IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT

STATE OF KANSAS,

Plaintiff,

v. 13CV407
Chapter 60; Division 7

DAVID SCOTT MORRISON,
Ward 5 Councilman, City of Prairie Village
Johnson County, Kansas,

Defendant.

JUDGMENT OF OUSTER

David Scott Morrison, a councilman twice elected to Ward 5 in Prairie Village,[1] the latest being in April of 2012, decided to allow his long-time acquaintance, Kelley Malone, his personal access code so he could reside in City Hall after-hours on October 27 through October 31, 2012. At the time, Mr. Malone was a methamphetamine ("meth") user and had reported to Mr. Morrison that a drug gang had a "hit" out on him. Rather than inform anyone of either the health risks or attendant danger associated with having Mr. Malone stay in City Hall, Mr. Morrison made up a cover story for Mr. Malone's initial entry, one which was compounded at the trial of this matter. Thereby, he ignored common sense, failed to tell the truth about the circumstances of allowing Mr. Malone into City Hall that first night, violated his fiduciary obligations to Prairie

[1] Ward 5 covers the southernmost portion of Prairie Village, running roughly from 95th to 83rd Streets and from Nall to Mission. Council terms are four years. Mr. Morrison described his advocacy for his constituency as follows: "I am the people's voice. I represent the people over the interests of developers. I try to be their voice."

Village's citizens and staff, and violated the law. For the reasons that will be discussed below, he should forfeit his office as a consequence.

***Quo Warranto* or Ouster Proceedings**

Quo warranto or ouster proceedings, as they commonly are known, are statutory civil actions. K.S.A. 60-1201. They may fall into three categories. First, *quo warranto* actions may be brought to challenge the legitimacy of a public action taken by a public official (for example, challenging the constitutionality of a city ordinance, the election of a public official, the annexation of land, or the exercise of corporate franchise).[2] Second, a *quo warranto* action is appropriate when an individual is engaged in the unauthorized practice of law.[3] Finally, *quo warranto* actions are used to oust public officials. This case falls into that last category.[4]

Kansas has codified the common law *quo warranto* cause of action in K.S.A. 60-1201 *et seq*. Ousters are rare proceedings. The statutory section on *quo warranto* provides guidance on some aspects of the action, but ultimately generalizes that "relief in the form of *quo warranto* shall be obtained under the same procedure as relief in other civil actions." K.S.A. 60-1201. Jurisdiction is appropriate "whenever any public officer shall have done or suffered any act which by the provisions of law shall work a forfeiture of his or her office." K.S.A. 60-1202(2).

A *quo warranto* action may be instituted by the county [or district] attorney in the county

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[2] *See, e.g., State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 179 P.3d 366 (2008); *Wilson v. Sebelius,* 276 Kan. 87, 72 P.3d 553 (2003); *Umbehr v. Bd. of Cnty. Comm'rs of Wabaunsee Cnty.,* 252 Kan. 30, 843 P.2d 176 (1992); *State ex rel. Stephan v. Martin*, 230 Kan. 747, 641 P.2d 1011 (1982); *State ex rel. Beck v. Bd. of Comm'rs of Allen Cnty.*, 143 Kan. 898, 57 P.2d 450 (1936).

[3] *See, e.g., State ex rel. Stephan v. Williams*, 246 Kan. 681, 793 P.2d 234 (1990); *State ex rel. Boynton v. Perkins*, 138 Kan. 899, 28 P.2d 765 (1934)*; State ex rel. Stovall v. Martinez*, 27 Kan. App. 2d 9, 996 P.2d 371 (2000).

[4] *See, e.g., State ex rel. Stovall v. Meneley*, 271 Kan. 355, 22 P.3d 124 (2001); *State ex rel. Miller v. Richardson*, 229 Kan. 234, 623 P.3d 1317 (1981); *State ex rel. Ralston v. Blain*, 189 Kan. 575, 370 P.2d 415 (1962); *State ex rel. Anderson v. Stice*, 186 Kan. 69, 348 P.2d 833 (1960); *State ex rel. Beck v. Harvey*, 148 Kan. 166, 80 P.2d 1095 (1938).

of his jurisdiction with or without complaints of violations of K.S.A. 60-1205, and "an officer may be suspended from performing any of the officer's duties, pending a final hearing and determination of the matter." K.S.A. 60-1206 & 60-1207. If a temporary suspension is warranted, there must be proper notice and a hearing, as well as a finding that suspension is appropriate. K.S.A. 60-1207. The Court declined to issue a temporary suspension in this case as it wanted a full evidentiary hearing.

In this instance, Stephen Howe, the district attorney, filed a *quo warranto* petition against Mr. Morrison on January 17, 2013, alleging that he had "willfully neglected to perform his duty to abide by the Municipal Code of the City of Prairie Village and [that Mr. Morrison] engaged in willful misconduct in office and/or violated a penal statute involving moral turpitude." The petition also alleged willful misconduct, negligent performance of councilman duties and the separate crimes of official misconduct, trespass, and theft.

The statutory provision for ouster in K.S.A. 60-1205, provides:

> Every person holding any office of trust or profit, under and by virtue of any of the laws of the state of Kansas, either state, district, county, township or city office, except those subject to removal from office only by impeachment, who shall (1) willfully engage in misconduct while in office, (2) willfully neglect to perform any duty enjoined upon such person by law, (3) demonstrate mental impairment such that the person lacks the capacity to manage the office held, or (4) who shall commit any act constituting a violation of any penal statute involving moral turpitude, shall forfeit such person's office and shall be ousted from such office in the manner hereinafter provided.

