

Seattle Ethics and Elections Commission Special Meeting

September 25, 2019

A special meeting of the Seattle Ethics and Elections Commission (SEEC) convened on September 25, 2019 in Room 4096 of the Seattle Municipal Tower, 700 Fifth Avenue.

Commission Vice Chair Hardeep Singh Rekhi, acting as Chair, called the meeting to order at 3:36 p.m. In attendance were Commissioners Bruce Carter, and Susan Taylor. Acting Chair Rekhi, and Commissioners Nick Brown, Eileen Norton, and Richard Shordt participated in the meeting via telephone. Chair Brendan Donckers was absent. Executive Director Wayne Barnett was joined by Assistant City Attorneys Jeff Slayton, Gary Smith, and Ariel Schneier, along with staff members Fedden Amar, Chrissy Courtney, René LeBeau, and Annie Tran. Treasurer Abbot Taylor was also on the phone, and in attendance was Attorney David Perez of Perkins Coie, as a representative of Mr. Abbot Taylor.

1) Request for review of Director's interpretation of Rule 16H; Exhibit A

Commissioner Brown disclosed that he has known Mr. Perez personally and professionally for nine years or so and does not believe their relationship will impact his judgement.

Mr. Perez thanked the commission and the Director for their time, and stated that he and his client, Mr. Taylor, were concerned that the recent interpretation of Rule 16H is *ultra vires*, stating that the rule as drafted is rather clear and clearly inconsistent with the new interpretation, which Mr. Perez considered more of a re-writing of the rule than a re-interpretation. Mr. Perez argued that it appears clear from conversations with the Director and written exchanges that the

commission staff acknowledges that the interpretation is inconsistent with the text of the rule, but that the commission staff has policy reasons for deviating from the text of the rule.

While Mr. Perez stated that he does not disagree with the policy considerations, they are not reasons for deviating from the rule, they are reasons for opening up the rule to amendment and there is a process for doing that, but the rule as written, and as applied in the past, is that the commission would reference the date that the commission decides to grant the release, not the date when the candidate crosses the Maximum Campaign Valuation (MCV) threshold. Mr. Perez and his client, Mr. Taylor, believe that ultimately if the commission does not apply the rule as written, then the interpretation would be invalid and *ultra vires*. Mr. Perez says that it is concerning that the commission would reinterpret the rule, acknowledge the interpretation is inconsistent with past practice, acknowledge the interpretation is inconsistent with the text, and still not comply with the Seattle Municipal Code (SMC) protocol for notice and comment.

Commissioner Carter asked Mr. Perez if this is re-visiting the same issue as two months ago and whether this was a motion for re-hearing. Mr. Perez stated that he was not present two months ago, but it was his understanding that there was a hearing several months ago where his client may have argued at that hearing, but does not necessarily think this is a motion for re-interpretation, since an *ultra vires* action can be challenged at any time. Mr. Perez was not certain that Mr. Taylor teed up the issues as cleanly as in the letter that Mr. Perez submitted to the commission and believes this is a question of law and is hoping to resolve it within the commission itself.

The Director stated that he believes his position is clear in the evidence as well, and he concedes that the rule as written supports Mr. Perez's reading, but there are two issues; one is the rule has never been interpreted, this rule was written to address what was seen in 2017, so this is

the first time the rule has been applied as written. The second is that the law that is being interpreted by the rule, is about releasing someone from a spending limit, but what is being dealt with here is a situation where the rule has nothing to do with the release from a spending limit, if it is activated when somebody requests release from the spending limit.

The Director noted that if one candidate was released at \$40,000 and had they raised only another \$30,000 and ended at \$70,000, then the rule as it is written, as Mr. Perez is arguing, would require the commission to give them \$110,000 to spend for the general election because that would be \$150,000 minus the \$40,000 they had on the date that the candidate was released. The Director does not believe that was the commission's intent. The Director continued that this rule was written in the heat of the 2017 campaigns, the maiden voyage of the Democracy Voucher Program, and if they could turn back time, they would have written a better rule. The Director does not believe that the commission is bound to interpret this rule in a way that gives certain candidates an advantage simply because they requested relief from the spending limit long before that spending limit was even in play.

