



ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

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March 9, 2010

Zachary Nathan
1108-C Bryant Street
San Francisco, CA 94103-4305

Dear Mr. Nathan:

You have requested a formal written opinion from the Ethics Commission regarding whether the City's one-year post-employment restriction in Campaign and Governmental Conduct Code ("C&GC Code") section 3.234(a) applies to your future communications with the commission to which you were appointed, or to your future communications with the entire City department of which the commission is a part.

The Ethics Commission provides two kinds of advice: written formal opinions and informal advice. S.F. Charter § C3.699-12. Written formal opinions are available to individuals who request advice about their responsibilities under local laws. Formal opinions provide the requester immunity from subsequent enforcement action if the material facts are as stated in the request for advice, and if the District Attorney and City Attorney concur in the advice.¹ *See id.* Informal advice does not provide similar protection. *See id.* Because you seek advice on actions you may take in the future, the Commission is treating your request as a request for formal advice.

Question Presented

You have requested a clarification of the City's year-one post-employment ban, which will prohibit you from communicating with your former unit of government on behalf of anyone other than yourself or the City for one year after you terminate your service on the Access Appeals Commission ("AAC"). Specifically, you ask if the ban applies to your communications with the AAC, which is the commission on which you now serve; or whether the ban extends to communications with the Department of Building Inspection ("DBI"), which includes the Building Inspection Commission ("BIC") as well as the AAC.

¹The Ethics Commission does not act as a finder of fact. Advice is prepared based upon the facts presented by you in this letter. The advice in this letter may provide immunity, but only to the extent that the material facts related to a future enforcement action are presented here.

Short Answer

For one year after your termination of service on the AAC, the one-year post-employment restriction bars you from communicating with the DBI, including the BIC and AAC, on behalf of any other person in order to influence a governmental decision.

Relevant Facts

In December 2009, the BIC appointed you to the AAC. Since then, you have become aware of the City's restriction on compensated advocacy, which bars you from receiving any form of compensation to communicate on behalf of any other person, with any officer or employee of the City in order to influence a governmental decision. *See* C&GC Code § 3.224(a)(2). You have sought a waiver from the compensated advocacy ban from the Commission, and the Commission will consider your request at its March 8, 2010 meeting. In the event that the Commission does not grant your waiver request, it is likely that you will resign from your seat on the AAC. Once you resign from the AAC, you will be subject to the City's post-employment restrictions under C&GC Code section 3.234.²

The AAC was established under California Health and Safety Code section 19957.5 to consider appeals from DBI enforcement decisions regarding disabled access and adaptability provisions of the California Building Code and San Francisco Building Code. *See* San Francisco Building Code § 105A.3.1, Information Guide and Appeals Forms of AAC. The members of the AAC are appointed by the BIC and serve at its pleasure. *See* S.F. Building Code § 105A.3.2. The Director of the DBI or a designated representative serves as the permanent Secretary of the Commission. *See* Rules of the AAC ("Rules"), Rule 3(d). The DBI Inspection staff provides necessary staff services to the Commission. Under the AAC's Rules, the staff representative must "file and process all appeals to the Commission, send all notices required by law or by these rules, prepare the agenda of the meetings of the Commission with a written statement of each case with the agenda materials and give an oral presentation of the case at the Commission's hearing on the matter." *See* Rules, Rule 3(e). The AAC's decisions are final and conclusive as to DBI. *See* S.F. Building Code § 105.3.3.

Members of the AAC file Form 700s, and are listed in DBI's section of the City's Conflict of Interest Code. *See* S.F. C&GC Code § 3.1-155.

Relevant Law

C&GC Code section 3.234(a)(2) provides:

- (2) One-Year Restriction on Communicating with Former Department.

² You have also requested the Commission to grant you a waiver from the post-employment restriction pursuant to San Francisco Campaign and Governmental Conduct Code (C&GC Code) section 3.234(c). Your request will also be considered by the Commission at its March 8, 2010 meeting.

