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CITY OF SPOKANE ETHICS COMMISSION

SPOKANE AREA NOW,)	
)	
Complainant,)	
)	RESPONSE TO MOTIONS TO
vs.)	DISMISS AND MOTION TO STRIKE
)	
)	
DAVID CONDON, MAYOR,)	
)	
Respondent.)	
)	
)	
)	

COMES NOW Complainant SPOKANE AREA NOW ("NOW"), by and through its undersigned attorneys, Rick Eichstaedt and the Center for Justice responds to the two Motions to Dismiss and Motion to Strike filed by Respondent David Condon in this matter. As set forth below, there is no legitimate basis to dismiss this complaint. Accordingly, the Commission should either: (1) determine that an ethics violation has occurred based upon the information submitted or (2) schedule this matter for a hearing and subpoena witnesses that may clarify the facts of this matter.

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2-17-16

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2 **1. CONSIDERING THESE MOTIONS IS INCONSISTENT WITH THE PLAIN**
3 **LANGUAGE OF THE SPOKANE MUNICIPAL CODE AND THE**
4 **COMMISSION’S POLICY AND PROCEDURES MANUAL.**

5 After a unanimous decision finding jurisdiction and a vote against
6 reconsidering that decision, Mayor Condon seeks a third bite of the apple urging this
7 Commission to dismiss a complaint that the Commission has already determined to
8 have merit for a hearing. This is clearly inconsistent with both the plain language of
9 the Municipal Code and the Commission’s Policy and Procedures Manual.

10 The Commission’s Policy and Procedures Manual (“Manual”) 4.3(1)
11 provides:

12 The Commission shall request an initial written response to the complaint
13 from the respondent, which shall be filed with the Commission at least ten
14 business days before the Commission holds an initial meeting to review the
15 complaint. The initial response shall pertain to whether the complaint should
16 be dismissed pursuant to SMC 1.04A.110 D. 1. a. – f. and shall not address
17 the merits of the complaint.

18 That section goes on to provide that the Commission “shall schedule an
19 initial meeting to review the complaint in order to make a determination consistent
20 with SMC 1.04A.110 D.” Manual at § 4.3(2). “If the Commission determines the
21 complaint alleges facts which, if found to be true, would be sufficient to constitute a
22 violation of the Code of Ethics, it shall meet with the respondent to create a
23 stipulation resolving the complaint, the determination of compliance and the penalty,
24 if any, to be imposed consistent with SMC 1.04A.110 E.” *Id.* at § 4.3(3).

25 Once a hearing on jurisdiction and a meeting on a potential stipulation
occurs, the Commission must conduct a hearing – “Complaints that are not resolved
through adjudication under SMC 1.04A.110 D or the stipulation process under SMC

1 1.04A.E, shall proceed to an investigation process pursuant to SMC 1.04A.110 F.”

2 Manual at § 4.4. Additional hearings on jurisdiction are not appropriate.

3 The Municipal Code reflects the requirements of the Manual –providing no
4 option for further consideration of dispositive motions:

5 As soon as practicable after giving due consideration to a complaint
6 the Commission shall either:

7 1. Dismiss the complaint based on any of the following grounds:

- 8 a. It has no jurisdiction
- 9 b. The alleged violation, if true, would not constitute a violation
10 of this article;
- 11 c. The alleged violation is a minor or de minimis violation;
- 12 d. The complaint or inquiry is, on its face, frivolous, groundless
13 or brought for purposes of harassment;
- 14 e. The matter has become moot because the person who is the
15 subject of the complaint or inquiry is no longer a City officer
16 or employee;
- 17 f. The appointing authority has already taken action as a result
18 of finding a violation and the Commission believes the action
19 was appropriate; or

20 2. Determine that:

- 21 a. The complaint alleges facts which, if found to be true, would
22 be sufficient to constitute a violation of the Code of Ethics;
- 23 b. Further information must be presented for the Commission to
24 determine if a violation of the Code of Ethics has occurred.

25 SMC § 01.04A.110(D). Here, the Commission made a finding by unanimous vote
consistent with 2(a) that the alleged facts which, if found to be true, would be
sufficient to constitute a violation of the Code of Ethics.

The Municipal Code further states that once such a jurisdiction is determined
that a hearing will occur in the absence of a stipulation:

If the complaint is not resolved by stipulation, or earlier in the
adjudication process, or additional information is required to
establish the factual record necessary for the Commission to
determine whether a violation of the Code of Ethics has occurred, the
board may convene a hearing at a future date certain. At such a

1 hearing, the Commission may call additional witnesses or consider
2 additional documentary evidence. After final deliberations on
3 additional testimony, statements, or documents presented at the
4 hearing, the Commission shall determine whether or not a violation
5 of the Code of Ethics has occurred.

