



ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

BENEDICT Y. HUR
CHAIRPERSON

Date: July 6, 2011

JAMIENNE S. STUDLEY
VICE-CHAIRPERSON

To: Members, Ethics Commission

BEVERLY HAYON
COMMISSIONER

From: John St. Croix, Executive Director

DOROTHY S. LIU
COMMISSIONER

By: Richard Mo, Chief Enforcement Officer

Garrett Chatfield, Legal Analyst/Investigator

CHARLES L. WARD
COMMISSIONER

Re: Complaint Disposition

JOHN ST. CROIX
EXECUTIVE DIRECTOR

Introduction

The Ethics Commission has calendared the following case for discussion at its July 11, 2011 meeting. This case was originally calendared for the Special Meeting of the San Francisco Ethics Commission on October 18, 2010. This matter was postponed due to several requested continuances by both the complainant and respondent.

1. Complaint No. 01-100115, was referred to the Ethics Commission by the Sunshine Ordinance Task Force ("Task Force") on January 15, 2010. The referral stated that the Library Commission, through its representative, Secretary Sue Blackman, violated Sunshine Ordinance sections 67.15(a) and 67.34 for willful failure to allow public comment at a Library Commission meeting, and section 67.21(e) for failure to send a knowledgeable representative to Task Force hearings.

Background

On June 4, 2009, Sue Cauthen ("Complainant") attended a regularly scheduled Library Commission meeting. During general public comment, she was denied the opportunity to speak by the Library Commission President, Jewelle Gomez. On June 23, 2009, Ms. Cauthen filed a complaint with the Task Force against the Library Commission for its refusal to allow public comment. Ms. Cauthen is a member of the Task Force, but recused herself from all Task Force proceedings concerning this matter.

On July 28, 2009, Ms. Cauthen appeared before the Task Force to present her claim. No representative from the Library Commission attended. On August 13, 2009, the Task Force issued an Order of Determination, ordering the Library Commission to appear before the Education, Outreach and Training Committee of the Task Force on September 10, 2009. No representative for the agency appeared at that meeting.

The matter was then sent to the Task Force's Compliance and Amendments Committee on October 13, 2009. No representative from the Library Commission appeared at that meeting.

On December 1, 2009, at a special meeting, the Task Force referred the matter to the Ethics Commission, finding the Library Commission, through its representative, Secretary Sue Blackman, in violation of Sunshine Ordinance sections 67.15(a) and 67.34 for willful failure to allow public comment at a Library Commission meeting, and section 67.21(e) for failure to send a knowledgeable representative to Task Force hearings. Ms. Blackman attended that meeting.

Staff interviewed Ms. Cauthen, Ms. Blackman, and Ms. Gomez. In addition, staff reviewed all materials sent from the Task Force, including a DVD of the June 4, 2009, meeting.

Applicable Law

Sunshine Ordinance section 67.15(a) states, in relevant part:

“Every agenda for regular meetings shall provide an opportunity for members of the public to directly address a policy body on items of interest to the public that are within policy body's subject matter jurisdiction . . .”

Sunshine Ordinance section 67.15(c) states:

“A policy body may adopt reasonable regulations to ensure that the intent of subdivisions (a) and (b) are carried out, including, but not limited to, regulations limiting the amount of time allocated for public testimony on particular issues and for each individual speaker. Each policy body shall adopt a rule providing that each person wishing to speak on an item before the body at a regular or special meeting shall be permitted to be heard once for up to three minutes. Time limits shall be applied uniformly to members of the public wishing to testify.”

Library Commission By-Laws, Article VII, Section 2, states, in relevant part:

“Each person wishing to speak on an item before the Commission shall be permitted to be heard once for up to three minutes. Each agenda for regular meetings shall provide an opportunity for members of the public to directly address the Commission on items of interest that are within the Commission's jurisdiction.”

Sunshine Ordinance section 67.34 states:

“The willful failure of any elected official, department head, or other managerial city employee to discharge any duties imposed by the Sunshine Ordinance, the Brown Act or the Public Records Act shall be deemed official misconduct. Complaints involving allegations of willful violations of this ordinance, the Brown Act or the Public Records

Act by elected officials or department heads of the City and County of San Francisco shall be handled by the Ethics Commission.”

