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ETHICS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

In the Matter of Charges Against

ROSS MIRKARIMI,

Sheriff, City and County of San Francisco.

MAYOR LEE'S REPLY TO SHERIFF MIRKARIMI'S BRIEF ON THE ISSUES SPECIFIED BY THE ETHICS COMMISSION AT ITS MEETING OF APRIL 23, 2012

Hearing Date: May 29, 2012
Hearing Time: 5:30 p.m.
Location: City Hall Room 400

INTRODUCTION

The Sheriff's arguments fail to adhere to the Charter, which must serve as the touchstone for these proceedings. Instead, the Sheriff proposes Government Code sections 3060-3075, an entirely different removal procedure under state law, as the best source for the rules of procedure. He then argues that the Ethics Commission should invalidate half of the Charter definition of official misconduct as too vague, and replace the other half with dicta from a 1980 court decision. The Commission should reject these proposals and hew instead to the language, principles and purpose of the Charter removal proceedings.

The Sheriff provides no justification for engrafting criminal rules of procedure borrowed from state law onto the administrative hearing contemplated by the Charter. He posits that, because he is an elected official rather than a mere appointee or employee, administrative procedures are inadequate in his case and he is instead entitled to "the highest standard of law in the land." (Sheriff's Br. at 1:26 – 2:4.) But that is mere hubris. In fact, the Charter removal provisions treat elected officials and many different appointed officials exactly the same, with no suggestion that customary administrative proceedings before the Ethics Commission are good enough for one but not the other. And the Sheriff's brief foray into the case law does no better. He relies on a single 1914 case for his claim that "[it] has been recognized for 100 years or more [that] removal proceedings for elected officials are akin to a criminal prosecution." (Sheriff's Br. 2:1-3.) But all that case decided was that *one of the state procedures* for removal codified in the state Penal Code (in place in 1914 but long since repealed) was criminal in nature—not that all removal proceedings are.

The Sheriff also flounders in his attempt to escape accountability under the Charter's actual definition of official misconduct in Section 15.105(e). First, he claims that the portion of Section 15.105(e) that defines official misconduct as "conduct that falls below the standard of decency, good faith and right action impliedly required of all public officers" is unconstitutionally vague and the Commission must therefore disregard it. Rather than cite any law, the Sheriff just argues "[t]he Commission could ask ten different people what the phrase 'standard of decency, good faith and right action impliedly required by all public officers' means and get ten different responses."

(Sheriff's Br. at 7:4-6.) But if the Commission asks ten California judges, it will get the same answer ten times: under a wealth of existing case law, that phrase refers to the accepted standards of professional conduct for the particular office held by the public officer. In this case, that means the Sheriff was required to comport himself in line with the standards of professional conduct for a sheriff. There is nothing unusual about looking to the standards of a profession, and the Mayor's subject matter experts will explain them.

The Sheriff next tries to rely on the 1980 *Mazzola* decision to immunize him from removal based on his earliest misconduct, which occurred a week before he was sworn in. But the *Mazzola* decision had nothing to do with the timing of misconduct. Stray language in a decision – dicta – is not authority for issues that the court did not consider. What controls here is the Charter language, "wrongful behavior by a public officer in relation to the duties of his or her office." No court or tribunal has ever held that the San Francisco Charter gives a free pass for official misconduct by a sitting official who has also been elected to another office. And none should get a free pass. There is ample authority from other jurisdictions that *if* a public official is to be immunized for misconduct based on its timing, the misconduct must occur and must come to light before the *election*.

His legal arguments unavailing, the Sheriff tries to turn the tables by complaining that he is being persecuted, not prosecuted. But the Sheriff is simply being called to account for his own actions. These are not made-up charges; the Sheriff was not framed. Rather, the Sheriff has pleaded guilty to a criminal act against his wife committed after he was elected. That conduct, particularly in light of the surrounding facts, circumstances and consequences, raises serious and legitimate questions about whether Sheriff Mirkarimi should remain in office. Any responsible Mayor would call that question, and any responsible City Attorney would fully investigate it.[1]

[1] The Sheriff spends a substantial portion of his brief focused on other investigations and other public officials. That discussion does not advance the issues presently before the Commission and falls outside the scope of the ordered briefing. Accordingly, the Mayor does not respond. If the Commission seeks further information on any of those matters, the Mayor will of course provide it.

