

## **Seattle Ethics and Elections Commission Regular Meeting December 3, 2008**

The regularly scheduled meeting of the Seattle Ethics and Elections Commission convened on December 3, 2008 in Room 4080 of the Seattle Municipal Tower, 700 Fifth Avenue. Commission Chair Michele Radosevich called the meeting to order at 4:06 p.m. Commissioners Tarik Burney, Ed Carr, Mel Kang, Lynne Iglitzin, Robert Mahon and Nancy Miller were present. Executive Director Wayne Barnett and staff members Gwen Ford, Kate Flack, Polly Grow and Mardie Holden were present, as was Assistant City Attorney Jeff Slayton.

### **1) Public Comment**

There was no public comment.

### **2) Approval of minutes of the October 1, 2008 meeting**

Commissioner Miller suggested that on page 2, first paragraph, line 6 of the minutes, the word "Commissioners" should be removed. Commissioner Miller made a motion to accept the amended minutes, which was seconded by Commissioner Burney. The minutes were approved unanimously.

### **3) Approval of minutes for November 3, 2008 meeting**

Commissioner Miller made a motion to accept the minutes as prepared, which was seconded by Commissioner Kang. The minutes were approved unanimously.

### **4) Election of Officers for 2009**

The Chair called for nominations for the Commission's chair and vice-chair. She said that her term would expire at the end of 2008, as would Commissioner Kang's term. For that reason, she was not interested in continuing to serve as Chair. She thanked the Commissioners for the opportunity to serve as chair for 2007 and 2008, and shared how much she had enjoyed her service as a commissioner.

The floor was opened for the nomination of chair. Commissioner Miller nominated Commissioner Mahon to be chair for 2009, and Commissioner Iglitzin seconded the motion. The vote was unanimous.

The floor was then opened for the nomination of the vice-chair. Commissioner Mahon nominated Tarik Burney, and Commissioner Iglitzin seconded the motion. The vote was unanimous.

**6) Ethics Code Review-Section 1 (Disqualification from Acting on City Business)**

The Executive Director said that the most substantive changes that he is recommending are to Section 1. He said that he believes that section 1(a) is too broad and 1(b) is too narrow. Section 1(b) allows an employee to award a contract to his adult child, and that puts us way outside the mainstream of what other cities, states, and the federal government do, and he believes we need to broaden 1(b). The section should take into account not only the employee's financial interest, but also the financial interest of their immediate family members, an organization in which they are an officer or employee, a business with which they are negotiating, et cetera.

If 1(b) is broadened, then the Executive Director suggests that 1(a) be narrowed to require disclosure of appearances of conflicts. Reasonable people can disagree about whether something creates an appearance problem, so he believes that disclosure is more appropriate. And requiring recusal for appearance problems causes us to too narrowly define what constitutes an appearance problem. For example, the Executive Director noted that under Massachusetts law he routinely filed disclosures when matters arose in which his prior employer was involved, even after he'd been gone from the firm for more than a year. Under our Code, the Commission reached the decision that after a year there was no appearance problem. The Executive Director

doesn't think that decision squares with reality, and thinks it leaves the public in a worse position, with no public awareness that, for example, a former employee of a firm is participating in the award of a contract to that firm.

Commissioner Kang said that the current 1(a) promotes confidence that government operations and decisions are being made in an objective manner. He wanted to know from the Executive Director as to how his proposal enhances public confidence in the way government makes decisions. Commissioner Kang also said that he is not convinced that disclosure by itself has the great sanitizing effect that some claim. He stated that there have been a lot of studies at the federal level that their disclosure regime does not necessarily deter conflict of interest.

The Executive Director brought up the Elections Code. Under the Elections Code, we force all the donations to be public, we post them and we empower people to draw connections between where the money is and who it is going to. They can reach their own conclusions about whether government is acting in a way that gives them confidence. Under the Ethics Code as it is now we force people to put their trust in the Executive Director. He believes that people have less of a say in how government is operating when they cede these determination to the bureaucracy.

The Executive Director clarified for Commissioner Iglitzin that Section 1 only applies to City employees acting in their official capacity. You have to be acting under the color of your office.

