

RECOMMENDATION OF THE EXECUTIVE COMMITTEE OF THE BLOOMINGTON
COMMON COUNCIL REGARDING A COMPLAINT FILED BY CLERK BOLDEN –
ADOPTED BY THE COMMON COUNCIL ON 11 DECEMBER 2019

STATEMENT OF THE COMMON COUNCIL

The City of Bloomington Common Council has investigated City Clerk Nicole Bolden's complaint against City Council Administrator/Attorney Dan Sherman, which stemmed from a Rules Committee Meeting that took place on August 5, 2019. Mr. Sherman expressed concern that the Rules Committee Meeting had not been properly noticed according to Indiana's open door laws. Ms. Bolden's office was responsible for posting the notice for the meeting. Ms. Bolden claimed that notice had been properly posted and that Mr. Sherman's behavior towards her in questioning the notice was disrespectful and rude. Ms. Bolden also stated that Mr. Sherman's behavior may have stemmed from a personal animus towards her related to her race, or for some other reason.

After receiving Ms. Bolden's complaint, the Common Council hired outside counsel to investigate two issues: 1) the truthfulness of Ms. Bolden's claim that notice was timely posted; and 2) whether Mr. Sherman had any animus based on race. The Common Council's outside counsel interviewed numerous witnesses, including Ms. Bolden and Mr. Sherman, reviewed emails, reviewed video, and reviewed photographs. After gathering all of this information, outside counsel for the Common Council prepared a written Investigation Summary, dated September 11, 2019. Based on the information collected through the investigation, it was determined that the evidence does not support Ms. Bolden's claim that the notice was timely posted on Thursday, August 1, 2019. The evidence also showed that Mr. Sherman was justified in his concern about the adequacy of the notice and acted to prevent the Rules Committee meeting from taking place in violation of Indiana open door law. The investigation also found that Mr. Sherman was not motivated by racial animus or any other prohibited discriminatory motive in questioning Ms. Bolden about the notice.

For purposes of transparency, the Common Council is making available to the public the section of the Investigation Summary titled, "Conclusions, Takeaways, and Suggested Next Steps," by placing this part of the Investigation Summary into the record. Finally, the Clerk is advised not to engage in any retaliation against Mr. Sherman.

By a motion, the Council approves this Statement and the action it requires.

**RELEASE OF “CONCLUSIONS, TAKEAWAYS, AND SUGGESTED NEXT STEPS”
SET FORTH IN THE INVESTIGATE SUMMARY**

Conclusions, Takeaways, and Suggested Next Steps

The Council engaged BME to investigate and make findings on two points. First, the Council wanted BME to ascertain whether notice was posted timely for the first Rules Committee meeting and establish what exactly happened between Bolden and Sherman from July 31st to August 5th, 2019. Second, the Council asked BME to investigate Sherman’s behavior, evaluate whether he acted out of bias or prejudice in questioning Bolden, and consider any potential legal ramifications of his actions, since he is a Council employee.

I. Findings Regarding the Posting of Notice

Bolden claims that she and her office prepared notice more than a week before it needed to be posted. There is no reason to dispute her claim, and Sherman said that Bolden may very well have created the notice posters early. Sherman inquired about notice the morning of July 31, 2019, and Bolden responded moments later, stating that she and her office would be posting notice for the Monday, August 5, 2019, Rules Committee meeting.

Sherman claims that he left a meeting the evening of Thursday, August 1, 2019, went to prepare packets for the following day, and noticed there was no notice posted on the Council office bulletin board for the August 5th Rules Committee meeting. Sherman said that he walked around the building to look for notice in other locations. Sherman’s cell phone pictures show that notice was not posted on Thursday evening, August 1st, prior to 8:04 p.m. in any of the five locations he checked. Sherman sent an email on August 1, 2019, at 8:47 p.m. to Bolden, Volan, Rollo, Piedmont-Smith, Sims, and Granger asking about the Rules Committee meeting and inquiring into whether it was still scheduled. In recalling the purpose of his email, Sherman explained that something was “amiss,” and he was concerned notice had not been posted. Sherman also explained that he was concerned about how the Clerk might react to his questions based on past interactions.

