

## **Marshall University Classified Staff Council Minutes**

May 19<sup>th</sup>, 2011, Memorial Student Center BE5

**Members Present:** Nina Barrett, Bernice Bullock, Mike Dunn, Ronnie Hicks, Jennifer Jimison, Dwayne McCallister, Jan Parker, Kris Standifur, Jennings Stiltner, Joe Wortham

**Members Absent:** Barbara Black, Diana Bradley, Johnny Bradley, Tootie Carter, Toni Ferguson, Carol Hurula, William Lewis, Leonard Lovely, Kelly Preston

**Guests:** Dr. Stephen Kopp, Matt Turner, Michelle Douglas, Debra Hart

The meeting was called to order by Chair Nina L. Barrett.

### **Dr. Kopp – University President**

June 9<sup>th</sup> is the date of the Service Awards Luncheon.

Dr. Kopp reported that there is a lot happening on campus. All but one of the major renovation projects are underway with the East Bond funding that we received. Some of the projects will carry on to next year, in particular the Smith Hall project of replacing all the windows in that building. The next renovation project will be for the Medical Education Building.

There has been a lot of work done on the new bond issue. There is still a lot of background work that needs to be done on it. Time and effort will need to be spent on fundraising if we're to do all of the projects the Board approved at their April meeting. We will need to raise about \$25 Million in private money to complete all of the projects.

The Higher Learning Commission of the North Central Association, (which is our regional accrediting body), is in the process of promulgating new standards and affiliations. The traditional 10-year accreditation process is going out and they're coming up with 2 other processes. One is the Academic Quality Improvement project that has been around a while, and then there's a Pathway's project which is just getting started. Marshall was invited to be in the third cohort of institutions that are piloting the Pathways process. We have a meeting in June that we will attend to evaluate whether we really want to be in that cohort or not. We are in the process of gearing up for reaccreditation with the Higher Learning Commission. That accreditation process does not hit us until 2016, but it's not too early to start thinking about it, due to all the work that is involved with getting ready and gearing up for it.

Raises for Classified Staff are set to go July 1, and were approved by the Board. Decisions will be made shortly for what to do with Faculty and Non-Classified.

Orientation programs are coming up soon. All of the orientation slots for June have already been filled, and we're expecting further growth in this coming year's freshman class. Also, 1<sup>st</sup> and 2<sup>nd</sup> year retention looks like it will be better than this past year.

Dr. Kopp then opened the floor to questions.

***With all of the internal memory that copiers have these days it is a concern that not having them “wiped” before selling them in the yard sale could compromise confidential information.*** Dr. Kopp gave his thanks for bringing this to his attention and stated he will be looking into current practices for wiping a copier’s memory, and will implement something if we’re not already doing it.

#### **Ms. Michelle Douglas – Human Resources**

Michelle gave her congratulations on those Staff Council members who were re-elected.

Michelle mentioned that they’re looking forward to the upcoming Staff Awards Luncheon and that there will be an employee of the year announced. Also, if anyone needs Judy Blevins or Erica Thomas from HR they have officially moved to the 3<sup>rd</sup> floor of Old Main. They’re waiting to put some of the finishing touches on the training center as well.

#### **Service Awards Report – Joe Wortham**

The Service Awards Committee was notified Monday that the 27<sup>th</sup> Annual Service Awards Luncheon was approved to proceed for Thursday June 9<sup>th</sup> in the Don Morris Room at 12pm. Invitations have been sent and Joe highly encouraged everyone to respond as quickly as possible. The due date for RSVP’s is Tuesday May 31<sup>st</sup>. The regular meal option will be Stuffed Chicken Breast, the vegetarian will be Portobello Napoleon, and the diabetic option will be Baked Chicken Breast.

#### **Approval of Minutes**

April Minutes were approved as written.

#### **Recommendations & Resolutions**

Mike Dunn brought forth Recommendation CSR-10-11-04 SCEC (attached on pages 5-9) and made a motion that it be passed.