The State alleged grounds (1), (2) and (4) for removal.[5]

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[5] The Court's instructions essentially tracked these grounds by first informing the jury in Instruction No. 10 of the three grounds for ouster: (1) the non-criminal willfully engaging in misconduct while in office, (2) willfully neglecting to perform any duty required of such person by law [including city ordinances], and (3) the three criminal acts involving moral turpitude, in this case, willful misconduct by providing confidential information, trespass and theft.

The Use of an Advisory Jury in Ouster Proceedings

At a hearing on May 10, 2013, following motions, the Court determined it would hear the case with an advisory jury. Because ouster or *quo warranto* cases are considered equitable (judge-tried), the public official is not entitled to a jury trial. *See State ex rel. Miller v. Richardson*, 229 Kan. 234, 241, 623 P.3d 1317 (1981) (ouster proceedings equitable) and K.S.A. 60-239(c) (allowing advisory jury trials when jury trial not a matter of right). In this case, the State sought a three-judge panel and the defendant requested an advisory jury.

Quo warranto cases have been heard by three-judge panels, but it is not necessary. *Meneley*, 271 Kan. at 382; *Richardson*, 229 Kan. at 241*; Cahill*, 222 Kan. at 579 (removal of Shawnee County sheriff). So the use of multiple judge panels often appears to reflect the gravity of the charges and a prominent county-wide elected position.[6] An advisory jury is appropriate where "it appears that the evidence will be sharply conflicting, the law difficult, and the public interest keen." *Cahill*, 222 Kan. at 579-80 (trial court's decision not to empanel an advisory jury or three-judge panel held not to be an abuse of discretion). This case involves "keen" public interest, although the facts were not greatly disputed. It serves the Court to have a time-honored democratic institution – a jury – to reflect the community's interest. And, in this case, the jury was instructed on the law and what factual issues were required to aid the Court in its

[6] *See Meneley*, 271 Kan. at 355 (concealment of deputy's theft of drug evidence, false testimony to attorney general during inquisition and at hearing over deputy's drug use); *Richardson,* 229 Kan. at 234 (county treasurer crediting public employees for time not worked in exchange for sexual favors); *Cahill*, 222 Kan. at 576 (BPU members who padded expense accounts for items they did not incur); *Fransham v. McDowell*, 202 Kan. 604, 451 P.2d 131 (1969) (action against mayor and city commissioners over appointments to summer program and unlawful adoption of ordinances regarding salaries and pension); *State ex rel. Ferguson v. Robinson*, 193 Kan. 480, 394 P.2d 48 (1964) (ouster of sheriff for allowing inmate to leave custody at night to go home without supervision); *Blain*, 189 Kan. at 575 (ouster of county commissioner for drinking and gambling); *Stice*, 186 Kan. at 69 (ouster of judge who had been disbarred); and *State ex rel. Parker v. McKnaught*, 154 Kan. 689, 107 P.2d 693 (1940) (ouster of chief of police who gave liquor which was evidence to peace officers during a convention and took payments from violators of gambling and liquor laws in exchange for immunity).

determination. In that respect, ultimately, the "duty rests on the court to determine the truth of disputed facts. It may approve the jury's findings or disapprove them and make its own independent findings. If they are approved they are as effective as if made originally by the court." *Grannell v. Wakefield*, 172 Kan. 685, Syl. ¶ 1, 242 P.2d 1075 (1952).

Here, without objection from either party, and after crafting instructions in numerous conferences with counsel that were intended to reflect the concerns of all parties, the jury was instructed and answered special questions posed to it by its verdict, which was:

VERDICT FORM

We, the jury, present the following answers to the questions submitted by the court:

Willful Misconduct in Office

1. Do you find that it is highly probable that Prairie Village City Councilman David Scott Morrison, while in office, intentionally or purposefully engaged in misconduct in order to do wrong or cause injury to another when he:

(a) Gave his Prairie Village key code to Kelley Malone and showed Kelley Malone around Prairie Village City Hall?

Yes _x__ No ___

(b) Allowed Kelley Malone to stay in Prairie Village City Hall at various times between October 27, 2012 and October 31, 2012, and allowed him to have access to people, items or documents that were not accessible to the general public?

Yes _x__ No ___

Willful Neglect of Duty

2. Do you find that it is highly probable that Prairie Village City Councilman David Scott Morrison, while in office, intentionally or purposefully neglected to perform any duty mandated by law in order to do wrong or cause injury to another when he:

(a) Gave his Prairie Village key code to Kelley Malone and showed Kelley Malone around Prairie Village City Hall?

Yes _x__ No ___

(b) Allowed Kelley Malone to stay in Prairie Village City Hall at various times between October 27, 2012 and October 31, 2012, and allowed him to have access to people, items or documents that were not accessible to the general public?

Yes _x__ No ___

(c) Failed to perform duties entrusted to him under the Municipal Code of Prairie Village?
Yes x___ No ___

Violation of Crimes Involving Moral Turpitude

3. Do you find that it is highly probable that Prairie Village City Councilman David Scott Morrison violated the criminal statute of official misconduct in office?

Yes ___ No _x__

4. Do you find that it is highly probable that Prairie Village City Councilman David Scott Morrison violated the criminal statute of trespass?

Yes ___ No _x__

5. Do you find that it is highly probable that Prairie Village City Councilman David Scott Morrison violated the criminal statute of theft?

Yes ___ No _x__

6. If any answer to questions 3 through 5 is yes, do you find that the facts and circumstances giving rise to the alleged crimes of official misconduct, trespass, or theft in this case involved moral turpitude?