Volan responded in the early morning hours of August 2, 2019, to confirm the meeting was still scheduled and to discuss the goal of the first meeting. Volan followed up with two additional emails to provide the location and to tell Bolden that they should be sure to discuss whether the Rules Committee should be a standing committee.

Bolden responded hours later, at 6:47 a.m. on August 2, 2019, to discuss the standing committee portion of Volan’s email and to state “since we had already said we would do the notice[,] we did.” In her interview, Bolden stated that she saw the notices posted on Friday morning. She also stated that she spoke with Nico on Friday morning and asked him if he had posted the notices on Thursday, as required. Bolden said that Nico told her that he had posted them Thursday.

Bolden thinks that she may have been in the office early on Friday, August 2nd, to confirm that the notices were posted. She also thinks she may have sent the email confirming the notices were posted at 6:47 a.m. from her office, but she is not positive.

The video shows Nico posting papers on the upstairs bulletin boards on Friday, August 2, 2019, between 7:50 a.m. and 7:53 a.m. (presumably the notices for the Rules Committee meeting based on the locations and Sherman's pictures from August 2nd, showing that notice was now posted). The timing of the video and the content of the video leaves room for Nico to post papers in the Council office and the downstairs bulletin board at or around 7:50 a.m. on Friday morning, as well. Based on additional evidence, Nico failed to post anything in the atrium / main lobby stand at that time.

Given the video evidence, it is not likely Bolden saw notice posted by 6:47 a.m. on Friday, August 2nd, when she sent the email confirming that notice was posted. Moreover, Bolden said that she spoke with Sherman in her office between 8:30 and 9:00 a.m. to confirm that notice had been posted. Bolden claims that she only would have confirmed notice was posted in three locations (the two bulletin boards upstairs and the one downstairs—but not in the Council office or the atrium / main lobby stand). Bolden claims that Sherman's 9:03 a.m. email asking where notice was posted was therefore odd and passive-aggressive because the two had just discussed where notice was posted. Sherman disputes this claim because he said the conversation with Bolden did not happen until an hour or so later. Even then, Sherman said that Bolden had gauze in her mouth, that Bolden was not talking, and that Nico talked about the notice while Bolden simply nodded. According to Sherman, it was not clear from that conversation where Nico (and Bolden) claimed to have posted notice.

The video shows Bolden entering the building around 8:40 a.m. on Friday, August 2nd, immediately looking at the atrium / main lobby stand, entering her office, and Nico returning with a paper (presumably a notice) and putting it in the atrium / main lobby stand. In her interview, Bolden was clear that she did not leave the office that day and had nothing scheduled in the morning that caused her to leave the office and return later. This would make 8:40 a.m. the first time Bolden would have been in the building to look for the notices. That Bolden immediately checked the atrium / main lobby stand indicates that she likely looked for the notices upon entering. Because Nico had presumably done the other postings around 7:50 a.m., Bolden would have seen them posted in the other locations.

Sherman stated that he did not send the 9:03 a.m. email on August 2nd until after he spoke with Bolden. Sherman said that he sent that email from home and that he got to the office later, between then and 10:00 a.m. Sherman said that he spoke with Bolden and Nico about where notice was posted at that time but not before then. Sherman's timing fits the evidence better and makes sense of Bolden's 10:59 a.m. email saying, "[a]ssuming you sent this before we talked about where the notice was posted, Dan."

Additionally, Sherman took pictures of the notice being posted on August 2, 2019, after 10:00 a.m. If Sherman got into the office at or around the time he claimed and then talked with Nico and Bolden about notice, the timing of his cell phone images matches his claim that he walked around to take pictures to preserve the record. The bottom line is, Sherman's before and after cell phone images from August 1st and 2nd and the video evidence seem to corroborate Sherman's claim

that notice was not posted Thursday evening and was posted Friday morning before Sherman arrived. The evidence also indicates that notice was posted in four of the five locations roughly 50 minutes before Bolden arrived; that Bolden saw notice was not posted in the atrium / main lobby stand; and that Nico completed notice in that location after Bolden walked into her office.

