

1 Commission Chair Radosevich presided.

2 At the close of the hearing on July 16, the Commission deliberated in closed session. The
3 Commission then considered and adopted in open session a verbal motion. The motion stated
4 that:

5 1) Councilmember McIver violated the ethics code on two occasions - when he executed
6 the consulting contract with GHA and when he later executed the contract amendment;

7 2) Councilmember McIver did not violate the ethics code when he authorized payment
8 of the two invoices for the GHA contract; and,

9 3) Under all the circumstances, the appropriate penalty was a fine of \$500 for each of the
10 two violations.
11

12 The Commission also announced that it would later issue this written Determination,
13 including findings of fact, conclusions of law, and an order, as provided in Commission
14 Administrative Rule 3(V) and 3(W).³

15 **II. FINDINGS OF FACT**

16 1. Councilmember McIver has been a member of the Seattle City Council since
17 1997.

18 2. Councilmember McIver has for several years been interested in improving the
19 City Council's oversight of the office of the Seattle City Auditor.
20

21 3. Beginning in approximately 2003, Councilmember McIver began work on a project
22 to create a framework to evaluate the performance and function of the Seattle City Auditor's Office
23

participate in hearing the matter.

³ It is the Commission's intent that applicable time deadlines such as appeal periods begin to run only when a written Determination is issued.

**IN RE COUNCILMEMBER MCIVER
DETERMINATION, FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER
Page - 2**

Thomas A. Carr

Seattle City Attorney
600 Fourth Avenue, 4th Floor
P.O. Box 94769
Seattle, WA 98124-4769
(206) 684-8200

1 (“the audit project”). The audit project consumed substantial time and effort of the Councilmember,
2 his staff and the Council Central Staff.

3 4. Councilmember McIver was chair of the City Council Finance and Budget
4 Committee for four years. As his tenure as chair wound down in 2006, he became even more
5 interested in making significant progress on the audit project.

6 5. Councilmember McIver initially believed that the audit could be performed in-
7 house. At some point, Councilmember McIver came to favor hiring an outside consultant to
8 perform such a review. As part of that effort, Councilmember McIver had his staff look into
9 identifying a consultant qualified to perform that work.

10 6. Over the summer of 2006, Nancy Coyle and Frances Youn worked on proposals
11 for the review of the City Auditor’s office.

12 7. In mid-2006, as the framework part of the project was being completed,
13 Councilmember McIver and his staff began to explore the question of what skills and experience
14 would be necessary in an outside consultant. He discussed this question with the City’s Director of
15 Finance, as well as the City’s former auditor.

16 8. The City’s contracting process permits departments to contract up to a dollar
17 maximum with consultants from a roster of qualified consultants without a competitive process.
18 The initial GHA contract was within that dollar limit.

19 9. On July 31, 2006, Ms. Coyle prepared a memo for Councilmember McIver
20 discussing options for the review.

21 10. On August 17, 2006, Ms. Youn sent to Ms. Coyle an e-mail detailing next steps
22 for the review, including finding “out scope of services that various consultants provide.”
23

1 11. Ms. Youn's log for October 3, 2006, includes the following entry: "PHONE
2 Joann Francis remind McIver discuss review of Auditor."

3 12. Ms. Youn's log for October 10, 2006, notes that GHA was being considered for
4 the contract. The log says: "review doesn't need to be extensive for \$35K."

5 13. In June 2006, Ms. Francis joined GHA as a principal. Ms. Francis owned a five
6 percent interest in GHA at the time she joined GHA.

7 14. Sometime in the fall of 2006, Councilmember McIver met with Ms. Francis and
8 Carl Griffin, GHA's president, to discuss whether GHA should review of the functions of the
9 Seattle City Auditor's Office.

10 15. At this meeting Mr. Griffin gave Councilmember McIver a copy of GHA's
11 Statement of Qualifications, which contained information about Ms. Francis status as a principal
12 of GHA.

13 16. Councilmember McIver first learned that Ms. Francis was an employee or
14 principal of GHA at this meeting, which occurred well before December 2006.

