

## **Does Appearance Trump Substance?**

### **Watsonville City Personnel Commission's Discipline Appeal Process**

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#### ***Summary***

The City of Watsonville has a Personnel Commission and procedures to enable city employees to appeal a disciplinary action taken by management. On August 20, 2009, the Commission conducted an open hearing on an appeal. After the hearing, a complaint was filed with the Santa Cruz County Grand Jury questioning the fairness of the procedures and the behavior of the commissioners and the city attorney before and during the appeal process. The complainant stated that there was possible “bias” as the commissioners and the department manager had dinner together before the hearing, and that the city attorney unduly influenced the commissioners during the deliberations.

The Grand Jury found that the Personnel Commission and other parties involved correctly followed hearing procedures, and it commends the City of Watsonville for the construct of the appeals process for its city employees. However, the Jury recommends some changes to remove the potential appearance of bias and to encourage employee confidence in the appeal process.

#### ***Background***

The City of Watsonville, through its charter and municipal code, has established a Personnel Commission and defined a process for its employees to appeal a disciplinary action taken by management, including actions such as suspension, demotion, or dismissal. The Commission is comprised of seven citizens appointed by the city council and conducts hearings according to established rules and procedures. The city attorney is present at hearings and may advise the commissioners during their deliberations. The commissioners hear appeals, deliberate, and make recommendations to the city manager.

In some cases, as when a hearing lasts into the evening, the City of Watsonville provides dinner for the commissioners, with a standing invitation to the city manager, the city attorney, and department heads. Other employees involved in the proceedings are invited to participate in the dinner but must pay for the meal themselves. An agenda is posted to announce when a dinner is provided; however, personnel not fully aware of the protocol for the dinners may have scheduling conflicts and be unable to attend.

A complaint was filed with the Grand Jury on September 23, 2009. The complainant was concerned with “unethical issues” relating to the August 20 appeal, stating that:

- the department manager greeted the commissioners at the door and had dinner with them, providing an informal opportunity for him to discuss the details of the case with them before the formal hearing, and
- although the city attorney represents the commission and other city committees, it appeared that the commissioners were not allowed to independently come to a decision without strict constraints placed upon them by the city attorney.

## Scope

The Grand Jury reviewed the City of Watsonville disciplinary appeal process, including the governing documents, and investigated the activities of the Personnel Commission and other participants in the hearing that took place on August 20.

## Findings

- F1. The City of Watsonville appeal process is outlined and governed by three documents: the City Charter, the Municipal Code, and the Rules and Procedures of the Personnel Commission.

**Response: Watsonville City Council – PARTIALLY AGREE**

*In addition to the three documents, the appeal process is also governed by the Personnel Rules and Regulations of the City of Watsonville as adopted and amended through Resolution No. 44-07 (CM) of the Watsonville City Council and also by California Court decisions regarding due process. Government Code sections 3254(b) and 3254.5 were also taken into consideration as the employee involved is a firefighter.*

- F2. Per the Watsonville Municipal Code and the City Charter, recommendations made by the Personnel Commission are only advisory to the city manager

**No Response Required**

- F3. Prior to the hearing on August 20, the city did provide dinner for persons involved in the hearing. An agenda was posted announcing the dinner. The commissioners attended, as did the city attorney and the department manager defending the disciplinary action. In fact, the manager greeted and admitted one of the commissioners into the room where the dinner took place.

**Response: Watsonville City Manager – AGREE**

*There was an agenda posted announcing the dinner for the commissioners. Staff was in attendance at the dinner which was open to any one wishing to attend.*

- F4. Those interviewed confirmed that the commissioner knew the department manager and that they did exchange salutations, but that nothing was said regarding the appeal. The hearing was not discussed during dinner. However, some of the commissioners also were concerned about the potential appearance of collusion.

**Response: Watsonville City Council – PARTIALLY AGREE**

*Those in attendance confirm that nothing was said regarding the appeal/hearing at the dinner. However, it is not known whether or not some commissioners were concerned about the potential appearance of collusion as it was not expressed to staff, the City Attorney, or anyone else except apparently to the Grand Jury. Greeting and holding the door for someone is courteous and customary. For example, the attorney for the Department and the employee greeted each other in the hearing room.*

**Response: Watsonville City Manager – PARTIALLY AGREE**

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- F5. The employee who requested the Commission hearing could have attended the dinner but would have been required to purchase his meal; however, he was not told he could attend.

