

**Seattle Ethics and Elections Commission Regular Meeting  
April 4, 2012**

The regularly scheduled meeting of the Seattle Ethics and Elections Commission convened on April 4, 2011 in Room 4080 of the Seattle Municipal Tower, 700 Fifth Avenue. Commission Chair Bill Sherman called the meeting to order at 4:03 p.m. Commissioners Bruce Carter, Rich Cohan, Lynne Iglitzin, David Mendoza and Amit Ranade were all present. Vice-Chair Tarik Burney was absent. Executive Director Wayne Barnett and staff members Anthony Adams, Kate Flack, Gary Keese and Chris Thomas were present. Assistant City Attorneys Jeff Slayton and Erin Overbey were also in attendance.

**1) Public Comment**

There was no public comment.

**Action Items**

**2) Approval of minutes March 7, 2011 meeting**

Commissioner Cohan motioned to approve the March 7, 2011 minutes, and Commissioner Carter seconded the motion. The minutes from the March 7, 2011 Regular Commission meeting were unanimously approved.

**3) Opinion request regarding transfer of funds between committees**

The Chair recommended that the Commission approach this issue as two distinct but overlapping questions. First, what is the best interpretation of the law as it currently exists, and second, does the Commission believe that the law should be amended? He said it was important to distinguish between the Commission's role as the interpreter of the Elections Code, and its role as an advisor to the City Council and the Mayor on policy issues.

Commissioner Carter asked the Executive Director to explain how staff had arrived at its current interpretation of the law and rules, and the Executive Director walked the Commission

through the analysis of the existing Code section governing transfers and the language of Rule 11, which deals with transfers.

Commissioner Carter said that he was most concerned about the fact that the existing interpretation advantaged incumbent officeholders over challengers holding a different office. The Chair asked the Executive Director whether this had been an issue in the past, and the Executive Director indicated that candidates with sizable surpluses were a relatively new phenomenon.

The Chair explained his analysis as follows: the Elections Code defines contributions to include transfers from other committees, and it also limits contributions to \$700. So the strictest reading of the Code would suggest that a committee can only transfer \$700 to another committee. But reading the law as a whole, the Chair said that the section regarding transfers (SMC 2.04.375) suggests that transfers should not be viewed as a lump sum transfer from one committee to the next, but instead as transfers of funds provided by individual contributors to subsequent campaigns. He referred the commission to the language of paragraph 9 of SMC 2.04.375, which refers specifically to a contributor approving the use of “his or her contribution” for a subsequent campaign. So while the Chair agreed with the staff’s current position that transfers from one committee to a committee for a different office counted against the contribution limit of the contributor who approves of that transfer, he said that he read the law to also subject a transfer of a contribution from one committee to a subsequent campaign for the same office should also count against a contributor’s contribution limit, albeit one that did not require the contributor to give his or her consent to the transfer. In other words, committees can only transfer \$700 to a campaign for the same office, unless they can attribute transferred funds to a particular contributor.

The Commissioners agreed with the Chair's analysis, and Commissioner Ranade asked what the Commission should do to make this new interpretation clear. Assistant City Attorney Slayton indicated that since the Commission was simply interpreting the law, there was no need to seek an amendment to the Elections Code. He said that it would be appropriate for the Commission to amend its rules to make the new interpretation an official Commission position. The Chair indicated that he would still like to see the Council act to make the law clearer on this point. He also said that if the City Council disagreed with the Commission's interpretation, a law change would give them the opportunity to clearly articulate that disagreement.

Commissioner Carter said that he liked the new interpretation because it no longer gave incumbent officeholders an advantage.

Commissioner Ranade made a motion for the staff to draft changes to the Commission's rules to implement the new interpretation articulated by the Chair, and Commissioner Iglitzin seconded the motion. The motion carried unanimously.

The Commission then moved on to a discussion of what would be the ideal way for the Elections Code to treat transfers. Commissioner Ranade suggested that he thought it would be wise to cap the amount of money that a candidate could transfer to a subsequent committee. He said that when someone contributes to a candidate, that person is expressing that they want that candidate to be elected to that particular seat in that particular election. He said that the law should provide an incentive to candidates to honor that contributor's intent. He said that limiting transfers to some set amount of money would also eliminate the need for the Commission to arbitrarily set which contributors' funds were being transferred, and which were not.

Assistant City Attorney Slayton said that Alaska had a law in place much like what the Commissioner was suggesting. In response to a question, he indicated that the Alaska law had

been upheld in court. Commissioner Carter said that he liked that such a law eliminated the need for candidates to tell some people that they could not contribute to a campaign because they had contributed to a prior campaign.

The Commission elected not to propose specific changes at this time, but instead to solicit public input, move ahead with the change to the Commission's rules, and revisit this issue in the future.

#### **4) Request for advice from the City Council on draft changes to the Whistleblower Protection Code**

The Commission discussed the section of the draft ordinance dealing with retaliation claims. Kate Flack gave an overview, telling the Commission that there were six essential steps in the process: (1) a complaint is filed with the Executive Director, (2) the Executive Director screens the complaint, (3) if the Executive Director determines that the complaint is valid, the staff investigates the complaint, (4) the Executive Director makes a reasonable cause determination, (5) the Executive Director convenes a settlement conference, to see if the parties can agree to a resolution, (6) if settlement talks fail, the Executive Director may file a retaliation complaint with the City's Hearing Officer, who will adjudicate the claim.

