

Item #4 - Executive Director Memorandum



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Whitney Barazoto, Executive Director

TO: Public Ethics Commission
FROM: Whitney Barazoto, Executive Director
DATE: September 7, 2021
RE: Public Ethics Commission's Administrative Process; Case No. 16-14, *In the Matter of Thomas Espinosa*

This memorandum provides an overview of the Public Ethics Commission's (PEC or Commission) administrative process followed in Case No. 16-14, *In the matter of Thomas Espinosa*, and, specifically, Commission staff's obligations and activities investigating, attempting settlement, and carrying this matter through an administrative hearing and subsequent PEC meeting. This memorandum is in response to concerns and questions raised by Commissioners at its June 30, 2021, Commission meeting in which Mr. Espinosa called in to the meeting to make statements about his health to contest the Commission's case against him. Following the June 30 meeting, Commission staff requested and now include the following written documents:

1. Supplemental Report from Hearing Officer Smith regarding her consideration of information received by the respondent on the evening before the hearing, including copies of the notes submitted by the respondent; and
2. Memorandum by the City Attorney providing legal analysis regarding the administrative process and role of the PEC.

In addition, I am providing a copy of the Commission's Complaint Procedures, which are cited in the City Attorney's memorandum.

Administrative Process

The Commission's Complaint Procedures guide the administrative investigation and hearing process, as directed by City Charter (Section 603) and City Ordinance (Oakland Municipal Code Chapter 2.24). These procedures require, among other things, specific steps to ensure due process for a person who is alleged to have violated local laws under the Commission's jurisdiction. These procedures dictate staff's obligations that result in multiple occasions to communicate with a respondent to provide them with information and an opportunity to engage in the Commission's administrative process. In short, these procedures include, but are not limited to, the following:

1. Initial notification of an investigation;
2. Interview of respondent, if necessary;
3. Offer of settlement, if applicable;
4. Notice of hearing, if scheduled, including specific language in the notice that respondent may be represented by counsel and may present any relevant evidence; PEC staff also includes a copy of the Commission's Complaint Procedures with the hearing notice;

Item #4 - Executive Director Memorandum

5. Notice and a copy of the Hearing Officer's proposed Findings of Facts and Conclusions; and
6. Notice of Public Ethics Commission review of the Hearing Officer's recommendation, and subsequent notice of final PEC action and ability to appeal to superior court.

Beyond these requirements, PEC staff can, and often do, take further steps to reach out, share additional information, or facilitate a respondent's access to meetings in order to ensure the Respondent understands and can fully participate in the Commission's process, particularly when a Respondent is not represented by counsel.

Procedural Communications in Case No. 16-14

By way of review, Commission staff provides an abbreviated summary of the procedural history of communications with Respondent and, at times, his representative in Case No. 16-14 to assist the Commission with an understanding of the communications that have occurred over the course of case resolution in this matter.

Initially in this case, all communications were sent to the Respondent at the address that was on his Driver's License and personnel records (View St.) during the investigation, including initial notification of the PEC's investigation, once opened. Upon notification, PEC staff interviewed Respondent in October 2016 while he was still working with the City. He resigned from the City shortly after the interview.

During and following the investigation, Respondent was represented by an attorney who was acting on behalf of the Respondent during two later interviews of the Respondent in June 2018 and during initial attempts at settlement in July 2018.

By November 2018, no settlement was reached, so PEC staff brought a probable cause report to the Commission at its public meeting on November 5, 2018, with notice provided to Respondent's attorney.

Since that time, Respondent had no contact with PEC staff and it became clear to staff that Respondent had permanently moved from the address on file, with no forwarding information provided to staff. Upon PEC staff attempts to reach Respondent, Staff further learned that his attorney no longer represented him.

On October 16, 2020, PEC staff received a notice of bankruptcy discharge for Thomas Alton Espinosa, issued on October 1, 2020.

PEC staff conducted a search, along with other law enforcement partners, for Respondent's whereabouts following his disappearance in 2018. These efforts resulted in a new potential location for the Respondent at his mother's property in Raisin City.

