

**CITY OF OAKLAND**  
**Public Ethics Commission**

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**TO:** Public Ethics Commission  
**FROM:** Daniel Purnell  
**DATE:** July 12, 2004

**RE: A Staff Report And Action To Be Taken Regarding A Request By City Auditor Roland Smith To Consider A Proposal To Restrict Political Activities By The City Administrator**

**I. BACKGROUND**

At its regular meeting of March 1, 2004, the Commission considered a request from Oakland City Auditor Roland Smith to determine whether any law prohibits City officers from taking a position on local ballot measures. If such laws do not exist, he requests the Commission to consider initiating one. **Attachment 1.**

Mr. Smith's request was prompted by a piece of campaign literature in support of Measure P in the March, 2004, election. This Oakland ballot measure contained a series of amendments to the Oakland City Charter affecting the so-called "strong mayor" initiative, commonly known as "Measure X." Certain Oakland residents received the campaign piece in the mail. The mailing consisted of a single page featuring the City of Oakland's "tree" logo. A campaign committee known as the "Yes On Measure P Committee" paid for the mailer. **Attachment 2.**

Among those listed on the campaign mailing in support of Measure P was "City Manager Deborah Edgerly." Ms. Edgerly had been acting as the City Manager since her appointment to that position in July, 2003, by Oakland Mayor Jerry Brown. (As a result of the passage of Measure P, the office of "City Manager" has been redesigned to that of "City Administrator.")

## II. ANALYSIS

The Oakland City Charter identifies as "officers of the city" the Mayor, City Councilmembers, City Manager (now "City Administrator"), City Attorney, City Clerk, City Auditor, and "such department heads, members of boards and commissions and executive officers of such boards and commissions as may be so designated by ordinance." [City Charter Section 400] The City Clerk, City Administrator and the various department heads are appointed positions which are compensated through employment contracts or employment relationships with the City.

The question which Mr. Smith presents is whether the City of Oakland may, by local law, regulate the political activities of any of the above City officers as those activities pertain to supporting or opposing local ballot measures. Based on a reading and interpretation of California law, the answer is probably "no."

Chapter 9.5 of the California Government Code generally regulates the political activities of public employees. Section 3201 provides:

"The Legislature finds that political activities of public employees are of significant statewide concern. The provisions of this chapter shall supersede all provisions on this subject in the general law of this state or any city, county, or city and county charter except as provided in Section 3207." [**Note:** Section 3207 permits local agencies to adopt restrictions on political activities that occur during working hours and on the premises of a local agency. See discussion below.]

Government Code Section 3203 further provides:

"Except as otherwise provided in this chapter, or as necessary to meet the requirements of federal law as it pertains to a particular employee or employees, no restriction shall be placed on the political activities of any officer or employee of a state or local agency." [Emphasis added.]

From the above language, it appears that the state has expressly preempted the field of regulation over political activities by local employees. As a general rule, when a state law contains express provisions which declare the legislature's intent to preempt local regulation, a local law will likely be invalidated unless it is found to regulate a different "field" of activity or involves a judicially declared "municipal affair" of a charter city. [Cal. Const. art. XI, §7; See also Bishop v. City of San Jose (1969) 1 Cal.3d 56, 61.]

In this situation, state law has preempted the field of "political activity" by local government officers and employees. Since Chapter 9.5 does not define what "political activity" means, there is a slight question of whether a city officer's expressed support or opposition for a local ballot measure would qualify as a political activity.

In California Common Cause v. Duffy (1987) 200 Cal.App.3d 730, the court determined that a county sheriff engaged in "political activity" when he distributed postcards criticizing former California Chief Justice Rose Bird and which encouraged Chief Justice Bird to resign from office. The court ruled that the distribution of the cards constituted "political activity" since the postcards were printed by a private campaign committee and "did not merely present the facts both good and bad as to the Chief Justice's tenure or her judicial opinions but rather argued only one side. Distribution of these postcards was not 'informational' activity; it was political." Duffy at 747-748.

Based on the ruling in Duffy, it is likely that a City employee's expression of support or opposition to a local ballot measure, in which the communication is printed by a private campaign committee and which only advances one side of the issue, would constitute a "political activity" which cannot be regulated by local law.

Government Code Section 3203 does permit local agencies to regulate political activities which occur on public property or during work hours. There is no indication that any political activity in connection with Measure P took place on public property or during work hours. Even if Oakland were to adopt such a local law, it would not preclude City officers or employees from expressing their political views on their own time.

Commission staff notes that it may be possible to craft a local law that would prohibit City officers or employees from using or lending their City titles in connection with their expressed support or opposition to a local ballot measure. Such a law would arguably be a "municipal affair" over which a charter city like Oakland could regulate and governs an activity (i.e., the use of City titles) that is technically outside the field preempted by the state (i.e., political activity). The drawback to such an approach is that it would only apply to City officers and employees and not to other people. An attempt to regulate what other people may or may not represent in their campaign literature would likely face serious challenges under the First Amendment.

### **III. CONCLUSION**

Commission staff concludes that the City may not regulate political activities by a City officer or employee except during work hours or while on City premises. However, Commission staff does not believe, as a practical matter, that such an approach would effectively preclude the expression of political views in future campaigns.

Respectfully submitted,

Daniel D. Purnell  
Executive Director