

August 5, 2010

TO: San Jose Elections Commission

FROM: Michael A. Smith, Vice-Chair

SUBJECT: Timeliness of Elections Commission Investigations

Resolution 75260 of the San Jose City Council, which provides regulations and procedures for the Elections Commission, states that the investigation and hearing process "is to be completed at the earliest possible time" and that "while timelines cannot be precise because of the nature of an investigation, timeliness is paramount...". Specific requirements regarding the timeliness of investigations are listed in Section H (Scheduling) of the Resolution:

- In all cases, the Evaluator's Report and Recommendations must be submitted to the City Clerk within 30 calendar days after the Evaluator receives the complaint unless an extension has been requested and granted as provided in this section.
- Whenever an action is required to be completed by a particular time pursuant to these Regulations or an order of the Commission, the Evaluator or Respondent may request an extension of time by filing a written request with the City Clerk. The Clerk will promptly forward the request for an extension to the Chair of the Commission and the City Attorney's Office. In consultation with the City Clerk and the City Attorney's Office, the Chair may grant the request only upon 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.

Prior to adoption of Resolution 75173 (the immediate predecessor to Resolution 75260) by City Council on November 17, 2009, Section H of Resolution 72547 (which preceded Resolution 75173) stated that:

- If the Evaluator does not find sufficient cause then the Evaluator's Report to the Commission shall be issued in no more than 7 days from receipt of the complaint.
- The investigation must be completed in time for a Commission Hearing in no more than 2 weeks from receipt of the complaint.
- Whenever an action is required to be completed by a particular time pursuant to these Regulations or an order of the Commission, the Evaluator or Respondent may request an extension of time. Requests for extensions of time may be made to the Chair. The Chair may grant the request only upon a showing of good cause.

The changes in Section H arose from recommendations developed during a 2009 Elections Commission review of Resolution 72547. Commissioners recognized and expressed concern that the schedule requirements in Section H had essentially NEVER been met. This led to considerable discussion among Commissioners, City staff and the Independent Evaluator (Hanson Bridgett LLP) regarding the appropriate balance between expectations for speedy investigations and practical constraints of the "real world." Eventually, a consensus was reached that more realistic, but still somewhat aggressive,

schedule requirements should be proposed. These discussions led to the recommendation, subsequently adopted by the City Council, that the Evaluator be required to submit a Report and Recommendations within 30 calendar days of receiving a complaint. Hanson Bridgett LLP indicated that they were supportive of the new requirements and did not identify any significant reservations concerning their ability to comply.

There have been only two investigations completed since the new schedule requirements were adopted. While this provides insufficient data to draw any firm conclusions, the signs are not good in that neither investigation was completed within a 30-day window. Thus, I believe further thought and discussion are called for to determine if additional steps should be taken to better align schedule requirements and performance. As a first step, I reviewed the complaint files in the City Clerk's office for the years 2004 - 2010 and documented historical schedule performance in the attached spreadsheet. The "Days Elapsed" column indicates the number of days between the filing of a complaint with the City Clerk and the completion of the Evaluator's Report and Recommendations. This approximates the interval specified in the Resolution; namely the number of days between the Evaluator receiving the complaint from the City Clerk and the Clerk receiving the Report from the Evaluator.

I recommend that the Commission review the data in the attached spreadsheet and initiate a discussion on possible actions with City staff and the current Independent Evaluator. Such actions could include any or all of the following:

1. Within the constraints of the existing contract, take a more forceful approach with the Evaluator regarding the City's expectations for schedule performance.
2. Identify significant "roadblocks" impeding schedule performance, and initiate actions to help clear or mitigate the impact of these roadblocks. This might involve actions to be taken by the Commission, City Council, City staff and/or Evaluator.
3. In light of historical schedule performance, once again consider the reasonableness of a mandated 30-day schedule and the potential downside of proposing any further relaxation in this requirement.
4. Strengthen the language concerning the City's expectations for schedule performance in the upcoming Request for Qualifications (RFQ) for an Independent Evaluator, give greater weight to the level of commitment to schedule performance in evaluating/scoring proposals and include specific language regarding schedule performance (and possible penalties) in the next contract. Proposals submitted in response to the RFQ should be required to include specific commitments regarding steps that would be taken to ensure investigations are afforded a suitably high priority and that sufficient resources are made available to complete investigations in a timely manner.

