

CITY OF CRANSTON
BOARD OF CANVASSERS
Special Meeting of July 19, 2021 – APPROVED MINUTES

The Cranston Board of Canvassers met on July 19, 2021, in a meeting advertised in accordance with the Rhode Island Open Meetings Act on July 15, 2021. The meeting was called to order by the Chairperson, Randall Jackvony, at 4:32 p.m. It was held virtually via electronic means on Zoom, conducted in accordance with the Governor's Executive Order 21-72 in response to the COVID-19 Coronavirus Pandemic.

MEMBERS PRESENT: Randall Jackvony, Gary Vierra, Quilcia Moronta

MEMBERS ABSENT: None

NON-MEMBERS PRESENT: Nicholas Lima (Registrar / Director of Elections), Alice Petrone (Board Alternate), Dolores DiMeo Carroll (Board Alternate), Anthony Moretti (Director of Administration), Christopher Millea (City Solicitor), Emerson Brito (Elections Assistant)

The chair declared a quorum present.

AGENDA

- I. CALL TO ORDER
- II. APPROVAL OF MINUTES – 6-17-2021 (VOTES MAY BE TAKEN)
- III. PURSUANT TO R.I. GEN. LAWS § 17-8-5 (A)(4), THE BOARD WILL DISCUSS AND VOTE TO APPOINT AND EMPLOY EMERSON BRITO AS A BILINGUAL ELECTIONS SPECIALIST. (CONTINUED FROM 6-17-2021) (VOTES MAY BE TAKEN)
- IV. ADJOURNMENT (VOTE WILL BE TAKEN)

II. APPROVAL OF MINUTES – 6-17-2021 (VOTES MAY BE TAKEN)

Mr. Jackvony asked for a motion to approve.

MOTION: By Mr. Vierra and seconded by Mr. Jackvony to approve the meeting minutes of 6-17-2021.
PASSED ROLL CALL VOTE – 3-0 – Mr. Jackvony, Mr. Vierra, and Ms. Moronta voting Aye.

III. PURSUANT TO R.I. GEN. LAWS § 17-8-5 (A)(4), THE BOARD WILL DISCUSS AND VOTE TO APPOINT AND EMPLOY EMERSON BRITO AS A BILINGUAL ELECTIONS SPECIALIST. (CONTINUED FROM 6-17-2021) (VOTES MAY BE TAKEN)

Mr. Jackvony said this matter was continued from the previous Board meeting on June 17, 2021. City Solicitor Christopher Millea was on the call and asked the Chair to be heard regarding this matter.

Mr. Jackvony asked for a motion from the Board before discussion commenced. Mr. Millea agreed that a motion should be made to properly put the matter before the Board before discussion takes place.

MOTION: By Mr. Jackvony and seconded by Ms. Moronta to approve the appointment.

Discussion ensued. Mr. Millea said he hasn't attended a previous meeting of the Board and wanted to introduce himself to the membership. Mr. Millea said he is the City Solicitor for the City of Cranston and was appointed by Mayor Hopkins in January.

He said this matter has been under discussion for some time, dating back to the Mayor's budget submission to the City Council, based on discussions that the Board of Canvassers was looking to add an additional staff member. He said the Council chose to fund the new position, however there are some issues that should be addressed before the Board chooses to take action.

Mr. Millea said it is his legal opinion that the Board of Canvassers does not have the authority to appoint anyone to work for the City of Cranston. He said the Board of Canvassers is specifically addressed in the Charter as being a department that falls under the Department of Administration, and that the department head, Mr. Lima, is appointed by the Mayor of the City of Cranston. He said the Mayor has authority to appoint anyone within the department as an employee of the city.

Mr. Millea said there is a state statute which generically speaks to the authority of local canvassing boards, R.I. Gen. Laws § 17-8-5. He said this position does not fall under that exception because the position is noted as being an expert. Mr. Millea said that this statute is a violation of separation of powers and steps on the Home Rule Charter of the City of Cranston. He said a state statute cannot dictate who the City can and cannot hire within its departments.