15 17. Councilmember McIver has on several occasions vacationed with Ms. Francis and
16 her husband, both at a Virgin Islands condominium owned by Ms. Francis and her husband and
17 at a vacation time share in Mexico then owned by Councilmember McIver and his wife.

18 18. GHA was on an applicable City consultant roster. The consultant roster is
19 maintained by the Department of Executive Administration. The list is divided by the subject or
20 skill-set of the particular consultant.

21 19. Consultants must apply to be placed on the roster and must submit their
22 qualifications for a particular category. The application is circulated for review by departments of
23

1 the City which might have use for such consulting services. Upon successful review, the consultant
2 is placed on the list.

3 20. Sometime in the second half of 2006, Councilmember McIver decided that he
4 wanted to hire GHA to perform the audit.

5 21. Councilmember McIver knew both Carl Griffin and Duane Hill, named principals of
6 GHA, and was aware of their qualifications regarding audits and local government.

7 22. During a budget committee hearing in October 2006 for the 2007 budget, two
8 competing proposed actions were discussed related to review of the Auditor's Office.

9 Councilmember McIver's proposal called for hiring a consultant to review the Auditor's Office
10 to be paid for out of the Legislative Department's 2007 budget. Neither of the two proposals
11 were adopted by the City Council.
12

13 23. Councilmember McIver proposed using 2006 City Council Consultant Budget
14 funds to hire a consultant. Consistent with City Council policy, he obtained the support from two
15 other Councilmembers and the consent of Council President Nick Licata to contract with an outside
16 consultant to perform the audit. The budget funding for the consultant was to come out of the 2006
17 Council consultant budget rather than the 2007 budget.

18 24. Councilmember McIver also had as a general priority increasing the opportunities
19 available to businesses owned or operated by women and minorities to contract with the City to
20 provide needed goods and services.
21

22 25. GHA was a certified MBE (Minority Business Enterprise) under City policies.

23 26. In December 2006, the scope of work and contract amount negotiations between
GHA and Councilmember McIver were completed. The agreed contract amount was \$37,000.

1 27. The written work scope was sent to Council Administrative staff for the preparation
2 of the contract to which the work scope would be attached and the assignment of a contract number
3 to administer payment. There were at least two drafts and one final completed contract document.

4 28. During the last week of December 2006 and the first week of January 2007,
5 Councilmember McIver went on vacation with Ms. Francis and her husband and stayed in the
6 Francis' condominium in the Virgin Islands for about ten days to two weeks.

7 29. Councilmember McIver signed the contract with GHA in early January 2007,
8 shortly after returning from his vacation. The contract was dated as of December 28, 2006,
9 apparently for budget purposes.

10 30. In May 2007, the contract was amended to expand the scope of work and increase
11 the contract amount by \$5,000. Such increases were permissible under City and Council
12 contracting rules.

13 31. In February and April 2007, Councilmember McIver approved for payment
14 invoices from GHA.

15 32. GHA performed its services and prepared a final report, which made several
16 recommendations on the organization and function of the Auditor's Office. There is no dispute
17 that GHA performed its services in a competent and professional manner or that the City
18 benefited from the contract. The Auditor later contracted with GHA for additional consulting
19 work to help implement the recommended changes.
20

21 33. In January 2008, the City Council voted unanimously to adopt a resolution
22 implementing the recommended changes in the Auditor's office.
23

1 **III. CONCLUSIONS OF LAW**

2 1. The Commission has jurisdiction to hear this matter and the requisite quorum was
3 present for the hearing.

4 2. The Seattle Ethics Code, SMC 4.16.070(1)(a), states that no City officer or
5 employee shall “[e]ngage in any transaction or activity, which is, or would to a reasonable
6 person appear to be, in conflict with or incompatible with the proper discharge of official duties,
7 or which impairs, or would to a reasonable person appear to impair, the officer’s or employee’s
8 independence of judgment or action in the performance of official duties and fail to disqualify
9 him or herself from official action in those instances where the conflict occurs.”