Sherman's email from August 2nd at 6:00 p.m. matches his claim that he tried to clarify the conversation he had with Nico and Bolden about where notice was posted. Sherman's email was not answered, and his August 4, 2019, email at 8:12 p.m. went unanswered as well. Bolden said that she did not see those emails and was unaware of them until Volan texted her about the emails. Prompted by Volan and upon seeing the emails the morning of Monday, August 5, 2019, Bolden claims that she asked Nico about the postings again. Bolden said Nico confirmed again that the notice was timely posted on Thursday.

Bolden said that she relied on Nico to do the postings, asked him about the timing on a couple of occasions (Friday morning and Monday morning), and took his word that the notice was timely posted. The evidence, however, calls Bolden's complete reliance on Nico into question. Bolden immediately looked at the atrium / main lobby stand when she entered the building at approximately 8:40 a.m. on Friday, August 2, 2019; and Nico emerged to post a notice shortly after Bolden walked into her office. This evidence calls Bolden's lack of knowledge about notice into question, at least with respect to one of the locations.

Regarding the other locations, it is possible that Bolden asked Nico and trusted his claim that notice was made. It is also possible that Bolden contacted Nico after Sherman's 8:47 p.m. email on August 1, 2019, and that Nico then posted notice the following morning around 7:50 a.m. There is simply no evidence on what transpired between Sherman's Thursday night email and Nico's postings the next morning. Either way, it seems clear that notice was not posted to any location until Friday, August 2nd. Sherman's concerns about timely notice therefore appear justified.

II. Findings Regarding Potential Legal Ramifications

With respect to the second aspect of this investigation, the Council wanted BME to investigate whether its employee, Sherman, had engaged in racial discrimination or otherwise been motivated to act by racial bias. It is important to note up front, that there is no evidence to support a finding that Sherman was motivated by racial bias. Bolden herself could not say whether any alleged mistreatment she experienced from Sherman was based on her race, age, sex, or other characteristic/circumstance. In fact, Bolden was unsure if Sherman's demeanor toward her was simply Sherman being protective of his role or defensive of his office. She could not say one way or the other what drove Sherman. Further, she did not point to any specific incidents from her past interactions with Sherman to indicate that Sherman's stated motive was misleading and a mere cover for racial bias or prejudice regarding any other protected status.

In thinking through whether Sherman may have been motivated by race, Bolden offered only the claim that Sherman has little experience working with African-Americans and that

Sherman once singled out Council Member Sims for scrutiny over attendance. Sims did not corroborate Bolden's claim, however, and there is no evidence to suggest that Sherman's lack of work experience with African-Americans had any impact on his treatment of Bolden. Ultimately, Bolden admitted that she did not know Sherman's motivations and had no basis for believing Sherman was motivated by race or any other reason.

Sherman also gave a non-discriminatory explanation for his actions. Specifically, Sherman stated that he felt lied to by Bolden based on the Friday morning email she sent at 6:47 a.m. He also claimed that his past interactions with Bolden gave him pause about addressing her in person without witnesses. Because he had sent the emails over the weekend, Sherman believed Bolden had been provided with a way out of going forward with the meeting. When Bolden did not take that out and failed to respond all day Monday, Sherman decided to attend the meeting, use a conversation with witnesses present to protect himself, and stop the meeting so it would not violate Indiana law. Sherman said that he did not intend to show Bolden up and had no idea a member of the media would be present. In short, the evidence seems to indicate that Sherman and Bolden had a dispute over their roles, the influence of their respective offices over the Council, and that this incident was part of longstanding tension between them unrelated to race or any other protected status.

In terms of any potential legal claim that Bolden may allege as a result of this incident, racial discrimination in employment is a violation of Title VII of the Civil Rights Act of 1964, as amended. Similarly, public sector employees may assert a constitutional claim of racial discrimination that largely mirrors the elements and proof required in the Title VII context. For a claim of racial discrimination in employment under either theory, an applicant or employee is required to show that he or she received an adverse action affecting a condition of employment (e.g. hiring, pay, benefits, disciplinary action) and that the adverse action occurred because of the employee or applicant's race or skin color.

