

CITY OF ASHLAND

DRAFT MINUTES FOR THE REGULAR MEETING ASHLAND CITY COUNCIL

Tuesday, August 6, 2019

Council Chambers

1175 E. Main Street

Note: Items on the Agenda not considered due to time constraints are automatically continued to the next regularly scheduled Council meeting [AMC 2.04.030.E.]

6:30 p.m. Executive Session*

*The Ashland City Council will hold an executive session to conduct deliberations with persons designated by the governing body to carry on labor negotiations, pursuant to ORS 192.660(2)(d).

The Executive Session was adjourned at 6:50 PM.

7:00 p.m. Regular Meeting

I. CALL TO ORDER

Mayor Stromberg called the Business Meeting to order at 7:00 PM

II. PLEDGE OF ALLEGIANCE

III. ROLL CALL

Councilors' Slattery, Graham, Akins, Seffinger and Jensen were present. Councilor Rosenthal was absent.

IV. MAYOR'S ANNOUNCEMENTS

Mayor Stromberg announced the current Commission and Committee vacancies.

Mayor Stromberg announced that there will be no public input on Item XII. Item number 2.

V. CITY ADMINISTRATOR REPORT

None.

VI. APPROVAL OF MINUTES

1. Study Session of July 15, 2019
2. Business Meeting of July 16, 2019

Jensen/Slattery moved to approve the minutes. Discussion: None. All Ayes. Motion passed unanimously.

VII. SPECIAL PRESENTATIONS & AWARDS

1. Hiroshima and Nagasaki Day Proclamation

Jensen read the Proclamation into the record (*see attached*).

VIII. MINUTES OF BOARDS, COMMISSIONS, AND COMMITTEES

[Airport](#)

[Conservation](#)

[Forest Lands](#)

[Historic](#)

[Housing and Human Svcs.](#)

[Parks & Recreation](#)

[Planning](#)

[Public Arts](#)

[Transportation](#)

[Tree](#)

[Wildfire Mitigation](#)

- IX. PUBLIC FORUM** Business from the audience not included on the agenda.
(Total time allowed for Public Forum is 15 minutes. The Mayor will set time limits to enable all people wishing to speak to complete their testimony.) [*15 minutes maximum*]

Lynn Georgens – Ashland – Spoke regarding 5G in Ashland. She explained that there are over 200 members in Ashland that are part of the group. She gave updates to the latest things happening regarding this issue. The Group Oregon for Safe Technology is promoting awareness of the existing technology for safe practices. She spoke that good research is coming out now about current and new technology. More powerful so we can have smart homes and smart cars and faster video download speeds. She announced that there are 2 events coming up one on the internet and one in Santa Cruz, CA.

Sue Wilson – Ashland – She spoke regarding Ashland losing its nature regarding a whistle blowing case. She explained that the cost was high and being paid by tax payers. She questioned why citizens were not more informed. She spoke that Ashland lead employees are highly paid, the tax payers have a right to expect the employees understand and follow employment laws. She spoke that Staff should protect the whistle blower. She questioned what will be done to ensure this does not happen again. She spoke that whistle blowing should be something done without retaliation. She handed out a letter for the record (*see attached*).

Huelz Gutcheon – Ashland – Spoke regarding energy efficiency. He spoke to the importance of Ashland getting with the times with how buildings are being built. He spoke to the importance of not having autonomous homes.

Dr. Carol Voisin – Ashland – Thanked Susan Wilson for bringing up the whistle blower. She spoke regarding the content of the letter that Mr. Smeenk sent to the City. She spoke in concern of the site selection of the water treatment plant. She submitted a letter into the record (*see attached*).

X. CONSENT AGENDA

1. Sole Source Procurement for Body Cameras and Conducted Energy Weapons

Slattery pulled this item.

Public Input

Amiko – Gabriel Blue – Spoke regarding the Ashland Police Department Policy Manual. She spoke that Ordinance 3176 is problematic. Mayor Stromberg explained she was in violation of Council Rules and asked her to stop speaking.

Council went into recess.

Chief Tighe O’Meara spoke that if anyone thinks the APD Policies need updating he is welcome to discuss this.

2. Approval of Liquor License Request for Mary’s BBQ Place, LLC.
3. “Revitalize Downtown Ashland” Transportation and Growth Management Citizen Advisory Committee Appointments

Seffinger pulled this item. She questioned if there will be a person on the committee that is specifically looking at age friendly issues such as loading zones.

Public Works Director Paula Brown gave a Staff report. She explained that Jackie Bachman will part of the Committee to look at senior issues.

4. Appointment of Patricia Herdklotz to the Airport Commission
5. Appointment of James Wickre and Laurence Parker as Ashland Municipal Court Judge Pro tempore

Akins pulled this item.

Council directed Staff to bring back this item with more information on the candidates.

6. Resolution No. 2019-25; a Resolution Supporting the U.S. Congress Carbon Act

Slattery/Jensen moved approval of items 1, 2, 3, 4 and 6 of the Consent Agenda. Discussion: None. All Ayes. Motion passed unanimously.

