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September 11, 2009

REPORT TO THE COMMITTEE ON RULES, OPEN GOVERNMENT AND
INTERGOVERNMENTAL RELATIONS

2009 PROPOSED CHANGES TO THE ETHICS COMMISSION INVESTIGATIVE AND
ENFORCEMENT PROCEDURES

INTRODUCTION

In 2008, the Ethics Commission [Commission] submitted proposals to the City Council to expand its investigative and enforcement procedures. The proposals included amendments to the Ethics Ordinance to: (1) compel appearance and testimony of witnesses before the Executive Director during its formal investigations; and (2) create a new offense to prohibit lying or providing false documents to the Commission or staff during formal investigations or at hearings. This Office analyzed the proposed changes and raised several legal issues. *See City Att’y Report 08-24 (Oct. 9, 2008) [2008 Report]*. On October 13, 2008, the Council declined to adopt the proposed changes.

The Commission has resubmitted its proposals and attempted to address the concerns raised in the 2008 Report. In addition, the Commission has submitted a memorandum from outside counsel [Foster Memo] retained by the Commission that critiques our 2008 Report. Respectfully, we remind the Committee that this Office provides the Council and its Committees with legal advice, not outside counsel retained by the Ethics Commission. We have not abrogated the responsibility to provide legal advice and we fulfill it today by incorporating the analysis presented in our 2008 Report and supplementing it as necessary. A copy of the 2008 Report is attached for the Committee’s reference.

DISCUSSION

The City Council retains full control over the Commission’s existence and all its procedures. *See San Diego Charter § 41(d)*. For example, the Council could decide the Commission no longer meets City’s purposes and repeal the ordinance establishing it; the Council could change the Commission’s responsibilities and duties; and the Council need not accept Commission-proposed changes to its procedures. This report provides the Council with our continued legal input on the Commission’s proposed changes, which may assist the Council in its policy decisions.

I. The Commission's Proposal to Compel Witness Attendance and Testimony During Commission Investigations.

The Commission requests that the Council amend the Ethics Ordinance so it can subpoena witnesses during its formal investigations. This is a policy issue for the Council to decide. The most recent revision of the Commission's proposal, dated August 6, 2009, is similar to those proposed in 2008. The new proposal incorporates suggestions made by the City Attorney that mitigate some of the concerns raised in our 2008 Report, but do not eliminate them.¹

A. Due Process Considerations.

The Foster Memo, insists that due process does not *require* any protections for witnesses that are compelled to appear and testify during the investigative stage of the Commission's proceedings, citing the authority in *Hanna v. Larche*, 363 U.S. 420 (1960). In the *Hanna* case, the proceeding before the Commission on Civil Rights was purely investigative with no adjudicatory responsibilities. In that regard, the Court stated:

'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.

Id. at 442.

¹ The City Attorney's suggestions were prompted in part by the decision in *Watkins v. United States*, 354 U.S. 178, 209 (1957).

Formal investigative proceedings before the Ethics Commission are part of its adjudicatory proceedings. Accordingly, the extent of the due process *required* during the formal investigation of the Commission will depend on several factors. Because this is a case of first impression, the extent of due process required is uncertain. Nonetheless, we have recommended certain protections be provided to witnesses that are compelled to testify at the investigative stage of Commission proceedings.

B. The Commission's Proposed Changes to Investigative and Subpoena Procedures: Suggested Modifications if Council Enacts the Procedures.

The Commission's August 6, 2009 revised amendments to the ordinance include changes: (1) to permit the Commission to subpoena individual witnesses to give sworn testimony before the Director; (2) to give the Director the option to forego seeking voluntary interviews with such witnesses before seeking a subpoena; (3) to authorize the Director to administer oaths to subpoenaed witnesses during a formal investigations; and (4) to modify the subpoena procedures and to renumber and clarify contempt sanctions for failures to comply with Commission subpoenas.

If the Committee recommends approval of the Commission's proposal to subpoena witnesses during formal investigations, we suggest the following additional modifications.

1. **Witness subpoenas during formal investigations.**

Section 26.0402. We suggest the proposed language be changed to be consistent with other ordinance language. For example:

Subpoena means a written order requiring a ~~witness's appearance~~ witness to appear and give testimony (during) in connection with a (formal) Commission investigation or at a Probable Cause Hearing or Administrative Hearing to give testimony.²

Section 26.0445(b)(5). This section adds a requirement that subpoenas for witnesses provide them *notice* of the specific area of inquiry and "the fact that the witness has a right to be accompanied by legal counsel or any representative" during their testimony. However, the *right* to counsel needs to be established by adding language to section 26.0424 relating to formal investigations.

² New words in parentheses, our deletion as double strikeout.

2. Foregoing efforts at voluntary compliance before seeking subpoenas.

Section 26.0445(b)(3). Under existing section 24.0424, the Director is required to make reasonable efforts to seek voluntary compliance before seeking a subpoena duces tecum during a formal investigation. Proposed subsection 26.0445(b)(3) provides the Director with sole discretion to forego seeking voluntary compliance before seeking a witness subpoena, or a subpoena duces tecum, during a formal investigation. These sections appear to be inconsistent and the Council should decide whether they wish to provide the Director with this discretion or to retain the existing procedures.

The Director's memorandum to the Committee dated September 9, 2009 at page 3 indicates that discretion is only to be exercised "in extraordinary circumstances." The proposal includes no such limitation, nor is there a definition of what would be such extraordinary circumstances.

