RESPONSE

March 24, 2021

Ms. Eva Arseo
Interim City Clerk
City of Riverside
3900 Main Street, 7th Floor
Riverside, CA

Re: Hunter V. Plascencia Board of Ethics De Novo Re-Hearing

Dear Ms. Arseo:

This letter serves as my written comments to the Board of Ethics regarding the re-hearing in the matter of Hunter v. Plascencia. As you are aware, the City Council found that the Board of Ethics abused its discretion in making findings that I violated two provisions of the City Ethics Codes. The City Council's position is consistent with the response I provided at the initial Board of Ethics hearing that made clear there were no violations. My initial response should have been given greater consideration by the Board. In conducting this de novo review, the Board should not repeat its errors and further tie up the resources of the Council and City staff by improperly validating these baseless claims a second time.

With regard to the allegation that my actions in proposing a City policy that would permit the use of a union bug on City business cards and stationary, the City Council is correct that the Board of Ethics has no authority to second guess the policy decisions of the City Council. As the City Council determined, "The union bug on a business card does not promote the interest of a third party as its use is legal, there is a precedent for such an insignia to be used on a city stationary, and the insignia certifies labor performed not an allegiance to any one entity."

The policy proposed by me and adopted by the City Council to allow for union bugs did not act for the benefit of a third party. In fact, no third party was even named or proposed to be named in the policy decision. Further, the City Attorney made clear during the December 17, 2019 hearing that there was "no legal impediment" to the placement of the union bug on the City cards and stationery. The Board of Ethics was made aware that numerous other counties, cities, and State government entities have a similar policy and have had similar policies in place for decades. The Board of Ethics ignored all of these facts and law, instead making its own layperson legal interpretation of the Ethics Code. That interpretation was wrong. This error should not be repeated a second time.

With regard to the allegation that the City's Sunshine Code was violated, the Board of Ethics in finding a violation once again substituted its judgment for that of the City Council on a discretionary issue. If the Mayor or a Council Member, with the concurrence of another Council Member determine that urgency exists for an item to be placed on the agenda without additional

notice, the placement of that item on the agenda does not violate the City Sunshine Code. The Board of Ethics has no authority whatsoever to determine what is or is not urgent. Only the City Council, which is elected by the people of Riverside, is empowered to make policy decisions and judgments on their behalf. Once again, the Board's layperson legal determinations are wrong and the error should not be repeated.

Further, I hope this matter will serve as an opportunity for the Board of Ethics, and the City government as a whole, to review the fundamentally unfair process that is established by the Board of Ethics hearing procedures. The Codes violate the due process protections afforded to any person under the United States Constitution, including members of the City Council. Specifically, the following provisions deny the rights of Board of Ethics respondents particularly where, as here, findings of violations can result in penalties such as censure by the City Council or deprivation of service as Mayor Pro-Tem, among others:

- The prohibition of respondents being represented by counsel at the pre-hearing or hearing;
- The requirement that the pre-hearing be held with the same burden of proof as the full hearing, without providing Respondents with the right to provide arguments against the allegations at the pre-hearing;
- The failure to provide explicitly for judicial review of the actions of the Board and City Council finding violations of the Ethics Codes;
- Allowing Board Members to make legal determinations, instead of an administrative law judge or other legally trained neutral party, and;
- The impermissible restrictions on the free speech rights on City Council Members by the application of the Ethics Codes.

Procedural History

On June 16, 2020, Jason Hunter filed a Code of Ethics and Conduct Complaint with the City Clerk's Office. The complaint alleged that on December 17, 2019, I violated subsection (C), (D), (E), (F), and (M) of RMC 2.78.060 Prohibited Conduct. The basis of the complaint arises out of the City Council's consideration and discussion of allowing a "union bug" on City business cards. On August 6, 2020, the Hearing Panel conducted a pre-hearing and determined that the evidence was sufficient to move forward and conduct a full hearing on the complaint. On September 10, 2020, I filed a timely response to the complaint.

On September 30, 2020, the Hearing Panel met to hear evidence related to the Hunter Ethics complaint. Based upon the evidence presented and after consideration, the Hearing Panel found that I violated Riverside Municipal Code 2.78.060(M) Violations of federal, State, or local law prohibited and Riverside Municipal Code 2.78.060(D) Advocacy of private interests of third

parties in certain circumstances prohibited. The Hearing Panel did not find any other violation of the Code of Ethics and Conduct.