XI. PUBLIC HEARINGS (Persons wishing to speak are to submit a “speaker request form” prior to the commencement of the public hearing. Public hearings shall conclude at 9:00 p.m. and be continued to a future date to be set by the Council, unless the Council, by a two-thirds vote of those present, extends the hearing(s) until up to 10:30 p.m. at which time the Council shall set a date for continuance and shall proceed with the balance of the agenda.)

XII. UNFINISHED BUSINESS

1. National Citizens’ Survey Add-Ons and Custom Questions

Madding gave a Staff report.

Council directed Staff to send out an email doodle to poll Council on the questions. Madding suggested that if Council has additions to send them to Staff.

2. Second Reading of Ordinance 3176 Relating to Public Safety; Adding New Ashland Municipal Code Chapter 10.58**

****Public Testimony will not be allowed on this matter.**

City Attorney David Lohman explained how to proceed with this topic after the last meeting. He handed out a memo addressing questions of concern (*see attached*).

Lohman explained that at the last business meeting each Councilor spoke in deliberation but Seffinger was cut off. He spoke that Council can continue where they left off. The motion on the floor was **“Rosenthal/Jensen moved to approve Second Reading of Ordinance No. 3176”**.

Council decided to continue where they left off.

Seffinger continued with her deliberation stating the importance of safety. She explained this Ordinance is not meant to punish or harm any group. She explained that this Ordinance will sunset in one year and if people are concerned please bring the issues to Council.

Slattery/Graham moved to amend the motion section 1-A of Ord 3176. A. It shall be unlawful for a

person to knowingly fail to provide the person's name and date of birth to a peace officer when the peace officer is issuing the person a citation for a violation as used in this Chapter, "violation" means an offense described in ORS 153.008. Discussion: Slattery explained that this would remove the term "probable cause". He spoke that this is not to hurt people it is for safety. Graham agreed with Slattery. She explained that this will be looked at carefully in the next year. She spoke that she understands the real fear in this room and it is justified given what is going on in our Country. She spoke that she will support this motion in the hope that it will become clear to our citizens it is for safety and; that both officers will have the tools they need and citizens' rights are protected. She thanked Chief O'Meara for the work that has been done. Akins spoke in appreciation of the word change. She spoke she will vote no on this because it doesn't meet burden of proof that this is necessary to pass this Ordinance. She spoke that there is no hurry to pass this Ordinance and suggested talking with experts regarding how it is written. **Roll Call Vote: Slattery, Graham, Seffinger, Jensen: YES. Akins: NO. Motion passed 4-1.**

Roll Call Vote to the main motion: Seffinger, Graham, Slattery and Jensen: YES. Akins: NO. Motion passed 4-1.

Slattery asked APD and Staff if they would be willing to have make a connection with the citizens' when APD comes with quarterly updates regarding Ordinance 3176. He suggested Council invite community members to sit up on the dais with Council to discuss and answer questions. Madding responded yes.

XIII. NEW AND MISCELLANEOUS BUSINESS

1. Staff Budget Presentation Discussion

Madding gave a Staff report.

Graham spoke to reasons why she suggested the City develop a budget presentation for the Community. She spoke to the importance of discussing the challenges that the City faces and creative solutions to fix the problems. Council spoke to the importance of this presentation.

Graham/Slattery moved to direct the City Administrator to proceed with a 2019-2021 biennial budget public presentation. 5-0

2. City Administrator Evaluation

Madding gave a Staff report. She spoke that a survey will be sent out to Council tomorrow. She spoke that the surveys will be sent to Human Resources Director Tina Gray by August 12th. Gray will then prepare a report to give to all at the Executive Session on August 19th. Madding explained she will give a recap of what she has accomplished and goals of hers for the City and City Council.

XIV. ORDINANCES, RESOLUTIONS AND CONTRACTS

1. Second Reading of Ordinance 3177 Amending AMC CH 2.18 Conservation Commission to the Conservation and Climate Outreach Commission and Ordinance No. 3178 Creating the Climate Policy Commission; Adding a New AMC CH 2.27

Assistant City Administrator Adam Hanks gave a Staff report.

Graham/Slattery to amend the purpose, membership, powers and duties of the Conservation

Commission and to re-name the Commission as the Conservation and Climate Outreach Commission with the approval of Second Reading of Ordinance 3177 as presented. Discussion: None. **Roll Call Vote: Akins, Seffinger, Jensen, Slattery and Graham: YES. Motion passed unanimously.**

Graham/Seffinger moved to create the Climate Policy Advisory Commission with the approval of Second Reading of Ordinance 3178 with the following change from First Reading:

Deletion of the last full sentence on page 1 (lines 30 and 31) and replacing it with the following insertion: Either the Mayor or one (1) City Councilor shall serve on the Commission as a voting member and, upon appointment by the Mayor and confirmation by the City Council, may serve as the initial Chair. One (1) City staff person shall serve on the Commission as a non-voting, ex-officio member.” Correction – page 2 line 1 – include 2 student members Ashland school district or university.