Yes ___ No _x__

7. Agreement on each of the above questions was by ten or more jurors?
Yes _x_ No ___

/s/ Rachel Phillips

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Presiding Juror

The Purpose of Requiring Higher Proof in Such Actions

The purpose of a *quo warranto* action is "to prevent persons from continuing to hold office whose inattention to duty, either because of its habitualness or its gravity, endangers the public welfare; and the neglect contemplated must disclose either willfulness or indifference to duty so persistent or in affairs of such importance that the safety of the public interest is

threatened." *State v. Corwine*, 113 Kan. 192, 213 P. 658, 659 (1923), (*quoting State v. Kennedy*, 82 Kan. 373, 108 P. 837 (1910)). "The object of removal of a public officer for official misconduct is not to punish the offending incumbent, but to protect and preserve the office, and to free the public of an unfit officer." *State ex rel. Londerholm v. Schroeder*, 199 Kan. 403, 415-16, 430 P.2d 304 (1967) (citing *State ex rel. Ralston v. Schowalter*, 189 Kan. 562, 569, 370 P.2d 408 (1962)).

When the plaintiff (here, the State) requests ouster, it is "a drastic action, and should be invoked only where the evidence is clear and convincing, and the misdeeds flagrant." *Cahill*, 222 Kan. at 576. Thus, when a clear and convincing evidence burden is required, it is a higher burden than the ordinary civil preponderance of the evidence standard (where the prevailing party need only establish proof through evidence that tips one way). Under a clear and convincing standard, juries are instructed that to meet such a burden, it must be found to be "highly probable." *See* PIK Civ. 4th 102.11.

In criminal cases, where a defendant's liberty is at stake, the State must prove its case beyond a reasonable doubt, the highest burden of proof possible. While some actions in *quo warranto* may allege criminal acts, as in the current case, the State need not file criminal charges before or after the *quo warranto* action is initiated because "the legislature intended this to be an additional proceeding, independent of criminal proceedings." *Richardson*, 229 Kan. at 240.

With such little guidance on *quo warranto* actions in Kansas, the Court turns to other states with similar statutory mechanisms. Tennessee's statute on ouster reads as follows:

> Every person holding any office of trust or profit, under and by virtue of any of the laws of the state, either state, county, or municipal, except such officers as are by the constitution removable only and exclusively by methods other than those provided in this chapter, who shall knowingly or willfully commit misconduct in

> office, or who shall knowingly or willfully neglect to perform any duty enjoined upon such officer by any of the laws of the state, or who shall in any public place be in a state of intoxication produced by strong drink voluntarily taken, or who shall engage in any form of illegal gambling, or who shall commit any act constituting a violation of any penal statute involving moral turpitude, shall forfeit such office and shall be ousted from such office in the manner hereinafter provided.

T.C.A. 8-47-101. While the third and fourth provisions regarding intoxication and gambling are not specifically spelled out in the Kansas provisions [but have been a basis for ouster in Kansas], the first two and last provisions in the Tennessee Code are virtually identical to Kansas' statute. *Compare with* K.S.A. 60-1205 ("willfully engage[ing] in misconduct while in office, willfully neglect[ing] to perform any duty enjoined upon such person by law, …. [and] commit[ting] any act constituting a violation of any penal statute involving moral turpitude"). Therefore, guidance from Tennessee decisions is helpful to this Court's determination in the present case.

Like Kansas, Tennessee requires the clear and convincing burden of proof to establish "willful misconduct": "[t]he foregoing findings notwithstanding, the trial court ruled that the plaintiff had failed to prove by 'clear and convincing evidence' that Crosby 'knowingly or willfully' committed the type of misconduct essential to establish the requisite statutory grounds to remove a public official from office." *State ex rel. Carney v. Crosby*, 255 S.W.3d 593, 595 (Tenn. 2008). The Tennessee court went on to say that, when the issue is whether an official knowingly or willfully committed misconduct in office, "[t]here is no bright line test for determining what is or is not knowing or willful misconduct in office." *Id*. at 597. Tennessee courts also take "good faith" into account when deciding whether ouster of a public official is appropriate:

> [A] distinction must be drawn between the acts done in good faith but unenforceable because the statute makes them so, and acts of willful misconduct,

> as where a public officer corruptly and fraudulently abuses his powers in making the contract.... But public officials acting in good faith, who, through ignorance, error or oversight, run counter to a charter provision or some statute law, did not subject themselves to indictment and removal from office at common law, and under similar circumstances could not be removed from office under the Ouster Law.… Even though, as is indicated by the foregoing cases, the "good faith" of a defendant can be a factor to be considered in determining whether the defendant's actions constitute "misconduct" for purposes of Tenn. Code Ann. § 8–47–101, an intent or desire to benefit personally from an activity is not an essential element of "misconduct" for purposes of the statute.

State ex rel. Estep v. Peters, 815 S.W.2d 161, 164 (Tenn. 1991) (*citing State ex rel. Perkinson*, 19 S.W.2d 254, 255 (1928)). Because of Tennessee's similarities in this rare area of the law, the Court and parties looked to these cases for further guidance.

In a *quo warranto* action, "the court may, in the exercise of its discretion, take into consideration the position and motives of the relator, the interest or policy of granting the remedy, the public interest, convenience, or detriment, the prospect of strife, confusion, and litigation, and unreasonable delay or acquiescence of the complaining party." *State v. Bd. of Comm'rs of Wyandotte Cnty.*, 117 Kan. 151, 230 P. 531, 535 (1924).

With the foregoing in mind, the Court will now address its findings of fact and conclusions of law in accordance with K.S.A. 60-252.

FINDINGS OF FACT

The Court accepts the jury's findings insofar as they are incorporated herein. The following findings of facts are derived from the witnesses and exhibits introduced at the trial of this matter. The undisputed evidence reflects a series of events that can only be described as reflecting breathtakingly bad judgment by Mr. Morrison. By seniority, he was the city council

president or mayor *pro tem*, at the time of this incident, having been elected in April of 2008 and then re-elected without opposition in April of 2012.