Sunshine Ordinance section 67.21(e) states:

“If the custodian [of public records] refuses, fails to comply, or incompletely complies with a request . . . the person making the request may petition the Sunshine Task Force for a determination whether the record requested is public. . . . Upon the determination that the record is public, the Sunshine Task Force shall immediately order the custodian of the public record to comply with the person’s request. . . . Where requested by the petition, the Sunshine Task Force may conduct a public hearing concerning the records request denial. An authorized representative of the custodian of the public records requested shall attend any hearing and explain the basis for its decision to withhold the records requested.”

Facts and Analysis

On June 4, 2009, the Library Commission held a regular meeting. The agenda for that meeting included:

“Item 1, Public Comment, This item is to allow members of the public to comment generally on matters within the Commission’s purview as well as to suggest new agenda items for the Library Commission’s consideration;”

and

“Item 2, Peer Review of Proposed Design for the North Beach Branch Library, Discussion, Presentation and discussion of peer review of proposed design for a new North Beach Branch Library.”

During Item 1, a member of the public in support of the North Beach Branch design began to discuss her approval of the design. She spoke for about 20 seconds before the President, Ms. Gomez, asked the speaker to hold her comments until Item 2.

Immediately following that speaker, Ms. Cauthen attempted to speak about a non-design related issue regarding the preservation of historic San Francisco libraries. Ms. Cauthen began her statement to the Commission as follows: “Good Afternoon. I’m Sue Cauthen. I’m talking about North Beach but not about design. I just want you - - I think you all know I had a coalition of groups who are concerned about the present plan, and I passed around --.”

Ms. Cauthen was then interrupted by Ms. Gomez, telling her to hold all North Beach comments until Item 2. Ms. Cauthen attempted to explain that she was not speaking about the design of North Beach. Ms. Gomez continued to raise her voice while asking Ms. Cauthen to sit down. Ms. Cauthen then returned to her seat.

1. *Ms. Gomez's conduct violated the public testimony requirements of Sunshine Ordinance section 67.15.*

Section 67.15(a) requires that each body include an item on its meeting's agenda for general public comment on matters within the body's jurisdiction. Each body is given latitude as to how to administer and comply with such public comment requirements. (Section 67.15(c).)

Library Commission By-law, Article VII, section 2, states that "each person wishing to speak on an item before the Commission shall be permitted to be heard once for up to three minutes. Each agenda for regular meetings shall provide an opportunity for members of the public to directly address the Commission on items of interest that are within the Commission's jurisdiction."

A public body may limit public comment uniformly to facilitate the administration of the meeting.¹ (Section 67.7(c).) The language in Agenda Item 1 was broad and allowed for comments on any matter within the Commission's jurisdiction. It contained no language restricting comment only to those matters that do not appear on the agenda. Item 2 specifically stated that the discussion concerned the proposed design for the new North Beach Branch.

Ms. Gomez informed staff that the North Beach Branch design was of great community interest and there were more members of the public attending that meeting than usual. She stated that she informed the public that North Beach items should only be addressed during Item 2. The DVD of the meeting shows that Ms. Gomez asked another member of the public to sit down when it became clear the speaker's comments addressed the design of the North Beach branch. Ms. Gomez also told staff that prior to this incident, she believed that all comments, however remotely related to an agenda item, had to be held until that agenda item was called.

Ms. Cauthen is part of a coalition concerned with the historic preservation of library branches, including North Beach. During her interview with staff, she stated that she planned to use her general public comment time to address only the preservation efforts of her coalition. She further stated that given the way Item 2 was worded, she believed that she would only be able to comment on the design of the North Beach Branch during that item.

Although Ms. Gomez was within the law to limit public comment, Ms. Cauthen began by clearly stating that she was not speaking to the design of the North Beach branch. As soon as Ms. Gomez heard that Ms. Cauthen was part of a coalition that was concerned about the North Beach plan, Ms. Gomez told Ms. Cauthen to stop speaking. Ms. Cauthen reiterated that she did not intend to speak to the design of the North Beach branch. The actual substance of Ms. Cauthen's comment was never expressed, yet Ms. Gomez repeatedly, and with increasing force, told Ms. Cauthen to sit down. Ms. Cauthen subsequently stated that she would not continue with her intended comment out of a concern she would "provoke the Chair."

¹ The next Library Commission's meeting agenda was re-worded in the general public comment item to include matters "within the subject matter jurisdiction of the Commission and that do not appear on the agenda." (June 18, 2009, Library Commission Meeting Agenda, Item 1.)

