

Item #6 - Staff Memorandum



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TO: Public Ethics Commission
FROM: Kellie F. Johnson, Enforcement Chief
DATE: January 25, 2020
RE: Case No. 20-03 (a); In the Matter of Everette Cleveland prepared for the April 5, 2021 Commission meeting.

I. INTRODUCTION:

On or about January 7, 2020, Former Assistant City Administrator Maraskeisha Smith (Smith) reported to the Public Ethics Commission (PEC) Staff that the City Attorney had contacted her about Housing Development Coordinator (HCD), Everette Cleveland Jr.'s (Respondent) alleged violation of the Government Ethics Act. As the Assistant City Administrator, Smith was the Respondent's supervisor. The City Attorney informed Smith, by letter, that two HCD staff members violated conflicts of interest ordinances when they decided or participated in deciding the award of funds by HCD to a nonprofit housing developer under the 2019 "Notice of Funding Availability" (NOFA) program. (Norma Thompson was also named in the report and the PEC prepared a separate Case Analysis and Recommendation Case No. 20-03 (b))

The Respondent was alleged to have taken part in the decision-making process regarding NOFA applications submitted by a nonprofit housing development company called Community Housing Development Corporation (CHDC), whose executive director – Don Gilmore – is also Cleveland's father-in-law.

The PEC investigation found that Cleveland influenced or attempted to influence the review of NOFA applications submitted by CHDC. It does not appear that he specifically intended to confer an undue benefit on CHDC. Cleveland's supervisors were aware of his potential conflict but did not remove him from working on CHDC applications until midway through the NOFA process; even then, Cleveland was only instructed not to directly score CHDC applications, but does not seem to have been instructed to avoid influencing the review of those applications altogether.

The investigation also found that Cleveland, although required to file an annual Statement of Economic Interest in 2019, failed to file a Form 700.

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Staff recommends that the Commission allow Cleveland to enter into a Diversion Agreement. If Cleveland pays the fees associated with the Diversion Agreement and successfully completes the specified provisions of his agreement, in a timely manner, the Commission will close the allegations against Cleveland.

II. SUMMARY OF LAW:

All statutory references and discussions of law pertain to the referenced statutes and laws as they existed at the time of the violations.

O.M.C. 2.25.040 (A): Financial Conflicts of interest: A public servant is prohibited from participating in making or influencing a decision in which he or she has a financial interest, as defined by the CA Political Reform Act. (CA PRA)

O.M.C. 2.25.040 (B): Elected officials and designated public servants are required to file a Form 700 Statement of Economic Interest pursuant to the CA PRA.

O.M.C. 2.25.060 (A)(2): Misuse of City Position: A Public Servant is prohibited from using his or her position or prospective position, or the power or authority of his or her office or position, in any manner intended to induce or coerce any person to provide any private advantage, benefit, or economic gain to the City Public Servant or candidate or any other person.

O.M.C. 2.25.070 (D): A public servant may not make or influence an employment or contract action involving a relative, as defined.

O.M.C. 2.25.030 (E): Definitions: A relative is any person who is related with in the third degree by blood, marriage, or contract, and includes a spouse, domestic partner, parent, grand parent, child, sibling, parent-in-law, aunt, uncle, niece, nephew, first cousin or any similar step relations.

III. OVERVIEW OF THE NOFA PROCESS

The NOFA is an awarding of loan funds from the City of Oakland for the construction, rehabilitation or preservation of affordable housing development projects. The program is administered by HCD, which submits its funding recommendations to the City Council for final approval. Funds are awarded on a biennial basis. In the 2019-2020 City budget, the amount of NOFA funds to be awarded was estimated to be \$19,033,959.

In 2019, NOFA consisted of two separate NOFAs that were awarded at the same time: one for New Construction of Multifamily Affordable Housing, and one for the Acquisition, Rehabilitation, and Preservation of Multifamily Affordable Housing. Nonprofit housing developers were eligible to seek funds for up to two separate projects under each NOFA, meaning that a developer could potentially

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seek funds for a maximum of four of their projects under the 2019 NOFA. Each project required a separate application, even if they belonged to the same developer.

The NOFA process began with the publishing of the NOFA guidelines, detailing what type of projects the City would fund as well as the application requirements. Prior to publication, the NOFA guidelines were drafted by HCD staff and incorporating input from City officials and private sector advisors.

