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FORMAL OPINION NO. 3

MEMORANDUM OF LEGAL ADVICE NO. 3974

February 26, 1982

HONORABLE JOSEPH E. COLEMAN
PRESIDENT OF CITY COUNCIL
ROOM 496 CITY HALL
PHILADELPHIA, PENNSYLVANIA 19107

Re: Powers of City Council with Respect to a Council Member Found Guilty But Not Yet Sentenced for Commission of an Infamous Crime

DEAR COUNCIL PRESIDENT COLEMAN:

This is in response to your letter dated February 22, 1982, in which you have asked the following questions regarding the powers of City Council with respect to Councilman Jannotti:

- (1) May Council by majority vote prevent Councilman Jannotti from attending sessions of Council?
- (2) May Council by majority vote exclude Councilman Jannotti from the caucus, committee assignments, and other regular business and activities of the Council?
- (3) May Council by majority vote remove Councilman Jannotti from his membership on the Gas Commission?
- (4) May Council grant Councilman Jannotti a paid leave of absence, at his request, during which he

would voluntarily exclude himself from regular Council sessions but would perform other councilmanic activities?

We have advised you previously in 1980 Formal Opinion No. 16 that the exclusive procedures for forfeiture or removal from the office of a Councilmember are set forth in the Constitution of Pennsylvania and various legislative enactments, and that under such, Council does not have the unilateral power to expel a member. In 1980 formal Opinion No. 15, we advised you that a Councilmember does not automatically forfeit his office upon conviction of an infamous crime unless and until judgment of sentence is imposed by the court. Copies of Opinions Nos. 15 and 16 are attached hereto for your convenience.

Since Councilman Jannotti has yet to be sentenced, he remains a Councilmember. As a Councilmember he has the right to attend the regular sessions of Council and to be permitted to participate in the normal and regular activities of a Councilmember, including the caucus and committee work, both of which are integral parts of the legislative processes of the Council. See, *Ammond v. McGahn*, 390 F.Supp. 655 (D. N.J. 1975), reversed on other grounds, 532 F.2d 325 (3rd Cir. 1976); *Gerwertz v. Jackson*, 467 F.Supp. 1047 (D. N.J. 1979).

It has been suggested that Council may have the power to remove Councilman Jannotti under Section 2-103 of the Home Rule Charter which sets forth the qualifications for a Councilmember and provides that "The Council shall be the sole judge of the qualifications of its members." This section does not give Council the power to expel a member for commission of a criminal offense. The "qualifications" to which this section refers are those set forth in that same section of citizenship, residence, and age of the Councilmember. It is only such qualifications of which Council is the judge. See, *Powell v. McCormack*, 395 U.S. 486 (1969).

With regard to membership on the Gas Commission, we have been informed by the Clerk of the Council that Mr. Jannotti was appointed in 1974. Since terms on the Gas Commission are limited to four years, Councilman Jannotti's term has expired, and he now serves at the pleasure of the Council. Even during the course of a term, it would appear that Council, as the appointing authority, could remove a member at will. See 1980 Formal Opinion No. 1, with respect to the removal by Council of its President. In any event, in view of the expiration of Mr. Jannotti's term, it is unquestionable that Council has the power to remove him at this time.

Finally, it is our opinion that Council may not grant a member a voluntary leave of absence from participation in the regular sessions of Council and still continue to pay such member a salary. It is true that the general rule is that the salary of a public officer is an incident of the office and may not be discontinued because of neglect or failure to perform his prescribed duties. *Reed v. Sloan*, 475 Pa. 570 (1977); *Jones v. Dushman*, 246 Pa. 513 (1914). On the other hand, where a public officer voluntarily and formally agrees not to perform his duties, particularly because of the pendency of criminal proceedings, it is our view that such conduct is tantamount to an abandonment of the office and any right to the prescribed salary. See, *Hirschberg v. City of New York*, 294 N.Y. 55, 60 N.E. 2d 539 (1945); *City of St. Louis v. Whitley*, 283 S.W. 2d 490 (Mo. 1955); *Lehner v. Sullivan*, 91 Ohio App. 305, 108 N.E. 2d 159 (1952); *Bell v. Treasurer of Cambridge*, 310 Mass. 484, 38 N.E. 2d 660 (1941).

The fact that Mr. Jannotti would be absent from at least the regular meetings of Council is, in my judgment, tantamount to a complete abandonment of his duties and powers as a Councilmember. The essential duties and powers of a Councilmember are to introduce, debate, and vote on legislation. An expressly declared renunciation of participation in Council sessions would make it impossible for a member to perform these critical

functions.

I should stress that the denial to Councilman Jannotti of his salary is premised on case law which emphasizes the voluntary abandonment of the powers and duties of office. Should the Council purport to exclude Mr. Jannotti involuntarily, and should it later be held that such exclusion was beyond the powers of Council, then it might be argued successfully that Mr. Jannotti would be entitled to his salary for the period of this exclusion.

Sincerely,
ALAN J. DAVIS
City Solicitor

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