The Chair wanted to understand which interpretation is consistent with the rest of the other rules and asked that the Director and Mr. Perez give their comments, to help give some clarity.

The Director stated that if the purpose of the rule is to decide what to do when someone requests relief from the spending limit, then adopting Mr. Perez's determination as to when that should begin would divorce it from its purpose and the Director believes that his recommended interpretation is far more consistent with the goals of the program.

Mr. Perez says that the touchstone of intent is always the language and beginning with the rule's language, the assumption is that the commission adopted the rule to be consistent with the overall structure, and you don't deviate from the rule's language unless it is necessary to do so because the language is otherwise ambiguous. Mr. Perez continued that here there is not an ambiguity argument, the argument is that we ought to ignore the language because we think that there is a policy reason and that policy reason would be more consistent with the overall structure. Mr. Perez suggests to the commission that is a reason to amend the rule, but not to deviate from the text, and argues that the text is more consistent with the interpretation offered by Mr. Perez and Mr. Taylor. Mr. Perez stated that to the extent that intent is important, the text reflects that intent, and the text supports their interpretation, and their interpretation more closely aligns with the intent as reflected in the rule. Mr. Perez said that they cannot go back in time and redline the rule in the past, and he believes that the Director is trying to redline the rule now with the benefit of hindsight and that is fine, but there is a notice and comment period and there is a procedure that should be observed if the rule is to be changed.

Commissioner Carter asked that if equity were considered, is there a risk that Mr. Perez's construction would lead to inappropriate or perhaps unfair results. Mr. Perez says he does not believe so, because there are two options; one is that in theory, there could be a delay in deciding whether to release someone. Mr. Perez was not sure if that would be inconsistent with another rule, but if the concern is that the candidate is only at \$40,000 and release would be premature because it would be allowing a big cushion and create a loophole, then you could hold off on release as a practical way to address the concern, without changing the text.

Mr. Perez then went on to say that another way would be to change the text, if you think it would lead to these results. Mr. Perez stated that when you write a rule, or a piece of

legislation, you don't know prospectively how it is going to play out in externalities and this appears to be a legitimate externality; it might allow for a candidate to have a slight advantage and without conceding that is the case here, it is a valid hypothetical and it is a valid reason to open up the notice and comment period since that happens with all sorts of rules. Mr. Perez cautioned the commission not to, for expediency's sake, ignore that process because they might also be ignoring other externalities in the changes. Mr. Perez argued that this interpretation effectively being a change, for all that is known, might have other externalities that a notice and comment period might elucidate. Mr. Perez continued to say that is the whole point of the notice and comment period; other people with interests can say, "hey, by the way, the way I run my campaigns, we always want an earlier decision," and the commission would take that into account prior to their voting rather than a unilateral decision without public input.

Commissioner Taylor stated she was interested in hearing what the Director had in mind when he alluded to unfair advantages. The Director answered that what he had in mind was a scenario with two candidates, both participating in the program, with one released at \$75,000 and one released at \$40,000, both go into the general, and the candidate that was released at \$40,000 would have \$30,000 additional dollars to spend in the general than the candidate who was released at \$75,000. The Chair asked if the Director meant \$30,000 in additional voucher money and the Director answered, no, just 30,000 additional dollars.

The Director also noted that in response to Mr. Perez's remark about when a candidate is released and the possibility of delaying that, is not an option under the law, which says that once a participating candidate shows that an opponent has exceeded the MCV the commission shall release them from the MCV, so as the Director reads it, the shall in statute, not may, would not allow for a delay. Mr. Perez stated that is fair enough, and all the more reason potentially, to

amend the rule. Commissioner Taylor noted that it sounds like it was a mistake. The Director stated that it was an attempt post hoc to draft a rule that meshed with what they did in the primary election in 2017, where there were only two candidates who requested release.

