

IN THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI

IN RE: AFFIDAVIT FOR REFERRAL TO	)	
PROSECUTING ATTORNEY	)	
	)	
	)	Case No. 1831-MC00153
	)	

**MEMORANDUM TO COURT**

COMES NOW, the State of Missouri, by and through Special Prosecuting Attorney, Amy Fite. The court appointment for the Special Prosecuting Attorney was specific to all the powers, duties and responsibilities set forth in section 106.230 RSMo.

The statutory duty pursuant to section 106.230 RSMo includes determining whether the facts alleged in the affidavit justify filing a complaint.

Section 106.220 RSMo provides, “Any person elected or appointed...., who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, ...shall thereby forfeit his office and may be removed therefrom in the manner provided in sections 106.230 to 106.290”

Therefore, the specific issue to determine is whether or not Presiding Commissioner Curtin forfeited his office under section 106.220 RSMo by either failing to personally devote his time to the performance of the duties of such office, or by being guilty of a willful or fraudulent violation or neglect of an official duty.

The Missouri Supreme Court in *State v. Foote* stated that while a conviction is not required for ouster, even criminal conduct, if it is unrelated to an official duty is not sufficient for ouster. 903 S.W.2d 535, 538 (Mo. 1995) (citing *State ex inf. McKittrick v. Wymore*, 343 Mo. 98, 119 S.W.2d 941, 944 (Mo. banc 1938)). In *Foote*, the Missouri Supreme Court acknowledged there is no statutory definition of “official duty” and stated it included “those duties specifically set out in the several statutes”. *Id.* The *Foote* Court went on to state the Missouri Supreme Court in *State ex inf. McKittrick v. Wymore*, 345 Mo. 169, 132 S.W.2d 979, 987 (Mo. banc 1939)

(quoting 46 C.J. Sec. 301 p.1035) previously explained the duties of a public office also include: those [duties] lying fairly within its scope, those essential to the accomplishment of the main purpose for which the office was created, and those which, although incidental and collateral, serve to promote the accomplishment of the principal purposes. *Id.*

Following a thorough review of the matter and researching applicable caselaw and statutes, in summary, my opinions and conclusions include:

- a. There was a PAC created. However, there is no prohibition on creating a PAC.
- b. Mr. Cirtin did perform work on the PAC while in Greene County buildings, did request employees to do PAC related work, did request employees to do PAC related work while in Greene County buildings, and that he did use Greene County e-mail for PAC related work. While this conduct is prohibited for certain state employees, there is not a similar statutory prohibition for county officials. See Section 36.157 RSMo. Further, while some of this conduct appears contrary to certain provisions of the Greene County Personnel Manual and to the advice provided by the county counselor, neither the Greene County Personnel Manual nor the advice of the county counselor created an official duty. See Greene County Personnel Policy Manual sections 1-4 (a), 3-8 (d), 15-1 (b), 15-2, 15-5, and 15-6 and John Housley opinion letter dated September 7, 2017.
- c. Mr. Cirtin is alleged several times to have failed to personally devote his time to the performance of his duties. As stated above, Mr. Cirtin engaged in work on the PAC while in Greene County buildings and during Greene County's regular business hours. There is no statute specifically prohibiting this. The facts further included, Mr. Cirtin continued to engage in his duties as presiding commissioner.

Therefore, this conduct did not constitute forfeiture of office by failing to personally devote his time to the performance of his duties.

- d. Many of the allegations are addressed by the Missouri Ethics Commission finding “no reasonable grounds to support one or more violations of chapter 115 RSMo or Section 130.047, RSMo by the Greene County Commissioners or by the Greene County Sheriff”. See Joint Stipulation of Facts I. paragraph (4) filed April 25, 2018. This includes Section 115.646 RSMo prohibition on “no contribution or expenditure of public funds shall be made directly by any officer, employee or agent of any political subdivision to advocate, support or oppose any ballot measure of candidate for public office. This section shall not be construed to prohibit any public official of a political subdivision from making public appearance or construed to prohibit any public official from making public appearance or from issuing press releases concerning any such ballot measure.”