Attachment

| Complainant | Respondent | Allegation(s) | Complaint Filed | Report Completed | Days Elapsed | Length of Report | Author(s) of Report | Hearing Date(s) |
|-------------|----------------------------|--|-----------------|------------------|--------------|------------------|---------------------|-------------------------|
| Soule | Clancy | Inaccurate/incomplete campaign reports | 6/1/2010 | 7/14/2010 | 43 | 18 | Moye | 7/14/2010 |
| Sandoval | Duong | Inaccurate/incomplete campaign reports | 5/19/2010 | 7/12/2010 | 54 | 30 | Moye | 7/14/2010 |
| Price | Scarlett | Late contribution; late/incomplete reporting | 6/9/2009 | 8/5/2009 | 57 | 12 | Cassman/Moye/Miller | 8/12/2009 |
| Anonymous | McEnergy/Urban Markets | Violations of lobbying ordinance | 12/8/2008 | 4/24/2009 | 137 | 31 | Cassman/Moye/Miller | 4/30/2009 |
| Nguyen | Vu/Duong | Failure to identify responsibility for mailer | 5/28/2008 | 6/18/2008 | 21 | 11 | Cassman/Moye/Miller | 7/2/2008 |
| Kaeding | Reed/Lien/Ajlouny | Excess contributions | 6/15/2007 | 7/6/2007 | 21 | 4 | Cassman/Moye/Miller | 7/11/2007 |
| Reed | Chavez | Excess contributions | 10/31/2006 | 6/11/2007 | 223 | 14 | Cassman/Moye/Miller | 6/13/2007 |
| Chu | Lien et al | Coordination of independent expenditure | 5/16/2007 | 6/8/2007 | 23 | 15 | Cassman/Moye/Miller | 6/13/2007 |
| Lopez | Oliverio/Rubino | Excess contributions | 2/27/2007 | 6/8/2007 | 101 | 11 | Cassman/Moye/Miller | 6/13/2007 |
| Hileman | Chavez/PPM | Improper contributions | 12/22/2006 | 6/7/2007 | 167 | 24 | Cassman/Moye/Miller | 6/13/2007 8/9/2007 |
| Wines | Liccardo et al | Excess contributions | 10/24/2006 | 10/31/2006 | 7 | 11 | Cassman/Moye/Miller | 11/1/2006 |
| Liccardo | Diaz et al | Excess contributions | 10/12/2006 | 10/23/2006 | 11 | 14 | Cassman/Moye/Miller | 10/26/2006 11/1/2006 |
| Burrow | Retired SJ Police/Fire PAC | Violation of contribution period | 10/3/2006 | 10/20/2006 | 17 | 3 | Cassman/Moye/Miller | 10/26/2006 |
| Preminger | SJ/SV Chamber of Commerce | Improper/unreported contributions | 5/17/2006 | 5/26/2006 | 9 | 20 | Cassman/Moye | 5/31/2006 |
| Anonymous | Reed | Failure to obtain contributor info; unreported contributions | 4/27/2006 | 5/26/2006 | 29 | 6 | Moye | 5/31/2006 |

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|-----------------|------------------|--|-------------------------------------|------------------|--------------|------------------|---------------------------|------------------------|
| Anonymous | Cortese | Receipt of improper gift | 9/22/2005 | 10/21/2005 | 29 | 5 | Cassman/ Franklin | N/A |
| A. Nguyen et al | L. Nguyen | Improper contributions | 7/13/2005 | 9/2/2005 | 51 | 12 | Cassman/ Franklin/Gher | 9/7/2005 |
| Pham et al | M. Nguyen | Excess/unreported contributions, etc. | 5/31/2005 6/21/2005 8/16/2005 | 9/2/2005 | N/A | 27 | Cassman/Lee | 9/7/2005 |
| K. Nguyen | L. Nguyen | Improper campaigning | 4/1/2005 | 5/9/2005 | 38 | 14 | Cassman/Moye | 5/12/2005 |
| Reed | Gregory | Receipt of prohibited gifts | 5/28/2004 | 12/8/2004 | 194 | 31 | Cassman/Moye | 12/13/2004 |
| De La Rosa | Pyle | False information in mailer | 10/28/2004 | 11/24/2004 | 27 | 2 | Cassman | 1/27/2005 |
| Garbett | Dando/NBCards | Improperly promoting charitable event | 9/17/2004 | 11/24/2004 | 68 | 4 | Cassman | 1/27/2005 |
| Doyle | Arreola/Kali-Rai | Revolving door violation; failure to register as lobbyist | 3/26/2004 | 8/20/2004 | 147 | 26 | Cassman/Moye | 8/25/2004 9/29/2004 |
| Roeder | Gonzales | Excess contributions/ expenditures for officeholder account | 4/13/2004 | 6/25/2004 | 73 | 28 | Cassman/Moye | 6/28/2004 |