

**AS OF SEPTEMBER 12, 2006, THIS LETTER HAS
BEEN SUPERSEDED BY AMENDMENTS TO SDMC
SECTIONS 27.3503 and 27.3550**

March 16, 2006

SDEC Formal Advice Letter No. FA06-06

Advice Provided To:
Mike McGhee
10405 San Diego Mission Rd., Ste. 201
San Diego, CA 92108

Re: Request for Advice Regarding the Impact of the City's Post-Employment
Restrictions on Your Employment with San Diego City Firefighters Local 145

Dear Mr. McGhee:

This advice letter has been prepared in response to your letter to the City of San Diego Ethics Commission dated March 2, 2006. You are seeking advice from the Ethics Commission with regard to how your employment with San Diego City Firefighters Local 145 is affected by the post-employment lobbying provisions of the Ethics Ordinance.

QUESTIONS

1. As a former City Official who is subject to the Ethics Ordinance's post-employment lobbying restrictions, may you lawfully have direct communications with City Officials for the purpose of influencing decisions on behalf of your employer, San Diego City Firefighters Local 145?
2. As a former City Official who is subject to the Ethics Ordinance's post-employment lobbying restrictions, may you lawfully speak to City Officials on any topic or issue at a meeting convened under the Ralph M. Brown Act?

SHORT ANSWERS

1. Although the City's Ethics Ordinance does restrict the ability of former City employees to lobby the City, it also contains exemptions for communications that relate to collective bargaining agreements and memorandums of understanding between the City and its employee organizations. Because the job duties you've described fall within these exemptions, you may lawfully engage in these duties even if they involve having direct communications with City Officials during your one-year post-employment period.

2. Yes. Notwithstanding the City's post-employment lobbying restrictions, the Ethics Ordinance's "public hearing" exemption enables you to lawfully speak to City Officials on any topic or issue at a meeting convened under the Ralph M. Brown Act.

BACKGROUND

Until recently, you were employed as the City of San Diego's Labor Relations Manager. You separated from City service to take a position with San Diego City Firefighters Local 145 [Local 145] as the Director of Labor Relations. Local 145 is an employee organization recognized by the City of San Diego. You have described your job duties for Local 145 as follows: (a) represent Local 145 on any issues related to wages, hours, and/or working conditions; (b) sit on the Local 145 bargaining team for successor labor agreement; (c) work with the Fire-Rescue Department on issues relating to the interpretation of the applicable memorandum of understanding [MOU] with the City; (d) work to resolve or file grievances with the department; and (e) represent employees in discipline and appeal matters.

On January 5, 2006, prior to leaving City service, you met with Ethics Commission staff to discuss your concerns regarding post-employment restrictions. This advice letter confirms and elaborates upon the general prospective assistance we gave you at that meeting.

ANALYSIS

A. General Prohibitions

There is nothing in the Ethics Ordinance that prohibits a former City Official from accepting employment from any company or entity after leaving City service. What the Ethics Ordinance does prohibit, however, are certain types of "lobbying" activities on behalf of a former City Official's new employer. The term "lobbying" is defined as a "direct communication with a City Official for the purpose of influencing a municipal decision on behalf of any other person." San Diego Municipal Code [SDMC] § 27.3503. The SDMC defines "direct communication" to include talking to other persons by telephone or in person, and corresponding with other persons in writing, electronically, or by fax.

The Ethics Ordinance contains restrictions and prohibitions applicable to the lobbying activities of compensated City Officials (as opposed to volunteer members of City boards and commissions) for a one year period after they leave City employment. SDMC § 27.3550. In particular, section 27.3550's prohibitions include the following:

- (a) It is unlawful for any former City Official who received compensation from the City to work on a particular project during his or her City service to engage in direct communication with the City, for compensation, with regard to any pending application for discretionary funding or discretionary entitlements before the City relating to that particular project on behalf of any person other

than a Public Agency for a one year period immediately following termination of service with the City.

....

- (b) It is unlawful for any former City Official, for compensation, to knowingly counsel or assist any person other than a Public Agency in connection with an appearance or communication in which the former City Official is prohibited from engaging pursuant to subsection (a) for a one year period immediately following termination of service with the City.

....

- (d) It is unlawful for any former City Official to engage in direct communication for the purpose of lobbying the City if all of the following circumstances apply:
 - (1) the former City Official served as a City Official within the previous twelve months; and
 - (2) the former City Official received compensation from the City for his or her services as a City Official; and
 - (3) the former City Official is receiving compensation from a private business to engage in the direct communication with the City.

B. Project Ban

The provisions of subsections (a) and (b), above, pertain to work on a particular project, and are intended to prevent City Officials from working on a particular project on behalf of the City and then “switching sides” to work on the same project for the other side while the project is still pending before the City. In other words, this restriction would prevent you from lobbying the City on any pending projects you worked on while a City employee. It does not appear, however, that your employment with Local 145 will involve any pending projects you worked on as a City employee. Although your prior duties as the City’s Labor Relations Manager clearly included participation in labor agreements, those agreements have been finalized by actions of the City Council. As such, the labor agreements you worked as a City employee on are no longer “pending.” You indicated that your work for Local 145 will include participating in negotiations related to a successor labor agreement. Such an agreement would constitute a new contract with the City, and would therefore be considered a separate and distinct “project” within the meaning of the Ordinance.