Discussion:

*Does Article X, Section 9 mentioned in the recommendation deal with the unconstitutionality of the tax itself or of the Home Rule Board? The tax itself.*

After some discussion a motion to amend was made to add the words “in the City” after the phrase “imposed on all persons”. Motion was seconded and passed.

An editorial change was made to remove the word “does” from the phrase “Marshall University does not allow” in the first line.

Motion was made to accept Recommendation CSR-10-11-04 SCEC with changes, seconded and passed.

**BOG – Mike Dunn**

Mike sent his report to Council via email and it's attached on pages 10-11.

**Discussion:**

The Classified Staff raises will go into effect July 1, but it will only be the 33% of the difference of what an individual is making as compared to what the 2001 Salary Schedule says they should be making. The 2% raise that the State budgeted to give us is being included in the 33% and no more.

The Primary Special Election that was recently held on a Saturday was taken as a Holiday for many State 4-year institutions. Marshall, Glenville and Fairmont State were the only 4-year institutions that did not.

**Committee Reports:**

***Election Committee – Joe Wortham*** – Joe announced that Monique Williams declined to serve on EEO Group 50 – Clerical for the 2011-2013 Staff Council term. Joe said that there was a similar circumstance that happened 2 years ago that was resolved using an unofficially coined term called “Janis Rule”. This rule states that if someone declines or is unable to take their seat before they have been officially seated the next highest vote receiver will take their place. In this case, the next highest vote receiver in EEO 50 was Maura Conway, who has agreed to fill the vacant seat for the 2011-2013 term.

Joe Wortham made a motion that Council approves the seating of Maura Conway as a representative of EEO Clerical group per the “Janis Rule”. Motion was seconded and passed.

***Personnel/Finance Committee – Johnny Bradley*** – No Report

***Physical Environment Committee – Bill Lewis*** – No Report

***Legislative Committee – Carol Hurula*** – No Report

***Staff Development Committee – Carol Hurula*** – Staff Development committee will be taking donations for the Flower Fund at the Service Awards Luncheon. .

**Faculty Senate Committees****Announcements:**

There being no more business, the meeting was adjourned.

Minutes taken and prepared by: \_\_\_\_\_  
Katie M. Counts, Program Assistant, Staff Council

Minutes approved by: \_\_\_\_\_  
Nina L. Barrett, Chair, Staff Council

Minutes read by: \_\_\_\_\_  
Stephen J. Kopp, University President

**STAFF COUNCIL EXECUTIVE COMMITTEE  
RECOMMENDATION**

**CSR-10-11-04 SCEC**

The Staff Council Executive Committee recommends that Marshall University not allow a City of Huntington proposed 1% "Occupation Tax" that would be based upon income made in the city to be deducted from Marshall University Employee paychecks, as it is in conflict with the Constitution of the State of West Virginia.

**RATIONALE:**

The Marshall University Classified Staff Council, duly elected to represent the interests of **over six hundred Marshall University Classified Employees**, are in agreement with the stance taken by Steel of West Virginia Inc., the Cabell County Commission, and others that the proposed City of Huntington 1% Occupation Tax, based on taxable income, is not uniformly imposed on all persons in the City and therefore flunks the mandatory requirements of Article X, Section 9 of the Constitution of the State of West Virginia.

Therefore, as a University named after the honorable John Marshall, a US and State constitutional advocate, we urge our administration NOT to allow this unconstitutional tax to be implemented upon its employees.

See attached for additional documentation.

**STAFF COUNCIL CHAIR:**

APPROVED  
BY COUNCIL: *Nina L. Barnett* DATE: 5/19/11

DISAPPROVED  
BY COUNCIL: \_\_\_\_\_ DATE: \_\_\_\_\_

**UNIVERSITY PRESIDENT:**

APPROVED: \_\_\_\_\_ DATE: \_\_\_\_\_

DISAPPROVED: \_\_\_\_\_ DATE: \_\_\_\_\_

**COMMENTS:** \_\_\_\_\_  
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\_\_\_\_\_



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March 15, 2011

Emmet S. Pugh, III, Chair  
Municipal Home Rule Board  
c/o West Virginia Development Office  
Building 6, Room 553  
State Capital Complex  
1900 Kanawha Boulevard, East  
Charleston, WV 25305-0311

**Re: Constitutionality of the City of Huntington's Proposed Municipal Occupation Tax**

Dear Chairman Pugh:

Spilman Thomas & Battle, PLLC was asked by Steel of West Virginia, Inc., to write to the Municipal Home Rule Board regarding the proposal by the City of Huntington, West Virginia, to impose an occupation privilege tax.

