

Item 6a - Staff Memo 18-11 Harbaugh



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TO: Public Ethics Commission
FROM: Kellie Johnson, Enforcement Chief
DATE: December 15, 2020
RE: *In the Matter of Anthony Harbaugh (Case No. 18-11)*; Post Hearing Recommendation for the January 4, 2020, PEC Meeting

INTRODUCTION

The Enforcement Unit of the City of Oakland Public Ethics Commission (“Complainant”) brought this action to address violations of the Government Ethics Act (“GEA”) by former Oakland Building Inspector Anthony Harbaugh (“Respondent”). Complainant charged Respondent with thirteen separate violations of the Government Ethics Act: Soliciting and Receiving Bribes; Misusing City Position, Conflicts of Interest; Making or Seeking to Use His Official Position to Influence Governmental Decisions; Failing to Report Economic Interest Disclosure; Misuse of City Resources; Soliciting or Accepting Gifts; and Failing to Report Gifts. A two-day hearing before Hearing Officer Jodi Smith occurred on November 18 and 19, 2020. Complainant was required to show that the violations occurred by a preponderance of the evidence.

At the conclusion of the hearing, Enforcement Staff informed the Hearing Officer that the violations of the Gift Ordinance were alternative theories and that if at the conclusion of the evidence the Hearing Officer found that the money the Respondent received for inspections was income and not gifts, the Gift Ordinance violations should be dismissed (or vice versa). Staff also recommended a base-level penalty amount of \$5,000 per GEA violation pursuant to the PEC Penalty Guidelines, for a total of \$65,000.

Respondent denied that he committed any violations of the Government Ethics Act.

Hearing Officer Smith submitted a recommendation to the Commission with findings of fact that conclude the Respondent violated nine (9) separate provisions of the Government Ethics Act and a recommendation of an administrative penalty in the amount of \$22,000.

Staff reviewed the Hearing Officer’s report and joins in the recommendation that the Commission adopt the findings of facts as determined by the Hearing Officer. Staff will defer to the Commission on the imposition of an appropriate penalty amount.

I. BRIEF HISTORY

In October 2016, during the course of a pro-active investigation into the alleged bribery and misuse of position by building inspector Thomas Espinosa, Commission Staff found that an additional City building

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inspector, Anthony Harbaugh, participated in and/or aided and abetted Thomas Espinosa in committing multiple violations of the Oakland Government Ethics Act, including the following: soliciting and receiving bribes; making, and seeking to use his official position to influence, governmental decisions in which he had a disqualifying financial interest; misusing City resources for personal financial gain; misusing his City position to induce/coerce others to provide him with economic gain, and; failing to report significant income from individuals with matters before him as a City building inspector.

In sum, Between January 2015 and December 2016, Thomas Espinosa planned and executed inspections and unlawful permit approvals on multiple properties within the City of Oakland and induced property owners to pay him directly for his service. Harbaugh actively participated in and assisted in the execution of Espinosa's inspection bribery scheme and was also paid money, under the table, for conducting inspections and approving permits.

II. PROPOSED DECISION

a. VIOLATIONS

The Hearing Officer's proposed decision finds that the Respondent, Anthony Harbaugh, committed the following violations of the Government Ethics Act:

1. Count 1: Soliciting and Receiving Bribes in Exchange for Performance of an Official Act

On or between January 1, 2015 through December 31, 2016, Respondent, Anthony Harbaugh, violated O.M.C.2.25.070(A) of the Oakland Government Ethics Act by demanding, seeking, receiving, accepting or agreeing to receive or accept money or a thing of value as a bribe to influence his government actions as a building inspector for the City of Oakland, for personal enjoyment and/or non-government purposes.

On or between January 2015 and December 2016, Respondent violated Section 2.25.070 (A) of the Oakland Government Ethics Act by soliciting \$300 from Ms. Williams in exchange for a "Pass" result on an electrical inspection at her Mead Ave. property.