Typically, to demonstrate such a claim, the complainant must show that he or she is a member of a protected class, that he or she experienced an adverse action in employment, and that another employee (or several employees) who are not members of that protected class were similarly situated but did not experience the same adverse action. If a complainant can make out those prima facie elements, the employer can put forth a reason for why the complainant was treated in the manner he or she was treated. If the employer states a legitimate, non-discriminatory justification for the manner in which the complainant was treated, the burden passes to the complainant to present evidence that such a reason was merely a pretext for the underlying discrimination.

In addition to the above classic form of a discrimination claim, harassment based on race is also prohibited by Title VII and the equal protection clause of the Fourteenth Amendment and is a form of unlawful discrimination. Racial harassment is unwelcome conduct based on race (or other protected status) and is unlawful where (1) enduring the offensive conduct becomes a condition of continued employment, or (2) the conduct is severe and pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. Petty

annoyances and isolated incidents (unless very serious) generally will not rise to the level of illegality.¹

The allegations by Bolden here likely fail to make out a classic case of discrimination. First, while it was important to establish that Sherman was not engaging in racial discrimination as a representative of the Council, Bolden is an elected official, not an “employee” as defined by Title VII. This undercuts any argument to a claim of discrimination under Title VII before even considering the merits of what happened.

Second, even if Title VII was applicable (and in considering a potential Title VII claim alongside a potential constitutional claim under the equal protection clause), Sherman’s comments and interactions with Bolden do not affect a condition of Bolden’s working engagement with the City. Not only is it true that Sherman did not do or say anything that actually affected a condition of Bolden’s working engagement, but it arguably is unlikely that anything Sherman could do or say in the course of his public duties as a Council employee could affect Bolden’s position with the City because she works in and is the head official of an entirely separate office.

Third, and more to the point of the Council’s direct inquiry in this investigation, even if Sherman could affect Bolden’s employment, there is no evidence to support the notion that anything Sherman did or said on August 5, 2019, or anytime else, had anything to do with Bolden’s race. Rather, the evidence supports Sherman’s claim that he had legitimate questions about whether notice had been effectively provided and that he spoke up to prevent a meeting from occurring in violation of Indiana’s open door laws. As the Council’s Administrator/Attorney, it was within Sherman’s job description and responsibilities to look into the legality of the meeting and to act to prevent a violation of law. Not only did Sherman have a legal, non-discriminatory explanation for why he took the steps he did, the photographic as well as video evidence supports Sherman’s version of events—i.e., that notice was not posted in accordance with law and that the meeting was about to go forward absent Sherman’s intervention.

Fourth, Bolden was not able to offer any specific examples whereby Sherman treated a different City official, elected or otherwise, differently from how he treated Bolden. When given the opportunity to provide a similar situation with a different employee/official, Bolden generalized that Sherman got into disagreements with many personnel throughout the years, including personnel who are not African-American. However, if Bolden also got into disagreements with other personnel who are not African-American, this would contradict, not support, a claim of racial discrimination. While Bolden claimed that Sherman had resolved those other disagreements by apologizing in private (suggesting that he had or was treating her differently by his approach in this

¹ For a constitutional claim of unlawful racial harassment in this context, a complainant would also have to make additional showings, including a showing that the harasser acted under color of law and with discriminatory purpose or intent. Because the overlapping elements between a Title VII and equal protection clause claim are likely not satisfied here, these additional showings for any potential constitutional claim are not discussed.

matter), Bolden could not give the date, time, or details of any other specific disagreement, admitted that she was not present for any of those alleged conversations, and provided no substantiating evidence as to how they were resolved.

Without a specific instance to comment on, Sherman could not confirm, deny, or distinguish any allegation about other disputes with City employees/officials. Sherman did explain, however, that he had never been involved in a disagreement with another City official or employee where the main issue involved a potential lack of candor or erroneous representation of a fact by the other employee/official that could result in a violation of Indiana law and legal exposure for the Council. Bolden provided nothing to refute Sherman's claim about the unique situation presented on August 5, 2019.