6 SMC § 01.04A.110(F).

7 In short, it is not the time to consider these motions – the Board made a
8 jurisdictional decision – the next step in the process is to schedule a hearing,
9 subpoena necessary witnesses, and consider documentary evidence.

10 **2. A HEARING IS NECESSARY TO CONSIDER TESTIMONY FROM**
11 **CRUCIAL FACTUAL WITNESSES.**

12 A hearing in this matter is necessary to hear from key witnesses that know
13 the facts of this matter. The Commission is empowered by the Municipal Code to
14 subpoena witnesses and compel the production of documents that will aid in its
15 determinations. SMC § 01.04A.090(B). That is necessary in this matter.

16 The pleadings of the Mayor assert facts that appear to be contrary to the
17 documentary information provided by NOW. Certainly, if the Commission is going
18 to consider these assertions, the Mayor must be witness under oath to explain what
19 occurred. Likewise, the Mayor submitted a declaration of Leroy Eadie to support
20 his claim that no ethics violation occurred, however, witnesses that may contradict
21 that version of the story – including the President of the City Council and Parks
22 Board members -- are unwilling to provide testimony unless compelled to do so by
23 this Commission. *See Exhibit A (emails).*¹

24
25 ¹ Leroy Eadie was willing to discuss the matter and sign a declaration on behalf of NOW that is
included with this response.

1 It is fundamentally unfair to allow consideration of written witness testimony
2 from one party without allowing for consideration of all key witnesses that would
3 allow this Commission to determine whether an ethics violation occurred.

4 **3. THE MAYOR WAS DISHONEST IN HIS SEPTEMBER 22, 2015 PRESS**
5 **STATEMENTS .**

6 Mayor Condon's January 19, 2016 Motion to Dismiss asserts that
7 undisputed facts indicate that he made no dishonest statement at the September 22,
8 2015 press conference. As indicated below, this is clearly not the case and this
9 Commission must either deny the motion to dismiss or find that an ethics violation
10 occurred.

11 **a. Definition of "Dishonesty" includes deceit and concealment.**

12 Mayor Condon's January 19, 2016 Motion to Dismiss asserts that a lie of
13 omission or continuing misrepresentation does not meet the definition of "dishonesty"
14 in "the absence of any common law or statutory or legislative definition." Motion to
15 Dismiss at 4.

16 To the contrary, the ordinary meaning of "dishonesty", as well as both
17 Washington statutory and case law indicate that withholding information is
18 dishonest. In fact, these definitions include whether there was intent to deceive – not
19 imply whether the truth was told.

20 While "dishonesty" is not defined in the Spokane Municipal Code,
21 Washington law is clear that, unless contrary legislative intent is indicated, words
22 are given their ordinary, dictionary meaning. *See State v. McDougal*, 120 Wash.2d
23 334, 350, 841 P.2d 1232 (1992). "Dishonesty" is defined by Merriam-Webster's
24
25

1 Dictionary as “lack of honesty: the quality of being untruthful or deceitful.”²

2 “Deceitful” is defined as “making or trying to make someone believe something that
3 is not true.”³

4 Moreover, Washington statutes define “[d]ishonesty related to employment”
5 as “including but not limited to deliberate falsification of company records, theft,
6 deliberate deception, or lying.” RCW 50.04.294(2)(c).

7 Washington court similarly included “deceit” and “concealment” as part of
8 the definition of “dishonesty.” In *Hanson Plc v. Nat’l Union Fire Ins. Co.*, 58 Wn.
9 App. 561, 794 P.2d 66, (1990), the Court of Appeals stated, “The words ‘fraud’ and
10 ‘dishonesty,’ ... are deemed to include any act showing a want of integrity or a
11 breach of trust,..., together with **deceit and concealment.**” In *Estate of K.O. Jordan*
12 *v. Hartford Accident & Indem. Co.*, 120 Wn.2d 490, 844 P.2d 403, (1990), the State
13 Supreme Court affirmed this definition stating, “The court in *Hanson PLC*
14 determined that a fraudulent or dishonest act is any act ‘showing a want of integrity
15 or a breach of trust, or an abstraction of funds, together with deceit and
16 concealment.’”

