City of Seattle

Ethics and Elections Commission

January 28, 2008

Re: Case No. 07-1-1010-1

Dear *****:

On October 10, 2007, you filed a complaint with our office alleging that Councilmember David Della, personally and through his chief of staff, David Namura, improperly used his official City position to advance his reelection campaign. You alleged that both Della and Namura, at different times, threatened retaliation for your unions' support of Tim Burgess, Della's election opponent. For the reasons discussed below, I am dismissing your complaint.

Investigation

Commission staff conducted nine interviews. We placed the five key persons we interviewed in our office under oath.

1. *Councilmember David Della's June 25 telephone conversation with Seattle Police Officers' Guild ("SPOG") President Richard F. O'Neill.*

On June 22, 2007, SPOG and Seattle Firefighters Union, Local 27 ("SFFU") issued a joint press release endorsing Burgess over Della in the race for Position 7 on the Seattle City Council. That day, Della, who was in his City office at the time, tried several times to reach O'Neill by telephone. O'Neill did not work on June 22, so the two did not have a conversation until Monday, June 25.

O'Neill told us that Della was upset when they spoke. He asked why he had not won the endorsement, and O'Neill shared the reasons behind SPOG's endorsement of Burgess.

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GCIU 804-M

According to O'Neill, Della then said "So let me get this right. You are working without a contract and you are not going to endorse the incumbent who sits on the finance and budget committee?" Della then said "Well, when I win we are going to have to have a hard discussion," to which O'Neill responded that he was sure they would talk if Della was reelected. According to O'Neill, the call then ended.

Della recalls the conversation differently. He denies making the statement O'Neill attributes to him, denies making any mention of SPOG's contract negotiations, and denies mentioning his seat on the finance and budget committee. He said he called O'Neill about their relationship, because the endorsement "ma[de] it awkward." He told us he expressed his disappointment with their endorsement decision, and reminded O'Neill that he'd asked SPOG to remain neutral if they did not endorse him. He said he told O'Neill he was "working to win this," and that O'Neill said they would mend fences if he won. According to Della, that ended the conversation.

2. *David Namura's October 1, 2007 conversation with SFFU Vice-President Kenny Stuart.*

David Namura and Kenny Stuart both attended a candidate forum sponsored by Friends of Victor Steinbrueck Park at Cutter's on October 1. As the forum got under way, Namura offered to buy Stuart a beer. The two retired to the restaurant bar.

Stuart told us Namura told him that if the fire fighters made independent expenditures supporting Burgess, they would damage their relationship with Della. Stuart also said that Namura mentioned the Fire Department's budget, and Della's seats on the Finance Committee and the Labor Policy Committee. Stuart told us that Namura told him that if the fire fighters' continued to campaign hard for Burgess, it would be "bad for fire fighters."

Stuart told us that he had a bad memory, and that he had written down his account of the conversation with Namura the morning of October 2. The written account includes one other detail. Stuart wrote that "Della will not be responsive to Seattle Fire Fighters and it will irreparably damage the relationship between Seattle Fire Fighters and Della." Stuart told us he committed the conversation to writing on the advice of Mike Sheridan, SFFU's political consultant. Stuart also told us that David Freiboth of the King County Labor Council had met with Namura several weeks before the October 1 forum and that Namura had explored a "strategy of threats towards Seattle Fire Fighters" at the meeting.

Namura recalled his conversation with Stuart as a friendly one, in which Stuart talked about the upcoming birth of his child. (Stuart told us that in a follow-up conversation he had with Namura – after these allegations came to light – he had agreed with Namura's characterization of their conversation as a friendly one.) Namura said the two had never met before, and that he initiated the conversation to try to better understand why the fire fighters and Della didn't have a better relationship. Namura told us that he laid some of the blame for the poor relationship on Della's staff, but also that the fire fighters "weren't doing a good job of building relationships." Namura, however, called "completely false" the allegation that he had

told Stuart that Della would not be responsive to Seattle Fire Fighters, or had threatened retaliation in any way.

3. Other Interviews

Commission staff interviewed Tim Burgess, Della's opponent. Burgess told us that Stuart related the account of his conversation with Namura to him at the close of the October 1 forum. Burgess told us that he advised Stuart to "write this up," and let the Ethics Commission know about it.

Commission staff also interviewed David Freiboth. Freiboth told us that he had a conversation with Namura in late July or early August in which Namura had said in passing that the fire fighters needed to know that their continuing support for Burgess would affect their relationship with Della. Freiboth characterized the comment as one made out of frustration. He declined to characterize the conversation as an attempt to put into motion a "strategy of threats" against the fire fighters for their support of Burgess. Later, in early September, Freiboth saw Namura at an event and said, "You're not going there, are you?" to which Namura responded, "No." When Freiboth heard the allegations leveled by Stuart, he called Namura and asked him whether he'd threatened Stuart, and Namura denied doing so.