Furthermore, Mr. Millea said there was a question as to whether or not the position is a union position or a non-union position. He said if it was a union position, it would be required to be posted and tested. He added that he as legal counsel felt that open meetings laws could be violated because this position was discussed in the budget process for an individual, which should be noted. Mr. Millea said his legal advice to the Board, as the sole attorney of all boards and commissions under the Charter, is at this point a vote should not be taken and we should review the legalities as to an appointment to this position. He said it is his opinion that the Mayor has the ability to appoint anyone within the auspices of the canvassing board, and that there is some grey area in the state statute that he doesn't think this position falls under. He said his only concern is making sure the city does this correctly.

Mr. Jackvony referenced Mr. Millea's testimony that the Mayor appoints the Registrar. Mr. Jackvony said that is not his understanding, and that Mr. Lima's position is and has been appointed by the City Council. Mr. Millea said that under Section 5.02 of the Charter, the Mayor has the power to appoint all department heads, and the only exception to that within the charter is the head of the Department of Records, the City Clerk. He said there are some areas that need to be answered in the Charter, and that

under Section 5.02, the Mayor appoints all department heads. He said because the Board of Canvassers is not specifically excluded from that charter language, then it is included. He said there is grey area how that appointment happens, but it is clear in the Charter that the Mayor controls appointments to Canvassing.

Mr. Millea said there is some grey area located within the general laws of the State of Rhode Island, but that gets into the legislature in the 1980s dictating to what the City of Cranston does with its own Home Rule Charter.

Mr. Jackvony said he doesn't want to make this about Mr. Lima, because he knows Mr. Lima was appointed by the City Council, and every Registrar prior to that was appointed by the City Council. He said the City Solicitor is taking a different tact on that, but this is not about the Registrar position that we're talking about. He asked Mr. Millea to clarify his opinion that the position is an "expert." Mr. Millea said that assuming state law would be allowed to dictate what the City of Cranston does, this position does not fall within that because a bilingual expert is not a clerical or technical assistant.

Mr. Millea added that the Registrar is chosen for a term of two years, and said that the Charter grants authority to the Mayor to appoint the Registrar and the individuals who work within the department. Mr. Millea said he would like more time to do research.

Mr. Jackvony said in looking at the state law, he views the language granting the Cranston Board of Canvassers authority is clear. Mr. Millea said in the statute, the City Council sets the fee for the appointment. Mr. Millea said this law hasn't been touched since 1987, and that the idea the state tells us who we can and can't employ is illegal and in violation of the Home Rule Charter. Mr. Millea said this should not be resolved over a Zoom call tonight.

Ms. Moronta said she was trying to understand the grey area Mr. Millea is referring to. She said her understanding is that the past practice is that the City Council has appointed positions under the authority of the Board of Canvassers.

Ms. Moronta said the June meeting was postponed because the Mayor requested more time for Mr. Millea to research this position, and Mr. Millea is now here again a month later requesting still more time. Ms. Moronta said there is a need for bilingual staff in City Hall in the canvassing office, and delaying this repeatedly is reducing the availability for that service to members of the public.

Mr. Millea said he wanted to be abundantly clear that he is not speaking to the position or its necessity or about Mr. Brito's qualifications, but he wants to ensure the expected legal process is followed. He said that the Canvassing Authority does not have the authority to appoint anyone, and he has not found a law that allows the Board the ability to appoint anyone to an interpreter position. He said it is clear from the Charter that the Mayor has the ability to appoint the Director of Canvassing, Mr. Lima, and has done so to his understanding. He said Mr. Lima was appointed after the 2020 election as a department head within the administration, and that he works under the pleasure of the Mayor of the City of Cranston.

Mr. Millea said the Law Department is not saying that Mr. Brito has to stop the job he is currently doing, nor is he saying whether the position should be part-time or full-time.

Mr. Millea said his obligation is to make sure we are not opening ourselves up to liability by rushing to a decision to appoint someone to a position that either the canvassing board does not have the authority to do, or that we're doing improperly.

Mr. Millea reiterated that by Charter he is the legal advisor to every board in the City of Cranston and it is his job to give the Board advice. He said if the Board chooses not to heed his advice and opens itself to liability, that's within the canvassing board. He said his department has done extensive research over the last month and there's still a few questions that remain unanswered, and that's the position of the city Law Department.