(It is significant that the prohibition in Section 115.646 RSMo is for direct expenditures of public funds while a prohibition in Section 36.157 RSMo is for the use of state resources. Specifically, Section 36.157 RSMo provides: Prohibitions on political activities by state employees. An employee may not engage in political activity (1) While on duty; (2) In any room or building occupied in the discharge of official duties; (3) By utilizing any state resources or facilities; (4) While wearing a uniform or official insignia identifying the office or position of the employee; or (5) When using any vehicle owned or leased by the state or any agency or instrumentality of the state.)

- e. The allegation in paragraph 9(e) regards the use of Greene County’s tax-exempt status to fraudulently obtain a tax refund. The facts include there was a Largent invoice #7608 billed to Greene County. This was for push cards prepared for the PAC. Though the invoice was

- addressed to Greene County, it was paid for by the PAC not by Greene County. Further, e-mail communications reflect that after being informed by Largent of its recent receipt of a tax-exempt letter and of incorrectly charging tax to invoice #7608, Mr. Cirtin requested a check to be cut for a sales tax refund to Greene County. Please note that Largent performed work for both Greene County and for the PAC. The work for Greene County was tax-exempt. Largent did cut check #023381 to Greene County to refund sales tax from the 7608 invoice in the amount of \$150.94. However, it was subsequently voided. Therefore, neither Greene County nor the PAC received an unwarranted tax refund.
- f. Paragraph 9(f) alleges violations of Chapter 610 by holding a meeting and conducting county business without all the commissioners and further alleged a notice violation. First, Chapter 610 does not apply to meetings regarding a PAC. Further, public meetings are conducted by governmental bodies. See Section 610.010 (4) and (5). The notice requirement pertains to governmental bodies. See Section 610.020 RSMo. Enforcement of Sections 610.010 to 610.026 RSMo can be had by bringing an action against a governmental body. See Section 610.027 RSMo. It is a governmental body that can violate Section 610.020 RSMo. The allegation is claiming a violation by Mr. Cirtin individually. As an individual, Mr. Cirtin does not constitute a governmental body. Therefore, this allegation cannot create a basis for forfeiture of office.
- g. It is appropriate for employees to seek an opinion from legal counsel on what conduct is and is not ethical and lawful. An employee seeking such an opinion, even if the request is prompted by Mr. Cirtin's conduct, cannot form the basis for Mr. Cirtin forfeiting his office, as forfeiture is based on the office holder's conduct. Mr. Cirtin's

response to the opinion does not constitute a violation of an official duty.

- h. Whether or not Mr. Cirtin's conduct was coercive or created a hostile or intimidating work environment does not constitute forfeiture as such conduct does not correspond to an official duty.
- i. Violating the constitutional prohibition on nepotism includes forfeiture of office. The facts include Mr. Cirtin's wife became a part-time employee of the Ozark Transportation Organization (OTO) while Mr. Cirtin was serving as the Chair of the Board of Directors. Mr. Cirtin's eligibility to serve on the Board of Directors was directly related to his being a Greene County Commissioner. While the Board of Directors was responsible for the hiring of the position of Executive Director for the OTO, the Executive Director position was responsible for hiring the remainder of the staff. While the prohibition on nepotism arguably applies to this situation and if so, any member of the Board of Directors is prohibited from naming, appointing or voting to have a relative within the fourth degree employed as the Executive Director. It was the Executive Director who had the authority to and did hire Mrs. Cirtin.

While there are facts that support that some of the conduct alleged in the affidavit did occur, this conduct did not involve a willful or fraudulent violation or neglect of any official duty. Thus, justification is lacking to prosecute the affidavit.

Respectfully submitted:



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AMY J. FITE, #44966  
Special Prosecuting Attorney