10 3. The Executive Director has the burden of proving by a preponderance of the
11 evidence each element of SMC 4.16.070(1) (a) relevant to this case. Specifically, the Executive
12 Director must establish that: (a) Councilmember McIver is a "City officer or employee;"
13 (b) Councilmember McIver engaged in a "transaction or activity;" (c) the transaction or activity
14 engaged in "would to a reasonable person appear to impair the officer's ... independence of
15 judgment or action;" (d) the judgment exercised or action taken was "in the performance of
16 official duties;" and (e) Councilmember McIver failed to disqualify himself "from the official
17 action in those instances where the conflict occurs."

18 **A. Councilmember McIver Is a City Officer.**

19 4. As a sitting member of the City Council, Councilmember McIver is a current City
20 officer.

21 **B. Councilmember McIver Engaged in a Transaction or Activity.**

22 5. Mere friendship is not itself a “transaction or activity” within the meaning of
23

1 SMC 4.16.070(1)(a). However, certain types of transactions or activities between friends could
2 rise to the level of a “transaction or activity” within the meaning of this section.

3 6. In vacationing together on several occasions, both as the guest of Joann Francis
4 and her husband at their Virgin Island condominium and with Ms. Francis as his guest at his
5 vacation property in Mexico, Councilmember McIver engaged in a “transaction or activity”
6 within the meaning of SMC 4.16.070(1)(a).

7
8 **C. Councilmember McIver's Transactions or Activities with Ms. Francis Would to a
9 Reasonable Person Appear to Impair Councilmember McIver’s Independence of
10 Judgment or Action.**

11 7. There are two parts to the applicable standard – the appearance standard and the
12 reasonable person standard.

13 The Appearance Standard

14 8. Councilmember McIver argues that the Executive Director must prove that his
15 judgment was in fact impaired. The Commission disagrees. The appearance standard in the
16 SMC 4.16.070(1)(a) requires public officers to consider the appearance of impairment as well as
17 actual impairment, and to disqualify themselves from an official decision if a reasonable person
18 would conclude that a transaction or activity would appear to impair their independence of
19 judgment in that decision.

20 9. "Impair" means "to damage or make worse by or as if by diminishing in some
21 material respect."⁵

22 10. Councilmember McIver also argues that impairment must be judged objectively
23 by evaluating the result or outcome of the judgment. The Commission disagrees. The evidence

⁵ Merriam-Webster's Online Dictionary, 10th Ed., www.merriam-webster.com/dictionary/impair.

1 may show, as it did here, that the official's judgment appears to be impaired, even though the
2 public official's ultimate decision results in a benefit for the City. Impaired judgment can result
3 in good outcomes for the City just as unimpaired judgment occasionally results in bad outcomes.
4 Impairment or the appearance of impairment does not depend on how subsequent events turn out
5 for the City.

6 The Reasonable Person Standard

7 11. The reasonable person standard is an objective one.

8
9 12. Vacationing with Ms. Francis, particularly as her guest at her vacation property
10 immediately prior to executing a contract with a consulting firm in which he knew she had an
11 ownership interest, would to a reasonable person appear to impair Councilmember McIver's
12 independence of judgment or action regarding his selection and entry into a consulting contract
13 with FHA.

14 13. Vacationing with Joann Francis, particularly as her guest at her vacation property
15 immediately prior to executing a contract with a consulting firm in which he knew she had an
16 ownership interest, would to a reasonable person appear to impair Councilmember McIver's
17 independence of judgment or action regarding his subsequent decision to enter into an amended
18 consulting contract with GHA.

19 **D. Councilmember McIver's Judgments and Actions Were Within His Official Duties.**

20 14. The appearance of impairment must be regarding the official's judgment related
21 to the performance of his or her official duties.

22 15. Councilmember McIver's entry into the original consulting contract constituted a
23 "judgment related to performance of his official duties."

1 16. Councilmember McIver's amendment of the consulting contract constituted a
2 "judgment related to performance of his official duties."

3 17. Councilmember McIver's approval of payment of invoices did not constitute a
4 "judgment related to performance of his official duties", but rather was a merely ministerial or
5 administrative act.⁶

6 **E. Councilmember McIver Did Not Disqualify Himself from the Official Action in**
7 **Those Instances Where the Conflict Occurred.**

8 18. If the previous elements are present, the public officer must disqualify himself or
9 herself from "the official action in those instances where the conflict occurs."

