



ETHICS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

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COMMISSIONER

LEEANN PELHAM
EXECUTIVE DIRECTOR

Date: February 11, 2019

To: Members of the Ethics Commission

From: Jeff Pierce, Director of Enforcement & Legal Affairs

Subject: **AGENDA ITEM 4: Proposed Stipulation, Decision, and Order**

- ***In the Matter of Joseph Certain (SFEC Case No. 1718-012)***

Summary: This memorandum provides information regarding the Proposed Stipulation appearing on the Consent Calendar and what the Commission may do next regarding this Proposed Stipulation.

Action Requested: The Commission may approve the Proposed Stipulation by majority vote, or it may provide guidance to Commission Staff regarding the Proposed Stipulation.

Pursuant to the Enforcement Regulations the Commission adopted on January 19, 2018, and which became effective on March 20, 2018, the Executive Director may enter negotiations with a respondent(s) at any time to resolve the factual and legal allegations in a complaint by way of a stipulated order (*i.e.* a negotiated settlement). Enforcement Reg. § 12(A). The Regulations require that the stipulated order set forth the pertinent facts and may include an agreement as to anything that could be ordered by the Commission under its authority pursuant to Charter section C3.699-13. *Id.*

Immediately after the Executive Director enters a stipulated order with a respondent, the Executive Director must inform the Commission of the proposed stipulation. Enforcement Reg. § 12(E). Thereafter, any member of the Commission may request that the stipulated order be reviewed in public session by the full panel of the Commission during its next meeting. *Id.*

As of today, February 11, 2019, no Commissioner had requested review of the attached stipulated order in public session by the full panel of the Commission. It therefore appears on the Consent Calendar. The Commission may approve the stipulation by majority vote, or it may provide guidance to Commission Staff regarding the Proposed Stipulation. Enforcement Reg. § 12(F).

Members of the public may comment on the stipulated order.

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Executive Director
2 Jeffrey Zumwalt
Investigative Analyst

3 San Francisco Ethics Commission
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7 BEFORE THE SAN FRANCISCO
8 ETHICS COMMISSION

9
10 In the Matter of) SFEC Complaint No. 1718-012
11 JOSEPH CERTAIN,)
12)
13 Respondent.) **STIPULATION, DECISION**
14) **AND ORDER**
15)

16 THE PARTIES STIPULATE AS FOLLOWS:

17 1. This Stipulation, Decision, and Order ("Stipulation") is made and entered into by and
18 between Joseph Certain ("Respondent") and the San Francisco Ethics Commission ("the Commission")
19 (collectively, "the parties").

20
21 2. Respondent and the Commission agree to settle and resolve all factual and legal issues
22 in this matter and to reach a final disposition without an administrative hearing. Upon approval of this
23 Stipulation and full performance of the terms outlined in this Stipulation, the Commission will take no
24 future action against Respondent, and this Stipulation shall constitute the complete resolution of all
25 claims by the Commission against Respondent related to the violations of law described in Exhibit A.
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Respondent understands and knowingly and voluntarily waives all rights to judicial review of this Stipulation and any action taken by the Commission or its staff on this matter.

3. Respondent acknowledges responsibility for and agrees to pay an administrative penalty in the amount of One Thousand Dollars (\$1,000) for one violation of the San Francisco Campaign and Governmental Conduct Code ("SF C&GCC") section 3.218(a) as set forth in Exhibit A. Respondent agrees that \$1,000 is a reasonable administrative penalty.

4. Within ten business days of the Commission's approval of this Stipulation, Respondent shall either pay the penalty through the City's online payment portal or otherwise deliver to the following address the sum of \$1,000 in the form of a check or money order made payable to the "City and County of San Francisco:"

San Francisco Ethics Commission
Attn: Enforcement & Legal Affairs Division
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

5. Respondent agrees not to engage in any future employment, activities, or enterprises deemed incompatible by the Respondent's department in violation of SF C&GCC section 3.218(a).

6. If Respondent fails to comply with the terms of this Stipulation, then the Commission may reopen this matter and prosecute Respondent under Section C3.699-13 of the San Francisco Charter for any available relief.

7. Respondent understands, and hereby knowingly and voluntarily waives, any and all procedural rights under Section C3.699-13 of the San Francisco Charter and the Commission's Enforcement Regulations with respect to this matter. These include, but are not limited to, the right to appear personally at any administrative hearing held in this matter, to be represented by an attorney at Respondent's expense, to confront and cross-examine all witnesses testifying at the hearing and to subpoena witnesses to testify at the hearing.