As for a harassment-based race discrimination claim, because Bolden is not an employee, she does not have a Title VII claim on this potential theory either. Even if she was an employee, however, and in considering Title VII and/or an equal protection clause claim under this theory, Bolden still likely has not provided sufficient information to support harassment discrimination. First, Bolden could not provide any specific examples where she was subjected to offensive conduct by Sherman. Instead, Bolden stated that she was subjected to numerous types of micro-aggressions—incidents that she described as being enough to irritate her but which never were sufficient enough to trigger a formal complaint. By her own admission, then, Bolden said that she never experienced severe offensive conduct or any one instance sufficient to support a race based harassment claim by itself.

Second, because Bolden could not provide a single example of a micro-aggression that she actually experienced, the frequency of any such "irritants" is likewise unknown and questionable. Without severe and pervasive exposure to race based harassment, any potential claim in this vein lacks viability, and Bolden's own testimony creates doubt as to the severity and frequency of any mistreatment.

In short, based on the evidence and testimony, a claim of racial harassment or discrimination does not appear to have sufficient legal weight to be successful. Moreover, the evidence does not support a finding that Sherman discriminated against Bolden because of her race, and the evidence does not support a finding that Sherman was motivated by race or any other protected status in questioning Bolden about notice.

III. Next Steps

Aside from the above legal assessment, the fallout from the August 5, 2019, incident has created a scenario where Sherman wants an exoneration and Bolden wants a public apology. Those desired outcomes appear to be mutually exclusive and incapable of simultaneous implementation. As a consequence, the Council is left with a purely political decision regarding how it wants to handle Bolden's complaint because Bolden and Sherman cannot both get what they want.

Regarding Bolden, she is upset with how Sherman handled the notice issue, regardless of whether he was ultimately right. Bolden believes Sherman acted in a manner that exhibited potential race discrimination, brought her personal embarrassment, and drew negative attention to her office. Nevertheless, while Bolden felt personally disparaged, her complaint does not seem to carry much legal risk. That is, the facts fail to support a case for racial discrimination or harassment or even the appearance of racial prejudice or bias. Further the photographic and video evidence supports Sherman's claim that notice was not timely posted. Thus, Sherman acted to prevent a meeting from occurring that was not in accordance with the law, and Sherman acted within his job description to prevent the Rules Committee meeting from taking place.

Consequently, pressuring Sherman to provide a public apology for something where he was proven right likely would be unjustified. It may also create an inference that Sherman needed to apologize because Bolden's complaint about potential racism had credibility. That is, forcing a public apology may lead to the false impression that Sherman engaged in racial bias or prejudice. If the Council is intent on working to repair the relationship between Sherman and Bolden, it should avoid creating a false narrative that potentially harms Sherman's reputation.

Regarding Sherman's desired outcome, he is a 29-year employee of the Council with what appears to be a well-regarded record up through this complaint. Because the evidence does not support a finding that he acted out of racial bias or prejudice against Bolden but rather was proven justified in his concern over adequate notice, some level of exoneration makes sense. Because Sherman has his own attorney now who will be advocating on his behalf, the Council needs to consider how public or private Bolden's complaint was maintained and the potential ramifications of an exoneration matching that level of privacy or publicity. That is, if it is well-known what Sherman was actually accused of publically, a failure to clear his name of misconduct or wrongdoing may open the Council up to legal risk from the other direction. The Council should consider how publically or privately it needs to handle an acknowledgement (1) that Sherman was correct about the notice issue, (2) that Sherman pursued it as part of his job duties, and (3) that the evidence does not support that Sherman was motivated by racial animus or discrimination.

If the Council is considering a publically adopted resolution on this matter, it may want to know with certainty whether Bolden actually relied upon Nico's representations or if Bolden directed Nico to post notice with the knowledge that it had not been properly posted. Confronting Nico and/or Bolden with the video evidence seems like the most viable action for ferreting out the truth and seeing if Nico and Bolden provide the same explanation.

Whatever the Council ultimately decides, the formation of the Rules Committee and hashing out the roles of the Clerk and Administrator/Attorney clearly will be beneficial for the Council and the City in the short term and going forward.