10 19. Councilmember McIver failed to disqualify himself from the decision to enter
11 into the consulting contract, to amend the contract, or to approve payment of the invoices.

12 20. The Commission concludes that the phrase "where the conflict occurs" does not in
13 all cases require an actual conflict. The "appearance" language and the "impairment of judgment
14 or action" language in the section would both be rendered superfluous if this last clause of the
15 section were construed to require an actual conflict in all cases. In an appearance of impaired
16 judgment case such as this, "action ... where the conflict occurs" is better understood to mean
17 "action where the appearance of the impairment of judgment occurred."

18 **G. Councilmember McIver Violated SMC 4.16.070(1)(a).**

19 21. Councilmember McIver violated SMC 4.16.070(1)(a) when he failed to disqualify
20
21

22 ⁶ If, for example, Councilmember McIver had recused himself from the decision to contract with
23 GHA and from the decision to increase the GHA contract amount, then the Ethics Code would
not require him to recuse himself from the ministerial or administrative acts of approving
payments under the contracts.

1 himself from the decision to select and to enter into the consulting contract with GHA.

2 22. Councilmember McIver violated SMC 4.16.070(1)(a) when he failed to disqualify
3 himself from the decision to negotiate and enter into the amended consulting contract with GHA.

4 23. Councilmember McIver did not violate SMC 4.16.070(1) (a) when he approved
5 the payment of invoices under the contracts with GHA.

6 **H. The Appropriate Penalty**

7 24. Pursuant to SMC Section 4.16.100, the Commission has authority to impose a
8 monetary fine of up to \$5,000 per violation of the Ethics Code and require the reimbursement of
9 reasonable investigative costs in an amount not to exceed the amount of any monetary fine.

10 25. There are several mitigating factors that, although not excusing Councilmember
11 McIver's duty to disqualify himself from the decisions to enter the original and amended contracts,
12 are relevant to determining an appropriate penalty: (a) Councilmember McIver did not intentionally
13 violate the Ethics Code; (b) Councilmember McIver did not obtain any private benefit from his
14 decision to enter the original or amended contracts with GHA; (c) Councilmember McIver did not
15 select GHA in order to benefit Ms. Francis; (d) GHA was on the City's consultant roster for years
16 and was qualified to perform the work; (e) the City Council later concluded that the City benefited
17 from the work performed under the original and amended contracts; (f) Councilmember McIver's
18 decision was strongly motivated by a desire to increase the City's use of minority business
19 enterprises, which was an appropriate, even laudable, City goal; and (g) the City Council lacked
20 appropriate controls regarding the method of selecting a particular consultant once the decision to
21 hire a consultant had been approved by the Council President.
22
23

1 26. In light of the facts and the mitigating factors described above, the Commission
2 concludes that a penalty of \$500 per violation constitutes a reasonable penalty for Councilmember
3 McIver's violations of the Ethics Code.

4 27. In light of the facts and the mitigating factors described above, the Commission
5 concludes that Councilmember McIver should not be required to reimbursement the City for its
6 investigative costs.

7 **IV. ORDER.**

8
9 1. Councilmember McIver violated SMC Section 4.16.070(1) (a) in January 2007
10 when he failed to disqualify himself from the decision to to enter into a consulting contract with
11 them.

12 2. Councilmember McIver violated SMC Section 4.16.070(1) (a) in May 2007 when
13 he failed to disqualify himself from the decision to enter into an amended consulting contract with
14 GHA.

15 3. Councilmember McIver should pay from his personal funds a penalty of \$500 per
16 violation, for a total of \$1,000.

17 **THE SEATTLE ETHICS AND ELECTION COMMISSION**

18
19 Michele Radosevich 7/22/08
Michele Radosevich, Chair

Lynne Iglitzin (by gt) 7/22/08
Lynne Iglitzin, Commissioner

20 Robert Mahon 7/22/08
Robert Mahon, Commissioner

Ed Carr 7/22/08
Ed Carr, Commissioner

21
22 Tarik Burney (by gt) 7/22/08
23 Tarik Burney, Commissioner