

ERC RESOLUTION NO. 2020-3

A RESOLUTION OF THE ETHICS REVIEW COMMISSION OF THE CITY OF SAN MARCOS, TEXAS RECOMMENDING AMENDMENTS TO THE SAN MARCOS CODE OF ETHICS THAT WOULD: REQUIRE ETHICS COMPLAINTS TO BE SWORN BEFORE A NOTARY PUBLIC; REQUIRE NOTICE TO BE GIVEN TO INDIVIDUALS WHO FILE ETHICS COMPLAINTS REGARDING POTENTIAL CONSEQUENCES OF FILING GROUNDLESS COMPLAINTS; PROHIBIT THE FILING OF AN ETHICS COMPLAINT REGARDING ANY VIOLATION ALLEGED TO HAVE OCCURRED MORE THAN SIX MONTHS PRIOR TO THE FILING DATE; REQUIRE CITY OFFICIALS AND EMPLOYEES TO COOPERATE WITH THE ETHICS REVIEW COMMISSION DURING HEARINGS ON ETHICS COMPLAINTS BY TESTIFYING AND PRODUCING DOCUMENTS; PROHIBIT RETALIATION IN THE FORM OF ADVERSE PERSONNEL ACTION AGAINST CITY EMPLOYEES WHO FILE ETHICS COMPLAINTS IN GOOD FAITH OR WHO TESTIFY OR PRODUCE DOCUMENTS DURING ETHICS COMPLAINT HEARINGS; PROHIBIT CITY OFFICIALS OR EMPLOYEES FROM USING THEIR POSITIONS TO THREATEN OR INTIMIDATE A CITY EMPLOYEE TO DISCOURAGE THE EMPLOYEE FROM FILING AN ETHICS COMPLAINT OR COOPERATING IN AN ETHICS COMPLAINT HEARING

RECITALS:

1. The Ethics Review Commission (the "Commission") is required by Section 2.443 of the San Marcos City Code to meet at least once per year to review the Code of Ethics and is authorized to make recommendations to the city council regarding amendments.
2. The Commission previously recommended amendments to the San Marcos Code of Ethics to require employees to testify and to produce documents during hearings on ethics complaints. The City Council expressed concerns about moving forward with such amendments without recommendations from the Commission on other amendments to provide whistleblower protection for employees who participate in the ethics complaint process.
3. The Commission formed a committee to draft proposed text amendments to provide whistleblower protections for city employees and to review the process for filing ethics complaints. The committee's recommendations were discussed and revised by the Commission over the course of several meetings.

BE IT RESOLVED BY THE ETHICS REVIEW COMMISSION OF THE CITY OF SAN MARCOS, TEXAS:

PART 1. The Commission hereby recommends that the City Council discuss and consider adoption of an ordinance amending the San Marcos Code of Ethics to include the provisions contained in the redlined document attached as Exhibit A to this resolution.

PART 2. This resolution shall be in full force and effect from and after its passage.

ADOPTED on November 10, 2020.

A handwritten signature in blue ink, appearing to read "Lee Garcia".

Lee Garcia
Chair

Attest:

A handwritten signature in blue ink, appearing to read "Tina Moreno".

Tina Moreno
Recording Secretary

Sec. 2.444. – Complaints; review and hearings; sanctions for violations.

(a) Complaint procedure.

- (1) Any resident or employee of the city who believes a person has violated a provision of this article or a state conflict of interest law may file a written complaint with the city attorney. The complaint must:
 - (A) Identify the complainant and the person who allegedly committed the violation;
 - (B) Provide a sufficient sworn statement of the facts which, if true, would constitute a prima facie violation of a provision of this article or a state conflict of interest law;
 - (C) Specify the provision of this article or a state conflict of interest law which is alleged to have been violated;
 - (D) Identify sources of evidence, if any, that the complainant is relying on to support the alleged violation ~~recommends should be considered by the commission~~;
 - (E) Be filed on a form prescribed by the commission available on the City of San Marcos website and from the city attorney's office; and
 - (F) No complaints shall be filed within a period beginning on the 60th day ~~prior to~~ before the first day of early voting for any city election and ending on the later of the regular election day or runoff election day.
 - (G) A complaint alleging a violation within the commission's jurisdiction must be filed with the city attorney's office within six (6) months of the Complainant becoming aware of the act or omission that constitutes a violation of this Code. The Complainant shall swear to the facts by oath before a notary public or other person authorized by law to administer oaths under penalty of perjury. (DENTON)
 - (H) The code of ethics is not intended to be used as a political weapon or to intimidate or embarrass affected persons. Complainants who submit frivolous complaints are hereby notified that their actions may subject them to criminal prosecution for perjury, or civil liability for the torts of defamation or abuse of process. (DENTON) For purposes of this section a "frivolous complaint" is a sworn complaint that is groundless and brought in bad faith or groundless and brought for the purpose of harassment. (KYLE)
 - (I) A complaint that is not sworn as required shall not be forwarded by the city attorney's office to the ethics review commission but shall be returned to the complainant. (SAN ANTONIO)
- (2) The city attorney will acknowledge the receipt of the complaint to the complainant and provide a copy of the complaint to the commission and to the person accused within seven business days of accepting the complaint form.
- (3) City officials and employees may not use or threaten to use official authority or influence to discourage persons from acting in good faith to report an ethical violation. In addition, city officials and employees may not take action as a reprisal against any city officials or employees who report or initiate a complaint. It shall be a violation of

