

Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: RICHARD DOYLE
City Attorney

SUBJECT: Questions Raised by Council
in Response to the Mayor's
Indictment

DATE: June 27, 2006

BACKGROUND

Councilmembers have requested this Office to respond to several questions relating to actions that may be discussed at the June 28th special meeting.

ANALYSIS

The City Council has broad authority with respect to municipal affairs. The Council, however, may not take actions that are inconsistent with the City Charter. Some of the proposed actions, if adopted, implicate state and federal employment law protections.

SPECIFIC QUESTIONS AND ANSWERS

Can the Council prohibit the Mayor from representing the City at any conferences, workshops, seminars, or any other formal or informal gathering?

The Council may prohibit the Mayor from representing the City at gatherings, conferences, workshops, or seminars; however, the Council cannot restrict the Mayor's ability to appear at gatherings, conferences, workshops, or seminars as the political leader of the City.

Section 501 provides that the Mayor is the political leader and shall provide guidance and leadership to the Council by expressing and explaining to the community the City's policies and programs. Political leadership shall be concerned with the general development of the community and the general level of City services and activity programs.

Under Section 502, the Mayor has the duty to "inform the citizens concerning any matters of policy or program which the Mayor believes are for the welfare of the community."

Can the Council remove the Mayor as chair of all city meetings and reassign his seat location on the dais?

Pursuant to Charter Section 502(e), the Mayor cannot be removed as chair of any meetings involving the entire Council. The Council may reassign the Mayor's seat location.

Can the Council prohibit any and all travel by the Mayor on official city business?

Yes - To the extent that travel requires entire Council approval, the Council can withhold that approval. Council Policy 0-4, Section E, Travel by Elected and Appointed City Officials provides that all out-of-state travel of an official nature, even if taken at no expense to the City, must be approved by Council. The Travel Policy does not require approval to attend the U.S. Conference of Mayors; National League of Cities and its Committees; League of California Cities and its Committees; and other committees to which the Mayor is appointed by the Council.

Can the Council direct the City Manager and City Clerk to not allow any expenditure or reimbursement for travel, meals, and/or incidental expenditures by the Mayor including the revocation of the Mayor's city issued credit card?

Yes - To the extent Council approval is required for travel or other expenses and has withheld approval.

Charter Section 408 requires reimbursement of expenses to the extent the Mayor incurred these expenses in the performance of his duties or functions of office. The Council can direct the City Clerk to revoke the Mayor's city issued credit card. If the Mayor has incurred costs associated with carrying out his duties under Charter Sections 501 and 502, the City will need to reimburse him.¹

¹ Further, the wage and hour laws provide that employees are to be reimbursed for all "necessary expenditures incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful." (Cal. Labor Code §2802). Thus, to the extent that the Mayor is an employee under the labor laws, he must be reimbursed for all necessary expenditures already incurred.

Can the Council eliminate the Mayor's compensation and car allowance?

Council could reduce but not eliminate the Mayor's compensation.

Section 407 provides that the Council may adopt and/or reduce the salary recommendations from the Council Salary Setting Commission. Compensation for the Mayor and members of the City Council is set by ordinance. Any change in the Mayor's compensation would require an amendment of the salary setting ordinance. The Mayor's salary may be more than, or the same as, but cannot be less than the salary of each member of the Council. The amendment would require a first and second reading for adoption and would not become effective until the 31st day after the second reading.

The amount of car allowance is recommended by the Salary Setting Commission as a part of the compensation recommendations for the Mayor and Council. The 2003 Ordinance provides that the Commission's recommendation that the car allowance be increased was deferred by the Council. The current allowance for all members of the Council including the Mayor is \$350. Any changes to the car allowance for the Mayor must be commensurate with the allowance received by other Members of the Council and not less.

If the Mayor takes an approved leave of absence in accordance with the Charter requirements, will he still be paid a salary?

Yes. Section 403 provides that no deduction shall be made from the salary of the Mayor because of his failure to attend any Council meeting. The Council may excuse by written resolution up to five (5) consecutive absences under Section 409(m), and an additional five (5) subsequent regular meetings, for a total of ten (10) meetings.

Who would preside over the meeting of the Council if the Mayor did not?

In the absence of the Mayor, the Vice Mayor would preside. Under Section 503, the Vice Mayor shall serve until a person is appointed to succeed him or her or until his or her office otherwise becomes vacant. Since the office of the current Vice Mayor will not become vacant, the only way to elect a new Vice Mayor is if the current Vice Mayor resigns and a new Council member is elected to succeed.

Could the Council revise the adopted budget to change the budget for the Mayor's Office?

Yes, however, Section 1206 requires a public hearing with notice of the hearing published not less than 10 days prior to the hearing.

Can the Council vote to terminate and/or defund the Budget and Policy Director position in the Mayor's office?

The Council cannot remove the Budget and Policy Director, a position within the Mayor's Office.