1 8. Respondent understands and acknowledges that this Stipulation is not binding on any
2 other government agency with the authority to enforce the San Francisco Campaign & Governmental
3 Conduct Code section 1.100 *et seq.*, and does not preclude the Commission or its staff from cooperating
4 with or assisting any other government agency in its prosecution of Respondent for any allegations set
5 forth in Exhibit A, or any other matters related to those violations of law set forth in Exhibit A.

6 9. This Stipulation is subject to the Commission's approval. In the event the Commission
7 declines to approve this Stipulation, the Stipulation shall become null and void, except Paragraph 10,
8 which shall survive.

9 10. In the event the Commission rejects this Stipulation, and further administrative
10 proceedings before the Commission are necessary, Respondent agrees that the Stipulation and all
11 references to it are inadmissible. Respondent moreover agrees not to challenge, dispute, or object to
12 the participation of any member of the Commission or its staff in any necessary administrative
13 proceeding for reasons stemming from his or her prior consideration of this Stipulation.

14 11. This Stipulation, along with the attached Exhibit A, reflects the entire agreement
15 between the parties hereto and supersedes any and all prior negotiations, understandings, and
16 agreements with respect to the transactions contemplated herein. This Stipulation may not be
17 amended orally. Any amendment or modification to this Stipulation must be in writing duly executed by
18 all parties and approved by the Commission at a regular or special meeting.

19 12. This Stipulation shall be construed under, and interpreted in accordance with, the laws
20 of the State of California. If any provision of the Stipulation is found to be unenforceable, the remaining
21 provisions shall remain valid and enforceable.

22 13. The parties hereto may sign different copies of this Stipulation, which will be deemed to
23 have the same effect as though all parties had signed the same document.
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Dated: 2/5/2019



LeeAnn Pelham, Executive Director
San Francisco Ethics Commission

Dated: 1/29/19



Joseph Certain

DECISION AND ORDER

The foregoing Stipulation of the parties in the matter of “Joseph Certain; SFEC Complaint No. 1718-012,” including the attached Exhibit A, is hereby accepted as the final Decision and Order of the San Francisco Ethics Commission, effective upon execution below by the Chairperson.

IT IS SO ORDERED.

Dated: _____

Daina Chiu, Chairperson
San Francisco Ethics Commission

Exhibit A

I. Introduction

Respondent Joseph Certain (Respondent Certain) has served as a Firefighter with the San Francisco Fire Department (SFFD) since 1994 and is currently assigned to the Airport Division. In addition to serving as a firefighter, Respondent Certain has operated various online businesses to generate more income. To promote one particular product, Respondent Certain filmed a video inside a City firehouse that includes him speaking about the product while wearing an SFFD uniform. Respondent Certain would later upload the video to his account on YouTube. Respondent Certain also created at least one more video in which he directs viewers to one of his promotional websites and otherwise promotes his image as a business man, a video that included, in the background, photographs of himself in his SFFD uniform and before a clearly identified SFFD fire engine. In addition to these videos, Respondent Certain maintained a website that sold shirts printed with the “SFFD” abbreviation and other firefighting images. In doing so, Respondent Certain violated provisions of the SFFD Statement of Incompatible Activities (SIA) that prohibits firefighters from (1) using City resources for personal purposes and (2) using their designation as a firefighter for private gain or advantage, in violation of San Francisco Campaign and Governmental Conduct Code section 3.218(a).

II. Applicable Law

The San Francisco Campaign & Governmental Conduct Code (SF C&GCC) prohibits City officers and employees from engaging in employment, activities, or enterprises that their department has identified as incompatible in a Statement of Incompatible Activities (SIA). SF C&GCC § 3.218. The San Francisco Fire Department (SFFD) SIA has identified the following activities as incompatible, and therefore prohibited, with the duties of a San Francisco Fire Department employee:

No officer or employee may use City resources, including, without limitation, facilities, telephone, computer, copier, fax machine, e-mail, internet access, stationery and supplies, for any non-City purpose, including any political activity or personal purpose.

SFFD SIA, § IV(A).

No officer or employee may use City letterhead, City title, City e-mail, or any other City resource, for any communication that may lead the recipient of the communication to think that the officer or employee is acting in an official capacity when the officer or employee is not.

SFFD SIA, § IV(C)(2).

Respondent Certain’s conduct, as an active member of the SFFD, is governed by the SFFD SIA.

III. Summary of Material Facts

Respondent Certain utilized the business name “No9to5Inc” when promoting online entrepreneurial strategies and various business ventures. At times during the conduct addressed in this matter, Respondent Certain maintained a website, www.No-9-to-5.com, and the email address

no9to5inc@gmail.com. Respondent Certain uploaded a video to YouTube under the user name “No9to5Inc.” titled “Bluetthooth [sic] Game Changer.” The video featured Respondent Certain wearing his SFFD uniform while sitting in a room at a City firehouse.

