

MEMORANDUM

Defendant (hereinafter "Kysylyczyn") is the Mayor of the City of Roseville (hereinafter "the City"). He has been criminally charged with violating Minn. Stat. Sections 471.87 (Count I) and 609.43(2) (Count II), both gross misdemeanor offenses. Kysylyczyn moves for dismissal of these charges on the grounds that the Complaint lacks probable cause and that Section 609.43(2) is unconstitutionally vague as applied to this case. The State seeks a determination that the attorney-client privilege does not apply to conversations between the Roseville City Attorney and Kysylyczyn concerning the issue of whether Kysylyczyn should vote on the issue of paying a bill for legal services rendered to him in connection with an ethics complaint.

The following are the undisputed facts of this case. On or about March 26, 2001, a Roseville citizen filed an ethics complaint against Kysylyczyn which included allegations ranging from violations related to campaign contributions and lobbying activities at the state capitol to ordinance violations relating to property owned personally by Kysylyczyn. The Roseville City Council hires/appoints a part-time city attorney who is responsible for the legal affairs of the City. Joel Jamnik, Esq., was engaged as Roseville's City Attorney during the relevant period of time. Mr. Jamnik served as legal counsel for the Roseville Ethics Commission during the investigation of the ethics complaint filed against Kysylyczyn. Kysylyczyn hired Keith A. Niemi, Esq., (hereinafter "Niemi") to represent him in connection with the ethics complaint. On or about December 26, 2001, Niemi submitted his bill to Neal Beets, Roseville City Manager, for fees incurred in defending Kysylyczyn. On June 17, 2002, the issue of payment of Niemi's bill was placed on the Roseville City Council's consent agenda under the category "Purchases and/or Contracts Exceeding \$5,000." At the regular meeting of Roseville's City Council on June 17, 2002, one Council member told Kysylyczyn that he should not vote on

the issue of payment of Niemi's bill due to a potential conflict of interest. In his official capacity as Mayor, Kysylyczyn did vote on the issue of payment of Niemi's bill. Niemi's bill was paid by the City of Roseville.

The Complaint in this matter essentially alleges that Kysylyczyn took part in a decision to pay Niemi's invoice for legal services provided to him, that Kysylyczyn had a personal financial interest in the payment of the invoice as the individual who incurred the legal expense, that Kysylyczyn was advised by more than one person that he should not vote on the issue of paying Niemi's invoice because of a potential conflict of interest and that Kysylyczyn voted to pay the invoice, knowing it was forbidden by law to be done in his capacity as a public officer.

Count I of the Complaint charges Kysylyczyn with violating Minn. Stat. Section 471.87, which provides:

"Public officers; interest in contract; penalty

Except as authorized in Section 471.88, a public officer who is authorized to take part in any manner in making any sale, lease, or contract in official capacity shall not voluntarily have a personal financial interest in that sale, lease, or contract or personally benefit financially therefrom. Every public officer who violates this provision is guilty of a gross misdemeanor."

The defense asserts that Section 471.87 does not apply to the facts of this case because there was no contract with the City in which Kysylyczyn had an interest. The State asserts that Kysylyczyn's contract with Niemi for legal services was ratified by the City when the City Council voted to pay Niemi's invoice and that Kysylyczyn's vote on that issue violated this law.

Section 471.87 precludes certain public officers from having an interest in or benefiting from a government sale, lease or contract. Op. Atty. Gen. 59A-32 (1978 WL 34124 (Minn. A.G.)) See also, Town of Martinsburg v. Butler, 112 Minn. 1, 127 N.W. 420 (1910); Stone v. Bevans, 88 Minn. 127, 92 N.W. 520 (1902). The criminal provisions of Section 471.87 apply only where an

officer has a prohibited financial interest in a contract with his municipality or other relevant governmental unit. Op. Atty. Gen. 90a-1 (April 22, 1971). Where a disqualifying interest is present, the contract, sale or lease would not be allowed under this statutory section whether the interested public officer votes on the issue or not. Op. Atty. Gen. 90a (Dec. 29, 1958); Op. Atty. Gen. 90-E-5 (Feb. 25, 1954). The legislative intent of Section 471.87 being to prohibit public officials from having an interest in or benefiting from contracts with governmental units is evidenced by the exceptions to this prohibition under Section 471.88.