Steel of West Virginia, Inc., and its many employees are opposed to the City of Huntington's proposed municipal occupation tax. The steel workers question why someone who enters Huntington only to work will pay one percent of his or her income to the City while a City resident who may earn more money and utilizes many more City services will pay nothing at all because his or her work is performed a few miles away, outside the City, or the resident has investment income that escapes taxation under the proposed tax scheme.

Steel of West Virginia, Inc., for and on behalf of its employees, asked us to review the proposed municipal occupation tax and Professor Robert M. Bastress's letter of January 20, 2011, commenting on the constitutionality of the proposed tax. I am qualified to undertake this review because I have more than 39 years experience working with West Virginia's tax and revenue laws culminating in my holding the position of General Counsel for either the West Virginia State Tax Department or the West Virginia Department of Revenue from 1985 until October of 2005, when I retired and joined Spilman Thomas & Battle, PLLC, representing clients in a variety of state and local tax matters. Additionally, I am the editor of the *2011 Guidebook to West Virginia Taxes* published by the West Virginia Society of Certified Public Accountants, and author of the West Virginia chapters of *Property Tax Deskbook* and the *Sales & Use Tax Deskbook* published by the American Bar Association.

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**The Occupation Tax Violates the Uniformity Mandate in W. Va. Const. Art. X, § 9.**

Huntington's proposed municipal occupation tax ordinance declares the tax to be a privilege tax<sup>1</sup> imposed on employees and self-employed persons working within the City of Huntington measured by the employee's compensation or the self-employed individual's income from services rendered within the City.<sup>2</sup> The rate of the proposed tax is one percent.<sup>3</sup> The tax is not imposed on City residents who work outside the City or receive their income from investments – no matter how much the resident earns or how many City services they may use. As presently configured, the Huntington municipal occupation tax is highly regressive and is not based on the taxpayer's ability to pay the tax. A fair tax is generally recognized as one that is both progressive and based on the ability to pay. In short, Huntington's proposed municipal occupation privilege tax is an unfair tax.

The principal legal problem with the tax is that it is in substance and effect an income tax on persons, and to be constitutional an income tax must be uniformly imposed on all persons in the City of Huntington, as mandated in W. Va. Const. art. X, § 9, which reads:

The Legislature may, by law, authorize the corporate authorities of cities, towns and villages, for corporate purposes, to assess and collect taxes; but such taxes shall be uniform, with respect to persons and property within the jurisdiction of the authority imposing the same.

(Emphasis added.) Since the tax is not uniformly imposed on all persons, it flunks the mandatory requirements of Section 9.

Article X, § 1 of the West Virginia Constitution allows the Legislature to tax privileges, franchises and income of persons and corporations and to graduate the income tax rates. Section One reads, in relevant part:

The Legislature shall have authority to tax privileges, franchises, and incomes of persons and corporations and to classify and graduate the tax on all incomes according to the amount thereof and to exempt from taxation incomes below a minimum to be fixed from time to time, and

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<sup>1</sup> Ordinance § 774.02

<sup>2</sup> Ordinance § 774.03

<sup>3</sup> Ordinance § 774.04

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such revenues as may be derived from such tax may be appropriated as the Legislature may provide.

(Emphasis added.) Under this language of the Constitution, a tax on a privilege and a tax on incomes of persons are two separate and distinct taxes.