During the video, Respondent Certain introduces a product that is available for purchase, what he refers to as the “Bluetooth Game Changer,” which works by transmitting a signal to all electronic devices within signal range and delivering an advertising message to the devices via Bluetooth signal. In the video, Respondent Certain states that the product is so new and exciting that he was unable to wait until he left the firehouse to tell potential customers about the product. Respondent Certain also refers to himself in the video as the “friendly, favorite firefighter.”

IV. Conclusions of Law

Count 1: Violation of the San Francisco Fire Department’s Statement of Incompatible Activities

By appearing in the YouTube video “Bluetooth Game Changer” in his SFFD uniform and filming it inside of a City firehouse, Respondent Certain violated the provisions of section IV(A) of the SFFD’s SIA prohibiting the use of City resources for personal purposes.

By referring to himself as the “friendly, favorite firefighter,” Respondent Certain attempted to associate his position as a firefighter with the SFFD with the product, to generate goodwill and increase the likelihood that viewers would participate in the venture. He therefore, violated section IV(C)(2) of the SFFD’s SIA prohibition on the use of City resources for any communication that may lead the recipient of the communication to think that the officer or employee is acting in an official capacity when the officer or employee is not.

Therefore, because Respondent Certain’s conduct violated provisions of the SFFD SIA by engaging in conduct identified as incompatible with the public duties of members of the SFFD, he violated SF C&GCC section 3.218(a).

V. Penalty Assessment

This matter consists of one violation of the SF C&GCC carrying a maximum total administrative penalty of \$5,000, as authorized by the SF Charter at section C3.699-13(c).

Regulation 3.218-8(b)¹ requires the Commission to assess the impact of Respondent Certain’s

¹ The exact language of Regulation 3.218-8(b) follows: “Penalties for other violations of the SIA will depend upon the Ethics Commission’s assessment of the impact of the respondent’s activities on the City and the department,

activities on the City and the SFFD as a whole; compliance with other applicable laws and rules; whether the violation was an isolated incident or part of a pattern of violations; whether Respondent Certain or others were inappropriately enriched by the activity; whether the violation was negligent, knowing, or intentional; and the intent and spirit of the SIA.

Respondent Certain cooperated fully with Staff's investigation, provided pertinent details previously unknown to Staff, and acknowledged his wrongdoing. Staff finds that his violations were not willful and has no evidence that Respondent Certain intended to conceal, deceive, or mislead Staff or his department. Respondent Certain stated that he did not receive any income as a result of the "Bluetooth Game Changer" YouTube video and the video has since been removed from the website. When last reviewed by Staff, the video had logged approximately 140 views in the year it had been available for view on YouTube. Respondent Certain has also made assurances to Staff that going forward he will keep his employment with the SFFD and position as a firefighter separate from any non-City purposes, including any political activity or personal purpose.

The evidence shows that Respondent Certain dressed for work and made the video prior to the start of his shift. Respondent Certain maintains that he wore his SFFD uniform and made the video at the City firehouse through a lapse in judgment and was not intending to influence the decisions of potential customers by doing so. While Respondent Certain acknowledges that wearing his uniform and filming the video at the City firehouse were inappropriate, Respondent Certain stated his belief that firefighters are still permitted to engage in personal conduct while on-duty in City uniform and on City property.

However, Respondent Certain's conduct in this matter is prohibited not only by the SIA but also by the SFFD's Rules and Regulations. Section 3902 of the SFFD's Rules and Regulations prohibits the Unauthorized Use of Uniform for any purpose except to perform the member's official job duties. Section 3904, addressing Active Participation in Employment, Business or Enterprise, prohibits members from participating in any non-Fire Department employment, business, or enterprise while on duty, on Department property, on Department business or in uniform.

Based on the foregoing, Staff believes the maximum penalty of \$5,000 for Respondent Certain's violation of the SIA is not warranted. In light of the penalty factors and penalties that respondents have paid in roughly analogous scenarios, Staff has proposed a penalty of \$1,000 for this violation. Ethics Commission Staff and the Respondent have agreed upon an administrative penalty of \$1,000 for one violation of SF C&GCC section 3.218 as set forth in the Stipulation, Decision, and Order.

board or commission as a whole; compliance with other applicable laws and rules; whether the violation was an isolated incident or part of a pattern of violations; whether the respondent or others were inappropriately enriched by the activity; whether the violation was negligent, knowing or intentional; and the intent and spirit of the SIA; and any other factors that the Ethics Commission deems appropriate and material."