CITY OF WICHITA

ETHICS ADVISORY BOARD

TO:	City Council
FROM:	Ethics Advisory Board
SUBJECT:	EAB Report on Ethics Complaint 2023-06
	FINAL AFTER ADDITIONAL REVIEW
DATE:	May 11, 2023

On February 6, 2023, Mr. Chester Pinkston ("complainant") filed a complaint. (Originally, on October 14, 2022, Mr. Pinkston had filed a very similar complaint jointly with Mr. Jose Salcido, but it failed to pass initial review because it was not notarized as required by Council Policy 39.) In compliance with City Council Policy 39, our report is as follows:

Mr. Pinkston filed a response requesting reconsideration of the EAB's findings and conclusions. Policy 39 says any party may request additional review by the EAB if there is dispute on the facts of the complaint or interpretation of the Code of Ethics. The EAB's review is addressed at paragraphs 6 and 7, following the original decision which is set forth below.

Original Complaint Decision:

1. Summary of Complaint -

Mr. Pinkston alleges that City Council Member Bryan Frye attempted to denigrate, extort, slander and retaliate against him on September 20, 2022, using comments made during a meeting of the City Council.

2. Scope of Investigation -

The investigation included review of the complaint and the Council Member's response, review of the video recording of Council Member's comments complained of, as well as review of the follow-up comments made by Mayor Whipple. Also reviewed were the City Council meeting minutes for the Council's September 20, 2022 City Council meeting which reflected those comments.

A letter dated March 3, 2023, accompanied by a list of ten written questions seeking additional information, was sent to the complainant for response. No response has been received from the complainant to date.

On or about March 6, 2023, complainant's lawyer, James Thompson, called the investigator about the March 3, 2023 letter and accompanying questions. Mr. Thompson's first question to the investigator was what is the investigator's relationship to Det. Justin Rapp, a Wichita police

officer referred to, though not by name, in complainant's Notice of Claim against the City pursuant to K.S.A. 12-105b and related federal lawsuit. The investigator explained that there is no known blood relationship. The investigator is acquainted with and friends with the Detective's father, a now retired lawyer who practiced with the Foulston Siefkin Law Firm.

Mr. Thompson also expressed concern about providing the requested information in light of the pending litigation filed by complainant against the City as well as several City officials and employees. The investigator said he understood the reluctance in light of the litigation.

The investigator asked Mr. Thompson to ask his client, the complainant, to answer the questions he felt comfortable answering and return the responses quickly so the investigator could consider whatever information was provided in completing his investigation and submitting his report to the EAB.

Mr. Thompson suggested that he'd speak with his client but made no further commitment.

On March 28, 2023, the investigator sent a follow-up letter to Mr. Thompson requesting responses to those questions the complainant felt comfortable responding to. No responses have been received to date.

The lack of response to the investigator's questions does not impose a barrier to completing the investigation inasmuch as the complaint is focused on comments made by Council Member Frye which were captured on video and are also reflected in the City Council meeting minutes.

3. Summary of Facts -

On or about September 19, 2022, complainant along with two other current or former Deputy Chiefs of Police with the Wichita Police Department, through their attorney James Thompson, submitted a "Notice Pursuant To 12-105b", placing the City on notice of the Deputy Chiefs' claims for compensation due to alleged violations of federal and state law resulting in injury to them personally.

Complainant requested financial compensation in excess of $700,000, as well as non-economic relief, including a public apology from the City and the immediate resignation of the City Manager and Human Resources Director. Complainant stated that he was willing to forego litigation if a reasonable settlement could be achieved.

The following day, Council Member Frye made the following statement during the Council comments segment of the City Council meeting:

> "The definition of extortion is the practice of obtaining something, especially money, through force or threats. It is mind-blowing that two current Deputy Chiefs of the

Wichita Police Department have resorted to this tactic. Deputy Chief Salcido and Deputy Chief Pinkston should resign immediately."[1]

Mayor Whipple then spoke up, saying:

"I'll remind members that we have a firewall up in our ordinance and we are not to influence the hiring, firing or disciplinary action of employees and that we have to go through the City Manager for that, but all opinions are welcome."[2]

