the AG's office and was hoping they would have given us a little more flexibility. For example, the notes are not a completed product and not relied upon and could have been redacted. Steve asked the Council

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if they wanted to fight this or if they didn't care what was released.

Bob reviewed the contents of the 29 page memo. They are as follows:

- 1) Talks about Mr. Berkovich's employment status. That he was a non-merit employee.
- 2) There was a brief overview of the history between Mr. Berkovich and Marilyn.
 - a. Specific events included July 10, 2014. This was the incident that Bob personally witnessed where Mr. Berkovich blew up at Marilyn at the law school.
 - b. The affidavit from the UPC law clerk who was there at the time.
 - c. Summary of what happened after that.
 - d. Bob's conversation with Mr. Berkovich and Marilyn.
 - e. The investigation that was completed by the Attorney General's office.
- 3) Summary of Bob's conversation/counseling with Mr. Berkovich.
- 4) Summary of Bob's conversation with Jay Francis Valarga. He was the AG's employment law specialist at the time.
- 5) Summary of pages of information from Marilyn.
- 6) Summary of discussion with Mr. Berkovich in light of the meeting with Greg Ferbrache, Kris Knowlton, and Jay Francis.
- 7) Included an email Mr. Berkovich had sent to Mark Nash which was a very lengthy and unprofessional memo that included all of UPC staff and cc'd to Scott Reed.
- 8) Talked about how Mr. Berkovich disagrees about Bob's grammar.
- 9) Included the incident that happened at the 2015 October Training Committee meeting of which some of you were there and witnessed.
- 10) Subsequent meetings Bob had with Mr. Berkovich per #9.
 - a. Bob talked with Mr. Berkovich about the course of action to be taken.
 - b. The Council was going to meet per Steve Garside and Stephen Foote's recommendation.
 - c. Bob advised Mr. Berkovich that the Council would convene to discuss what happened. Ed was packing up his office as he anticipated being fired. Bob told him to wait until after the Council convened.
- 11) Bob again counseled with Jay Francis.
- 12) Summary of Bob's thoughts and comments.
- 13) Enclosures. They include the following:
 - a. Letter offer of employment. Status of an at-will employee, non-merit status.
 - b. Attachment are notes of the conversation between Bob and Mark Nash in July 2014.
 - c. Lengthy email Mr. Berkovich sent to Mark Nash.
 - d. Statement from Marilyn that she provided to Bob and the AG investigator summarizing what had happened between her and Mr. Berkovich.
 - e. Email between Mr. Berkovich, Marilyn and others.

These are the documents that Mr. Berkovich is requesting.

Steve stated that he wondered what Mr. Berkovich wanted to do with the documents and this was concerning. In a long conversation with Mr. Berkovich, Steve told him that he needed to let this go or it would canker his soul. Mr. Berkovich's response to Steve was that he was able to separate

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himself from it.

Scott Stephenson's question was clarified regarding losing this through attempting to reclassify it through the GRAMA statute as protected that it wouldn't work under the closed meeting because it was the documents provided to the council not the minutes of closed meeting.

Stephen Foote pointed out that attorney-client privilege would be between Jay Francis and who he counseled is protected. But the rest can come out. Steve Garside responded that because Mr. Berkovich was an at will employee and we didn't have to give him a basis for his termination. The only thing we have to do is give him a name clearing hearing and that has been done. The question is this going to give additional ammunition to bad mouth UPC and its staff. Bob anticipates that and Mr. Berkovich could take things out of context and exact vengeance on UPC and staff.

Rob Cosson asked what happens at the schedule hearing if the Council agrees to turn over all but the employment documents as far as taking away the forum from Mr. Berkovich. And if the employment parts are redacted, Mr. Berkovich may still argue for that and Bob might have to appear for that portion. As it appears, this may give him more of a forum. These are the last of the document as Mr. Berkovich has all the other documents.

Steve asked Council members if they wanted to review the package again.

It was indicated by Scott Stephenson and Jann Farris that if there is nothing in the documents of concern to release them.

Stephen Foote made the motion to release the information with the understanding that does not prevent us from reclassifying anything in the future. The motion was seconded by Scott Stephenson. No further questions or discussion. Voice vote included:

Stephen Foote - yay
Haley Christensen - yay
Scott Stephenson - yay
Steve Garside - yay
Robert Cosson - yay
Greg Ferbrach - abstain (AG's already made a finding.)

III. MEETING ADJOURN