**Response: Watsonville City Manager – PARTIALLY AGREE**

*It is correct that the employee requesting the appeal hearing could have attended the dinner; however, he was not expressly invited. Nevertheless, it was posted on the agenda. This was a unique situation as usually Personnel Commission hearings to consider employee disciplinary appeals are closed to the public. However, in this case, the employee expressly requested that the hearing be open to the public. As a result, the dinner was made open as well to anyone wishing to attend. Staff present that evening were invited to eat after all commissioners had been served. Had the employee been present, he presumably could have eaten as well. Again, normally, this would have been a closed affair and only the Personnel Commission and staff to the commission (Recording Secretary and Counsel) would have been present.*

- F6. The hearing was held after dinner. All parties were represented by counsel, including the commissioners, who were represented by the city attorney. When the hearing was completed, the commissioners went into closed session with the city attorney for deliberations. The city attorney provided clarification and advice when requested by the commissioners; the attorney only answered questions asked by the commissioners and did not influence their decision on the appeal.

**Response: Watsonville City Manager – AGREE**

- F7. The Watsonville city attorney advises and represents the city council and all city boards and commissions. The Santa Cruz city attorney and the Capitola city attorney similarly advise and represent the city councils and all boards and commissions in their cities. However, the Watsonville City Charter, unlike the charters of these other cities within the county, does not explicitly include commissions and committees for city attorney representation.

**Response: Watsonville City Council – PARTIALLY DISAGREE**

*The Santa Cruz City Charter in Section 812 states that the City Attorney shall have the power and be required to (a) Represent and advise the City Council and all City officers, commissions or boards or departments in all matters pertaining to their office. The City of Capitola is a general law city and has no charter.*

*Section 804 of the Watsonville City Charter states that the City Attorney shall,*

- a. Represent and advise the Council and all City officers in all matters of law pertaining to their offices*

- b. Represent and appear for the City in any or all actions and proceedings in which the City is concerned or is a party, and represent and appear for any City officer or employee or former City officer or employee in any or all actions and proceedings in which any such City officer or employee is concerned or is a party, for any action arising out of his employment or by reason of his official capacity;*
- c. Attend all meetings of the Council and give his advice or opinion in writing whenever requested to do so by the Council or by any of the boards or officers of the City. The City was concerned in this matter.*

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- c. Attend all meetings of the Council and give his advice or opinion in writing whenever requested to do so by the Council or by any of the boards or officers of the City. The City was concerned in this matter.*

## **Conclusions**

- C1.** The Personnel Commission conducted the appeal in accordance with the requirements of the City Charter, the Municipal Code, and the Rules and Procedures of the Commission, and there were no errors in the manner in which the hearing was accomplished.
- C2.** There is a need to ensure that all participants receive a fair and impartial hearing by an independent judge. Although the dinner was not an illegal action, the mingling of commissioners with management prior to the hearing could result in a perception of bias that may undermine the credibility of the Personnel Commission in the eyes of the participants and the general public.
- C3.** The addition to the City Charter of specific language about the city attorney's representation of city commissions and committees would help to clarify the role and eliminate speculation about the legitimate powers and duties of that attorney.

## **Recommendations**

- R1.** The Watsonville Personnel Commission should maintain a fair process free from suspicion of bias and to this end should limit the dinner attendees prior to the appeal hearings to commissioners, their legal counsel, and the recording secretary only.

**Response: Watsonville City Council – HAS BEEN IMPLEMENTED**

*Dinners prior to future personnel hearings heard by the Personnel Commission will be limited to commissioners, the legal counsel to the commission and staff to the commission.*

**Response: Watsonville City Manager – HAS BEEN IMPLEMENTED**

*Dinners prior to future personnel hearings heard by the Personnel Commission will be limited to commissioners, the legal counsel to the commission and staff to the commission.*

- R2.** To eliminate speculation about the role of the city attorney, the Watsonville City Charter should expand the description of the powers and duties of the attorney to include the representation of city commissions and committees.