Mr. Jackvony said he has been serving on the Board since prior to the 2014 election, and full-time personnel has not changed, with the exception of the Registrar. He said that position has been repeatedly appointed by the City Council, but because of the stability of staffing in the office, this question has not come up in recent memory.

Mr. Jackvony said that he reviewed minutes of Board of Canvassers meetings in the 1970s and 1980s, and there were several instances where the Board took action to appoint and employ its own personnel. Mr. Millea said it is because R.I. Gen. Laws § 17-8-5 predates a constitutional convention that discussed separation of powers. Mr. Millea said he want to ensure we get this correct, and that the legal department is not trying to stonewall any decision or give advice that is improper.

Mr. Vierra said he has been around for a long time through several registrars that have been appointed, and as he understands it, the Registrar has never been submitted to the Council for advice and consent. He said the City Council takes a vote on the Registrar at the inauguration meeting, upon nomination by the Council, and it is not a name submitted by the Mayor. He said he is confused by the City Solicitor's position because it is not what the City has done in past practice for the last 20 years.

Mr. Vierra said that in terms of Mr. Millea's comments about whether the position is clerical or an expert, Mr. Vierra said the job description clearly refers to it as having clerical duties regardless of what the job title is.

Mr. Vierra also added that he says, according to Mr. Millea's argument, the issue is the legality of the state law as it applies to the Home Rule Charter. Mr. Vierra asked if that is the actual question for the city, as to whether the City should take action for the General Assembly to amend that law. Mr. Vierra said given what the plain language of the law is, the Board of Canvassers is within the confines of that law if we act today.

Mr. Millea said he doesn't want this Board or any commission to do anything that could be deemed illegal or force the City to bring an action in Superior Court. Mr. Millea said his position as legal advisor is that the Mayor has the power to appoint. He said the City Council might give advice and consent, but that ultimately Mr. Lima is appointed by the Mayor. Mr. Millea wanted to be clear that this is not about Mr. Lima as a person, but about the Registrar position, and more so about whether the Mayor has the power of appointment for staff of the Board of Canvassers.

Mr. Millea said the Charter may be at odds with the laws of the State of Rhode Island. He said his position is that the Charter would trump the state law in this regard. He said

otherwise, the state would have the ability to come in and tell us what to do. Mr. Millea said he believes it is prudent to allow time for his department to get a definitive answer on this, and we don't have it yet. He said we have the Charter, and ordinances, which says the Registrar serves as the department head for Canvassing, and by saying that it falls directly under the Mayor's authority.

Mr. Millea said time is not of the essence right now. He said we can do this quickly, and a lot of legal research has been done, but we're not there yet. He said it would be most prudent if we put this off until his department can get the correct answer. Mr. Vierra thanked Mr. Millea for his comments.

Mr. Jackvony said he is not sure where in the job description it says the Bilingual Election Specialist position is an expert. He does not recall seeing that terminology in there, and is not sure where Mr. Millea is getting that term from.

Anthony Moretti, Director of Administration, appeared to speak. Mr. Moretti said he had a statement to make. He said the Mayor's office would like to do the proper thing. He said he defers to the City Solicitor and at this time he is not aware of any legal body that would have better jurisdiction or expertise. He said it doesn't make sense for the City to be involved in an in-house legal entanglement, and time is not of the essence. He said that in terms of the two existing full-time staff members in the office, he was told personally by Mayor Traficante that he appointed one of those individuals, and he was personally notified by Mayor O'Leary that he appointed the other individual. He said that conflicts with Chairman Jackvony's opinion.

Mr. Lima said the City Solicitor is advising the appointment conflicts with the Home Rule Charter of the City because Mr. Millea is contending that the Canvassing Authority is considered under the authority of the Mayor. He asked Mr. Millea to clarify that position.

Mr. Millea said the Charter makes the Registrar the head of the Canvassing Department, and pursuant to Section 5.02 of the Charter, the Mayor has the power to appoint all department heads, except the Department of Records (City Clerk), which it specifically excludes. Mr. Millea advised that if a department head is not specifically excluded, it would be included under the directive of the Mayor.

