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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'S OPPOSITION TO SHERIFF'S REQUEST FOR SUBPOENAS**

Good cause does not exist to issue the four witness subpoenas sought by the Sheriff, and the Commission should reject the Sheriff's request.

1. The proposed witnesses' testimony relates to a credibility dispute on collateral issues and is not material to the merits of the official misconduct charges. None of the four proposed witnesses has testimony relevant to the Sheriff's conduct, which is the basis for these official misconduct charges. None of the testimony bears on what occurred on December 31, the Sheriff's actions during the police investigation and prosecution, the Sheriff's conviction and sentence, or the relationship between the Sheriff's behavior and his duties.

2. The Sheriff's claim that the Mayor did not testify truthfully – which is wrong – is not a defense to the Sheriff's official misconduct. The Charter provides that the City and County of San Francisco is entitled to have a Sheriff who does not breach his duties and who behaves with

decency. The Charter does not give the Sheriff a free pass for his misconduct based on the alleged misconduct of anyone else.

3. It would be wasteful to expend time and effort on this issue. The proposed testimony concerns only a credibility dispute on a collateral matter: the Mayor's alleged communications before he decided to file charges, regarding matters that do not relate to the basis for the misconduct charges. Tribunals routinely decline to pursue such collateral issues, because they simply waste resources and distract from the real issues to be decided. "Under Evidence Code section 352, a trial court has broad power to control the presentation of proposed impeachment evidence to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." *People v. Mendoza*, 52 Cal. 4th 1056, 1089-90 (2011) (internal citations omitted). That statement of the law applies here. Subpoenaing these witnesses would only lead to a nitpicking war of attrition over credibility issues that are not material to the official misconduct charges.

4. The Sheriff has requested that the Commission issue subpoenas for four witnesses who are offered to impeach testimony on a collateral matter. Two of those witnesses (Mr. Peskin and Ms. Walker) have only hearsay to offer on that collateral matter, so they could not testify unless there were a showing that they could impeach testimony of the two other witnesses (Mr. Wong and Supervisor Olague) alleged to have communicated with the Mayor.

5. Issuing subpoenas to Mr. Wong (and then Mr. Peskin) would be of little value. If the Commission were to issue a subpoena to Mr. Wong, then Mr. Wong would be asked whether he had authority from the Mayor to extend a job offer to Sheriff Mirkarimi. If Mr. Wong answered no – which is expected, given Mr. Wong's statements in the press – then the Sheriff would call Mr. Peskin to testify about his conversation with Mr. Wong. But Mr. Peskin's proposed testimony would not address whether Mr. Wong *actually* had any authority. Indeed, Mr. Peskin's proposed testimony would show only that someone in San Francisco may have claimed to have political clout or influence that he did not actually have. That is not an unusual occurrence in San Francisco (or anywhere else). It proves nothing about whether the Mayor actually granted any authority to make a job offer. And if this testimony came in, the Mayor would then have to submit evidence to further

demonstrate that he never granted any such authority. All of this would waste a tremendous amount of time. And it is irrelevant. Suppose that the Sheriff could prove (contrary to the facts) that the Mayor offered an alternative job to Sheriff Mirkarimi. That would not prove anything germane to these misconduct proceedings. An offer of a lower-level City job elsewhere says nothing about whether Mr. Mirkarimi has met the standard expected of *the Sheriff*. More is required and expected from the chief of a law enforcement agency than other public servants.

6. Issuing a subpoena to Supervisor Olague would be worse than a waste of time: it would interfere with the Board of Supervisors' decisionmaking and it would actually *create* an argument for bias where none currently exists.

a. If Sheriff Mirkarimi wishes to make an argument that Supervisor Olague is biased, this is the wrong place. The Board of Supervisors itself is the proper forum for the Sheriff to raise his claims (even though these claims are without merit). The Ethics Commission's role here is to hold a hearing and forward the record and recommendation to the Board. The Charter does not authorize the Commission to make decisions about bias or recusal of Board members. The Board has established rules (*see, e.g.*, Board of Supervisors Rule of Order 4.14) and longstanding practices for considering recusals. The Board regularly handles matters where claims of bias and recusal requests come up, and the Board is well equipped to handle such issues on its own.

b. And on the merits, there is no bias here. Neither Supervisor Olague nor Ms. Walker's testimony would establish bias. Both the Mayor and Supervisor Olague have already stated that the Mayor did *not* ask Supervisor Olague for her advice whether he should initiate removal proceedings against Sheriff Mirkarimi. But even if they did have such a conversation, that would not be a basis for a claim that Supervisor Olague is biased. The proffered testimony from Ms. Walker is that Supervisor Olague recommended that the Mayor *not* remove the Sheriff involuntarily. Even if this were accurate – which it is not – that is hardly the basis for a claim that Supervisor Olague is biased *against* the Sheriff.

c. The Sheriff is wrong to claim that *any* communication between the Mayor and Supervisors is akin to "jury tampering." This is not a jury trial, it is an administrative hearing.