2. Count 2: Misusing City position to induce/coerce others to provide him with economic gain

On or between January 1, 2015, through December 31, 2016, Respondent, Anthony Harbaugh, refused to complete a record of a final inspection at the Mead Ave. property owned by Elizabeth Williams, for the purpose of inducing or coercing Ms. Williams into providing the Respondent with a payment.

By using his authority as a City official to induce or coerce a person to provide him with an economic gain, Respondent violated Section 2.25.060 (A) (2). of the Oakland Government Ethics Act.

3. Count 3: Conflict of Interest Violation: Make or Participate in Making a Governmental Decision Involving a Source of Income

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A City employee uses his or her official position to make or participate in making a decision when he or she has a financial interest within the California Political Reform Act.

On or between January 2015 and December 2016, Respondent, Anthony Harbaugh, violated Section 2.25.040(A) by making a decision on behalf of the Oakland Building Department to issue Elizabeth Williams a “Pass” result on an electrical inspection at her Mead Ave. property in Oakland, when he had a financial interest within the meaning of the California Political Reform Act.

4. Count 4: Conflict of Interest Violation: Make or Participate in Making a Governmental Decision Involving a Source of Income

A City employee uses his or her official position to make or participate in making a decision when he or she has a financial interest within the California Political Reform Act.

On or between January 2015 and December 2016, Respondent, Anthony Harbaugh, violated Section 2.25.040(A) by making a decision on behalf of the Oakland Building Department to issue Elizabeth Williams a “Pass” result on an inspection for remodel construction at her Market Street property in Oakland, when he had a financial interest within the meaning of the California Political Reform Act.

5. Count 5: Conflict of Interest Make or Participate in Making a Governmental Decision Involving a Source of Income

A City employee uses his or her official position to make or participate in making a decision when he or she has a financial interest within the California Political Reform Act.

On or between January 2015 and December 2016, Respondent, Anthony Harbaugh, violated Section 2.25.040(A) by making a decision on behalf of the Oakland Building Department to issue Elizabeth Williams a “Pass” result on an electrical, plumbing and frame inspection at her 877 27th Street property in Oakland, when he had a financial interest within the meaning of the California Political Reform Act.

6. Count 6: Conflict of Interest Violation: Make or Participate in Making Governmental Decision Involving a Source of Income

A City employee uses his or her official position to make or participate in making a decision when he or she has a financial interest within the California Political Reform Act.

On or between January 2015 and December 2016, Respondent, Anthony Harbaugh, violated Section 2.25.040(A) by making a decision on behalf of the Oakland Building Department to issue Bill Charman a “Pass” result on the frame and final inspection at his “Gimme Shelter” 4163 Rifle Lane property in Oakland, when he had a financial interest within the meaning of the California Political Reform Act.

7. Count 9: Making or Seeking to Use His Official Position to Make Governmental Decisions in Which He Had a Disqualifying Financial Interest

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As a City employee, Respondent was prohibited from making, participating in making, or attempting to use his official position to influence a governmental decision in which he had a disqualifying financial interest.

An official has a disqualifying financial interest in any governmental decision that involves an individual from whom the official was promised or provided income totaling \$500 or more within 12 months prior to the time when the governmental decision is made.

On or between January 1, 2015 through December 31, 2016, Respondent, Anthony Harbaugh, violated O.M.C.2.25.040(A) of the Oakland Government Ethics Act by using his official position make a governmental decision to issue Elizabeth Williams building permits, for multiple properties, when that decision involved an individual from whom he was promised or provided income totaling \$500 or more within 12 months prior to the time the decision to issue permits were made.

8. Count 10: Economic Interest Disclosure Violation: Failing to Report a Source of Income

On or between January 1, 2015 through September 24, 2016, Respondent, Anthony Harbaugh, a Building Inspector with the City of Oakland, violated Oakland Government Ethics Act 2.25.040(B) when he failed to report income he received from Elizabeth Williams.

