DAVID P. WAGGONER, SBN 242519
1777 Haight Street
San Francisco, CA 94117
Telephone (415) 305-7708
Facsimile (415) 386-8106
davidpwaggoner@gmail.com

SHEPARD S. KOPP, SBN 174612
11355 W. Olympic Blvd.
Los Angeles, California 90064
Telephone (310) 914-4444
Facsimile (310) 914-4445
shep@shepardkopplaw.com

Attorneys for SHERIFF ROSS MIRKARIMI

ETHICS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

IN RE MAYOR EDWIN LEE'S CHARGES OF OFFICIAL MISCONDUCT AGAINST SHERIFF ROSS MIRKARIMI	**SHERIFF ROSS MIRKARIMI'S OPENING BRIEF** Hearing Date: May 29, 2012 Hearing Time: 5:30 p.m. Location: City Hall Room 400

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INTRODUCTION

The City and County of San Francisco has been a home rule charter city since the year 1900. In the 112 years since, it appears that there has been only one instance when a Mayor of this city has sought to remove a democratically elected official. That occurred in 2007, when then-Mayor Gavin Newsom filed written charges of official misconduct against then-Supervisor Ed Jew for extortion and perjury while in office. Here, Mayor Edwin Lee is seeking to remove Sheriff Mirkarimi for a plea to a misdemeanor false imprisonment charge – which *is not* a crime of moral turpitude[1] – related to conduct which occurred before Sheriff Mirkarimi was in office and had nothing to do with the office of Sheriff. If Mayor Lee is successful, Sheriff Mirkarimi will not only be removed from the office of Sheriff, he may be unable to hold any public office ever again. The severity of such a censure is exceptional in every way.

The lack of any real historical precedent for removal proceedings of an elected official speaks volumes about the perils of any effort by one elected politician – the Mayor – to interfere with the will of the electorate by attempting to remove another elected official and bar that official from holding office for life. The notion that this power should be exercised sparingly is underscored by the fact that the 1995 amendment of the San Francisco Charter expanded the well-established definition of official misconduct to include the constitutionally vague language of "conduct that falls below the standard of decency, good faith and right action impliedly required of all public officers," while failing to establish any rules or procedure by which the Ethics Commission should arrive at a recommendation to the Board of Supervisors. As shown below, this Commission should reject this constitutionally unsupportable surplusage, much as a court of appeal may sever unconstitutional portions of a statute to save the remainder. The only definition of official misconduct as used in the San Francisco Charter that should apply in these proceedings is that set forth by the California Court of Appeal in *Mazzola v. City and County of San Francisco* (1980) 112 CA2d 141.

In recognition of the obvious flaws inherent in these proceedings, our current Mayor posits that the procedures developed to adjudicate charges of governmental misconduct by appointed or hired employees of the City are adequate to apply to an effort to remove the

[1] The Ninth Circuit Court of Appeal determined that a misdemeanor violation of California Penal Code § 236 is not a crime of moral turpitude. (*Saavedra-Figueroa v. Holder* (9th Cir. 2010) 625 F 3d 621, 627.)

democratically elected Sheriff of San Francisco. Decidedly, they are not. As has been recognized for 100 years or more, removal proceedings for elected officials are akin to a criminal prosecution. (*See, e.g, People ex rel. Dorris v. McKamy* (1914) 168 Cal. 531, 533.) The principle that proof of official misconduct must satisfy the highest standard of law in the land is made explicit in the correlative state statutory scheme codified at Government Code sections 3060-3075. Under state removal proceedings, a grand jury must first hand down an indictment, after which the elected official is entititled to all the procedural and substantive protections developed in California criminal law, including but not limited to the right to demur, and the right to a trial by jury, with the requirement of jury unanimity, and the standard of proof being that of beyond a reasonable doubt.

It follows that if there is to be any hope of legal legitimacy in these proceedings, most, if not all, of the due process protections that attend a criminal prosecution should obtain to Sheriff Mirkarimi. These include:

1) The right to demur to the written charges;
2) The requirement that the Mayor convince members of the Ethics Commission beyond a reasonable doubt that official misconduct has been proven before any member can vote to recommend that the Board of Supervisors sustain the written charges;
3) The requirement that before the Commission may recommend that the Board of Supervisors sustain the written charges, all five members of the Commission must agree to such a recommendation.
4) The hearing should strictly adhere to the California Evidence Code.

The Mayor believes the Sheriff is entitled to less due process than what the State of California mandates for all state elected officials. Should the Commission fail to afford the democratically elected Sheriff of the City and County of San Francisco the same protections the State of California affords democratically elected officials, the Commission will undermine its own legitimacy by applying a special standard at the behest of the Mayor. For all the Mayor's talk of the will of the People, this is an unprecedented political prosecution that has nothing to do with the will of the People and everything to do with a Mayor who abused his power in an effort

to thwart the will of the people, even after the Superior Court and District Attorney had already adjudicated the very basis of the Mayor's charges.

Finally, the Mayor's opening brief and list of fact witnesses make clear the Mayor and City Attorney have every intention of drawing out this case as long as possible by effectively retrying Sheriff Mirkarimi on charges that have already been adjudicated, while throwing in some new ones along the way. While the Mayor was circumspect in his initial written charges, he has since become significantly more bold. The Mayor has gone from alleging that maybe Sheriff Mirkarimi engaged in witness dissuasion (*See* Written Charges of Official Misconduct, 8:5-6) to now making a certain accusation. This transformation is unexplained, but the allegation is provably false.

Notwithstanding the adjudication of charges which on their face state they are but a possibility, the Commission should parse out exactly what the legal issues are in the case as opposed to the factual issues. Lengthy hearings on undisputed facts are a waste of time. Sheriff Mirkarimi does not contest that he pleaded guilty to misdemeanor false imprisonment. The Mayor does not contest that all other charges (including witness dissuasion) were dismissed by the District Attorney. Apparently, the Mayor has access to evidence that the Police and District Attorney did not. As to any factual dispute, the Commission should admit only evidence that would prove or disprove a relevant factual dispute.

I. THE COMMISSION SHOULD REJECT THIS UNPRECEDENTED POLITICAL ABUSE OF THE SUSPENSION POWER AS IT IS BEING INCONSISTENTLY APPLIED WITHOUT ANY REGARD TO PAST PRACTICES

In its deliberations, the Commission should consult the historical record, which is instructive for actions which have not been deemed to be official misconduct. For example, in San Francisco, previous mayors have not sought the removal of the following publically elected officials:

In 1977, Sheriff Richard Hongisto willfully defied a lawful court order to evict tenants from a building and served a five-day jail sentence for criminal contempt. One of the the core duties of the Sheriff of San Francisco is to "[e]xecute the orders and legal processes issued by courts of the State of California." (San Francisco Charter §6.105[3].) Then-Mayor Moscone did not seek Sheriff Hongisto's removal.

In 1995, Terence Hallinan was elected District Attorney of San Francisco. Despite Hallinan's history of arrests and convictions for physical assaults during his youth, see *Hallinan v. Committee of State Bar Examiners* (1966) 65 Cal. 2d 447, the Mayors in office during Mr. Hallinan's tenure as District Attorney did not seek to remove him for official misconduct.

Furthermore, the City Attorney is investigating and prosecuting this case in an unprecedented manner as well. The City Attorney has asserted authority to investigate however it pleases with absolutely no deference to the Commission. According to the City Attorney, the Commission is but a co-equal administrative body on par with the Mayor and City Attorney, with no authority whatsoever as to any investigation carried out by the Mayor or City Attorney, regardless of what governmental ethics laws might be violated by the Mayor and City Attorney. However, the Commission, as the judicial authority in these proceedings, absolutely has the authority to determine whether the investigations carried out by the Mayor and City Attorney are done so in compliance with the law.

The Mayor and City Attorney want to have it both ways: on the one hand, they assert the Commission has jurisdiction over the allegations, while on the other hand, they assert that only the Superior Court has jurisdiction over the investigation of those same allegations. In effect, the Mayor asserts that the Commission can weigh the validity of the allegations, but not the integrity of the investigation. The Mayor and City Attorney thus assert carte blanche authority to use the power of their offices to interrogate anyone on any basis, and search and seize any property on any basis. Meanwhile, Sheriff Mirkarimi has no similar means of discovery. The investigatory scheme asserted by the Mayor and City Attorney – whereby they have absolute discovery rights but the Sheriff has none – could not be more in violation of fundamental due process.