Graham read the below changes into the record:

“2.27.010 Establishment; Membership There is hereby established a Climate Policy Commission for the City of Ashland. The Climate Policy Commission shall reflect and represent a wide range of community interests and perspectives. Such interests shall include, but not be limited to, environmental, energy efficiency, renewable energy, academic, business, low income, health, communities of color, and elderly interests. The Climate Policy Commission shall consist of nine (9) voting members and (2) who are 35 years old or younger at the time of appointment. Eight (8) of the members shall reside within the City, and one (1) member may be an at-large member living within the City’s urban growth boundary. Either the Mayor or one (1) City Councilor shall serve on the Commission as a voting, non-ex-officio member and, upon appointment by the Mayor and confirmation by the City Council, may serve as Chair. One (1) City Staff person shall serve on the Commission as a non-voting, ex-officio member. The Commission may optionally include two (2) student members representing the Ashland School District or a college or University. Student members under the age of 18 shall serve as non-voting, ex-officio members. Both voting and ex-officio members shall be appointed by the Mayor with confirmation by the City Council. The primary staff liaison shall be appointed by the City Administrator and shall serve as the secretary of the Commission”.

Discussion: Akins questioned why a college or university and if it had to be local. Council decided to change the wording to read “Ashland School District or University”. **Roll Call Vote: Slattery, Jensen, Akins, Seffinger and Graham: YES. Motion passed unanimously.**

2. Appointments to the Climate Policy Advisory Commission

Hanks gave a Staff report. Slattery spoke to the importance of attendance to these meetings.

Slattery/Jensen moved to confirm the Mayor’s appointments to the Climate Policy Advisory Commission. Discussion: None. **Roll Call Vote: Jensen, Seffinger, Akins, Graham and Slattery: YES. Motion passed unanimously.**

3. First Reading of Ordinance 3180 Relating to the Rules of the City Council; Amending AMC 2.04.100

Public Input

Cate Hartzell – Ashland – Spoke regarding the Municipal Code. She spoke to the importance of establishing and maintaining ethical boundaries of power.

Madding gave a Staff report.

Jensen/Slattery moved to approve first reading of Ordinance 3180, an Ordinance relating to the rules of the City Council; amending AMC 2.04.100, allowing the Mayor to propose and the City Council to approve the appointment of a Council Liaison to act in a voting capacity and/or as the Chair to City Advisory Boards and Commissions. and Commissions.

Discussion: Jensen spoke in support of the motion and explained this isn't something that would be used often. Graham spoke to the fundamental differences between ad-hoc committees and other Commissions or Committees. She spoke that it is helpful for a Councilor to be in the chair position at the beginning to get the Commission up and running. Seffinger spoke in concern of having the wording to include City Commissions.

Seffinger/Akins moved to amend the motion to approve first reading of Ordinance 3180, an Ordinance relating to the rules of the City Council; amending AMC 2.04.100, allowing the Mayor to propose and the City Council to approve the appointment of a Council Liaison to act in a voting capacity and/or as the Chair to City Advisory Boards and/or ad-hoc groups. Discussion: Seffinger spoke that it would benefit not having a Councilor be a Chair of a Commission. Akins agreed with Seffinger. Slattery questioned if this change would impact Ordinance 3178. Lohman answered no and explained when you create a Committee you can have different wording specifying the liaison roles. **Roll Call Vote: Slattery, Graham, Akins, Seffinger and Jensen: YES. Motion passed unanimously.**

4. Resolution No. 2019-24; a Resolution Approving the Scope of Work and the Timeline for the Cost Review Ad hoc Committee

Madding gave a brief Staff report. She explained that she will bring this back to Council no later than February 4th.

Slattery explained that the Committee will be looking at the General Fund 90% and 10% looking at other issues specifically.

Jensen/Graham moved to approve Resolution No. 2019-24 setting the work program and timeline for the Cost Review Ad Hoc Committee. Discussion: Graham spoke to the importance of getting this done. **Roll Call Vote: Jensen, Seffinger, Akins, Graham and Slattery: YES. Motion passed unanimously.**

5. Appointment of the Cost Review Ad Hoc Committee

Akins questioned how it was determined who was appointed to this committee. Slattery explained that him and Seffinger contacted Councilors and appointed Budget Committee members to see who would like to serve on the committee. He spoke that Mark Welch also gave interest to serve on the committee. Akins spoke that she would like to be on the committee.

Slattery explained that there will be 2 meetings a month beginning in September.

Slattery/Seffinger moved to approve the Cost Review Ad Hoc Committee appointments as listed with additions of Councilor Julie Akins, citizen Mark Welch and one other person to be determined when the budget seat is appointed. Discussion: Slattery spoke that he is ready to work. Seffinger spoke to the importance of letting the community know the committee is looking at the spending. **Roll Call**

Vote: Akins, Slattery, Graham, Seffinger and Jensen: YES. Motion passed unanimously.

XV. OTHER BUSINESS FROM COUNCIL MEMBERS/REPORTS FROM COUNCIL LIAISONS

Slattery suggested for Staff to bring forward a stop measure that when Business Meetings get to the 10:30 PM hard stop and Council is in the middle of deliberations allow to extend the meeting 15 minutes to call the question.