A Building Inspector is required to report all sources from whom he received income, totaling \$500 or more during the January 1 through December 31, 2015, period by April 1, 2016.

9. Count 11: Misuse of City Resources for personal financial gain

On or between January 1, 2015, through December 31, 2016, Respondent Anthony Harbaugh, violated O.M.C. 2.25.060 (A)(1) of the Oakland Government Ethics Act by using the following: A City-owned vehicle, computer and printer, and cell phone for personal or non-government purposes.

b. PENALTY

The Hearing Officer's proposed decision recommends that the Commission impose a total administrative penalty of **\$22,000** for the nine (9) violations of the Government Ethics Act.

III. POSSIBLE ACTIONS BY THE COMMISSION

Pursuant to the Commission's Complaint Procedures, the Commission may either adopt the proposed decision in its entirety, or in the alternative, adopt the proposed decisions' actual finding, but reach additional or different conclusions consistent with the proposed decision's factual findings. (Commission's Complaint Procedures § VII(I)(2).)

If the Commission decides to adopt the proposed decision in its entirety, the proposed decision will be adopted as the Commission's decision and the Respondent will be ordered to pay an administrative penalty of \$22,000.

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If the Commission decides that the proposed decision's factual findings warrant a different legal conclusion and/or a different penalty, the Commission may adopt the proposed decision's factual finding and additional or different legal conclusions and/or impose a different penalty.

Whether the Commission decides to adopt the proposed decision in its entirety or adopt different legal conclusions and/or penalties, the Commission's decision and order regarding a proposed decision will constitute the closure of the administrative process for this matter. (Commission's Complaint Procedures § VII(J).)

Aggravating Factors

The PEC has broad discretion in evaluating a violation and determining the appropriate penalty based on the totality of circumstances. This list of factors to consider is not an exhaustive list, but rather a sampling of factors that could be considered. There is no requirement or intention that each factor – or any specific number of factors - be present in an enforcement action when determining a penalty. As such, the ability or inability to prove or disprove any factor or group of factors shall in no way restrict the PEC's power to bring an enforcement action or impose a penalty

For serious violations, such as Bribery and violations that do not qualify for a warning letter or the streamlined stipulation program, the PEC will start a penalty amount with a “base-level” amount and then adjust the penalty amount based on mitigating and aggravating factors of the enforcement action.

Here, the circumstances of Harbaugh's conduct establish several aggravating factors, including Harbaughs lack of veracity, that should increase the severity of the penalty:

1. The Respondent is a public servant in a high-level decision-making position that abused his position of trust and authority. His willful abuse of a trusted position of authority designed to protect the public and the safety of their homes posed great harm to the Oakland Community;
2. Harbaugh engaged in several instances of deception to cover up the inspections of which he was getting paid under the table, including failing to properly log the Accela system, failing to note the property owner's job card and assigning himself to inspections that he was not assigned to do. Most egregious was that he deliberately entered a misrepresentation into the Accela data base representing that he inspected a property and approved the permit when, in fact, he had not;
3. Harbaughs conduct was deliberate, including multiple instances where he changed assigned inspectors to jobs for his own personal gain;
4. His conduct was part of a pattern of conduct that went on for several months;
5. Harbaugh has failed to take any steps to cure any of the enumerated violations. For example, he has not informed the Planning and Building Department of the specific property that he failed to inspect and yet misrepresented that he had conducted its inspection; and
6. At the time of the Respondent's conduct he had worked for the Oakland Planning and Building Department for more than seven years. Harbaugh was a seasoned public servant, well versed in the department's policies against receiving personal payments under the table and the requirement to input accurate data into the Accela database. He chose to ignore them for his own personal gain.

Mitigating Factors

As far as the PEC is aware, Harbaugh has no previous history of violations in the City of Oakland.

IV. COMMISSION STAFF RECOMMENDATION

Commission Staff recommends that the Commission adopt the Hearing Officer's proposed factual and legal findings. Staff will defer to the Commission the imposition of the appropriate administrative penalty.