17 In short, the Commission’s examination of this complaint is more extensive
18 than a simply inquiry as to whether the Mayor’s statements were truthful – the
19 Commission must look at whether the statements amounted to deceit or concealment
20 of actual facts. As the record indicates, the Mayor failed to disclose the facts of the
21 situation – that Ms. Cotton had complained and that there was an inappropriate
22 relationship between Mr. Straub and Ms. Cotton – one of an abuser and victim.

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24
25 ² See <http://www.merriam-webster.com/dictionary/dishonesty>.

³ See <http://www.merriam-webster.com/dictionary/deceitful>.

1 **b. NOW's Complaint is distinguishable from the dismissed complaints.**

2 Mayor Condon's January 19, 2016 Motion to Dismiss also asserts that the
3 NOW complaint is identical to the previously dismissed complaints. Motion to
4 Dismiss at 2-3. To the contrary, the NOW complaint alleges specific complaints
5 regarding a broader series of questions. As provided above, NOW asserts that the
6 Mayor was dishonest (i.e., deceitful and concealed the truth) in the following
7 statements:

8 REPORTER 1: Were there any sexual harassment complaints
9 lodged against Frank?

10 MAYOR CONDON: No.

11 REPORTER 2: There have been rumors of an inappropriate
12 relationship between the Chief and Ms. Dugaw. Has that been
brought up at all? Was that made part of this as well?

13 MAYOR CONDON: The critical thing is the management style.
14 The issue with – that you speak of, but there has been no official
filing of anything.

15 *See* Transcript of September 22, 2015 Press Conference at 2.

16 The question is not whether an "official complaint" was filed, but rather the
17 Mayor's answers to whether there were complaints and whether there was an
18 inappropriate relationship. The Mayor's Motion to Dismiss hangs its hat solely on
19 whether an "official" complaint was filed – rather than the question – was there a
20 complaint lodged?

21 First, what is a complaint? The ordinary, dictionary definition of a
22 complaint is:

- 23 1. a statement that you are unhappy or not satisfied with something
24 2. the act of saying or writing that you are unhappy or dissatisfied
25 with something

1 3. something to be unhappy about : something that people complain
2 about

3 See <http://www.merriam-webster.com/dictionary/complaint>.

4 This is reflected in other dictionaries that define “complaint” as “a statement
5 that you are unhappy or not satisfied with something -- We lodged a complaint with
6 the hotel manager. [we complained to the hotel manager].”⁴ “Complaint” is also
7 defined as “an expression of discontent, regret, pain, censure, resentment, or grief;
8 lament; faultfinding.”⁵

9 In the Mayor’s January 27, 2016 Response and Motion to Strike, the Mayor
10 argues that because that one of three definitions from a single dictionary defined a
11 “complaint” as a “formal allegation” that the Mayor certainly could only understand
12 that a complaint amounted to a formal written complaint.

13 However, the record is clear that Ms. Cotton complained – including to the
14 Mayor’s senior staff. As previously indicated, records from the City (included as
15 Attachment A to the original complaint) indicate that complaints involving Straub’s
16 behavior were received as early as April 13, 2015 regarding allegations that Straub
17 groped and forcibly kissed Ms. Cotton. While city records indicate that the
18 complainant did not desire any investigation of the improper physical actions
19 (groping and kissing) and no “formal” complaint was filed, it is clear that the City
20 was aware of the complaints of unwanted sexual conduct. *Id.*

21 Records from the City (included as Attachment B to the original complaint)
22 also document a March 31, 2015 meeting involving Straub where he berated Ms.
23 Cotton utilizing sexually charged language stating that “she ‘fucked’ him” and
24

25 ⁴ See <http://www.learnersdictionary.com/definition/complaint>.

⁵ See <http://dictionary.reference.com/browse/complaint?s=t>.

1 “fucked him in the ass and broke the dick off.” Ms. Cotton clearly indicated a desire
2 to assist in the investigation of the improper verbal actions that occurred at the
3 March 31, 2015 meeting with Straub. Attachment A (original complaint). As a
4 result, Mayor Condon met with Ms. Cotton’s attorney and Ms. Cotton was
5 transferred.

6 Moreover, this assertion ignores the element of the NOW complaint focusing
7 on the Mayor’s response to the question of whether there was an inappropriate
8 relationship – to which the Mayor provided a deceitful answer that concealed the
9 truth.

10 In short, it is clear, that the NOW complaint is focused on whether the
11 Mayor’s statements at the September 22, 2015 press conference were deceitful or
12 concealed the truth.