However, the Charter does not contemplate forcing the subject of an official misconduct proceeding to go to Superior Court every time he or she wants to challenge a new and unprecedented assertion of authority by the Mayor and City Attorney. The Mayor cites no legal authority for his assertion that the Commission has no authority over his investigation. Neither judicial economy nor fundamental fairness are served by having the investigation supervised by the Superior Court while the Commission determines the sufficiency of the allegations. The lack of deference to the Commission demonstrated by the Mayor and City Attorney speaks volumes.

Moreover, the City Attorney has threatened to add another charge against Sheriff Mirkarimi because the Sheriff has not assisted with the City Attorney's dual-track, renegade investigation. The City Attorney has subpoenaed the Sheriff's phone records, demanded he show up and give a recorded statement, seized and searched his work computer against his objections, and demanded documents, asserting no other authority than the Mayor's prerogative.

However, when the City Attorney investigated current Department of Public Works Director Mohammed Nuru for alleged wrongdoing the City Attorney issued no subpoenas, and certainly never threatened to charge Nuru for official misconduct for noncooperation (*See* Exhibit 1, attached, City Attorney Memo on Investigation of SLUG and Nuru). Similarly, when the City Attorney investigated city payments to Mayoral Staff Member Ruby Rippey-Tourk, there were no subpoenas or threats to charge Ms. Rippey-Tourk for declining to be interviewed (*See* Exhibit 2, attached, City Attorney Memo on Investigation of City Payment to Rippey-Tourk).

However, as here, in both the Nuru and Rippey-Tourk cases, the subjects under investigation declined to be interviewed by the City Attorney. They were not subpoenaed. They were not hounded by City Attorney investigators. Additional charges were not threatened. Rather, Mr. Nuru eventually received a promotion (by Mayor Lee, uncoincidentally) for his trouble, and Ms. Tourk received a significant sum of city funds for hers. This double standard highlights the troubling, and transparently political, nature of this case.

What do we know to be true? The Sheriff – a known political opponent of the Mayor and District Attorney – was elected by the People of the City and County of San Francisco. Before assuming office, the Sheriff committed a misdemeanor. The Ninth Circuit has determined that said misdemeanor is not a crime of moral turpitude. After the Sheriff was sentenced for said misdemeanor, the District Attorney asserted justice had been served. The Mayor immediately suspended the Sheriff vis-à-vis flimsy, flawed and fallacious charges.

The City Attorney began investigating the Sheriff with a vehemence unmatched in recent memory and in complete disproportion to *any* other City Attorney investigation. Seeking redress, the Sheriff asked for the Commission to intercede and determine the applicable rules of discovery. The Mayor and City Attorney responded by saying they are not under the authority of

the Commission. Instead, the Mayor and City Attorney have stated that they have every intention of retrying the Sheriff on charges that were already adjudicated, calling dozens of witnesses no matter how irrelevant, and generally reciting any and every outrageous, prejudicial and inflammatory tidbit as frequently as possible.

Sheriff Mirkarimi has accepted responsibility for his conduct, is taking the appropriate steps to address that conduct, has the support of his family and community, and should be permitted to immediately resume the office to which he was democratically elected by the People of the City and County of San Francisco. Sheriff Mirkarimi, his family and the People of San Francisco have suffered enough.

II. THE LEGAL FRAMEWORK SURROUNDING SAN FRANCISCO CHARTER SECTION 15.105(e)

In order to adequately answer the questions posed by the Commission at the last meeting, it is essential to set forth an understanding of the legal framework surrounding the Charter's definition of official misconduct, including related state statutes and decisions of the appellate courts of California. Initially, we note that the validity of San Francisco Charter provisions is subject to review by the California Court of Appeal and higher courts. (*See, e.g., Fiscal v. City and County of San Francisco* (2008) 158 Cal. App. 4th 895 [Charter's ban on handguns invalidated by Court of Appeal because preempted by state legislation].) Indeed, the Court of Appeal can and must take up the question of whether a portion of the San Francisco Charter is void for vagueness, as it did in the seminal – and controlling -- case of *Mazzola v. City and County of San Francisco* (1980) 112 CA2d 141.

Thus, the mere fact that a Charter provision exists does not mean that it is constitutional or legally valid. One of the tasks of this Commission is to determine whether Charter section 15.105(e)'s definition of official misconduct is legally valid. We contend that it is not, because the portion stating that official misconduct includes "conduct that falls below the standard of decency, good faith and right action impliedly required of all public officers" is unconstitutionally vague.

A law is constitutionally vague if it fails to give fair notice of the practice to be avoided, and does not provide reasonably adequate standards to guide enforcement. (*City of San*

Bernardino Hotel/Motel Ass'n v. City of San Bernardino (1997) 59 Cal. App. 4th 237, 245 (citation omitted).) Likewise, a statute which either forbids or requires the doing of an act in terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. (*Id.* at 246.) The Commission could ask ten different people what the phrase "standard of decency, good faith and right action impliedly required of all public officers" means and get ten different responses.

If this portion of section 15.105(e) is too vague to be fairly applied, what remains is the following: "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." This is language which is taken practically verbatim from the *Mazzola* decision – appropriately so, as *Mazzola* is the only appellate court decision which has ever ruled on the question of the meaning of official misconduct as used by the San Francisco Charter. (*See Mazzola, supra*, 112 CA2d 141 at 149-50.)

Besides the *Mazzola* opinion, whose definition of official misconduct should govern this removal proceeding, there are other state statutes and appellate decisions which provide guidance for use in this proceeding. Specifically, California Government Code sections 3060-75 codify the rules and procedures established by the state legislature for use in proceedings to remove an elected official for official misconduct. Most notable is the fact that this state statutory scheme clothes the elected official in the presumption of innocence, and accords him or her with all the legal protections afforded to persons charged with violating criminal laws. So, section 3060 requires that at least twelve grand jurors vote to indict the elected official on the charges of misconduct before a proceeding may be commenced. Sections 3065 and 3066 permit the elected official, called the defendant, to answer the charges by denying the truth of the accusation or by objecting in writing to its sufficiency – a right which is tantamount to a demurrer. Of course, it bears noting that even in criminal law, Penal Code section 1004 permits a defendant to demur on the grounds that charging document fails to state a public offense.

Most critically for this proceeding, GC § 3070 states that the trial of an accusation of official misconduct shall be by a jury, and conducted in all respects in the same manner as the

trial of an indictment. Of course, in a trial on a criminal indictment, the prosecution is held to the standard of proof beyond a reasonable doubt, and a unanimous jury must agree before a conviction may be had. (*People v. Russo* (2001) 25 Cal. 4th 1124, 1132, citing Cal. Const., art. I, § 16.) Finally, section 3071 entitles both sides in a removal proceeding on an accusation of official misconduct the right to compulsory process of witnesses.

With the foregoing in mind, we now address the issues raised by the Commission at the last hearing.

III. OUTSTANDING PROCEDURAL ISSUES FOR THE HEARING

A. What is the applicable standard of proof?

The standard of proof should be beyond a reasonable doubt. This is so because there is a fundamental difference between an attempt to remove an elected official for misconduct and an attempt to remove appointed or hired public employees. The former seeks to repudiate the publically expressed will of the electorate, while the latter does not. Given the premium placed by our democracy on the primacy of the will of the voter, it makes sense that the standard should be much higher than that required for non-elected public employees. The state Legislature clearly thought as much when it enacted GC §§3060-75, which applied the rules of trial on criminal indictment to removal proceedings for elected officials.

Moreover, as the Charter is silent on this issue, any doubts should be resolved in favor of Sheriff Mirkarimi. The Commission could apply a principle such as the rule of lenity, which states that when a criminal statute is unclear or ambiguous the defendant "is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute ..." (*People v. Gutierrez* (1982) 132 Cal.App.3d 281, 284.)

B. On what type of evidence may the Commission rely?

Strict rules of evidence should apply. Because, as noted above, the attempted removal of an elected official is akin to a criminal prosecution, the Commission should require adherence to the California Evidence Code, just as would be the case in a criminal trial.

C. Must the Ethics Commission act unanimously relating to this matter?

Yes. For the same reasons that require the highest burden of proof be used, that of beyond a reasonable doubt, before this Commission can recommend to the Board of Supervisors that it vote for removal, the Commission must be unanimous in voting to make such a recommendation.

