

Seattle Ethics and Elections Commission Regular Meeting September 3, 2008

The regularly scheduled meeting of the Seattle Ethics and Elections Commission convened on September 3, 2008 in Room 4080 of the Seattle Municipal Tower, 700 Fifth Avenue, Seattle, Wa. Commission Chair Michele Radosevich called the meeting to order at 4:02 p.m. Commissioners Tarik Burney, Ed Carr, Lynne Iglitzin, Mel Kang, Robert Mahon and Nancy Miller were present. Executive Director Wayne Barnett and Commission staff members Bob DeWeese, Gwen Ford, Kate Flack, Polly Grow and Mardie Holden were present, as was Assistant City Attorney Jeff Slayton.

1) Public Comment

There was no public comment.

2) Approval of August 6, 2008 Minutes

Commissioner Burney requested that the minutes be amended to reflect his opposition to identifying on the ballot candidates who participated in public financing. Commissioner Iglitzin made a motion to accept the amended minutes, which was seconded by Commissioner Miller. The motion carried unanimously.

The Chair announced that the Commission would take up Agenda Item #4 before discussing Agenda Item #3.

4) Closing the Indemnification Loophole.

The Executive Director stated that in August the Commission received the payment of the fine levied on City Councilmember Richard McIver, which was paid from the City's Judgment Claims Fund under the City's Indemnification Ordinance. After discussing this matter with the Chair, he directed that the money be returned to the Judgment Claims Fund.

The issue of whether or not the law was properly interpreted to indemnify Councilmember McIver has been mooted by Councilmember McIver's payment of the fine with his personal funds. There is, though, substantial interest on the part of some City Councilmembers in trying to close this loophole to prevent City officers and employees from seeking indemnification in the future for fines levied by the Commission.

While the Executive Director initially favored amending the Ethics Code to close the loophole, there are some misgivings in the City Attorney's office about this approach. Assistant City Attorney Slayton said he believes that their legal advice would be to amend the Indemnification Ordinance if there is a desire to make a change. He stated in the past they have used "notwithstanding" language, but there have been some recent opinions by the State Supreme Court that cast some doubt on this approach.

The Chair suggested that the Commission discuss the concept, not specific legal language. She felt very strongly that permitting officers and employees to be indemnified renders absolutely meaningless the ability of the Commission to fine them for ethics violations that were committed in the course of their employment. Commissioner Mahon said that he believes that we need to amend the code because he does think that the plain language of the Indemnification Ordinance does indemnify councilmembers and or employees for Ethics Code violations.

Assistant Attorney Slayton explained how the Indemnification Ordinance works. There are a couple of different processes depending on whether it is a lawsuit or an agency claim. Usually, there is a request from a department director, triggering a "scope call" by the City Attorney's office. In the lawsuit context there is usually a "revision of rights," so that a decision can be made later that the City will not indemnify, which makes it a two-tiered process.

Commissioner Mahon asked how indemnification would work under the Elections Code. The Executive Director stated that the only way that a City officer or employee can violate the Elections Code “in the course of their employment” is by misusing City resources for campaign purposes. So the impact of the indemnification clause on the Elections Code is extremely limited.

Commissioner Kang questioned why the Commission was only discussing the payment of fines, and not discussing the cost of defense. Commissioner Carr said he would have a concern with denying legal representation to City Councilmembers or employees. They are innocent until proven guilty. People should not have to fear being required to hire an attorney to defend actions they took on behalf of the City.

The Executive Director stated his concern that if the payment of the fine were contingent on a showing of bad faith, then we would have fewer settlements, more hearings, and more contentious hearings. Commissioner Miller commented that settlements are the more practical way to proceed.

Commissioner Mahon made a motion to recommend to the City Council that either the Ethics and Elections Codes or Chapter 4.64 be amended to provide that fines levied under the Ethics and Elections Code are payable with personal funds of city officers and employees, and that defense be undertaken with “reservation of rights” consistent with outside litigation. Commissioner Miller seconded the motion. Six Commissioners voted in favor of the motion, and Commissioner Kang dissented.