3. Modification of subpoena procedures and contempt.

Section 26.0443(d). The point of this new subsection is unclear. As phrased it does not permit formal investigative subpoenas or subpoenas duces tecum to be served pursuant to subsections (b) and (c). It requires investigative subpoenas be served in accordance with California Government Code section 11184(a), which in turn requires compliance with Code of Civil Procedure sections 413.10 et seq. Those sections provide for service statewide, outside the state and outside the country. *See* Cal. Gov't Code § 413.10. The section also requires service of all subpoenas issued for Probable Cause or Administrative hearings to be accomplished in the manner provided by California Government Code 11450.20(b). But process under that section extends statewide, which is far beyond the limited City-wide jurisdiction of this City-created Commission.

We suggest this section be modified to delete required compliances with these state statutes and to permit all subpoenas to be served in the same manner as are other documents under section 26.0433. This will help to avoid any confusion about the limits of the Commission's jurisdiction. Alternatively, the subpoena section should be modified to clarify the Commission's subpoena power extends only within the San Diego municipal limits.

Section 26.0445(h). This section incorporates existing language permitting failure to comply with a commission subpoena to be punished as a contempt of court with misdemeanor sanctions. The Director's memorandum to the Committee dated September 9, 2009 at page 3 indicates that this section clarifies that contempt may occur only after failure to comply with a court order. We do not see that clarification in the version submitted.

We suggest the following clarification:

Failure to comply with a *Subpoena* or *Subpoena duces tecum* issued pursuant to this section , (after a court has issued an order compelling such compliance), may be punished as a contempt of court and may be prosecuted as a misdemeanor.

Finally, most of the Commission's proposed changes are to section 26.0445 which relates to subpoenas and subpoenas duces tecum. Some of these changes may be more appropriate for inclusion in section 26.0424 relating to formal investigations. In particular, section 260445(b)(6) and (7) relating to the administration of oaths and the recording of the witness testimony.

II. The Proposed New Offense is Largely Preempted by State Perjury Laws and May Not Be Enforced by the Commission.

The Commission again proposes to create a new offense (SDMC § 26.0416) to make it unlawful for persons under the Commission's jurisdiction to knowingly (a) make false statements regarding material facts or (b) submit written materials containing false information regarding material facts during a Commission investigation or at Commission hearings.

A violation of the new offense would result in administrative remedies. The new proposal also provides that a hearing officer unrelated to the Commission would enforce the section. We recommend a review of the hearing procedures to determine whether they are appropriate for enforcement of this type of action without additional modifications to the code. Finally, it is not clear who will bear the additional costs related to using this administrative hearing process.

If the Committee recommends expanding sanctions for lying to the Commission, the ordinance should provide an exemption for conduct encompassed by the state perjury laws. We concluded in our 2008 Report that the proposed ordinance is likely preempted by state perjury laws *to the extent* it contemplates sanctioning those who provide materially false testimony or documents *under oath* at Commission hearings or during Commission investigations. 2008 Report at 9-11. That opinion was based upon the Supreme Court's analysis in *Cohen v. Bd. of Supervisors*, 40 Cal. 3d 277, 293-300 (1985).³ Our opinion remains unchanged.

Alternatively, the Council could enact a criminal offense for lying to the Commission or its representatives that is similar to other offenses in the Municipal Code. For example, the Council recently created a new criminal offense for those who might obstruct the City's internal and external auditors. *See* San Diego Ordinance No. O-19895 (September 1, 2009, second

³ The Foster Memo does not address the *Cohen* case, nor our conclusion that enforcement under the proposed ordinance would only be precluded to the extent it encompasses conduct already covered under the state perjury laws, namely, providing false sworn testimony and documents. California Penal Code sections 118 and 132.

reading). This criminal offense would exclude penalties for any conduct violating the state perjury statutes (California Penal Code sections 118 and 132). For example:

§ 26.0416 Prohibition Against False Testimony and False Documentation

- (a) It is unlawful for any person under the jurisdiction of the Commission, with the specific intent to mislead the Commission or its representatives to:
 - (1) knowingly make a false statement regarding a material fact during the course of a Commission investigation to any Commission representative; or
 - (2) submit any books, papers, records, or other documentation during the course of a Commission investigation, a Probable Cause Hearing, or an Administrative Hearing knowing that such documentation contains false information regarding a material fact.
- (b) This section shall not apply to conduct which may be charged as a felony under California Penal Code sections 118 and 132.
- (c) Any person under the jurisdiction of the Commission who violates this section is guilty of a misdemeanor and is subject to the criminal penalties set forth in Chapter 1 of the Municipal Code.

The above provision would be more consistent with the other City laws that prohibit providing false information to City officials.

CONCLUSION

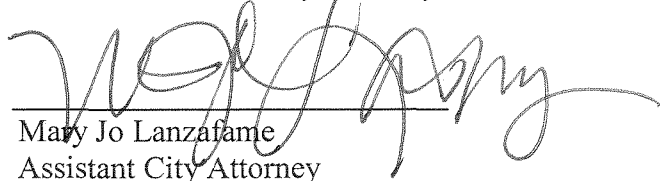
The Commission has proposed expanding its powers to allow it to compel witnesses to appear and give testimony before the Commission's Director during formal investigations. The Commission also proposes giving the Director sole discretion to forego seeking voluntary compliance before seeking investigative subpoenas and subpoenas duces tecum. The expansion of subpoena authority will subject individuals to compelled appearance and testimony during the formal investigations by the Commission. Such authority should not be granted lightly. If the Committee chooses to recommend forwarding these proposals to the Council, we suggest making the additional amendments discussed in this memorandum.

We reiterate our concern that the conduct covered by the proposed new offense for lying is preempted by state perjury laws *to the extent* it contemplates sanctioning those who provide materially false testimony or documents *under oath* at Commission hearings or during Commission investigations. Accordingly, if the Committee approves any ordinance on this subject, whether criminally or administratively enforced by entities other than the Commission, we recommend that it exempt conduct which is covered by the state perjury laws.

Respectfully submitted,

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RC-2009-21
Attachment