

EXHIBIT E

12/13/2018 Ways & Means Committee

1 taxpayers either sanctions or attorneys' fees.

2

3 I see Mr. Brown here in the audience. You've heard some
4 discussion. Would you like, Mr. Brown, to enlighten us in any way
5 further than what we've already gotten from your memo?

6

7 **MR. BROWN:**

8 Well, actually -- thank you, by the way, Madam Chair. Many of the
9 points that were brought up during the questioning of Mr. Miller
01:19PM 10 actually covers almost all of the topic that -- and all of
11 discussion that needs to be had, in my view. So if anybody has any
12 questions, I'll be happy to answer any questions, but -- but
13 everything has pretty much been summed up.

14

15 **CHAIRPERSON FLEMING:**

16 We have a question from Mr. Trotta.

17

18 **LEG. TROTТА:**

19 Yeah, are you aware of the Faithless Servant Doctrine?

01:20PM 20

21 **MR. BROWN:**

22 Yes, Mr. Trotta -- I'm sorry, Legislator Trotta, I am.

23

24 **LEG. TROTТА:**

25 And, why didn't, you know, do you think we have a chance of winning
26 this?

27

28 **MR. BROWN:**

29 I do not.

01:20PM 30

31 **LEG. TROTТА:**

32 And why is that?

33

34 **MR. BROWN:**

35 Because as far as I'm aware, and Mr. Miller doesn't -- doesn't seem
36 to disagree either, although he says he would research the issue,
37 as far as I'm aware, there is no case in New York State or any
38 other knowledge of jurisprudence that I have, where a person's
39 salary and benefits have been the subject of clawback because --
01:20PM 40 because the employee may have committed essentially some type of
41 tort, which, and by the way, a 42 U.S.C. 1983 case is really just
42 another type of tort; it is based in civil rights law.

43

44 **LEG. TROTТА:**

45 Well, I'm getting motion from the back that you're wrong. And, you
46 know, correct me if I'm wrong, case law becomes case law because of
47 a case. We don't have any cases that go into this. So unless this
48 is going through, we don't know, maybe we'd come to the case law in
49 the future. Isn't it true that if we could do this and we could
01:21PM 50 win, it will be case law. And shouldn't you be looking out for the
51 taxpayers' wellbeing? And to say that Jimmy Burke didn't cause
52 that \$1.5 million is totally disingenuous because it was his
53 actions that did it.

54

55 So, I think it's more of a continued coverup of what's been going
56 on in this County for the past few years. It becomes case law. I

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1 will change this to put this in so that it will go through, I mean,
2 it doesn't prevent you from doing your job, which would be looking
3 out for the taxpayers and not the County Executive.

4
5 **CHAIRPERSON FLEMING:**
6 Mr. Trotta, are you --

7
8 **MR. TROTТА:**
9 I think that down the road -- no, I'm not, I'm asking a question.

01:21PM

10
11 **CHAIRPERSON FLEMING:**
12 No, no, no, I'm just asking, are you putting a question?

13
14 **LEG. TROTТА:**
15 I'm gonna put a question on it. You are looking out -- isn't it
16 true, you're looking out for the County Executive more than the
17 taxpayers because --

18
19 **CHAIRPERSON FLEMING:**
20 Mr. Trotta, just -- just to be aware --

21
22 **LEG. TROTТА:**
23 It's a question. Again, you know something --

24
25 **MR. BROWN:**
26 I have a question.

27
28 **LEG. TROTТА:**
29 -- let the coverup continue, I'm gonna ask the Counsel --

30
31 **MR. BROWN:**
32 I have a question.

33
34 **LEG. TROTТА:**
35 -- to please change it and we'll go through it this way. Because
36 this is why the taxpayers of this County have been getting screwed
37 for the past 12 years.

01:22PM

38
39 **CHAIRPERSON FLEMING:**
40 Mr. Trotta, just to remind you and the public that you are not a
41 member of the Committee. I, as a courtesy, want you to have your
42 say, but I don't think it merits going beyond what's a proper
43 discussion. Are you finished, sir?