The West Virginia Supreme Court of Appeals has held that “[t]he character of a tax is determined not by its label but by analyzing its operation and effect.” Syllabus point 2, *City of Fairmont v. Pitrolo Pontiac-Cadillac Co.*, 172 W. Va. 505, 308 S.E.2d 527 (1983), cert denied, 466 U.S. 958, 104 S. Ct. 2169, 80 L.Ed.2d 553 (1984); syllabus point 4, *City of Huntington v. Bacon*, 196 W. Va. 457, 473 S.E.2d 743 (1996). See also, *Hukle v. City of Huntington*, 134 W. Va. 249, 255, 58 S.E.2d 780, 783 (1950) (“It is well-neigh universal principle that courts will determine and classify taxation on the basis of realities, rather than on what the tax is called in the taxing statute or ordinance.” (citation omitted.)); *City National Bank v. City of Beckley*, 213 W. Va. 202, 579 S.E.2d 543, 548 (2003) (citing *Hukle v. City of Huntington*, *supra*.)

While the Huntington City Council calls the tax a privilege tax in the ordinance imposing the tax, the measure of tax in the case of employees is their employee compensation, and in the case of self-employed individuals is their net income from self-employment, both of which are federal and state income tax concepts. This so-called privilege tax is in substance an income tax on persons and must be uniformly imposed on all persons. Simply put, “If it walks like a duck, quacks like a duck, looks like a duck, it must be a duck,” and even if City Council calls it something else, it is still a duck.

When the substance of the tax is examined, the Huntington occupation privilege tax is an income tax that flunks the uniformity requirement of Article X, § 9 because it is only imposed on the income of employees and self-employed persons who work in the City, it is not imposed on residents of Huntington who work outside the City but benefit from City services, and it is not imposed on other residents of the City who receive investment income.

Professor Bastress states on page 2 of his letter of January 20, 2011, to this Board that “by virtue of home rule authority or express legislation, almost all other states permit their cities to impose either a local income tax or a local sales tax.” At the end of that same paragraph he writes: “The definitions may differ from analogous state taxes; they cannot conflict with state law. Thus, for example, the City does not have to provide for add back deduction (as West Virginia does) on the self-employment tax.” While Professor Bastress does not identify these add back deductions, we believe they are those found in the West Virginia Personal Income



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Tax Act, see, e.g., W. Va. Code § 11-21-12. We agree with Professor Bastress that Huntington is not required to provide for these add back deductions. However, what the City may not do is to impose an income tax that is not uniformly imposed on all persons in the City.

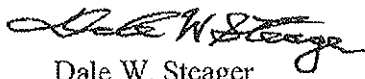
We agree with Professor Bastress that West Virginia case law authority exists for the proposition that Section 9 does not apply to license and privilege taxes, which are in the nature of excises, but only applies to taxes on persons and property. See, e.g., *Mullens v. City of Huntington*, 117 W. Va. 740, 188 S.E. 120 (1936). But, an income tax is not an excise tax or a "privilege tax" as that term is used in W. Va. Const. art. X, § 1. Consequently, the tax must be imposed uniformly on all persons living and working in the municipality. Otherwise, it flunks the mandatory uniformity requirement in Article X, § 9.

#### **Conclusion**

In conclusion, we respectfully submit that the City of Huntington's occupation tax is unconstitutional under W. Va. Const. art. X, § 9 because it is not uniformly imposed on all persons in the City.

For these reasons, we urge the Municipal Home Rule Board not to approve the City of Huntington's application to impose a municipal occupation tax.

Respectfully submitted,



Dale W. Steager

DWS/ljr

cc: Members of Municipal Home Rule Board  
Floyd McKinley Sayre III, Esq.  
Brian Jones  
Chris Fletcher  
The Honorable Herb Snyder  
The Honorable Jim Morgan  
Angel Moore, Esq.  
John O'Connor

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**MUBOG meeting 4-28-11-Full meeting after committee meetings-Reference the attached agenda and documents for some details.**