Mr. Moretti interrupted to present a point of order. He said he doesn't think the appointment of Mr. Lima is on the agenda and asked if that was a violation of open meetings law.

Mr. Jackvony said Mr. Millea brought it up extensively as an example to help support his legal argument presented to the Board. He said we don't want to muddy the waters further.

Mr. Lima said we are discussing whether or not the Canvassing Authority has the ability at all under the law to appoint personnel to the office before taking action on this appointment, which is pertinent and directly related. Mr. Jackvony agreed, but added the discussion should not be about Mr. Lima's position.

Mr. Millea said he doesn't want to talk about Mr. Lima's position at all, and if it's been discussed it's in tangent to the argument.

Mr. Lima said he wanted to clarify because Mr. Millea mentioned in his presentation that Mr. Lima was appointed by the Mayor. Mr. Lima said he was not, in fact, appointed by the Mayor, and wanted to correct the record if Mr. Millea misspoke. Mr. Millea said he stands corrected and apologized, as it was not his intent in that discussion.

Mr. Lima returned to his question regarding the Charter. He said Mr. Millea presented an argument that department heads, with the exception of the Department of Records, are appointees of the Mayor, and therefore the employees and department head of the Board of Canvassers must be mayoral appointees. However, Mr. Lima said the director of the Planning Department, the Director of the Cranston Public Library, and the Superintendent of Cranston Public Schools are just some examples of department heads and employees of the city that are not appointed by the mayor, but by a controlling board, be it the City Plan Commission, Library Board of Trustees, or the School Committee, respectively. Mr. Lima questioned Mr. Millea's interpretation of Charter Section 5.02 because it ignored those instances, and argued that the Board of Canvassers is similarly positioned, and authorized by state law, as those other boards are, to hire its own staff, as is posted on the agenda for this meeting.

Mr. Millea said the Charter is clear about a firewall between the administration of the Mayor and anything to do with the administration of schools, so there are other departments which don't fall under the Mayor as well, but they are specifically addressed. Mr. Lima said Mr. Millea referenced R.I. Gen. Laws § 17-8-5 and claimed it is not applicable or out-of-date, however, Mr. Lima said he spoke with the Executive Director of the Rhode Island Board of Elections, staff from the Rhode Island Secretary of State's office, and his election director counterparts in several other cities and towns, and that law is widely and actively utilized and enforced. He said there was general agreement amongst every person he spoke with that the statute is applicable and empowers the Board of Canvassers, and it would be news to those individuals if that was not the case.

Mr. Lima said he is concerned about the premise of the argument that the Charter supersedes state election law, because it implies Mr. Millea's argument that the Mayor would have direct control over the elections apparatus of the City. Mr. Lima said that violates a central tenant of state elections law, as far as he has been familiar with it in his five years as the City's election director. He said several Rhode Island Supreme Court rulings have established that the Board of Canvassers and those who administer elections are agents of the state conducting a state function under Title 17, of which § 17-8-5 is a to-date unquestioned part of.

Mr. Lima said when the Board of Canvassers takes action, either to run elections at the local, state, or federal level, it's done under the auspices of Title 17. To his knowledge, there is no section of Title 17 that is rendered inoperative because of a conflict in a municipal charter or ordinance. He said Title 17 is the controlling nature of elections, because elections have been long-established through a series of state Supreme Court decisions going back to *Nixon v. Malloy*, as a state function. He said the Board of

Canvassers members and staff themselves are considered state officers, who while employed by the municipality, have to report and answer to the state Board of Elections.

Mr. Lima said because of that, the Board of Canvassers, if it takes action here, would be subject to review by the state Board of Elections, through the rules and regulations promulgated by it under state election law, if there was an appeal. He said actions of the Board of Elections are then appealable directly to the Rhode Island Supreme Court. Mr. Lima said that this decision being under the direct authority of the Board of Canvassers as expressed in § 17-8-5, is clear not just to him but to the senior staff he spoke with at both state election agencies and in other municipalities. Mr. Lima said it may not have been followed correctly in the past, as Director Moretti mentioned in past appointments, however you can't un-ring a bell if it was done incorrectly in the past, but certainly going forward it should be done correctly.