Moreover, support for this position is found in the Charter itself. The Mayor cites Charter section 4.104(b) for this language: "Unless otherwise required by this Charter, the affirmative vote of a majority of the members shall be required for the approval of any matter..." This, claims the Mayor, supports its position that a majority vote should suffice to recommend removal.

The Mayor conveniently omits the very next sentence of section 4.104(b): "All appointive boards, commissions or other units of government shall act by a majority, two-thirds, three-fourths or other vote of all members." (Charter §4.104(b), underscoring supplied.)

Obviously, this means that the Commission is free to decide on what kind of vote – majority, super-majority, or unanimous – is best suited to these proceedings. For the reasons previously stated, the weight of California law comes down heavily in favor of the requirement of unanimity.

IV. OUTSTANDING SUBSTANTIVE ISSUES FOR THE HEARING

A. Can the Sheriff engage in official misconduct subjecting him to removal from office prior to the time that he held that office?

No. As explained above, the *Mazzola* decision must be the touchstone for defining the outer contours of the Charter's definition of official misconduct. In that case, the Court of Appeal rejected Mr. Mazzola's claim that the term "official misconduct" as used in the San Francisco charter was unconstitutionally vague. In so ruling, the court made a careful and deliberate survey of the legal authorities that supported its ruling, i.e., numerous California cases and learned treatises. The reason the court was able to arrive at its conclusion that the term "official misconduct" was not unconstitutionally vague was precisely because these legal authorities had considered the term and already decided what it meant. And, one of the foremost things the term meant was that the misconduct had to be done in the officer's "official capacity" – which obviously denotes an officer who is in his or her office at the time the misconduct

occurs. (*See Mazzola, supra*, 112 CA3d at 150, citing 63 Am.Jur.2d, Public Officers and Employees, § 190, p. 743.) Thus, it was entirely expectable that the court, after spending a page or more of the decision describing the term "official misconduct," stated that official misconduct was conduct done while in office. The precise quote is:

"Thus, there must be a violation or omission of a *proscribed act* committed while *in office*." (*Mazzola, supra*, at p. 150.) In fact, contrary to the Mayor's assertion in his Opening Brief at page 21, footnote 7, that he -- the Mayor -- is the person who added the emphasis on the words "*in office*" in that sentence, it was in fact the Court of Appeal which italicized those words. The very emphasis used by the court in its definitional summation of the term undercuts the Mayor's argument that the *Mazzola* definition of official misconduct is dicta. When the *Mazzola* opinion is read in its entirety, it is disingenuous to assert that the the italicized portions of the opinion are unimportant; in fact, they are the most critical portions of the opinion.

Finally, even if this definition could somehow be branded as dicta, it would still have to be followed. In *Paley v. Superior Court* (1955) 137 Cal.App.2d 450, 460, the Court of Appeal stated: "Because the issue was not necessary to the decision in a narrow sense, real parties in interest argue that what the Supreme Court said was dicta and need not be followed. We do not agree. Dicta are not to be ignored. Dicta may be highly persuasive, particularly where made by the Supreme Court after that court has considered the issue and deliberately made pronouncements thereon intended for the guidance of the lower court upon further proceedings. (*Id.*, underscoring supplied.)

County of Fresno v. Superior Court (1978) 82 Cal. App. 3d 191, 194 is to the same effect: "Even when part of an opinion is not relevant to material facts, if it is responsive to an argument raised by counsel and intended for guidance of the court and attorneys upon a new hearing, it probably constitutes the basis of the decision and cannot be disregarded by a lower court as mere dictum." "And, of course, even if part of a higher court's opinion may be dictum, lower courts are bound to follow it." (*Fogerty v. Cal.* (1986) 187 Cal. App. 3d 224, 234, fn. 7.)

If lower courts are bound to follow the words of a higher court, then surely this Commission must as well. For all these reasons, the *Mazzola* definition of official misconduct as requiring that the conduct be done while in office may not be ignored.

For further support, one may look to state cases construing proceedings held under GC §§3060-75. A survey of these cases shows that almost every one of these accusations was for acts done by elected officials while they were in the office from which removal was sought. See, for example, the following:

Steiner v. Superior Court, (1996) 50 CA4th 1771 [Court of Appeal rejected removal of two county supervisors for failing to adequately supervise the county treasurer, who plunged the county into bankruptcy];

Coffey v. Superior Court (1905) 147 Cal. 525 [police chief's ouster for failing to seek prosecution of an illegal gambling ring];

People v. Harby (1942) 51 CA2d 759 [a city councilman removed for taking a city car on a long vacation trip, in violation of a city ordinance prohibiting private use of a county car];

People v. Becker (1952) 112 CA2d 324 [removal of Board of Education member for receiving portions of insurance premiums for policies insurance companies provided for the school district on whose board Becker sat];

People v. Mullin (1961) 197 CA2d 479 [removal of a sheriff from office after he forced a girl to go with her father, whom she accused of molesting her, provided no protection for her, and did not report the claim to the district attorney or juvenile authorities as the law required];

and the list goes on.

With the exception of the guilty plea, all the conduct listed in the Mayor's written charges concerns conduct which occurred before Ross Mirkarimi became Sheriff. These acts by definition are not official misconduct. For the foregoing reasons, Sheriff Mirkarimi cannot be removed from office for conduct which occurred before he became Sheriff.

Here, the Mayor ignores the plain meaning of the words, "in office." "In office" means what it says. It does not mean some other office, i.e., supervisor. It does not mean "office-elect." The plain language of *Mazzola* controls any application of the law of official misconduct in these proceedings, not the Mayor's tortured reading of the Charter to arrive at a conclusion clearly outside the realm of common sense. *Mazzola* and every other relevant case make it

perfectly clear that the law of official misconduct is to be narrowly construed to apply to *abuse of that office while in that office* vis-à-vis conduct *directly related to that office*. Neither prong of the official misconduct test is met here.

B. Does "official misconduct" under the Charter require that the alleged misconduct relate to the Sheriff's duties?

Yes. As the Mazzola court stated: "Quite clearly, official misconduct requires a direct relationship of the alleged wrongdoing to the office held." (*Mazzola, supra*, 112 CA3d at p. 151.) Contra *Mazzola*, the Mayor, while initially waffling in the charging document (*See* Written Charges of Official Misconduct, 3:9-13), apparently now argues that official misconduct requires a "nexus" to the office, but need not be "related" to the office (*See* Mayor's Opening Brief; 24:23-27, 25:1-13). Beyond pointing out that Charter § 15.105(e) is broad enough to find any elected official guilty of official misconduct for any behavior at any point in time no matter how tangentially related to the office, the Mayor fails to say how conduct may be connected to an office but otherwise not related to the office.

C. If so, does the conduct alleged relate to Mr. Mirkarimi's duties as Sheriff?

No. The conduct alleged has no relation or connection to the duties of the Sheriff of San Francisco, which are to maintain the jail and execute lawful orders of the court. The Mayor's attempts at categorical syllogism are unpersuasive (sheriff arrests people + sheriff was arrested = sheriff can not arrest people). There obviously is *no direct connection or relationship* to the conduct and the office. The Mayor is thus left to making word associations.

The argument that a sheriff can be removed from office because of a misdemeanor false imprisonment conviction is akin to a school board member being removed from office for plagiarism or a district attorney being removed because of a conviction for any crime, even an infraction. The Mayor's inflammatory rhetoric does not change the fact that the conduct at issue occurred before Sheriff Mirkarimi was in office, is not a crime of moral turpitude, is a misdemeanor, and has absolutely nothing to do with his official duties.

D. Is the Sheriff's guilty plea to the misdemeanor charge of false imprisonment sufficient to sustain a finding of official misconduct?

No. The guilty plea itself does not have sufficient legal significance to sustain such a finding. First, the guilty plea was an uttering of words, while the definitional history of official misconduct includes acts usually, or omissions, more rarely.

Second, to answer the Mayor's contention that the plea and sentence itself could constitute misconduct, there exists a useful analogy in the area of a court's ability to revoke the probation of a defendant in a criminal case. Penal Code § 1203.2 permits a court to revoke probation and find the defendant in violation thereof for any of defendant's conduct that occurs while he or she is on probation. A court, however, may not revoke probation for any conduct by the defendant that occurred prior to the time defendant was placed on probation – even if the defendant pleads guilty to a crime based on that conduct after he has been placed on probation. The same principle applies here. The Mayor may not be permitted to seek the removal of Sheriff Mirkarimi because he exercised his constitutional right to enter a plea of not guilty and insist on a jury trial for a period of time, for conduct occurring before he became Sheriff.