Once NOFA applications were received, HCD staff reviewed those applications in two phases. The first phase – referred to in this report as a “threshold” or “completeness” review – determined whether the applications included all of the necessary information and met the City’s minimum qualifications. The reviewer would then send a letter to the applicant informing them of any outstanding information needed to complete the application. The second phase – referred to in this report as the “scoring” phase – consisted of detailed staff evaluation and ranking of applications per the criteria outlined in the NOFA guidelines.

During both the threshold and the scoring phases, applications were reviewed by a handful of HCD staffers and consultants. Each reviewer typically handled three or four applications apiece, and generally (but not always) reviewed the same set of applications during both phases. Decisions regarding who would review each application were made by HCD staff as a group, with final approval by the HCD Unit Manager/Housing Development Manager.

Both phases of the NOFA application review also involved HCD staff meetings where applications were discussed. During the threshold phase, the meetings concerned questions regarding whether certain submissions made by applicants satisfied the completion criteria. During the scoring phase, the reviewer would present the scores they had assigned to different parts of the application, for the purpose of ensuring that HCD staff was scoring applications consistently and to address any special issues that the reviewer may have encountered.

HCD staff and the respondents characterized the scoring of NOFA applications as more of a technical application of objective criteria, rather than a subjective appraisal of the merits of a particular project. Decisions to award NOFA funds are based on final tabulated scores and availability of funds. (The project with the highest score is awarded the full amount they requested). There is no such thing as a “vote” within HCD to decide which projects get approved for funds; it all depends on the scoring of a project relative to the scores received by other projects.

The next step in the NOFA process was the drafting of the City Council agenda report, which detailed the funding recommendations that had been made by HCD staff. Funding recommendations were based by ranking applications based on their final scores; staff did not “vote” *per se* on which applications should be ranked over others. The City Council would then vote to approve the staff recommendation.

IV. SUMMARY OF EVIDENCE:

Everett Cleveland, Jr., was hired at HCD in May 2018, as a Housing Development Coordinator IV. It was his first time working for the public sector. Previously, he had worked at a nonprofit housing developer. The Respondent is also the son-in-law of Don Gilmore, who is Executive Director of the nonprofit Community Housing Development Corporation (CHDC). Gilmore has been Cleveland's father-in-law since 2007. Neither the Respondent nor his wife received any income from CHDC¹, nor does the Respondent have any other relatives besides Gilmore who work at CHDC.

The Respondent was hired at HCD by Antoinette Pietras, who was then Housing Development Manager. (Pietras passed away shortly after Cleveland joined the City). She was the one who interviewed him, and the only person with whom he interfaced personally during the hiring process. According to the Respondent, there was an understanding when he was hired that he would take the lead on managing the 2019 NOFA process. The topic of the Respondent's relationship to Gilmore never came up during the hiring process, though he told the PEC that it was common knowledge among HCD staff at the time he was hired that Gilmore was his father-in-law. (Gilmore was known to HCD staff from his long-standing role as an affordable housing developer). According to the Respondent, his relationship to Gilmore was never a subject of concern until late in the 2019 NOFA process.

The Assistant City Administrator informed PEC Staff that the Housing Department did not have a formal policy on potential conflicts of interest in the NOFA selection process. Smith was not aware of any conflicts policy, written or otherwise, provided to the Respondent, nor did she recall any formal policy on avoiding an appearance of impropriety in the NOFA selection process.

The Respondent was the "lead facilitator" of the 2019 NOFA process, from the guideline revision phase until the initial drafting of the City Council staff report. He was assigned that role by Pietras. As the lead facilitator, he essentially acted as a project manager – he scheduled HCD staff meetings regarding the NOFA, answered staff questions about how to interpret the NOFA guidelines, ensured that staffers were meeting their internal deadlines, and tracked scoring decisions in a master spreadsheet.

During the drafting of the NOFA guidelines, the drafting team consulted with the Mayor's Housing Cabinet, of which Gilmore was a member. The input from the Mayor's Housing Cabinet was given at a meeting of that group, attended by the Respondent and HCD Deputy Director Leshin, though Gilmore directed his input to the whole group. According to e-mails reviewed by the PEC, Gilmore's input specifically related to equity aspects of the NOFA process. There is no evidence in the e-mails and text messages reviewed by the PEC of any direct communication between Gilmore and the Respondent about the guidelines. According to the Respondent, the subject of a possible conflict with his father-in-law did not come up during the time that he was revising the NOFA guidelines.

¹ Gilmore did provide the Respondent and his wife with a \$5,000.00 cash gift in April 2018 towards the down payment on their house; this was one month prior to the Respondent's employment at the City.

