

Gayathri Thaikkendiyil
Acting Executive Director

Patrick Ford
Director of Enforcement

San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102
(415) 252-3100

BEFORE THE SAN FRANCISCO

ETHICS COMMISSION

In the Matter of)	SFEC Complaint No. 2223-506
)	
Frank Fung,)	
)	
Respondent.)	STIPULATION, DECISION, AND ORDER
)	
)	
_____)	

THE PARTIES STIPULATE AS FOLLOWS:

1. This Stipulation, Decision, and Order (Stipulation) is made and entered into by and between Frank Fung (hereinafter "Respondent") and the San Francisco Ethics Commission (the Commission).
2. Respondent and the Commission agree to settle and resolve all factual and legal issues in this matter and to reach a final disposition without an administrative hearing. Respondent represents that Respondent has accurately furnished to the Commission all information and documents that are relevant to the conduct described in Exhibit A. Upon approval of this Stipulation and full performance of the terms outlined in this Stipulation, the Commission will take no future action against Respondent

regarding the violations of law described in Exhibit A, and this Stipulation shall constitute the complete resolution of all claims by the Commission against Respondent related to such violations. 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 as set forth in Exhibit A. Respondent agrees that the administrative penalty set forth in Exhibit A 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 as set forth in Exhibit A 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. If Respondent fails to comply with the terms of this Stipulation, then the Commission may reopen this matter and prosecute Respondents under Section C3.699-13 of the San Francisco Charter for any available relief.

6. 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.

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

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

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

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

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

12. The parties hereto may sign different copies of this Stipulation, which will be deemed to have the same effect as though all parties had signed the same document.

07-20-2023 | 14:45:26 PDT
Dated: _____ DocuSigned by: Gayathri Thaikkendiyil
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GAYATHRI THAIKKENDIYIL, ACTING EXECUTIVE DIRECTOR
SAN FRANCISCO ETHICS COMMISSION

07-20-2023 | 14:35:30 PDT
Dated: _____ DocuSigned by: Frank Fung
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FRANK FUNG

DECISION AND ORDER

The foregoing Stipulation of the parties in the matter of “Frank Fung, SFEC Complaint No. 2223-506,” 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: _____

YVONNE LEE, CHAIRPERSON

SAN FRANCISCO ETHICS COMMISSION

Exhibit A

I. Introduction

Frank Fung (“Respondent”) served as a Planning Commissioner from May 1, 2019 to June 30, 2022, when his term expired. Respondent first began City service when he was appointed to the Board of Appeals (“BOA”) in 1986 and served until 1988. Respondent was then reappointed to the BOA in 2004 where he served following multiple reappointments until his appointment to the Planning Commission in 2019. Respondent has served as a City commissioner for a total of 20 years.

Respondent is also the president of the architectural firm ED2 International (“ED2”) in which he has a 50% ownership stake. Respondent held that position at all times relevant to this matter. In May 2021, while Respondent was serving as a Planning Commissioner, ED2 entered into a subcontract with the Airport Commission through an agreement with a primary contractor, Plant Construction Company (“Plant Construction”). Respondent signed the contractual agreement with Plant Construction on behalf of ED2. The subcontract between ED2 and the Airport Commission constituted a violation of City ethics laws on Respondent’s part because Respondent was a City officer. ED2 received the amount of \$39,460 pursuant to the contract.

Additionally, on his Form 700 financial disclosures for calendar years 2019, 2020, 2021, and a leaving office disclosure filed in 2022, Respondent reported ED2 as a source of income but failed to list each individual source of income to ED2 of \$10,000 or more as required under the law, in violation of City and State ethics laws.

II. Applicable Law

Prohibition on City Officers Contracting with the City

During his or her term of office, no City officer shall enter, submit a bid for, negotiate for, or otherwise attempt to enter, any contract or subcontract with the City where the amount of the contract or the subcontract exceeds \$10,000. SF C&GCC § 3.222(b). For purposes of this prohibition, a “contract” is any agreement other than a grant or an agreement for employment in exchange for salary and benefits. *Id.* § 3.222(a)(3). A “subcontract” is a contract to perform any work that a primary contractor has an agreement with the City to perform. *Id.* § 3.222(a)(4). The contracting prohibition applies to a contract or subcontract with a business entity if the officer exercises management and control over the entity. *Id.* § 3.222(c)(2).

Financial Disclosures (Form 700)

SF C&GCC section 3.1-102(a)(1) requires City officers and many City employees to file a Form 700 Statement of Economic Interests. Such officials must file within 30 days of assuming or leaving office and must also file annually by April 1st to report financial interests during the previous calendar year. SF C&GCC section 3.1-102(a); 2 CCR 18730.