E. Even if all the charges alleged against the Sheriff are true, should the Commission dismiss the charges because the Commission has no jurisdiction and the allegations were already adjudicated?

Yes. As previously stated, as a matter of law the written charges do not constitute official misconduct. Just as the Commission may dismiss complaints of misconduct when probable cause does not exist, so may the Commission dismiss these charges.

The Commission has the authority to dismiss any complaint when the evidence does not support a finding of probable cause to believe a violation of a relevant law has occurred. The Commission's Regulations for Investigations and Enforcement Proceedings provide a clear basis for dismissal of a complaint. According to § IV(B) of the Regulations, a complaint may be dismissed where:

1. Credible evidence clearly refutes the allegations.

2. **The allegations, if true, do not constitute a violation of law within the Commission's jurisdiction.**

3. The complaint contains an expression of opinions, rather than specific allegations.

4. The allegations contained in the complaint are already under investigation, or already have been resolved, by the Commission or another law enforcement agency.

Here, the Commission must dismiss the Mayor's charges because: 1) the Commission has no jurisdiction to adjudicate allegations of violation of criminal statutes; and 2) the allegations have already been investigated and resolved by another law enforcement agency, namely the San Francisco Police Department, District Attorney's Office and Superior Court.

The Commission has jurisdiction over "the impartial and effective administration and implementation of the provisions of this charter, statutes and ordinances concerning campaign finance, lobbying, conflicts of interest and governmental ethics." Charter § C3.699-10, underscoring supplied. The Mayor has not accused the Sheriff of violating any law within the purview of the Commission. Accordingly, the charges must be dismissed.

Moreover, as noted, all of the allegations made by the Mayor were already investigated by the San Francisco Police and District Attorney and resolved by the San Francisco Superior Court. Subsequent to the entry of the plea, the Assistant District Attorney who prosecuted the case publicly declared that justice had been served. Neither the Superior Court nor the District Attorney ever made any suggestion that the Sheriff would be unable to keep his position as the democratically elected Sheriff. In fact, the opposite is true. The plea agreement was crafted precisely in order to 1) respect and reflect the facts and the law, and 2) to enable the Sheriff to continue serving as Sheriff.

Quite simply, the Mayor's suspension of the Sheriff was an abuse of discretion supported by neither the facts nor the law. Because the allegations were already adjudicated, the Commission has no jurisdiction to effectively retry Sheriff Mirkarimi on the same charges all over again. To do so is tantamount to double jeopardy, violates fundamental due process, and would be an unprecedented waste of taxpayer dollars. Accordingly, the Commission must dismiss the charges.

V. SHERIFF MIRKARIMI REQUESTS THE COMMISSION SET FIRM DATES FOR THE COMPILING OF THE RECORD AND VOTING ON ITS RECOMMENDATION TO THE BOARD

In the event that the Commission decides not to dismiss these written charges, Sheriff Mirkarimi requests that the Commission establish a schedule for swift action on these charges. The witness list provided by the Mayor seems designed to turn this process into a long-running spectacle. Sheriff Mirkarimi will object to the Commission receiving any evidence from many of the "witnesses" on the Mayor's witness list. Sheriff Mirkarimi is prepared to defend these charges right now, and it would be unfair to both him and the citizens of San Francisco to permit the Mayor to turn this into a long, drawn-out process. If the Mayor thought he had proof of official misconduct by Sheriff Mirkarimi, he should have been ready to prove it up the day he filed written charges. This Commission should not countenance any unpreparedness on the part of Mayor Lee by granting requests for delay.

CONCLUSION

The Commission should dismiss the Mayor's charges because: 1) the charges are transparently political; 2) the charges are grossly inconsistent with past practices; 3) the charges have already been adjudicated; and 4) the Mayor fails to allege a violation of a law under the Commission's jurisdiction. In the alternative, the Commission should adopt the same due process protections the State of California affords its elected officials, and the Commission should reject the Mayor's efforts to make the hearing as lengthy and salacious as possible, and adjudicate only the relevant legal and factual questions at issue. Finally, the Mayor's charges against Sheriff Ross Mirkarimi must fail because the evidence will show that the conduct at issue does not rise to the level of official misconduct under the law.

Dated: May 7, 2012

By:

/s/ David P. Waggoner
DAVID P. WAGGONER

/s/ Shepard S. Kopp
SHEPARD S. KOPP

Attorneys for SHERIFF ROSS MIRKARIMI

CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

TIMOTHY ARMISTEAD, CHIEF
Division of Investigation

DIRECT DIAL: (415) 554-4264
E-MAIL: tim.armistead@sfgov.org

MEMORANDUM

TO: LORI GIORGI, Chief Attorney, Public Integrity Task Force

FROM: TIMOTHY ARMISTEAD, Chief, Division of Investigation
GEORGE COTHRAN, Investigator

DATE: 10 May 2004

RE: Report of Investigation, SLUG Elect, Case # 040964

Background

On 6 January 2004, an investigation was initiated into an allegation that was brought to the attention of this Office by a staff person of the Human Rights Commission. The allegation was that workers of a local private non-profit agency named the San Francisco League of Urban Gardeners (commonly called "SLUG") were directed by supervisors and by the executive director of SLUG to campaign and vote for Gavin Newsom in the election for mayor of San Francisco in November and December of 2003. (The general election was on 4 November; the runoff was on 9 December.) According to the allegation, the activities occurred on normal work time, and most of the SLUG workers involved had intended to vote for Matt Gonzalez for Mayor, not Gavin Newsom.

If true, the alleged activities could violate individual SLUG workers' voting rights as well as a local ordinance prohibiting the use of contract or grant monies for political campaigning. Additionally, if true and if the activities took place while workers were being paid with City and County funds to perform the normal duties of SLUG, then the activities also could constitute a prohibited taking of public funds, potentially a violation of California penal code sections covering fraud and embezzlement. Additionally, if true, SLUG could be in jeopardy of losing its 501(c)(3) status. Finally, the alleged activities could constitute violations of both the municipal and the state elections codes. (See **Tab A** for Section 12G.1 and companion sections of the San Francisco Administrative Code, as well as for relevant sections of the municipal and state elections codes. Tab A also includes an IRS circular explaining prohibitions on political campaigning by charities and non-profits. For penal code sections of potential relevance, see generally sections 424, 484 et seq. and 504 et seq. of the California penal code.)

The investigation into this allegation regarding SLUG is complete to the extent that we feel it can be, given the limitations imposed by several difficulties:

Memorandum

a) SLUG's executive director and supervisorial staff of interest have declined through counsel to be interviewed, as has SLUG's former executive director;

b) Despite our repeated efforts verbally and in writing, SLUG has failed to cooperate fully with our document requests;

c) Witnesses who work(ed) for SLUG in low-level capacities have declined to cooperate with the investigation, citing fear of retribution by SLUG, a claim to which we give some credence after an experience one of us had being surveilled and approached in an intimidating manner throughout most of one day in the field;

d) We have not yet obtained documents of interest from counsel to the Newsom for Mayor campaign.

The purpose of this report is to advise you regarding investigative steps that have been undertaken specific to the original allegation of election-related activities (directed or coerced voting and campaigning for Gavin Newsom), and our findings to date in regard to just that limited issue.

For security reasons, the names of our witnesses and of the SLUG supervisors they identify as having been involved in urging or coercing them to vote and campaign for Newsom are not given in this report. Likewise, payroll and time sheet documents, as well as interview transcripts, are being held in the investigative file rather than being attached to this report. Those documents can be reviewed by appropriate officials upon request.

Investigative Steps

1) We have obtained financial documents from SLUG, from the Controller, and from the Department of Public Works which have allowed us to establish funding sources and mechanisms for SLUG, as well as allowing us to determine whether SLUG supervisors, administrators, and workers were paid City funds during the periods of time that our witnesses allegedly were performing election-related activities.

2) To date, we have identified and interviewed nine individuals who were employed by SLUG as of the November - December 2003 period. Seven of these individuals were let go by SLUG effective 31 December, one of them is still employed at SLUG as of this writing, and one of them – formerly a supervisor at SLUG – resigned from SLUG approximately a week prior to this writing. All of them worked at least several months for SLUG; many for up to a year, and the one who still is employed by SLUG has been there close to two years. The supervisor who recently resigned had worked for SLUG for nearly three years. (The group of former SLUG

employees includes the individual who originally took the allegation of election-related activities to the HRC.)