The Prairie Village City Complex and Access to the Same

The Prairie Village city complex, 7700 Mission Road (on the southwest corner) is a police station connected to the city hall by a long covered corridor which can be locked and accessed by key coded doors after hours. During normal business hours, which is 8 a.m. to 5 p.m., the city building can be accessed by the public through doors facing Mission Road (to the east), but after such hours, anyone in the building who leaves will find the doors locked behind them. One can leave but not return. Presumably, one could hold the door open for others to enter after hours. The only access to the complex after hours requires one to pass by the police dispatcher's bullet proof window, adjacent to which is a key-coded door. Council members and some city staff are given access codes to punch in numbers that allow them to enter city hall. Once in City Hall, there are video cameras that monitor some of the hallways.

The evidence is undisputed, or, the Court finds, that any confidential records in either the city clerk's office or the municipal court's office could not be accessed with a council member's key code. Also, no one could access the police department facility after hours. It is also undisputed that City Hall is not set up for residency. It has an employees' lounge, where there is a couch, a small table, kitchenette and television for the benefit of staff during breaks and lunch. There also is a weight/locker room in the basement. To access these staff facilities requires a key code, which the police department provides to council members and staff. Mr. Morrison was given a key code, consisting of the last four numbers of his social security number. Mr. Morrison testified that he was given no restrictions or policy on how he could use his code, or even

whether it could restrict any "guests" he might bring into the city portion of the complex. He testified that because this did not involve police business, he was not required to notify anyone in the police department about his reasons for accessing the building. Virtually all of the police dispatchers testified that they were not in a position to question a city council member's access and, in fact, if someone had an access code, they would not stop that person from entering. Even after the events which unfolded in this matter, no police dispatchers were disciplined.

With this preliminary layout of the city complex, then, the Court will discuss the facts which developed into this controversy, as observed from the numerous witnesses who testified,[7] and in consideration of video statements, recorded phone calls and documents admitted into evidence.

The Relationship between Mr. Morrison and Mr. Malone

Kelley Malone, now 38, graduated from Shawnee Mission West High School and attended Johnson County Community College for a year. He met David Morrison some time in the late 1990s. Both of them had worked at a mortgage company for several years until it closed. Mr. Morrison recalled working there for six or seven years. At some point, Mr. Malone left the mortgage company and went into auto finance. According to Mr. Morrison, Mr. Malone was pretty adept at selling cars, and was employed as such from 1996 through 2000. Mr. Malone also has had run-ins with the law. He had a misdemeanor theft charge in Jackson County, and two

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[7] They include: Capt. Tim Schwartzkopf (police department); Bettina Jamison (municipal court administrator); Kyle Shipps (police department); Penny Mann (city building codes); Sheila Hopkins (municipal court clerk); Chief Wes Jordan (police department); Cpl. Eric McCullough (police department); Dawn Johnson (police department dispatcher); Pamela Huskey (former police department dispatcher); Cory Park (police department dispatcher); Sheriff's Det. Rebecca Crabtree; Scott Curry (cleaning contractor); Kelley Malone; Joyce Munday (city clerk); Catherine Logan (city attorney); Gregory Miller (City Union Mission); Sgt. Myron Ward (police department); Quinn Bennion (city administrator); Nicholas Sanders (city human resources and technology manager); Tim Kobe (police department staff services); and Councilman David Scott Morrison.

misdemeanor DUI charges. The only family he referenced was a son and grandparents. He was charged without having a drivers license in both 2010 and 2012.

Mr. Malone testified in this matter while in custody, although without visible shackles and attended by a deputy, in light of his recent approval for probation on a felony drug charge. As he described it, Mr. Malone said his descent from employed homeowner to unemployed homeless person began after he suffered a motorcycle accident and got hooked on pain medications. He testified to "never using a needle" but using Oxycontin, snorting heroin and smoking meth.

In 2011, Mr. Malone first became homeless. He did use the facility at City Union Mission located at 10th and Troost, in Kansas City, Missouri, staying there a week. He contacted Mr. Morrison some time that year, and Mr. Morrison helped him by putting him in a hotel for a week – feeding him, buying him clothes and arranging for a job interview. Mr. Malone apparently recovered because Mr. Morrison testified that he was successfully selling cars at a KIA dealership, had bought a house and car, and things seemed to be going well for Mr. Malone. However, in mid-2012, Mr. Malone said he started using drugs again. By August 2012, he was in a car accident and Lenexa police found drugs in his car (for which he recently received probation). Although it is not clear, there is some suggestion that Mr. Malone may have begun working with Lenexa police. He later asked Mr. Morrison for some legal help in connection with those charges. At the time of trial, when he testified, Mr. Malone was a gaunt version of himself as reflected in prior mug shots, Exhibit 70, which were not admitted into evidence but from which the Court can take judicial notice as they are contained within JIMS (Justice Information

Management System). At various times during his testimony, Mr. Malone, called as a witness by the State, sat hunched over, leaning into the microphone, with fairly terse responses.

When he called Mr. Morrison on October 27, he used a cell phone to call Mr. Morrison, and asked him for a place to stay for a couple of days. He said Mr. Morrison picked him up and drove him to City Hall. He said he carried a sports bag with some clothes, shower "stuff," and a cell phone. Mr. Malone testified that he was told he could stay there overnight. Mr. Morrison told him where he could go within the City Hall. He said he could use the restroom, the employee lounge and gym, and he showed him the wall phone in the break room or lounge. They then went to eat and Mr. Malone was dropped back off. He did not take anything out of the employees' refrigerator, but had change he could use for a vending machine.