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While drafting the NOFA guidelines, the Respondent would discuss the draft with other HCD staffers. The draft was then presented to Deputy Director Leshin for review and approval; the Respondent did not have final say over the contents of the guidelines. Following publication of the NOFA, the Respondent facilitated a public workshop regarding the requirements of submitting a completed, thorough NOFA application. There was a brief question-and-answer session at the end, but the substance of the workshop was limited to the general guidelines; no individualized advice on particular applications was given because no applications had been completed or submitted at that point.

During the threshold review phase, the Respondent was assigned to review several applications. One of those applications was submitted by CHDC for its project at Harp Plaza. The Respondent was assigned to that application because Harp Plaza was an already-existing (“pipeline”) project which he had been managing on behalf of HCD since before the 2019 NOFA.² (Harp Plaza had been a recipient of NOFA funds in 2017, and was now seeking additional funding in support of the project). According to the Respondent, it was common for HCD staffers already assigned to an existing project to perform the threshold review on that project if they were seeking 2019 NOFA funds; the idea was that the staffer was already familiar with the project and therefore could more easily review the application.

The Respondent wrote a letter to CHDC during the threshold review of its Harp Plaza application, letting them know what further information they needed to submit or clarify. This was standard procedure during the NOFA, in that every other Housing Development Coordinator did the same for the applications that they were reviewing.

Before the scoring phase of the NOFA began, Katz Mulvey was promoted to Unit Manager. She subsequently met with Leshin to review the list of which staff members would score each NOFA application that had passed the threshold review. In reviewing the list, Katz Mulvey noted that the Respondent was assigned to score the Harp Plaza application even though Gilmore was his father-in-law. She flagged this as a potential conflict of interest, and she and Leshin decided to reassign the Harp Plaza application scoring review to another staffer (Janet Howley, a consultant brought on to help with the NOFA). This decision was communicated to the Respondent, along with an instruction not to score any other CHDC applications. Cleveland did not object to the reassignment.

During the subsequent scoring phase of the NOFA process, the Respondent scored two NOFA applications, neither of which were CHDC applications.

² The Respondent had been assigned to facilitate the Harp Plaza project by then-Housing Development Manager Antoinette Pietras. There was no discussion at that time about a potential conflict given that Gilmore was the Respondent’s father-in-law, though it was common knowledge at HCD that Gilmore and he were related.

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CHDC had submitted four applications in total under the 2019 NOFA. Other HCD staffers besides the Respondent conducted the threshold reviews of the other three (non-Harp Plaza) CHDC applications. The Respondent told the PEC that he only discussed those applications during staff meetings, in the same context as with other NOFA applications: to make sure the threshold reviews were consistent across all applications without giving a “special advantage” to one project over another. He does not recall ever disagreeing with another staff member about whether CHDC had fulfilled its threshold requirements on any of its applications.

According to the Respondent, due to the group meetings there was “no need” to come to him individually with questions about a particular application, and in any event, it was “not my role” to make “unilateral decisions.” He did confirm that he discussed all four of the CHDC applications at staff meetings, just as he did with non-CHDC applications. HCD staffers attending those meetings included Cleveland, Thompson, Janet Cowley, Ahmed Conde, and sometimes Katz Mulvey. The Respondent told the PEC that he did not weigh in on any applications during those meetings that he did not personally review. Instead, he took notes on what the other reviewers were doing and documented their decisions into a master spreadsheet.

The Respondent also told the PEC that, outside of the staff meetings, he provided “no input whatsoever” on the scoring of any CHDC applications. Cleveland’s internal e-mails largely verify this. However, there are some instances where – by request of, or in coordination with, other HCD staffers – he weighed in on potential scoring issues on CHDC applications, contacted other City departments to obtain information necessary to score CHDC applications, or reaches out to CHDC to obtain the required documentation or clarification would allow them to receive a higher score.

When asked about this discrepancy between his claim to the PEC that he did not weigh in on CHDC applications outside of meetings, and the evidence of his e-mails, the Respondent clarified that he would give input in a “general context” based upon “NOFA guidelines” because, as the one who had put the guidelines together and therefore had the most knowledge of them, he was responsible for answering such questions. When a staffer would ask him such a question, he would turn to the NOFA guidelines and give an answer based on that.

When scores on all NOFA applications were completed, the Respondent consolidated them into a master spreadsheet. The HCD Director then reviewed the information. The Respondent then wrote the first draft of the City Council staff report, describing HCD’s funding recommendations based on the application scores. He did not finalize the staff report after working on the initial draft, because at that point he was asked to step away from the NOFA process entirely due to the issue of his potential conflict of interest involving Gilmore.