2) We obtained payroll records and time sheets from SLUG for the November-December 2003 period, and we obtained from three former SLUG employees copies of their pay stubs for that period. We also obtained various financial records and documents pertaining to the source and disbursement of monies from city departments to SLUG, and we interviewed appropriate city financial officers in this regard.

3) We identified the executive director and all but one[1] of the supervisors of SLUG who were named by the witnesses as having participated in directing the election-related activity, and we showed photo lineups to three of the witnesses in order to confirm their verbal identifications (which often were given only as first names or nicknames).

4) We interviewed six key Gavin Newsom campaign staff, four of them paid staff and two of them volunteers. Additionally, we interviewed a consultant to the Newsom campaign who also did volunteer work on behalf of the Harris campaign.

5) After information was developed in the course of the investigation that SLUG workers may have been urged to vote for Kamala Harris for District Attorney at the same time they were urged or directed to vote for Gavin Newsom for Mayor, we interviewed District Attorney Kamala Harris's campaign manager.

6) We sought several times – so far unsuccessfully – to interview all the SLUG supervisors and the executive director. As of this writing, all but one of the SLUG supervisory staff have declined to be interviewed, as has the executive director (See letter from SLUG's attorney, **Tab B**).

7) We identified the campaign offices and polling places that SLUG workers most likely visited if their allegations were true.

8) We identified the former SLUG executive director (Mr. Mohammed Nuru, since August 2000 a deputy director of the city's Department of Public Works) who was alleged to have participated in directing – in one alleged instance, coercing – SLUG workers in some of their campaign activities. We created a photo lineup for the witnesses in order to ensure their identification of him. We also sought to perform a voluntary, non-compelled interview of Mr. Nuru. Through counsel, Mr. Nuru declined to be interviewed.

9) We obtained records from the Department of Elections that allowed us to determine whether SLUG workers and supervisors voted in the manner that our witnesses told us they

[1] One supervisor has an extremely common name and SLUG records that are available to us at this time do not allow us to determine his identity.

voted: using absentee ballots in the basement of City Hall during the first week of December 2003.

10) We identified and interviewed uninvolved citizens who happened to have been voting absentee in the basement of City Hall at the same time that records show SLUG workers voting there.

11) We identified and interviewed nine individuals who were known to have worked at SLUG during prior election cycles and who recounted SLUG election-related activities during those periods. We verified that these witnesses in fact did work at SLUG during the 1998 and 1999 time periods by accessing SLUG payroll records from those periods. (We have been unable to verify employment during 1997 because of our inability to obtain the records from that period.)

12) We obtained telephone records of Mohammed Nuru's city land line and cellular telephones for the period July-December 2003, and we pulled his city PC hard drive and his city Palm Pilot. Additionally, we obtained Nuru's DPW time records for the November-December 2003 period. All these tasks were accomplished with the consent and cooperation of Nuru's department head and were performed because of the alleged participation of Nuru in some of the alleged activities.

Findings

Our findings to date are broadly categorized as being of three types:

1) Findings pertaining to the funding of SLUG activities and the payment of its staff during those periods of time when election-related activity was alleged to have occurred.

2) Findings pertaining to allegations made and stories told by the nine individuals who worked for SLUG during the immediately past mayoral election of November-December 2003;

3) Findings pertaining to the interviews of individuals who worked for SLUG during prior election cycles, but who have not worked for SLUG during the recent past.

A) Findings pertaining to funding and payroll issues:

1) During all the periods of time in November and December 2003 that election-related activity is alleged to have occurred, SLUG's executive director, supervisors, and line workers were being paid through the mechanism of invoices to the Department of Public Works, which in turn reviewed SLUG's payroll records and other reimbursables and then wrote a check from

general fund monies in its own budget. In part these monies were from DPW's own budget, and in part they were monies which were work-ordered from the budgets of MUNI Railway and the Department of Human Services. Each of the latter two departments have for some years funded SLUG activities which are particularly pertinent to their respective missions. In the case of DHS, the Temporary Employment Program (commonly, "TEP") is a part of its welfare-to-work program. In the case of MUNI Railway, it funds a ten-member SLUG cleanup crew that patrols and cleans the area of Third Street most heavily impacted by the Third Street Light Rail Project. While these departmental monies are sometimes considered to have been awarded to SLUG by way of grants, the specific funding authority for reimbursement of SLUG's activities is its contract with the City.

2) SLUG and DPW payroll records, as well as SLUG time sheets, demonstrate that if the election-related activities alleged by our witnesses did in fact occur, they occurred on days and at times of day when the affected SLUG line workers and supervisors were paid full-time wages by SLUG as if they had been performing legitimate City work.

B. Findings pertaining to the election of November-December 2003:

1) All nine SLUG witnesses, while not necessarily known to each other (three different work crews are represented by our witnesses), tell essentially similar stories about their election-related activities during the recent election cycle. While differing somewhat in details of memory and the dates of voting, the stories essentially corroborate each other.[2]

2) The witnesses agree that on or just prior to 2 December 2003 (one week before the runoff election of 9 December), they were instructed to be at SLUG headquarters in the late morning of 2 December for a so-called "garage meeting" of the entire organization. The one witness who at the time worked an early shift (08:00 – 17:00 hours) told us he was directed by his supervisor to go to headquarters and wait for the meeting to start at about 11:00 hours; those who worked the late shift (12:00-20:00 hours) told us they were instructed by their supervisors to report to headquarters an hour earlier than usual for an 11:00 hours garage meeting.

3) The witnesses agree that at the garage meeting, Jonathan Gomwalk, executive director of SLUG, talked about the upcoming runoff election and urged the workers to vote for Gavin Newsom for Mayor and Kamala Harris for District Attorney. According to some but not all the witnesses, the emphasis as between the two races was on Newsom for Mayor. According to

[2] The only qualifier to this observation is that one SLUG witness recalls possibly having participated in Gavin Newsom GOTV activity on 4 November, the day of the general election, in addition to 9 December, the day of the runoff. The others either did not clearly recall whether or not they worked the election on the fourth, or they recall that they did not. See the text at "Findings" #'s 13 and 14 for more details about SLUG campaigning on 4 November. The text that immediately follows this footnote deals only with the witnesses' recollections of their activities on 2 and 9 December.

some witnesses, Gomwalk *directed* the workers to vote for these two candidates, while according to others, he *urged* a vote for these two candidates. Some of the witnesses stated that Gomwalk said or implied that if they failed to vote for Newsom, they would not be paid. Two witnesses stated that two slightly different messages – a "soft" one about SLUG losing funding and a "hard" one about individual workers not being paid for the day -- were given by Gomwalk at the meeting. Some witnesses agree that the "real" message – consistent with their experiences with prior SLUG practices – was given by the supervisors in more private settings, and that the message was to vote for Newsom on pain of forfeiture of pay or worse. Witnesses explained that having worked for SLUG for many months, they had learned from experience that any directive from certain supervisors would be enforced by threats of loss of pay, loss of a day's work, or termination. Two of these witnesses were entirely certain that these potential penalities were spelled out by their supervisors in the context of the orders to vote for Newsom.

4) Subsequent to the garage meeting, the witnesses agree that they were driven in SLUG vans to the Third Street headquarters of Kamala Harris's campaign, where they listened to a speech – possibly by Harris herself -- and were fed a lunch. Some but not all the witnesses agree that they were instructed to take off the vests that identified them as SLUG workers prior to attending this Harris event.

5) The witnesses stated that after their appearance at Harris's event, they were instructed to get into different vans which they referred to as "voting vans" – vans provided by various organizations to take people to the polls – and were told that they were going to be taken to City Hall to vote absentee. Some but not all the witnesses stated that various SLUG supervisors told them at or about this time of the day, that they should vote for Gavin Newsom for mayor and that after voting, they were to give their voting stubs to their SLUG supervisor to prove they voted. Others stated that these directives were given to them at the earlier "garage meeting," and still others stated that these directives were given to them while waiting in line to vote in the basement of City Hall. Some witnesses agreed that a particular supervisor, who reportedly functions as executive director Gomwalk's lead supervisor, was especially clear in instructing them to vote for Newsom and in directing them to turn over their voting stubs to him. Two of these witnesses said that this supervisor made it clear that failure to do so would result in loss of pay. All the SLUG worker witnesses except one stated that they did in fact turn over their voting stubs, as instructed, to SLUG supervisors. One witness said that he himself was not directed to vote for Newsom, but that he had heard other SLUG workers being so directed by a supervisor.