As Chairman Jackvony mentioned, Mr. Lima said, you don't have to go too far back in the minutes of the Cranston Board of Canvassers, to the '70s and '80s, to find examples where the Board exercised the exact function that is posted on today's agenda. He said staff members were appointed, hired, and fired by this Board, and taking action today would not be unprecedented. Mr. Lima said the state law may have been ignored or unknown by subsequent board compositions in the 1990s, but that the state law is clear and everything he has been told by the state election officials he reports to on any election matter have agreed with the interpretation that the Board has this authority.

Mr. Lima said the core of the legal argument that Mr. Millea has presented to the Board does not line up with basic or accepted standard practice in election law around the State of Rhode Island. Mr. Lima said, for example, the City of Warwick is currently engaged in hiring an election staff member, which will be approved by their Board of Canvassers under § 17-8-5, just as its previous staff members were. Mr. Lima said similar procedures are followed in Woonsocket, Portsmouth and other towns.

Mr. Lima said the intent of the statute is to create a natural separation between the administrative operations of the city and an election process which has to have a barrier between elected officials and the election apparatus that those officials use to seek office. He said there is a reason state election law is structured the way it is and for the legislative intent behind it, and a reason the Board of Canvassers has the authority it has, which is utilized by multiple other cities and towns. Mr. Lima said he understood Mr. Millea's position to ensure the Board proceeds with caution, however the argument being presented that the Mayor has control over appointments is contradictory to everything he's come to understand in his time as an elections administrator.

Mr. Lima said for the Mayor to make such an appointment itself could be construed as an illegal action, and for the Board of Canvassers to not be involved in that process would run in direct contrast to the Board's powers illustrated in § 17-8-5.

Mr. Millea said he has not had any discussions with the department of elections and their legal staff, or with the Secretary of State's office. He said he is dealing with a personnel matter, and the State of Rhode Island should not be able to dictate who is hired and paid for by the City of Cranston. Mr. Millea said he does not question Mr. Lima's intent or interpretation, and said he may be 100 percent right, but he said he

thinks it's best to get the proper answers. He said the informal advice Mr. Lima may have received would be improper to rely upon at this point in time. Mr. Millea said this is a legal issue that needs to be hammered out and addressed before we go down this road.

Ms. Petrone said she is a trained language educator and has a degree in Spanish from Rhode Island College. She said Mr. Brito is capable and qualified for this position, and has been working for the Board on a part-time basis since 2018. However, being part-time, he is not in on Tuesdays or Thursdays. Ms. Petrone expressed concern that, presently, if someone who speaks Spanish comes in on the two days per week Mr. Brito is not in, they cannot be adequately or quickly served. She said that is a counterpoint to Mr. Moretti's and Mr. Millea's arguments that time is not a factor.

Mr. Jackvony said no one is questioning Mr. Brito's qualifications or the need for the position.

Ms. Petrone said the reference to "expert" is semantics. She said every member of the Board and Mr. Lima were all appointed by the City Council. She said the Board's ability to appoint, with Council consent, is clear. She said this issue has been known for months, and was postponed already. Ms. Petrone said we need to make a decision, because every day that this position is not properly filled, we are not servicing the demographics of this city, and that is consummately important.

Mr. Jackvony wanted to be clear he appreciates Mr. Millea appearing at the meeting to provide the Board with his legal opinion. He said there's a mix of what has been done formally and informally in the past, and he said he knows himself and the other members of the Board do not wish to run afoul of any law that would have to be settled in court.

Mr. Jackvony said it's important to note that this Board has made decisions before that have been questioned or influenced by guidance from the state Board of Elections, which this Board reports to.

He said what speaks most loudly to him is that state law specifically says that the Board of Canvassers has the power to appoint its necessary clerical and technical staff. He said we can argue whether or not the word expert or specialist doesn't fall into that, but frankly he thinks that semantics. Mr. Jackvony said you don't need to be an attorney to understand what the words appoint and employ mean.

Mr. Jackvony said he wanted to amend his original motion to ensure it includes that the appointment is sent to the City Council for their approval, pursuant to the state law, which specifically mentions Cranston. He said our action today will be to approve it, to send along to the City Council for their consideration. He said the final decision is ultimately up to the City Council.

