

MINUTES

ETHICS REVIEW COMMISSION MEETING OCTOBER 2, 2008 5TH FLOOR AMERICAS CONFERENCE ROOM - 5:00 P.M.

MEMBERS PRESENT

Gerald Mangrum, Mayoral
Raymundo Rodriguez, District #2
Rodney Hansen, District #5
Paul Harrington, District #6
Alexander Neill, District #7

MEMBERS ABSENT

Richard D. Pineda, District #1
Yusuf Farran, District #3
Andre Ewing, District #4
Isela Pena, District #8

OTHERS PRESENT

Elaine S. Hengen, Senior Assistant City Attorney
Sandra Dunsavage, Recording Secretary

I. CALL TO ORDER

Seeing a quorum, Chair Gerald Mangrum called the meeting to order at 5:04 p.m.

II. APPROVAL OF MINUTES FOR SEPTEMBER 4, 2008.

Mr. Rodriguez moved to approve the minutes of September 4, 2008. Mr. Neill seconded motion and the motion passed unanimously.

III. DISCUSSION AND ACTION REGARDING POTENTIAL CHANGES TO THE ETHICS ORDINANCE AND MAKING RECOMMENDATIONS FROM THE COMMISSION TO THE COUNCIL RULES LEGISLATIVE REVIEW COMMITTEE.

Chair Mangrum made the motion to include in the ordinance a gift restriction in the amount of \$50.00 for those individuals covered under the purview of the ordinance restricting the acceptance of gifts over \$50.00 from anyone who is not a family member or a close friend. Chair Mangrum opened the floor for discussion.

Ms. Hengen presented an example to members explaining that two weeks ago at the City Council meeting a proclamation was presented to the Amigo Air Show and representatives from the Air Show all walked up to all the Council Members and handed them complimentary tickets to the Air Show that had a face value of more than \$50.00. If the \$50.00 limit had been in place, the tickets would have to have been returned.

Ms. Hengen stated that a provision could be added which provides for acceptance of tickets for purposes of attending events promoting El Paso and events that relate to the

official capacity and within the scope of office holder duties. Examples of events that relate to official capacity could include the accepting of awards, such as plaques, certificates, trophies, and other similar mementos publicly presented in recognition of public service, and other duties including Honorarium, hosting entertainment events and any transportation or lodging expense.

Mr. Neill suggested that language be included explaining that no one individual or business could contribute a monetary amount of \$75.00 per year.

Chair Mangrum introduced the motion once again that there be a \$75.00 limit for any gifts accepted by anybody covered under the purview of the ethics ordinance, with the exceptions of items that would be under the course of official duties.

Mr. Rodriguez moved to approve the motion. Mr. Harrington seconded motion, all in favor and the motion passed unanimously.

Ms. Hengen asked members what they preferred to do with the reportable gift log. The reportable gift log could have the requirement to report any gifts with amounts between \$50.00 and \$75.00.

Chair Mangrum made the motion to require all gifts to be reported except those with a value of \$10.00 or less. Mr. Neill seconded motion, all in favor and the motion passed unanimously.

Mr. Hansen commented that he would like to see other chapters, restrictions, or other codes that the City has as a cross-reference available for the public for certain issues in the Ethics Ordinance.

Ms. Hengen accepted the task of looking at obtaining links and/or references for purposes of providing a cross-reference tool with other Codes or Chapters as a courtesy on the City's Website, under the Ethics Review Commission.

Chair Mangrum addressed a question to Ms. Hengen asking if members appointed to serve on the Housing Authority Board and the RMA (Regional Mobility Authority) fall under the guidelines of the Ethics Ordinance.

Ms. Hengen explained that the Housing Authority Board does not due to the fact that there is no mechanism of enforcement. The statute provides that the Mayor appoint members to serve on the Housing Authority Board. The statute also provides its own mechanism by which the members can be removed. There is no basis as to which the Ethics Review Commission could investigate a Housing Authority Commission Member or take any action against them for violation.

Chair Mangrum asked whether it could be possible if members of the Housing Authority Board signed an agreement giving their permission to be subject to the Ethics Ordinance.

Ms. Hengen stated if Housing Authority Board members were asked to sign an agreement that would have the effect of a member impermissibly waiving their statutory rights regarding removal. State Law provides the mechanism by which members are removed, and they have to be removed by that mechanism. Research would be required to determine how the City might have jurisdiction to apply non-penal ordinances to someone that is not within the city government. The statute provides that the Mayor appoint the commission members, but once appointed the members become the Board of a separate governmental entity.

Ms. Hengen explained further that the Housing Authority Board is a separate governmental entity. Under State Law the City, utilizing state statutes back in the 1940's, created the Housing Authority of the City of El Paso, which became an independent governmental entity under the state statute. The statute provides that the Mayor of the City responsible for the creation of the entity then appoints members to serve on the Board.

Ms. Hengen stated that additional research could be done to see if the City could impose the requirement of the Ethics Ordinance of those individuals.

