


REQUEST FOR COUNCIL ACTION

Date: November 19, 2012
Item No.: 12.i

Department Approval

City Manager Approval

WJ Malinen

Item Description: Consider Ethics Complaint Report

1 **BACKGROUND**

2 In early October, the City’s Ethics Commission received a complaint alleging that the Human
3 Rights Commission, the City Council and the City Manager violated the City’s Ethics Code by
4 inappropriately expending public funds when it urged citizens to vote on a state constitutional
5 amendment.

6 In accordance with the City’s Ethics Code, the complaint was sent to the City Attorney for
7 review. The City Attorney researched the allegations and sent his report to the Ethics
8 Commission for review at its November 14, 2012 meeting.

9 The report concluded that a “violation of Section 3.J of the Roseville Code of Ethics has not
10 been established by clear and convincing evidence,” and recommended that the complaint be
11 dismissed and that no adverse action be taken.

12 The Ethics Commission adopted the report and recommended the Council adopt the report and
13 recommendations, as presented.

14 **POLICY OBJECTIVE**

15 Ensure a full and fair review of ethics complaints are reviewed.

16 **FINANCIAL IMPACTS**

17 None

18 **STAFF RECOMMENDATION**

19 Receive the City Attorney’s report and accept the Ethics Commission recommendation to accept
20 the report which recommends dismissing the complaint.

21 **REQUESTED COUNCIL ACTION**

22 Receive the City Attorney’s report and accept the Ethics Commission recommendation to accept
23 the report which recommends dismissing the complaint.

24

Prepared by: William J. Malinen, City Manager
Attachments: A: Ethics Complaint
B: Report of the City Attorney

October 2, 2012

City of Roseville
Ethics Commission
2660 Civic Center Drive
Roseville, MN 55113

John M. Kysylyczyn
3083 Victoria Street
Roseville, MN 55113

Commission members:

I am filing a complaint with the Roseville Ethics Commission due to a violation of Resolution 10408, Section 3, J.

This section of the ethics resolution states the following:

J. Public Funds, etc. No Public Official shall use public funds, personnel, facilities, or equipment for private gain or political campaign activities, except as may be authorized by law.

This provision within the ethics resolution was violated numerous times by the Roseville City Council, the Human Rights Commission, and the City Manager, all Public Officials.

The discussion on the issue and instructing people to vote YES on a state constitutional amendment is clearly an act of being engaged in political campaign activity.

Public funds, personnel, and facilities were used for this activity and there is nothing in law that authorizes city resources to be used in this manner. While it may be acceptable to use public funds to educate the public in a fair and balanced manner on an issue that is related to the operation of city government, that was clearly not the case in this situation.

This is no different of a scenario than a school district using taxpayer resources to tell people to vote YES on a levy referendum. It is also no different than the city telling people to vote YES on a bond referendum or advocating for people to vote YES or NO to change the form of government. All of these activities are clearly unethical and possibly illegal.

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There are numerous meeting minutes and videos of City Council and Human Rights Commission meetings that these issues were discussed along with numerous newspaper articles. This issue is well known throughout the community.

If it is acceptable to expend public funds telling citizens how to vote on issues, where is the line drawn? Should city resources be used to tell people which council candidates or legislative candidates to vote for? Should the city use public resources to tell people to vote NO on the upcoming school district levy referendum?

I would appreciate being invited to the Ethics Commission meeting when this complaint is being discussed and will be prepared to offer testimony.

Sincerely,

A handwritten signature in black ink, appearing to read "John M. Kysylyczyn". The signature is fluid and cursive, with a long horizontal stroke at the end.

John M. Kysylyczyn

REPORT OF THE CITY ATTORNEY
IN RE: ETHICS COMPLAINT DATED OCTOBER 2, 2012

This office received a resident complaint dated October 2, 2012, alleging a violation of the Roseville Code of Ethics. Pursuant to Section 5.E of the Ethics Code, this office has investigated the complaint. Under Section 5.E.2, this document constitutes our formal report and recommendations in the matter.