The Executive Director proposed vastly broadening the definition of "Immediately family" to mean a spouse or domestic partner, child, step-child, brother, sister, parent or step-parent, or a person claimed as a dependent on the officer or employee's latest federal income tax return.

Commissioner Mahon suggested that the addition of the child of a domestic partner would mirror how the state handled domestic partnerships in the tax context. Commissioner Mahon asked whether this broad definition of “immediate family” impacts other sections of the Code. The Executive Director said that in his opinion it did not have any unintended consequences.

The Chair asked whether or not we should include in this definition “members of the same household,” even if they aren’t related or dependents. The Executive Director said that under 1(a) we could add that as a prohibition. The Chair stated that she thought that was a good idea, since it’s hard to avoid the conclusion that there is some type of financial interest there. The Executive Director said that the only thing that he could foresee as an issue is someone that is in the household on a transient or intermittent basis. The Chair said that the person should be living in the home during the time the contract is awarded, and if somebody used to live with you, that is the kind of thing which should be disclosed.

The Chair said that the definition for “immediate family” should stay at it is drafted with the addition of children of domestic partners, and then look at adding people in the household to the list in 1a.

The Executive Director then turned to section 1(b), which currently bars employees from dealing with their former employers for a year. The Executive Director suggested that there should be some mechanism for overriding that section. Executive Director Barnett said that he invited Andrew Lee with SPU to discuss a case in which section 1(b) had in the Executive Director’s opinion worked against the City’s interests.

Mr. Lee introduced himself to the Commission. He said that the issue had come up around the hiring of an individual to work on the Alaskan Way Viaduct project. They were

looking for someone with technical skills as they related to hydraulics, modeling, etc., and someone with the capacity to develop and take a leadership role within the agency. He stated that they wanted someone who could get up to speed very quickly with this project and did not have to wait for six months before they felt comfortable. Therefore, having someone with direct experience on the project was seen as a plus. Two candidates were interviewed for the job and the person that was hired had all of three of their required qualifications, which were: (1) good technical background, (2) really good growth potential and, (3) he had been working directly on the viaduct as consultant. He had been working with a private engineering consultant company that was under contract with WADOT. The person hired had been working on the Alaskan Way Viaduct project for the consultant firm from 2005 to 2007.

After the hire, the City had a desire to contract directly with the consultant to do some additional modeling and additional sewer related work for the City. They were the right firm to do it because they had the right cast of characters and the right experience. But then they learned that the new hire would not be allowed to work with his past employer. Mr. Lee and his supervisor sat down and spoke with the Executive Director. What they concluded was the most appropriate course of action given the constraints of the law was to take the hire off of the project altogether for one year. As his supervisor, Mr. Lee had to step in and do the work. Mr. Lee said that without a doubt Ben Marre was the most qualified person at SPU to do this work, but he wasn't able to under the Ethics Code. Mr. Lee pointed out that he has no regrets about hiring him – he has been an excellent person and his growth potential has been huge. And Mr. Marre has been invaluable on other projects. Nevertheless, he had significant expertise he could have offered the City, significant guidance he could have offered to the consultants. All in the all, those people on the project team internally saw this as a huge loss.

Commissioner Kang asked Mr. Lee that, if Mr. Marre had been involved in that project, is there anything he could have done internally that would have mitigated the appearance of a conflict, such as extra levels of supervision or extra levels of review? Mr. Lee said that his office had explored that with the Executive Director but had been told that wasn't sufficient to comply with the Code.

The Executive Director said that these cases really do merit some flexibility. There are several options, such as having a waiver which would include a mitigation plan and have a disinterested third party (which would be the Executive Director or the Commission) review the mitigation plan. The Executive Director said that one thing he cautioned is that the Commission recall the steel shop case, where the Commission set up all these procedures that had to be followed, which we later learned had not been followed. Granted it is just a year, but he is concerned about policing compliance with the mitigation plan.