this Code for any city officials or employees to take any retaliatory action against any other city official or employee for utilizing or participating in any of the complaint procedures established by this Code. It shall also be a violation of this Code for any city employee to retaliate against any city official or another employee for participating in the complaint. (HOUSTON) A City of San Marcos official or employee may not suspend or terminate the employment of, or take other adverse personnel action against a city employee who in good faith files a complaint with the ethics review commission. "Adverse personnel action" means an action that affects a city employee's compensation, promotion, demotion, transfer, work assignment, or performance evaluation. (derived in part from Texas Gov't Code § 554.001 and 554.002)

(b) *Review of complaints by commission.*

- (1) The commission shall review each complaint in executive session prior to conducting a hearing to determine whether the complaint is in proper form and alleges sufficient facts to constitute a prima facie violation of a provision of this article or a state conflict of interest law.
- (2) If the commission determines that the complaint is defective in form or does not allege sufficient facts to constitute a prima facie violation of a provision of this article or a state conflict of interest law, the commission shall dismiss the complaint, and provide notice, including the reasons for the dismissal, to the complainant and to the person accused.
- (3) If the commission determines that the complaint is in proper form and alleges sufficient facts to constitute a prima facie violation of a provision of this article or a state conflict of interest law, the commission shall schedule a hearing on the complaint.

(c) *Hearings.*

- (1) The commission will adopt rules of procedure to govern hearing on complaints. The rules will allow for the presentation of evidence by the complainant and the person accused, and cross examination of witnesses.
- (2) The chair of the commission or any person acting in that capacity, and the recording secretary of the commission, are authorized to administer oaths to persons who testify at hearings conducted by the commission.

(3) City officials and employees may not use or threaten to use official authority or influence to discourage persons from acting in good faith to provide information or testimony during a hearing or in relation to a complaint. In addition, officials and employees may not take retaliatory action against any city officials or employees who provide information or testimony during a hearing or in relation to a complaint. It shall be a violation of this Code for any city official or employee to take any retaliatory action against any other city official or employee for participating in any of the complaint procedures established by this Code. It shall also be a violation of this Code for any city employee to retaliate against any city official or another employee for participating in the complaint. (HOUSTON)

(4) All city officials and employees shall cooperate with the ethics review commission and shall supply requested testimony or other evidence for a hearing to assist the commission in carrying out its duties to resolve a pending complaint. Failure to abide

by the obligations imposed by this subsection is a violation of this Code of Ethics.
(SAN ANTONIO)

- (d) *Ex parte communications.* It is unlawful for a person who has filed a complaint alleging a violation of this article or a state conflict of interest law by a city officer or employee, or a person against whom such a complaint has been filed, to communicate verbally or in writing about the subject matter of the complaint with a member of the ethics review commission at any time other than during a public meeting of the commission. All such communications by such persons to the commission outside of a public meeting of the commission must be directed to the city attorney. The city attorney will collect all such communications and provide them to the commission with the agenda materials for the meeting at which the complaint is considered. The city attorney will make copies of these communications available to interested persons in accordance with state law.
- (e) *Sanctions.* If the commission determines at the conclusion of a hearing that a violation has occurred, it may impose or recommend any of the following sanctions:
- (1) A letter of notification, if the violation is clearly unintentional, or when the official or employee's action was made in reliance on a written opinion of the city attorney. A letter of notification shall advise the official or employee of any steps to be taken to avoid future violations.
 - (2) A letter of admonition, if the commission finds that the violation is minor and may have been unintentional, but calls for a more substantial response than a letter of notification.
 - (3) A reprimand, if the commission finds that the violation:
 - (A) Was minor and was committed knowingly, intentionally or in disregard of this article or a state conflict of interest law; or
 - (B) Was serious and may have been unintentional.

A copy of any reprimand directed to an official shall be sent to the city council. A copy of any reprimand directed to an employee shall be sent to the city manager and included in the employee's personnel file.
 - (4) A recommendation of suspension from office or employment, if the commission finds that the violation:
 - (A) Was serious and that was committed knowingly, intentionally or in disregard of this article or a state conflict of interest law; or
 - (B) Was minor but similar to a previous violation by the person, and was committed knowingly, intentionally or in disregard of this article or a state conflict of interest law.

A recommendation of suspension of an official appointed by the city council shall be transmitted to the city council, and the council will have final authority on whether to impose a suspension. A recommendation of suspension of an employee shall be directed to the city manager, who will have final authority on whether to impose a suspension.

- (5) A recommendation for recall or removal from office or employment, if the commission finds that the violation was serious and was committed knowingly, intentionally or in disregard of this article or a state conflict of interest law. A recommendation for recall of a city council member or removal of an official appointed by the city council will be forwarded to the city council. A recommendation for removal of an employee will be forwarded to the city manager.
- (6) In addition to a sanction under subdivisions (1) through (5) above, the commission may recommend to appropriate authorities that a person be prosecuted for a violation of this article or a state conflict of interest law.