44
45 **LEG. TROTТА:**
46 You know what merits a proper discussion --

47
48 **CHAIRPERSON FLEMING:**
49 No, no, no, Mr. Trotta --

01:22PM

50
51 **LEG. TROTТА:**
52 -- is the chief of police --

53
54 **CHAIRPERSON FLEMING:**
55 -- we're asking you, sir, to put a question --

56

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1 **LEG. TROTTA:**

2 -- on the cover of Newsday for having sex with prostitutes and no
3 one did anything. This deserves the --

4
5 **CHAIRPERSON FLEMING:**

6 Mr. Trotta, you're out of order, sir.

7
8 **LEG. TROTTA:**

9 Guess what, you're out of order.

01:22PM

10

11 **CHAIRPERSON FLEMING:**

12 Thank you for being a guest at our Committee. If you have a proper
13 question to put, I'd certainly entertain it.

14

15 **LEG. TROTTA:**

16 Let the corruption continue.

17

18 **CHAIRPERSON FLEMING:**

01:22PM

19 So, Mr. Brown, I just want to confirm that there was -- according
20 to your memo, you advised, as I understand, that it's unlikely that
21 we could prevail in a lawsuit that's spelled out in the resolution.
22 The resolution actually directs you to bring a suit that you feel
23 is ill-advised or you advise in your professional opinion is
24 ill-advised, first, because it won't be successful; and, second,
25 because it could expose the taxpayers to additional costs. Is that
26 accurate?

27

28 **MR. BROWN:**

29 That is accurate.

01:23PM

30

31 **LEG. TROTTA:**

32 Oh, please.

33

34 **CHAIRPERSON FLEMING:**

35 And that's because in part because -- in part because Mr. Burke was
36 not a defendant in the final settlement of the case. Is that
37 right?

38

39 **MR. BROWN:**

40 That's right.

41

42 **CHAIRPERSON FLEMING:**

43 So even though we'd all love to, in agreement with those who are
44 concerned about the acts taken by Mr. Burke, and we would love to
45 see him have to repay the County, there's no legal theory under
46 which we could do that as it's spelled out in this resolution. Is
47 that right?

48

49 **MR. BROWN:**

01:23PM

50

51 That's correct.

52

53 **CHAIRPERSON FLEMING:**

54 Okay. Excuse me. And so there were a couple of theories, if you
55 just want to put on the record, sir, the two theories under which
56 this settlement was arrived at.

56

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1 **MR. BROWN:**
2 Sure. The complaint had three causes of action: One against
3 Burke, one against the County and one against other law enforcement
4 officers.

5
6 **CHAIRPERSON FLEMING:**
7 Okay. So wait a second, I just -- because we've been going on for
8 a little bit, I just want you to be sure to hear my question and
9 answer the questions.

10
11 **MR. BROWN:**
12 Oh, I'm sorry, I thought that was --

13
14 **CHAIRPERSON FLEMING:**
15 The question was, there were two theories that had survived to the
16 settlement table. And those two theories were what?

17
18 **MR. BROWN:**
19 The second theory was the Monell liability claim against the
01:24PM 20 County. And the third theory was a failure to intervene against
21 fellow law enforcement officers.

22
23 **CHAIRPERSON FLEMING:**
24 And it was those two last theories that were the subject of the --
25 of the settlement.

26
27 **MR. BROWN:**
28 Correct.

29
30 **CHAIRPERSON FLEMING:**
31 And neither one of those theories is something that we can then go
32 back and look for indemnification or approximate cause liability
33 from Mr. Burke.

34
35 **MR. BROWN:**
36 Correct.

37
38 **CHAIRPERSON FLEMING:**
39 Okay. Does anyone else have any questions for Mr. Brown?

40
41 **MR. BROWN:**
42 Thank you.

43
44 **CHAIRPERSON FLEMING:**
45 Okay. Yes, I'm sorry, Mr. Sunderman.

46
47 **LEG. SUNDERMAN:**
48 Mr. Brown, have you investigated at all into possibly retaining
49 some of this money or starting a lawsuit against Mr. Burke?

01:25PM 50
51 **MR. BROWN:**
52 Commencing an action against Burke?

53
54 **LEG. SUNDERMAN:**
55 Yes.

56

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1 **MR. BROWN:**

2 Under the -- under the -- under this resolution, no. There's no
3 basis for it as the Committee has discussed and as I just had
4 stated.

5
6 **LEG. SUNDERMAN:**

7 But prior --

8
9 **MR. BROWN:**

01:25PM 10 There's no basis for the -- there is no basis for the County to go
11 against Burke to recover, to recoup, to be indemnified the
12 settlement dollars that were paid in the lawsuit.

13
14 **LEG. SUNDERMAN:**

15 But why wouldn't we want to try to regain that money?

16
17 **MR. BROWN:**

18 There's no legal theory to seek indemnification by the County from
19 Burke. The lawyer that was here before you was talking about
01:25PM 20 something else.

21
22 **LEG. SUNDERMAN:**

23 But what we heard from that lawyer bringing us some information
24 forward, wouldn't we want to look into it to see if it's a
25 possibility?

26
27 **MR. BROWN:**

28 That lawyer, Mr. Miller, and I have respect for him, but I think
29 that he's wrong in this case. He's bringing -- he's bringing to
01:26PM 30 your attention factually distinguishable cases and cases which are
31 distinguishable under the law as well.

