Approved as to Form and Legality**

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City Attorney

City of Oakland
Public Ethics Commission
March 2, 2009

In the Matter of)
) Complaint No. 09-01
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Carlos Plazola filed Complaint No. 09-01 on January 22, 2009.

I. SUMMARY OF COMPLAINT

Mr. Plazola filed Complaint No. 09-01 alleging that Oakland Mayor Ronald Dellums violated Oakland's "Anti-Nepotism And Cronyism" Ordinance by appointing long-time aide Dan Lindheim as Interim Director of Economic Development and Acting City Administrator. Mr. Plazola also alleges these actions implicate Oakland's Conflict of Interest regulations and the City Council's Rules of Procedure/Code Of Ethics. ***Attachment 1.***

II. BACKGROUND

In December, 2007, Mayor Dellums appointed Mr. Lindheim as interim director of Oakland's Economic And Community Development Agency. In June, 2008, Mr. Lindheim was appointed acting City Administrator following the departure of Deborah Edgerly. Mr. Dellums appointed Mr. Lindheim as the "permanent" City Administrator on January 29, 2009.

On July 10, 2008, City Councilmember Ignacio De La Fuente introduced an ordinance requiring disclosure of all known family, cohabitation and "consensual romantic" relationships among City employees and their supervisors, and a prohibition on the hiring or supervision of persons based on such relationships. The proposal was heard several times before the City Council's Finance And Management Committee.

When the proposal came before the City Council in November, 2008, City Councilmember Nancy Nadel initially proposed, and the City Council ultimately adopted, additional language to prohibit acts of "cronyism", defined as: "participating in any employment decision that may be viewed as a conflict of interest, such as one involving a close friendship, a business partner, and/or professional, political or commercial relationship, that would lead to preferential treatment or compromise the appearance of fairness."

As finally adopted by the City Council on December 9, 2008, the ordinance:

- requires all individuals applying for City employment -- and all City officials and supervisors -- to disclose all known "family relationships, consensual romantic and cohabitant relationships" with City employees

- prohibits City employees and officials to supervise persons with whom they have a known family relationship, consensual romantic relationship or cohabitant relationship

- provides penalties up to and including termination for any individual who "willfully and deliberately" fails to disclose his or her known regulated relationships

- prohibits City officials and employees from engaging in cronyism and/or attempting to influence employment decisions based on a regulated relationship

- directs that any City employee who becomes aware that a City employee or official has attempted to make employment decisions based on regulated relationships "or who has otherwise engaged in acts of cronyism" shall report such instances to the Director of Personnel, the City Attorney or the City Auditor. ***Attachment 2.***

III. ANALYSIS

A. Commission Jurisdiction And The Anti-Nepotism Ordinance

City Charter Section 202(b)(5) provides that "[t]he City Council shall by ordinance prescribe the function, duties, powers, jurisdiction and terms of the members of the Commission. . ." There is nothing in the Commission's own enabling ordinance (O.M.C. Chapter 2.24) or in the City's "Anti-Nepotism And Cronyism" Ordinance that expressly confers jurisdiction or authority upon the Commission to investigate or determine alleged violations under the ordinance.[1] The ordinance itself is somewhat vague in its "Enforcement" section on which office or officer of the City shall investigate or determine violations of its provisions:

- Section 7(A) provides that the Director of Personnel "shall be responsible for collection of information concerning family relationships, consensual romantic relationships and cohabitation relationships."

- Section 7(B) provides that the Director of Personnel, in consultation with the City Attorney, shall be responsible for identifying and implementing

[1] Several members of the public addressing the City Council during consideration of the ordinance suggested that "some role" be created for the Commission in the legislation, specifically that the Executive Director be notified of potential violations. The City Council took no action to incorporate such provisions into the ordinance.

alternative arrangements" should family, consensual romantic or cohabitant relationships exist.

- Section 7(C) provides that any City employee who becomes aware that an official, manager or employee has attempted to influence the City its officials, managers or employees, or change the terms and conditions of employment based on family, consensual romantic or cohabitant relationships "shall report that attempt to the Director of Personnel, the City Attorney or the City Auditor."

- Section 7(D) provides that the Director of Personnel shall provide an annual report to the City Council describing the "nature and number of prohibited relationships disclosed, and what actions were taken to make alternative arrangements."

