City of Seattle

Ethics and Elections Commission

April 2, 2009

Re: Case No. 08-1-1104-1

Dear **********:

On November 4, 2008, you filed a complaint with our office making several allegations of wrongdoing by City employees. Most of your complaints fall outside the Commission's jurisdiction. After conducting a preliminary investigation, I find no reasonable cause to believe that Personnel Department employees violated the Ethics Code. Therefore, I am dismissing your complaint.

Allegations

You raised seven issues about the action of various City of Seattle employees who were involved with the issuance of a curb cut permit to your neighbor. The allegations are as follows:

1. Members of the Mayor's staff, Seattle Department of Transportation (SDOT) Deputy Director Anne Fiske-Zuniga, and members of the City Attorney's office improperly used their official positions to benefit your neighbor.

2. Deputy Director Fiske-Zuniga, Assistant City Attorneys Judy Barbour and Patrick Downs, and your neighbor's attorney engaged in *ex parte* communications during the appeal of the denial of your neighbor's application for a curb cut.

3. Seattle Law Department attorneys inappropriately edited a traffic safety report requested by Deputy Director Fiske-Zuniga.

4. SDOT denied you due process.

5. City officials violated the Public Records Act.

6. Seattle Law Department attorneys violated the Rules of Professional Conduct.

7. Deputy Director Fiske-Zuniga misused her City-provided Blackberry to make personal telephone calls.

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GCIU 804-M

The Commission's Jurisdiction

As a threshold matter, it is important to note that the Commission's powers are defined by law, and that the Commission is powerless to enforce laws other than those it is charged with enforcing. SMC 3.70.100.A sets forth the laws that the Commission is empowered to administer and enforce. That section limits the Commission's jurisdiction to the Ethics Code, the Elections Code, the Whistleblower Protection Code, the Lobbyist Disclosure Code, and the Election Pamphlet Code.

The Commission is not empowered to pursue your allegations regarding improper *ex parte* contacts, denial of due process, violations of the Public Records Act, and violation of the Rules of Professional Conduct. I have discussed with you the appropriate fora in which to lodge such complaints.

Facts

In July 2007, your neighbor received the first of three temporary disabled parking permits from the Washington State Department of Licensing (DOL). In August 2007, she applied for a permit (the "paver permit") to install pavers on the planting strip in front of her home. SDOT granted a paver permit on November 21, 2007.

Before the paver permit was granted, your neighbor also applied for a "curb cut" permit. SDOT issued that permit as well.

In January 2008, your neighbor was hired as an employee in the Personnel Department.

By January 2008, the pavers had not been installed and the planting strip had been dug up for over six months. You lodged a complaint with the City's Customer Service Bureau (CSB), urging that the City take action to deal with the eyesore.

SDOT field employees contacted your neighbor and informed her that the paver permit would expire on February 11, 2008, unless the installation of pavers had begun. Your neighbor responded that she could not start work because her contractor had abandoned the project. Later, SDOT sent written notice that the paver permit would expire in February.

Shortly after SDOT employees told your neighbor that her paver permit was about to expire, your neighbor began contacting various City officials, including employees in this office, the Mayor's Office, City Council, and SDOT. She alleged violations of the Ethics Code, poor customer service, and disparate treatment by SDOT. (The allegations of Ethics Code violations were resolved last year, when the full Commission administratively dismissed your neighbor's complaint in Case No. 08-1-0415-1.) Ken Nakatsu, the Mayor's Chief of Departmental Operations, e-mailed employees of the Executive Departments involved, stressing that the City needed to "act as a single entity in a consistent manner" when addressing your neighbor's concerns.

By letter dated March 7, 2008, SDOT Chief of Staff Casey Hanewall informed your neighbor that City law did not allow parking on a planting strip, that curb cuts were only allowed to provide access to private property, and that for these reasons SDOT was denying her request for a curb cut permit. In a March 10 communication, your neighbor was advised of her right to appeal the denial.

Your neighbor submitted an untimely appeal of the denial of the curb cut permit, which SDOT nevertheless accepted. The appeal alleged that SDOT was not uniformly applying the law that forbade parking on a planting strip, and that the City was required under the Americans with Disabilities Act (ADA) to allow her to park on the planting strip to accommodate her disability. The issues of disparate treatment and the need for accommodations under the ADA had not previously been reduced to writing.

Your neighbor retained an attorney, who delivered a "Request for Administrative Review," to Deputy Director Fiske-Zuniga on May 7, 2008. In the request and its accompanying papers, your neighbor presented a disabled parking permit issued by DOL for a period of five years. The attorney pressed the issue of accommodations for your neighbor based on her disability, as established by the State-issued permit.

On June 5, 2008, in an undated letter, Deputy Director Fiske-Zuniga reversed SDOT's denial of the permit. Your neighbor was issued a permit for a curb cut and installation of pavers for five years, subject to several conditions.