On October 27, 2020 the City Council found that the Board of Ethics abused its discretion on September 30, 2020 with regard to both of the allegations the Board found to be in violation of the City's Code of Ethics and Conduct. The matter is now back before the Board of Ethics for a de novo (new) review of the allegations, taking into consideration the City Council findings of abuse of discretion.

First Allegation Response – Acting for the Benefit of a Third Party

The first allegation contends that I violated City Code Section 2.78.060 (D), which relates to the advocacy of private interests of third parties by a Council Member before the City Council. Specifically, the Code provides as follows:

> (D) *Advocacy of private interests of third parties in certain circumstances prohibited*. No elected official of the City of Riverside shall appear on behalf of the private interests of third parties before the City Council; nor shall any appointed member of a board, commission or committee of the City of Riverside appear before their own body on behalf of the private interests of third parties, except for limited exceptions as provided for in the California Fair Political Practices Commission Regulations or otherwise by law.

The allegation against me is that, by proposing at a Council meeting a policy that City Council Members may add a union bug to their City business cards and stationery, I was advocating for the private interests of a third party. This allegation fails for several reasons.

First, as the City Council noted in finding, the Board of Ethics abused its authority in finding a violation. The issue before the Council was a policy choice, not the private interest of a third party. The City Council's entire function is to make policy for the City. Only the Council is authorized to do so as they are the elected representatives of the people of Riverside. The Board of Ethics may not substitute its policy judgment for that of the Council.

The use of union bugs on products is a practice that stretches back for centuries. Its purpose is to identify that the labor used to make the product enjoyed the benefits of union membership in terms of collective bargaining of wages and conditions to raise the standards of living for working people, among others. Union bugs on public business cards and stationery is ubiquitous throughout government. I provided just a small number of local examples of this in my original response to the Hunter complaint, which I incorporate fully by reference here. The decision to use the union bug does not financially benefit a specific union. Rather it is a policy choice to demonstrate support for working people and organized labor. The Board of Ethics should play no role in such policy decisions.

Second, if the Board of Ethics were to continue labeling actions such as the one taken with regard to the union bug as "advocacy of the private interests of third parties," the City Council would no longer be able to make many of its basic, required decisions. For example, if a new business development comes before the Council for approval, if a City Council member speaks on behalf of the project from the dais, that would appear to fit within the Board of Ethics overly broad definition of advocacy of third party interests. Yet the City is required to make decisions such as this at virtually all City Council meetings. The logical extension of the Board of Ethics' decision regarding the union bug policy would illegally punish clearly permissible and, in fact, required actions by the City Council. The Board of Ethics has no such authority and should end this interpretation of City Code 2.78.060 (D) immediately.

Next, I did not "appear" before the City Council. That term does not refer to a City Council member participating in a meeting from the dais. Rather, it refers to addressing the City Council as a member of the public or other interested party would. (see for example FPPC *Barnett* Advice Letter A-16-32)

Further, City Code Section 2.78.060 (D) references exceptions to the Code that can be found in FPPC regulations or other law. This implies that the underlying purpose of the Code was to prohibit conduct similar to that prohibited in the Political Reform Act (Government Code Section 87100, et. seq.) and FPPC regulations (California Code of Regulations Section 18110, et. seq.) The Political Reform Act and FPPC Regulations have a fully developed body of law (including FPPC Advice Letters) that guide the conduct of public officials with regard to conflicts of interest, which is another way of stating the term "advocacy of the private interests of third parties." I strongly recommend the Board of Ethics (with the assistance of the City Attorneys' office) use the FPPC statutes, regulations and advice letters as their guide in interpreting the City Code.

If the conflict of interest rules are applied to my factual circumstances, there is clearly no violation. A conflict of interest requires the public official to have a financial interest in the subject of the decision in order for there to be a conflict. No such financial interest exists here. Further, there isn't even a specific entity that was the subject of the decision. Rather it was a general policy decision Again, there is no conflict of interest.

For these reasons, the Board of Ethics should make no finding of a violation on this allegation.