13 **c. There is no evidence before the Commission to support the assertion**
14 **that Mayor Condon did not know that Ms. Dugaw is Monique**
15 **Cotton.**

16 In the Mayor’s January 27, 2016 Response and Motion to Strike, the Mayor
17 argues he had no knowledge that Ms. Dugaw was in fact Monique Cotton and that
18 NOW had falsified quotes to indicate that Dugaw was Cotton.

19 First, NOW did in fact state “Cotton” instead of “Dugaw” in its amended
20 complaint. This was simply a scrivener’s error and was not intended to confuse or
21 deceive the Commission. NOW clearly cited sources and provided a CD of the
22 original interaction – both the Transcript of September 22, 2015 Press Conference at
23 2 (included with Condon’s Motion to Dismiss) and the CD of Press Conference.
24 NOW does not dispute that the name used was Dugaw.

1 Second, Ms. Cotton (formerly Dugaw) is a widely known member of the
2 community. Many people know her and her maiden name. There is nothing in the
3 Mayor's response to indicate that he did not know who was being referred to – the
4 Mayor did not state “who are you referring to” or “there is no employee named
5 Dugaw” or anything else indicated the confusion asserted in the Mayor's motion.
6 Moreover, this is an unsubstantiated assertion that would require the Mayor as a
7 witness to assess – not an unsworn statement in a pleading.

8
9 **d. The Doctrine of *Res Judicata* and Collateral Estoppel does not apply
to this proceeding.**

10 Mayor Condon's January 19, 2016 Motion to Dismiss also asserts that
11 consideration of the NOW complaint is barred by the legal doctrines of *res judicata*
12 or collateral estoppel. Motion to Dismiss at 3. Again, this is simply not the case.

13 Collateral estoppel and *res judicata* require identical parties be present in
14 both matters – NOW was not a party to other complaints.

15 The doctrine of *res judicata*, or claim preclusion, prevents the same parties
16 from relitigating a claim that was raised or could have been raised in an earlier
17 action. *Roberson v. Perez*, 156 Wash.2d 33, 41 n. 7, 123 P.3d 844 (2005). The
18 doctrine is intended to prevent piecemeal litigation and to ensure the finality of
19 judgments. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wash.2d
20 89, 99, 117 P.3d 1117 (2005). The party asserting *res judicata* must establish that
21 the subsequent action is identical to an earlier action in (1) identity of persons and
22 parties, (2) the subject matter, (3) the cause of action, and (4) the quality of the
23 persons for or against whom the claim is made. *Id.* Here, there are no identical
24 parties.
25

1 The doctrine of collateral estoppel bars relitigation between the same
2 parties on an issue of ultimate fact that has been determined by a valid and final
3 judgment. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). Collateral estoppel
4 applies only where: (1) the issues presented in both cases are identical; (2) there
5 was a final judgment on the merits in the first action; (3) the party against whom
6 the doctrine is asserted was a party to or in privity with a party to the prior action;
7 and (4) application of the doctrine does not work an injustice against the party to
8 whom it is applied. *State v. Barnes*, 85 Wn.App. 638, 650, 932 P.2d 669, review
9 denied, 133 Wn.2d 1021 (1997). The burden of proof is on the party asserting that
10 all elements of collateral estoppel exist. *Barnes*, 85 Wn.App. at 650-51. Again,
11 there are no identical parties.
12

13 **e. NOW does not assert that confidential information be revealed, but**
14 **rather than information that deceives the public is not disseminated.**

15 Condon's January 19, 2016 Motion to Dismiss also asserts that providing
16 information responsive to the questions would have resulted in a separate ethics
17 violation related to the release of confidential information. Motion to Dismiss at 3-
18 4. Again, this is simply not the case.

19 NOW does not complain that the Mayor had a duty to release all the
20 information – instead NOW asserts that the information provided to the public must
21 not be deceitful or conceal the truth. Had the Mayor wished to not answer the
22 question, he simply could indicate as much – “I cannot answer – that is confidential”
23 or “I cannot answer that at this time.”

24 Assertions about other potential ethics violations only cloud the issues and
25 are not relevant to this proceeding.

1 **4. THE FACTS SUPPORT THAT THE MAYOR WAS DISHONEST REGARDING**
2 **THE TRANSFER OF MS. COTTON.**

3 In a second Motion to Dismiss, Mayor Condon asserts that the Mayor was
4 not dishonest in his December 11, 2015 letter to City Council because: (1) the City
5 explored creating a “dual position” for Ms. Cotton at both Fire and Police and (2)
6 that Mr. Eadie, Parks Director, had authority to retain Ms. Cotton. This kind of
7 factual dispute needs to be resolved at a hearing on this matter.

