

**SPECIAL MEETING OF CASS COUNTY BOARD OF COMMISSIONERS
DECEMBER 1, 2016**

1. MEETING CALLED TO ORDER

Chairwoman Mary Scherling called the special meeting to order at 10:30 AM to consider a final resolution of removal of the County Administrator pursuant to the Cass County Home Rule Charter. All members were present as follows: Ken Pawluk, Rick Steen, Chad M. Peterson and Mary Scherling. Arland Rasmussen was present via conference call.

2. PUBLIC HEARING

Mrs. Scherling will open the public hearing and allow for comments from Keith Berndt, his legal counsel, and others that Mr. Berndt wishes to address the commission. She will then ask for comments from anyone else who wishes to address the commission either in favor of or in opposition to the vote on the final resolution of removal. Commissioners will be allowed the opportunity to ask questions of individuals during the public hearing. Once this is complete, the public hearing will be closed and the commission will take whatever action they deem appropriate.

Keith Berndt

County Administrator Keith Berndt discussed his travel for FM diversion-related meetings to Washington, D.C. on August 17, 2016, and to Chicago on August 18, 2016, which were last minute trips he agreed to attend as the representative for the diversion. His flight from O'Hare Airport in Chicago was delayed on the return flight to Fargo the evening of August 18th. He recognized someone else that was waiting for the flight and asked the person to join him in the restaurant. He said they each had two beers over approximately the next two hours while they waited for the flight and as evidenced from his credit card receipt, which is part of the investigative report. He boarded the flight and made some rude comments to the flight attendant. Even though the attendant was very unconventional, Mr. Berndt said he was wrong to publicly criticize his conduct. Mr. Berndt said he is sorry for his actions that day and regrets the negative publicity that the incident has created for the county government. Since that time, he has done his best to address the issues as prescribed by the commission chair. He cancelled wedding plans including a trip to Hawaii on September 16th in order to immediately begin a medical leave of absence. Mr. Berndt returned to work on October 24th and upon his return, he believes he performed his responsibilities effectively until he was suspended on November 8th. He believes he could again be effective at his job if given that opportunity.

Brad Johnson

Brad Johnson has been a friend of Keith Berndt's for the last five years. He said Mr. Berndt has always been gentlemanly, a caring individual, and a good friend.

Jason Benson

Jason Benson serves as the Cass County Engineer. He testified about his work experience with Keith Berndt. He has worked at the Cass County Highway Department for the last 16 years—eleven of those years he worked directly for Mr. Berndt. In 2011 when Mr. Berndt became the County Administrator, Mr. Benson worked with him in meetings and interactions on personnel issues, buildings and grounds, and the FM diversion project. During this time, he has seen Mr. Berndt's contributions to the county including flood projects and the diversion. His main testimony is about his observations. During his 16 years, Mr. Benson has never seen Mr. Berndt consume alcohol or be under the influence or impaired by alcohol while on or during normal work hours. He has seen Mr. Berndt consume alcohol during evening social events at conferences.

Mr. Steen asked if Mr. Benson ever saw any behavior of Mr. Berndt's that made him or other people uncomfortable. Mr. Benson did not see anything personally that would be outside of normal social interactions.

Leo Wilking

Leo Wilking serves as Mr. Berndt's legal counsel. He distributed a binder with exhibits which he will refer to during his testimony. Mr. Berndt has been employed with Cass County for 24 years beginning first as the County Engineer and since 2011 as the County Administrator. In the past, he has been recognized as County Official of the Year and County Engineer of the Year. Mr. Wilking said in his role as administrator, Mr. Berndt's primary focus has been the FM diversion and is one of the reasons he applied for the job. Mr. Berndt estimated that 50% to 70% of his time in 2015 and 2016 was related to the diversion, and estimates 40% to 50% will be spent on the project in 2017. The FM diversion is the largest construction project in the history of North Dakota. Mr. Berndt's training and experience as a professional engineer is invaluable in terms of this project. He said the commission needs to have a very good reason to terminate him as he has served as Co-Executive Director of the FM Diversion Authority and has been guiding this project for the last five years. He thinks the tax payers would want a good reason to fire him and would want to look at his overall job performance. Mr. Wilking referred to favorable performance appraisals from three commissioners in the past. Mr. Wilking discussed the August 18th airplane incident, which occurred at 10:00 PM and in Chicago about 1,000 miles away from Fargo. He discussed the testimony of Mary Phillippi, who was on the same flight and said the flight attendant was overly dramatic and she was entertained; however, Ms. Phillippi had no idea who the attendant was talking to at the time, and she did not hear a confrontation. Mr. Wilking said that Mr. Berndt did use profanity, which he has admitted was inappropriate.