Second Allegation Response – City Sunshine Ordinance

The second allegation contends that I violated City Code Section 2.78.060 (M), which relates to the violation of local law. Specifically, the Code provides as follows:

> (M) *Violations of federal, State, or local law prohibited.* No public official of the City of Riverside shall intentionally or repeatedly violate the Charter of the City of Riverside, the Riverside Municipal Code, or any established policies of the City of Riverside affecting the operations of local government, or be convicted of violation of any State or federal law pertaining to the office which they hold.

The local law I was alleged to have violated was the Sunshine Ordinance. The Sunshine Ordinance provides for a twelve day notice requirement for the posting of agenda items. At the time of the alleged violation, it allowed for an exception to the twelve day notice requirement if a finding was made that the agenda item had urgency, and thus required a hearing sooner than twelve days. Specifically the Ordinance stated (at the time the alleged violation occurred):

> Section 4.05.050
> D) Excuse of Sunshine Notice Requirements. If an item appears on an agenda but the local body fails to meet any of the additional notice requirements under this section, the local body may take action only if the minimum notice requirements of the Riverside City Charter and the Brown Act have been met and one of the following applies:
>
> 1) The local body, by a two- thirds vote of those members present, adopts a motion determining that, upon consideration of the facts and circumstances, it was not reasonably possible to meet the additional notice requirements under this section and any one of the following exists:
>
> a) The need to take immediate action on the item is required to avoid a substantial impact that would occur if the action were deferred to a subsequent special or regular meeting; or,
>
> b) There is a need to take immediate action which relates to federal, state, county or other governmental agency legislation or action or the local body' s eligibility for any grant or gift; or,
>
> c) The item relates to a purely ceremonial or commendatory action.
>
> 2) **If the Mayor or a Council Member, with the concurrence of another Council Member, believe an item is urgent**, and the failure to meet any additional notice requirements was due to:
>
> a) The need to take immediate action, which came to the attention of the local body after the agenda was posted, or;

The Board of Ethics found that my decision (which was made more broadly by the City Council as well) to make a determination of urgency in order to hear an agenda item sooner than the usually required twelve day notice violated Section 4.05.050. As the City Council found, however, the determination of what is or is not "urgent" is a discretionary policy decision within the exclusive purview of the elected City Council. The Board of Ethics has no role to play in second-guessing the policy decisions of the Council. Therefore, the Board should not make a second finding of a violation on this issue.

Violations of Constitutional Rights

In addition to the points discussed above, I want to point out several fundamental flaws with the Board of Ethics Hearing Rules and Process which rise to the level of violating my rights under the federal and state constitution. I raise these points here to provide further support for the position that the Board of Ethics has no basis to find that I violated the City Code provisions in question. Furthermore, I recommend in the strongest terms that the Board of Ethics promptly proceed to recommend to the City Council that they immediately suspend further proceedings involving any person and review the constitutional problems that I mention here, and set about fixing them immediately.

A. It is Impermissible for the Board of Ethics to Restrict My First Amendment Right as a Legislator to Express My Support for the General Policy of Including a Union Bug on City Business Cards

In the prior Board of Ethics hearing on this matter, the Board ruled that I had violated RMC section 2.78.060 (D) when I proposed at a Council meeting a policy that City Council Members may add a union bug to their City business cards and stationery because I was allegedly advocating for the private interests of a third party. The merits of this allegation have been rebutted above and the Board must find now that no violation has occurred. However, I also want to point out that the Board's application of Section 2.78.060(D) violates my rights under the First Amendment since courts have long held that "legislators are given the widest latitude to express their views and there are no stricter free speech standards on them than on the general public." (*Holbrook v. City of Santa Monica* (2006) 144 Cal. App. 4th 1242, 1247-1248.) My discussion of the union bug issue was not to advance the interests of any party; rather, I was merely expressing my views to support the principle of collective bargaining and unions in general. No member of the public may be prevented from doing this at a City meeting, so I also cannot be prevented from discussing this or any other matter of public interest. (*See id.*)

Such an application of Section 2.78.060(D) clearly violates my First Amendment rights. Under California law, my ability to express my views on policy "is a bedrock principle of the First Amendment," and the Board of Ethics cannot seek to prohibit me from expressing such views because the complainant and/or members of the Board of Ethics find my views to be disagreeable. (*See Hopper v. City of Pasco* (2001) 241 F. 3d 1067, 1081.) To use RMC § 2.78.060(D) as a gag rule to prevent me, and/or any other Councilmember, from speaking in support of the idea of collective bargaining and organized labor would be a severe overstretch and a sweepingly illegitimate use of the Ethics Code and Board of Ethics process. Accordingly, a finding that that I did not violate Section 2.78.060(D) is necessary and required to avoid such a major overreaching and unconstitutional use of City procedures aimed to silence and impede my ability to do my job as a Member of the City Council.

