CITY OF OAKLAND
OFFICE OF THE CITY ATTORNEY
MEMORANDUM

TO: Matthew MacDonald, PEC Chair
Jerret Yan, PEC Vice Chair
Avi Klein, Commissioner
Ryan Micik, Commissioner
Arvon Perteet, Commissioner
Joseph Tuman, Commissioner

FROM: Tricia Shafie, Deputy City Attorney to the PEC

DATE: September 17, 2021 File No: PEC-160002

RE: **GUIDE TO MENTAL CAPACITY ISSUES IN ADMINISTRATIVE SETTINGS**

GUIDE TO MENTAL CAPACITY ISSUES IN ADMINISTRATIVE SETTINGS

1. Is mental incapacity a defense to GEA violation and what, if any, role would the PEC have?

A. Valid Defenses to Government Ethics Act Allegations.

Oakland's Government Ethics Act (GEA), enacted in 2014, includes ethics and transparency laws such as bribery, misuse of city resources and/or position, conflicts of interest and failure to make mandatory financial disclosures. The following are elements of each of these laws:

i. Bribery: (a) public employee (b) solicits/accepts anything of value (c) in exchange for the performance of an official act. OMC §2.25.070.

ii. Misuse of Public Resources or Position: (a) public employee (b) uses position, power or authority (c) in any manner intended to induce or coerce anyone (d) to provide a private advantage, benefit or economic gain to the public employee or any other person. OMC §2.25.060(A)(2).

iii. Conflicts of Interest: (a) city employee (b) makes, participates in making or seeks to influence City decisions (c) in which the employee has a disqualifying financial interest. OMC §2.25.040(A).

iv. Mandatory Financial Disclosures: (a) designated City employees (b) must file statements of economic interest (c) disclosing all required information pursuant to the Political Reform Act and the City's Conflict of Interest Code. OMC §2.25.040(B).

In defense, anyone accused of violating these laws ("Respondent") could assert such affirmative defenses as laches, unclean hands, entrapment, or even lack of intent for certain violations. Notwithstanding the above, and as explained in more detail below, incapacity is not a legal defense to any of these alleged violations.

B. PEC role in determining mental capacity.

Mental capacity does not rebut any element of a GEA law, as do defenses such as unclean hands and laches. Because mental capacity is not a defense to any GEA violation, it cannot be considered when analyzing the elements of any of the above identified laws. In fact, even if a Respondent were mentally incapacitated during the commission of any action leading to a GEA violation, this would not constitute a defense to any GEA law. At its core, mental capacity is a due process issue that must be determined prior to any substantive hearing or proceeding.

As mental capacity is not a defense but rather a due process issue, whether a Respondent is mentally incapacitated should be raised at the earliest possible moment. Fulfilling the mandates of due process, including the right to be heard and any attendant issues, in administrative proceedings requires a less rigid, case-by-case review. While no case or statutory law is directly on point regarding how to accommodate a mentally impaired citizen in administrative hearings, in other administrative situations, courts give great deference to the administrative entity's decision on how to ensure the citizen receives a fair opportunity to be heard.

As long as the agency has a fair process in place that affords parties an opportunity to be heard, and follows that process, courts will generally not overturn administrative decisions based upon a perceived lack of an opportunity to be heard. At most, depending upon the issue at stake, the Respondent may be entitled to present oral testimony and conduct examinations and cross-examinations during the hearing.

In administrative settings, courts have found that due process generally requires consideration of the following interests: (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, (3) the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official, and (4) the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[1] The greater the interests at stake are, the more process that is due. Cases involving property rights will require the highest amount of process. Fines and penalties are on the lower end of the scale.

