

Seattle Ethics and Elections Commission Regular Meeting November 5, 2008

The regularly scheduled meeting of the Seattle Ethics and Elections Commission convened on November 5, 2008 in Room 4080 of the Seattle Municipal Tower, 700 Fifth Avenue, Seattle, Wa. Commission Chair Michele Radosevich called the meeting to order at 4:00 p.m. Commissioners Tarik Burney, Ed Carr, Mel Kang, Lynne Iglitzin and Nancy Miller were present. Commissioner Robert Mahon was absent. Executive Director Wayne Barnett and staff members Bob DeWeese, Gwen Ford, Polly Grow and Mardie Holden were present, as was Assistant City Attorney Gary Keese. Commissioner Carr left the meeting at 4:37 p.m.

1) Public Comment

There was no public comment.

2) Consideration of settlement with City employee who used City car for personal use

In September, staff received a complaint from a citizen who noticed a City car parked at Westfield Southcenter Mall on a Sunday morning. Staff determined that the employee was not at the mall on City business. And when we calculated how many miles she should have driven on official business, it did not equal the amount of miles she drove. The settlement is a reimbursement of \$66 for the unauthorized mileage driven for use over and above needed for official use, and a penalty of \$200 for using the car for non-City purposes.

Commissioner Miller made a motion to accept the settlement, which was seconded by Commissioner Iglitzin. The motion passed unanimously.

3) Appeal of dismissal of Case No. 08-1-0611-2 (City employee received personal items at City office)

The Executive Director informed the Commission that Mr. Nguyen is scheduled to attend this meeting but has not yet arrived. Given the fact that the appeal was not timely filed, the first

order of business is whether the Commission wants to waive the deadline. Commissioner Iglitzin made a motion to waive the deadline for the appeal due to medical explanations, which was seconded by Commissioner Kang. Discussion on this issue was set aside for 20 minutes (until 4:30 p.m.) to allow Mr. Nguyen an opportunity to get to the meeting.

Mr. Nguyen arrived at 4:15 p.m. and the Chair asked him to address the reasons for the appeal being late, and the reason for his appeal. Prior to Mr. Nguyen speaking, Commissioner Kang said that Mr. Nguyen had referenced seeking legal advice from Schwerin, Cambell, Bernard. Commissioner Kang asked whether he had ever contacted them. Mr. Nguyen stated that he did contact them but did not hire them as of yet because their recommendation was to contact them after the EEOC findings. Commissioner Kang disclosed that Schwerin, Cambell, Bernard was the law firm he retired from and he has no other connections with the firm. Commissioner Iglitzin also disclosed that her son works there as an attorney.

Mr. Nguyen explained that the reason he was late in filing the appeal was due to the fact that he was moving from Burien back to Seattle and was involved in a car accident. He was in severe pain, unable to walk or work. The motion was still on the floor to hear the case even though the appeal was submitted late and to get to the merits of the case. The motion passed unanimously to excuse the late filing of the appeal.

The discussion then focused on the merits of the case. Mr. Nguyen discussed problems encountered at work and stated that he was suffering from anxiety attacks, etc. Mr. Nguyen stated that he cooperated with human resources during their investigation, and subsequently contacted human resources regarding the problems he was encountering. Nothing had changed. Mr. Nguyen was finally able to meet with Mary Beth Josef, human resources manager, to discuss his concerns, but he was not satisfied with her response. He was upset that the investigation was

incomplete, and none of the people he listed for the manager to contact was interviewed. There were subsequent meetings with department managers, which also failed to address the situation at hand.

The Chair advised Mr. Nguyen that most of the information he was sharing was not within the Commission's jurisdiction, and encouraged him to focus his comments on the alleged Ethics Code violations that were the subject of the dismissal. The Chair stated that the Commission has no authority over how the Parks Department conducts its investigations. The Commission only has authority over how Commission staff conducts its investigations. She stated that if the Executive Director dismissed his complaint without proper investigation then that is something the Commission can deal with. Mr. Nguyen stated he was not complaining about Mr. Barnett not doing a good job with his investigation but he is appealing the Executive Director's reliance on the Parks Department's investigation.

The Executive Director stated that at the time Mr. Nguyen filed his complaint, he learned that there was a contemporaneous investigation under way in Parks. To avoid duplication of effort and resources, he chose to await a determination from the Parks Department. He confirmed that Commission staff had conducted no independent investigation. He dismissed the complaint because he concluded that the supervisor's use of City resources for personal purposes was *de minimis*.

Commissioner Kang wanted to clarify in his own mind what a *de minimis* violation is. The Executive Director said that under the Ethics Code, the *de minimis* standard allows employees to use City resources for personal use when the use doesn't take a lot of time and doesn't cost the City money, and isn't related to campaigning or a side business. Whether it violates another rule or policy is not relevant under the Ethics Code. Under the Whistleblower

Code, a violation of a rule or law is an improper governmental action. The fact that the use appeared to be contrary to a sentence in the Employee Handbook does not establish improper governmental action under the Whistleblower Code, because the handbook is neither a rule nor a law.

The Chair said that we are looking at use of time, which falls under the Ethics Code, and which the Executive Director found to be *de minimis*. Under the Ethics Code we aren't looking at the nature of the use. Under the Whistleblower Code, we do look at the nature of the use, so even a *de minimis* use would be improper if it violated a law or rule.

Commissioner Iglitzin questioned whether or not there is a process in place for Mr. Nguyen to appeal the Parks decision. Mr. Nguyen stated he was told by the Parks Department that whatever they are doing for their process it is exempt under the Public Disclosure Act and they do not have to disclose it to him.