The Respondent has not been specifically involved in any CHDC projects since this matter became an issue. When asked by the PEC if he ever had a personal hesitation about working on CHDC applications, the Respondent said he did not, because in his mind he was not doing anything different from other Housing Development Coordinators. He also never discussed “NOFA stuff” with Gilmore

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outside the office because they did not want to cause any problems with the processing of CHDC applications. When asked if he was ever concerned about the appearance of impropriety, he said no, because he is a “worker bee” and does what he is instructed to do. He said such concerns are a matter for his supervisors, not for him.

In 2019, CHDC, The Respondent’s Father-in-Law’s non-profit, was selected to receive one or more of the NOFA project funding. A report or tip was sent to the City Attorney regarding the selection process. The City Attorney reviewed the facts of the allegations and contacted the Housing Department and the Assistant Administrator Smith and informed her that the that funding awarded to DHDC cannot be approved and must be revoked because of the conflict of interests. As a result of the City Attorney’s decision, CHDC’s funding award was rescinded.

During the investigation, PEC staff confirmed that as of March 17, 2020, the Respondent had not filed any Form 700s. In an interview, he told the PEC that he is familiar with a Form 700, and that he had filed one. When asked when he filed that form, and he said it was around the time he received a letter from Public Ethics about this investigation. Prior to that, no one had ever informed him that it was his responsibility to fill out a Form 700. The Respondent’s only Form 700 was filed on March 30, 2020.

V. ANALYSIS

The evidence obtained during the investigation established that the Respondent, in his official capacity, participated in the decision of the Housing Department to grant NOFA funding to various non-profit candidates. Although the Respondent was adamant that he did not weigh in on any applications during meetings to evaluate NOFA candidate applications, other than those he personally reviewed. Evidence to the contrary established that by request of, or in coordination with, other HCD staffers -- he weighed in on potential scoring issues on CHDC applications, contacted other City departments to obtain information necessary to score CHDC applications, or reaches out to CHDC to obtain the required documentation or clarification would allow them to receive a higher score.

The Respondent also participated in scoring other NOFA applicants. Grading and reviewing other NOFA applicants which created a potential conflict of interest for the Respondent because the opportunity to score or advocate for scoring other applicants lower or differently to provide an advantage to his father-in-law’s nonprofit, remained a possibility.

A City employee is prohibited from making or influencing a contract action involving a relative. Most city governments and agencies have rules against nepotism and Oakland is no different. The Respondent was aware that his father-in-law’s non-profit CHDC submitted an application for NOFA Funds. The NOFA process is the awarding of a contract loan from the City of Oakland for the funding of construction, rehabilitation or preservation of affordable housing development projects. In this case, the Respondent violated the City’s nepotism ordinance when he participated in or influenced the decision to recommend NOFA funding to a particular applicant.

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Designated City employees are required to file Statement of Economic Interest Form 700 to openly disclose any economic interests that may present a conflict of interest. The Form 700 is a relatively simple form that requires a public servant to self-report any and all economic interests (including those of a spouse or family member) that may impact their employment with the City of Oakland. Here, the Respondent failed to timely file a Form 700 for the year 2019 until well after the Public Ethics Commission Enforcement Staff contacted him.

Under the provisions of the Government Ethics Act, a Public Servant may violate conflict of interest laws when he or she uses or attempts to use their official position to influence a decision when he or she contacts or appears before any official in his or her agency for the purposes of affecting a decision in which they have a financial interest.

Further, a City employee is prohibited from making, participating in making or influencing a decision of the City when he or she has a financial interest in the decision. On the facts gathered in the investigation, it appears that the Respondent did not have a direct financial interest in the decision to recommend awarding the NOFA funding.

There was no evidence that Cleveland received any funds, fees or kickback when CDHC was initially awarded the NOFA funding. There was no evidence that the Respondent's father-in law promised to make a payment or provided a payment (or any other thing of value) upfront to the Respondent in exchange for a favorable recommendation to the City Council for a NOFA funding. In the absence of any evidence to establish the Respondent's financial interest, there is insufficient evidence to show that the Respondent violated any provision of the Government Ethics Act for Financial Conflicts of Interests.

VI. VIOLATIONS

Count 1: Misuse of City Position

A City employee violates the Government Ethics Act when he or she uses his or her position or prospective position, or the power or authority of his or her office or position, in any manner intended to induce or coerce any person to provide any private advantage, benefit, or economic gain to the City Public Servant or candidate or any other person.