XVI. ADJOURNMENT OF BUSINESS MEETING

The Business Meeting was adjourned at 9:35 PM

Respectfully submitted by:

City Recorder Melissa Huhtala

Attest:

Mayor Stromberg

In compliance with the Americans with Disabilities Act, if you need special assistance to participate in this meeting, please contact the City Administrator's office at (541) 488-6002 (TTY phone number 1-800-735-2900). Notification 72 hours prior to the meeting will enable the City to make reasonable arrangements to ensure accessibility to the meeting (28 CFR 35.102-35.104 ADA Title I).

PROCLAMATION

- Nuclear weapons are the most devastating weapons ever created by humankind, posing an intolerable risk to human survival. The threat of their use is increasing.
- Ashland's public commitment to end the threat of nuclear catastrophe dates to 1982, when its citizens passed a ballot measure declaring the city a Nuclear Free Zone.
- Ashland became a Mayors for Peace city in 1998, responding to a global invitation from the mayors of Hiroshima and Nagasaki to work for the abolition of nuclear weapons. There are currently 7,772 Mayors for Peace cities in 163 nations and regions, including 215 in the U.S. and 7 in Oregon.
- Mayors for Peace enthusiastically supports the new Treaty on the Prohibition of Nuclear Weapons, adopted in July 2017 under United Nations auspices. It will enter into force when it has been ratified by 50 states parties.
- In June 2019, the Oregon Legislature passed Senate Joint Memorial 5, calling on the President and Congress to lead global efforts to reduce the threat of nuclear war.
- Also in June 2019, the U.S. Conference of Mayors adopted its 15th consecutive annual resolution urging the President and Congress to provide leadership to prevent nuclear war and enter into negotiation to eliminate nuclear weapons.
- During August 6 through August 9, concerned citizens from civic organizations and faith communities in Ashland and the Rogue Valley will commemorate the atomic bombings of Hiroshima and Nagasaki, educate each other on new developments, and renew their commitment that such weapons should never be used again.

NOW THEREFORE, THE City Council and Mayor, on behalf of the citizens of Ashland, hereby proclaim August 6, 2019, as:

"Hiroshima Day"

and hereby proclaim August 9, 2019, as:

"Nagasaki Day"

in the city of Ashland, and invite all citizens to participate in the Hiroshima - Nagasaki Vigil activities.

Signed this ___ day of _____, 2019

John Stromberg, Mayor

Melissa Huhtala, City Recorder

Ashland City Council Meeting - August 6, 2019
Public Forum Input
includes attachment of 10-page 7/24/19 court opinion and order

Sue Wilson
Ashland, Oregon

Ashland recently lost a major whistleblowing case. This failure resulted in liabilities of over \$625,000 for damages and attorney's fees not including its own legal costs funded through a regional government insurance coverage that ends up being paid by taxpayers. The case showed multiple retaliatory acts by city staff for whistleblowing type complaints going back to 2010. The case also showed that the whistleblower's action initiated changes that resulted in hundreds of thousand of dollars in savings to the city for engineering projects.

The whistleblower was the only licensed engineer in the Public Works Department at the time. He had oversight responsibility for all projects. Why was he not kept informed about this project? When he came forward with valid concerns, what were the motivations to punish him?

Instead of acknowledging its wrongdoing the city applied the full force of its legal staff. Not once did the city try to settle the case. And at the trial it was evident that a "pile-on" legal strategy was used in a failed attempt to discredit the whistleblower.

The jury unanimously found the city violated the Whistleblower law and awarded maximum monetary compensation for damages to the whistleblower.

Ashland lead employees are highly paid ... having salaries and benefits totaling well over \$100,000. The taxpayers have a right to expect that these employees understand and follow employment laws. The following people could have and should have protected the whistleblower and saved the taxpayers from paying for their mistakes.

the Human Resource Director,
the City Attorney,
the current and past Public Works Directors,
the Deputy Public Works Director, and
the Public Works Superintendent

Why are these employees still employed by Ashland? What's the plan to ensure this does not happen again?

Ashland should put into practice its policies for whistleblowing to be consistent with our Governor's approach for transparency and encouragement of employees to come forward without fear of retaliation.

There's opportunity to change this combative culture through the current City Administrator if she had more support in that effort ... and with a changed mindset in the city council to pursue it.

Mr. Mayor in your leadership role it's your responsibility to do due diligence, take necessary actions and change the punitive culture.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
MEDFORD DIVISION

PIETER SMEENK,

Case No. 1:17-cv-01466-CL

Plaintiff,

v.

OPINION & ORDER

MICHAEL FAUGHT, and THE CITY OF
ASHLAND,

Defendants.

CLARKE, Magistrate Judge.

This case comes before the Court on Defendant's Renewed Motion for Judgment as a Matter of Law (#123) pursuant to Fed. R. Civ. Pro. 50(b). For the reasons set forth below, Defendant's motion is DENIED.