(A) No current or former officer or employee of the City and County, for one year after termination of his or her service or employment with any department, board, commission, office or other unit of the City, shall, with the intent to influence a government decision, communicate orally, in writing, or in any other manner on behalf of any other person (except the City and County) with any officer or employee of the department, board, commission, office or other unit of government, for which the officer or employee served.

Ethics Commission Regulation 3.234-5(a) defines “department, board, commission, office or other unit for which a former City officer or employee served” as follows:

- (1) The department, board, commission, office or other unit of government for which a former City officer or employee served shall be:
 - (A) the unit of City government that the officer or employee directly served at the time he or she left City service, including any government unit to which the officer or employee was loaned; and
 - (B) any other unit of City government subject to the direction and control of the body of City government described in subsection (a)(1)(A) of this regulation.
- (2) The following factors shall be used to determine the unit of government for which a former officer or employee directly served at the time the officer or employee left City service:
 - (A) the unit of government that controlled the budget, personnel and other operations related to the former officer's or employee's position;
 - (B) the department or agency on which the former officer's or employee's position is listed in the City's conflict of interest code (Article III, Chapter 1 of the San Francisco Campaign and Governmental Conduct Code);
 - (C) whether the law creating a unit of government suggests that it is a separate entity; and
 - (D) any other factors the Ethics Commission deems relevant.

Discussion

You were appointed to serve on the AAC. But the AAC is not a stand-alone commission, and the Commission concludes that members of the AAC “directly serve” not just the AAC but the entire DBI. In reaching this conclusion, the Commission considers the factors listed in Regulation 3.234-5(a)(2):

- The DBI controls the budget, personnel and other operations of the AAC. The AAC has no separate budget or personnel, and relies on DBI employees for its Secretary and all administrative support. As a practical matter, the level of support provided is determined by DBI without input from AAC.
- AAC Commissioners are listed in the City's Conflict of Interest Code under the DBI, along with BIC commissioners and DBI employees.

- But the law creating the AAC suggests that it is a separate entity. As noted above, the existence of the AAC derives first from Health & Safety Code Section 19957.5, and the AAC was created by local ordinance codified in the Building Code at section 105A.3. While the law indicates that the AAC is a separate entity, the ordinance creating the AAC contemplates a close relationship between the AAC and the DBI, specifically providing that BIC shall appoint members and DBI shall staff the commission.

Although this is a close question, the Commission concludes, based on these factors, that AAC commissioners “directly serve” the DBI. This conclusion finds support in Example 2 in Regulation 3.234-5(a)(2):

Example 2. A former employee of the Bureau of Street Use and Mapping at the Department of Public Works would be considered a former employee of the Department of Public Works. Although the Department of Public Works is divided into several different bureaus, the Director of Public Works is responsible for the budget, personnel and operations of each bureau; positions within the Bureau of Street Use and Mapping are listed in the City's conflict of interest code under the Department of Public Works; and the laws creating the Department of Public Works do not suggest that each bureau is a separate department.

The AAC is not absolutely analogous to the Bureau of Street Use and Mapping because in contrast to the Bureau, the law creating the AAC suggests that it is a separate entity, not merely a division of the DBI. But the AAC is much like the Bureau in its real-world relationship with the Department of Public Works: a staff member of DBI serves as the AAC's Secretary; the DBI provides necessary staff services to the AAC; and members of the AAC are listed in the City's conflict of interest code under the DBI. For these reasons, the Commission finds that the unit of government for purposes of the one-year post-employment ban is the DBI.

Conclusion

For the reasons discussed above, the unit of government for the one-year post-employment ban for you as a member of the AAC is the DBI.

I hope this information has been helpful to you. Please do not hesitate to let me know if you have questions.

Sincerely,

John St. Croix
Executive Director

By: Mabel Ng
Deputy Executive Director

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