DISCUSSION

I. SHERIFF MIRKARIMI'S GUILTY PLEA DOES NOT LIMIT THE SCOPE OF THE MISCONDUCT CHARGES.

The Sheriff erroneously contends that the scope of his misconduct was conclusively determined in the Superior Court criminal action and is limited to misdemeanor false imprisonment. In his view, the only thing for the Commission to do is to decide whether that misconduct was "official" and serious enough to warrant removal. (Sheriff Br. 3:4-5, 3:14-17, 14:1-25.) This is incorrect. Official misconduct, as defined by Charter section 15.105(e), is not co-extensive with criminal convictions. In this case, the Sheriff's guilty plea to misdemeanor false imprisonment and his sentence for a crime of domestic violence are powerful evidence of official misconduct, but they are not the whole story. To determine whether the Sheriff engaged in wrongful behavior related to the duties of his office or conduct that fell below the standard of decency, good faith and right action required of him, the Ethics Commission must consider all of the alleged misconduct, not just the guilty plea.

And contrary to the Sheriff's intimations, the fact that the DA dismissed the three remaining charges under Penal Code section 1385 does *not* establish that he was innocent of the charged conduct and put those allegations to rest. "[D]ismissals are routinely employed in a multitude of situations, most of which do not entail 'factual innocence'; for example, dismissals: (1) of some of multiple counts 'to effectuate plea bargains arranged between the People and the defense and approved by the court.'" (*People v. Glimps* (1979) 92 Cal. App. 3d 315, 323 (quoting *People v. Orin* (1975) 13 Cal.3d 937, 946).) And even if the Sheriff had been acquitted of those offenses, that outcome would not bar these official misconduct proceedings. "The well established rule in California is that a prior acquittal in a criminal proceeding does not have res judicata effect in a later . . . administrative disciplinary proceeding." (*Lofthouse v. Dep't of Motor Vehicles* (1981) 124 Cal. App. 3d 730, 736.) And double jeopardy is not a problem either. (*See In re Brown* (1995) 12 Cal. 4th 205, 217 [rejecting double jeopardy claim in attorney disbarment].)

Sheriff Mirkarimi's insistence that his crime is not one of moral turpitude is also wrong. The case on which he relies, *Saavedra-Figueroa v. Holder* (9th Cir. 2010) 625 F.3d 621, holds only that is *possible* to commit misdemeanor false imprisonment without moral turpitude. But that

possibility is closed in this case, because domestic violence is a crime of moral turpitude. (*See, e.g.*, *Donley v. Davi* (2009) 180 Cal.App.4th 447; *People v. Rodriguez* (1992) 5 Cal.App.4th 1398; *see also Padilla v. State Personnel Bd.* (1992) 8 Cal.App.4th 1136, 1141 [court considers terms and restrictions of probation in addition to specific charges in assessing moral turpitude].)

Finally, the Sheriff argues that "the plea agreement was crafted" in order "to enable the Sheriff to continue serving as Sheriff." (Sheriff's Br. at 14:18-20.) The Sheriff may very well have crafted his plea with the hope of avoiding removal. But there is no evidence that the People of the State of California and the sentencing court did so. Nor could they. The Charter entrusts the power of removal to the Board of Supervisors, who must determine whether the Sheriff engaged in official misconduct as it is defined in Section 15.105(e), not whether he violated the Penal Code. This requires the Mayor to establish the full extent of the Sheriff's wrongful behavior or disgraceful conduct and its relationship to the duties or standards of his office. Sheriff Mirkarimi cannot limit these proceedings to his carefully "crafted" plea—or, better still, the least culpable conduct that could hypothetically qualify as a factual basis for that plea. He is accountable to San Franciscans for all of his conduct as a public officer, not just the conduct he is willing to admit.

