

i - Staff Memorandum and Penalty Options



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TO: Public Ethics Commission
FROM: Kellie Johnson, Enforcement Chief
DATE: June 24, 2021
RE: *In the Matter of Thomas Espinosa (Case No. 16-14)*; Additional Information Regarding Penalty Options Following Discussion at the June 7, 2021, PEC Meeting

OVERVIEW

This memorandum provides additional information to the Public Ethics Commission (PEC or Commission) regarding enforcement penalty options in order to assist the Commission in determining appropriate penalties in the Matter of Thomas Espinosa, PEC Case NO, 16-14, following discussion of the item at the Commission's June 7, 2021, public meeting. This memorandum is a supplement to the information provided at that June 7 meeting and included again in the agenda materials for this June 30, 2021, special meeting in which the matter was continued.

BACKGROUND

By way of review, 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 Thomas Espinosa ("Respondent"). Complainant charged Respondent with 47 separate violations of the Government Ethics Act in the following areas: 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; and Misuse of City Resources. An administrative hearing before Hearing Officer Jodie Smith occurred on April 27, 2021. Complainant was required to show that the violations occurred by a preponderance of the evidence.

At the administrative hearing, Commission staff presented evidence to prove 47 violations of GEA and recommended a base-level penalty amount of \$5,000 per GEA violation pursuant to the PEC Penalty Guidelines and to impose a select few penalties concurrently, for a total of \$200,000. Following the hearing, Hearing Officer Smith submitted a recommendation to the Commission with findings of fact that conclude the Respondent violated 43 separate provisions of the Government Ethics Act and a recommendation of an administrative penalty in the amount of \$210,000.

At the June 7, 2021, Commission meeting, the PEC reviewed the hearing officer's recommendation and engaged in discussion indicating that Commissioners were interested in increasing the fine amounts

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beyond the usual \$5,000 amount per violation and instead invoking the ability to pursue fines of “up to three times the amount the person failed to report properly or unlawfully contributed, expended, gave, or received.”¹ Staff suggested that the Commission continue the item to a future meeting so that staff could prepare information to assist the Commission in determining the appropriate fine for each violation within this higher penalty framework.

ADDITIONAL INFORMATION FOR CONSIDERATION OF PENALTY OPTIONS

Commission staff compiled the following information for the Commission to consider in determining penalty amounts for each violation in this matter:

1. **Spreadsheet of Counts and Available Penalties (Attachment 1)** – Staff reviewed the Hearing Officer’s findings of facts and conclusions and attempted to quantify the dollar amounts (within the larger range of what was received in the 12 months preceding the governmental action) that might be associated with each specific violation. In some cases, such as the bribery violations in which the evidence connecting payments to actions was clear, the dollar amount can be isolated and easily quantified; however, in many cases, such as the conflicts of interest violations, it is more difficult to link specific actions to an amount certain, as the violation occurs upon the governmental action regarding the source of prior income over the past 12 months. Therefore, several governmental actions relate to the same pot of money that was identified as income or loans that the respondent received in the preceding 12 months.
2. **Public Ethics Commission Penalty Guidelines (Attachment 2)** – These guidelines are the result of a PEC subcommittee process and full PEC review to establish guiding principles for staff to consider when making fine recommendations and negotiating settlements. Overall, the goal of PEC’s enforcement penalty approach is to provide timely, fair, and consistent enforcement that is proportional to the seriousness of the violation and, under administrative and constitutional law provisions, to impose fines that are not excessive, arbitrary, or capricious.
3. **List of Past Fines for GEA Provisions at Issue in Case No. 16-14 (Attachment 3)** – Staff compiled a list of prior PEC fines for each of the violations that are the subject of Case No. 16-14 for the Commission to consider as precedent for comparison. While the Penalty Guidelines aim to ensure consistency of penalties for similar violations over time, the guidelines also expressly state that the guideline “is advisory only, and does not limit the PEC from using discretion to deviate from the guidance when atypical or egregious circumstances exist.”

CONCLUSION

Staff recommends that the Commission review this additional information in considering a penalty framework that imposes fair, and not excessive, penalties commensurate to the type of violations and the amounts at issue in this case.

¹ OMC 2.25.080(C)(3)