Section 901 of the Charter provides that the Mayor has the exclusive authority to appoint his assistants; implicit is the exclusive authority to remove. If an assistant has not been laid off or fired, the assistant is entitled to compensation.²

With regard to the Public Information Office, Section 502(g) provides the "Mayor shall have the power to direct and supervise the Public Information Office of the City."

Charter Section 808 establishes the Public Information Office. The Public Information Officer is appointed by the Mayor and is under the direction and supervision of the Mayor. The Public Information Office is charged with the duty to gather and disseminate to the public and to the news media, in a timely manner, accurate and complete information concerning the policies of the Council and other information regarding the City and the general region in which it is located and to perform such other duties as may be assigned by the Council.

The Public Information Office is unlikely to be able to fulfill its duties under the Charter without sufficient funding. Although the Mayor may direct and supervise the Public Information Officer, the Council may also assign other duties to the Public Information Office.

Could the Council adopt all of the annual appropriation ordinance except all or a part of the appropriation for the Mayor's Office?

Under Charter Section 1207, after adoption of the budget (which was done June 20) the Council "shall appropriate monies for the operation of each of the offices, departments and agencies of the City during the budget year and for other purposes or objects named in the budget." Appropriations for the "operating expenditures" for the Mayor and Council offices are made in lump sums; there is

² The wage and hour laws require that employees who perform work are to be paid for their services. Under federal law, if an employer knows or has reason to believe that the employee is working, the work is compensable. (29 U.S.C. §§201-209) Employees are paid either hourly, if non-exempt, or by salary if the employee meets either the executive, administrative or professional exemption tests. Thus, to the extent that the Mayor is considered an employee, he must be paid for all work performed.

no line item appropriation by position or by categories such as personal, equipment, or supplies.

The Council could not adopt the entire appropriation ordinance except the appropriation for the Mayor's Office. Section 1207 requires that there be an appropriation for each of the offices, departments and agencies of the City. While Charter Section 1207 requires that the Council appropriate moneys, it does not require that the adopted appropriation be the same as the amount in the adopted budget. The Council could appropriate an amount that is less than the amount in the adopted budget.

Because there is no line item for a particular position, the Council could not defund one particular position. The Council could reduce the appropriation for the Mayor's Office by an amount equivalent to the cost of a position. However, reducing the amount appropriated does not mean that a particular position will be eliminated; once there is an appropriation for "operating expenses" those funds can be used for any operating expenses of the office.

Not appropriating the amount in the adopted budget for the Mayor's Office would result in an imbalance; the matter would need to come back on a future Council agenda to appropriate the funds for other purposes or to increase the ending balance. In addition, a reduction in the amount appropriated could raise labor issues if the appropriated amount is insufficient to cover payroll.

Could the Council defer the action on the appropriation for the Mayor's Office?

Yes, but if the Council fails to take action prior to the beginning of the fiscal year, an argument can be made that under Section 1207 the amounts proposed as expenditures in the adopted budget for the operation of the Mayor's Office would be deemed appropriated until the Council took action on the appropriation.

If the Council adopts the annual appropriation ordinance, could the Council reduce the appropriation to the Mayor's Office at a later date?

Yes. Under Section 1208(c), at any time during the budget year, the Council may repeal or reduce any appropriation. This would require adopting an ordinance amending the FY 2006-2007 annual appropriation ordinance.

Can appropriation regarding the Mayor's office budget be discussed separately in the special meeting scheduled for Wednesday?

The Brown Act and Charter Section 412 provide that no business shall be considered at any special meeting other than such as is specified in the notice of such meeting. If the appropriation is to be discussed, it will need to be noticed.

Can the appropriation discussion regarding the Mayor's office budget on June 27 be continued to the Special Meeting scheduled for June 28?

Yes, if there is a continuance of the discussion of the item to the Special meeting. Since the Special meeting is within 5 days of the regular Council Meeting, matters properly placed on the Agenda may be considered at the Special meeting. Notice of the continuance must be posted at the Council Chambers. (Gov. Code Section 54954.2)

GENERAL EMPLOYMENT LAW ISSUES

Labor Code Section 432.7 – Records of Arrest

With respect to any proposed adverse employment action carried out against the Mayor's Budget and Policy Director because of the recent indictments, California law provides that in determining any condition of employment, an employer may not use any record of an arrest that did not result in a conviction.

Specifically, California Labor Code Section 432.7 provides in relevant part: "nor shall any employer seek from any source whatsoever, or utilize, **as a factor** in determining any condition of employment including hiring, promotion, termination ... any record of arrest or detention that did not result in conviction. ... As used in this section, a conviction shall include a plea, verdict, or finding of guilt regardless of whether sentence is imposed by the court." (Cal. Labor Code §432.7 (emphasis added).) Thus, until or unless an arrest results in a conviction, the arrest can not be used to determine any condition of employment, such as removal of duties, revocation of current privileges (credit card, car allowance, etc.), or termination. See *Pitman v. City of Oakland*, 197 Cal.App.3d 1037, 1044 (1988).