Members of the Planning Commission must file the Form 700 with the Commission and are designated as Category 2 filers, meaning that they must “disclose all interests in real property, and all

income from, and investments and business positions in any business entity that is principally involved in real estate development, architecture, design, engineering, real estate brokerage, real estate finance or appraisal, or historic preservation." SF C&GCC §§ 3.1-103(a)(1), 3.1-335. When reporting their share of income to a business entity, commissioners are required to disclose the name of each source of income to the business entity if their pro rata share of the gross income to the business entity from that source was \$10,000 or more during the reporting period. Cal. Gov. Code section 87207(b)(2).

Under state law (which is incorporated by reference through C&GC Code section 3.1-101), *income* is defined as "a payment received, including, but not limited to, any salary, wage, advance, dividend, interest, rent, [or] proceeds from any sale..." received from a source that is located in or doing business in the jurisdiction. Cal. Gov. Code section 82030. A business entity is any organization or enterprise operated for profit including, but not limited to, a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation, or association. Cal. Gov. Code section 82005.

III. Material Facts and Analysis

Contracting with the City

Respondent is the president of the architectural, planning, and interior design firm ED2. Respondent has a 50% ownership stake in ED2. Respondent also served as a City officer from 2004 to June 30, 2022.

In 2021, Respondent again entered into a subcontract with the City in violation of City ethics laws. On September 9, 2020, while Respondent was a member of the Planning Commission, the San Francisco Airport issued a request for proposals (RFP) for design-build services for the Sewer Treatment Plant Improvements Project. On January 8, 2021, the Airport received five proposals, including a proposal from Plant Construction. As part of its proposal, Plant Construction listed Respondent's company, ED2, as a potential subcontractor.

On May 5, 2021, the Airport Commission approved a contract with Plant Construction for the Sewer Treatment Plant Project, including a subcontract with the design firm ARUP. ED2 had an existing sub-contractual relationship with ARUP, a consulting firm consisting of design, engineering, and sustainability consultants. On January 20, 2022, ED2 submitted a fee proposal to ARUP, seeking to become a subconsultant to ARUP on the Sewer Treatment Plant project. Based on the contractual agreement between ED2 and ARUP, ED2 became a subcontractor on the Sewer Treatment Plant Project. Airport payment records show that ED2 received a total payment amount of \$39,460 based on the work performed under the contract. ED2 did not receive any further payment under the contract, and no further payment is due to ED2.

Because Respondent was a City officer, he was prohibited from entering or attempting to enter into any contract or subcontract with the City. Here, because Respondent entered into a subcontract with the City, Respondent violated City ethics laws.

Financial Disclosures (Form 700)

Each year between 2019 and 2022, while a member of the Planning Commission, Respondent filed Form 700s, including three annual disclosures covering calendar years 2019-2021 and a leaving office form covering January through August 2022. On each of these Form 700s, Respondent reported receiving a pro rata share of over \$100,000 of gross income, including his pro rata share of the gross income to the business entity ED2 in which he holds a 50% stake. However, on none of these Form 700s did Respondent report the name of each source of income of \$10,000 or more to ED2 as required under the law. Notably, the last time Respondent disclosed this reportable information was in 2012. Since 2013, Respondent has failed to disclose this information.

After being contacted by Commission investigators, Respondent amended his Form 700s for calendar years 2019-2022 to disclose each source of income of \$10,000 or more to ED2 as required. Respondent identified one source in 2019, one source in 2020, two sources in 2021, and three sources in 2022. In total, Respondent failed to report seven sources of income of \$10,000 or more.

For the sources of income identified on Respondent's amended forms, Investigators found no evidence that any of them had matters before the Planning Commission during the relevant time periods that could have given rise to the financial conflict of interest.

IV. Violations of Law**Count 1****Entering a City subcontract while serving as a City officer in violation of SF C&GCC Section 3.222(b)**

Count 1: By submitting a bid for and entering into a subcontract with the City where the amount of the subcontract exceeded \$10,000, Respondent violated SF C&GCC Section 3.222(b).

Count 2**Failure to disclose reportable sources of income on Annual Statement of Economic Interests (Form 700) in violation of SF C&GCC Section 3.214**

Count 2: On four separate Form 700s Respondent filed for calendar years 2019, 2020, 2021, and 2022, Respondent failed to report seven sources of income from which he received \$10,000 or more through his business entity in violation of SF C&GCC § 3.1-103(a)(1).