Mr. Morrison testified that when he received Mr. Malone's phone call on Saturday, October 27, it was "out of the blue" and he had not been in contact with him for several months, despite having known Mr. Malone for 17 years. He considered him friend and "standup guy," and they used to go to football games together. When he had gone by his house previously, Mr. Malone was no longer there. According to Mr. Morrison, Mr. Malone was calling from a pay phone, and, although he had lost other phone numbers and contacts, Mr. Morrison's number had been committed to his memory. He told him: "I'm in trouble and I need help. I don't have any place to stay. I have nowhere to go." He was homeless again, Mr. Morrison testified. Immediately, Mr. Morrison started making calls. He called the city dispatcher, Dawn Johnson, who inquired from her supervisor about resources. She related back to Mr. Morrison that city officers often would take homeless persons to City Union Mission.

Mr. Morrison also called his pastor at Village Presbyterian Church. He left a message with the associate pastor, Jerrod McLaughlin. He explained the situation and asked for sanctuary in the church but was told it was not set up for that. He said that the pastor related he had worked with a number of people who had drug problems but he rejected taking him to a hotel as Mr. Morrison had done in the past because "there'd be too many people coming and going, and it wouldn't be a good idea."

Later, Mr. Malone called back to determine if there had been any progress and Mr. Morrison said he was still working on the problem. After talking to Ms. Johnson, Mr. Morrison called City Union Mission and learned that they would only charge a dollar a night, but that there was a curfew before supper and because the temperature was getting below freezing, they were expected to have a full house that night. Mr. Morrison testified that it was not guaranteed that Mr. Malone would have a place at City Union Mission. He went to pick up Mr. Malone and thought he had the problem solved until Mr. Malone rejected the idea of going to the shelter. During his testimony, Mr. Morrison said that Mr. Malone believed the shelter was located in an area where there had been drug activity and he did not feel safe there. He refused to go there. In his video statement to Det. Rebecca Crabtree, Exhibit 53, Mr. Morrison told her that Mr. Malone believed he would not be safe because he would be "the only white person down there" and he would stand out.

Mr. Morrison lived with elderly parents, aged 79, at the time, and he said Mr. Malone could not stay with them because his mother had health issues and a weakened immunity such that he did not want to expose her to whatever "bacteria or viruses" Mr. Malone might be carrying. Mr. Malone did tell Mr. Morrison that he had been using meth but had been clean for a

week. He also mentioned that there had been a "hit" out on him by drug dealers. At this stage, Mr. Morrison testified that he believed he did not have any other choice except to bring Mr. Malone into City Hall, where it was warm, safe and secure.

He told Mr. Malone that he could spend the night there. He picked up Mr. Malone and brought him to the dispatcher window where Ms. Johnson was still on duty. According to Ms. Johnson's testimony, Mr. Morrison made it sound as though he had a neighborhood meeting and that Mr. Malone would be there for that. This conversation is somewhat disputed. On direct, Mr. Morrison testified: "And as I recall it, I think I said I was going to be meeting with Kelley and that I had to pick up some stuff for a homes association meeting….Yeah, I had to pick up some material or some stuff for a homes association meeting, ***which I did while I was there.***" (Emphasis added.)

While Mr. Morrison attempted to recharacterize this conversation as a "miscommunication," the Court finds that his testimony was not credible. It attempted to undermine Ms. Johnson's clear recollection that Mr. Morrison told her there was a neighborhood meeting and Mr. Malone was there in conjunction with the same. Ms. Johnson had her suspicions because this was the same individual Mr. Morrison had called about earlier. That Mr. Morrison had lied about the reason for Mr. Malone's presence and then sought to spin this same conversation in court, is particularly disturbing. Lies revealed themselves such as when the State challenged the homes association "packet" that Mr. Morrison suggested he was there to pick up. When the State was poised to play a surveillance video from that first evening, after Mr. Morrison stated on direct that ***he had*** picked up the packet, Mr. Morrison acted as though his direct testimony had only indicated he intended to look for a packet. On cross examination, he

testified that he did not pick up the packet because he "remembered" he already had gotten the same earlier. This was a significant line of testimony because the intent to lie and misrepresent is reflective of the fact that Mr. Morrison knew that what he was doing was wrong.

The Court also believes Ms. Johnson's testimony because it relied on a contemporaneous message she had submitted to her supervisor, the same one with whom she had checked with about a homeless shelter. *See* Exhibit 57. In that message, she stated: "I know, totally bad time to tell you this but...Ok, you know the homeless guy I told you David Morrison was calling about? Well he just took him over to City Hall. Telling me 'they' were having a meeting with the rest of the neighborhood…Surely he wouldn't let the guy stay the night over there would he? I don't know of any meeting…not that that matters."

Whether Mr. Malone made $9.59 worth of phone calls or committed a theft is a *de minimis* issue, which the jury resolved. What is more serious is why Mr. Morrison felt compelled to misrepresent the reason for Mr. Malone's presence if he were secure in his belief, as he testified, that he could bring whoever he wanted into City Hall. This bit of bravado, however, is negated by the actual cover used to slip Mr. Malone into City Hall, which depended on a subordinate employee not questioning a city council member. In other words, Mr. Morrison depended, to a certain extent, on not being questioned. At trial, however, he was questioned, and he was willing to misrepresent to the Court the truth of what happened.

