

**Evanston City Council
Closed Session Minutes
Aldermanic Library
Tuesday, May 31, 2005**

PRESENT: Aldermen Wynne, Holmes, Moran, Tisdahl, Rainey, and Hansen

ABSENT: Aldermen Jean-Baptiste, Bernstein and Wollin

STAFF: Judith Aiello, Julia Carroll, Herb Hill, Frank Kaminski, Gavin Morgan, Elke Purze and Bill Stafford

PRESIDING: Mayor Lorraine H. Morton

START: 6:08 p.m.

Alderman Tisdahl moved that Council convene into Closed Session for the purpose of discussing matters related to litigation pursuant to 5ILCS Section 120/2 (c) (11). Seconded by Alderman Hansen.

Roll call. Voting aye – Wynne, Holmes, Moran, Tisdahl, Rainey, Hansen. Voting nay – none. Motion carried. (6-0)

The following aldermen communicated by teleconference during this meeting: Alderman Bernstein from Pratt, KS, Alderman Wollin from Madeira Beach, FL and Alderman Jean-Baptiste from Chicago, IL.

1st Assistant Corporation Counsel Herb Hill announced they were to decide on whether to settle the Prado/DeVaul case which was on appeal and the Elowina DeVaul case. Originally there was a \$13,001,000 judgment on the Prado/DeVaul case (with interest accruing daily at \$1600-1800) and, pending the Appellate Court decision on Prado/DeVaul case, a stay on the Elowina/DeVaul case which was booked at \$4 million. Total exposure for both was \$17 million. The latest negotiation resulted in \$4.5 million to settle Prado/DeVaul and \$2 million to settle Elowina/DeVaul, a package of \$6.5 million. That is 34 cents on the dollar on the Prado/DeVaul case and a good settlement number.

The purpose of the meeting was to make a decision on this matter. At the last negotiation he did not put a number on the table, told plaintiff's attorney that number was off, based upon his failure to respond to a meeting seven-eight weeks ago. Mr. Hill thought that the attorney thought \$5 million was still on the table. Hill had told him he did not know if he could get \$5 million. Plaintiff's attorney was at \$9 million for both cases and in the interim went down by \$2.5 million. Based on this change in his demand, he requested Mayor Morton call a special meeting so Council could have a decision opportunity because the Appellate Court could make a decision any day.

Alderman Rainey asked the cost of the appeal and how did Hill account for the change in the settlement figure by plaintiff's attorney, recalling the attorney had said his client was out of control. The cost of the appeal is around \$600,000. Mr. Hill explained that he told the attorney at the last negotiation to make his best pitch which Hill would take to the Council and he refused. The attorney did not get back to Hill. However the attorney got back to Quinlan and told him he was still at \$9 million. The City Council's position was the last best offer and the City out waited the plaintiff. Hill's position, was no money on the table, you call this meeting, tell me what you want and Hill corrected DeFranco's misstatements. DeFranco then backed off; thought they were worried about the Appellate Court decision, although the hearing had occurred. Alderman Rainey asked who was at the negotiation where the \$6.5 million demand was made. Mr. Hill, Jim Carroll, Bill Quinlan, Elke Purze, Lisa Jensen and Frank DeFranco were present. He wanted witnesses there because Mr. DeFranco has his own attitude on what is true and not true. Mr. DeFranco is the lead attorney but Ms. Jensen argued the appeal and conceded to the judge that there was perjury by her client. She said nothing at the discussion. The only two people who spoke were Mr. Hill and Mr. DeFranco.

City Manager Julia Carroll opined that this was a reasonable settlement, and, if they decided to take it, it would dispose of liability and risk to the City. They don't know the outcome of the appeal to the Appellate Court. She recommended Council consider this settlement.

Alderman Moran confirmed that the City put \$5 million on the table before. The last he heard there was no change in the plaintiff's position; asked who called who next? Mr. Hill said the City was called by DeFranco who called Quinlan with a story that was not correct, but wanting to have a meeting. He told Council about it and said he would meet with him at Quinlan's office. From that time, a period of 10 weeks until this call, there was no communication from Hill, Quinlan or Ryan's office to DeFranco. There was a separation of at least two months. The story was that he was waiting for Hill to get back to him, which was bogus because DeFranco had gotten back to Hill on Monday and had said no.

Mayor Morton asked how much time was spent on the appeal. Mr. Hill said about 2-1/2 or 3 years.

Alderman Wynne asked if there was any indication that the Appeals Court will make a decision anytime soon. Mr. Hill had no idea, which was another reason for this meeting. When the discussion ended, DeFranco asked Hill if he would recommend \$6.5 million to Council. Hill told DeFranco that he thought the \$6.5 million was high. DeFranco looked surprised. Does Hill believe \$6.5 million settlement is high with \$2,000 interest a day being added? Neither Quinlan nor Ryan can guarantee a win. Elowina was injured substantially and they don't have details because of the stay. \$2 million is a good settlement and a great settlement if the appeal is lost. If they win the appeal, it is a whole new trial on the facts. She spent about three weeks in the hospital and there is psychiatric report on her that is not good. She was 13 years of age at the time of this accident. Based on those risk factors, with less assurance, because he does not have all the facts, a package at \$6.5 million is a savings.