**Response: Watsonville City Council – WILL NOT BE IMPLEMENTED**

*The Watsonville City Charter already authorizes the City Attorney to advise the Commission.*

- R3.** To provide the greatest separation between the Personnel Commission and city management, the city should consider hiring independent counsel for the Commission.

**Response: Watsonville City Council – WILL NOT BE IMPLEMENTED**

*In a series of California published cases over the last few years, California courts have been very clear that it is perfectly proper for the City Attorney to represent the Commission. In *Morongo Band of Mission Indians v. State Water Resources Control Board*, 45 Cal.4<sup>th</sup> 731 (February 9, 2009), the California Supreme Court addressed this very issue.*

*In construing the constitutional due process right to an impartial tribunal, we take a more practical and less pessimistic view of human nature in general and of state administrative agency adjudicators in particular. In the absence of financial or other personal interest, and when rules mandating an agency's internal separation of functions and prohibiting ex parte communications are observed, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias. Unless such evidence is produced, we remain confident that state administrative agency adjudicators will evaluate factual and legal arguments on their merits, applying the law to the evidence in the record to reach fair and reasonable decisions. As we explain, any tendency for the agency adjudicator to favor an agency attorney acting as prosecutor because of that attorney's concurrent advisory role in an unrelated matter is too slight and speculative to achieve constitutional significance.*

*HOLDING: It did not violate license holder's right to due process for the prosecuting agency attorney to simultaneously serve as an advisor to the Board on an unrelated matter. The decision reversed the Court of Appeal's judgment.*

*The Supreme Court's decision effectively overruled the decision in *Quintero v. City of Santa Ana*, 114 Cal. App. 4th 819 (Cal. Ct. App. 2003). The *Quintero* court held that the internal separation of functions on a case-by-case basis was insufficient to satisfy the constitutional requirements for due process of law, and that an administrative agency's internal separation of functions must be complete not only as to each individual case, but as to all cases, related or unrelated, that are pending before the agency at any given point in time.*

*In the case of Watsonville's disciplined firefighter, the City hired a separate attorney from an outside law firm to advise the department and the City Attorney had no communications of any kind with the department or anyone else involved in the case except the Commission. The City could have hired an attorney from the same law firm if it followed particular protocols. Instead the City staff selected an attorney from a different law firm to avoid even an appearance of impropriety. It is also important to note that no one involved in the hearing process, including the employee ever claimed the City Attorney had a conflict of interest or any improper communications. The City follows best practices and the City's practices well exceed the due process protections afforded under California law.*

**Response: Watsonville City Manager – WILL NOT BE IMPLEMENTED**

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## Commendations

The Grand Jury commends the City of Watsonville for the disciplinary appeal process for its city workers. The catered dinner for the private citizen personnel commissioners also is noteworthy.

## Responses Required

<b>Respondent</b>	<b>Findings</b>	<b>Recommendations</b>	<b>Respond Within/ Respond By</b>
Watsonville City Council	<b>F1, F4, F7</b>	<b>R1-R3</b>	60 days September 1,2010
Watsonville City Manager	<b>F3-F7</b>	<b>R1, R3</b>	90 days October 1,2010

## Sources

### Interviews/Visits

- City of Watsonville Employee Complainant
- City of Watsonville Officials:
  - Attorney's Office
  - Manager's Office
- City of Watsonville Personnel Commissioners
- Santa Cruz County Officials:
  - County Counsel's Office

**Publications/Documents**

Grand Jury citizen complaint form 09-07

Agenda for the Special Personnel Commission meeting on August 20, 2009

City of Capitola Municipal Code Chapter 2.04. VII City Attorney 2.04.340 Powers and Duties.

City of Santa Cruz Charter Section 812 City Attorney: Appointments, Powers, and Duties

City of Watsonville City Charter Article IX Boards and Commissions Sections 902, 908, 909

City of Watsonville City Charter Section 804 City Attorney: Powers and Duties

City of Watsonville Municipal Code Article 2 City Attorney 2-3.201

City of Watsonville Municipal Code Title 2 Personnel Commission Chapter 4.02,03,04,12

City of Watsonville Rules and Procedures of the Personnel Commission

**Web Sites**

<http://www.ci.capitola.ca.us>

<http://www.ci.santacruz.ca.us>

<http://www.ci.watsonville.ca.us>