In great respect, what follows hereafter is a question of putting the best spin on a bad decision that depended on Mr. Morrison's right to avoid being questioned about his decision as the mayor *pro tem*. Mr. Morrison had given Mr. Malone his access code, the last four numbers of his social security number, so that Mr. Malone could come and go as he pleased. A video

camera log shows that Mr. Morrison and Mr. Malone entered the facility around 5:52 p.m. on Saturday, October 27, left about 12 minutes later, and then returned at 8:55 p.m. that night in front of another dispatcher, Ms. Huskey. Mr. Morrison left at 9:22 p.m. On Sunday, Mr. Malone encountered Scott Curry, the janitorial service vendor, and they talked. Later, Mr. Morrison and Mr. Malone are seen leaving at 1:06 p.m. They went to a Chiefs' game with two other persons. Mr. Morrison testified that he thought it would be good to get Mr. Malone out and get his mind off of his situation. Around 12:20 a.m. that morning, Mr. Morrison and Mr. Malone arrive at dispatch, and Mr. Morrison left at 12:42 a.m. At 7:40 a.m., Mr. Malone entered the city council chambers and then left around 8:45 a.m., in a white SUV. At 8:55 a.m., he entered with a female and they then left at 9:48 a.m.

According to Mr. Morrison, Mr. Malone called him and told him he spent the night in his girlfriend's car, but then said he planned to return to City Hall that Tuesday night. Mr. Morrison told him that was "not a good idea." Mr. Morrison did not follow up and Mr. Malone was then seen entering City Hall at 12:20 a.m. Wednesday, until he was discovered by city staffers who reported his presence to the police. Chief Jordan then encountered Mr. Malone in the locker room area at 9 a.m.

Thereafter, there are phone calls, interviews, an extensive review of security tapes and cameras and a conclusion that nothing was taken or breached, other than the security of City Hall, by a person using Mr. Morrison's access code.

The State presented the testimony of Gregory Miller, from City Union Mission, who testified that the shelter is open 24 hours, and that they have security personnel who check all those entering the facility to ensure that no weapons can get in. They ban anyone found with

weapons from using the facility in the future. The facility, he explained, has 286 beds, and even room to put another 60 mats on the floor in the day room, if needed. The facility also has means to refer people for drug treatment or job assistance.

According to Mr. Morrison's statements and testimony after this incident, he was not aware that Mr. Malone went back to City Hall. It is true that there were phone recordings that Mr. Morrison had tried to set up a meeting with Mr. Malone and Chief Jordan, but Mr. Malone resisted attending that meeting until he had met with Mr. Morrison's personal lawyer, who was going to assist with his friend's pending legal problems.[8]

Cross examination of Mr. Morrison brought home the dilemma the Court faces. Mr. Morrison chose to ignore the potential risks and security breach posed by Mr. Malone, who, in many respects, he did not know. He knew that he had been addicted to meth although he claimed to be "clean" for a week. Of course, Mr. Morrison knew that Mr. Malone had been addicted previously, that he had helped him clean up and that he descended again into drugs. That alone would have suggested his "clean" status was not reliable, even if he believed him.

The State drove home through its cross examination that Mr. Morrison treated his employer's work space with more care and respect in ensuring that it was locked up at night and that no one was present after he left than he did the public's City Hall, where people work and depend on others to ensure that unnecessary risks were not taking place. Mr. Malone posed an unnecessary risk; he posed a health and security risk. When pressed as to why he checked his

[8] The Court takes judicial notice of Case No. 12CR2589 and that Mr. Malone was charged with felony possession of methamphetamines, heroin and Xanax resulting from the August 8, 2012 Lenexa accident. After a plea agreement, the State dismissed all but the methamphetamine charge, to which Mr. Malone pled guilty and received 12 months of probation, spending a month in jail. A judgment of conviction was entered on August 29, 2013.

employer's premises at the end of the night, Mr. Morrison conceded that this was to make "sure it's safe for when your next employee is coming to work."

In this regard, Mr. Morrison protected his own immediate family from contact with Mr. Malone, but not the City's "family" or staff. He admitted to knowing about meth users based on what he "sees on TV," namely, that "if they're addicted, that that's all they think about and that it can wreck their lives." He admitted that users fail to keep up work, get behind in finances, and cause problem for others. He said that he knew the addiction affects their health and can affect their brains. Essentially, Mr. Morrison knew enough to know that Mr. Malone was using him and that he could not trust the decisions made by Mr. Malone, could not trust that he was the same person he had known in better times, and, certainly could not trust Mr. Malone to be responsible. Mr. Morrison knew Mr. Malone was in serious trouble, the extent to which Mr. Malone apparently did not fully share with Mr. Morrison, who only knew about his meth addiction (which is enough). In short, he could not trust Mr. Malone around other people any more than he could trust him around his own parents. He worried about any diseases Mr. Malone might be carrying into his own house, in light of his likely compromised health.

At trial, the Court observed Mr. Malone's nose dripping throughout his testimony. Whether that reflects the destruction evident from him sniffing heroin, cocaine or any other drug, is irrelevant. It demonstrates the deterioration of Mr. Malone's health and questions raised by exposing him to others who had no idea of his background. They were not given the choice to know whether Mr. Malone represented a threat to their health, much less whether his story of being a target for drug gangs could expose them to harm while Mr. Malone was coming or going from City Hall. The evidence shows that if Mr. Malone had a girlfriend, anyone could have

followed her to discover where Mr. Malone was staying. Whether Mr. Morrison was extremely naïve or willfully stubborn in extending a *personal* favor to Mr. Malone at the expense of other city staffers is irrelevant, the effect is the same. He used city property for his own benefit and to assuage his own views of what humanitarian gestures should be. Instead of being up front about it and risking question, he sneaked Mr. Malone in with a cover story that was a lie.

Despite all of the foregoing, Mr. Morrison actually told the city's police dispatcher, the person who was most likely to observe Mr. Malone on surveillance cameras, not to worry because they would be working together. He neglected to mention any of the circumstances attendant on Mr. Malone's stay to either the city administrator or city attorney, who could have directed Mr. Morrison to the city's conflict of interests policy. That Mr. Morrison could not trust Mr. Malone to behave or be responsible is evident from the fact that Mr. Malone ignored the risk his friend had been taking for him when he returned to City Hall on Tuesday night after being told that it was "not a good idea." Mr. Morrison said he "begged Kelley over the weekend to go see the police chief first thing, and he wouldn't do that." Mr. Morrison, knowing this, determined not to tell Chief Jordan about Mr. Malone's presence until the chief confronted Mr. Malone himself.

