City of Seattle

Ethics and Elections Commission

August 24, 2007

Re: Case No. 07-2-0816-1

Dear *****:

On August 16, 2007, you filed a complaint with our office stating that "someone from the Mayor's Office asked Al Clise to contribute to an anti-viaduct or pro-tunnel campaign and he agreed to do so." For the reasons discussed below, I am dismissing your complaint. (Your other allegation, that "100's of thousand of dollars were raised for the 'Not Another Elevated' and 'Pro Tunnel' Campaign from the Mayor's normal contributors," does not suggest violations of either the Ethics or Elections Codes.)

Facts

Mr. Clise told our office in March that he received a call from someone in the Mayor's office soliciting a contribution to the Not Another Elevated Viaduct ("NAEV") committee. (We were interviewing Mr. Clise to determine whether NAEV accepted a $7,500 contribution from Clise Properties after the deadline for accepting contributions in excess of $5,000.)

It is likely that the person who called Mr. Clise was an employee of Colby Underwood Consulting LLC, NAEV's fundraiser. According to Mr. Underwood, fundraisers calling from his office would introduce themselves as calling on behalf of NAEV. During the call, though, the fundraiser would reference the Mayor's support for the tunnel option, and sometimes try to schedule a time for the Mayor to speak directly with the prospective contributor.

The Counsel to the Mayor, Regina LaBelle, says that no fundraising calls on behalf of NAEV were placed from City telephones.

Relevant Law and Advisory Opinions

SMC 2.04.300, provides that: "No elected official nor any employee of his or her office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition." The law does not bar City officers and employees from promoting or opposing ballot propositions on their own time using their own resources.

SMC 4.16.070(2)(a) provides that no City officer or employee may "[u]se his or her official position for a purpose that is, or would to a reasonable person appear to be primarily for the private benefit of the officer or employee, rather than primarily for the benefit of the City; or to achieve a private gain or an exemption from duty or responsibility for the officer or employee or any other person…."

In *Op. Sea. Ethics and Elects. Comm'n.* 3E (1995), the Commission concluded that "[i]t has been a long-standing practice for elected officials in the State of Washington to use their titles of office to endorse candidates. So long as they do so on personal time, without using public facilities, such conduct is not prohibited." The opinion also states: "The title alone is not a City facility that may not be used to assist a candidate, as provided in SMC 2.04.300," and "[t]he use of the title to support the officer's candidacy is an exception to the prohibition against the use of position for private gain, SMC 4.16.070(2)(a), because of the past pervasive practice in Washington."

The State's Public Disclosure Commission has also taken the position that a title is not a facility. A September 2001 Assistant Attorney General's memorandum entitled "Statutory Limits On The Use of Public Funds/Facilities To Assist or Oppose Campaigns, Particularly Campaigns Involving Ballot Measures or Initiatives" contains the following passage:

> Unlike paper or ink or time, an officer's title cannot be measured or "expended" in any meaningful way. Knowledge that a particular candidate or ballot proposition is supported by "Commissioner X" may lend some weight or dignity to a campaign event or advertisement, or it may not. Thus, while it may be prudent to avoid using a position or title, primarily to avoid any implication that the agency or its officers are "officially" supporting a particular candidate or proposition, the mere identification of a person by stating his/her title or position would not seem to be a "use" of public facilities.

Analysis

Under *Op. Sea. Ethics and Elects. Comm'n.* 3E (1995), the Mayor's title is not a facility for the purposes of SMC 2.04.300, nor is the use of the title in connection with a political campaign a misuse of position. Although 95-3E dealt with a campaign for elective office, SMC 2.04.300 makes no distinction between campaigns for office and ballot issue campaigns – what is lawful in one context must be lawful in the other. The same can be said for SMC 4.16.070(2)(a); there is no reasonable basis for drawing a distinction between the two types of campaigns. Just as Councilmembers routinely use their titles in endorsements – and just as Council President Licata used his title in a fundraising appeal last fall in support of Citizens for

More Important Things' "Yes on I-91" campaign – so, too, can the Mayor use his title in connection with a fundraising appeal in support of NAEV.[1]

Conclusion

Based on the Commission's longstanding treatment of the use of titles under the Ethics and Elections Codes, and my determination that Mr. Clise's statement that he was contacted by "someone in the Mayor's office" does not constitute sufficient evidence to conduct a full investigation, I am dismissing your complaint. You are entitled to appeal my dismissal under Seattle Ethics and Elections Commission Administrative Rule 2.6.[2] Please be advised that if you elect to file an appeal under Administrative Rule 2.6, we will no longer be able to preserve your anonymity.

Very truly yours,

Wayne Barnett
Executive Director

cc: Seattle Ethics and Elections Commission *(complainant's name and address withheld)*
Mayor Greg Nickels *(complainant's name and address withheld)*

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[1] I note that finding Nick Licata's or Greg Nickels's use of their title a violation of the law would elevate form over substance. Even without their titles it seems unlikely that anyone would be confused as to the identity of Nick Licata or Greg Nickels.

[2] 2.6 Appeal of Executive Director Dismissal Decisions
(1) Upon the written request of a party aggrieved by an Executive Director's decision to dismiss a complaint, the decision may be reviewed by the Commission.
(2) A request for review shall be served at the office of the Commission no later than twenty one (21) days after the date of mailing the decision of which review is sought.
(3) A request for review shall state the grounds therefore, and shall be no longer than twelve 8 1/2" x 11" double-spaced pages in length with margins of at least 1" on every side, and no more than twelve characters per inch.
(4) When a request for review is served, enforcement of the decision of which reconsideration is sought shall be stayed and the decision shall not be final until the Commission has acted on the request for review.
(5) The Commission shall act on the request at the next meeting at which it may be practicable by:
(a) deciding whether to review the Executive Director's decision; and
(b) if it decides to do so, either affirming, reversing, or amending the decision.
(6) In reviewing the Executive Director's decision, the Commission shall base its review on whether the Executive Director had a rational basis for the decision, and shall only reverse or amend a decision to the extent that a rational basis is lacking.