One witness additionally claimed that the lead supervisor peered over her shoulder as she voted. Per our interview with Department of Elections staff, this would have been physically possible although reportedly it was not seen by DoE staff. Additionally, according to a second SLUG worker and an uninvolved citizen who was present at the time SLUG workers voted, an African-American male was seen walking in an aisle between voting booths in such a manner that this would have been physically possible. The second SLUG worker identified this man as the lead supervisor. The booths were arranged in narrow rows, and the backs of the booths were open, not curtained.

6) In the vans on the way to City Hall, at City Hall, and on the way back to SLUG headquarters from voting at City Hall, some of the witnesses either report complaining about being coerced by their employer into voting a certain way, or they report hearing others – including SLUG workers they accurately describe physically but do not know personally – complain about it. Additionally, a non-SLUG witness (a person who just happened to vote in proximity to the SLUG workers) characterized the appearance and body language of the SLUG workers as implying dissatisfaction or unhappiness about what they were doing. Additionally, another citizen reports having heard members of the SLUG group stating that they were going to vote "the way they were told to vote." (This witness accurately identified from photo lineups a SLUG supervisor and a SLUG worker who we know to have been present that day in the City Hall early voting area.) It appears, then, that the SLUG workers' complaints about this activity arose at the time of the activity, not just later after some of them were laid off (31 December 2003).

7) The witnesses reported that after they voted at City Hall, they were returned to SLUG headquarters and were then sent out to their regular SLUG jobs in various locations of the city. The witnesses agreed that they were paid for the full shift that day, including the hours spent on election-related activity. They also agreed that they did not work past their normal quitting time, in order to make up for the hours spent in political activity. Payroll records and time sheets corroborate this claim. The time sheets show all the witnesses being credited with a full day of work on the day they voted absentee, and payroll records reflect total hours worked for that pay period as being consistent with full pay for that day.[3] Departmental financial records indicate that the wages of all these witnesses and their supervisors, as well as the wages of the executive director of SLUG, ultimately are paid by the Department of Public Works from its general fund budget.

8) On an unknown date after 4 November but before 2 December, one of our witnesses reports having been taking his lunch break in a SLUG van when Mohammed Nuru came up to him. Nuru reportedly told him to " '. . .vote for Gavin Newsom. You know, he's our man and we all gonna come out on December 2nd.' " This implies that Nuru was aware of an early voting push being planned for 2 December. While Newsom campaign field director Alex Tourk advised us that the Newsom campaign produced no early voting day push after 7 October (the day of the recall vote for the governor's office), Tourk's District 10 field organizer (Ms Malia Cohen) advised us that in December the Newsom campaign sponsored a large, citywide early voting day push, complete with "voting vans" and motorized cable cars to take people to City Hall to vote absentee. She recalls that this early voting day was 2 December.

9) Of the nine witnesses to the recent election cycle, seven were scheduled to work for SLUG on 9 December 2003, the day of the runoff election. (Two witnesses were scheduled to be off on 9 December and did not participate in or witness the events to follow. One of these

[3] One of these witnesses actually was reportedly instructed to vote – and was taken to vote – on a different day, but the findings are consistent as to his pay with the experience of the other witnesses.

witnesses, however, recalled having been offered overtime SLUG pay by the lead supervisor if he agreed to campaign in a prior ballot measure campaign. He could not recall which ballot measure was involved.) Five of these reported that at the beginning of their shift, when they reported to SLUG headquarters, they were driven by SLUG supervisorial staff to the satellite office of the Gavin Newsom campaign in the Excelsior District.[4] While none of the five knew the address of the office, all of them said it was in the proximity of Mission and Geneva or Mission and Persia. In fact, that is true: it was in the Italian American Social Club on Russia Street, very close to where the witnesses recalled. At this location, the witnesses reported that they were instructed by Mohammed Nuru as to the Get Out The Vote (hereafter "GOTV") activities they were expected to undertake. Two of the witnesses stated that Nuru was very aggressive in his instructions, telling one of them that if she expected to be paid for the day, she would follow his directions.[5] Specifically, they reported that they were given door hangers and "targeted voter" lists, and were driven variously in Gavin Newsom for Mayor volunteers' vehicles and in SLUG vans to locations in the Crocker-Amazon and Lakeview districts of San Francisco, where they were to hang the door hangers and were, in addition, expected to periodically check the voter rolls in the polling places in those locations. Mohammed Nuru reportedly was among the people teaching them how to do this by going to polls with them. They were to compare the voter rolls in the polling places to their lists of targeted Newsom voters, and if a targeted voter had not voted, they were to walk to that person's home and attempt to persuade the voter to go vote, or alternatively hang a door hanger there if the voter did not come to the door. These witnesses stated that they were expected to perform these activities their entire shift or until 20:00 hours, whichever came earlier. One of the witnesses gave us an accurate physical description of the lead campaign worker (called the "field organizer" by the Newsom campaign) in the Russia Street office, another of the witnesses identified that individual in a photo lineup, and all the witnesses accurately described Nuru.[6]

10) A sixth witness who was involved in the 9 December activities stated that he was given a different assignment. He reportedly was sent to the Gavin Newsom for Mayor office on Third Street, where he and other members of the Visitacion Valley and Third Street Light Rail SLUG crews reportedly were given Newsom for Mayor campaign signs. They were assigned to perform one function during their entire shift: to walk up and down Third Street and on major side streets, holding up the signs. This they reportedly did for their entire shift. This witness also recalled that at one point in the day, Jonathan Gomwalk showed up driving a pickup truck and transported them to a more strategic location. This recollection is consistent with that of different

[4] Two of these witnesses believed that the activities that follow in the text occurred on the same day that they were taken to City Hall to vote; in fact, they collapsed two different days in their memory. In light of this confusion, we have used other witnesses to corroborate their presence at both locations on both days.

[5] One of these witnesses reports having eventually refused to engage in the activity, inasmuch as he was a strong Gonzalez supporter and already felt profoundly cheated by having been coerced into voting for Newsom on 2 December on pain of losing his day's pay. When he refused to do more work, according to the witness, Nuru reportedly told him to "get off your ass and get to work." The witness alleges that he did not do as Nuru instructed, instead just sitting in a chair in the Russia Street office for the remainder of the shift.

[6] All of the SLUG witnesses knew Nuru on sight, having seen him and heard him speak at several SLUG events.

SLUG witnesses who worked out of the Russia Street office. They recalled that Gomwalk was driving a pickup truck on 9 December and that he transported them from SLUG headquarters to the Russia Street location. This sixth witness's photograph was identified in a photo lineup by a consultant to the Newsom campaign who stated that he recalled seeing him in the Third Street Newsom campaign office on 9 December. The witness's recollection is corroborated by the seventh 9 December witness, the former supervisor of the Third Street Light Rail crew, who remembers the witness having campaigned with Newsom signs along with the former supervisor and the rest of his crew on that day. (See **Tab D** for this supervisor's interview.)

11) All seven witnesses who allege having engaged in the 9 December electioneering activities advised us that they were paid for the day by SLUG as if they had performed their normal SLUG duties. Time sheets and payroll records corroborate this. The time sheets show eight hours worked by these people on 9 December, and the payroll records, while not reflecting specific days worked, reflect a total number of hours worked for the pay period that is consistent with their having been paid in full for 9 December.

12) Our interview of one of the SLUG workers merits separate mention. This individual is still employed by SLUG and is in his second year of employment there as a street sweeper, much of that time on the Third Street Light Rail crew. Not a participant in the TEP program, his wages are paid by MUNI. The members of his crew generally enjoy greater job longevity than TEP participants, whose tenure at SLUG generally is limited to one year. This witness was approached early in the investigation and seemed to want to give us an interview, but then changed his mind for fear of retribution by his supervisor who reportedly had ordered him to not cooperate. He came forward only recently, having decided after talking to a trusted friend to "just tell the truth," even though he was very concerned about the fate of SLUG workers if the investigation should negatively impact SLUG. This witness participated in -- and corroborated the stories of other SLUG witnesses to -- the events of 2 and 9 December.[7] Additionally, he described the campaign activities of the Third Street Light Rail crew, which significantly transcended those of our TEP witnesses. His description of these activities, which follows, was corroborated by his former rail crew supervisor, an individual who gave us an interview recently and then resigned from SLUG, reportedly because he felt "embarrassed" that he had participated in the election-related activities reported herein.