32
33 **CHAIRPERSON FLEMING:**

34 I would note also, one -- this was a federal suit and the others
35 are ftate suits.

36
37 **MR. BROWN:**

38 That's correct.

39
40 **CHAIRPERSON FLEMING:**

41 It's a completely different body of law. Mr. Gregory, oh, I'm
42 sorry, were you done, Rudy?

43
44 **LEG. SUNDERMAN:**

45 All right.

46
47 **CHAIRPERSON FLEMING:**

48 Sorry. Mr. Gregory.

49
50 **P.O. GREGORY:**

51 All right. Dennis, so I have been in and out so I've heard part of
52 the conversation, missed a lot of the conversation. So when the
53 gentleman, I forget his name --

54
55 **MR. BROWN:**

56 Mr. Miller.

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1

2 **P.O. GREGORY:**

3 -- Mr. Miller was here earlier, there was some mention of potential
4 recouping the salary. I know the resolution directly pertains to
5 just the settlement, recouping any costs from the settlement that
6 were paid out. But is it possible to recoup the salary for Burke's
7 actions during this time period?

8

9 **MR. BROWN:**

01:27PM

10 I do not think that that theory that was asserted by Mr. Miller,
11 could be used to recover the salary of James Burke. And the reason
12 why I think that is because those types of theories and those types
13 of cases have been used where the employee has been dishonest or
14 disloyal or stole from the employer causing him or her to have a
15 forfeiture of their salary and benefits. That's not what happened
16 here. What happened here was essentially, you know, an act of
17 wrongdoing.

18

19 **P.O. GREGORY:**

01:27PM

20 All right.

21

22 **MR. BROWN:**

23 Similar to a tort. Like I said before, I'm not aware of any case
24 --

25

26 **P.O. GREGORY:**

01:28PM

27 With a tort there's, right, there's -- you can have, you know,
28 limited liability. I mean, there's -- I forget the term, but the
29 County could take 70% liability, Burke could take 30%, whatever
30 that percentage is --

31

32 **CHAIRPERSON FLEMING:**

33 Contribution.

34

35 **P.O. GREGORY:**

36 Contribution, yes, yes. Right?

37

38 **MR. BROWN:**

39 Yeah, in a tort case, correct.

01:28PM

40

41 **P.O. GREGORY:**

42 So that doesn't apply?

43

44 **MR. BROWN:**

45 That does not -- that does not apply.

46

47 **P.O. GREGORY:**

48 We're talking about salary, not the settlement.

49

50 **MR. BROWN:**

51 What Mr. Miller, and apparently now what Legislator Trotta is going
52 to assert, is that a lawsuit should be brought against James Burke
53 to clawback and recoup his salary in whole or in part, I guess over
54 the lifetime of his -- of his career.

55

56

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1 **P.O. GREGORY:**
2 Right, because -- I'm sorry.

3
4 **MR. BROWN:**
5 I do not believe that there is -- on the basis of the facts of the
6 Loeb case, I do not believe that that theory could be successfully
7 asserted.

8
9 **P.O. GREGORY:**
01:28PM 10 Why?

11
12 **MR. BROWN:**
13 Because the type of case -- because that theory has been utilized
14 when an employee has been dishonest and disloyal. Not to -- not
15 for the County to be made whole for any damages that it has paid.
16 In fact, what he's suggesting is completely separate and apart from
17 what -- from what is the subject of this legislation. He's
18 proposing a completely different theory that's been around since
19 the 19th century that protects employees -- employers from being
01:29PM 20 harmed by dishonest employees. That's not what happened here.

21
22 **CHAIRPERSON FLEMING:**
23 Can I just step in for a moment? What's very important to focus on
24 is just that the bill in front us has only one resolve clause. And
25 that resolve clause is to recoup the -- to commence legal action
26 against James Burke to recover the monies associated with the
27 settlement of the Christopher Loeb case.

28
29 So, I wonder, Mr. Brown if you were asked to do a memo of law on
01:29PM 30 whether we could pursue salary of James Burke under this Faithless
31 Servant theory, whether you'd be able to prepare something for us.

32
33 **MR. BROWN:**
34 Yes, absolutely.

35
36 **CHAIRPERSON FLEMING:**
37 Okay. I think -- I think that merits some attention. So I'll make
38 that request to you.

39
40 **MR. BROWN:**
41 Yes, no problem.

42
43 **CHAIRPERSON FLEMING:**
44 And if you -- if you could get --

45
46 **MR. BROWN:**
47 No problem.

48
49 **CHAIRPERSON FLEMING:**
01:30PM 50 -- us another memo this time on the other theory. But right now we
51 have an agenda and the agenda only includes this 2167.

