

TOWN HALL 3 EAST MAIN ROAD PERU, MA 01235

**SELECT BOARD EXECUTIVE SESSION MEETING MINUTES: June 1, 2021: 6:03 P.M.**

**Town Administrators Office**

Ed Munch, BOS Chairman/Historical Commission  
Bruce Cullett, Selectman/Chief of Police  
Verne Leach, Selectman/ACO  
Caleb Mitchell, Town Administrator  
Attorney Davis  
Jody Mills, Insurance Agent

Item 1: **Call to order:** 6:03 P.M.

Item 2: **Roll Call:** Chairman Munch Present, Selectman Cullett Present, Selectman Leach Present

Item 3: **State Recording status:** Caleb Mitchell recording.

Item 5: **Possible executive session in accordance with M.G.L. c. 30a sec. 21(3) to conduct strategy with respect to Litigation**

Attorney John Davis said he is an attorney out of Boston retained by the Town of Peru Insurance Company, MIIA, and with is Jody Mills, a representative from the Insurance Company. Attorney Davis said he was recently contacted by MIIA regarding the action brought by the Estate of Sherilyn Hayes. Attorney Davis stated that Ms. Hayes was a young woman who passed away in November 2019 by her own hand under circumstances that the family believes puts some culpability on the defendants they have named in the lawsuit. The primary defendant or the principal defendants are the Town of Dalton, Former Police Officer John Marley, the Dalton dispatcher, Dalton Police Chief, and another Police Officer in the Town of Dalton. Attorney Davis said the reason he is there is that they have named the Town of Peru as well as Officer Kyle Nutting as defendants. Attorney Davis said he was hired only to defend the Town of Peru and that he is not defending Mr. Nutting and the Insurance Company is not providing Mr. Nutting with a defense because he was acting outside the scope of his employment, he was not acting in his capacity as a Police Officer at the time of the activity alleged in the complaint. The claims in the complaint are Civil Rights claims alleging the violation of the deceased for; Due Process, Equal Protection Rights; wrongful death; and negligence of the Town of Peru. Attorney Davis said his view is that this is an exceedingly difficult case to win against the Town of Peru and that liability, if any, looks very thin, maybe the Town of Dalton has some issues because this young woman passed in the Town of Dalton and a friend of hers called the Dalton Police Department looking for a well being check and no well being check was ever sent out. That is really the substance of the complaint, why they did not send a wellness check out. Attorney Davis said that if the Board read any of the complaint there were some concerns about Mr. Nutting as the boyfriend of the deceased and there may have been something to protect him and not focusing on responding to the call for a wellness check. Attorney Davis said he thinks the case is very defensible on behalf of the Town of Peru in the sense that number one, Officer Nutting was acting outside the scope of his employment and the Town of Peru as an employer of Mr. Nutting is not responsible for things he is doing when he is not acting as a Police Officer or in uniform and doing business for the Town as Law Enforcement. Secondly, the Law in Massachusetts is clear that typically one does not owe a duty to prevent another from committing suicide and there are cases involving Police Departments, Schools, and other institutions. Typically, that is the type of action on part of somebody who is very distressed or upset and in that frame of mind. They are the cause of their own demise not the conduct of somebody else. There are some narrow exceptions to that in the context of residential schools, but he does not think there are exceptions that would apply in these circumstances. Attorney



Davis said there is also some issues with the timing and if this young woman actually took her life before the Dalton Police Department was ever called, there still may be some questions to be answered by Dalton Police for the failure to respond on a timely basis but it might be that the situation when she was already deceased and a timely response, to put it bluntly, would not have made a difference in the end. There is also an absence of any allegations or fault on the part of the Town of Peru in this complaint. To try and identify what the Town is accused of doing or failing to do is hard to identify on the part of the Town, Town Officials, or Town Personnel. There is a lot of reasons for why the court might give us a dismissal. The Civil Rights standard is extremely high, you have to show some sort of aggregates conduct on the part of a public entity, typically if you're talking about Due Process the standard is you have to show a conduct on the part of the defendant that shocks the conscience and there is none. On top of that, as a Town and a Municipality, you're not vicariously liable for Mr. Nutting and they would have to show conduct that rises to the level of a policy or practice on part of the Town. There is no such policy or practice alleged in the complaint. Finally, to the extent that even if they have, they could state a negligence complaint against the Town, which would be controlled by the Massachusetts Court Claims Act, the maximum amount recoverable against a public employer such as a City or Town is \$100,000.