BACKGROUND

Plaintiff Pieter Smeenk was a licensed engineer on staff at the City of Ashland's Public Works Department for several years. Plaintiff filed this action on September 18, 2017, alleging

violations of free speech rights under 42 U.S.C. § 1983, retaliation for engaging in whistleblower activity under ORS 659A.203, and common law wrongful termination (#1). Prior to trial, the Court found that Defendant was entitled to summary judgment on the issue of common law wrongful discharge, and Plaintiff later voluntarily dismissed his free speech claim. Therefore, the only claim presented to the jury at trial was Plaintiff's whistleblower retaliation claim. For his whistleblower retaliation claim, Plaintiff sought \$259,637 in economic damages, calculated from the time he was terminated in 2017 until he obtained other employment.

Defendant moved for judgment as a matter of law under Fed. R. Civ. P. 50(a) both orally and in writing on the basis that Plaintiff had not presented sufficient evidence to establish protected whistleblowing activity under ORS 659A.203. Both motions were denied by this Court. On March 21, 2019, the jury rendered a verdict in Plaintiff's favor in the amount of \$259,637 for economic damages (#116). Judgment was entered on the verdict on March 26, 2019 (#118). Defendant now moves for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b).

Throughout this litigation, Plaintiff presented three instances of alleged protected activity that resulted in retaliation, with the first two instances occurring in 2010 and 2015, and the last instance occurring in 2017. On summary judgment, the Court held that Plaintiff's first two alleged instances of retaliation were barred by the applicable statute of limitations. *See* Opinion and Order at 9 (#51). However, the Court allowed testimony at trial concerning the 2010 and 2015 instances because they were relevant to Plaintiff's employment history, the state of mind of his employers in making their decision to terminate his employment in 2017, and Defendant's defense that Plaintiff had a history of performance issues and not following the proper chain of

command. The three instances of alleged whistleblowing activity and corresponding retaliatory responses are summarized below to provide context.

1. 2010 protected activity and retaliatory response.

In 2010, Plaintiff's job description was revised to exclude any supervisory authority over other City employees. Plaintiff complained about the proposed reclassification to his supervisor Mr. Faught and to the City Administrator, but the reclassification proceeded over Plaintiff's objections. The first allegedly protected activity occurred thereafter when Plaintiff sent an email to the Oregon State Board of Examiners for Engineering and Land Surveying ("OSBEELS") for clarification regarding the lawfulness of his reclassification and the City's staffing arrangement. Mr. Faught allegedly retaliated against Plaintiff for contacting OSBEELS by issuing an oral reprimand with an accompanying memorandum to Plaintiff's personnel file. The memorandum states that the reprimand was for failing to acknowledge the finality of the City Administrator's decision and improperly circumventing the grievance process by soliciting the City Council.

2. 2015 protected activity and retaliatory response.

In 2014, the Engineering Services Coordinator, Scott Fleury, applied to OSBEELS for an Oregon engineering license. Plaintiff completed a professional reference form and submitted it to OSBEELS as part of Mr. Fleury's application process. As reflected in meeting minutes dated August 2014, OSBEELS considered this reference form and noted that Plaintiff had identified "potential practice violations." Plaintiff alleged that Mr. Faught retaliated against him for this activity by issuing a non-disciplinary performance memorandum in February 2015.

3. 2017 protected activity and retaliatory response.

On February 21, 2017, the Ashland City Council was scheduled to hold a meeting at City Hall. On the agenda was a consent item for approval to move forward with a project for a new

water treatment plant (“WTP project”). Mr. Fleury was acting as the WTP project leader. Plaintiff was not part of the WTP project. Upon learning that the engineering services contract for the WTP project was going to be considered at the meeting, Plaintiff made phone calls to the engineering firms that were not awarded the project to “confirm [his] assumptions.” Def. Motion for Summ. Judgment, p. 7; Smeenk Depo 183:2-25; 184:1-14. Plaintiff arrived at the city council meeting shortly before it began and approached the City Attorney and City Administrator and advised them that if the WTP project was not pulled from the agenda pending further review, he would offer testimony to the City Council in opposition to its approval. Plf. Opp. to Motion for Summ. Judgment, p. 9. Mr. Faught ultimately agreed to remove the WTP project from the agenda. Plaintiff alleged that Defendant retaliated against him for raising his concerns to the City Attorney and City Administrator about the WTP project by placing him on administrative leave and ultimately terminating his employment on April 7, 2017.

LEGAL STANDARD

A district court may set aside a jury verdict and grant judgment as a matter of law “only if, under the governing law, there can be but one reasonable conclusion as to the verdict.” *Winarto v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276, 1283 (9th Cir. 2001); Fed. R. Civ. P. 50(a). When evaluating such a motion, “the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court’s later deciding the legal questions raised by the motion. Fed. R. Civ. P. 50(b).