Mr. Nguyen stated he witnessed three shipments of wine at about two bottles each delivered to his supervisor over a period of a year, which violates the ethics code and the only other fact is that he has witnesses other than himself that saw other deliveries. Nevertheless, the Parks Department told Ms. Byington that she was to stop having wine delivered to the community center.

As for Mr. Nguyen's allegations of discrimination, Assistant City Attorney Gary Keese stated that the EEOC, not the Commission, is the right agency to look into that kind of an allegation. He stated that EEOC has their law to enforce and so does the Commission, and there is not much overlap. Mr. Nguyen referred to another supervisor receiving guns and ammunition at the community center. The Executive Director said that this was before the Commission a couple of months ago and he did find that there was an improper governmental action because it

is unlawful to even possess ammunition or weaponry on City property. For alcohol to be unlawful on City property there has to be intent to consume it on City property.

The Chair stated that it appears that Mr. Nguyen has issues with some management decisions, but she had heard no evidence of ethics violations. Commissioner Miller made a motion to deny Mr. Nguyen's appeal, which was seconded by Commissioner Burney. The vote was unanimous.

4) Ethics Code Review – Sections 2 (Improper Use of Official Position), 3 (Acceptance of Gifts or Loans) and 5 (Holding a Financial or Beneficial Interest in a City Transaction)

The Executive Director referred the Commission to his memo dated October 2, 2008 regarding Possible Amendments to the Ethics Code.

His first issue is that the code does not make it clear that an attempt to use one's position is a violation. This came up in a complaint last year. The Executive Director believes that a wise clarification would be to say if you attempt to use your position and fail you are as culpable as the person who was successful in using their position.

The language regarding misuse of position is worded in a very confusing way. There are two clauses in this section, the first one calls for balancing the City's interest against the private gain and the second one doesn't. He feels that section could be re-written in a far clearer way that better captured what the test was.

Another issue involves the bar on assisting others with City "transactions." This is another area where the code uses the word transaction, which is not defined in City law but is in State law. The state law's definition of "transaction" tracks our definition of "matter," and he recommends amending the code to bar assistance in matters.

Another issue is right now Section 2c says that no City employee will assist any person in any City transaction where such City officer or employee's assistance is, or to a reasonable person would appear to be, enhanced by that officer or employee's position with the city. There is a 1990 Advisory Opinion that says your position would appear to enhance your services if you worked in that department. As far as the Executive Director has seen, this is the last opinion that dealt with this section. He'd like to rewrite the section so that it reflects the 1990 opinion, while making sure that the mayor's office and the legislative department are barred from assisting anyone with any city department outside of their official duties. The goal here is not to prevent elected officials or their staffs from calling on behalf of constituents regarding services.

The language regarding beneficial interests in contracts is borrowed from a State law applicable to municipal officers. State law bars such officers from having a beneficial interest in a contract for the benefit of his or her office. It very difficult to apply that language to employees, who are also subject to the City's ethics code. Section 5 is looking at contracts that are per se unlawful.

The Executive Director stated that he circulated this document again to the Community Council Federation, League of Women's Voters, the Municipal League and some others. An issue came up that he and Commissioner Kang heard about over two years ago while they were at a meeting at the Seattle Neighborhood Coalition. There are some in the community who believe the Code should spell out that lying is a violation of the Ethics Code. The Executive Director wanted to bring that to the attention of the Commission for discussion because to him if there was a place to fit that in it would be in Section 2 under Use of Position. It really doesn't fit into conflict of interest, gifts, or beneficial interests in a contract. Commissioner Kang stated that he spoke with a community person about this issue and his thought was it just seems

unethical to lie. This came up during the course of dealing with the public in hearing or something of that nature that City employees just lie and they wanted to have a rule regarding this. The Chair stated that it is very difficult to police what is a lie or a mistake. It is too difficult to get at what people's intentions are. Commissioner Kang stated that there was one way that it could be remotely relevant and that is some agencies and some statutes provide that lying during the course of a Commission investigation would be a violation. In this way we could police them ourselves without having to initiate a different personnel matter or something of that nature, which is something the Commission may want to consider. The Executive Director said that under our rules everybody is under oath and a lie would be a violation.

The Executive Director also stated that our Statement of Purpose for the ordinance it is a little slim and there could be room to carve out some aspirational goals, which would not have any penalties attached and would not be a violation of the law. We could still say "City employees should be truthful in their dealings." This would not have any enforcement power behind it, but would still declare the purpose of City Government that people should be truthful. The Chair stated that it seems to work better as an aspirational statement than as rule of law.

5) Dismissal of Case No.08-WBI-1 (Allegations against various personnel department employees.)

The Executive Director said that this dovetails with the complaint the Commission heard the appeal of earlier today. We received a complaint and found out that the employee had already filed a complaint with the Personnel Department, which had hired an outside investigator to investigate the claims. We let that investigation run its course, and at the close they provided us with their report. After making the determination that they had done a thorough investigation, we incorporated the findings of that investigation into our report. The appeal time has run out and there has been no appeal.

6) Executive Director's Report

We've received approximately 38 lobbyist registrations. The Executive Director said he has done some outreach. He has been to the MEDC's general meeting, to the Seattle Human Services Coalition, and to the Chamber of Commerce a couple of months ago. There is also a notice posted at the City Council sign in desk that tells visitors that there is a new lobbying law in effect and advises visitors to contact us if they lobby for pay on more than 4 days or parts thereof. This appears to be going smoothly thus far, and we are working out some kinks and will be back before the Commission with some recommendations for changes in 2009.

He announced that Commissioner Carr has left Boeing for a job with Avenade.

Meeting adjourned at 5:10 p.m.

Minutes respectively submitted by Gwendolyn Ford, Administrative Staff Analyst.