None of the above enforcement provisions mention any process for the investigation, determination or remedies pertaining to allegations of "cronyism." There is certainly nothing indicating the City Council's intention that the Commission be authorized to perform these functions even after being encouraged to do so. In the absence of any express delegation of authority, the Commission is not able to determine violations under the Anti-Nepotism Ordinance.

B. Allegations Under The City Council's Code of Ethics

In January, 2005, the Oakland City Council adopted its most recent version of its Rules of Procedure. Contained in the City Council's Rules of Procedure is the City Council's "Code of Conduct." [2] The Code of Conduct provides twelve standards of ethical conduct to be observed by members of the City Council. Nothing in the Rules of Procedure or, more specifically, the Code of Ethics, indicates any intent that these rules should apply to any other official or employee in the City. Thus even if the appointment of Mr. Lindheim by Mayor Dellums implicated one of the twelve broad standards for ethical behavior, there is no basis to conclude these standards have applicability to anyone other than members of the City Council.

C. Allegations Under The City's Conflict Of Interest Regulations

O.M.C. Section 2.24.020(c) provides that it shall be the function and duty of the Commission to "[o]versee compliance with conflict of interest regulations as they pertain to city elected officials, officers, employees, and members of boards and commissions." Historically, the Commission has applied this language to consider complaints under O.M.C. Chapter 3.6, which sets forth Oakland's "Conflict of Interest Code." O.M.C. Chapter 3.6 expressly incorporates Title 2 of the Fair Political Practices Commission's financial conflict of interest regulations, Section 18700 et seq. The

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[2] The current Code of Conduct has previously been designated as the City Council's "Code of Ethics" in prior versions of the City Council's Rules of Procedure. The current "Code of Conduct" also refers to itself as the "Code of Ethics" in Paragraph 12.

Commission has always been, however, without express authority to determine violations of these regulations and has historically either dismissed and/or referred to the FPPC complaints arising under these provisions.

Mr. Plazola argues that the Commission may have jurisdiction over the allegations raised under the Anti-Nepotism Ordinance under Section 2.24.020(c) because the definition of "cronyism" means "participating in any employment decision ***that may be viewed as a conflict of interest***, such as one involving a close friendship, a business partner, and/or professional, political or commercial relationship, that would lead to preferential treatment or compromise the appearance of fairness." (Emphasis added.) He further cites City Charter Section 202(a) which makes the Commission responsible for:

> *". . .responding to issues with regard to compliance by the City of Oakland, its elected officials, officers, employees, boards and commission with regard to compliance with City regulations and policies intended to assure fairness, openness, honesty and integrity in City government including, Oakland's Campaign Financing Reform Ordinance, conflict of interest code, code of ethics and any ordinance intended to supplement the Brown Act, and to make recommendations to the City Council on matters relating thereto. . . "*

The broad authority under Charter Section 202(a) must be read in concert with the more specific provisions of Charter Section 202(b)(5) which, as cited above, provides that "[t]he City Council shall ***by ordinance*** prescribe the function, duties, powers, jurisdiction and terms of the members of the Commission..." Under Charter Section 202(b)(5), the City Council has authorized specific powers of investigation and enforcement to the Commission under the Sunshine Ordinance, the Oakland Campaign Finance Act, the Lobbyist Registration Act, and other laws. Furthermore, the definition of cronyism, while describing itself as a "conflict of interest", is more about avoiding the ills of "preferential treatment" and "compromising the appearance of fairness." These broad and worthwhile concepts are nevertheless distinct from what is commonly understood to represent a "conflict of interest" under the City's financial conflict of interest "code." Thus it is difficult to conclude that the Commission's authority to oversee compliance with the City's conflict of interest code means that the Commission may adjudicate what constitutes "cronyism" under the Anti-Nepotism Ordinance.[3]

D. Conflict With The City Charter

On February 5, 2009, the Office of the City Attorney issued a written opinion pertaining to Mr. Plazola's complaint. ***Attachment 3.*** In summary, the City Attorney concluded that the "anti-cronyism" provisions conflict with City Charter Section 500, which governs the Mayor's appointment of the City Administrator. The City

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[3] The foregoing does not mean, in its advisory legislative capacity, the Commission could not make recommendations to the City Council regarding provisions in the Anti-Nepotism Ordinance. Indeed, there are a number of issues and omissions contained within the Anti-Nepotism Ordinance that the Commission may wish to address legislatively at a later date.

