Approved as to Form and Legality**

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City Attorney

City of Oakland
Public Ethics Commission
September 3, 2009

In the Matter of)
) Complaint No. 09-07
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David Mix filed Complaint No. 09-07 on July 13, 2009.

I. SUMMARY OF COMPLAINT

Mr. Mix filed Complaint No. 09-07 alleging that 1) City Councilmember Rebecca Kaplan failed to file timely campaign disclosure statements in her capacity as treasurer of a ballot measure committee; 2) she is engaged in a "conflict of interest" between her duties as a City Councilmember and her duties as a committee treasurer; and 3) she misused public funds to promote recent Oakland ballot measures C, D, F and H. ***Attachment 1.***

II. BACKGROUND

Oakland ballot measures C, D, F and H appeared on a special mail ballot election on July 21, 2009. The City Council took action to place the measures before Oakland voters in March, 2009. All four measures were designed to raise revenue or reduce expenditures to address Oakland's budget deficit. All four measures passed.

III. FACTUAL SUMMARY AND ANALYSIS

On May 14, 2009, Ms. Kaplan executed and submitted a Statement Of Organization (FPPC Form 410) with the Office of the City Clerk. ***Attachment 2.*** The Statement of Organization identifies "Yes 4 Oakland: A coalition in support of Measures C, D, F & H organized by R. Kaplan" as a primarily formed ballot measure committee. Ms. Kaplan designated herself as committee treasurer and "controlling officeholder." Kenneth Linney was designated as assistant treasurer. Mr. Linney serves as president of The Next Generation, a "full service campaign consulting, management and issue advocacy firm," according to the firm's website.

Between approximately May 7, 2009, and July 4, 2009 (the last date for which campaign reports are available), the "Yes 4 Oakland" committee reportedly raised $17,275.00 in contributions and loans. It reportedly incurred $20,284.73 in expenses. Of the $20,284.73 in expenses, approximately $19,850.00 (about 98 percent) was spent on advertising, campaign literature, and campaign consulting fees.

A. Late Filing Of Campaign Reports

Mr. Mix contends that the "Yes 4 Oakland" committee failed to file timely pre-election reports. For the City's July 21, 2009, special election, the FPPC established the following campaign reporting periods and filing deadlines:

Period Covered	Filing Deadline	Type Of Statement
1/1/09 to 6/6/09	6/11/09	Pre-Election
6/7/09 to 7/4/09	7/9/09	Pre-Election
7/5/09 to 12/31/09	2/1/10	Semi-Annual

The "Yes 4 Oakland" committee filed both its pre-election campaign statements on July 14, 2009. ***Attachment 3.*** Ms. Kaplan told Commission staff in an email and in conversation that they looked up the incorrect filing deadlines on the FPPC website, not realizing that special dates had been set for the July 21 special election. ***Attachment 4.*** Mr. Linney said that upon receiving a call from Mr. Mix inquiring why the statements had not been filed he promptly completed and filed the delinquent statements. Both Mr. Linney and Ms. Kaplan stated that their actions were unintentional.

Under the California Political Reform Act, candidates and committees are potentially liable in the amount of $10 per day for late pre-election statements. The local filing officer (in this case, the Office of the City Clerk) has discretion whether to impose this amount and may waive liability in certain cases where the late filing "was not willful and that enforcement of the liability will not further the purposes of the [Political Reform] Act." [Government Code Section 91013]. The Commission does not have authority to impose fines or penalties for late campaign filings.

B. "Conflict Of Interest"

Mr. Mix contends that Ms. Kaplan engaged in a "blatant conflict of interest" by serving as campaign treasurer and controlling officeholder for the "Yes 4 Oakland" committee while serving as a local elected official. There are no facts to suggest that Ms. Kaplan made, participated in making, or attempted to influence a governmental decision relating to Measures C, D, F and H that was likely to have a material effect on her personal financial interests. What Mr. Mix appears to be arguing is that by serving as a campaign treasurer for a ballot measure committee, Ms. Kaplan participated in an activity that was incompatible with her duties as a public official. This argument is more rhetorical than legal: There is no state or local law prohibiting an elected officeholder from serving as a campaign treasurer or a controlling officeholder of a ballot measure committee. To the contrary, the Political Reform Act tacitly recognizes this possibility by requiring officeholders who have significant influence over the actions or decisions of a ballot measure committee to include their name(s) in the title of the committee (which Ms. Kaplan did in this instance).

C. Improper Use Of Public Resources

Mr. Mix alleges that Ms. Kaplan misused public funds for campaign purposes and "illegally utilize[d] the Council office and City facilities in the promotion of the four measures."

Penal Code Section 424(a) makes it unlawful for any city officer to appropriate public funds or resources, without authority of law, to his or her own use or to the use of another. Government Code §8314 makes it unlawful for local officers and employees to use public resources for campaign activities or other purposes which are not authorized by law. Both Penal Code §424 and Government Code §8314 do not apply to the "incidental or minimal" use of public resources.

Mr. Mix told Commission staff he has no specific information that Ms. Kaplan used public funds or used her City Council office or City facilities to promote Measures C, D, F and H. Ms. Kaplan specifically denies that she used any public money, time or resources to promote the measures. She told Commission staff that she retained The Next Generation to serve as an outside campaign resource because it was unconnected with any City facility or service. All services provided by The Next Generation were paid from the "Yes 4 Oakland" campaign account. None of her City staff was involved in the campaign during work hours. In the absence of any information to the contrary, Commission staff concludes there is no factual basis for Mr. Mix's allegation that Ms. Kaplan improperly used public resources to promote Measures C, D, F and H.[1]

IV. STAFF RECOMMENDATION

Commission staff recommends that the Commission dismiss Complaint No. 09-07 with respect to allegations pertaining to "conflict of interest" and "misuse of public resources" on grounds that there are no material facts on which to conclude a violation of law occurred. Commission staff recommends that the Commission refer to the Office of the City Clerk issues pertaining to the late filing of pre-election campaign statements for further review pursuant to the City Clerk's authority under the Political Reform Act.

Respectfully submitted,

Daniel D. Purnell
Executive Director

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[1] Complaint No. 09-07 highlights an occasional issue with respect to complaints that allege, without any factual basis, violations of law. The extent to which a respondent, or Commission staff, should be required to develop exculpatory or incriminating information, respectively, in response to unsupported allegations should be addressed in the next review of the Commission's General Complaint Procedures.

** *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.*