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2014 MAR 11 PM 2:48

LYNN FAZZ
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YUMA ARIZONA 85364

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YUMA

ALAN L. KRIEGER, Mayor of City of
Yuma,

Plaintiff,

VS.

CITY OF YUMA, ARIZONA, and the
CITY COUNCIL OF YUMA, ARIZONA
Respondent.

CASE NO.: S1400CV2013-00102

FINDINGS AND ORDERS RE:
Respondent's Motion to Dismiss

This matter came before the Court for oral argument on March 10, 2014 on Respondent's Motion to Dismiss. The Plaintiff appeared with counsel, Joshua Carden. The Respondent was represented by counsel Eric Spencer and Adam Lang. The Court has considered the pleadings, argument of counsel and the applicable law.

ISSUE ONE: Is Resolution No. 2279 passed by the City Council enforceable?

THE COURT FINDS that the Resolution No. 2279 is enforceable and binding on the City Council. The City Charter defines City action in Section 6. "The City Council shall act by ordinance, resolution or verbal motion". Section 6 goes on to describe the steps necessary to have a Resolution become effective. The Charter also states that

1 Resolutions shall be admissible in evidence in any court in the State of Arizona ..." (See
2 Section 6 paragraph (k) of City Charter).

3 While a Resolution may not be an ordinance, it comes into effect by the same
4 official process. The Resolution adopted a policy that provides for defense and
5 indemnification for its elected officials, appointed officials and employees of the city. It
6 is unreasonable to believe that the City Council would adopt a Resolution in accordance
7 with the City Charter and then not expect to abide by it.
8

9 **ISSUE TWO: Do the attorneys fees incurred by Mayor Krieger fall within**
10 **the scope of the Resolution requiring the City Council to pay those fees.**

11 **THE COURT FINDS that the attorneys fees incurred by Mayor Krieger fall within**
12 **the scope of the Resolution.**

14 First, the Report of Special Counsel dated May 14, 2012, states that the
15 investigation was conducted based on allegations directed to the conduct of Mayor
16 Krieger in his capacity as Mayor of the City of Yuma. The Resolution specifically says
17 that the policy is for defense and indemnity pertaining to actual or alleged wrongful acts
18 by elected or appointed officials and employees of the city. The Mayor was an elected
19 official of city. He was alleged to have done wrongful acts in his capacity as Mayor.
20

21 The definition of a "wrongful act" in the Resolution is broad. Section E states in
22 pertinent part..."or any matter claimed against them by reason of their being or having
23 been officials or employees of the city".
24

25 Section 2 of the Resolution explains Defense and Indemnity. Again, the
26 Resolution is broad in its language. It states that the City shall defend any suit. It does
27 not specify law suit. In Section 3, under Exclusions, the Resolution uses the terms "any
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1 claim or suit". Based on the broad language, the Resolution is not limited to defending
2 a law suit.

3
4 The result of the investigation was a censure resolution against the Mayor.
5 Therefore, none of the Exclusions under Section 3 apply.

6 **ISSUE THREE: Is a Writ of Mandamus a proper claim and does the notice**
7 **of claim statute apply.**

8 THE COURT-FINDS that a Writ of Mandamus is proper and that the notice of
9 claim statute does not apply.

10
11 The Writ of Mandamus is proper pursuant to A.R.S. §12-2021. The City issued a
12 resolution which it refused to comply with. Mayor Krieger has an enforceable legal right
13 which the City created when the Resolution was enacted.

14 In, *Oak Creek Citizens Action Committee v. City of Oak Creek*, 304 Wis.2d 702
15 (2007), the Court held that the notice of claim statute did not apply to mandamus action
16 to compel the City to comply with a statute. The Court opined, "Mandamus is
17 generally regarded as not embraced within the statute of limitations applicable to
18 ordinary actions but is subject to the equitable doctrine of laches". *Id.* at 711.

19
20 Mayor Krieger was timely in request for reimbursement for his attorney's fees.
21 The City formerly began the investigation on February 1, 2012. The city ended the
22 investigation and adopted the censure resolution on May 14, 2012. Two months later,
23 Mayor Krieger sought to recover his attorney's fees by filing a Notice of Claim (July 6,
24 2012). The Mayor filed a Special Action on February 6, 2013.

25
26 The City claims that there was no notice in the July 6, 2012 Notice of Claim that
27 Mayor Krieger was asking for reimbursement pursuant to the Defense and Indemnity
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1 Resolution. That should not preclude him from enforcing the Resolution. The Petition
2 for Special Action filed on February 6, 2013 is based on the Resolution. The Petition for
3 Special Action was timely filed and therefore no prejudice to the Council exists. The
4 Mayor took affirmative action to recover his attorney's fees in a timely manner. A
5 change in legal strategy made prior to the filing of the lawsuit should not preclude him
6 from seeking relief.
7

8 The Court agrees with the Plaintiff's argument that the City knew of its
9 duty to provide indemnity and the cost of defense when it enacted the Resolution.
10 There should be no further requirement to present a notice of claim. This is not a claim
11 for damages because the duty involves payment of money.
12

13 **ISSUE FOUR: Did the City Council exceed its jurisdiction and authority by**
14 **censuring Mayor Krieger without providing due process.**

15 **THE COURT FINDS that the Mayor was entitled to due process before the City**
16 **Council can issue a censure resolution.**
17

18 The City Charter grants the City Council the authority to determine its own rules
19 of procedure and punish its members. See City Charter Section 5. Rules. However,
20 the City Charter does not provide the actual rules they must follow.

21 The City Charter grants the City Council the power to conduct investigations.
22 Included in the power to investigate is the ability to subpoena witnesses, administer
23 oaths, take testimony and require the production of evidence. These powers are judicial
24 in nature. It also states that, "Any person who fails or refuses to obey a lawful order
25 issued in the exercise of these powers by City Council shall be guilty of a misdemeanor.
26 See Charter Section 10. It necessarily follows that if the City Council is afforded the
27
28

1 aforementioned powers, they must also comply with due process before issuing a
2 punishment. The Charter would not make legal sense if it meant that a person can be
3 charged with a misdemeanor for not following the City Council's orders yet not be
4 afforded due process.

5 The act of censuring a member of the city council is within the punishment
6 powers of the City Council. Here, the City Council used its powers to punish which
7 could have resulted in further legal action against the mayor based on alleged violations
8 of federal and state law. The United States and Arizona constitutions require due
9 process, which includes adequate notice, the opportunity to be heard, or to refute the
10 evidence. The City Council failed to comply with these constitutional rights.

11
12
13 The City Council's argument that the censure was a legislative act because it
14 was accomplished through a resolution lacks merit. The fact remains that the
15 Resolution was strictly a punishment. Therefore, the Mayor should have been afforded
16 his due process rights.

17 **ISSUE FIVE: Is a Writ of Certiorari an appropriate claim?**

18
19 THE COURT FINDS that a Writ of Certiorari is an appropriate claim pursuant to
20 A.R.S. §12-2001.

21 The City Council was acting as a tribunal and exceeded its jurisdiction by
22 censuring the Mayor without providing him due process.

23
24 IT IS ORDERED that the Respondent's Motion to Dismiss is denied.

25 ORDERED this 11th day of March, 2014.

26 
27 LISA W. BLEICH
28 JUDGE OF SUPERIOR COURT PRO TEM/
 COMMISSIONER

1
2 Copies of the foregoing mailed this 11th day of
3 February 2014, to:

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12 LYNN FAZZ, CLERK OF THE SUPERIOR

13 By: ELIZABETH ALBARRAN
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