Mr. Wilking referenced the county policy regarding inappropriate words and actions. He also referred to state law regarding home rule charter counties, which includes language that counties can adopt ordinances relating to public health, safety, morals and welfare but the county cannot regulate any industry or activity that is regulated by state law or rules adopted by a state agency. He said the county policy has to be an ordinance and cannot contravene state law. The county has a number of ordinances but the county's personnel policy is not one of those ordinances. He said a portion of the Human Rights Act includes that it is unlawful to discharge an employee based on a mental or physical disability. Both federal law and state law recognize alcohol abuse as a disability. Mr. Wilking does not believe Mr. Berndt has a disability but he thinks the commission perceives him to have a disability. If the board perceives Mr. Berndt as having a disability and discharges him, this is a violation of state law. He said if his job performance is satisfactory and the commission discharges him because of a perceived disability, the board is inviting a lawsuit. The Human Rights Act also states it is unlawful to discharge an employee because of the employee's participation in lawful activity off the employer's premises during non-working hours which is not in direct conflict with the essential business-related interests of the employer. Mr. Wilking referred to the incident on August 18th and said it included lawful activity off the employer's premises during non-working hours and was not in direct conflict with the interest of Cass County. He thinks the best solution is to not terminate Mr. Berndt as he has done everything that has been expected of him. If the board feels the working relationship has been so damaged they cannot effectively work with Mr. Berndt and termination is chosen, Mr. Wilking suggested a severance of nine to twelve months or one to two weeks of pay per years of service, which would be 24 to 48 weeks of severance.

Birch Burdick

State's Attorney Birch Burdick said he sees things a little differently than Mr. Wilking. He said North Dakota Century Code 11-09.1 outlines how to enact a home rule charter and a list of powers that may be included, which Cass County adopted in 1994. For issues that may be outside of the norm and are not included in the home rule charter, a county may choose to implement an ordinance. He does not agree that a personnel policy needs to be adopted as an ordinance. He said personnel policies are a normal order of business in any organization, and he does not believe a personnel policy needs to be made into an ordinance to utilize the policy in order to make decisions.

Mr. Burdick said it appears Mr. Wilking is focusing on the issue of alcohol being present at some of the incidences contained in the investigative report and supplements to the report. The board is not deciding whether Mr. Berndt had something to drink on a given occasion, but what his actions and behavior were during the incidences that have been discussed. He is not aware of anyone focusing

on a disability or a perceived disability but rather on an employee's actions and behavior. He said only the board can decide what weight these incidences may have when making their decision.

Mr. Pawluk asked for Mr. Burdick to clarify the law as it relates to termination of an employee who may be suffering from alcoholism and bad behavior that may be related to someone being an alcoholic.

Mr. Burdick said the issue of terminating someone's employment under the Americans with Disabilities Act (ADA) discusses ramifications for people with illnesses or disabilities. It does not prohibit an employer from terminating someone based on their behavior. An employer may not terminate someone because of a disability itself, but does not prohibit an employer from terminating an employee or enacting some type of discipline because of that behavior.

Mr. Wilking said Mr. Berndt has had difficulty with drinking, but in September and October he addressed that problem by attending in-patient treatment for three weeks. He has demonstrated a seriousness and commitment that indicates this will not be a problem in the future. He said the board could adopt a resolution that states this is the last chance, but he does not think now is the appropriate time since Mr. Berndt has taken the step that Mr. Pawluk and Mrs. Scherling suggested he take, which was to receive treatment. Mr. Wilking said any prior incidents, i.e. the 2014 incident in a bar in Bismarck, were not mentioned in the resolution adopted by the commission on November 7th and is not the appropriate context. The appropriate context to measure this employee is his job performance, and Mr. Wilking referred to Mr. Berndt's satisfactory evaluations. He thinks terminating his employment for behaviors is a risky gamble.

Mrs. Scherling asked for additional comments from the audience, and hearing none, closed the public hearing.

3. DISCUSSION BY BOARD

Mrs. Scherling asked the board for any comments, questions or discussion.

Mr. Peterson said the board is not able to prove whether or not Mr. Berndt was intoxicated during the events in Bismarck or on the airplane—Mr. Berndt's indication was he was not per his own words, which reinforces to Mr. Peterson that this issue has nothing to do with a private matter but with actions taken during public events. He does know that people saw certain behavior but does not know why Mr. Berndt behaved the way he did. He said there have been corroborating witnesses that have been interviewed and a witness on the plane. Mr. Peterson said Mr. Wilking and Mr. Berndt referenced his employee reviews. Mr. Peterson said he didn't do his job two years ago when he was vice chairman of the commission. He could have written a long, detailed explanation of what he was told happened about an event that occurred in Bismarck involving Mr. Berndt, but he didn't and admits he made a mistake. He didn't write a report on the incident because of the reason Mr. Wilking suggested—the Cass County Commission is involved with the FM Diversion project and any negative publicity could have affected the process in moving forward with the project. He said a critical written statement would have hurt Mr. Berndt personally and professionally and would hurt the organization. He said Mr. Berndt has done his job satisfactorily but the problem is the series of events leading up to today is what caused this—it wasn't one action or issue he has of a personal nature; it was a series of events over time.