II. THE CHARTER REMOVAL PROCEEDINGS ARE ADMINISTRATIVE, NOT CRIMINAL IN NATURE, AND SHOULD BE CONDUCTED ACCORDINGLY.

A. These Proceedings Are Not "Akin To A Criminal Prosecution."

The Sheriff offers two reasons why the Ethics Commission must proceed as though this were a criminal trial. First, he asserts that the Commission's existing administrative hearing procedures, while they rightfully apply to "appointed or hired employees," are not "adequate" for "the democratically elected Sheriff of San Francisco." (Sheriff's Br. at 1:26 – 2:1 [emphasis in original].) That view cannot be reconciled with the Charter. Charter removal proceedings do not differentiate between elected officials and a large group of enumerated appointed officials, including Ethics Commissioners, each of whom is equally protected from arbitrary removal by the definitions and procedures in Section 15.105. (*See* § 15.105 (a), (b) [enumerating appointed officials].) It follows that the same hearing procedures that are "adequate" for appointees are, in the absence of any statement to the contrary, equally suitable when applied to elected officials. This is

as it should be, as both kinds of officials have the same paramount obligation to safeguard the public trust and refrain from misconduct. At the same time, the Charter does differentiate—quite dramatically—between elected and appointed officials, who receive extensive procedural protections against removal, and the disciplinary and termination procedures for regular employees. The Sheriff's very right to this extensive hearing and to retain his position except by a supermajority vote of his elected peers are significant advantages that flow from his office. There is no unchecked threat to the will of the people that requires the Commission to treat the Sheriff like a criminal defendant.

The Sheriff's second argument for treating this hearing like a criminal trial relies on a single case, *People ex rel. Dorris v. McKamy* (1914) 168 Cal. 531, 533, which the Sheriff cites for the proposition that "removal proceedings for elected officials are akin to a criminal prosecution." (Sheriff's Br. 2:2-3.) That case stands for no such thing. Rather, it holds only that a particular set of removal proceedings under now-repealed California Penal Code sections 770 *et seq.,* were criminal in character. While that is true as far as it goes, that observation has no bearing on these administrative removal proceedings under the San Francisco Charter. And it provides no support whatsoever for the Sheriff's claim that criminal rules derived from the Government Code must apply. The Charter controls these proceedings.

B. A Simple Majority Vote Of The Commission Controls

The Charter mandates that a simple majority vote of a Commission is required to take action, unless the Charter specifies otherwise. Section 4.104(b) provides, in pertinent part:

> The presence of a majority of the members of an appointive board, commission or other unit of government shall constitute a quorum for the transaction of business by such body. [Omitted sentences permitting "presence" to include remote participation due to pregnancy, childbirth, or parental leave.] *Unless otherwise required by this Charter, the affirmative vote of a majority of the members shall be required for the approval of any matter,* except that the rules and regulations of the body may provide that, with respect to matters of procedure the body may act by the affirmative vote of a majority of the members present, so long as the members present constitute a quorum. All appointive boards, commissions or other units of government shall act by a majority, two-thirds, three-fourths or other vote of all members. (S.F. Charter § 4.104(b), emphasis added.)

The Sheriff argues that the last sentence of this provision permits this Commission to adopt any voting requirement it would like for these removal proceedings. (Sheriff's Br. at 9.) But the Sheriff's interpretation of the last sentence would negate the meaning of the previous sentence, which states that "[u]nless otherwise required by this Charter, the affirmative vote of a majority shall be required for the approval of any matter." The Commission should not adopt a "construction that renders part of the statute meaningless or inoperative." (*Hassan v. Mercy Am. River Hosp.* (2003) 31 Cal.4th 709, 715-716 [internal quotation marks omitted].) Rather, the proper interpretation of the last sentence is that whatever voting requirement exists under the Charter, it is measured against "all members" of the body, not just those members who are present. For example, suppose four members of the Ethics Commission are present. The last sentence clarifies that an act requiring the assent of at least two-thirds (66%) of the Commission cannot be adopted by three of the four members *who are present*. While that would be 75% of those present, it is only 60% of "all members." Four votes would be required to meet the minimum number of votes that would exceed 2/3 of "all members."