In *Washington v. Harper* the Supreme Court underscored that neutral decision makers in administrative matters are not required to be law trained or judicial or administrative officers.[2] This supports the idea that nor are they expected to be medical experts. *Washington v. Harper* concerned a mentally ill prisoner that challenged forced medical treatment without a judicial hearing.[3] The Supreme Court found that a hearing was not required to fulfill the standards of due process and gave deference to the legislature's decision-making.[4] The Court held that due process required no more. In reaching this determination, the Court used the balancing test in *Mathews*.[5]

The PEC has a well-developed administrative process in place that affords Respondents and Complainants alike ample opportunities to be heard at multiple points throughout this process. As described more fully below in Section 2.A, Respondents have no less than <u>seven</u> opportunities to raise issues, objections or concerns throughout this process. And these opportunities all exist at the administrative level, prior to any appeals to a court of law. With regard to mental capacity specifically, logistically, the PEC could address concerns around mental capacity, as described below in Section 2.B.

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1 *Mohilef v. Janovici*, 51 Cal. App. 4th 267, 286–87 (1996) (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976).
2 *Washington v. Harper*, 494 U.S. 210, 233 (1990).
3 *Ibid*.
4 *Id*.
5 *Id.* at 231 (see fn. 1).

Finally, were a Respondent to raise their mental status as an issue, the burden is on them to allege and prove insufficient mental capacity.[6] In other words, administrative bodies, much like judicial courts themselves, do not have to take Respondents at their word with regard to mental capacity; rather, this contention must and should be tested during a hearing or at a special preliminary hearing prior to the substantive hearing. Conducting such proceedings at or before the hearing affords all parties the opportunity to present their best evidence and to probe or vet that evidence to determine its sufficiency and veracity.

2. What are a Respondent's opportunities to be heard and what are the PEC's obligations?

A. <u>A Respondent's Opportunities to be Heard under PEC Procedures</u>.

The PEC developed its current Complaint Procedures after valuable input from the sitting PEC Commissioners and best practices collected from agencies and stakeholders, following the PEC's funding and staffing expansions in the wake of the PEC Charter amendments in 2014. Once staff opens an investigation, they notify the Respondents about the existence of the investigation, including the issue(s) to be investigated.[7] This is done in writing.[8] Subjects are free to contact PEC staff at any time to discuss issues or matters they deem pertinent.

Next, once staff concludes their investigation and determines that a hearing is warranted, they prepare and submit a "probable cause report" to the full PEC.[9] During this same time period, staff also notifies the Respondent and the individual(s) or entities who submitted the complaint, if it was not a self-generated complaint.[10] Any Respondent has the right and opportunity to appear at the meeting where staff presents their probable cause report to the PEC. This presents a further opportunity for Respondents to appear and voice any concerns about issues or matters of which they believe the PEC should be aware.

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6 *Doolittle v. Exchange Bank*, 241 Cal.App.4th 529, 545 (2015).
7 PEC Complaint Procedures ("PEC CP"), (2020) Section IV.C.
8 *Ibid*.
9 *Id*., Section VI.A.
10 *Id*., Section VI.B.

Under the Section on Administrative Hearings, staff notifies all Respondents at least 30 days before the hearing date.[11] The precise wording of this notice is prescribed by statute and requires that staff provide Respondents with the date, time, location and name of the hearing officer.[12] It further requires that Respondents be notified of their rights to be represented by counsel, present evidence, and request the issuance of subpoenas for witnesses and things.[13] Here again, Respondents may reach out to PEC staff with any issues, objections or matters of concern.

Per the Complaint Procedures, City of Oakland hearing officers, including the full Commission or a subset thereof, expect parties to submit to the hearing body any issues or matters to be resolved before the hearing at least seven days before the hearing takes place.[14] This presents yet another opportunity for Respondents or their representatives to raise objections, issues or matters to the hearing officer(s) prior to the hearing.

Further, five days before the hearing, all parties must submit written materials to the hearing officer.[15] Here too, Respondents are afforded another opportunity to apprise the hearing officer of any objections, issues or matters they believe the hearing officer ought to know about.

Finally, the hearing itself provides another forum for Respondents to raise all objections, matters or issues with any part of the hearing process.[16] At the start of any hearing, the hearing officer ensures that the parties are present and ready to proceed. Either at or prior to the hearing present the best opportunities to vet a Respondent's mental incapacity claims because the hearing officer(s) can probe and test the allegations through testamentary and documentary evidence.