1. **Vice-Chair John Hess called the Full meeting to order**-and went in the order below
2. No minutes from the February 17<sup>th</sup> meeting available
3. Action Item 4) PASSED-Approved Tuition/Fees and Budget for 2011-2012, which rounds off to a 6.9% increase for students. **Also a \$2.50 increase per semester for parking.**
4. Action item 1) PASSED-Starting design services for new Engineering Complex
5. Action item 3) PASSED-Capital expenditure budget request-2012-2017
6. Action item 2) PASSED-Lease space from St. Mary's for MU Physical Therapy Program
7. Action item 5) PASSED-(With a NAY vote from Mike Farrell and myself, because we felt the University could have did more for Classified employees) Approval of Salary Increases for University Employees. This Item (For Classified Employees) sticks with a four year to fully fund "commitment" that the administration and BOG started last year to fund a 2001 Market Salary Schedule. Basically in sticking with the plan, **classified employees can expect the same dollar amount increase that they received last year**, this year and for the next two years. By taking so long to fund a 2001 market salary schedule, the institution is assuring that new employees and veteran employees of over fifteen years receive a relatively small increase for the next four years. (Some exceptions for those who have PIQ'd into a higher pay-grade) John Hess said he would look at the budget again later this year, but that would not include a guarantee of further action. Although we appreciate increases, we strongly feel that our institution could have done more for classified employees. **Increases will be effective in July.**
8. Action Item 6) PASSED- School of Medicine Salary Increases
9. Action Item 7) ACCEPTED-Investment earnings update
10. Action Item 8) PASSED-(I abstained from vote in committee, could not vote on a 50 million dollar 30 year mortgage based on paperwork handed to me 30 minutes before vote. Some of the finance committee was invited to an all-day explanation the week before)  
Inducement Resolution-This allows the institution to borrow between 46-56 million to build engineering building, parking garage, work on Stone and Thomas building, indoor practice and track, soccer complex. Administration and BOG executive committee also are expected to garner 32 million in private gifts to accomplish these goals.
11. Item added-PASSED-Resolution to accept ownership tear down the Veterans Memorial field house, and assure that Veterans are remembered on new Soccer complex that takes its place.

**From the Academic and Student Affairs Committee meeting-Action Items**

Action items

- 1) ACCEPTED-Program review report
- 2) PASSED-Intent to plan-Bachelor of Business Administration in Risk Management & Insurance
- 3) PASSED-Intent to plan-Bachelor of Science in Health Services
- 4) PASSED-Addition of Degree program-Bachelor of Science in Public Health
- 5) PASSED-Addition of Degree program- Doctorate of Physical Therapy

6) Pulled-Intent to plan Master of Science in Public Health

**President Kopp Report-**

- Complemented MUBOG on historic commitment to the University in regard to Bond Issue
- Freshman received applications ahead of last year 5.2%
- Commented on the administrations 5 year budget plan- has planned for a 2.5% state budget decrease (per year) in next 5 years
- Budget understanding committee-or BUC-Started educating Faculty on the budget process
- Classroom modification-1 mil each year, ½ for technology, ½ for furniture
- campus conversations-going well
- SB 330-allows institution to increase investment from 18-25 million; MU Kept approval of programs (HEPC wanted this)--Non-classified percentage reduced from 25% to 20%, can go to 25 % with HEPC approval. The University championed the effort that will allow them to give more than 10% to some faculty, when they receive a promotion in rank. Tuition/fees, now have to go before HEPC with anything over 5%, but can approve title nine fees without it counting on this.

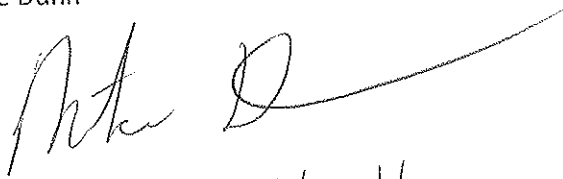
Executive Session –“Real Estate Transaction” was already reported by newspaper (Memorial Field House) Hence voted on earlier.

NEXT BOG Meeting WAS to be on JUNE 16<sup>th</sup>, this will be changed to June 14<sup>th</sup> because President Kopp will not be in town.

I will be at an ACCE sponsored Leadership Conference from June 13-15<sup>th</sup>, and have asked Sheri Noble to set in for me at the June 14<sup>th</sup> BOG meeting

Thank You all for voting for me in for another two year term as the Classified Staff representative on our BOG.

Mike Dunn



5-16-11