

REPLACEMENT MEMO



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle, City Attorney
Lee Price, MMC, City Clerk

**SUBJECT: PROPOSED REVISIONS TO
RESOLUTION NO. 72547 -
REGULATIONS AND
PROCEDURES FOR THE
SAN JOSE ELECTIONS
COMMISSION INVESTIGATIONS
AND HEARINGS**

DATE: November 9, 2009

This memo replaces the memorandum dated November 5, 2009 and distributed November 6, 2009 in order to correct the page numbers of the citations to the Resolution.

RECOMMENDATION

As recommended by the Elections Commission, approve a resolution making various revisions to City Council Resolution No. 72547, which sets forth the regulations and procedures for the Commission's investigations and hearings.

BACKGROUND

Over a year ago, the Elections Commission appointed a subcommittee to review Resolution No. 72547 and make recommendations about provisions that should be revised. The Commission approved those revisions earlier this year. Shortly after the Commission approved the first set of revisions, but before they were presented to the City Council, the Commission appointed another subcommittee to review the Commission's procedures related to anonymous complaints. The subcommittee made recommendations about the anonymous complaint procedure and the Commission suggested that the subcommittee work with the Offices of the City Attorney and City Clerk to revise Resolution No. 72547 accordingly. At its regular meeting on October 14, 2009, the Commission approved the additional revisions and directed staff to present the proposed resolution to the City Council.

ANALYSIS

A. Modifications to the Procedures for Anonymous Complaints

The proposed resolution requires that complaints filed with the Commission be signed by the Complainant. (See Page 2, Section B(3).) No written complaint may be filed anonymously. (See Page 4, Sections E(3) and (4).) Anonymous complaints may only be submitted by calling the “Elections Commission Anonymous Complaint Hotline” and good cause for anonymity must be stated. The Chair of the Commission, or the Vice-Chair, if the Chair is not available, will assess whether there is good cause for anonymity. If the Commissioner reviewing the call determines the Complainant has good cause for anonymity, the complaint will be forwarded promptly to the Evaluator by the City Clerk. If the Commissioner reviewing the call determines that the Complainant does not have good cause for anonymity, the complaint will not be forwarded to the Evaluator. (See Pages 4 and 5, Section E(6).)

B. Modifications to the Procedures for Finding Violations

The proposed resolution conforms the procedure for finding violations of Title 12 with the current version of the San Jose Municipal Code. On August 11, 2009, the Council approved a revision to Municipal Code Section 12.04.060(B). The earlier version of Section 12.04.060(B) required that the votes of at least three members of the Commission “who concurred in the finding of the violation” were required to impose any order or penalty. But because there may be a lapse in time between finding a violation and imposition of a penalty, it is possible that one or more Commissioners who voted to find a violation will have left the Commission before a penalty is imposed. Thus, revised Section 12.04.060(B) permits an Elections Commissioner to impose an order or penalty for a violation of Title 12 – even if he or she did not concur in the finding of the violation – as long as the Commissioner certifies that he or she has heard or read the testimony at the hearing on the complaint and reviewed all the evidence in the record. (See Pages 9 and 10, Section J(6) and Page 10, Section K(2).)

C. Modifications to the Investigation and Hearing Schedule

The proposed resolution recognizes that timeliness is paramount, particularly when an elections-related complaint is filed within two weeks of an election. At the same time, the proposed resolution revises the investigation and hearing schedule to reflect a more realistic time frame for the investigation and imposes more formal procedures for requesting extensions of time. Specifically, the Evaluator’s Report and Recommendations must be submitted within thirty (30) days – instead of seven (7) days – after receiving the complaint, unless an extension has been requested and granted. (See Page 8, Section H(1).) Furthermore, requests for extension must be made in writing to the City Clerk. The Chair of the Commission, in consultation with the City Clerk and the City Attorney’s Office, may grant the request only on a showing of good cause. The extension granted by the

Chair must be in writing and must specify the amount of additional time that has been permitted. (See Pages 8 and 9, Section H(2).)

D. Clarifications to Comport with Current Practice

The proposed resolution includes some clarifications that comport with current practice:

- The definition of “Investigator” and provisions about the Investigator have been added since the Commission regularly retains a firm to serve as an Investigator. (See Pages 3 and 4, Sections B(10) and D.)
- Any reference to the “attorney member of the Commission” has been deleted since the Municipal Code has been revised to eliminate the requirement that one member of the Commission be an attorney. (See Page 2, Section B(12), Pages 6 and 7, Section F(10) and Page 9, Section J(1).)
- Complaint forms are permitted to be filed with the City Clerk by electronic mail. (See Page 5, Section E(7).)
- The Evaluator’s investigation must include an interview with the Respondent and may include an interview with the Complainant and any witnesses and a review of documents and any other evidence. (See Page 6, Section F(7).)
- The Commission Hearing will be set at the earliest practicable date based on the projected schedule for submittal and distribution of the Evaluator’s Report and Recommendations. (See Page 7, Section G(1).)
- The City Clerk must notify the Complainant (as well as the Respondent) of the date and time of the meeting at which the complaint will be reviewed by the Commission. (See Page 7, Section G(2).)
- The Evaluator’s Report and Recommendations must be delivered to the Complainant before the Commission Hearing. (See Page 7, Section G(3).)
- The Evaluator’s Report and Recommendations should be delivered to the appropriate persons 72 hours in advance of the Commission Hearing, if possible, but in every case the Report and Recommendations must be available at the time of the Hearing. (See Page 7, Section G(3).)
- Commissioners may ask questions of witnesses or the Evaluator at the Hearing when recognized by the Chair. (See Page 7, Section G(10).)

- Individual Commissioners may not issue any written report or statement after the Hearing. (See Page 8, Section G(17).)
- The decision of the Commission after a Hearing will be the final administrative decision of the City, unless the Commission makes another decision by Resolution to impose penalties, in which case the decision imposing penalties will be the final administrative decision. (See Page 10, Section J(10).)

E. Other Revisions

The proposed resolution also includes a few revisions that are not substantive. (See Page 1, Section A; Page 2, Section B(8); Page 4, Sections E(1) and (2); Page 5, Section E(9)(a); Page 6, Sections F(5), F(8) and (9); Page 7, Section G(2); Page 9, Sections J(3)-(5); Page 11, Section L.) Any other revisions simply correct typographical errors or formatting.

CONCLUSION

The proposed resolution does not permit written complaints to be filed anonymously. Anonymous complaints may only be submitted by calling the "Elections Commission Anonymous Complaint Hotline." Good cause for anonymity must be stated, and the Chair and one other member of the Commission will meet to assess whether good cause exists. Unless at least one member of the subcommittee determines the Complainant has good cause for anonymity, the complaint will not be forwarded to the Evaluator for investigation.

The proposed resolution also conforms the procedure for finding violations of Title 12 with the current version of the San Jose Municipal Code; an Elections Commissioner may impose an order or penalty for a violation of Title 12, even if he or she did not concur in the finding of the violation, as long as the Commissioner certifies that he or she has heard or read the testimony at the hearing on the complaint and reviewed all the evidence in the record.

The proposed resolution modifies the investigation and hearing schedule to reflect a more realistic time frame to conduct the investigation and hearing and imposes more formal procedures for requesting extensions of time.

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Finally, the proposed resolution includes some clarifications that comport with current practice as well as other non-substantive revisions or corrections for typographical errors or formatting.

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For questions please contact Lee Price, City Clerk, at (408) 535-1260