Commissioner Norton asked the Director if he believes that his interpretation is consistent with the intent of the initiative. The Director answered yes and noted that the goal here is that there is a very competitive field and the purpose of the Voucher Program was to provide another funding mechanism while having as few effects on the competitive field as possible otherwise. Commissioner Norton stated that she does not believe that an interpretation of a rule trumps the intent of initiative, and she does not believe the rule can be interpreted in a manner that is inconsistent with the initiative and she was comfortable with the Director's decision in this matter.

Mr. Perez stated that he thinks there is a nuanced distinction here; he thinks that Commissioner Norton is saying that an interpretation of the rule that is consistent with the overall structure can't violate the rule, and he believes that is circular. Mr. Perez said the rule as written, the Director has conceded, does not align with the interpretation and the question before the commission is how to interpret the rule as written, because the rule as written is enforceable, and if the commission believes the rule as written is inconsistent with the Democracy Voucher legislation, it is incumbent on the commission to rewrite the rule, but that does not give the commission license to ignore the notice and comment period, those are two different issues.

The Chair asked if there were any other questions. Commissioner Brown stated that he would like to request that there be an executive session prior to making a decision, and the Chair agreed, but asked if anyone else had any questions before going into executive session. Attorney Gary Smith said that he had a question, for the Director, to compare and contrast the prior case in

August that also interpreted this rule to refresh the memory. The Director answered that in the previous case was about what happened to the money that was raised during the release period and not spent. The Director stated that there was a far greater textual basis because the rule says money raised and spent does not count towards the spending limit, and Mr. Taylor was advocating for the money raised but not spent to also not count towards the spending limit. The Director confirmed that while it was the same rule it was a very different scenario. Attorney Jeff Slayton clarified that in this case the money raised and spent is under discussion and the Director agreed.

Mr. Perez added that the rule says that money raised and spent prior to the commission's decision to release a candidate from the spending cap through the first day that a candidate becomes eligible shall not count towards the spending limit and grammatically that is not an ambiguous sentence.

The Director noted that this year, because of the early release, they were still releasing voucher proceeds to candidates after the candidates were released; and that is a wrinkle which if the commission does adopt Mr. Perez's argument, then the commission will conceivably be in a position where they were releasing vouchers that did not count towards the spending limit, and that is another way in which that interpretation would not be consistent with the language of the ordinance.

The Chair called for any final questions before going into executive session and Mr. Perez stated that his last point before the executive session begins is that statutory application is different than statutory interpretation. If the rule is ambiguous, then there is room for competing interpretations, but Mr. Perez does not believe the commission has or could find that the rule is ambiguous, and that would be an error of law in his opinion.

The Chair stated that the commission would be going to executive session to discuss a quasi-judicial matter at 3:57 p.m.; Mr. Taylor hung up from the call, and Mr. Perez will communicate to Mr. Taylor when the commission returns from executive session, which is planned at 4:15 p.m.

The Chair announced the return from Executive Session at 4:12 p.m. and Mr. Perez notified Mr. Taylor that he could return to the phone call. The Chair asked for any questions for Mr. Barnett or Mr. Perez, and Mr. Taylor re-joined the call at 4:12pm. The Chair asked if there were any motions from the commission.

Commissioner Brown moved that the commission approve the rule interpretation put forth by Mr. Abbot and his counsel, Mr. Perez, as the Director has indicated in his presentation during the open session that the rule as written should be interpreted in the way set forth by Mr. Perez in his letter and the plain language of the rule supports that interpretation and so we should approve his request that the Director's interpretation be overturned. The Chair seconded the motion and opened up the motion for discussion. The Chair stated that he wanted to make a few comments; he does believe there is a plain reading of this text that requires the commission to read it in the way Mr. Perez has presented, but it is not consistent with the intent of the rule or the overall intent or focus of the statute or the overall program. The Chair believes that after this election cycle is over the rule should be re-visited and the commission should make adjustments as appropriate. The Chair asked if there were any further comments, finding none, he then called for a vote, and the motion passed unanimously. The Chair thanked everyone for their time on such short notice and thanked Mr. Taylor, Mr. Perez, and the Director for all the work they have done to make the program such a success.

The Special Commission meeting of September 25, 2019 adjourned at 4:15 p.m.