The Board of Ethics must refrain from future unconstitutional restrictions on the First Amendment rights of City Council members.

B. The Prohibition on Respondents Being Represented by Counsel at the Pre-Hearing or Hearing Violated Due Process Guaranties

Board of Ethics Hearing Rules and Procedures section 6 provides,

> ***[n]either the complainant, nor the respondent shall be represented at the hearing by an attorney.*** Although an attorney may be present and consulted at the hearing, ***the attorney shall not address the Hearing Panel or participate in any aspect of the hearing.***

((Emphasis added); *see also* RMC § 2.78.080(Q).) This prohibition on the right to be represented and heard by counsel clearly violates my constitutional due process rights. It is one thing to say that parties may be heard without being represented by counsel if they so choose, but quite another to say that parties may not be heard through counsel entirely.

The aforementioned Board of Ethics rule fundamentally goes against state and federal constitutional due process protections. Indeed, in discussing the general right to a fair hearing in an adjudicative hearing, the U.S. Supreme Court stated,

> "What, then does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. ***The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.***"

(*See Powell v. Alab.* (1932) 287 U.S. 45, 68-69 (emphasis added).) Indeed, according to the U.S. Supreme Court, the rationale for the view that a person in an adjudicative proceeding has a right to be represented and heard, by counsel, is clear, "[c]ounsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the [client]." (*Goldberg v. Kelly* (1970) 397 U.S. 254, 270.) Consequently, the view that parties in an adjudication have a right to retain and be heard by counsel has long been central to our nation's view toward constitutional due process rights; so much so that the U.S. Supreme Court declared that if an adjudicative body or process "arbitrarily refuses to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." (*Powell,* 287 U.S. at 69.) Moreover, the rule that a person appearing at an adjudicative hearing is entitled to be represented and heard through counsel applies not only in court but also to administrative proceedings like the present one.

There is ample precedent showing this principle. For example, the federal Ninth Circuit Court of Appeals has held that persons have a right to be heard through counsel of their choosing in administrative proceedings before agencies as diverse as the federal Securities and Exchange Commission to proceedings prior to an expulsion from school. (*See Sartain v. Securities and Exchange Comm'n* (9th Cir. 1979) 601 F. 2d 1366, 1375; *Black Coalition v. Portland Sch. Dist. No. 1* (9th Cir. 1973) 484 F. 2d 1040, 1045.) 1315.)

In the present case, the Board of Ethics and its rules and procedures have denied me the ability to be heard through an attorney at any of its hearings. There is no valid justification for this, in my case or for anyone else. This rule is unfair and unconstitutional; therefore, the Board of Ethics should find no violations in my case and promptly recommend to the City Council that they should conduct a review of the Board of Ethics Rules and Procedures to address its inherent unconstitutionality and unfairness on this basis.

C. The Requirement that the Pre-Hearing Be Held With the Same Burden of Proof as the Full Hearing, Without Providing Respondents with the Right to Provide Arguments Against the Allegations at the Pre-Hearing is Grossly Unfair and Violates Due Process Protections

Another reason that the Board of Ethics should not find any violations of the code of ethics is that the pre-hearing and hearing procedure to which I have been subjected is fundamentally flawed, unfair, and violates constitutional due process protections. Earlier on, I was subjected to a pre-hearing whereby "[t]he complainant shall verbally present to the hearing panel and all evidence . . . that will be presented at the hearing to provide the allegations in the complaint. (RMC § 2.78.080(e)(5); Bd. of Ethics Hearing Rules & Proc. §7(K).) At that so-called pre-hearing, "[t]he Hearing Panel is to ***assume that all representations of evidence by the complainant are true for the limited purpose of determining whether the complainant has shown that it more likely than not*** that a violation of the Prohibited Conduct section of the Code of Ethics has occurred . . . . and ***[i]f it is determined by a majority of the Hearing Panel that it is more likely than not that there may be a potential violation of the Prohibited Conduct*** . . . then the City Clerk shall set a hearing date." (Bd. of Ethics Hearing Rules & Proc. § 7(M), (N); RMC § 2.78.080(E)(6), (7).) It should be noted that no formal provisions are made for a respondent to counter any of these allegations or to have an attorney speak on her behalf.