Attorney observes that the ordinance imposes additional restrictions on the Mayor's power of appointment that conflict with the City Charter's provisions, thus rendering the anti-cronyism restrictions "void and unenforceable" as it applies to the appointment of the City Administrator. Thus even if the Commission were vested with the authority to determine whether the "anti-cronyism" provisions were violated, the City Attorney has advised that these provisions are "void and unenforceable" as to the facts Mr. Plazola alleges.

E. Additional Allegations Dated February 5, 2009

Following the apparent receipt by Mr. Plazola of the City Attorney's written opinion on February 5, 2009, Mr. Plazola sent Commission staff an email amending his complaint. ***Attachment 4.*** Mr. Plazola seeks to amend his complaint to include 1) the January 29, 2009, appointment of Mr. Lindheim as allegedly violating the anti-nepotism provisions (the City Attorney had raised the issue that the actions of the Mayor to appoint Mr. Lindheim in an interim capacity had occurred ***before*** the ordinance was adopted and there is no provision in that law to operate retroactively), and 2) allegations that the January 29, 2009, appointment, in addition to violating the anti-cronyism provisions, also violates City Charter Section 500 on its face.

City Charter Section 500 states in its entirety:

> ***Section 500. Appointment.*** *The Mayor shall appoint a City Administrator, subject to the confirmation by the City Council, who shall be the chief administrative officer of the City. He shall be a person of demonstrated administrative ability with experience in a responsible, important executive capacity and shall be chosen by the Mayor solely on the basis of his executive and administrative qualifications. No member of the Council shall, during the term for which he is elected or appointed, or for one year thereafter, be chosen as City Administrator.*

Mr. Plazola contends that prior to the appointment of Mr. Lindheim, Mayor Dellums issued a job announcement "detailing the minimum job qualifications: Twelve (12) to fifteen (15) years of senior level executive management experience preferably in a large sophisticated diverse urban governmental organization." He alleges that the Mayor "appointed someone with less only 7 months experience (sic)". Mr. Plazola argues the appointment creates a "conflict of interest where the mayor made a decision that was in conflict with his responsibility to the residents of Oakland based on the requirements in the Charter, because of his pre-existing relationship to Mr. Lindheim."[4]

With his latest amendment, Mr. Plazola seeks to label the question of whether a Mayoral appointee meets broadly stated job criteria into a "conflict of interest" matter subject to the Commission's jurisdiction and authority. As stated above, the

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[4] Commission staff reaches no conclusion whether Mr. Lindheim meets the sole Charter requirement of having "demonstrated administrative ability with experience in a responsible, important executive capacity" or whether his background meets the published job qualifications.

mere labeling of an issue as a "conflict of interest" does not necessarily make it so. There is no authority whatsoever that confers upon the Commission the jurisdiction to determine whether the Mayor's appointment of the City Administrator meets the criteria set forth in City Charter Section 500. The City Charter instead provides judicial remedies for alleged violations of its provisions that Mr. Plazola is free to pursue.

IV. STAFF RECOMMENDATION

Commission staff recommends that the Commission dismiss Complaint No. 09-01 on grounds that 1) Oakland's Anti-Nepotism Ordinance confers upon the Commission no jurisdiction or authority to determine alleged violations of its provisions; 2) there is no apparent basis in fact or law that Mayor Dellums violated the City Council's Code of Ethics; 3) the definition of "cronyism" does not constitute a "conflict of interest" subject to Oakland's financial conflict of interest code; 4) the "anti-cronyism" provisions are "void and unenforceable" as to the Mayor's appointment of the City Administrator; and 5) the Commission has no jurisdiction to determine violations of City Charter Section 500.

Respectfully submitted,

Daniel D. Purnell
Executive Director

** *City Attorney approval as to form and legality relates specifically to the legal issues raised in the staff report. The City Attorney's approval is not an endorsement of any policy issues expressed or of the conclusions reached by staff on the merits of the underlying complaint.*