The Third Street Light Rail crew (hereafter, "rail crew"), according to this witness, devoted major efforts to the Newsom campaign, especially during the period between the general and the runoff elections. According to this witness, their campaign duties during this period were first outlined to them by Jonathan Gomwalk in a crew meeting. On subsequent occasions during this period, the witness's supervisor and the lead supervisor repeated Gomwalk's directions. During that period, according to this witness, many of the rail crew members were rotated in to

[7] The only significant difference in his recollection from that of the others, is that he recalled doing poll checking work in District 11 for a few hours on 9 December prior to being driven to the Russia Street office, rather than the reverse.

the Newsom campaign during at least a few of their normal SLUG work days. In that way, according to the witness, the rail crew always had some presence on the street cleaning up, but also always had some presence in the Newsom campaign. As an example, our witness stated that in the five weeks between the general and runoff elections, he worked on the Newsom campaign a total of five shifts on SLUG time, and on some of those shifts he worked long enough to earn overtime. SLUG paid him for those shifts as if he had been sweeping the streets. On some occasions he worked out of the Newsom campaign Third Street office. On other days, he used his own van to transport clients of a different non-profit agency (Jelani House) to the main Newsom campaign headquarters on Van Ness Avenue, where they (and he) prepared door hangers. His contact at Jelani House for this transportation duty was, he said, Linda Richardson. The door hangers our witness described appear to have been the same ones that he and our other witnesses distributed on 9 December. According to the witness, he transported approximately 20 Jelani House clients on each occasion, and they all worked at Newsom headquarters from about noon into the evening hours, on one occasion until 10:00 p.m.

When we asked if he wanted to perform these campaign activities, the witness responded that Gomwalk and the supervisors made it clear that he and the other crew members had a choice in the matter: either work the campaign for SLUG wages, or go home. They all knew, he said, that "go home" meant no pay for that shift, and the possibility of a suspension or worse for failing to follow orders.

This same witness gave us details of SLUG's participation in the mayoral debate at Jones Methodist church on Post Street early in Thanksgiving week. We had been told by one of the TEP witnesses that he and other TEP crew members cleaned up around one of the debates, but he was unclear of details about the debate itself or its exact location in the western part of the City. Our rail crew witness clarified this event for us. He told us that he and the other rail crew members were directed to attend the debate even though it was a day off for them (Sunday, 23 November 2003), and they were told they would be paid overtime for their attendance.[8] At the debate itself, according to the witness, he saw SLUG workers cleaning up outside the church in their SLUG gear, while he and other rail crew members along with all the SLUG supervisors and Jonathan Gomwalk actually attended the debate but not in SLUG gear. At the debate, according to the witness, and following the example of their supervisors, the rail crew heckled and booed Supervisor Gonzalez. According to the witness, prior to the debate his supervisor and Gomwalk made it clear that their role at the debate was to support Newsom. According to a consultant to the Newsom campaign who attended the debate, Gomwalk in fact was in attendance that evening.

[8] A check of the time sheets for that week reveals that the majority of the rail crew received roughly the same amount of overtime for that week, but it was credited to several days other than the 23rd, which on the time sheets is reflected as a day off for the crew. This witness's former supervisor explained that on directions of SLUG's lead supervisor, he credited himself and his rail crew with the overtime in such a way as to make it appear to have been earned legitimately in Third Street cleanup duties.

Memorandum

TO: Lori Giorgi
DATE: 10 May 2004
PAGE: 11

13) Alex Tourk, currently deputy chief of staff for Mayor Newsom, was the Newsom for Mayor field director. His statements of interest in this investigation are as follows:

a) He has advised us that on frequent occasions, beginning in approximately the summer of 2003, he telephoned Mohammed Nuru and Jonathan Gomwalk to tell them about upcoming campaign events. He stated that he placed those calls because he was aware that both men could be expected to bring SLUG workers to Newsom campaign events, especially events on weekends. This is consistent with statements by one of our witnesses to the effect that on a few occasions during the months prior to the mayoral election, he and other SLUG workers were assigned to attend and/or clean up at Newsom for Mayor events. It also is consistent with the recollection of one witness that at a park cleanup event for which SLUG workers were paid, approximately a month prior to the general election, Mohammed Nuru spoke to them about the likelihood that they would lose their jobs if Gavin Newsom was not elected mayor.

b) Tourk stated that it was always his assumption that any SLUG workers attending campaign events were doing so voluntarily. He also has stated, in this regard, that he was aware that SLUG is a private non-profit agency.

c) Tourk also recalled that he was unaware at the time of the campaign – and was unaware at the time of our interview – of any laws affecting a private non-profit agency's ability to engage in political activity. On the other hand, Malia Cohen, field organizer in the Bayview office of the Newsom campaign, recalls that Mr. Tourk gave her the names of several non-profit agencies in that area and told her they were "players" and should be approached for support. Ms Cohen's recollection is that Mr. Tourk specifically mentioned SLUG in this context. Further, she recollects that Mr. Tourk told her that there were legal restrictions on how non-profit agencies could participate in campaigns.

d) Finally, Tourk advised us that Mohammed Nuru was in fact staffing the Russia Street office on 9 December 2003, and that one of Nuru's main responsibilities there was to recruit volunteers to work the GOTV effort that day.

14) James A. MacLachlan III, governmental liaison for the city's Public Utilities Commission, was a volunteer on the Newsom for Mayor campaign. According to Alex Tourk, MacLachlan was assigned to the Russia Street office on 9 December. We interviewed Mr. MacLachlan and determined that he staffed that office from approximately 07:00 to approximately 20:00 hours on 9 December, spending the great majority of that time in the office itself. MacLachlan also stated that he did the same thing on the day of the general election, 4 November. On both days, his assignment was to train the volunteer precinct workers and give them their packets of targeted voter lists and door hangers. *On both days*, according to MacLachlan, the Newsom campaign knew ahead of time that Mohammed Nuru would be at the Russia Street office that day and that Nuru's role on each day was to assign precinct tasks to "his

people." In other words, according to MacLachlan, Nuru's job vis-à-vis volunteers was a specific and limited one: Nuru was to orient and supervise his own group of people.

According to MacLachlan, Nuru's people were approximately ten African-Americans, mostly men and one or two women, who arrived "more or less" as a group and who were taken out in a van to the five or six precincts assigned to Nuru.

When shown photo spreads three months after 9 December, MacLachlan accurately identified two of the SLUG supervisors who, according to our SLUG witnesses, were there. Additionally, his recollection that "Nuru's people" included one or two women squares with the statements of our SLUG witnesses, including the statements we have taken from those two women.

15) We interviewed Trent Rhorer, the executive director of the city's Department of Human Services. Rhorer was a GOTV volunteer for the Newsom campaign on both election days -- the general election on 4 November and the runoff on 9 December. On both days, his duties were to be the "numbers person" at the Russia Street campaign office. That is, it was his job to gather from all the precinct workers the numbers of targeted voters who had voted by various times throughout the day. In this capacity, Rhorer conversed with some of the paid and volunteer workers throughout the day as well as at one or two campaign rallies preceding the two election days. Rhorer estimates that on both election days, he began work at the campaign office at approximately 07:30 hours and ended at 20:00 hours. He spent most of that time inside the office. Rhorer's observations of interest are as follows:

(a) He knew that on both election days he could expect Mohammed Nuru to be at the campaign office and to be accompanied by SLUG workers acting as volunteer precinct workers.

(b) He said that it was common knowledge at the Russia Street office that SLUG workers would be working some of the precincts. He exemplified this by pointing out that when he and others composed a chart (on butcher paper) of the precincts to be covered, and by whom, those precincts that were not designated as "belonging" to a particular volunteer were designated on the chart with the name "SLUG." He said that several slots on the charts were designated "SLUG." This recollection is consistent with that of the SLUG worker who still is a member of the Third Street Light Rail crew (see finding # 12), who noted that when he entered the Russia Street office for the first time on 9 December, he was directed to sign a roster next to the entry "SLUG".