4. Applicable Section(s) of the Code of Ethics Involved –

The complaint form used by Mr. Pinkston is the original form, which did not specifically require listing a particular Policy 39 subsection (A-P) alleged to have been violated. In follow-up correspondence, Mr. Pinkston specifically alleges violation of subsections B and O in addition to whistleblower protections. Policy 39, Subsection "B" provides:

"[Officials of the City of Wichita, Kansas shall]:

B. Conduct themselves so as to maintain public confidence in the performance of their job duties."

It is difficult to understand how Council Member Frye's comments on a matter of public concern would violate his duty to maintain public confidence in the performance of his duties. Council Member Frye as an elected public official possesses a First Amendment right to express his opinion on such matters which is no less robust and no less strenuously protected than that afforded to the speech of citizens in general. *See Rangra v. Brown*, 566 F.3d 515 (5th Cir. 2009).

Subsection "O" provides:

"O. Refrain from patronage and do not interfere with the hiring process in order to maintain the integrity of that process. Officials should refrain from expressing an improper interest in the hiring process."

Patronage is defined in Council Policy 39 as "[a]n official's act of breaching their official authority to unduly influence the appointment of a person to a City office."

Council Member Frye's statement merely encouraged Deputy Chiefs Salcido and Pinkston to resign. His statement did not opine on the hiring of any employee or the appointment of any person to a City office. Thus, Council Member Frye's statement did not violate this provision.

Policy 39 also specifically provides Whistle Blower Protection:

"The City will not tolerate intimidation, coercion, or discrimination of any kind against officials, employees, or other individuals who voice opposition to unlawful action."

[1] Excerpts from City Council Meeting Minutes, September 20, 2022.
[2] Excerpts from City Council Meeting Minutes, September 20, 2022.

> Whistleblower is defined in part as an "employee who discloses information to appropriate officials he or she reasonably believes evidences: [a] violation of any law…."
>
> The provision goes on to say that "[n]o [] employee who in good faith reports a violation shall suffer harassment, retaliation, or adverse consequences." "An official who retaliates against someone who has reported a violation in good faith is subject to investigation by the Ethics Advisory Board."

On September 19, 2022, Deputy Chiefs Salcido, Pinkston, and Givens submitted a notice pursuant to 12-105b to the City of Wichita, clearly voicing opposition to alleged unlawful conduct. Then, at the city council meeting on September 20, 2022, Council Member Frye made the above statement.

We do not believe it is disputed that the statement was made in relation, or as a result of, the notice that was received on or about September 19, 2022. Thus, the issue comes down to whether Council Member Frye's statement amounted to intimidation, coercion, harassment, or retaliation.

It's noteworthy that Council Member Frye's statement was not accompanied with any threats or force. He simply stated that Deputy Chiefs Salcido and Pinkston should resign, without any statement regarding what actions he would take if they did not resign. The statement also was not made in a forceful or threatening manner.

Council Member Frye did not direct any City of Wichita representatives to fire or take other action against the Deputy Chiefs. Absent such a directive, it is hard to imagine how Mr. Frye's statement could be deemed retaliatory.

Finally, it should be noted that complainant specifically cited in his February 16, 2023 email the code of ethics for Wichita city employees. The EAB has no jurisdiction over the code of ethics for city employees, so that code is irrelevant to this matter.

5. Findings of the EAB –

Upon review of the parties' arguments and City policies and procedures, the Ethics Advisory Board ("EAB") finds Policy 39 was not violated.

On April 26, the EAB adopted this report and considers this matter closed.

Request for Review of Decision:

6. Response of Complainant –

Mr. Pinkston's response principally alleges that Mr. Frye's statement is not protected by the First Amendment in that it constitutes slander per se, and that, as a result, malice should be inferred. From that backdrop, Mr. Pinkston alleges that, because Mr. Frye's comments were made with malice in response to Mr. Pinkston's mandated notice, such comments meet the definitions of retaliation, harassment, and intimidation under Policy 39.

Mr. Pinkston also references that, in Kansas, retaliation is generally defined as an adverse action taken by an employer against an employee for engaging in protected activity, ultimately concluding that Mr. Frye's statement was retaliatory and an adverse employment action.