A Rule 50(b) motion for judgment as a matter of law is not a freestanding motion. Rather, it is a renewed Rule 50(a) motion. Because it is a renewed motion, a proper post-verdict Rule 50(b) motion is limited to the grounds asserted in the pre-deliberation Rule 50(a) motion. Thus, a party cannot properly “raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its pre-verdict Rule 50(a) motion.” *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003) (citing Fed. R. Civ. P. 50 advisory committee's notes to the 1991 amendments that “a post trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion.”); *Murphy v. City of Long Beach*, 914 F.2d 183, 186 (9th Cir. 1990) (“[Judgment notwithstanding the verdict] is improper if based upon grounds not alleged in a directed verdict [motion].”). When ruling on a renewed motion, the court may (1) allow judgment on the verdict, if the jury returned a verdict; (2) order a new trial; or (3) direct the entry of judgment as a matter of law. *Id.*

DISCUSSION

I. Plaintiff's burden at trial was to prove that he engaged in protected whistleblowing activity in 2017 and was wrongfully retaliated against for that activity.

Although not argued in the briefs, Defendant asserted at oral argument on this motion that if the Court finds that Plaintiff did not prove that he engaged in protected whistleblower activity for any one of the three alleged incidents that took place in 2010, 2015, or 2017, then the Court must award Defendant a directed verdict and order a new trial or enter judgment in Defendant's favor. The Court has found no authority to support such an assertion. As confirmed in this Court's Summary Judgement Opinion and Order (#51), Plaintiff was barred by the statute of limitations from seeking damages for anything other than the alleged whistleblowing and retaliation that occurred in 2017. The Court allowed testimony at trial concerning the alleged

instances of whistleblowing and retaliation in 2010 and 2015 because they were relevant to Plaintiff's employment history, the state of mind of his employers in making their decision to terminate his employment, and Defendant's own defense that Plaintiff had a history of not following the chain of command and was terminated because of his history of performance difficulties. Plaintiff abided by the Court's ruling and did not seek damages or present evidence about damages that he may have incurred from the 2010 or 2015 whistleblowing instances, and instead sought damages calculated from the time he was terminated by the City of Ashland shortly after the 2017 whistleblowing incident to when he mitigated his damages by obtaining new employment.

Defendant also asserted at oral argument that the only retaliatory response alleged by Plaintiff was his ultimate termination in 2017, and therefore it was his burden to prove that the whistleblowing activity in 2010 and 2015 were connected to his termination. However, it is very clear from Plaintiff's Complaint, as well as from Defendant's own motion for summary judgement brief, that Plaintiff raised three distinct instances of whistleblowing that resulted in three distinct retaliatory responses. Plaintiff claimed that the retaliatory response he was subjected to in 2010 was in the form of an oral reprimand and accompanying performance memo (Plf.'s Complaint ¶ 14) and the retaliatory response he was subjected to in 2015 was another performance memo that placed him on a "performance plan" (Plf.'s Complaint ¶ 22). Plaintiff states in his Complaint that the City committed its "final retaliatory act against Mr. Smeenck by terminating his employment," and that it "relied on the previous retaliatory acts, including the oral reprimand and the Performance Memo" to justify its termination decision.

Therefore, because the first two instances of alleged whistleblowing activity and retaliation were barred by the statute of limitations, Plaintiff's burden at trial was to prove that he

engaged in protected whistleblowing activity in 2017 and was wrongfully retaliated against for that activity by way of his termination.

II. Plaintiff presented substantial evidence for a reasonable juror to conclude that Plaintiff engaged in protected whistleblower activity in 2017.

Regarding the 2017 whistleblowing claim, Defendant renews its position that Plaintiff did not make legally sufficient “disclosures” under ORS 659A.203 for a reasonable juror to conclude that he engaged in protected activity. The jury was provided the following instructions regarding whistleblower retaliation and the definition of “disclosure”:

To establish a whistleblower retaliation claim, the plaintiff must prove by a preponderance of the evidence the following:

- (1) The plaintiff disclosed information that the plaintiff reasonably believed was evidence that a public employer:
 - (a) violated a federal or state law, rule, or regulation;
 - (b) engaged in mismanagement, gross waste of funds, or abuse of authority; or
 - (c) took an action resulting in substantial and specific danger to public health;
- (2) The defendant took or threatened to take disciplinary action against the plaintiff because of the plaintiff’s disclosure; and
- (3) The plaintiff was damaged as a result.

In order to prevail on his public whistleblower claim, plaintiff must prove that his whistleblowing was a “substantial factor” in the decision to take disciplinary action against the plaintiff. A “substantial factor” is one that made a difference in an employment decision; that is, the decision would not have been made without it. It need not be the only factor.

A “Disclosure” under the whistleblowing statute is a report of wrongdoing to a person who was previously unaware of the information and includes a report of wrongdoing within an agency or department as well as to those outside an agency or department.