Chair Mangrum commented on the RMA (Regional Mobility Authority) as being appointed by the Mayor.

Ms. Hengen clarified that the members of the RMA Board are appointed by the City Council. The Mayor submits a slate of three people for Council to appoint one of those three to each of the slots available. The RMA falls under the same guidelines and jurisdiction as the Housing Authority Board.

Chair Mangrum gave the floor to Mr. Neill for proposed additions to the Ethics Ordinance.

Mr. Neill presented his proposals for the Ethics Ordinance. A copy of the proposed provisions presented is provided as an attachment to the minutes. The provisions are drawn from ethics ordinances currently in place in Dallas, Austin, and San Antonio.

Chair Mangrum commented on the issue of the subpoena power explaining that in order to add the provision to the Ethics Ordinance it would require a charter amendment by the City so that the citizens can vote on it.

Ms. Hengen explained that the Charter gives the right to conduct investigations and request witness testimony in the production of evidence. Documents could be sent out requesting the presence of a witness or requesting the production of evidence. In the event that someone were to disregard that after receiving the official request of the commission, then the solution would be to bring it to City Council. The City Council under their investigative power can then issue a subpoena for the information. Provisions in 3.8 are still in the Charter, where the Council shall have the express power to inquire into the official conduct of any department, officer, or employee of the City

and for that purpose shall have the power to administer oath, subpoena witnesses and compile the production of evidence/materials to the inquiry. Otherwise, this issue would have to be presented to the citizens asking for another Charter amendment (in 2009).

Chair Mangrum suggested a memorandum of agreement with the Council of Judges or a memorandum of understanding for purposes of reviewing and recommending subpoena in an Ethics case that's under review.

Ms. Hengen advised that the Council of Judges is the body that oversees the operations of the court system. The City does not have the authority or ability by ordinance to require the Council of Judges take action for or on behalf of the City.

Chair Mangrum made the motion that when the ordinance is brought forward for introduction to City Council, the Commission will present the recommendation of a Charter Amendment be submitted to the voters allowing for a limited subpoena authority for The Commission. Mr. Neill seconded motion, all in favor and the motion passed unanimously.

Chair Mangrum introduced the motion that the Ordinance allow for recommendations from the Commission for any removals from office. Lower levels of violation where an offense is committed but not considered significant, then the Commission could write a letter of caution. The following level where an offense is committed that is unethical, however not criminal or not removable, then the Commission could write a letter of reprimand. The first two levels being under the purview of the Ethics Ordinance. Violations requiring a letter of censured or a recommendation to be removed from office, then these levels should be forwarded to Council in the form of a recommendation from the Commission. Mr. Rodriguez seconded motion, all in favor and the motion passed unanimously.

Chair Mangrum made the motion that the entire section with the exception of No. 6 – Subpoena Power be incorporated into the ordinance, along with any changes done by the City Attorney's office.

Ms. Hengen commented regarding the subject of independent legal counsel explaining that it could not be done by ordinance. If needed, there are presently provisions in the ordinance for issues that identify the point in time when the City Attorney's Office would in fact have a conflict and at that point outside legal counsel would be provided. Ethical obligations as an attorney require that the City Attorney's office determine if there is a conflict of interest and at which point present the issue to City Council. The City Council would then authorize the retention of outside legal counsel.

Chair Mangrum asked whether the Commission as a body could come forward and say that there could be a perception of a conflict of interest.

Ms. Hengen responded that they could not because it is the obligation of the attorney.

Chair Mangrum made the motion to ask Ms. Hengen to research the City Charter for San Antonio to determine if the charter gives the ordinance for San Antonio power for the commission to make the determination concerning conflict of interest. Whether the Charter sites anything or not, then that would give the Commission guidance on recommending that the change concerning independent legal counsel be added to the City Charter. Mr. Harrington seconded motion, all in favor and the motion passed unanimously.

Chair Mangrum made the motion to accept the proposal as presented by Mr. Neill, with exception of 5 and 6, in abeyance of Ms. Hengen's research and information. Mr. Neill seconded motion, all in favor and the motion passed unanimously.

IV. DISCUSSION AND ACTION ON THE 2007 ANNUAL REPORT TO THE CITY COUNCIL.

Ms. Hengen provided members with a copy of the 2007 Annual Report. Annual Report includes membership and the work undertaken, 4 meetings in 2007, meetings in May and October were joint meetings with the Council Rules LRC, meeting held in February 2007 concerning complaint of City Representative Alejandro Lozano, and meeting held in November 2007 concerning complaint of City Representative Rachel Quintana. A copy of the 2007 Annual Report is provided as an attachment to the minutes.

Chair Mangrum made the motion that the 2007 Annual Report be adopted and presented to City Council, with compliments of job well done. Mr. Rodriguez seconded, all in favor and the motion passed unanimously.

V. SCHEDULING OF NEXT MEETING(S).

Chair Mangrum recommended that the next meeting be held the first week of December for purpose of reviewing the first draft of the Ordinance. Members will be informed that the meeting for reviewing the first draft will be held at 5:00 p.m. on Tuesday, December 9, 2008.