Finally, Mr. Pinkston cites the Black's Law Dictionary definitions of "harassment" and "intimidation". Black's Law defines "harassment" as "[w]ords, conduct, or action (usu. repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress to that person and serves no legitimate purpose; purposeful vexation." Notable to the EAB, Mr. Pinkston failed to reference the "repeated or persistent" language contained in the definition. Black's Law defines "intimidation" as "[u]nlawful coercion, extortion."

7. Final Determination of the EAB –

The EAB, having met in executive session to consider legal advice and then in open session, affirms its April 26, 2023 decision and finds as follows:

Mr. Pinkston's argument that Mr. Frye's statement constituted slander per se is misplaced. The Kansas Supreme Court has abolished both libel per se and slander per se. *Marcus v. Swanson*, No. 122,400, 2022 WL 3570349, at *3 (Kan. Ct. App. Aug. 19, 2022) (citing *Gobin v. Globe Publishing Co.*, 232 Kan. 1, 5, 649 P.2d 1239 (1982) and *Moran v. State*, 267 Kan. 583, 599, 985 P.2d 127 (1999)); *see also Zoeller v. American Family Mut. Ins. Co.*, 17 Kan. App. 2d 223, 229, 834 P.2d 391 (1992). As a result, such doctrines have no bearing on the EAB's decision.

Ultimately, the EAB concludes that Mr. Frye's statement is protected by the First Amendment. Even assuming, arguendo, that it is not protected, Mr. Pinkston has failed to show that he suffered harm to his reputation as a result of such statement, which is an essential element of defamation under Kansas law.

In Kansas, defamation has three elements: (1) false and defamatory words, (2) communicated to a third person, (3) that result in harm to the reputation of the person defamed. *Droge v. Rempel*, 39 Kan. App. 2d 455, 459, 180 P.3d 1094 (2008) (quoting *Hall v. Kansas Farm Bureau,* 274 Kan. 263, Syl. ¶ 4, 50 P.3d 495 (2002)). Importantly, statements of opinion are generally precluded from this definition and cannot be deemed defamatory. *See Gatlin v. Hartley, Nicholson, Hartley & Arnett, P.A.*, 29 Kan. App. 2d 318, 320, 26 P.3d 1284 (2001) (citing *Liqui–Box Corp. v. Stein,* 98 Ohio App.3d 481, 484, 648 N.E.2d 904 (1994)). The Court in *Byers v. Snyder* opined on the difference between "personal opinion reflecting subjectivity" and a statement "recounting [] objective observations", which are not opinion. 44 Kan. App. 2d 380, 397, 237 P.3d 1258 (2010). In *Byers*, the Court found that telling third parties that someone "staggered down the deck at the marina and strongly smelled of alcohol" was recounting an objective observation. *Id.* Whereas saying, he "isn't … totally innocent in all this, there are things about him you don't know" is merely a personal opinion. *Gatlin*, 29 Kan. App. 2d at 320 (citing *Stein*, 98 Ohio App.3d at 484).

In determining whether a statement is one of fact or opinion, the first inquiry is whether a reasonable factfinder could conclude that the statement implied a false assertion of fact. *See Schwartz v. American College of Emergency Physicians*, 215 F.3d 1140, 1146 (10th Cir. 2000) (citing *Jefferson County School Dist. v. Moody's Investor's Services, Inc.*, 175 F.3d 848, 853 (10th Cir. 1999)); *see also Jefferson County*, 175 F.3d at 855. The second inquiry is whether the statement is "sufficiently factual to be susceptible of being proved true or false." *Schwartz*,

215 F.3d at 1146 (citing *Jefferson County*, 175 F.3d at 853 and *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21, (1990)); *see also Carson v. Lynch*, No. 76,767, 1998 WL 36035596, at *2 (Kan. Ct. App. May 22, 1998) (citing *Milkovich*, 497 U.S. at 20-21) (In order to be actionable, "a statement of opinion must contain a provable false connotation".).

In *Milkovich*, a newspaper article alleged that the plaintiff lied at a hearing. 497 U.S. at 5. The Court concluded that a reasonable factfinder could conclude that the statements at issue implied an assertion that plaintiff perjured himself at the hearing. *Id.* at 21. The Court also found "the connotation that plaintiff committed perjury was sufficiently factual to be susceptible of being proved true or false." *Id.* Whether the plaintiff lied, the Court explained, could be verified by comparing the plaintiff's testimony at the subject hearing and his testimony before the trial court. *Id.* "Unlike a subjective assertion the averred defamatory language is an articulation of an objectively verifiable event." *Id.* at 22 (quoting *Scott v. News-Herald*, 25 Ohio St.3d 243, 496 N.E.2d 699, 707 (1986)).