Attorney Davis said there are many immunities that can be invoked, and he would plan to invoke on behalf of the Town including one which says that the Public Employer did not originally cause the harmful situation that ensued so you can't be held responsible for damages. Attorney Davis said he spoke to the Plaintiff's Counsel, Attorney Burke, today who is well know in representing employees and has a positive reputation. Attorney Davis asked Attorney Burke about service and Attorney Burke was unaware that anybody had been served the summons and complaint on the Town of Peru. It would be important for them to kick off this case against the Town of Peru and have a Constable or Sheriff come to the Town Hall and serve either the Town Administrator or another Town Official with the Process. Attorney Davis told Attorney Burke that he was authorized by the Town of Peru to waive service of summons on behalf of the Town. The effect of this is twofold, they don't have to chase someone down to serve in hand, but the advantage of waiving service is the Town has more time to respond than they normally would. If they were to serve the Town, the summons and complaint they would have 20 days to respond but by waiving service they get 60 days to file a response. Attorney Davis said with all the reasons mentioned about the strength of the defense, he would plan to respond by preparing and filing a motion to dismiss. Typically, a defendant would need to go paragraph by paragraph, I admit this, I deny this, I cannot admit or deny this and set forth in writing the various defenses they have. Attorney Davis is inclined to respond instead not with an answer but simply asking the Court to Dismiss this claim against the Town of Peru because the allegations do not support a claim for Civil Rights, negligence, or wrongful death. Attorney Davis believes the Town has a very liable motion and so he is inclined, with the Boards approval, to respond with a motion to dismiss. If Attorney Davis does this the timing would be around August 1<sup>st</sup>, the plaintiff would then have 14 days to file opposition. It is all done electronically these days so all other parties will receive electronic notice and copies of filings. Attorney Davis would then expect the Court to schedule an early hearing possibly by the end of August or early September. This would provide an opportunity for the Court to hear from both parties and then most likely at that point take the matter under advisement and wait for a decision. Attorney Davis said sometimes the decision is made in a matter of weeks and sometimes it's a matter of months, but he hopes that by the Fall there will be a decision on the motion to dismiss and if granted, Peru is out of the case. If the motion is denied, no loss in trying, then they prepare and file an answer and go through the discovery process with other defendants.

Cullett stated that it makes sense. Chairman Munch said he thinks the Board agrees with what Attorney Davis has said and things he should proceed in the direction he is heading. Attorney Davis said he would continue to update TA Mitchell and share copies of anything he prepares and files on behalf of the Town. Jody Mills stated she thinks Attorney Davis said everything she was going to say, and that the Town does have a \$2500.00 deductible that would go towards payment of the claim or defense costs. Jody stated she agrees with Attorney Davis's strategy and there was a letter sent out stating that Mr. Nutting was not in the scope of his employment so there is no insurance coverage for him. Cullett state that was expected. Munch said he is surprised that the Town of Peru was named in this suit, that they are distant from the whole incident that he does not see what connection there is. Attorney Davis said nor does he, the only allegations that even mention Peru is that Mr. Nutting was employed as a Police Officer, but they do not go so far as to allege he was acting in the scope. Attorney Davis said Mr. Nutting was having dinner with the former Chief around the time of the first call to Dalton and that Officer Marley reached out to the former Chief on his cell phone and the Chief

passed the cell to Mr. Nutting and rather than Dalton sending Officers to North Street home of the deceased they waited for Mr. Nutting, who went to the home with a friend and discovered the body. That is not to say there is a connection to Peru only in the terms of proximity, and a call was made and answered by your former Chief, and Mr. Nutting received a paycheck as an employee of Peru. Attorney Davis does not see allegations of fault or wrongdoing so as a defendant that are entitled to know what they are accused of.

Leach asked if they were aware that the Town had the investigator from outside. Cullett said he was not sure if it's important at this point to let Attorney Davis know there was an independent investigator firm hired to review Officer Nutting's conduct on that evening and the report does exonerate him and indicates he didn't violate any policy or procedure of the Police Department. Attorney Davis said he would like copy of the report and would like a copy of the report from Dalton.

Cullett made a motion at 6:30 to end the Executive Session. Munch seconds. All agree. Vote 3-0.

Respectfully Submitted

*Tonya Santaniello*, Administrative Assistant

Ed Munch, Chairman

Verne Leach, Selectman

Bruce Cullett, Selectman

Date Approved: 4/11/2022

Received April 26, 2022  
Kim Leach, Town Clerk