The "standard of impartiality required at an administrative hearing is less exacting than that required in judicial proceedings." *Gai v. City of Selma*, 68 Cal. App. 4th 213, 219 (1998). "[A]dministrative decisionmakers are drawn from the community at large. . . . Holding them to the same standard as judges, without a showing of actual bias or the probability of actual bias, may discourage persons willing to serve and may deprive the administrative process of capable decisionmakers." *Id.* at 233. To show bias, the Sheriff would need to show "*an unacceptable probability of actual bias* on the part of those who have actual decisionmaking power . . . ." *BreakZone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 1236 (2000) (quoting *U.S. v. State of Oregon*, 44 F.3d 758, 772 (9th Cir. 1994)) (emphasis added). A party seeking to show bias must demonstrate "concrete facts: bias and prejudice are never implied and must be established by clear averments." *Id.* at 1237 (quotation marks omitted). And notably, "[t]he factor most often considered destructive of administrative board impartiality . . . is bias arising from *pecuniary* interests of board members" – a factor that is absent here. *Gai*, 68 Cal. App. 4th at 225 (emphasis added). The Supervisors are different from a jury in another significant way. Every Supervisor *knows* Sheriff Mirkarimi, and the majority of them were colleagues of his – some for several years. That is true here as it would be in any official misconduct hearing: it is inherent in the removal process that the voters chose when they adopted Charter section 15.105.

d. If Supervisor Olague has some views about Sheriff Mirkarimi's conduct, there would be nothing wrong with that. Unlike jurors, legislators are *expected* to have some familiarity with and views regarding issues of public importance that come before them. Assuming that Sheriff Mirkarimi has a property right in his elected office that gives rise to a due process right – which he does not[1] – the statement that Ms. Walker attributes to Supervisor Olague would not

[1] Elected officials, who hold their offices in trust, have no property interest or other right to remain in office. *Snowden v. Hughes*, 321 U.S. 1, 7 (1944); *Taylor v. Beckham*, 178 U.S. 548, 577 (1900); *Rabkin v. Dean*, 856 F. Supp. 543, 549 (N.D. Cal. 1994). At most, Sheriff Mirkarimi would have the limited due process rights required in a post-decision "name-clearing" hearing, which by definition would involve a decisionmaker who already has a position on the merits. *See Binkley v. City of Long Beach*, 16 Cal. App. 4th 1795, 1811 (1993). Sheriff Mirkarimi's procedural rights here are limited to those provided by the Charter – the right to a hearing before the Ethics Commission

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disqualify her. "A councilman has not only a right but an obligation to discuss issues of vital concern with his constituents and to state his views on matters of public importance." *City of Fairfield v. Superior Court*, 14 Cal.3d 768, 782 (1975) (prior knowledge of factual background and prehearing expressions of opinions on permit did not disqualify council members whose role necessarily involves commenting on matters of public concern; even if such prior statements were made, they would be irrelevant). "A trier of fact with expressed political or legal views cannot be disqualified on that basis alone even in controversial cases." *Andrews v. Agricultural Labor Relations Bd.*, 28 Cal.3d 781, 791 (1981). "The right to an impartial trier of fact is not synonymous with the claimed right to a trier completely indifferent to the general subject matter of the claim before him." *Id.* at 790. Legislators are supposed to have opinions and views on matters of public importance. The Charter entrusts this removal decision to legislators. Under the Charter, a view is not disqualifying.

e. But Sheriff Mirkarimi's request for the Commission to issue a subpoena to Supervisor Olague is an attempt to *create* a claim of disqualifying bias. It is improper for the Sheriff to request a subpoena for an ultimate decisionmaker in this removal process. Supervisor Olague has no personal knowledge of the facts related to the Sheriff's conduct, yet the Sheriff proposes to subpoena Supervisor Olague and Ms. Walker, on an issue that is collateral to the charges. That subpoena would put the Commission in the untenable position of making credibility and factual findings about a decisionmaker, when there is no need to do so. In turn, Supervisor Olague would be put in the position of making a decision in a case in which she was called as a witness. Although there is strong authority that a claim of bias based on the Sheriff's own request would not require Supervisor Olague's recusal, the Sheriff likely would seek her recusal anyway. The Sheriff's attempt to subpoena Supervisor Olague (and Ms. Walker to testify about Supervisor Olague) is an improper strategic move by the Sheriff to create a basis to argue for Supervisor

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(footnote continued from previous page)
and a subsequent vote by the Board of Supervisors. Nothing in the Charter prohibits communication between the Mayor and the Board before or after the filing of charges.

Olague's recusal. That is highly prejudicial to the prosecution, given the nine-vote supermajority required for removal. That unfair prejudice is a good reason not to issue a subpoena to Supervisor Olague or Ms. Walker, particularly given the fact that this is a collateral issue of no or minimal relevance.

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