City Council Memorandum

City of Arts & Innovation

TO: **HONORABLE MAYOR AND CITY COUNCIL** **DATE: JUNE 22, 2021**

FROM: **CITY ATTORNEY'S OFFICE** **WARDS: ALL**

SUBJECT: **APPEAL OF THE FINDING OF PROHIBITED CONDUCT OF THE CODE OF ETHICS AND CONDUCT BY THE BOARD OF ETHICS HEARING PANEL ON APRIL 14, 2021**

ISSUES:

To determine whether the Hearing Panel committed clear error or an abuse of discretion based upon the April 14, 2021 hearing record.

RECOMMENDATIONS:

That the City Council:

1. Determine whether the Hearing Panel committed clear error or an abuse of discretion based upon the hearing record.

2. If there is no finding of a clear error or abuse of discretion, then the City Council shall adopt the decision of the hearing panel as the findings of the City Council on appeal;

   Or, if there is a finding of clear error or abuse of discretion, then the City Council shall clearly state the finding of clear error or abuse of discretion and shall refer the matter back to the Board of Ethics for a de novo hearing in light of the findings on appeal.

3. If the City Council finds there is a violation of the Prohibited Conduct of Riverside Municipal Code Chapter 2.78, the City Council may determine sanctions in accordance with the enforcement and sanctions section of that chapter.

HEARING PANEL DECISION:

On April 17, 2021, a Hearing Panel reheard (*de novo*) the complaint by Mr. Hunter with the new findings sent back down by the City Council. At the hearing, the Hearing Panel found that Councilwoman Plascencia violated RMC 2.78.060(M) Violations of federal, State, or local law prohibited by failing to meet the RMC 4.05.050(D)(2)(a) Excuse of Sunshine Notice Requirements because the need to take immediate action was not discussed or considered. The Hearing Panel also found that Councilwoman Plascencia violated RMC 2.78.060(D)

Advocacy of private interests of third parties in certain circumstances prohibited by use of the union bug on the business card because the union bug logo certifies allegiance to a specific party. The statement of findings is attached to this report.

DISCUSSION:

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, Councilwoman Plascencia 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 Councilwoman Plascencia's City business card. 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, Councilwoman Plascencia filed a timely response to the complaint.

On September 30, 2020, the Hearing Panel conducted a hearing on Mr. Hunter's complaint against Councilwoman Plascencia. After the presentation of evidence and deliberation of the panel, the Hearing Panel found that there were facts to sustain violations of RMC 2.78.060(M) Violations of federal, State, or local law prohibited and RMC 2.78.060(D) Advocacy of private interests of third parties in certain circumstances prohibited. Pursuant to RMC 2.78.100, the decision of the Hearing Panel finding violations of RMC 2.78.060 are automatically appealed to the City Council.

On October 27, 2020, the City Council heard the appeal and made findings of clear errors and abuse of discretion by the Hearing Panel. The City Council made the following findings related to clear error: (1) The Sunshine Ordinance was not violated pursuant to RMC Sections 4.05.050(D) and 4.05.050(D)(1)(A) which allows the Sunshine Ordinance to be waived if certain conditions are met. (2) "Urgency" is determined by either the Mayor and a Councilmember or tow Councilmembers. Urgency was established in this case and procedure was followed. (3) There is a clear process established in the Municipal Code to waive or circumvent the Sunshine Ordinance. It was followed. (4) The December 17, 2019, agenda and associated report for Item 7A did not violate the Sunshine Ordinance or the Brown Act as the report for Item 7A did not violate the Sunshine Ordinance or the Brown Act as the report defines "collateral" and as a union bug is an insignia. (5) 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 City Council also found that there was an abuse of discretion because the Hearing Panel substituted its own opinion of urgency over the opinion of the City Council. Further, it was to be an abuse of discretion for the Hearing Panel to disregard and override the policy decisions of the City Council when it came to the use of the union bug on City business cards.

On April 14, 2021, a Hearing Panel reheard the complaint by Mr. Hunter with the new findings sent back down by the City Council. At the hearing, the Hearing Panel found that Councilwoman Plascencia violated RMC 2.78.060(M) Violations of federal, State, or local law prohibited by failing to meet the RMC 4.05.050(D)(2)(a) Excuse of Sunshine Notice Requirements because the need to take immediate action was not discussed or considered. The Hearing Panel also found that Councilwoman Plascencia violated RMC 2.78.060(D) Advocacy of private interests of third parties in certain circumstances prohibited by use of the union bug on the business card because the union bug logo certifies allegiance to a specific party. Pursuant to RMC 2.78.100, the decision of the Hearing Panel finding violations of RMC 2.78.060 are automatically appealed to the City Council.

RMC 2.78.090(E) provides that "[t]he City Council shall review the record of the hearing to determine whether the hearing panel committed a clear error or an abuse of discretion based upon the record. If no such finding is made by a majority of the City Council, then the City Council shall adopt the decision of the hearing panel as the findings of the City Council on appeal. If there is a finding by the City Council of a clear error or an abuse of discretion by the hearing panel, then that finding shall be clearly stated and the matter shall be referred back to the Board of Ethics for a *de novo* (new) re-hearing of the matter in light of the findings on appeal."

The term "clear error" means although there may be evidence to support the finding, the reviewing entity after reviewing the entire evidence is left with a definite and firm conviction that a mistake was committed. (*Escobar v. Flores* (2010) 183 Cal.App.4th 737, 748.) The "clear error" standard is deferential to the fact finder. (*Ibid*.)

"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).)

Lastly, RMC 2.78.090(F) provides that "[i]f the City Council finds there is a violation of the Prohibited Conduct section of this chapter, then the City Council may determine sanctions in accordance with the enforcement and sanctions section of this chapter."

On May 25, 2021, the City Council continued the appeal of the Hunter v. Plascencia complaint to June 22, 2021.

On June 3, 2021, the Board of Ethics adopted the Statement of Findings and Decision as amended by Chair Keith Nelson and authorized Chair Nelson to present the Amended Statement of Findings and Decision to the City Council for the appeal of the Hunter v. Plascencia complaint.

FISCAL IMPACT:

There is no fiscal impact associated with this report.

Prepared by: Brandon S. Mercer, Sr. Deputy City Attorney

Approved as to form: Kristi J. Smith, Interim City Attorney

Attachments:

1. June 3, 2021, Board of Ethics Minutes
2. Amended Statement of Findings and Decision by Board of Ethics on June 3, 2021
3. Hearing Record
4. RMC Chapter 2.78
5. Complaint
6. Complaint Evidence including BOE HP Transcript of 9-30-21
7. Public Official Response dated 9-10-20
8. Public Official Response Audio Links
9. Public Official Response dated 3-24-21
10. Hearing Rules and Procedures