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JOHN ST. CROIX
EXECUTIVE DIRECTOR

Date: April 17, 2012
To: Members, Ethics Commission
From: John St. Croix, Executive Director
Re: Recommendations on hearing on charges of official misconduct

BACKGROUND:

On March 21, 2012, Mayor Edwin M. Lee filed Written Charges of Official Misconduct against Sheriff Ross Mirkarimi “(Charges)”. Pursuant to Charter Section 15.105(a), the Ethics Commission shall hold a hearing not less than five days after the filing of the Charges. The Ethics Commission is to make findings and transmit the full record of the hearing to the Board of Supervisors regarding whether the Charges should be sustained.

“Official Misconduct” is defined in the Charter as follows:

Official misconduct means any wrongful behavior by a public officer in relation to the duties of his or her office, willful in its character, including any failure, refusal or neglect of an officer to perform any duty enjoined on him or her by law, or conduct that falls below the standard of decency, good faith and right action impliedly required of all public officers and including any violation of a specific conflict of interest or governmental ethics law. When any City law provides that a violation of the law constitutes or is deemed official misconduct, the conduct is covered by this definition and may subject the person to discipline and/or removal from office.

In the interests of due process and in order to fully comply with its duties under the Charter, staff recommends that the Commission—in consultation with the parties—hold a hearing in phases, allowing for written submissions and argument before any live testimony. In addition, the Commission should establish a procedure regarding how the evidence should be presented, as described more fully below.

PROPOSED FORMAT:

The Commission should request briefing from the parties on the relevant legal and factual questions, followed by a hearing that provides the parties with an opportunity for oral argument to address those question. If necessary, the Commission could also

hold an evidentiary hearing (consisting of live testimony). If possible, the Commission should set all meeting dates relating to this matter as soon as practicable.

Counsel for the parties should review this proposal carefully prior to the April 23, 2012 hearing and be prepared to address the issues raised herein.

Questions to be addressed in briefs

Counsel should be prepared to address the following questions in the briefs.

Legal Questions

- What is the applicable standard of proof?
- On what type of evidence may the Commission rely?
- Can the Sheriff engage in official misconduct subjecting him to removal from office prior to the time that he held that office?
- Does “official misconduct” under the Charter require that the alleged misconduct relate to the Sheriff’s duties?
 - If so, does the conduct alleged relate to Mr. Mirkarimi’s duties as Sheriff?
- Is Mr. Mirkarimi’s guilty plea to the misdemeanor charge of false imprisonment sufficient to sustain a finding of Official Misconduct?
- Any other issues identified by the Commission or the parties

Factual Questions

- Does the evidence support the factual allegations contained in the Written Charges of Official Misconduct? Why or why not?
- Which, if any, of the factual allegations contained in the Written Charges of Official Misconduct are undisputed, and why?

Briefing Schedule

The Commission should consider two types of briefing schedules and request input from the parties on which schedule the parties prefer.

A. Option 1: Consecutive Briefing: The Mayor submits an Opening Brief, Mr. Mirkarimi submits an Opposition, and the Mayor submits a Reply.

- Opening Brief: (approximately one week after procedural hearing): No more than 25 pages, not including declarations. Service to be made on Ethics Commission

and opposing counsel.

- Opposition Brief: (Approximately 2 weeks from receipt of Opening Brief). No more than 35 pages, not including declarations. In a separate document, Mr. Mirkarimi may submit objections to the evidence. Failure to object to any piece of evidence shall be deemed a waiver of that objection. Objections to evidence shall be in a columnar format (evidence, with citation, column for objection, providing citation to Evidence Code and explanation).
- Reply Brief: (Within one week of receipt of the Opposition). Maximum of 10 pages. No new evidence may be submitted on the Reply Brief. In a separate document, the Mayor may submit objections to the evidence. Failure to object to any piece of evidence shall be deemed a waiver of that objection. Objections to evidence shall be in the same columnar format (evidence, with citation, column for objection, providing citation to Evidence Code and explanation).

B. Option 2: Simultaneous Briefing: Each side provided one Opening Brief and one Reply Brief.

- Opening Briefs: (approximately one week after procedural hearing): Each brief may be no more than 25 pages, not including declarations.
- Reply Briefs: (approximately two weeks after service of Opening Brief). Each brief shall be no more than 15 pages. No new evidence shall be submitted with the Reply Briefs. In a separate document, each party may submit objections to the evidence. Failure to object to any piece of evidence shall be deemed a waiver of that objection. Objections to evidence shall be in the same columnar format described above: (evidence, with citation, column for objection, providing citation to Evidence Code and explanation).

Oral Argument

- As soon as practicable after receiving the reply, the Commission should hold a hearing where counsel should be prepared to address: (1) whether the Commission can decide the matter on the papers or if live cross-examination testimony is necessary; (2) if counsel believes that live cross examination of any witness is necessary, counsel should provide an explanation of the dispute of material fact to which the specific testimony is relevant. Appropriate time limits will be imposed for oral argument.
- Counsel should also be prepared to address the current availability for testimony of every witness who has submitted a declaration on the party's behalf.

Live Testimony

- To the extent that the Commission deems live testimony to be necessary, it should

schedule the testimony as soon as practicable.

- As explained more fully below, no “direct” testimony should be permitted live, but instead should be submitted by declaration. Only cross examination plus a limited amount of “re-direct” examination should be permitted.

PROPOSAL FOR CONSIDERATION OF EVIDENCE:

The Commission should first evaluate the briefs of the parties, which should address the legal and factual issues raised by the staff and any issues raised by the Commission. The parties should submit any evidence they intend to rely upon with their first brief. While the Commission should not yet take a position on whether live testimony is necessary, the Commission should set at least the following ground rules:

- Any evidence upon which the parties intend to rely upon should be included with their briefs in the form of declarations, submitted under oath and under penalty of perjury.
 - Because live testimony may not be necessary, the parties should be cautioned that they should not expect another opportunity to provide evidence in favor of their positions if they do not present that evidence in declarations.
- Any declarant must agree to voluntarily appear to testify under oath before the Commission should the Commission deem such testimony necessary. Each declarant should indicate all weekdays on which they have an unavoidable conflict within the next 90 days. The declaration of any individual who does not agree to testify in person under oath should be disregarded, or at a minimum its weight should be substantially diminished.
- If the declarations reveal disputes of material fact and if the Commission deems live testimony necessary, the Commission should allow cross examination of witnesses who have submitted declarations. No “direct” testimony should be heard live. Thus, all declarations submitted should include all of the affirmative evidence the party intends the declarants to provide.
- If live testimony is deemed necessary, the Commission should consider narrowly tailored requests to call “adverse” witnesses, even if such individuals refuse to submit a declaration. The Commission should emphasize that such requests will not be granted absent extenuating circumstances.
- The Commission should not strictly enforce the Evidence Code. However, the Commission should give greater weight to admissible evidence.
- Public comment should not be considered evidence. Subject to the limitations above, only witnesses relied upon by either party should be permitted to provide evidence relating to the Charges.