3) Rules implementing SMC Chapter 2.06, Lobbying Regulations

The Executive Director laid out the changes to the rules since the last meeting. Rule 4.B has been added in an attempt to provide guidance on when a person is acting in the course of

their employment. Rule 4.B was intended to address a concern that had been aired at the public meeting held in July. Under 4.B, if you are paid as an officer, director or in a policymaking or communications role, or your scope of work includes lobbying as defined at SMC 2.06.010.J, then that would constitute lobbying during the “course of your employment.”

The Executive Director said that he had checked with the Public Disclosure Commission, and they interpret the casual lobbying threshold to apply to lobbyist contacts, not lobbyist contacts *on behalf of a particular employer*. Since the City’s law is modeled in large part on state law, he believes that the City law should be interpreted the same way. He stated that the Commission will need to issue a report on the law to the City Council in six months or a year, and the Commission can recommend this change at that time if it would like to.

Another issue that the rules do not address is reporting expenses on a cash or accrual basis. There was a consensus on the Commission that the law is ambiguous on this point, and that staff should permit filers to elect a method.

Commissioner Miller made a motion to approve the rules, which was seconded by Commissioner Burney. The motion passed unanimously.

5) Executive Director’s recommended administrative dismissal of Case No. 08-1-0415-1

The Executive Director stated this was a complaint that Darby DuComb, the Customer Service Bureau Director, was officially involved in a matter in which a close friend of hers was involved. Ms. DuComb and her friend dine together about once a quarter, and five years ago she rented two rooms and a bathroom in his house for six months. The monthly rent was \$500.

The Executive Director believes that transactions would cause a reasonable person to question her independence of judgment, but he believes that an administrative dismissal is appropriate based on Ms. DuComb’s limited involvement. All she did was send an e-mail to

SDOT to inquire about the status of the Project, after a lengthy delay. She received several phone calls from interested parties, and shortly thereafter her supervisor, Ken Nakatsu, took her off of the matter. The Executive Director said he did not see this as a major violation of the Ethic Code and believes that the steps the Mayor's office took to prevent this situation from going on any longer than it did merits an administrative dismissal. Commissioner Mahon made a motion to administratively dismiss the complaint, which was seconded by Commissioner Miller. The motion passed unanimously.

6) Voters' Pamphlet rule barring candidates from discussing their opponent(s)

Commissioner Kang gave some history on how this issue came about. State law says that candidates must talk about themselves, but the City's rule says that candidates cannot talk about their opponents. The issue at this juncture is procedural: Should the Commission put it back on the agenda as an action item where we give notice to the public and have a hearing and take testimony on whether or not to repeal that rule. The next election in which this rule would matter is 2009, so this would be a good time for the Commission to address this issue.

For the record Commissioner Mahon stated that his law firm represented Mr. Cogswell, who sued unsuccessfully several years ago to overturn the rule.

Assistant City Attorney Slayton opined that the Commission does have the authority to promulgate this rule, absent a City ordinance directing that it do so. The State mandates that if you are going to have a Voters' Pamphlet then there are certain rules that have to be promulgated. SMC Chapter 2.14 assigns to the Commission the duty to promulgate rules relating to the Voters' Pamphlet. Therefore, the Commission does have the power to make a rule.

Commissioner Mahon made a motion to hold a hearing in February 2009 on the rule barring candidates from mentioning their opponents, which was seconded by Commissioner Iglitizin. Five Commissioners voted in favor and Commissioners Radosevich and Miller voted against the motion.

7) Resolution of Case No. 08-WBI-0611-1

The Executive Director explained that this was a whistleblower complaint alleging that a Parks Department employee received deliveries of ammunition and possibly firearms at the International District Community Center. He did not treat this as an Ethics Code violation but looked at this as a violation of City rule. The Parks Department substantiated the allegation, but reported to him that the employee had been verbally warned and had received written coaching. Based on that result, the Executive Director made a report to the Mayor and the City Council under the Whistleblower Code that he believed the department's response was not satisfactory. He has now been told that the Parks Department is still in the process of reviewing the appropriate discipline for this employee.

8) Executive Director's report

The Executive Director welcomed Bob DeWeese back from his sabbatical and Polly Grow back from her vacation. He said he would like to have the Commission undertake a top to bottom review of the Ethics Code before the end of the year. The Commission agreed to start the review in October.

Meeting adjourned at 6:05 p.m.

Minutes respectfully submitted by Gwendolyn Ford, Administrative Staff Analyst.