By early 2021, PEC staff was preparing to submit Case No. 16-14 to the PEC through its default procedures (used in cases where a respondent fails or refuses to appear); however, staff proactively reached out to Respondent in March 2021 at the newly discovered address and received a call back from Respondent's brother-in-law, Mr. Reyes, in early April 2021. Mr. Reyes indicated that he was not acting on behalf of Respondent but that he was in communication with him and could relay information to Respondent, who he said was now living at the Raisin City address. Mr. Reyes conveyed to staff that Respondent's health is declining, and staff worked through Mr. Reyes to attempt to

Item #4 - Executive Director Memorandum

communicate with Respondent, including attempts to settle the matter prior to the hearing and schedule the hearing on a date and in a format that was accessible to Respondent.

The administrative hearing was set for April 27-29, 2021. On April 9, 2021, staff provided official notice by mail to Respondent's Raisin City address and also by email to Mr. Reyes stating that, to accommodate Respondent's lack of access to Zoom as indicated by Mr. Reyes, PEC staff would arrange for the hearing to be in-person at Oakland City Hall. Mr. Reyes confirmed receipt of the notice and that Respondent was aware of the hearing date.

On April 19, 2021, prior to the hearing, PEC Enforcement Chief Kellie Johnson met with Respondent and Mr. Reyes via Zoom to discuss settlement.

Following the Zoom meeting held by Ms. Johnson in which both Respondent and Mr. Reyes demonstrated the ability to successfully access the Zoom video technology, the administrative hearing location was updated to occur via Zoom, with the link provided through mailed and email notice sent on April 22, 2021.

On April 26, the day before the hearing, Executive Director Barazoto received a call from Respondent and engaged in a conversation with him regarding the hearing notice that he received and his response that he has no memory of any of the activities in the complaint. This conversation is summarized in an email provided to the Hearing Officer that same day to convey all of the information received from the Respondent and Mr. Reyes leading up to the hearing. (See Hearing Officer's Supplemental Report to the Public Ethics Commission, attached.)

While the information above is provided by PEC staff regarding key procedural contacts with Respondent pertaining to ensuring due process, below are two additional documents provided by non-PEC staff to provide further information for Commissioners regarding the process that occurred and the legal issues presented during the PEC's discussion of this matter in June.

Hearing Officer's Supplemental Report

PEC staff requested supplemental information from the Hearing Officer who reviewed Case No. 16-14 to provide a synopsis of her pre-hearing consideration of the doctor's notes submitted by Respondent on April 26, 2021. This review had been done by the Hearing Officer but was not mentioned in the final hearing officer recommendation; as a result, Respondent's claims were a surprise to Commissioners at the June 30, 2021, PEC meeting.

Therefore, attached to this agenda is the Hearing Officer's Supplemental Report to the Public Ethics Commission in which the Hearing Officer provides the details and copies of the doctor's notes first provided by the Respondent on the day before the administrative hearing, as well as her analysis of how the information was to be considered and her conclusions after Respondent did not appear at the hearing that occurred on April 27, 2021.

City Attorney Memorandum

At the June 30, 2021, PEC meeting, Commissioners raised questions regarding their obligations under the law in responding to Respondent's statements that evening that he had previously had a stroke and had no memory of his actions in this case. Deputy City Attorney Trish Shafie has provided the attached legal memorandum summarizing the key questions and issues that were raised during that discussion to clarify and advise on the following: 1) the PEC's role at this juncture (to establish

Item #4 - Executive Director Memorandum

penalties, not re-hear findings of facts), 2) the process due to a Respondent (with ample opportunities provided in the PEC's Complaint Procedures), 3) whether mental capacity, even if properly raised and able to be explored during the administrative hearing, is a defense to GEA (it is not), and 4) if mental capacity is raised as a due process issue rather than a defense, whose burden it is to prove mental incapacity (the Respondent's).

In light of the City Attorney's legal advice that the Respondent bears the burden of proving any claims of mental incapacity, Commission staff again proactively reached out to Respondent with a courtesy notice to ensure he is aware that Commissioners requested further information from him regarding his medical status and that he had an opportunity to submit evidence to the Commission, including a timeline of relevant medical events and diagnoses and how the medical impairment impacted his opportunity to be heard and/or represented by an attorney in this matter. Executive Director Barazoto sent a letter on August 16, 2021, providing such notice of the upcoming September 17, 2021, PEC meeting and opportunity to submit written documents in advance of the agenda posting. As of September 7, 2021, no additional documents have been received from Respondent on this issue.