Although the Mayor is an elected official and is classified as an officer rather than an employee for purposes of the City Charter, there is no clear distinction drawn under the relevant state labor law, and thus, the Mayor may be an employee for purposes of Section 432.7. The Mayor could be considered an employee with respect to other employment law provisions. For example, the City withholds portions of the Mayor's salary for taxes and benefits, he receives health benefits

through the City, and he is eligible for deferred compensation and is likely eligible for workers' compensation. To the extent that the Mayor is considered an employee, Section 432.7 would prohibit any recommended adverse employment actions in response to his arrest.

Wrongful Termination / Constructive Discharge

Assuming that the Mayor's Budget and Policy Director does not have an employment agreement or an implied-in-fact agreement that provides for termination only for good cause, the Mayor's Budget and Policy Director, and certain other employees in the Mayor's Office (i.e. Council Assistants, Senior Council Assistants, and Mayor's Executive Officers) are considered to be "at will."

"At will" employment means that the employment can be terminated with or without cause or notice. The employment, however, cannot be terminated for any illegal reasons, e.g., in violation of the anti-discrimination laws, anti-retaliation laws, whistleblower protection laws, etc. Thus, an employer's right to terminate an employee is limited by public policy considerations and a termination in violation of a public policy is a tort cause of action that gives rise to tort damages. A public policy must be one that benefits the public at large and may be a statute, constitutional provision, or administrative regulation. For example, if the City terminated the Mayor's Budget and Policy Director because of his arrest, that action would violate Labor Code Section 432.7 give rise to a tort claim of termination in violation of public policy – the policy being Labor Code Section 432.7. Arguably, if the other "at will" employees in the Mayor's Office are also terminated as a result of the City's violation of any public policies, they too may have standing to bring a wrongful termination claim. Furthermore, disciplinary actions short of termination may also be the basis for a violation of public policy claim.

A constructive termination claim may arise if the employer compels the employee to resign due to working conditions so intolerable or aggravated that a reasonable person in the employee's position would be compelled to resign. Essentially, a constructive termination claim transforms an otherwise voluntary resignation into a wrongful termination claim to establish employer liability. An employee claiming constructive discharge must also prove either a statutory violation (a violation of Labor Code section 432.7, for example), breach of contract or tort in connection with the termination in order to establish a wrongful termination.

Classified Employee Issues

To the extent that the Mayor's Office is de-funded, several issues arise as to the impact on classified employees within the Office. Classified employees include

clerical staff in the following classifications: Office Specialists, Senior Office Specialist, Secretary to the Mayor, and Administrative Assistants. Pursuant to City policy/Municipal Code, prior to laying off any classified employee, the City is required to reassign the employee to a vacant position, if any, in his/her classification or in a lateral or lower classification if the employee has the necessary education, experience and training. If the employee has seniority rights, he/she may "bump" the least senior employee in his/her classification, or in a lateral or lower classification within the series containing the class from which the employee is being laid off or in which the employee has previously served, assuming that the employee is otherwise qualified. There is a trickle down effect. The employee who is "bumped" would then be reassigned in the manner described above, if possible. If there are insufficient vacant positions, the least senior employees would be laid off.

Due Process - Liberty Interest

The Due Process Clause of the Fourteenth Amendment protects a public employee against the deprivation of liberty and property without due process of law. Unlike property interest in public employment, the liberty interest is afforded to all public employees whether classified or unclassified, permanent or probationary. The liberty interest is affected is an employer's action creates a stigma that adversely affects the employee's freedom to obtain other employment opportunities. If discipline or discharge involves an accusation that stigmatizes or impairs an employee's reputation for honesty or morality such as a commission of a crime then an employee may be denied a liberty interest. In such a case, the employee is entitled to a hearing to have the opportunity to clear his or her name. *Lubey v. City and County of San Francisco* (1979) 98 Cal.App.3d 340. At a minimum, notice and a meaningful opportunity to be heard prior to discipline or discharge should be provided to the employee. The sole purpose of the hearing is to provide the employee with the opportunity to clear his or her name. Thus, prior to any discharge, affected employees would be entitled to a *Lubey* hearing.

CONCLUSION

The Council may take actions to limit the travel and reimbursable expenses of the Mayor including revocation of the City issued credit card, the funding made available to the Mayor's Office and the Mayor's Budget Office, and reduce the salary of the Mayor to be equal to other City Councilmembers. Action by the Council to terminate or constructively terminate employees or to reduce

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privileges solely as a result of the indictments exposes the City to potential liability under employment law.

RICHARD DOYLE
City Attorney

By: 
WILLIAM H. HUGHES
Assistant City Attorney

cc: Les White