Similarly, in *Schwartz*, because a statement that an individual was "being sued for stock fraud" implied that such individual had perhaps engaged in stock fraud, and the statement was "sufficiently factual to be susceptible of being proved true or false", the Tenth Circuit determined that such statement was an unambiguous statement of fact. 215 F.3d at 1146 (quoting *Jefferson County*, 175 F.3d at 853).

Turning to the statement of Council Member Frye, we do not believe a reasonable factfinder could conclude that Mr. Frye was accusing Mr. Pinkston of the felony crime of extortion. Mr. Frye was careful to define "extortion" and make perfectly clear for any listeners what he was referring to by that term. We believe a reasonable factfinder would conclude that Council Member Frye was simply reciting a definition of extortion that he had located in a dictionary.

The only assertion we believe Mr. Frye's statement implies with regard to Mr. Pinkston is that he engaged in some forceful or threatening conduct to obtain money or something else of value. However, we do not believe this statement is susceptible of being proved true or false. Rather, it is a personal opinion reflecting subjectivity. We reach this conclusion by noting that while one person may believe that Mr. Pinkston engaged in threatening or forceful conduct by submitting the "Notice Pursuant To 12-105b", others may not. As a result, we conclude Mr. Frye's statement is protected by the First Amendment. Case law cited by Mr. Pinkston does not change this result.

Even assuming, arguendo, that Mr. Frye's statement is not protected, Mr. Pinkston's claim that the statement constitutes defamation further fails because Mr. Pinkston has failed to show damages as a result of Mr. Frye's statement. As noted above, the Kansas Supreme Court abolished slander per se. As a result, in order to make a claim of defamation, Mr. Pinkston is required to show actual damage to his reputation flowing from Mr. Frye's statement, as damages are no longer presumed. *Marcus*, 2022 WL 3570349, at *4 (citing *Gobin*, 232 Kan. at 5-6); *see also Zoeller*, 17 Kan. App. 2d at 229.

Mr. Pinkston puts forth only speculative allegations with regard to damages, including that accusations of criminal behavior *could have* serious ramifications on his career, and that the accusation *could be* a reportable offense under the Brady/Giglio standard and used to undermine his credibility. However, Mr. Pinkston has put forth no evidence showing how Mr. Frye's statement has actually damaged his career or reputation. "Broad and factually unsupported allegations ... do not support a claim for damages for alleged defamation." *Davis v. Hildyard*, 34 Kan. App. 2d 22, 30, 113 P.3d 827 (2005). "Although damages need not be

proved with exactitude or certainty, they must be more than merely speculative." *Marcus*, 2022 WL 3570349, at *6 (citing *Ryan v. Kansas Power & Light Co.*, 249 Kan. 1, 9, 815 P.2d 528 (1991), and *Ohlmeier v. Jones*, 51 Kan. App. 2d 1014, 1021, 360 P.3d 447 (2015)). Mr. Pinkston has not met this standard.

Mr. Pinkston's cited definitions for retaliation, harassment, and intimidation, also do not alter the EAB's original decision. Absent a directive to fire or take some other adverse action against Mr. Pinkston, we do not deem Mr. Frye's statement retaliatory or an adverse employment action.

The Black's Law definition of "harassment" even further supports the EAB's original decision. Mr. Frye's statement was not made for the purpose of annoying or alarming Mr. Pinkston, but it was made with regard to his "Notice Pursuant To 12-105b", which is clearly a matter of public concern. As such, the EAB believes Mr. Frye's statement served a legitimate purpose in addressing a matter of public concern. Also relevant to the EAB is that, according to Black's Law, harassment usually involves words or conduct that is "repeated or persistent". That is not the case here.

Finally, for all the reasons noted in our original decision and for those cited above, we do not find that Mr. Frye engaged in any unlawful or intimidating conduct.

The EAB has carefully considered the Complainant's assertions. The original decision of the EAB set forth above is hereby affirmed.