Moreover, because the "heavy" burden to prove mental incapacity rests with the individual or entity raising this issue, it is incumbent upon them to provide the hearing body with any and all requisite evidence sufficient to reach a determination.[17] Doing so allows the hearing officer and opposing parties to cross-examine witnesses and rebut

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11 *Id.*, Section VII.B.
12 *Ibid.*
13 *Ibid.*
14 *Id.*, Section VII.D.
15 *Id.*, Section VII.E.
16 *Id.*, Section VII.F.
17 *Doolittle v. Exchange Bank, supra*, 241 Cal.App.4th at 545.

documentary evidence. If the proponents of the mental incapacity claim fail to raise this issue at the "trial court" level, then the issue is waived.

However, even if a Respondent fails to reach out to staff or to submit issues to the hearing officer(s) either before or at the hearing, the PEC Complaint Procedures provide an additional fail safe by allowing Respondents to request that the hearing officer(s) re-hear part or all of the complaint because either (1) the proposed Findings of Fact contain one or more material errors of fact or (2) the Conclusions are not supported by substantial evidence.[18] Here again, if a Respondent believes there are issues that the PEC should be made aware of that impact the Findings of Fact or Conclusions, they may request that the hearing officer rehear part or all of the complaint.[19]

Finally, should Respondents fail to avail themselves of any one of the above seven opportunities to raise matters before the PEC staff or hearing officer(s), they may appeal any final order adopted by the PEC to a court of law.

B. The Role of the PEC in Matters Heard by Independent Hearing Officers.

After a hearing officer forwards their Findings of Fact and Conclusions to the PEC, the PEC's role is clearly defined under the Complaint Procedures. After the hearing officer receives all evidence and hears all argument on the complaint at issue, the hearing is considered closed.[20] This means that no more documentary evidence or testimony may be accepted and the Administrative Record is set. If neither party makes a request for rehearing, then the Executive Director places the Findings of Fact and Conclusions on the agenda for approval at the next regular or special PEC meeting.[21]

After notifying all parties and the complainant of the meeting date, time and location, the PEC *shall* take either one of two options: (1) adopt the proposed Findings of Fact and Conclusions in their entirety or (2) adopt the Findings of Fact and reach additional or different conclusions that are consistent with the Findings of Fact.[22] The only discretion that the PEC has at this stage in the administrative process is to reach additional or different conclusions, including the full range of options from dismissal

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18 *Id.*, Section VII.I.1.
19 *Ibid*.
20 *Ibid*.
21 *Id.*, Section VII.I.1.c.
22 *Id.*, Section VII.I.2.

(with or without a warning letter) through assessment of maximum penalties, including other remedial measures (such as classes, training, etc.).[23] And any alternative Conclusions that the PEC may adopt *must* be consistent with the unchangeable Findings of Fact because regardless of what action the PEC takes, it is restricted by the factual findings made by the hearing officer.[24] These Findings of Fact constitute part of the Administrative Record, and the PEC is bound to defer to them.

In other words, while there are seven separate occasions for Respondents to raise objections, issues or matters to the PEC staff or hearing officer, there is no opportunity at this juncture for the PEC to delve into the mental capacity of a Respondent. Respondents who fail to avail themselves of the myriad opportunities to raise mental capacity prior to this point may not do so at the PEC meeting confirming the Findings of Fact. This is because a Respondent who has failed to raise these issues in a forum where they can be properly vetted (i.e., before the hearing officer) has waived them.

If, however, the PEC is the primary body charged with making factual findings as well as determining violation penalties and amounts (that is, functioning as the hearing officer), then as the neutral fact-finder, the PEC could probe the mental capacity of parties appearing before it. This determination should be resolved as a preliminary matter pursuant to the PEC's Complaint Procedures, although it is possible for the PEC to conduct its probe on the date of the hearing. In either instance, the PEC would be tasked with satisfying itself that all parties appearing before it during an administrative hearing are able to be understood and have an understanding as to orientation of time, places and persons. However, again, and as pointed out above, even if the PEC had the authority to review mental capacity under its procedures, mental capacity is not a defense to a GEA violation.

cc: Whitney Barazoto, PEC Executive Director

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23 *Ibid*.
24 *Ibid.*