Thereafter, at the regular hearing set by the City Clerk, the Hearing Panel is tasked with adjudicating whether the respondent violated the ethics code by seeing if the complainant established by "preponderance of the evidence," that the respondent is guilty. (Bd. of Ethics Hearing Rules & Proc. § 10; RMC § 2.78.080(H).) According to the Rules and Procedures, "preponderance of the evidence" means " evidence that is more convincing and therefore, more probably in truth and accuracy." (*Id.*) However, since the matter proceeded beyond the Pre-Hearing, the Hearing Panel at the regular hearing already knows that during the Pre-Hearing

stage, it was already "determined by a majority of the Hearing Panel that it is more likely than not that there may be a potential violation of the Prohibited Conduct." Clearly, a Hearing Panel at the regular hearing cannot "un-ring the bell" or otherwise forget that the complainant had already been deemed, by majority vote, to have satisfied the burden of proof at the Pre-Hearing stage and therefore pre-disposed to find the respondent guilty.

Indeed, the burden of proof at the regular hearing is not only the same as that at the pre-hearing, but a respondent has to go the regular hearing and essentially overcome a prior determination of guilt which was made at that pre-hearing. This process is unfair and unconstitutional. Under California and federal law, "[t]here is no question but that administrative hearings are required to conform to essential fairness and due process standards." (*White v. Bd. of Medical Quality Assurance* (1982) 128 Cal. App. 3d 699, 705.) These standards include "the right to present legal and factual issues in a deliberate and orderly manner." (*Id.* at 705.) This includes the accused having the ability to introduce evidence and "rebut evidence introduced against her." (*Id.*) The California Supreme Court also stated,

> [w]hen . . . an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal. A fair tribunal is one in which the judge or other decision maker is free of bias for or against a party. Violation of this due process guarantee can be demonstrated not only by proof of actual bias, but also by showing a situation in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.

(*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal. 4th 731, 737.) In the present case, the way the Board of Ethics operates prevents me from getting a fair adjudication since I am not allowed to be heard by an attorney, I am not afforded a fair process at the pre-hearing (e.g., there is no formal process for me to argue against the complainant, whose allegations must be presumed to be true under current rules), and I have to deal with the fact that the Hearing Panel at the regular hearing already has before them a prior determination that I am guilty, a fact that the Hearing Panel cannot unhear. This is another reason that the complaint against me should be dismissed, and that the procedures be studied and fixed for the future.

D. <u>The Board of Ethics Rules and Procedures Fail to Expressly Provide for Judicial Review of Board and City Council Finding of Violations; and to Allow Legal Determinations to Be Made by An Administrative Law Judge</u>

Given the serious legal and reputational interests at stake when a person, such as myself, is brought before the Board of Ethics, especially on as specious of a charge and problematic procedures such as I have been subjected to, it has become clear that the Board of Ethics rules and procedures should provide for subsequent appeal of Board of Ethics and even City Council

decisions to a court of law by way of a petition for administrative mandate. (*See Mohilef v. Janovici* (1996) 51 Cal. App. 4th 267, 298.)

Currently, the City Code and Board of Ethics Rules and Procedures do not provide for such an appeal to a court of law. Thus, the Board of Ethics should not only find that I have committed no violation; it should also promptly recommend to the City Council that City Code should be amended to expressly allow for such an appeal, as a check to ensure that proper procedures and constitutional protections are maintained. In addition, the City Council should seriously consider utilizing the services of administrative law judges as many other cities and administrative agencies have done, to ensure the proceedings are conducted in an orderly and professional manner.

Conclusion

As the City Attorney noted, "abuse of discretion" means the decision maker "has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc. § 1094.5(b).) The Board of Ethics' decision in this matter was not supported by the findings and the findings were not supported by the evidence for the reasons stated above. Therefore, the Board of Ethics abused its discretion in making findings for the two violations alleged.

The Board of Ethics should not repeat its errors and make findings that no violations have occurred.

Respectfully Submitted

Councilwoman Gaby Plascencia