VI. ADJOURNMENT

Motion made by Mr. Rodriguez and seconded by Chair Mangrum to adjourn the meeting. All in favor and motion passed unanimously. Meeting adjourned at 6:30 p.m.

To: El Paso City Ethics Review Commission

From: Alexander V. Neill

Re: Proposed additions to ethics ordinance

Date: October 1, 2008

Ladies and Gentlemen:

As I have mentioned in past meetings, I feel a major shortcoming of the current ethics ordinance is a lack of detail in the procedure aspect once a complaint has been filed and approved. Specifically, I feel that the commission, the complainant, and the respondent lack a clear idea as what to expect once the complaint has been approved by the City Attorney's office. As such, I offer the following items for the commission's consideration. Please note that these provisions are drawn from ethics ordinances currently in place in Dallas, Austin, and San Antonio.

1. Notice of Scope of Hearing. Once the complaint has been approved and prior to the hearing by the Ethics Review Commission, the City Attorney will provide all parties with notice as to the specific provisions of the ordinance alleged in the complaint to have been violated. This will put the parties on notice as to which sections of the ordinance have been violated. This allows them both to prepare their cases and also prevents one side from surprising another at the hearing.

2. Prohibition against ex parte communications: Complainant and respondent, and any person acting on their behalf cannot contact any member of the Commission about the subject matter of the complaint

3. Hearing Rules: Right now, the present ordinance merely states that we should hear the issues and reach a decision. It is fairly silent as to how we reach the decision. The following are taken verbatim from Sec. 12A-28 of the City of Dallas Ethics Ordinance. These ordinances provide a good starting point as to the type of detail I this is lacking in the current ordinance.

"(b) General rules. A determination that a violation of this chapter has occurred can be made only upon an affirmative vote of at least three-fifths of the commission members present and voting, otherwise the complaint must be dismissed. A finding that a violation occurred must be supported by clear and convincing evidence. "Clear and convincing evidence" means that measure or degree of proof that produces in a person's mind a firm belief or conviction as to the truth of the allegations sought to be established.

(c) Procedural rules. A quorum of four commission members must be present for a hearing. Any member of the commission who is not present at a hearing on a complaint may not participate in any discussion, voting, or disposition regarding the complaint. All witnesses must be sworn, and the members of the ethics advisory commission or its legal counsel shall conduct questioning of witnesses. The commission is not bound by the rules of evidence and may establish time limits and other rules relating to the participation of any person in the hearing, subject to Subsections (d) and (e) of this section.

(d) Rights of the person charged. The person charged in the complaint has the right to attend the hearing, the right to make a statement, the right to present and cross-examine witnesses, and the right to be represented by legal counsel or another advisor.

(e) Rights of the complainant. The complainant has the right to attend the hearing, the right to make a statement, and the right to be accompanied by legal counsel or another advisor. The legal counsel or other advisor to the complainant may advise the complainant during the course of the hearing, but may not speak on behalf of the complainant, except to represent the complainant while testifying. The complainant may not present or cross-examine witnesses, except with the permission of the commission.”

4. Types of evidence considered. As of now, the ordinance is silent as to what types of evidence the Commission can consider. As you all know, I am an attorney. In a court of law, only certain types of evidence can be considered. However, this is clearly not a court of law and as such, strict rules regarding the admission of evidence should not be imposed. The following language is from Section 2-86(b) of the City of San Antonio Code of Ethics:

“(a) Evidence. The Ethics Panel shall rely on evidence of which a reasonably prudent person commonly relies in the conduct of the person’s affairs. The Ethics Panel shall further abide by the following:

- (1) The Panel shall hear evidence relevant to the allegations; and
- (2) The Panel shall not consider hearsay unless it finds the nature of the information is reliable and useful.”

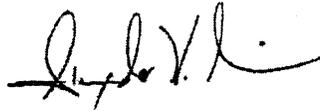
I consider this type of language to be a compromise between the need to place some restrictions and the fear of making the proceedings too restrictive. For those that do not know, hearsay is defined as an out of court statement used to prove the truth of the matter asserted. An example would be a witness stating “Someone told me that Rep. X was accepting bribes.” The idea behind the prohibition is that it is always better to hear the words straight from the proverbial horse’s mouth.

5. A provision allowing the Commission to have independent legal counsel, if needed. This may eliminate the perception of any type of conflict of interest in giving the Commission advice and representing city officials.

6. Subpoena power. As of right now, the Commission has no ability to compel witnesses to testify at the hearing. Not being able to compel attendance severely hampers our ability to have independent corroboration of the allegations by witnesses to the events. In turn, this hampers our ability to enforce the ordinance.

In short, I think these provisions, or something to a similar effect, will help clarify the proceedings for all parties involved. Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Alexander V. Neill". The signature is fluid and cursive, with a prominent initial "A" and a long, sweeping underline.

Alexander V. Neill