Mrs. Scherling said her task has been to obtain the relevant information pertinent to this issue. She wanted to fairly evaluate the information before making a decision. When Mr. Berndt had a different view of the events, she actively sought to find further information to clarify what exactly happened. There has been a thorough investigation not only of the incident in August but other activities that have happened in the past. She said because of the information that has been collected, nothing that was discussed today has changed her mind in what needs to happen next.

She asked the board for a motion in regard to this issue.

4. RESOLUTION #2016-24, Final Resolution of Removal – Keith Berndt***AMENDED MOTION, passed***

Mr. Peterson moved and Mr. Rasmussen seconded to adopt Resolution #2016-24, Final Resolution of Removal. Discussion: Mr. Steen asked the board if the commissioners want to consider any type of severance pay to Mr. Berndt. Mr. Pawluk thinks the time for that negotiation has passed and would have considered it favorably if there would have been discussion prior to the public hearing. Mr. Rasmussen believes the time has passed for the board to consider severance pay and unless an employee leaves on good terms, he does not support severance pay. Mr. Burdick said it is normal county policy to give someone leaving the county two weeks of severance pay, and unless the commission specifies otherwise, he would anticipate that the normal policy will be followed. Mrs. Scherling said this situation should be treated the same as any other employee. Mr. Peterson offered a friendly amendment to the motion to offer two weeks of pay to Mr. Berndt to maintain consistency with county policy, which Mr. Rasmussen agreed to as well. At the call for the question, Mr. Pawluk asked if the motion on the floor is for the amendment of two weeks of severance pay. The commission secretary clarified that the motion is for the final removal of Mr. Berndt including two weeks of severance pay. On roll call vote, the motion carried with Mr. Peterson, Mr. Rasmussen, Mr. Steen and Mrs. Scherling voting “Yes”; Mr. Pawluk voting “No”.

**RESOLUTION #2016-24
FINAL RESOLUTION OF REMOVAL**

WHEREAS: the Cass County Board of Commissioners became aware of an incident that occurred at O'Hare Airport involving Keith Berndt, Cass County Administrator, on or about August 18, 2016;

WHEREAS: at the time of the incident Keith Berndt was traveling for purposes related to Cass County business;

WHEREAS: an investigation was conducted to ascertain the facts regarding that incident including input from Keith Berndt, airline staff and others involved in or with knowledge of the incident, and the report included information relating to other behavioral incident(s), including in Bismarck in 2014 among others discussed;

WHEREAS: each of the Cass County Commissioners had an opportunity to review the investigative report and to participate in a discussion of the incident at the regularly scheduled Board meeting on November 7, 2016, at which Keith Berndt was present and during which he had an opportunity to participate;

WHEREAS: the Cass County Board of Commissioners passed removal Resolution #2016-23 on November 7, 2016, which was served upon Keith Berndt and Keith Berndt timely availed himself of the due process protocols of Cass County's Home Rule Charter, Article 7, §3, including a written response and request for a public hearing;

WHEREAS: the Cass County Board of Commissioners and Keith Berndt were provided additional investigative materials after Resolution #2016-23 was passed;

WHEREAS: a public hearing was held on this matter on December 1, 2016, at which Keith Berndt was present and during which he had an opportunity to participate, including the ability to present information to the Cass County Board of Commissioners; and,

WHEREAS: the Cass County Board of Commissioners has given full consideration to the matter;

NOW, THEREFORE, BE IT RESOLVED by the Cass County Board of Commissioners that:

1. Keith Berndt's behavior during the referenced incident, and as addressed in the investigative report which is inclusive of all the other items as well, and discussed at the Cass County Commission meetings on November 7 and December 1, 2016, is not reflective of the behavior expected of the Cass County Administrator or a Cass County employee pursuant to Cass County Employee Handbook Policy 701 (Employee Conduct and Work Rules).
2. Based upon the available information referenced above, and as discussed in the meetings on November 7 and December 1, 2016, the Cass County Board of Commissioners approves this Final Resolution of Removal, effective immediately. Keith Berndt will be provided two weeks of his regular salary as severance pay.

Dated: December 1, 2016.

Mr. Berndt said it has been a privilege to work for Cass County and wished the commission the best in the future.

5. ADJOURNMENT

The chairwoman declared the meeting adjourned at 11:23 AM.

ATTEST:

APPROVED:

Michael Montplaisir – Auditor
Cass County, North Dakota

Mary Scherling, Chairwoman
Cass County Board of Commissioners