Given the broad language included in agenda Item 1, staff finds that Ms. Gomez violated section 67.15 by denying Ms. Cauthen the right to make general public comment on a matter within the Commission's jurisdiction.

2. *Section 67.34 is not applicable to Ms. Blackman because she is not an elected official or department head, and her conduct was not at issue.*

Section 67.34 states that it is official misconduct for the failure of any "elected official, department head, or other managerial city employee to discharge any duties imposed by the Sunshine Ordinance." The Task Force's August 13, 2009, Order of Determination ("Order") finds that the "agency" willfully violated section 67.15(a) and did not refer to a specific individual. The Task Force's January 15, 2010, referral to the Ethics Commission states that the Order was against the Library Commission, through its representative, Secretary Ms. Blackman.

Section 67.34 is unenforceable against an agency, as the determination of official misconduct is limited to the conduct of individuals. (S.F. Charter § 15.105(e) [official misconduct is wrongful behavior by a public official].) In staff's memo to the Commission dated October 14, 2010, regarding this matter, staff originally stated that Ms. Blackman was not a managerial employee. As the Sunshine Ordinance does not define "managerial city employee," Ms. Blackman's position could be considered that of a managerial city employee. However section 67.34 specifically omits a managerial city employee from the officials that the Ethics Commission may make a finding of official misconduct. (See section 67.34 ["[c]omplaints involving allegations of willful violations of this ordinance, the Brown Act or the Public Records Act by elected officials or department heads of the City and County of San Francisco shall be handled by the Ethics Commission."].)

Moreover, as the violation was one of conduct rather than a records denial, it would not serve the interests of the public to hold Ms. Blackman accountable for another official's conduct. Thus, section 67.34 is not applicable to Ms. Blackman.

3. *Section 67.34 is not enforceable against Ms. Gomez because she is not an elected official, department head or managerial city employee; however, staff believes that her conduct falls below the standard of decency, good faith and right action impliedly required of all public officials.*

The Library Commission President is an appointed position by the Mayor. (See SF Charter Art. VIII § 8.102 [library commission members appointed and removed by the Mayor].) Because Ms. Gomez is not an elected official, department head, or managerial city employee, her actions do not implicate section 67.34. Further, as stated above, the Ethics Commission is only empowered to enforce willful violations of section 67.34 against elected officials or department heads. Nonetheless, staff believes that her conduct falls below the standard of decency, good faith and right action impliedly required of all public officials.

Assuming, arguendo, that section 67.34 applied in this instance, the Ethics Commission still lacks any enforcement authority over her violation of section 67.15. Section 67.34 is not

incorporated into any of the Ethics Commission's penalty provisions. While one recourse is to initiate the discipline, suspension, and removal process, members of the Library Commission are not listed as individuals subject to removal under S.F. Charter section 15.105. However, Charter section 8.102 provides that Library Commission members may be removed by the Mayor.

Although Ms. Gomez was not the named respondent, it was her conduct that resulted in the violation of the Sunshine Ordinance. Staff recommends referring the matter to the Mayor, Ms. Gomez's appointing authority, so he may determine what action, if any, to take against Ms. Gomez. At the same time, staff recommends that the referral letter to the Mayor indicate the Commission's belief that Ms. Gomez's actions fell below the standards appropriate for a public official.

4. Section 67.21(e) is not applicable.

Although no representative from the Library Commission attended a meeting on this matter until the meeting on December 1, 2009, section 67.21(e) only mandates that the custodian of public records attend any hearing to explain why a document was withheld. Here, the issue was the ability of an individual to make public comment, not the withholding of public records. Thus, section 67.21(e) is not applicable in this instance.

Recommendation

For the reasons stated above, staff recommends that the Commission take the following actions:

- 1) Dismiss the alleged violations of Sunshine Ordinance sections 67.15(a), 67.21(e) and 67.34 against the Library Commission, through its representative, Ms. Blackman; and
- 2) Refer the matter of Ms. Gomez's alleged violation of Sunshine Ordinance section 67.15 to her appointing authority, the Mayor, so that he may determine what action, if any, he should take against Ms. Gomez.

Alternatively, if the Ethics Commission decides not to accept staff's recommendation, then pursuant to the Ethics Commission Enforcement Regulations VI(B), the Commission may direct staff either to investigate the matter further or to prepare a probable cause report and schedule a probable cause hearing.