8 NOW has submitted material that contradicts these statements, including a
9 statement from the Fire Department, that indicate: (1) efforts were first made to
10 move Ms. Cotton to Fire (no reference to a “dual position”); (2) that the transfer was
11 designed to address Ms. Cotton’s complaints with Chief Straub and Ms. Cotton’s
12 insistence on a transfer out of Police to a position that looked like a promotion (“My
13 transfer to a new position has to be viewed as advancement”); and (3) the position is
14 currently subject to hiring.

15 Moreover, it is clear from the attached declaration of Leroy Eadie that: (1)
16 Mr. Eadie was not hiring Ms. Cotton – she was placed in Parks; (2) the position was
17 temporary; and (3) the position was advertised with no assurance that Ms. Cotton
18 would receive the position. *See* Leroy Eadie Declaration at ¶¶ 5-7, 9.

19 Further, testimony from members of the Park Board at hearing will further
20 explain the course of events that occurred bringing Ms. Cotton to Parks.

21 Lastly, the Commission has already ruled on a nearly identical claim
22 regarding a nearly identical set of facts filed by Shar Lichty in her complaint filed
23 against Teresa Sanders. In that complaint, Ms. Lichty asserted as her second
24 allegation:
25

1 Ms. Cotton's new position with the Parks Department included a
2 raise in annual salary from \$80,900 to \$90,000, with a scheduled
3 increase to \$96,000 in 2016. In late August, Ms. Sanders referred to
4 this raise as an "enticement" necessary to persuade Ms. Cotton to
5 accept the new position. *See* Attachment B. Ms. Sanders said the
6 decision to move Cotton came as part of a larger city endeavor to
"tell the story" of Riverfront Park. *See* Attachment B. After
changing departments, Ms. Cotton's position continued to be funded
by the police budget, even though she now worked in the Parks
Department. *See* Attachment B.

7 The Parks Department already has a spokesperson, Nancy
8 Goodspeed. *See* Attachment B. Park board members indicated that
9 they were informed of the transfer of Ms. Cotton only after the
10 decision was made, even though the board controls park spending
and is charged with managing the department. *See* Attachment B.
The decision to transfer Ms. Cotton "raised questions among some
park board and City Council members." *See* Attachment B.

11 The statement as to the nature of the transfer was false. In an email
12 dated August 28, 2015, it was revealed, contrary to Ms. Sanders'
13 public statements, that city officials first attempted to move Cotton to
the Spokane Fire Department, an effort rebuffed by fire officials.
14 Assistant Fire Chief Brian Schaeffer said in the email that city
administration officials approached him in April about transferring
15 Cotton. The email states, "The discussion of creating a public safety
[public information officer] position and assigning Cotton in there
16 was discussed ... We did have a meeting and decided that we would
prefer to do recruitment for someone that was better fitted for fire."
17 *See* Attachment C.

18 In its written decision, this Commission found merit in this claim stating:

19 As to Allegation No. 1, the Commission finds that the complaint alleges
20 facts which, if found to be true, would be sufficient to constitute a violation
of the Code of Ethics pursuant to SMC 1.04A.110(D)(2). Ms. Sanders'
21 motion to dismiss is denied by a vote of six to zero with one abstention by
the members of the Ethics Commission present for the hearing.

22 *See* Exhibit B.

23 Given the facts presented to the Commission in this matter and the nearly
24 identical facts asserted and claim made in the Sanders case, the Commission must
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1 find that there are sufficient facts, if found true, to warrant a hearing on this
2 matter.

3 **CONCLUSION**

4 As set forth above, there is no legitimate basis to dismiss this complaint.
5 Accordingly, the Commission should either: (1) determine that an ethics violation
6 has occurred based upon the information submitted or (2) schedule this matter for a
7 hearing and subpoena witnesses that may clarify the facts of this matter.

8
9 RESPECTFULLY SUBMITTED this 17th day of February, 2016.

10 **CENTER FOR JUSTICE**

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15 RICK EICHSTAEDT, WSBA #336487
16 Attorney for Spokane Area NOW
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1 **CERTIFICATE OF SERVICE**

2 I, Rick Eichstaedt, certify that on the 17th day of February, 2016, I caused
3 the foregoing *Response to Motion to Dismiss and Motion to Strike* with exhibits
4 and *Declaration of Leroy Eadie* to be served via email on the following:

5 City of Spokane Ethics Commission
6 James King

7 SUBMITTED this 17th day of February, 2016.

8 CENTER FOR JUSTICE

9
10 

11
12 RICK EICHSTAEDT, WSBA #336487
13 Attorney for Spokane Area NOW