Commissioner Carter asked how many state cases are resolved at the settlement stage. Kate Flack replied that it was her understanding that very few state cases ever go to a hearing.

The Chair asked Ms. Flack to confirm that the Executive Director has the discretion not to bring in an action even if he or she has made a reasonable cause determination. Ms. Flack confirmed that the Executive Director could decline to file charges.

Ms. Flack went on to explain that the Executive Director bears the burden of proof in a hearing to establish that (1) the employee was a cooperating employee under the ordinance, and

(2) the employee was the subject of an adverse action. After establishing those two elements, the burden shifts to the department to prove that the employee's cooperation with the SEEC was not a contributing factor in the adverse action. The Chair highlighted that this structure was employee-friendly.

Ms. Flack said then contrasted the burden shifting in the hearing to determine whether or not the employee had been subject to retaliation with an action to hold an employee accountable for retaliating in violation of the law. In those cases, the Executive Director always had the burden of proof. In response to a question from Commissioner Ranade, Mr. Slayton said that there was a difference between providing redress for a wronged employee and prosecuting an employee for violating the law.

The Commission then moved on to discuss remedies, and Ms. Flack contrasted the remedies available to (1) state whistleblowers, (2) local whistleblowers in jurisdictions that have not adopted their own whistleblower protection code, (3) victims of discrimination, and (4) City of Seattle whistleblowers under the draft ordinance prepared by staff. The staff proposed closely tracking the remedies available to victims of discrimination and state whistleblowers, including capped damages for humiliation and attorney's fees. The Chair pointed out that the language referring to "other damages" was ambiguous and needed revising.

The Chair then invited Jack Sheridan to address the Commission. Mr. Sheridan encouraged the Commission to give victims of retaliation the right to sue in court, which is available to victims of discrimination but not to whistleblowers under the draft ordinance.

The Chair asked Mr. Sheridan to speak to the administrative remedy in the ordinance. Mr. Sheridan took issue with the failure of the draft ordinance to provide a role for the whistleblower in the proceeding. If the Executive Director is not an effective champion for the

employee, the employee has no recourse under the draft ordinance. He or she has no advocate. Mr. Sheridan said that with a private cause of action, this would not be a glaring deficiency, but without one, he thought it was a serious flaw.

Mr. Sheridan also recommended that if the City does create a private right of action that the ordinance make clear that a court need not consider any conclusions reached by the Hearing Examiner as binding on the court.

The Chair asked Mr. Sheridan to comment on the asymmetrical nature of his proposal. Should an employee get “two bites at the apple” while the department accused of retaliating gets only one? Mr. Sheridan said he thought it was appropriate for the City to be bound by a determination made by a City agency.

Mr. Sheridan closed his remarks by noting that he was asking the City to be a leader on this issue, and to go farther than state law requires it to go.

The Chair then turned to Ms. Overbey from the City Attorney’s Employment Law section and asked her whether her office had any issues with creating a private right of action. Ms. Overbey replied that she had concerns about the cost of civil litigation. The Chair asked Ms. Overbey how many whistleblower retaliation claims the office deals with, and Ms. Overbey said that she recalled litigating only two cases in the last ten years that dealt solely with retaliation. Ms. Overbey contrasted those cases with ones where litigants made a variety of claims, including retaliation. Ms. Overbey noted, though, that she expected retaliation claims to increase if the City provided a remedy for individuals who claimed that they were retaliated against as perceived whistleblowers.

Mr. Slayton told the Commission that he would need to research the City’s authority to create a private right of action if the Commission wanted to consider making that

recommendation. He told the Commission that he had stopped work on that research when the Commission earlier determined to leave that question to the City Council. The Chair told Mr. Slayton that he was persuaded that the Commission should consider recommending the creation of a private right of action, and asked him to do the research.

Commissioner Carter thought it would be wise to consider giving employees a role in the administrative hearing. Commissioner Ranade voiced his concerns with the discretion for the Executive Director to not file charges despite a reasonable cause finding that a department had retaliated against an employee. Commissioner Mendoza said that he was sympathetic to the concept of putting victims of retaliation on par with victims of discrimination.

The Chair then invited Kathleen Barnard of the Washington Employment Lawyers Association to address the Commission. Ms. Barnard told the Commission that if they wanted to encourage whistleblowers to come forward then they would need more robust remedies. She did not think that the existing draft gave whistleblowers the protection they deserved or needed. She urged the Commission to look to the National Labor Relations Board as a model for involving employees in the administrative hearing to adjudicate their complaints. She also told the Commission that it was important to create a private right of action for complex cases. An administrative hearing is not appropriate for all cases.

### **Discussion Items**

#### **5) Executive Director's Report**

In light of the lengthy meeting, the Executive Director made no report.

**The Regular Commission meeting for April 4, 2012 was adjourned at 5:52 p.m.**