The complaint (copy attached) asserts a violation of Section 3.J of the Ethics Code. Section 3.J states:

Public Funds, etc. No Public Official shall use public funds, personnel, facilities, or equipment for private gain or political campaign activities, except as may be authorized by law.

The complaint alleges that the City Council, the Human Rights Commission, and the City Manager violated this provision of the Ethic Code. While the complaint fails to specifically identify the exact actions that purportedly violate Section 3.J, the complaint does state in pertinent part:

“The discussion on the issue and instructing people to vote YES (sic) on a state constitutional amendment is clearly an act of being engaged in political campaign activity...Public funds, personnel, and facilities were used for this activity and there is nothing in law that authorizes city resources to be used in this manner...There are numerous meeting minutes and videos of City Council and Human Rights Commission meetings that these issues were discussed along with numerous newspaper articles.”

With this information, our office assumes that the complainant alleges that the Ethics Code violation arises from the following occurrences:

1. On May 16, 2012, after conducting several public meetings on the topic, the Human Rights Commission discussed and passed a resolution in which the advisory body publicly stated its collective opposition to a proposed state constitutional amendment regarding the definition of marriage and its encouragement to Roseville and Minnesota voters to vote “no” on the ballot question. (Copy of resolution attached.)
2. On August 27, 2012, the City Council discussed and passed a resolution in which the governing body publicly stated its collective opposition to the aforementioned proposed state constitutional amendment and similarly encouraged Roseville and Minnesota voters to vote no on the ballot question. (Copy of resolution attached.)

Applying these facts, which are not in material dispute, to the above-referenced Ethics Code provision, this office submits the following analysis and substantive conclusions. Further, because this is the first known complaint asserted under the City’s Code of Ethics, this report also offers guidance regarding proper procedure to be used by both the Ethics Commission and City Council in this matter.

ANALYSIS

Section 3.J of the Ethics Code involves four distinct elements that must exist before a violation can occur. The four elements are:

- A. Conduct by Public Officials;
- B. Use of public funds, personnel, facilities, or equipment;
- C. Political campaign activity; and
- D. Lack of authorization by law.

Scrutiny of each element is necessary for a proper determination in this matter. If all four elements are found to exist in this matter, then a violation of the Ethics Code has been committed. If any of the four elements are not present, then a violation of the Ethics Code has not been committed. Under Section 5.F, the standard for decisions regarding allegations of ethical violations shall be by "clear and convincing evidence," as that phrase is defined by state law. In Minnesota, clear and convincing evidence requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. Clear and convincing evidence exists only where the truth of the facts asserted is "highly probable."

A. CONDUCT BY PUBLIC OFFICIALS

The Code of Ethics defines "Public Officials" as: members of the City Council and Mayor; the department head and assistant department head of each City department; members of any City commission, board, and task force; and the City Manager. The complaint asserts that actions by the City Council, the Human Rights Commission, and the City Manager constitute the alleged violation. To the extent that the complaint alleges a violation due to the discussion and passing of distinct resolutions, the Human Rights Commission and City Council are appropriately named. As such, the complaint sufficiently satisfies the first element of Section 3.J with regard to the Human Rights Commission and the City Council. The fact that the City Manager may have been present for one or both actions, however, does not equate to actual conduct by the City Manager. Therefore, the complaint does not satisfy the first element of Section 3.J with regard to the City Manager.

B. USE OF PUBLIC FUNDS, PERSONNEL, FACILITIES, OR EQUIPMENT

The complaint asserts that the alleged violations involved the use of an advisory commission's meetings and a regular meeting of the City Council, all or some of which presumably occurred at a public facility (City Hall). Further, the drafting and execution of the respective resolutions presumably required some involvement by City personnel and equipment. It can fairly be concluded, then, that public personnel, facilities or equipment were used in the commission of the alleged violation. Whether public funds were actually expended within the context of the alleged violation is less certain. It is difficult, if not impossible, to compute whether the amount of public funds required to support the personnel (salaries/wages/etc.), facilities (council chambers/etc.), or equipment (paper/copy machine/etc.) actually increased as a result of the alleged violation. Therefore, it cannot be said that public funds were expended in this matter.