The elements necessary to constitute a violation under Section 471.87 are : 1) That the offender be a public officer who is authorized to take part in making a contract in his/her official capacity; and, 2) that the official voluntarily have a personal interest in such contract or personally benefit financially therefrom. Op. Atty. Gen. 90-c-5 (Jan. 15, 1960). The prohibitions of this statute are operative only when all of the elements are present. Op. Atty. Gen. 59-a-32 (1978 WL 34124 (Minn. A.G.))

The precise issue to be determined, then, is whether Kysylyczyn had a prohibited financial interest in a contract with the City. If a contract with the City did not exist, Section 471.87 does not apply.

Kysylyczyn engaged Niemi to represent him in connection with the ethics complaint lodged against him. The Complaint does not allege, nor do the State's investigative reports include, any facts to the effect that the City ever intended to hire an attorney to represent Kysylyczyn in connection with the ethics complaint. Niemi's bill for legal services rendered to Kysylyczyn was submitted to the City under Minn. Stat. Section 465.76 (see Niemi letter to City Manager dated April 19, 2002). Subdivision 1 of that section provides:

"If lawfully doing duty. If reimbursement is requested by the officer or employee, the governing body of a home rule charter or statutory city, a

town or a county may, after consultation with its legal counsel, reimburse the city, town or county officer or employee for any costs and reasonable attorney fees incurred by the person to defend charges of a criminal nature brought against the person that arose out of the reasonable and lawful performance of duties for the city, town or county.”

Submission of Niemi’s bill under the above-referenced statutory section did not transform the contract between Kysylyczyn and Niemi into one between the City and Niemi. The mere fact that Niemi’s bill was included on the City’s consent agenda under “Purchases and/or Contracts Exceeding \$5,000” does not lead to the conclusion that the need to approve payment of the bill because of its amount made it a “contract” to be approved by the City. This is particularly true considering that other items, such as charitable contributions by the City, have been included under the same category. See Exhibit F attached to Defendant’s Memorandum of Law in Support of Motion to Dismiss Counts I and II. There are simply no facts, alleged or otherwise, to suggest that the City Council, Kysylyczyn or Niemi contemplated that the approval of payment of Niemi’s bill would create a contract with the City. Though Niemi’s letter to the City Manager refers to Kysylyczyn acting in his official capacity when the ethics complaint was filed, such a reference does not mean that Kysylyczyn contracted with Niemi in his “official capacity.”

Additionally, to conclude that the submission of Niemi’s bill and the Council’s approval for its payment under these circumstances created a contract with the City would also require the conclusion that reimbursement under Section 465.76 would be prohibited and potentially make other Council members subject to criminal charges. In other words, if the Council’s vote to pay Niemi’s bill created a contract with the City, Kysylyczyn would obviously have a prohibited interest in that contract because payment of Niemi’s bill would benefit him personally. The contract would be illegal under Section 471.87 whether Kysylyczyn voted on the issue or not. And if a prohibited contract existed under these circumstances, the Council members who knowingly authorized the

illegal contract could be subject to the criminal penalties of Minn. Stat. Section 609.43. Op. Atty. Gen. 90a-1 (April 22, 1971). This analysis is not intended to suggest that the City had any obligation to pay Kysylyczyn's attorney's fees and costs under Section 465.76 or any other law. The only issue to be decided here is whether probable cause exists to support the criminal complaint.