52
53 **P.O. GREGORY:**
54 May I? All right.

55
56

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1 CHAIRPERSON FLEMING:

2 I'm sorry, no.

3

4 P.O. GREGORY:

5 I wanted to ask him, because my understanding talking to Burke --
6 Burke? Trotta -- (laughter)

7

8 CHAIRPERSON FLEMING:

9 Oh, he'll appreciate that.

01:30PM

10

11 P.O. GREGORY:

12 -- that he was seeking the memo. And I spoke to Counsel about it.
13 He said he would have to change it. Because I would be supportive
14 of that. Because to me, it makes -- according to the current
15 lawsuit, it's in alignment to what that would be asking for because
16 we said, *no, you acted outside of your responsibilities, that's why*
17 *we separated you, we didn't pay for anything.* And that, to me,
18 would be in line with saying, *okay, while you were acting out of*
19 *the scope of your agency for Suffolk County, we want our money back*
20 *for that time period.* Does that makes sense? That's where I was
21 going.

01:31PM

22

23 MR. NOLAN:

24 Legislator Trotta on the way out did say he would like us to amend
25 the bill --

26

27 P.O. GREGORY:

28 Okay.

29

30 MR. NOLAN:

31 -- to include the new theory that was spoken by -- about by Counsel
32 earlier. But, you know, I think Legislator Fleming's question to
33 Dennis Brown makes sense; to explore that -- that theory and advise
34 this Legislature. Under that theory do we have a case? Dennis is
35 saying today he doesn't believe so, but I think the Committee would
36 benefit from analysis from Department of Law to find out do we, in
37 fact, have a case. I think everybody would love to get money back
38 from -- from Mr. Burke. The question is do we have a viable cause
39 of action, a viable theory to proceed under. But, yeah, Legislator
40 Trotta did ask us to amend the bill to include the new theory.

01:31PM

41

42 CHAIRPERSON FLEMING:

43 And perhaps based on what Mr. Nolan said I could ask Mr. Brown that
44 you expand the advice in this memo on the Faithless Servant theory
45 to just suggest whether there is, in fact, understanding it's the
46 appetite of this body to -- or certainly those who have spoken, to
47 hold Mr. Burke responsible and accountable to the greatest extent
48 we can with regard to taxpayer money. Is there any theory under
49 which we could pursue that? Would you be able to give us a memo
50 that encompasses that kind of a question?

01:32PM

51

52 MR. BROWN:

53 Yes.

54

55 CHAIRPERSON FLEMING:

56 Yes, Ms. Berland.

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1 **LEG. BERLAND:**
2 Thank you. I know I'm not on the Committee but I just want to make
3 sure salary and benefits, right, is your direction? Because I
4 think you just said salary but I want to hold it to salary and
5 benefits.

6
7 **MR. BROWN:**
8 Whatever would be an appropriate remedy under that doctrine.

9
10 **LEG. BERLAND:**
11 Right, okay.

12
13 **MR. BROWN:**
14 Yes.

15
16 **CHAIRPERSON FLEMING:**
17 That's a good point because the pension is something that's been
18 considered and is galling, so I understand that.

19
01:33PM 20 Is there anyone else who has questions for Mr. Brown? Yes, Ms.
21 Kennedy.

22
23 **LEG. KENNEDY:**
24 Bridget asked my question but now I -- isn't there something in the
25 law where they say that a pension is earned and a pension they can
26 only go back so far?

27
28 **MR. BROWN:**
29 I actually would have to look into it, but you're correct, the
01:33PM 30 pension, I believe, is constitutionally protected.

31
32 **LEG. KENNEDY:**
33 Right, that's what I thought. Okay, thank you. I'm glad you're
34 doing that for us.

35
36 **CHAIRPERSON FLEMING:**
37 Any further questions? Okay, seeing none, we have a motion to
38 approve and a second. I'll make a motion to table.

39
40 **LEG. MARTINEZ:**
41 I'll second that.

42
43 **CHAIRPERSON FLEMING:**
44 Seconded by Legislator Martinez. The tabling resolution comes
45 first, so on resolution 2167, we have a motion to table and a
46 second. All in favor? All opposed? Any abstentions? The motion
47 to table carries. Thank you. Thank you all for a good discussion.
48 Tabled (VOTE: 4-2-0-0. OPPOSED: LEGISLATOR KENNEDY, LEGISLATOR
49 SUNDERMAN) And we'll go back to the regular order of our meeting.

50
51 **TABLED RESOLUTIONS**

52
53 Tabled Resolutions. Resolution 1976, Establishing a balanced RFP
54 Waiver Committee (Cilmi). I'll make a motion to table; seconded by
55 Legislator Martinez. All in favor? Legislator Sunderman.