However, to the extent the complaint alleges that City facilities, personnel, and equipment were used in this matter, the complaint sufficiently satisfies the second element of Section 3.J.

C. POLITICAL CAMPAIGN ACTIVITY

The Ethics Code does not define “political campaign activity.” According to the complaint, the discussion of and encouragement toward voters for a particular vote on a state constitutional amendment issue “is clearly an act of being engaged in political campaign activity.” The complaint is correct on this point. The third element of Section 3.J is satisfied by the complaint.

D. LACK OF AUTHORIZATION BY LAW

Finally, no violation of the Ethics Code exists under Section 3.J if the alleged activity is authorized by law. There is significant reason to believe that the actions by the Human Rights Commission and the City Council in this matter are authorized by law. First and foremost, the First Amendment affords freedom of speech to all citizens and associations, including governmental entities. Further, as far back as 1966, the Attorney General of the State of Minnesota has offered the opinion that governing bodies can individually and collectively voice their support or opposition for a ballot initiative. Again in 2006, the Attorney General stated:

“Public officials are generally free, individually and collectively to announce their views on matters of public interest. Furthermore, it is not likely that local governments or associations can be precluded from taking and publicizing positions on such matters, even in those circumstances where the matters are not within the jurisdictions of the governing bodies.”

With this background, the League of Minnesota Cities issued a bulletin this year in which it advised that a city council can legally adopt a resolution in support or opposition to a constitutional amendment. Further, this summer the Minnesota Supreme Court issued an opinion in Abrahamson v. St. Louis County School District, A10-2162 (Aug.10, 2012), in which a school board expended public funds to distribute newsletters and other publications in support of a school bonding referendum. The Supreme Court ruled that the school district was subject to campaign-finance requirements for the funds used in such advocacy---and, therefore, suggested that not only can a governing body advocate for a particular ballot question, but also that expenditure of public funds to do so is authorized under the law. In any event, the weight of authority supports the proposition that the Human Rights Commission and City Council acted under authorization of law in discussing a state constitutional amendment and advocating a particular vote on the issue, even taking into account the potential for nominal public funds to have been spent in doing so. Therefore, the final element of Section 3.J is not satisfied by the complaint.

CONCLUSION

This office concludes that a violation of Section 3.J of the Roseville Code of Ethics has not been established by clear and convincing evidence. This office recommends that the complaint be dismissed and that no adverse action be taken in this matter.

PROCEDURE

Section 5 of the Ethics Code provides a procedural framework for the handling of the present complaint. The process is as follows:

1. The City Attorney shall investigate the complaint.
2. The City Attorney shall issue a report that documents the results of the City Attorney's investigation.
3. The City Attorney's report shall be delivered to the Ethics Commission.
4. The Ethics Commission is authorized to convene and issue its own report and recommendation to the City Council.
5. Thereafter, the City Council shall take action as the Council deems appropriate.

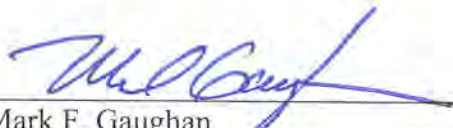
The Ethics Code provides no further procedural guidance. This office understands that the Ethics Commission will convene on November 14, 2012. The Commission will have three options to consider: (1) Adopt the report and recommendations of the City Attorney and forward the same to the City Council; (2) Reject the report and recommendations of the City Attorney, in whole or in part, and formulate its own report and recommendations to be forwarded to the City Council; or (3) Take no position on the report of the City Attorney and forward the matter to the City Council. The Commission is not authorized, under the Ethics Code or Section 206 of City Code, to undertake any additional actions.

Under the Ethics Code, the City Council's sole directive is to "take action as the Council deems appropriate." This office's recommendation is for the Council to receive the report and recommendations of the City Attorney (and, if applicable, the Ethics Commission) and take any appropriate action via motion after Council discussion. Because the task of investigation is vested within the City Attorney's office, no further information gathering is necessary.

Respectfully submitted,

Date: _____

11/9/2012



Mark F. Gaughan
City Attorney
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