Even though SDOT was well aware of your interest in the matter, you did not learn of the decision until June 16, 2008. You filed an appeal that same day, at 5:11 p.m. Your appeal focused on two issues: safety concerns and the need for an "unprecedented accommodation" given your neighbor's access to a disabled parking space in front of her home.

By a letter dated July 3, 2008, the Personnel Director terminated your neighbor's employment with the City.

Deputy Director Fiske-Zuniga heard your appeal on August 8, 2008. Following this review hearing, and the airing of your traffic safety concerns, Deputy Director Fiske-Zuniga requested an analysis of the traffic impact. SDOT Engineer Christopher Eaves performed an analysis, which was released on August 27, 2008. The report was reviewed by Assistant City Attorney Judy Barbour. The final report contains the engineer's factual analysis that the proposed curb cut "would increase travel time and the possibility of vehicle collisions," but omits the engineer's recommendation that the "curb cut request…be declined," which appeared in an earlier draft of the report.

Deputy Director Fiske-Zuniga, wrote to you on August 27, 2008, denying reconsideration of her June 5 decision. She told you that her denial was based on the fact that you failed to file a timely appeal, and the marginal potential impact of the curb cut on traffic safety. In an interview, Deputy Director Fiske-Zuniga reiterated these two bases for her denial. She told us that SDOT did not "look beyond" the State of Washington's issuance of a disabled parking permit to determine whether your neighbor was disabled. Deputy Director Fiske-Zuniga told us

that your neighbor's employment with the Personnel Department played no role in her review of either your neighbor's appeal or your appeal.

Your neighbor accepted the limited duration of the permit and the conditions. (If she does not or cannot renew the permit in five years, she will need to restore the planting strip at her own expense.) Permits were issued on December 15, 2008.

Phone records provided for the month of August 2008 show that Deputy Director Fiske-Zuniga used her City-issued Blackberry to place non-City calls that this office calculates as averaging two minutes per day over the course of the month.

Law

The Ethics Code states that no City 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…." SMC 4.16.070.2.a.

SMC 4.16.070.2.b states that no City employee may "[u]se 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…."

Analysis

Based on our preliminary investigation, I find no reason to believe that any of the City employees named in your complaint have misused their position "to achieve a private gain or an exemption from duty or responsibility" for your neighbor, or misused City resources.

I neither commend nor disparage the City's handling of this process and your appeal. That is not my role. I am dismissing your complaint because there is no evidence – nor any reason to believe that evidence exists – that would suggest improper motives for the City employees involved, or any connection between your neighbor and any of the City employees whose actions you question. In my research, I have found no instances in which the Commission has found a misuse of position to benefit another lacking either an improper motive or some connection between the City employee and the person benefited, in other words some conflict between the employee's public duties and their private dealings.

If the Commission were to find a misuse of position without any improper motive or nexus between the employee and the beneficiary of his or her actions, as is the case here, every aggrieved person – from a company that lost a bid for an RFP to an individual who felt they did not get a fair hearing from the Hearing Examiner – would have a colorable claim under the Ethics Code. I do not read our jurisdiction to be so limitless.

Furthermore, even if our jurisdiction were to reach any City action that benefited any person, the City employees who were involved in the issuance of a curb cut to your neighbor were operating with the ADA – a sweeping federal law protecting the rights of the disabled – as a backdrop. I find the decision to grant the permit to be within the zone of reasonable responses, given the potential for litigation. The facts do not support your claim that City staffs' actions primarily benefited your neighbor and not the City.

Finally, I find no evidence that your neighbor's brief and troubled tenure at the City's Personnel Department played any role in the City's treatment of her appeal. Deputy Director Fiske-Zuniga denies that your neighbor's employment played any role in her decision, and none of the documents that we reviewed in this case or Case No. 08-1-0415-1 calls that denial into question.

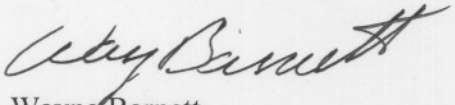
As for Deputy Director Fiske-Zuniga's phone records, the Commission has long held that City employees may make minimal personal use of City resources to handle the demands of daily living. The Deputy Director's use of her City-issue Blackberry for personal calls appears to average approximately two minutes per day. I do not find that the Deputy Director's use of her City-issued Blackberry violated the Ethics Code.

Conclusion

For the reasons explained above, I am dismissing your complaint. If you wish to pursue claims that City lawyers acted inappropriately, or that you were denied access to public records, or that the City denied you due process, you have other fora in which to pursue those complaints.

If you want to appeal my dismissal to the Commission, you may do so in accordance with Administrative Rule 4, which you can find at www.seattle.gov/ethics/etpub/AdminRules.pdf. You must appeal within 21 days receipt of this letter.

Very truly yours,



Wayne Barnett
Executive Director

cc: Seattle Ethics and Elections Commission *(complainant's name and address redacted)*
Anne Fiske-Zuniga, SDOT Deputy Director *(complainant's name and address redacted)*
Ken Nakatsu, Chief of Dept. Operations *(complainant's name and address redacted)*