The foregoing suggests that Mr. Morrison was willing to compromise his own integrity, the integrity of the City, and the security of others because it appealed to his own need to be regarded as a benefactor to Mr. Malone, who he had "taken under his wing." But because drug users can be selfish and stubborn, Mr. Morrison never had control of Mr. Malone and, thereby, Mr. Morrison put others at risk to benefit his own view of what was important. As a fiduciary, someone who literally had the keys to the City Hall, Mr. Morrison clearly violated ethics

provisions that required him to treat the people's house as he would his own. He used city property for his own benefit, to extend a favor to another, and misled people along the way.

CONCLUSIONS OF LAW

From the foregoing, the picture of a compromised city official, ignoring common sense, his own duties and then seeking to cover his own misfeasance emerges. Such conduct moves from misfeasance to malfeasance through the evident and dishonest misrepresentations that attended this decision and the attempt to cling to office in these proceedings, which compounded the misrepresentations.

It is apparent that the jury knew the difference between criminal misconduct involving moral turpitude,[9] K.S.A. 60-1205(4), and the general category of misconduct in office. K.S.A. 60-1205(1) &(2). Criminal misconduct in office is a specific category[10] and ouster under this

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[9] Instruction No. 13 provided the jury with this instruction:

> The State alleges that David Scott Morrison is responsible for the crime of willful misconduct. To establish the same, each of the following claims must be proved:
>
> (1) The defendant was a public official;
> (2) The defendant used confidential information acquired in the course of and related to his position as city councilman in Prairie Village for the private benefit or gain of himself or another;
> (3) The defendant's conduct was willful—that is, defendant's conduct intentionally or purposefully did wrong or caused injury or harm to another; and
> (4) This conduct occurred on October 27, 2012 through October 31, 2012, in Johnson County, Kansas.

[10] Instruction No. 11 provided the jury with this instruction:

> To establish the allegation of willfully engaging in misconduct in office, "willfully" can encompass a mental attitude of indifference to the consequences or a failure to take advantage of the knowledge of the rights and duties or powers of public office. In these proceedings, "willfully" is not confined to a deliberate intent to go beyond the bounds of law.

theory also must include "moral turpitude," which is a high burden, even under the clear and convincing burden.[11]

Here, the State's case never approached clear and convincing evidence to prove a crime of moral turpitude. The State sought to add an aiding and abetting theory on the ground that, even though Mr. Morrison did not steal or trespass himself or misappropriate confidential information (his key code), he allowed another to do so. Rather than confuse the jury, and because its decision was advisory, the Court allowed a modified criminal pattern instruction. It allowed the jury to decide whether *anyone* had committed a crime by modifying Instruction Nos. 13, 14 and 15 to require the State to prove the defendant (1) used confidential information "for the private benefit of gain of himself *or another*," or (2) that the defendant allowed a trespass or allowed *another*, to do so, or (3) that the defendant was responsible for a theft ($9.59 in phone calls) by allowing "another" to deprive the city of the benefit of its property. Mr. Morrison promptly paid the phone bill when he learned about it.

They jury rightfully rejected each of these criminal or "penal" theories because no evidence supported the same. Nor was there any evidence of moral turpitude. Indeed, the State's case in this regard was thin. The access code had been given to Mr. Morrison with no guidelines (other than common sense) and fidelity to the City's regulations. There was no evidence that either Mr. Morrison or Mr. Malone would have been aware of any long distance charges.

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[11] Instruction No. 16 provided the jury with this instruction:

> If you find that David Scott Morrison committed a crime or allowed another to commit a crime, you must also find that the conduct, facts, and circumstances surrounding such crime involved "moral turpitude."
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> "Moral turpitude" is defined as: conduct that is inherently base, vile, depraved, or contrary to accepted rules of morality and duties owed between one and another or society in general or involved an act that is reprehensible or despicable, inherently wrong, or involved an evil intent or maliciousness in carrying out the conduct.

Mr. Morrison was an authorized user of his access code, negating the crime of misappropriation and, without a specific policy of access to city facilities, which was not introduced into evidence other than through testimony that the city building was open 8 a.m. to 5 p.m., there was no evidence of unauthorized intent to deprive the owner (the City) of possession of the property. In other words, Mr. Morrison had the power to determine that Mr. Malone could enter the building and neither could be found guilty of trespass under these circumstances. Likely, the State realized this in electing not to charge either man with any crime.

What remains, then, for the Court to decide, is whether the jury's finding of willful misconduct in office, as requested by Instruction No. 11, and its finding of a willful neglect to perform a duty mandated by law, as requested by Instruction No. 12, is supported by the evidence. Defendant contends, despite his failure to object or offer any different instructions, that the results are inconsistent. The Court inquired of both parties, before discharging the jury, whether the jury should be discharged. The defendant did not suggest, at that time, that any inconsistency existed with the jury's determinations on the criminal questions.[12] In this regard, he points to the various instructions about willful conduct, the State's failure to tender adequate instructions related to its non-penal finding of misconduct and the confusing nature of various instructions, stemming from both civil and criminal pattern instructions, defining willful conduct.