V. Penalty Assessment

This matter consists of two counts in violation of the San Francisco Campaign and Governmental Conduct Code. The San Francisco Charter authorizes the Commission to assess a maximum administrative penalty of \$5,000 per violation. SF Charter § C3.699-13(c). Alternatively, the Ethics Commission may impose a penalty of "three times the amount which the person failed to report properly or unlawfully contributed, expended, gave or received." SF Charter § C3.699-13(c)(i)(3).

Per Commission Regulations section 9(D), when determining penalties, the Ethics Commission considers all of the relevant circumstances surrounding the case, including but not limited to: (a) the severity of the violation; (b) the presence or absence of any intention to conceal, deceive, or mislead; (c) whether the violation was deliberate, negligent or inadvertent; (d) whether the violation was an isolated incident or part of a pattern; (e) whether the respondent has a prior record of violations of law; and (f) the degree to which the respondent cooperated with the investigation and demonstrated a willingness to remedy any violations.

The ethics laws at issue in this case help to ensure that public office is not used for, nor appears to be used for, personal gain or unfair advantage. Violations of these laws can compromise the public's trust in the integrity of City government. In particular, City and County contracts should be, and should appear to be, awarded on a fair and impartial basis. If City officers contract with the City, directly or indirectly, it creates a potential for, and the appearance of, favoritism or preferential treatment by the City and improper awarding of public contracts.

Although Respondent's term ended, and he is no longer a City officer, Respondent's position as a Commissioner increases the severity of his violations. City Commissioners are one of the few categories of City officials currently required to complete ethics training because of the importance of their governmental decision making. Throughout his time serving on City Commissions or Boards, Respondent reported that he completed these trainings. Specifically, Respondent certified that he completed ethics training each year between 2018 and 2022. The version of the training in effect during that period included a slide stating, "City officers may not enter into contracts worth more than \$10,000 with the city... This ban also applies to businesses managed and controlled by the officer." Prior to 2018, certification of completing the ethics training was required only every two years. Respondent certified in 2012, 2014, and 2016 that he completed the ethics training. The 2014 version of the ethics training included a slide identical in substance to the slide described above.

Regarding Count 1, Respondent potentially created the appearance of favoritism and preferential treatment by entering into a subcontract with the City. Notably, Respondent has also engaged in previous contracts with the City on at least two other separate occasions, including a contract to provide design services in connection with the Airport Boarding Area B Project in March 2015 and another contract entered into in September 2015 to provide services in connection with the Airport Hotel Project. Although these two contracts are not included as part of the counts within this stipulation because they were entered into more than four years ago, which is a period beyond the statute of limitations pursuant to Section 13 of the Enforcement Regulations, the contracts demonstrate a history of violations of section 3.222(b) by Respondent and are, therefore, considered to be aggravating factors relevant to this matter.

ED2, a company in which Respondent has a 50% stake, received a total payment of \$39,460 under the Sewer Treatment Plant Project. Thus, 50% of the payment under the contract may be attributed to Respondent, in the amount of \$19,730. Accordingly, the appropriate penalty amount for this count is \$20,000, which covers the full amount attributable to Respondent under the contract and reflects the appropriate consequence for Respondent's conduct.

Regarding Count 2, Respondent's failure to publicly disclose a total of seven reportable single source of income of \$10,000 or more for calendar years 2019, 2020, and 2021, and his leaving office filing covering the period between January and August 2022 prevented the effective monitoring of his financial interests and the identification of when those interests might conflict with his government actions. It is the purpose and intent of the law that City officers and employees disclose their personal financial interests in order to protect public confidence in governmental processes. Respondent has since amended his filings to disclose the income and there was no evidence of a deliberate intention to conceal, deceive or mislead by Respondent. In a prior Ethics Commission enforcement case, (SFEC Case No. 2021-026, In the Matter of Darryl Honda) a penalty of \$600 was assessed for each reportable source of income that the respondent failed to disclose. The facts of the current case are similar to the Honda case, and it is thus appropriate to use the same penalty rate. The appropriate penalty amount for Count 2 is thus \$600 per omitted source of income, totaling \$4,200.

In mitigation, Respondent cooperated with the investigation and, as stated above, has also amended all of his Form 700s to come into compliance. Additionally, as stated above, Respondent is no longer a City officer.

In balancing the above facts and considering the penalty factors and prior analogous enforcement cases resolved by the Ethics Commission, and to promote a future deterrent effect, Staff proposes, and Respondent agrees to, the following penalty for the above listed violation of City law:

Count 1 (City Contracting by a City Officer): \$20,000

Count 2 (Form 700 Disclosures): \$4,200

TOTAL PENALTIES: \$24,200