Mr. Vierra said he was fine with that course of action. Mr. Vierra wanted to ask a question of Mr. Millea regarding a point he made in his opening comments, about whether or not this would be a union position, or would have to undergo a test, or need to be posted, rather than be an appointment.

Mr. Millea said he has concern that the prior appointments were done prior to the union positions being created. He said that going forward, any position within this department would be subject to the collective bargaining agreement with the Teamsters, meaning it could be subject to being posted and tested, and not just appointed. Mr. Millea said that could subject the City to legal action in the form of a grievance should the Canvassing Authority appoint Mr. Brito to this position.

Mr. Lima said that City Charter Section 14.04 specifically spells out the employees of the Board of Canvassers as being members of the unclassified service. He said the two current employees in the office, while members of the union, are unclassified, and are in non-tested positions. He said that protects these appointed positions from being bumped in seniority rules, so that once an appointment is made, the will of the Council cannot be abrogated by a different individual claiming seniority. He said while the employees are members of the bargaining unit, the Teamsters collective bargaining agreement specifically states that a classified employee cannot take an unclassified position, and an unclassified employee cannot bump a classified position.

Mr. Lima said the charter language designating the Board's employees as unclassified is clear, and while he is not sure whether Mr. Millea reviewed it as part of his research so far, he wanted to make sure the Board is aware of it.

Mr. Vierra asked Mr. Lima if a person was appointed, and the Council approves the appointment, whether that person would automatically become a union member.

Mr. Lima said the City Council created the position in the budget process under the step and grade of a union position. He said the funds have already been allocated effective back on July 1 and are in effect for the Fiscal Year 2022 budget. He said it is not a tested or advertised position, because it is an unclassified position subject to appointment by the Board. Upon hiring to the position, the appointee would become part of the bargaining unit, and would retain their unclassified status, just as the other two full-time employees are.

Mr. Vierra asked Mr. Millea if the position needs to be posted. Mr. Millea said he doesn't have an answer to that question, which is why he is concerned about going forward. He said he would anticipate the union filing a grievance if the union were to take a position that it should be a classified position, although he cannot predict the future. Mr. Millea said he is not sure whether Mr. Lima is correct on this issue. Mr. Millea said that going forward if the position is part of the union, it could be classified. Mr. Millea said we should have all the answers.

Mr. Moretti said he emphatically concurs with Mr. Millea. He said with all due respect to Mr. Lima's credentials as an attorney, if he could let us know what they are, he thinks it would be helpful. Mr. Moretti said if the Board votes for this at this time, it could cost the City a lot of money, a lot of entanglements, a lot of headache, when it does not have to. He said he thinks it is unnecessary and rash to make this decision at this time.

Ms. Petrone asked whether or not the City is obligated, once it reaches a certain threshold of voters, to have a person in place who is bilingual.

Mr. Jackvony said that we are currently not obligated to do that, however, based on the pending results of the 2020 Census, that could change later this year. He said it is not presently legally required.

MOTION: By Mr. Jackvony and seconded by Ms. Moronta to amend the main motion to approve the appointment and employment of Emerson Brito as a bilingual elections specialist pursuant to R.I. Gen. Laws § 17-8-5, and send to the City Council for consideration.
AMENDMENT PASSED ROLL CALL VOTE – 3-0 – Mr. Jackvony, Mr. Vierra, and Ms. Moronta voting Aye.

Mr. Lima said the main motion, as amended, now needs to be voted upon.

MAIN MOTION PASSED AS AMENDED ROLL CALL VOTE – 3-0 – Mr. Jackvony, Mr. Vierra, and Ms. Moronta voting Aye.

ADJOURNMENT

MOTION: By Mr. Vierra and seconded by Mr. Jackvony to adjourn.
PASSED UNANIMOUSLY – VOICE VOTE

The meeting was adjourned at 5:33 p.m.

Respectfully Submitted,

Nicholas J. Lima
Registrar / Director of Elections
Cranston Board of Canvassers

APPROVED by the Cranston Board of Canvassers: March 22, 2023