Defendant concedes that Plaintiff’s reports made in 2017 were “of information that he reasonable believed to be evidence of mismanagement, gross waste of funds or abuse of authority.” Def’s Mot. at 10, ¶ 2. However, Defendant argues that Plaintiff did not make actual disclosures to City Attorney Dave Lohman and City Manager John Karns, and only approached

them to ensure the water treatment project agenda item was removed from the meeting so that he could have more time to discuss his concerns with his supervisors Mr. Faught and Mr. Fleury. *Id.* at 8. As such, Defendant argues that Plaintiff's complaints of mismanagement, gross waste of funds or abuse of authority were instead made to only Mr. Faught and Mr. Fleury, and such disclosures are not legally sufficient because Mr. Faught and Mr. Fleury were the "wrongdoers" and already knew of the conduct being complained of. The Court disagrees. Following the above instructions, which Defendant did not object to, and based on the evidence presented at trial, a reasonable jury could conclude that Plaintiff's reports to City Attorney Dave Lohman, City Manager John Karns, and even to his supervisor Mr. Faught about the water treatment plant were protected "disclosures."

At trial, Plaintiff introduced the City's "Notice of Potential Disciplinary Action" that was issued to Plaintiff shortly after the 2017 city council meeting, which states that Plaintiff "alleged three main deficiencies in the contracting process" in his "statements a few minutes before the council meeting to John Karns and Dave Lohman." Plf.'s Trial Exhibit 18 at 1, ¶ 3. The Notice then listed the three deficiencies: (1) the failure to "allow for consideration of other, potentially more suitable water treatment plant sites"; (2) the failure to "carefully evaluate and address any adverse project impacts" that might arise from the contractor's loss of a key employee; and (3) the failure "to competitively procure the engineering work on two of the four projects in the proposed contract." *Id.*

The trial testimony of both Mr. Karns and Mr. Lohman support Plaintiff's assertion that he raised these three concerns to Mr. Karns and Mr. Lohman at the city council meeting. Mr. Karns testified that Plaintiff approached him at the council meeting and "mention[ed] he was concerned about the site, that there may have been preferable sites" and that he "brought up a

concern about . . . one of the employees of the contractor.” Trial Testimony of John Karns at 16:24-17:2. Mr. Lohman testified that immediately prior to the Council session, Plaintiff “asked about how he could go about testifying on a matter that was on the consent agenda” and that he was “concerned about the procurement process . . . the whole contracting process for this agenda item.” Trial Testimony of Dave Lohman at 16:8-13 & 17:5-11. In addition, Plaintiff presented the follow-up letter that he sent to Mr. Karns and Mr. Lohman three days after the council meeting where he further detailed his concerns with the water treatment project. Plf.’s Trial Exhibit 15; Trial Testimony of Smeenk at 57:18-58:6.

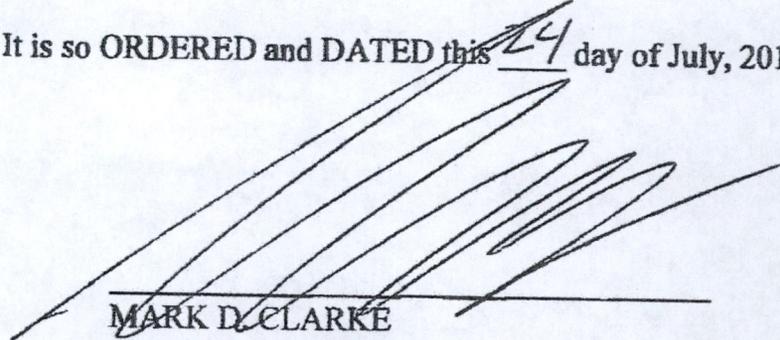
Moreover, based on Mr. Faught’s trial testimony, a reasonable juror could conclude that Mr. Faught was not aware of the alleged unlawful conduct and was not a “wrongdoer,” making Plaintiff’s statements to him about the water treatment project a legally sufficient “disclosure” under ORS 659A.203. At trial, defense counsel asked Mr. Faught what his “actual direct involvement” in the water treatment project was leading up to the 2017 council meeting. Suppl. Lundberg Decl., Ex. A at 59:17-19 (#139). In response, Mr. Faught testified that, aside from “reviews from Mr. Fleury about where they were,” a “quick” review of the council communication, and walking into one meeting “to see how the energy was going,” it “was completely Mr. Fleury’s project.” *Id.* at 59:20-60:1. Mr. Faught testified that he was “pretty confident that Mr. Fleury had followed the QBS process” because “he knew that [Mr. Fleury] had worked with legal through the whole process,” but he did not say that he had actually reviewed the QBS process himself. *Id.* at 64:6-8. Mr. Faught further testified that he was “surprised that [Plaintiff] had issues with the site” when Plaintiff raised his concerns at the 2017 council meeting.

Based on the evidence presented at trial, a reasonable juror could find that Mr. Karns, Mr. Lohman, and Mr. Faught were all persons in supervisory positions that were previously unaware of the reported wrongdoing, and therefore conclude that Plaintiff made a protected "disclosure" under ORS 659A.203.

ORDER

For the reasons stated above, Defendant's Renewed Motion for Judgment as a Matter of Law (#123) is DENIED.

It is so ORDERED and DATED this 24 day of July, 2019.



