
City Attorney

City of Oakland
Public Ethics Commission
September 12, 2005

In the Matter of)
) Complaint No. 05-08
)

Complaint No. 05-08 was filed by Marilyn Bartholomew on May 19, 2005.

I. SUMMARY OF COMPLAINT AND ALLEGATIONS

On November 29, 2004, Marilyn Bartholomew attempted to file a complaint with the Public Ethics Commission regarding various public records requests made to the City's Civil Service Board ("Complaint #1"). On November 30, 2004, the Executive Director contacted Ms. Bartholomew to initiate mediation between her and the Civil Service Board on the complaint as required by Section 2.20.270 (f).

The instant complaint (No. 05-08 as "Complaint # 2") is not about the public records acts matters. Rather, the instant complaint is about the mediation process for Complaint #1. Ms. Bartholomew filed Complaint #2 requesting that the Commission assign a mediator other than Executive Director Daniel Purnell and alleging that the Executive Director had violated the Sunshine Ordinance. **Attachment 1.**

Even though there may be no legal conflict of interest, Executive Director Purnell asked the City Attorney's Office to review the complaint.

II. ANALYSIS

Please see accompanying analysis by the City Attorney's Office.

III. STAFF RECOMMENDATION

Commission staff recommends that the Commission take the following action on Complaint No. 05-08:

As to Ms. Bartholomew's allegations pertaining to the selection of an outside mediator and failure of the Executive Director to mediate, the Commission should dismiss the complaint. Complaint #1 will then be allowed to proceed.

Respectfully submitted,

Niccolo De Luca
Specially Assigned Commission Staff

SPECIAL ASSIGNMENT OF STAFF

Pursuant to Oakland Municipal Code section 2.24.080, I hereby assign Niccolo De Luca staff to the Public Ethics Commission to act as Executive Director for Complaint No. 05-08

Dated: _____

Deborah Edgerly
City Administrator

CITY OF OAKLAND
CITY ATTORNEY'S OFFICE
MEMORANDUM

TO: Public Ethics Commission
FROM: Mark T. Morodomi
City Attorney's Office
DATE: October 3, 2005
RE: City Attorney's Analysis of Complaint No. 05-08

Executive Director Recusal and City Administrator Appointment

Executive Director Daniel Purnell has voluntarily recused himself from this matter to avoid even the appearance of conflict of interest.

Oakland Municipal Code section 2.24.080 gives the City Administrator (previously named the City Manager) the power to appoint staff to the Public Ethics Commission.

The ordinance when enacted contemplated that the City Administrator have the power to appoint alternative individuals if a specific staff member has a potential conflict of interest or to avoid the appearance of a possible conflict of interest. (Ordinance No. 12101 C.M.S.)

Accordingly, the City Administrator has assigned Niccolo De Luca specially on this matter.

I. THE LAW

A person must first engage in Commission supervised mediation before she can file an complaint regarding with the Ethics Commission public records. (Sunshine Ordinance Section 2.20.270(f).) That section provides in relevant part:

"No person may file a complaint with the Public Ethics Commission alleging the failure to permit a timely inspection or copying of a public record unless he or she has requested and participated in mediation as specified in Section 2.20.270(C)."

The intent of the section is to provide an opportunity for the resolution of disputes before they ripen into formal complaints. The mediation is before "the Executive Director of the Public Ethics Commission, or some mutually agreed person

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who agrees to volunteer his or her time” (Sunshine Ordinance Section 2.20.270(C)(1) emphasis added.) The mediator attempts to resolve the dispute to the mutual satisfaction of the parties. His recommendations are not binding on any party. (Id. At (C)(3).)¹

II. THE FACTS

This mediation began on November 30, 2004. However, on December 30, 2004, Ms. Bartholomew informed the Executive Director, because of the lack of progress in the mediation, she desired that her public records complaint (Complaint #1) proceed to the Commission instead.

On January 8, 2005, the Executive Director wrote back to Ms. Bartholomew providing information he had obtained from the Personnel Department on her public records request and informing her that Complaint #1 would proceed to the Ethics Commission if the new information was unsatisfactory to her.

On January 10 and 15, 2005, Ms. Bartholomew requested the Executive Director to obtain further information from the Personnel Department regarding Complaint #1. The Executive Director obtained more information from the Personnel Department and relayed the information on to Ms. Bartholomew on February 1, 2005. He also informed Ms. Bartholomew that the mediation had concluded, and that if she was dissatisfied with the information, Complaint #1 could proceed to the Ethics Commission.

Ms. Bartholomew wrote back on February 8, 2005 asking that the Executive Director obtain answers to nine more questions from the Personnel Department. The Executive Director forwarded the letter to the Civil Service Board staff and again informed Ms. Bartholomew that she had fulfilled her mediation requirements and that she could activate Complaint #1.

On March 4 and 17, 2005, Ms. Bartholomew again requested that the Executive Director obtain the answers from the Civil Service Board and complained that the mediation was taking too long.

She filed the instant complaint (Complaint #2) on May 19, 2005, against the Commission’s Executive Director. The complaint requested that the Commission assign an outside mediator.

Because the complaint was made against him, the Executive Director forwarded Complaint #2 to the City Attorney’s Office and the Chair of the Commission.

On July 7, 2005, the Department of Personnel refused to “mutually agree” to an outside mediator. That same day, the City Attorney’s Office, on behalf of the

¹ “Mediation” is not defined in the Sunshine Ordinance. A helpful definition is in the state Code of Civil Procedure. It is “a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.”

Commission, informed Ms. Bartholomew that because there was no “mutual agreement” on an outside mediator, the parties were at “impasse” and the mediation was complete.

On July 12, 2005, Ms. Bartholomew wrote back arguing that the mediation was not complete and repeated her request that the Commission appoint another mediator.

III. ANALYSIS

Paragraph (1) of Section 2.20.270(C) states that a person may demand immediate mediation with the Executive Director "or some mutually agreed person who agrees to volunteer his or her time. . ." (Emphasis added.) An outside mediator can only be assigned if the parties agree upon a person and that person agrees to volunteer his or her time. Because the Department of Personnel did not agree to an outside mediator, no outside mediator can be appointed.

Finally, the record shows that the Executive Director has attempted to mediate the underlying dispute. The Executive Director has sent three letters and made at least one telephone call to Ms. Bartholomew in an attempt to act as an intermediary between her and the Department of Personnel. To facilitate communication between the parties, he has obtained information from the Dept. of Personnel and provided the information to Ms. Bartholomew.

The Executive Director has fulfilled his duties under the Sunshine Ordinances.

IV. CONCLUSION

The complaint should be dismissed as it seeks relief is not available under the Sunshine Ordinance.