Between January 2019 and December 2019, the Respondent Everett Cleveland, violated O.M.C. 2.25.060 (A)(2), by using his position in a manner intended to induce a private advantage or economic gain to another person.

Count 2: Prohibition Against Nepotism

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A City employee violates the Government Ethics Act when he makes or influences a contract action involving a relative.

Between January 2019 and December 2019, the Respondent, Everette Cleveland Jr., violated Section 2.25.070 (D) making or attempting to influence a NOFA application selection process.

Count 3: Failure to File Financial Interest Form (F700)

A designated City employee violates the Government Ethics Act when he or she fails to file a Form 700 Statement of Economic Interest.

The Respondent failed to file a Financial Interest Form 700 for the year 2019, pursuant to the CA PRA and in violation of O.M.C. 2.25.040 (B).

VII. PROPOSED PENALTY

This matter consists of three violations of the Government Ethics Act (GEA), which carries a maximum administrative penalty of \$5,000 per violation or up to three (3) times the amount the person failed to report properly, or expended, gave, or received, whichever is greater.

The PEC considers several factors to determine the appropriate penalty, including, but not limited to, the following factors:

1. The seriousness of the violation, including, but not limited to, the extent of the public impact or harm;
2. The presence or absence of any intention to conceal, deceive, or mislead;
3. Whether the violation was deliberate, negligent, or inadvertent;
4. Whether the violation was isolated or part of a pattern
5. Whether the respondent has a prior record of violations and/or demonstrated knowledge of the rule or requirement at issue;
6. The extent to which the respondent voluntarily and quickly took the steps necessary to cure the violation (either independently or after contact from the PEC);
7. The degree to which the respondent cooperated with the PEC's enforcement activity in a timely manner;
8. The relative experience of the respondent.

The Public Ethics Commission has an independent obligation to determine the penalty merited by the Respondent's violation of the GEA. And, although the Commission has often concluded that the guideline penalty is sufficient to vindicate the Commission's interests in regulating violations of GEA, the Commission is free to impose a different sanction if that is appropriate. In this case, Staff recommends that the Commission impose a different sanction, a Diversion Agreement.

Aggravating Factors

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1. The respondent did not recuse himself from the application review process.

Mitigating Factors:

1. The Respondent cooperated with Enforcement Staff's investigation into this matter.
2. The Respondent was new to his position with the City.
3. The Department failed to provide Cleveland training on conflicts of interests.
4. The Department did not have a written policy, nor did it inform Cleveland on recusal due to conflicts of interest.
5. The Respondent made an effort to not directly review or approve his father-in-law's application.
6. The Respondent's supervisors were aware of the relationship between Cleveland and his father-in-law applicant and did not take action to resolve the conflict until later in the process.
7. Although untimely, the Respondent eventually filed a Financial Interest Form 700.

The purpose of administrative penalties like those provided in the Government Ethics Act is to promote transparency, gain compliance with the City Ordinance requirements and protect the public from Public Servants who have not discharged, will not discharge or are unlikely to properly discharge their professional duties. In this case, lack of knowledge of the law is not a defense to a Government Ethics Act violation. In fact, the facts establish Cleveland was vaguely aware of the potential conflict of interest and eventually attempted to mitigate the conflict by not directly reviewing his father-in-law's application. Here, most of the Respondent's actions, if not all, were performed with the full knowledge of his department supervisors. Not until later in the application review process did the Respondent's Supervisors recognize the potential conflict of interest.

This is a case where the failure of the department to provide sufficient training and oversight informed the choices that Cleveland made. As a result of the department's failure to provide training, staff recommends that Cleveland enter a Diversion Agreement with the Commission pay an imposed fee and agree to successfully complete trainings on conflicts of interest and related policies.

V. CONCLUSION AND RECOMMENDATION

There is probable cause that the Respondent violated Count 2 Financial Conflict of Interest, Count 1 Misuse of City Position, Count 2 Prohibition Against Nepotism and Count 3 Failure to File Form 700 when he participated in the decision to recommend a grant of NOFA funding, knowing that his father-in-law's non-profit was a candidate in the applicant pool.

To resolve this case, Staff recommends that the Commission approve a Diversion Agreement to counts 1, 2, and 3. A diversion program will provide the Respondent with the essential training and services that can address the underlying cause that contributed to his violations of the Government Ethics Act. By targeting the underlying issue of lack of training and department policies, a diversion

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program can improve long-term compliance with City ordinances and ensure effective execution of City policies and laws.