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[12] Able defense counsel submitted a letter on October 15, 2013, which the Court accepts as a post-trial suggestion, that the jury's resolution of the criminal misconduct theory of using confidential information means that it could not find willful misconduct or willful neglect for the non-criminal or non-penal aspects of this case. Defense counsel maintained that the State failed to provide an instruction, as was its duty, on its non-penal ouster grounds for willful misconduct and willful neglect of duties, and that the instructions provided, despite a lack of objection *from any party*, were confusing. The Court had several conferences to urge counsel to provide better instructions that actually reflected the theories pursued in the case, particularly because the State was pursuing criminal and non-criminal theories of willful misconduct. However, even if the jury instructions *might* have required some additional definition of the elements of misconduct, which is not apparent, the verdict remains advisory only and the Court can utilize it as it wishes in makings its own determination. But the Court believes the jury got it right on all counts. Additionally, K.S.A. 60-251(c) requires counsel to object to instructions before the instructions and arguments are delivered. Defense counsel made no such objection.

Of course, even if the jury was confused[13] or not adequately instructed, it does not prevent the Court from using as much or as little of the jury's determination as it finds helpful. The Kansas supreme court has held that "[a]n advisory jury is merely consultative with no binding effect in the trial court's decision. Thus, any error in the instruction to the advisory jury constitutes harmless error." *Lostutter v. Estate of Larkin*, 235 Kan. 154, Syl. ¶ 4, 679 P.2d 181 (1984). "Errors, if any, made by the trial court in giving instructions to an advisory jury are immaterial." *In re Robert's Estate*, 192 Kan. 91, 99, 386 P.2d 301 (1963). As noted, the jury adequately resolved the State's criminal or moral turpitude theories. But, even assuming it found no willful criminal misconduct, which required meeting four conjunctive elements, that did not prevent the jury from deciding there was a willful and purposeful wrong committed. The civil or non-penal version of misconduct in office could and did involve a violation of the city's ethics code, incorporated by ordinance, which is a "law" which required or mandated compliance by Mr. Morrison. It did not countenance evasion of his responsibilities or pleas to his particular humanitarian ethic. He already owed an ethical obligation not to violate the City's ordinance.

In this regard, the Code of the City of Prairie Village, Exhibit 61, at 1-13, precluded, under its conflict of interest policy, subsection (e)(6)(b), any council member from granting "any improper favor, service or thing of value."[14] Arguably, allowing Mr. Malone to stay in City Hall for four nights was an improper favor of value. Additionally, the ordinance precludes misuse of

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[13] The jury actually asked two questions of the Court before its verdict, related to reviewing certain evidence. But at no time did it reflect confusion over the instructions.

[14] Whether the city put a "value" on spending the night in City Hall is irrelevant because even a hotel stay would require some value. There is no doubt that Mr. Morrison found some measure of personal benefit in extending the value of his political connections to a friend of 17 years to allow him unimpeded access to something not afforded even taxpayers in Prairie Village. Mr. Malone was not even a resident of the city.

city property in subsection (g), by precluding any city official from permitting the use of city "property for personal convenience … except when such services are available to the public generally." The evidence is unrebutted from the city administrator, Quinn Bennion, that City Hall was not available for overnight residency to the public in general. Even after a significant storm on February 27, 2013, a community center was opened for the day. Such access, however, was afforded the public during regular business hours. Mr. Morrison, the evidence shows, used city property for his own convenience to meet his need to demonstrate to his friend that he was important enough to allow him access unavailable to the public in general. This was a personal benefit to Mr. Morrison. Enforcement of the city code for its violation, when involving public officials, is by censor or ouster. Exhibit 61, at 1-14(j). The city council voted for ouster.

When the Court impaneled an advisory jury October 14-16, it heard Councilman Morrison apologize for his "lapse in judgment."[15] And, while the jury determined that neither Mr. Morrison nor Mr. Malone was responsible for criminal conduct, there is little doubt that there was a violation of the city's ordinances on ethical requirements. It is a law which requires compliance under K.S.A. 60-1205(1) and (2). No city council member can ignore or finesse this fact no matter how noble he or she views a humanitarian motive or a sense of entitlement to use the premises as they see fit. Mr. Morrison did not contest the ethics charges when they were brought before the council. He assumed he would receive only a censor, not the ouster the council voted for.

While there is also a superficial appeal in this case to allow the voters in Ward 5 to show their displeasure through either a recall election or at the next ballot box, the legislature has

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[15] Such a response seems almost a cliché substitution for contrition.

directed district courts to address misconduct by public officials through the jurisdiction of an ouster proceeding. In some measure, an advisory jury reflects the will of the community. In this respect, the Court believes the jury got it right.

There obviously could be a different view of what happened October 27 through October 31, if the person Mr. Morrison sought to help was an abused spouse seeking sanctuary. That Mr. Malone did no harm while at City Hall while he was there, or that he needed help, could be passed off as "no harm no foul." More importantly, however, is that laws are not intended to be ignored, bent or selectively enforced. Here, the councilman owed citizens a fiduciary obligation to protect city property, staff and citizens, all of which could have been jeopardized by a thoughtless risk to which Mr. Morrison would not even subject his own family.

Because he violated the law in this respect, it is the Court's judgment that he be ousted from office under K.S.A. 60-1205(1) and (2), forthwith.

IT IS SO ORDERED, ADJUDGED AND DECREED.

10/18/13 /s/ David W. Hauber

Date DAVID W. HAUBER
District Court Judge, Div. 7

NOTICE OF ELECTRONIC SERVICE

Pursuant to KSA 60258, as amended, copies of the above and foregoing ruling of the court have been delivered by the Justice Information Management System (JIMS) automatic notification electronically generated upon filing of the same by the Clerk of the District Court to the email addresses provided by counsel of record in this case. Counsel for the parties so served shall determine whether all parties have received appropriate notice, complete service on all parties who have not yet been served, and file a certificate of service for any additional service made.

/s/ DWH