The Sheriff's proposed unanimity requirement also makes no sense in light of Charter section 15.105(a). That section does not require unanimity from the Board of Supervisors to sustain the charges and actually remove the Sheriff. Rather, it imposes a three-fourths' voting requirement for the Board of Supervisors, and none at all for the Ethics Commission. If the Charter meant to impose anything other than a simple majority for the Commission's recommendation, it would have said so. It did not. And it makes sense that the Ethics Commission would not need a supermajority. The Ethics Commission is making a *recommendation*, not the ultimate decision whether to remove.

III. BOTH PRONGS OF THE CHARTER DEFINITION OF OFFICIAL MISCONDUCT ARE LEGALLY SOUND AND MUST BE APPLIED ACCORDING TO THEIR TERMS.

A. The "Decency, Good Faith And Right Action" Requirement Is Not Unconstitutionally Vague.

The Sheriff contends that he cannot lawfully be removed for "conduct that falls below the standard of decency, good faith and right action impliedly required of all public officers," because that language is too vague to him fair notice that committing domestic violence and participating in

efforts to impede an investigation might fall within its ambit. Courts have repeatedly rebuffed similar vagueness challenges to right-conduct laws, and the Commission should do the same.

A vagueness challenge must be evaluated in light of the challenger's actual conduct in the particular case. (*See Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 764-65.) Complaints of vagueness necessarily fail if the conduct at issue is clearly covered by complained-of law. (*Parker v. Levy* (1974) 417 U.S. 733, 756.) The Sheriff challenge's vagueness challenge falters at this very first step. Whatever else "conduct that falls below the standard of decency, good faith and right action impliedly required of all public officers" might mean, it seems clear that it would encompass the serious misconduct alleged in this case.

But even if not, the "right action" standard would still survive a vagueness challenge. There is ample authority that laws prohibiting "unbecoming" or "unprofessional" conduct, however phrased, are not unconstitutionally vague because they refer to the common knowledge and experience among others in the challenger's position of the professional and ethical standards that govern that profession. (*See, e.g., Cranston v. City of Richmond, supra,* 40 Cal. 3d at p. 769 ["conduct unbecoming an employee of the City Service"]; *Nightingale v. State Personnel Bd.* (1972) 7 Cal.3d 507, 513-14 ["failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to his agency or his employment"]; *Morrison v. State Bd. Of Educ.* (1969) 1 Cal.3d 214, 239 ["immoral or unprofessional conduct"]; *Perea v. Fales* (1974) 39 Cal.App.3d 939 ["conduct unbecoming an officer"].) Following these cases, the right-conduct standard is not void for vagueness. Both high-ranking law enforcement officials and members of a legislative body would understand intimate violence, threats and undermining a law enforcement investigation to be conduct indicating unfitness to perform the duties of office. (*See Cranston v. City of Richmond, supra,* 40 Cal. 3d at p. 770 fn. 13; *Talmo v. Civil Service Comm'n* (1991) 231 Cal.App.3d 210, 231; *Monserrate v. New York State Senate* (2d Cir. 2010) 599 F.3d 148, 152.)

B. There Is No Basis In The Charter Or The Case Law To Immunize The Sheriff From Removal For His Misconduct While Sheriff-Elect.

The Sheriff further argues that the Charter definition of official misconduct as "wrongful behavior by a public officer in relation to the duties of his or her office," while not invalid on its

face, must be understood to apply only to conduct that occurs after the public officer takes the oath of office.[2] For all of the reasons stated in the Mayor's Opening Brief, there is no such restriction in the Charter, and *Mazzola v. City and County of San Francisco* (1980) 112 Cal.App.3d 141 does not change that.

In fact, the *Mazzola* court never even considered, much less decided, the question whether a public officer can commit official misconduct before taking the oath of office. To the extent the Sheriff relies on its passing use of the phrase "in office" to support his position, the Commission should decline to follow suit because it is dicta and, as a result, inherently unreliable. Language in an opinion is only authoritative in regard to issues squarely presented by the facts, expressly considered by the court, and necessary to the court's decision. (*Trope v. Katz* (1995) 11 Cal.4th 274, 284.)