It is also important to note that the Ethics Ordinance narrowly defines a “project” for purposes of the post-employment lobbying provisions as “any matter where a private business has made an application to the City for discretionary funding or discretionary entitlements, or where the City exercises discretion to enter into a lease, agreement, or contract with a private business.” You have stated that your duties for Local 145 will include representing the organization on issues

related to wages, hours, and/or working conditions; working with the Fire-Rescue Department on issues relating to the interpretation of its MOU with the City; working to resolve or file grievances with the department; and representing employees in discipline and appeal matters. It does not appear that any of these duties constitute a “project” as that term is defined in the ordinance. If, however, you believe that any aspect of your work for Local 145 will involve a particular “project,” and if you worked on that specific project while you were a City Official, then you would be precluded from lobbying the City on that project, and from counseling or assisting Local 145 on that project, for one year after leaving City service or until the project is no longer pending.

C. One Year “Cooling Off” Period

In addition to the “project ban,” the Ethics Ordinance contains a much broader prohibition that generally precludes former City Officials from lobbying the City for a one year period following their separation from City service. This one year period is often referred to as the “cooling off period” or the “revolving door” provision. As indicated by SDMC section 27.3550(d), above, former City Officials who were compensated by the City during the course of their City employment may not, for one year, engage in any “lobbying” activities with the City.

A key component of the definition of “lobbying” has to do with influencing municipal decisions. If your contact with a City Official is not an attempt to influence a “municipal decision,” then the post-employment restrictions do not apply to that contact. The term “municipal decision” is defined to include such actions as the drafting, introducing, and adopting ordinances and resolutions; creating reports for the City Council, entering contracts, making various types of quasi-judicial decisions, as well as any decision made by the City Council or any other City agency, board, or commission. According to SDMC section 27.3503, the term “municipal decision” expressly excludes certain activities relevant to your employment with Local 145:

- (d) any action relating to the establishment, amendment, administration, implementation, or interpretation of a collective bargaining agreement or memorandum of understanding between the City and a recognized employee organization, or a proceeding before the Civil Service Commission; or,
- (e) any management decisions as to the working conditions of represented employees that clearly relate to the terms of collective bargaining agreements or memoranda of understanding pursuant to subsection (d) above.

Accordingly, although the one year “cooling off” provision prohibits you from having any contact with the City for one year for the purpose of influencing a “municipal decision,” this prohibition clearly does not apply to any contacts you have with City Officials that truly relate to an MOU between the City and Local 145. The prohibition also clearly does not apply to any communications you may have with City Officials regarding the working conditions of represented employees who are covered under that MOU.

As stated above, you indicated that your position as Director of Labor Relations with Local 145 includes sitting on the Local 145 bargaining team for any successor labor agreements and working with the Fire-Rescue Department with regard to interpreting its MOU with the City. These activities fall squarely within the subsection (d) exemption identified above. You also stated that your job responsibilities include representing Local 145 on issues related to wages, hours, and/or working conditions, filing or resolving grievances with the Fire-Rescue Department, and representing employees in discipline and appeal matters. To the extent that such duties involve contacting City Officials with regard to the working conditions that relate to Local 145's MOU with the City, your actions in this respect would also be exempt from the provisions of the one year "cooling off" provisions.

Keep in mind that the above exemptions apply to you only with regard to actions expressly identified within the exemptions. In other words, even though you may lawfully contact City Officials in an effort to influence them concerning a new collective bargaining agreement or with regard to employee working conditions, these exemptions do not permit you to have similar contacts with City Officials with respect to unrelated matters, such as the City raising the transient occupancy tax or the City Council confirming an individual's appointment to a City board.

D. Public Hearing Exemption

You have also asked whether your status as a former City Official who is subject to the Ethics Ordinance's post-employment lobbying provisions impacts your ability to speak at Council meetings, Council committee meetings, Civil Service Commission meetings, and other similar type meetings convened under the Ralph M. Brown Act. As indicated above, the SDMC defines "lobbying" to mean certain types of "direct communications." The term, "direct communication" expressly excludes "appearing as a speaker at, or providing written statements which become part of the record of a public hearing." SDMC § 27.3503. The term, "public hearing" means "any meeting as defined by the Ralph M. Brown Act where a public record is kept of who spoke and who was represented by a lobbyist testifying at that hearing." Based on these definitions, it is clear that you may speak on any subject (including matters unrelated to employee working conditions or the Local 145 MOU) at any City Council meeting, Rules Committee meeting, etc., regardless of the fact that you are otherwise subject to the City's post-employment lobbying restrictions.

CONCLUSION

The Ethics Ordinance prohibits certain types of post-employment lobbying, but expressly allows former City Officials to engage in lobbying-type activities that relate to collective bargaining agreements and memorandums of understanding between the City and its employee organizations. The job duties you've described fall within these exemptions, and accordingly, you may lawfully engage in these duties even if they involve having direct communications with City Officials during your one-year post-employment period. In addition, the Ethics Ordinance's "public hearing" exemption enables you to lawfully speak to City Officials on any topic or issue at a meeting convened under the Ralph M. Brown Act

Finally, your letter requesting assistance seeks confirmation of earlier verbal advice we gave you on the subject of recusing yourself from working on any Local 145 matters during your final days of employment with the City. Because the Ethics Commission can only provide prospective assistance, we cannot comment in this advice letter on any activities you engaged in while employed by the City; such activities are all now considered past conduct. We can, however, confirm that we did inform you of SDMC section 27.3551's prohibition against a City Official influencing any municipal decisions involving the interests of a person or entity with whom he or she is seeking, negotiating, or securing an agreement concerning future employment.

Please note that this advice letter is being issued by the Ethics Commission solely as technical assistance from a regulatory agency as provided by SDMC section 26.0414(b). It is not to be construed as legal advice from an attorney to a client. Moreover, the advice contained in this letter is not binding on any other governmental or law enforcement agency.

If you have any additional questions, please do not hesitate to contact our office.

Sincerely,

Cristie McGuire
General Counsel

By: Stephen Ross
Program Manager-Technical Assistance