

Seattle Ethics and Elections Commission Special Meeting

July 18, 2012

The meeting of the Seattle Ethics and Elections Commission convened on July 18, 2012 in Room 1600 of the Seattle Municipal Tower, 700 Fifth Avenue. Commission Chair Bill Sherman called the meeting to order at 4:04 p.m. Vice-Chair Tarik Burney and Commissioners Bruce Carter, Rich Cohan, and David Mendoza were all present. Commissioner Lynne Iglitzin was absent. Executive Director Wayne Barnett and staff members Anthony Adams, Kate Flack, Polly Grow, Gary Keese and Chris Thomas were present. Assistant City Attorney Jeff Slayton and Assistant City Attorney Gary Smith were also in attendance.

1) Public Comment

There was no public comment.

Action Items

2) Approval of minutes of the June 6, 2012 meeting

The Executive Director pointed out a typo in the minutes from the June 6, 2012 meeting. Commissioner Cohan motioned to approve the minutes as amended. Commissioner Carter seconded. The minutes from the June 6, 2012 meeting were unanimously approved as amended.

***) Appeal of dismissal of Case No. 12-2-0703-1 (alleged misuse of public facilities to promote levy)**

The Chair began by establishing with staff the process for the Commission's review of the Executive Director's dismissal, and with counsel the standard for the Commission's review. The Administrative Rules afford some level of deference to the Executive Director's decision,

and it is the Commission's role to determine whether or not the Executive Director's exercise of his discretion was reasonable.

Chris Leman said that the Library's fact sheet on the Library Levy was speculative and not factual, and therefore was counter to guidance issued by the State Attorney General's office to local agencies commenting on ballot measures. Commissioner Carter asked Mr. Leman whether it was not always in the discretion of the legislature to take some action that would defeat the objects of a levy. Mr. Leman replied that the Attorney General's guidance is very clear that agencies may not speculate, and the Commission in rewriting the Explanatory Statement for the Library Levy recognized that the passage of the levy would not guarantee, for example, that libraries would have Sunday hours restored.

Mr. Leman told the Commission that he had asked the Executive Director to take advantage of the Commission's dispute resolution process but that the Executive Director told him that was not possible since he had dismissed the complaint. Mr. Leman told the Commission that he had some ideas for language to improve the fact sheet, and that he hoped that the Commission would agree to change the wording of the fact sheet, regardless of whether they found the Library in violation of the law.

The Executive Director defended his decision to dismiss the complaint, telling the Commission that he continued to believe that the fact sheet was primarily informational. He said that absolute certitude regarding the effects of the passage of a ballot measure has never been the standard for reviewing a fact sheet.

In response to a question from the Chair, the Executive Director said that the Attorney General's guidance dealt with an agency's ability to warn voters that popular programs would be

eliminated if a levy failed, calling that improper because the legislature could choose to fund those popular programs in some other way. The Executive Director said that the Library's fact sheet was not analogous to that hypothetical.

Mr. Leman said that the Commission's opinion in the Nickels case that a communication had to be "primarily informational" was a mistake, and that any deliberate effort to promote a levy is flatly illegal. He urged the Commission to revisit that opinion.

Commissioner Cohan asked Mr. Leman why the statements that the levy would do certain things necessarily implied that those things would not happen if the levy failed. Mr. Leman said that he didn't see how a reasonable reader would reach any other conclusion.

The Commission then moved to a discussion of the appeal. The Vice Chair made a motion to review the Executive Director's decision, which Commissioner Mendoza seconded. The Commission voted unanimously to review the Executive Director's decision.

Commissioner Carter made a motion to affirm the Executive Director's dismissal, saying that he thought the Executive Director's decision was reasonable and rational. The Vice Chair seconded the motion. The Commission voted unanimously to affirm the Executive Director's dismissal.

Mr. Leman asked the Commission whether they were going to discuss issuing an advisory opinion, and the Chair told Mr. Leman that issue was not on the Commission's special meeting agenda.

3) Commission rule governing credit card contributions.

The Executive Director told the Commission that a month had not been sufficient time for staff to do a rigorous review of the credit card rule, and to make a thoughtful recommendation to the Commission. In light of the fact that historically most fundraising takes place after January 1 of the election year, the Executive Director recommended suspending the enforcement of the portions of the credit card rule at issue until January 1. He said that would give the staff adequate time to research the issues.

Commissioner Mendoza moved to adopt the recommendation in the memo authored by the Executive Director. Commissioner Cohan seconded. The motion passed unanimously.

Discussion Items

4) Whistleblower Protection Code review

City Attorney Jeff Slayton told the Commission that his research suggested that the City could, if it wished to do so, create a private cause of action entitling employees to sue in Superior Court to vindicate their rights under the Whistleblower Protection Code. It is not crystal clear, but there is case law to support the position.

Kathy Phair Barnard, Chair of the Washington Employment Lawyers Association, told the Commission that creating an administrative remedy would make it harder for employees to prevail in Court on a common law tort claim for wrongful discharge in violation of public policy. For that reason and others, WELA urged the City to create a private right of action.

Ms. Barnard then urged the Commission to give whistleblowing employees party status in whatever administrative proceeding that the City creates.

Commission Cohan said that he was in complete support of both the private right of action as well as the involvement of employees in the administrative proceedings, and the other commissioners concurred.

5) Executive Director's report

The Executive Director reported that Commissioner-elect Lorena González had her hearing before the Council's Finance Committee, and was slated to go before the full City Council the following Monday.

In response to a question from Mr. Leman, the Executive Director indicated that staff was working on his complaint, and that while staff would attempt to resolve that complaint before the August election, Commission staff would act deliberately and would not rush the process.

The July 18, 2012 Commission meeting adjourned at 5:15 p.m.