Alderman Moran said he probably would accept the \$6.5 million except he thought they had more work to do. He noted DeFranco came down big for some reason that they don't know but his gut told him that they could settle for less than \$6.5 million. They did not ask him to come down. He was at \$9 million, wasn't changing and his client was out of control. Two months pass then somebody got control without prompting. Something happened that made him worry that he was a long way from \$20 million, so he thought there was some room to negotiate. He recommended going back and telling DeFranco that he had to fight hard for \$5 million and settle at \$6 million. \$600,000 is a lot of money for the appeal, but is a sunk cost and is an irrelevant criterion for Council to decide this. If DeFranco shows an inclination to come down to \$5.5 million, he would throw the \$600,000 figure at him, noting the City invested heavily in this which needs to be factored in.

Alderman Jean-Baptiste thought it prudent to take this offer; hated to prolong the process and have the case go against the City. He did not think they had much bargaining power at this time even though the other side seemed to be weakening. Finance Director Bill Stafford told them two weeks ago about the potential loss or savings, and planned to meet this challenge, if they had to pay the total they would be hurting. He supported the \$6.5 million settlement.

Alderman Tisdahl found this egregious because the City did nothing wrong. She sat through the appeal and at one point asked Art Newman how they were doing and he told her the City was losing. She agreed with Alderman Jean-Baptiste, settle and get out, noting there is a downside to judgment bonds. Alderman Wynne, too, did not like settling because the City did nothing wrong. She worked that when they go back and forth negotiating she cautioned they might get sent back for a new trial which would be more expensive. She thought the Elowina case was a real roll of the dice due to her hospitalization, rehab and head injury; agreed with Alderman Tisdahl. Alderman Hansen recalled when they spoke about the issues, they are evidentiary issues, but this is a situation where if they won, they could be remanded and get re-imburement.

Mr. Hill recalled there were four outstanding issues. On two they looked for complete reversal, proximate cause and willful and wanton conduct. They would be making new law in the state with that but he did not believe they would get a complete victory. Regarding the mental health records, were they to be successful and get a new trial that would bring out every mental health group against the City. The last key point says that unless the plaintiff puts their mental health at issue, mental health is confidential. They would be challenging this privilege to confidentiality. Alderman Moran recalled her mentation was damaged permanently as a result of this injury. The trial court said that was not the case and the City agreed. Mr. Hill thought they would have a good chance on the audio tape but again that involves a new trial and run the risk on everything else.

Mr. Hill said that Mr. DeFranco is an interesting character and he does not know when he tells the truth and when he does not. With his personality it is conceivable if they said settle for \$5.5 million, he would suggest rolling the dice

then forget about it. Alderman Hansen also knows Mr. DeFranco and agreed with Mr. Hill about the kind of attorney he is.

Alderman Bernstein concurred with the \$6.5 million settlement. A win in the Appellate Court, and he thought they would win, meant two new trials which were worth a lot not to go through. Alderman Wollin agreed that it would be good to get this over with rather than risk more trials. Alderman Holmes said based on Bill Stafford's commentary agreed that it would be wise to settle.

Alderman Rainey noted they were talking about settling for \$6.5 million and letting Mr. Hill negotiate. Alderman Bernstein noted that Alderman Moran suggested starting at \$5.5 million and to settle at \$6 million. Alderman Bernstein said he would give Mr. Hill his due, but if Hill did not think it would work, he would authorize \$6.5 million. A victory at the Appellate Court is only a reversal and a remand. They won't knock the case out at the Appellate Court and if there was a chance of that, he would roll the dice and settle for less. He said they are looking at two more trials costing \$250,000 and the City has exposure. He urged they go with the \$6.5 million unless Mr. Hill thinks he can do better.

Mayor Morton asked if Mr. Hill wanted Council to decide on the \$6.5 million. Mr. Hill wanted to Council to decide on the \$6.5 million or what they wanted to do. Mr. Hill said this is a high stakes poker game, and while he is a good poker player, there are times when you don't play poker with the time and risk of getting the plaintiff's attorney to agree. He would love to come back with a better deal. He did not know if that would happen. There is always the risk of the Appellate decision happening and a risk with the plaintiff's attorney who has a temper. He would love to negotiate at their direction but thought it safer to settle for \$6.5 million. Mayor Morton asked for a show of hands favoring authorization up to \$6.5 million to settle. A majority responded.

Alderman Moran said he would authorize \$6.5 million if they could not make any progress. Mr. Hill asked if he was to contact the plaintiff's attorney tomorrow, meet and he was to throw out \$5.7 million or is it \$6.5 million and they sign the papers. Alderman Moran said more people were interested in settling for \$6.5 million and he did not want to hold out for more negotiation if the majority of Council was not comfortable with that. Alderman Wynne appreciated Alderman Moran's idea to whittle the settlement down, but they have Mr. Hill's assessment of Mr. DeFranco and Alderman Hansen's. Mr. Hill is negotiating against someone who is erratic. If he could get \$500,000 would be terrific. She thought \$250,000 was low for two new trials; advised Mr. Hill to call Mr. DeFranco the next day and accept the \$6.5 million settlement. Alderman Rainey agreed; asked if there was any possibility he could change his mind. All agreed that Mr. Hill would call Mr. DeFranco and tell him that the \$6.5 million settlement was agreed upon. Alderman Moran advised someone also to call the Clerk of the Appellate Court immediately and tell them they had settled.

There being no further business to come before Council, at 6:38 p.m., Mayor Morton adjourned the meeting.

Mary P. Morris,
City Clerk