Analysis

SMC 4.16.070 states that no City officers or employee may either:

"a. Use 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," or

"b. Use or permit the use of any person, funds, or property under his or her official control, direction, or custody, or of any City funds or City property, for a purpose which is, or to a reasonable person would appear to be, for other than a City purpose…."

As a threshold matter, I believe that threatening to take, or not to take, official actions based on an individual or group's support for one's political opponent would violate the Ethics Code, whether that message is delivered personally – in which case it would violate SMC 4.16.070.2.a – or through an employee – in which case it would violate SMC 4.16.060.2.b. When a City officer or employee threatens to use his or her authority to "punish" some person or group, they have "used" their position in violation of the law. If the threat is effective, there will never be any evidence of actual retaliation, because the person or group will have altered their behavior to avoid the threatened retaliation. The misuse of official position is accomplished by the delivery of the threat.

I find support for this position in advice provided by the Committee on Standards of Official Conduct of the U.S. House of Representatives. In a 1999 memo entitled "Prohibition

Against Linking Official Actions to Partisan or Political Considerations, or Personal Gain," the Committee wrote that "the use of threats of reprisal, or promises of benefits…constitutes an abuse of the powers of the congressional office and is prohibited." I am also familiar with a case settled in Massachusetts involving a State Representative who acknowledged misusing his position when, in voice mails, he threatened retaliation against officers of a bank that had declined to make charitable contribution that the legislator had solicited on behalf of a tribe in the legislator's district. See *In re Philip Travis,* 2001 SEC 2014.

Having determined that I would charge a City officer with a violation of SMC 4.16.070(2) if I could establish that the City officer, either personally or through staff, used the officeholder's position to the detriment of a political opponent's supporters, I turn now to determine whether there is sufficient evidence for me to establish by a preponderance of the evidence that Della, personally or through Namura, threatened the police or fire union with retaliation for their support of Burgess.

I do not believe there is sufficient evidence to warrant filing charges in this matter. SPOG President Richard O'Neill told us that Councilmember Della invoked his position and alluded to SPOG's contract with the City when he called in the wake of SPOG's endorsement of Tim Burgess. Della denies this. Both men were alone at the time of the call, and both men were under oath when they provided their accounts to the Commission staff. While O'Neill shared his account of the conversation with his staff in the wake of the call, I do not believe that the hearsay evidence that staff would provide constitutes sufficient additional evidence to go forward.

The same can be said for Namura's conversation with Stuart. Stuart says that Namura threatened him, and Namura denies this. While Freiboth's account buttresses to some extent the testimony provided by Stuart, a case based on the conversation between Stuart and Namura is weak because of Stuart's inability to recall under oath before the Commission staff any specific threats of retaliation. I do not believe that Stuart's testimony – coupled with the testimony of Freiboth to a conversation that occurred two months before the alleged threat – is sufficient to enable me to establish a violation by a preponderance of the evidence.

Conclusion

Based on my evaluation of the testimony provided to the Commission staff in this investigation, I do not believe there is sufficient evidence to charge former Councilmember Della with violating the Ethics Code by using his official position to benefit his campaign. Accordingly, I am dismissing your complaint.

I have, however, concluded that Della violated the Elections Code when he called O'Neill from his City office, using his City telephone. It was not appropriate for Della to call SPOG's President in the wake of that group's endorsement decision, even if, as Della claims, his intention was to address the strain on the relationship caused by the endorsement. I will ask the Commission to administratively dismiss that violation, though, because I do not believe that charging Della for that single violation, in the wake of his election defeat, would serve the public interest.

You are entitled to appeal my dismissal under Seattle Ethics and Elections Commission Administrative Rule 4.[1] Please be advised that if you elect to file an appeal under Administrative Rule 4, we will no longer be able to preserve your anonymity.

Thank you for bringing this matter to our attention.

Very truly yours,

Wayne Barnett
Executive Director

cc: Seattle Ethics and Elections Commission *(complainant's name and address withheld)*
Mr. David Della *(complainant's name and address withheld)*
Mr. David Namura *(complainant's name and address withheld)*

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[1] A. Upon the written request of a party aggrieved by the Executive Director's decision to dismiss a complaint, or to impose late-filing penalties under SMC 2.04.330, the action may be reviewed by the Commission.
B. An appeal of a dismissal shall be served at the Commission's office no later than 21 days after the date of mailing the decision of which review is sought.
C. An appeal of late-filing penalties shall be served at the Commission's office no later than 14 days after the date of mailing the decision of which review is sought.
D. A request for review shall state the grounds therefor, 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 12 characters per inch.