C. The Sheriff's Wrongful Behavior Relates To The Duties Of His Office.

The Sheriff's brief is silent on the heightened responsibilities of professional and ethical conduct that attend the office of Sheriff. Nowhere does it discuss how the Sheriff's obligation to enforce the law is reflected in a concomitant duty to obey it; how his leadership role in confining other human beings imposes on him the duty to model humane treatment; or how, as the embodiment of law enforcement and criminal justice in San Francisco, the Sheriff's duties of honesty, integrity, accountability and fairness are always upon him, in private just as in public.

In light of the particular obligations of his office, it is difficult to understand Sheriff Mirkarimi's (entirely unexplained) insistence that his alleged misconduct is "obviously" unrelated to the duties of his office and "has absolutely nothing to do with his official duties."[3] (Op. Br. at

[22] Even if the Sheriff were correct that there can be no official misconduct before taking the oath of office, the Sheriff's pre-oath misconduct nonetheless relates forward in this case because he did not plead guilty until well after he took the oath. (*See, e.g., Wilson v. State Personnel Bd.* (1974) 39 Cal.App.3d 218, 222 [upholding employee's dismissal for crime of moral turpitude committed prior to employment where conviction took place during employment]; *People v. Pinon*, 35 Cal.App.3d 120, 124 (1973) [revoking probation on basis of guilty plea entered during probation to crime committed prior to probation]; *Monserrate v. New York State Senate* (2d Cir. 2010) 599 F.3d 148, 152 [upholding removal of state senator convicted during his official term for domestic violence he had committed after his election but prior to swearing the oath of office].)

[3] The Sheriff erroneously claims that the Mayor has taken the position that there must be a "nexus" between the misconduct and the office, but that the misconduct need not be "related" to the

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12:19, 26.) Indeed, the case law is entirely to the contrary. Court after court has explained that the "relationship is obvious" (*Hooks v. State Personnel Bd.* (1980) 111 Cal.App.3d 572, 577) between the special duties of a police officer, sheriff's deputy or corrections officer and conduct that is criminal—or simply dishonest. (*See, e.g.,Cranston v. City of Richmond, supra*, 40 Cal. 3d at p. 770 fn. 13; *Talmo v. Civil Service Comm'n* (1991) 231 Cal.App.3d 210, 231; *Nicolini v. County of Tuolumne* (1987) 190 Cal.App.3d 619, 633; *Parker v. State Personnel Bd.* (1981) 120 Cal.App.3d 84, 88; *Hooks, supra*, 111 Cal.App. d at p. 577.)

Law enforcement officers—and most emphatically *chief* law enforcement officers—have duties of unflinching honesty and impeccable conduct that the rest of us simply don't. (*See Vielehr v. State Personnel Bd.* (1973) 32 Cal.App.3d 187, 194.) Of course domestic violence, threats, compromising a criminal investigation, a criminal conviction and an ongoing criminal sentence directly relate to these duties. Legally and logically, it cannot be otherwise.

CONCLUSION

For the foregoing reasons, the Mayor respectfully requests that the Ethics Commission hold the administrative hearing contemplated by the Charter and create a full evidentiary record to transmit to the Board. As set forth in the Mayor's Opening Brief, the Commission should also: 1) order mutual pre-hearing discovery under the California Administrative Procedures Act; 2) use the administrative rules of evidence with the exception of disallowing declaration testimony from any witness who refuses cross-examination; 3) assign the Mayor the burden of proving the charges by a

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office. (Opp. Br. at 12:8-14.) That would be nonsense. The Mayor's actual position is that the Charter's definition of "official misconduct" always requires a relationship (or "connection" or "nexus") between the misconduct and the office, but the nature of that relationship differs somewhat between the two prongs of the definition. The "wrongful behavior" prong requires that the misconduct relate to the *duties* of a given office. The "decency, good faith and right action" prong requires that the misconduct relate to the *professional standards* of that office.

preponderance of the evidence; and 4) determine its recommendation to the Board by a standard majority vote.

Dated: May 17, 2012

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