

**NORTHERN KENTUCKY REGIONAL ETHICS AUTHORITY
ENFORCEMENT COMMITTEE
CASE NUMBER 20-11-19**

IN RE THE MATTER OF: Tyson Hermes, Council Member, City of Erlanger

HEARING DATE: November 19, 2020

FINDINGS, CONCLUSIONS & RECOMMENDATION

This matter is before the Northern Kentucky Regional Ethics Authority Enforcement Committee as result of a complaint filed by Jennifer Brown Jasper, then a candidate for Erlanger City Council, alleging that Tyson Hermes, then a member of the Erlanger City Council, violated the Erlanger Code of Ethics.

The original complaint alleged that Councilmember Hermes violated the Erlanger Code of Ethics section 43.13, by making use of public property for private use by participating in a “Candidate Forum” sponsored by the River City News, which forum was recorded and broadcast to the public, while Mr. Hermes was in the council chambers and had displayed behind him “campaign signs”.

The factual allegation upon which the complaint was made stated that Councilmember Hermes made use of public property for private use by participating in a “Candidate Forum” sponsored by the River City News, which forum was recorded and broadcast to the public, while Mr. Hermes was in the council chambers and had displayed behind him “campaign signs”.

Section 43.13 of the Erlanger Code of Ethics states as follows:

43.13 USE OF CITY PROPERTY, EQUIPMENT AND PERSONNEL.

No officer or employee of the city shall use or permit the use of any city time, funds, personnel, equipment, or other personal or real property for the private use of any person, unless:

- (A) The use is specifically authorized by a stated city policy.
- (B) The use is available to the general public, and then only to the extent and upon the terms that such use is available to the general public.
- (C) The use is disclosed to the City Council, at a public meeting thereof, and authorized and approved by the Mayor and City Council.

(Ord. 2048, passed 12-6-94)

After preliminary review the Northern Kentucky Regional Ethics Authority Enforcement Committee unanimously determined that the matter should be brought to a public hearing.

Notice to all parties was served and a hearing upon the complaint was scheduled for November 19, 2020 at 10:00 am on the 8x8 virtual platform.

On November 19, 2020, the hearing on the complaint was called to order and record was made of all those in attendance.

Appearing at the hearing was Jennifer Jasper and Council Member Hermes by and through counsel Chris Wiest. Also present for testimony was Erlanger Mayor Jessica Fette and Erlanger City Administrator Matthew Kremer.

All evidence previously submitted along with the complaint and the Councilman's written response was considered by the Committee.

That evidence included:

The original complaint, the River City News online Erlanger City Council Candidate Forum video, Councilman Hermes' response to the complaint and three Erlanger City Policies (Personal & Professional Wellness, Building Access Procedure and Meeting Room Rental Rules & Agreement Policy).

Councilman Hermes was given the opportunity to present any other evidence he wanted the Committee to consider, testified before the Committee and offered argument in his defense.

Mr. Hermes defended the complaint by alleging that his use of the city property was permitted by the city in accordance with a long-standing policy applicable to city personnel. He also defended by asserting that he was a "public agency".

It was stipulated that the place from which Councilmember Hermes participated in the forum was indeed city property.

After hearing and receiving all of the evidence, the Committee voted unanimously to go into executive session to deliberate the evidence.

The committee then returned from executive session and announced that the action to be taken would be the issuance of this finding and order and would include one dissent from the majority by separate writing.

THEREFORE, based upon the entire record the Committee **FINDS** that the respondent did in fact use city property during the forum. It is the finding of the committee that the respondent also displayed signs which he used during the then active campaign to advocate for his candidacy.

It is also the finding of the committee that the respondent did not obtain permission to use the council chambers, did not pay to rent the facility and did not schedule his use as per the custom of the city with any city personnel.

All of these uses would be in violation of the City of Erlanger ethics code Section 43.13 of the city *if* they were considered by the legislative body of the city to be “private use.”

However, while the city legislative body did include a “definitions” section in their code, they did not define what they intended to prohibit under the term “private use”. Nowhere in the code is that term defined, nor is there any indication by reasonable reference to other sections of the code from which that definition can be accurately determined.

The city mayor and manager both testified to “customs” but those are likewise not identified in the code of the city as legally enforceable definitions as customs can change without legislative action.

This committee is charged with the duty of enforcing the ethics code as written by the city of Erlanger. We have no authority to insert our own definitions into that code or speculate what the council may insert if it chooses to do so. Our job is to apply the code as written. And as written the code supplies no definition of “private use” which we can cite as grounds for enforcement of the remainder of the prohibitions, or permissions discussed therein.

The committee is charged with considering if the provided evidence is sufficient to meet the high standard of “clear and convincing” evidence. In the absence of a definition of “private purpose” or “private use” set forth by the legislative body of the City of Erlanger, as a Committee, we agreed that the standard of “clear and convincing” evidence of a violation of the Erlanger Code of Ethics could not be met.

For this reason, the Committee hereby **CONCLUDES** that the matter within be **DISMISSED** for the sole reason stated above. The Committee hereby recommends that the City of Erlanger consider revising the ordinance for clarity.

SO ORDERED THIS 19th DAY OF NOVEMBER 2020.

Marcus Carey
Chairman

DISSENTING OPINION written by the Honorable Robert F. Greene follows:

I respectfully dissent.

The majority Order clearly summarizes the actions of Councilman Hermes. The majority Order also leans toward a determination that Councilman Hermes violated the ordinance; but stops short because the ordinance does not define “private use.” My dissent is based on the proposition that “private use” does not need to be more specifically defined in the ordinance. Those words are an accepted part of our everyday language, are firmly embedded in it, and are in common usage by the citizens of Erlanger.

The opposite term in the context of the ordinance is “public use.” Those words are also an accepted part of our everyday language, are firmly embedded in it, and are in common usage by the citizens of Erlanger. They know and understand the difference without the necessity of specific definitions being set out in the ordinance; and while specific definitions of uncommon terms may be a comfort to those charged with enforcement, they are not necessary for words in common use.

The high standard of proof that must be applied here, clear and convincing evidence, demands prudence in interpreting the wording of the ordinance, but prudence also demands a sense of reasonableness and understanding of the objectives and purposes of the ordinance. There must be a balance here. “Private use” is an accepted part of our everyday language, are firmly embedded in it, and are in common usage by the citizens of Erlanger. In 1964 Supreme Court Justice Potter Stewart wrote that he did not need further definitions of “obscenity.” He coined the now famous phrase, “*I know it when I see it.*” At the other end of the spectrum, President Clinton, during his impeachment hearings, claimed in a deposition that he could not answer a question because “... *he did not know what the definition of ‘is’ is.*” Prudence and reasonableness lie between these extremes.

In my opinion, Councilman Hermes is in clear violation of the ordinance. He chose to be portrayed in the televised candidate forum from the City Building’s Council Chambers, ignoring the city’s established procedures for the private use of these city-owned and controlled facilities. It is my further opinion that his participation in this candidate forum under these admitted circumstances was a campaign event and a “private use” within the ordinary and customary meaning of those words. My preference would have been to recommend an appropriate sanction.

Robert F. Greene
Vice-Chairman