Commissioner Mahon said that from the conversation it appears that we are weighing mitigation against need, and the Commission is not in a position to do that. There was also a mention of timing with these issues in some cases. Commissioner Chair Radosevich explained the realistic options being discussed are 1) have the department get the Executive Director's explicit buy off on the waiver or 2) have the department head simply do it and inform the Commission of what's being done. The Executive Director commented that something like that is manageable but the Commission would have to discuss what kind of standards he would be applying in determining whether or not someone had earned the waiver or not. He was wondering whether or not he could set up some kind Commission or Director's rule that outlines the grounds on which a waiver would be granted. Commissioner Mahon believes that this should

be in the statute. The Chair stated that factors could include the duration of the waiver, the scope of the person's responsibility, and plans for supervising the employee

The Executive Director also said that 1(b) currently speaks to former clients, and in an advisory opinion the Commission has broadened that to include former employers. The Executive Director doesn't believe that is immediately obvious to anyone who is actually reading the code, and believes the Code should expressly refer to former employers.

The Executive Director then addressed 1(c), which says you have to disclose the interest in a contract that is within your office to the appropriate City contracting authority prior to the formation of the contract. Often times the question is asked who is the appropriate authority to disclose to. The Executive Director said that since this section deals with disqualification from acting on City transactions and Section 5 deals with beneficial interests in City transactions, this paragraph properly belongs in Section 5.

Commissioner Mahon suggested collapsing the section dealing with prohibited financial interests and the section dealing with former employers and clients. The Executive Director said he would look at that and see if we can come up with good language.

The Executive Director wanted to flag something that was not a part of the memo but does come up sometimes, which is stock holdings. We've had requests from people that have very small holdings in publicly held companies who may be involved in purchasing decisions, and we've never really articulated a good standard. The Chair said that disclosure would be appropriate for such circumstances.

Commissioner Mahon raised a question regarding the federal language which requires a showing that the employee acted with knowledge of the financial interest. It likely would not happen very often, but what if you did not know that your immediate family has a direct

financial interest? The Executive Director said that the U. S. Code is a criminal code, which is why it has a knowledge component. He has been reluctant to introduce even the idea that knowledge is relevant under the Ethics Code because he fears that would lead to an interest in requiring proof of knowledge under all sections of the Code. It is very difficult to develop evidence to prove knowledge, but the Commission can always take it into account in assessing a penalty or weighing a settlement.

The Executive Director's plan is to come back with a packet for the Commission to look over one more time. He said Assistant City Attorney Slayton is preparing something to address his proposal that the Code be broadened to cover City contractors. There are some people at the City who are hired on a contract basis to do some work for a department, which may be a substantial book of work. They may be in a position where they can steer contracts to the firm with which they are affiliated. Or a contractor may be in a position to supervise their spouse, who is a City employee. Assistant City Attorney Slayton is looking at whether or not we would create more problems than we solve. That is the only remaining substantive issue.

Commissioner Mahon said that if it is possible this process should be done before the Commission loses two of its members. The Executive Director will keep this in mind and have it done by the January meeting.

**7) Late filing penalties for Citizens for the Pike Place Market (\$50) and Seattle Parks for all (\$50).**

This is an informational item on the agenda. The Executive Director said these were two late filing that were filed a day late within the last seven days during the final week before the election. These were two \$50 penalties.



**8) 08-WBI-0604-1 (No finding of ethics code violations in City employee's supervision of cousins or use of City trucks).**

This was also an information piece. The Executive Directors said we did not find any violations of the ethics code because he did feel that by helping get the Commercial Driving Licenses there was at least an arguable City purpose, which was that the City was desperate for people who could drive trucks. But the employee clearly violated the law, and so this was a clear improper governmental action.

The Commissioner went into an executive session at 5:40 p.m. to discuss the Executive Director's salary and merit leave for 2009.

The Commission returned from Executive Session at 5:55 and announced that it was awarding the Executive Director five merit leave days and approving a cost-of-living allowance as well as a salary increase of \$2,500 for the Executive Director.

Meeting adjourned at 6:05 p.m.

Minutes respectfully submitted by Gwendolyn Ford, Administrative Staff Analyst.