The Complaint and attachments thereto, as well as the State's arguments, clearly reflect the basis of the criminal charge under Section 471.87 to be Kysylyczyn's vote to pay Niemi's bill. It is, at a minimum, difficult to construe Kysylyczyn's vote as anything but in conflict with his duty as a public officer to refrain from acting on a matter in which he had a direct personal interest. Where a contract does not exist, a public official may be disqualified from participating in proceedings where his own financial interests or benefit are evident and participation by such an interested member may be cause for invalidation of the action and/or recovery of monies paid. Op. Atty. Gen. 59A-32 (1978 WL 34124 (Minn. A.G.)); see also, E.T.O., Inc v. Town of Marion, 375 N.W.2d 815 (Minn. 1985); Lenz v. Coon Creek Watershed Dist., 278 Minn. 1, 153 N.W.2d 209 (1967).

Under the undisputed facts of this case, Kysylyczyn had a direct interest in the payment of Niemi's bill and his action in voting to pay that bill can reasonably be described as a conflict of interest. Though his vote in this matter may form the basis for invalidation of the Council's action and/or the recovery of monies paid, Kysylyczyn's vote cannot support a criminal charge under Section 471.87 because a prohibited contract with the City did not exist.

Count II of the Complaint charges Kysylyczyn with violation of Minn. Stat. Section 609.43(2), which provides:

"A public officer or employee who does any of the following, for which no other sentence is specifically provided by law, may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both:

(2) In the capacity of such officer or employee, does an act knowing it is in excess of lawful authority or knowing it is forbidden by law to be done in that capacity;

.....”

Criminal statutes are to be strictly construed in favor of defendants and all reasonable doubt concerning legislative intent should be resolved in their favor. State v. Haas, 280 Minn. 197, 159 N.W.2d 118 (1968). An act will come within the confines of Section 609.43(2) if the act is done by a public officer or employee, the act is committed while the defendant is acting in his official capacity as a public officer or employee, and the act is either forbidden by law or in excess of his lawful authority. State v. Ford, 377 N.W.2d 62, 76 (Minn. App. 1985). This statute is “not a model of clarity” and does not “define what ‘law’ must forbid the act, e.g., civil, criminal, administrative, school internal regulations, etc.” Id. at 66. “Lawful authority” under Section 609.43(2) is determined by statutes that define or describe a public official’s authority. State v. Serstock, 402 N.W.2d 514, 517 (Minn. 1987).

The Complaint alleges that Kysylyczyn knew his act of voting to pay Niemi’s invoice was “forbidden by law.” Presumably, the State initially relied on Minn. Stat. Section 471.87 as the law forbidding the act. Having determined that Section 471.87 does not apply to the facts of this case, the prohibitions of that statute cannot support Count II. No other law is cited by the State as establishing that Kysylyczyn’s vote was forbidden by law and this Court has been unable to identify any law that defines Kysylyczyn’s act as one that would give rise to criminal culpability. Though the State asserts that Kysylyczyn was advised of the potential conflict of interest by others, such advice is insufficient to support a criminal charge where the particular act is not otherwise defined and/or identified as being unlawful.

Though the Complaint does not allege that Kysylyczyn acted in excess of his "lawful authority," the State now asserts that Kysylyczyn did exceed his lawful authority by failing to comply with Minn. Stat. Section 10A.07.

Section 10A.07 requires elected and appointed public and local officials of metropolitan cities with populations over 50,000 to disclose certain information if they will be involved in a decision that might affect their financial interests. Kysylyczyn is not a "public official" as defined by Minn. Stat. Section 10A.01, Subdivision 35, and he is not a "local official" appointed by or elected to a "metropolitan governmental unit" as defined by Section 10A.01, Subdivisions 22 and 24, because Roseville is not a city with a population over 50,000. See Census attached. Section 10A.07 does not apply to Kysylyczyn and cannot, then, serve as the statute that defines or describes his authority.

There is insufficient probable cause to support the Complaint. Counts I and II must be dismissed.

As both Counts of the Complaint are dismissed, it is unnecessary to address the issue of attorney-client privilege.

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