

Memo

To: Commissioners
From: Wayne Barnett
Date: April 25, 2008
Re: SMC 4.16.070.2.c and “behind the scenes” assistance

The Law

SMC 4.16.070.2.c provides that no City officer or employee may:

Except in the course of official duties, assist any person in any City transaction¹ where such City officer or employee’s assistance is, or to a reasonable person would appear to be, enhanced by that officer or employee’s position with the City; provided that this subsection 4.16.070 A1c [*sic*] shall not apply to any officer or employee appearing on his or her own behalf or representing himself or herself as to any matter in which he or she has a proprietary interest, if not otherwise prohibited by ordinance.

Past Interpretations

The first opinion that I have found discussing SMC 4.16.070.2.c in any detail is *Advisory Opinion (“AO”) 90-4*. In *AO 90-4*, the Commission held that a building inspector at the Department of Construction and Land Use (“DCLU”) could not design projects that would be submitted to DCLU in connection with a permit application, even though she was not involved in the permitting process. The Commission wrote:

Even though you are employed in the Construction Inspection Division rather than the Plans and Permits Division; and, you state that in your private

¹ While the Ethics Code does not define the term “transaction,” I have long suspected that the term was borrowed from the State’s Ethics Code, which defines a “transaction involving the state” in relevant part as “ a proceeding, application, submission, request for a ruling or other determination, contract, claim, case, or other similar matter that the state officer, state employee, or former state officer or state employee in question believes, or has reason to believe: (i) [i]s, or will be, the subject of state action; or (ii) [i]s one to which the state is or will be a party; or [i]s one in which the state has a direct and substantial proprietary interest.” Note that this definition tracks closely the City’s definition of “matter.” “Matter” means an application, submission, request for a ruling or other determination, permit, contract, claim, proceeding, case, decision, rulemaking, legislation, or other similar action. Matter includes the preparation, consideration, discussion, or enactment of administrative rules or legislation. Matter does not include advice or recommendations regarding broad policies and goals.” SMC 4.16.070.K.

capacity you: would not accept design work which you would be inspecting; would not accept design work from owners or contractors whose work you inspect; would not make the permit application; would not discuss issues with Department staff; would not be involved in contract administration or construction management; and, that you would keep your supervisors apprised of any design work which would be submitted to the Department for permits, **the work relationships and other departmental associations do not provide for an environment which would prevent a reasonable person from concluding that the assistance you were providing was enhanced by your employment with the Department.** (Emphasis added.)

In 1992, the Commission issued another opinion interpreting SMC 4.16.070.2.c, this time opining on whether building inspectors could moonlight as carpenters or electricians on projects that would be inspected by their fellow building inspectors. The Commission held that they could do the work so long as they complied with several restrictions, including that they did not (1) inspect their own work or the work of the contractor for whom they were moonlighting, (2) discuss with their colleagues projects on which they had moonlighted, or (3) in any way attempt to influence their colleagues to approve those projects. *See AO 92-24.*

Issue

Does the Ethics Code bar an employee from working on City transactions involving their department, when the employee's colleagues will not know of their colleague's involvement?

Discussion

Relying on the Commission's past opinions, I have in the past advised employees that they could work "behind the scenes" on matters to be submitted to their department. (I've had just two such requests that I can recall in the past four years.) The leading opinion on the issue lists only "work relationships and departmental associations" as the basis for concluding that an employee's assistance may be enhanced by his or her City position. The other opinion concludes that such assistance will not violate the code if, among other factors, the employee's colleagues are unaware of his or her connection to a project.

One weakness of this approach, though, is that it pays short shrift to the realities of the marketplace. Take, for example, two equally skilled architects charging the same rate. The employee's work for the permitting agency almost certainly strikes the customer as an advantage. While this is likely mitigated to some extent by the knowledge that the City employee will not be able to present the plans to DPD, it still strikes me that, all other factors being equal, a customer would prefer to hire someone from a City department on a matter to be decided by that City department.

Another weakness of this approach is that it relies on the cooperation of third parties – customers, business partners, etc. – in concealing the City employee's role in a project. If a departmental employee was a "silent partner" on an RFP bid, it seems reasonable to expect that

the employee's partners might let the employee's role slip, in the hope of securing an advantage for their bid.

Finally, the interpretation that flows from these two opinions has the perverse effect, in certain circumstances, of making the Code *less* restrictive for current City employees than for former City employees. SMC 4.16.075.B.1 bars former City employees from assisting others with proceedings involving their former agency. The plain language of this section bars even "behind the scenes" assistance. *See AO 07-01 and AO 08-02.* So under the Commission's past opinions, a current DPD employee might be able to work on a permit application if there was no basis for thinking that his or her work relationships could enhance the customer's application, while a former DPD employee would be barred from working on the same permit application.

Recommendation

I recommend broadening the analysis of the "reasonable person" in SMC 4.16.070.2.c to encompass potential clients and customers. In the eyes of these important participants in City transactions, hiring an insider would seem advantageous. A customer is likely to believe that the City employee has knowledge of his or her department's processes and procedures that can be used to the customer's advantage. And even if the employee never attempts to take advantage of his or her work relationships, it is not possible to prevent their customers from attempting to take advantage of the employee's good name.