MARK D. CLARKE
United States Magistrate Judge

Friday February 24,2017

John Karns and David Lohman
City of Ashland
20 East Main Street
Ashland, OR 97520

Dear John and David

On Tuesday, February 21,2017, I took the issues below to Mike Faught. His response to my concerns was, shockingly, to suspend me and forbid me from speaking to anyone about City business for an indefinite period of time. My email access was taken away and no auto-response was put in place so no one can reach me and I can not respond to my ongoing professional communications. Mike was not willing to discuss the matter further. He said he would conduct an investigation of my concerns and determine what disciplinary measures might be appropriate.

I do wish I was able to bring the issues forward sooner but I only became aware of them shortly before I brought them forward. I also believe the City should have an open door policy and that I should not be penalized for bringing forward what I believe are legitimate issues of public concern.

Despite being wrongly disciplined, I remain very concerned about the attached council communication presented for approval in the consent agenda for the City Council Meeting on February 21 ,2017. Again. I apologize for the sudden way I brought my concerns forward, but I was only just made aware of this agenda item an hour beforehand, and noticed problems with the proposal as written that could be significant for the City. Thank you for allowing that agenda item to be moved forward to the next meeting.

Background

The matter of concern was the request in the consent agenda to award engineering contacts for four major projects to a single consultant. The first phase alone for this award will cost \$855,000. The total engineering fees for these contracts, although not disclosed could exceed \$4 million dollars.

Two of the four projects were not competitively procured. Their costs alone comprise the majority of this request to award, and their fees appear excessive. Prior public notice of the award was not provided, other than the meeting agenda posted over the holiday weekend. The agenda item had not appeared in the Council's "Look Ahead".

The siting study for the WTP was limited to two sites only, both steep and difficult to access by road.

After I was made aware of the agenda item, I skimmed the council communication, made several calls to verify my assumptions, and was told that the lead engineer for HDR was fired during the course of the procurement process, although he was rehired by Keller and Associates.

In reviewing the proposal in its entirety the next day, several areas within the scope of services are problematic. All of these issues combined would indicate a review of the qualifications based selection (QBS) is warranted prior to award to assure the City receives the best outcome for these large projects.

Problem

The proposed siting study is limited to consideration of only two very steep, difficult to access sites that are categorized by DOGAMI as high hazard for landslides. Other less hazardous more cost effective sites owned by the City are available, and not considering them could result in a waste of public funds.

The concern regarding the possible change in employment for the lead engineer would also indicate a need for additional inquiry. In a QBS process, access to a firm's resources is an integral part of the scoring process.

Another concern is that the approval of two large non competitively procured awards through a consent agenda appears to the engineering community as less than open and fair procurement it indicates a need for an additional review.

Other engineering concerns with the proposal could also result in additional and unnecessary costs to the City if not addressed before the contract is awarded.

Recommendation

- A. City procurement ordinances require that engineering services exceeding \$35,000 be procured through a competitive process. The Park Estates and Terrace Street Pump Stations engineering services should be procured competitively and separately, assuring an open and fair process, and protecting the City from legal challenges.
- B. Any potential friction created by the lead engineer changing firms midstream should be carefully evaluated to verify that the QBS selection process was fair, and whether the scoring might have changed the selection if the structural change had been disclosed or if it created a need to address with remedial measures.
- C. The sites proposed for the siting study should not be limited to two steep, inaccessible locations with relatively little level ground. Other sites already owned by the City should also be considered to assure the most cost effective options and best use of funds.
- D. The scope of services for the Water Treatment Plant and Crowson II projects should be rewritten based on up-to-date design information that includes enough detail to allow selection of the best alternative.

1. The scope needs to be revised to account for the approximately 20% reduction in water demand since the reservoir and plant were sized in 2012. Also, the fact that the TAP pump station was originally assumed for emergency use only but now is permanent should be included in the revision. Using an up to date analysis will likely indicate that a new reservoir may not be needed for many years to come and would not need to be included in the current scope. The purpose and need for the back-up treatment plant should also be re-assessed because it appears to have changed significantly since the master plan was approved in 2012. The cost effective use of public funds needs to be considered.
2. The siting study for the WTP should compare any site proposed directly against the option to bifurcate and harden the existing plant, because the costs and GHG emissions for moving the WTP are extremely large, and the benefit of relocating is relatively small.
3. A full greenhouse gas emissions comparison of siting alternatives should be included in the scope of services and should be meaningfully considered in the selection process. Plant relocation involves very large carbon inputs. Simply comparing GHG emissions between alternate treatment processes on only the relocation alternatives as proposed is inadequate because one of the largest inputs (construction) is ignored.
4. Environmental and geotechnical site drilling and testing should be completed before the site is finally selected. This task was included in the RFP preliminary scope and needs to be included in this phase of the proposal.
5. The estimates used for site selection need to be class 3 or better, not class 5. Class 5 estimates can be as much as 50% low, which presents too much risk at this point and could lead to a poor site selection.

I think we can all be proud of the open and professional way that City Council business is normally pursued in Ashland, but that can only succeed if the Council receives up to date and complete information when making decisions.

Sincerely

Pieter Smeenk PE SE CWRE
Senior Engineer