(c) He recalls that on 4 November, the SLUG workers who showed up – approximately 6 to 12 of them[9] – wore their SLUG work vests and took their instruction

[9] We note here that Rhorer puts the number of SLUG workers who appeared on 9 December at about the same – 6 to 12 people. What we do not know is the degree of overlap of SLUG workers on the two election days. We do have

from Mohammed Nuru. Additionally, according to Rhorer, SLUG executive director Jonathan Gomwalk was present and was wearing his SLUG vest as well. Interestingly, and consistent with our witnesses' recollections of their instructions on 9 December from SLUG supervisors to remove their SLUG vests prior to electioneering, Rhorer did *not* recall the SLUG workers wearing their vests or other identifying insignia on 9 December.

(d) On 9 December, Rhorer engaged one of our witnesses in conversation about the campaigning that day.[10] Rhorer recalled thanking the witness for campaigning and the witness replying: "It's better than sweeping the streets." It is interesting that the witness put the campaign work in the rhetorical context of his job with SLUG rather than in, say, a political context.

(e) Rhorer recalled that on at least one of the election days, and possibly both, John Gomwalk showed up at the campaign office and interacted with the SLUG workers there. He also recalled distinctly that Gomwalk was not given any electioneering duties to accomplish, but rather that he seemed to stay in the office near the sign-in area and mingle with various people, including the SLUG workers.

(f) Rhorer recalled that one and possibly two African-American males spent a significant amount of time in the late afternoon sitting in the office instead of going back out to the precincts. Rhorer could not recall with specificity the appearance of these individuals, but his recollection is at least consistent with one SLUG witness's story about refusing to return to the electioneering in the afternoon, choosing instead to just sit in a chair in the Russia Street office until being driven back to SLUG headquarters (see footnote 5, page 8). In this regard, our campaign staff witnesses indicated that to their knowledge, the African-American males who participated in campaigning from the Russia Street office were SLUG workers.

16) We interviewed Robert Brigham, the paid field organizer for the Russia Street campaign office. Brigham's physical appearance was accurately described by one of our male SLUG worker witnesses. Brigham recalled that prior to the general election, Alex Tourk instructed him to be sure to contact Mohammed Nuru to ensure that SLUG workers were turned out for the GOTV effort. Brigham also recalled that Tourk reminded him to contact Nuru prior to the runoff election as well. Brigham, like Rhorer, said that it was general knowledge within the campaign that Nuru was a "go to guy" (Brigham's term) for turning out volunteers for electioneering. Brigham stated that he did in fact contact Nuru and ensure that Nuru would be showing up for GOTV with some SLUG volunteers. Brigham acknowledged having seen Nuru working in the campaign office with a few African-American males and possibly one or two females on both election days, and he assumed that these were SLUG workers or former SLUG

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one 9 December witness who recalls having worked the election on 4 November as well, but an unknown number of the other 4 November SLUG campaigners may have been SLUG employees who we have not yet identified.
[10]Rhorer picked out the witness from the photo lineup we showed him of SLUG worker witnesses.

workers.[11] Brigham also correctly identified a photo of one of the two female SLUG workers who were among our witnesses, as having been a volunteer at the Russia Street facility. Finally, Brigham recalled that on 9 December an African-American male who reported in to Nuru spent considerable time during the late afternoon just sitting in a chair, which is consistent with a SLUG witness's story about refusing to go back out in the afternoon. Brigham also said, however, that he heard no altercation or dispute between Nuru and any of the African-Americans working with him.

17) Mohammed Nuru's telephone records indicate that he was not generally in the habit of telephoning the SLUG office in the morning hours. Normally, Nuru called SLUG at most once or twice a day, often not until the afternoon hours. Additionally, on many occasions, a day or more went by during the six-month period for which we have his telephone records (July – December 2003) when he made no known calls to SLUG at all. His calls to SLUG on 9 December, however, were numerous and were made in the morning hours, as follows: 07:42.; 08:03; 08:15; 08:45; 08:46; and 09:41. These calls in the morning hours of 9 December are consistent with an interpretation that he was helping to arrange the use of SLUG workers that day for the GOTV effort. This is the only day in the six months of telephone records that we obtained on which Nuru made so many calls to SLUG in the morning hours. It is noteworthy, nonetheless, that on the morning of the general election, 4 November 2003, Nuru called SLUG early in the morning twice, which while not as striking as the 9 December calling, was unusual for Nuru. On 4 November he called SLUG from his cellular telephone at 08:20 hours and again at 08:37 hours.[12]

18) According to Ms Rebecca Prozan, campaign manager for Kamala Harris, there was only one event in which SLUG figured in the Harris campaign: the event of 2 December. While she did have telephone conversations with Mohammed Nuru throughout the campaign, these conversations reportedly were about strategies for getting out the vote in the African-American community generally; they were not specific to requests for Nuru or Gomwalk to bring SLUG workers to rallies or GOTV events such as occurred on 9 December on behalf of the Newsom for Mayor campaign.

According to Prozan, the Harris campaign mailed approximately 9,000 flyers to members of the Bayview-Hunters Point community in preparation for the 2 December rally at the campaign headquarters at Bayview Plaza. This mailing included non-profit agencies in the area, as well. The event was scheduled to occur between noon and two o'clock on that day. Food was donated by two San Francisco restaurants, and the menu described by Prozan is consistent with the descriptions given to us by the SLUG witnesses. According to Prozan, it was dismaying that only about 50 to 75 people showed up for the event.

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[11] Brigham claimed to have believed that SLUG had folded in the summer of 2003, and that therefore the "SLUG" people to be turned out by Nuru would be former SLUG workers.

[12] On both election days, 4 November and 9 December, Nuru was on leave from his position at DPW.

Prozan concluded that all or most of the attendees were in fact SLUG workers. She concluded this based on several factors: all the attendees showed up at the same time and were led by Jonathan Gomwalk, who introduced himself to her; all of them appeared to be dressed in the same type of clothing; Gomwalk and/or Ron Vinson – a campaign volunteer, formerly with Mayor Brown's office – told her that all of them were from SLUG; and no one else introduced themselves to her as having brought a group of people to the event. After the meal and a speech by Kamala Harris stressing the importance of voting for the African-American community, the attendees boarded vans which had been donated to the campaign. According to Prozan, the vans were there in order to drive the attendees to City Hall to vote early absentee, as was described by our witnesses. Prozan reportedly knows nothing about the voting at City Hall itself, nor did she see the attendees after they left to board the vans.

C) Findings pertaining to earlier election cycles:

We have interviewed nine individuals at length who worked for SLUG in earlier years. Two worked in much the same capacity as our eight witnesses described earlier, during the 1999-2000 period. Another worked in administration and had daily access to then-executive director Mohammed Nuru, during the 1997-1998 period. The third also worked at SLUG during 1997. A fourth and fifth worked in an acting administrative capacity in the 1999 period. A sixth person worked for SLUG during 1997-1998, and a seventh worked there from 1995-1998. An eighth person worked at SLUG in a horticultural administrative capacity from 2001 through the summer of 2003. A ninth person worked in an educational capacity from early 1999 through the summer of 2000. We briefly describe the statements of six of them below, identifying them only as numbers 1 through 6.[13]

1) This individual reported that she was a key assistant to Mohammed Nuru during the period January 1997 through May of 1998. Currently she is an attorney with the Department of Justice in Washington, D.C. She advised us that campaign activity by SLUG was evident in the summer of 1997, in support of the stadium-mall ballot initiative. She witnessed a "garage meeting" during that period during which Nuru exhorted the SLUG supervisors and crew to perform telephone banking and precinct walking for the initiative. She stated that this meeting occurred during normal working hours.

2) This individual worked for SLUG during 1997 and reports having seen SLUG workers on normal work time apparently preparing to participate in a stadium-mall campaign event. He

[13] The statements given by three of these nine people are not summarized in the text. One person's statement was partially corroborated by our review of SLUG payroll documents from the relevant time period, but important details of his statement are refuted by the same documents, so we have decided to discount his statement entirely. The other two people reportedly witnessed no inappropriate political activity by SLUG or Mohammed Nuru, and conversely, reported nothing that would refute the statements of the six witnesses whose statements we summarize in the text.

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observed them carrying campaign signs to a vehicle in the SLUG parking lot, and then leaving the premises.

3) This individual was an acting administrator in the gardening program for SLUG in 1999. She reports that at an administrative staff meeting just prior to the 1999 mayoral race, Mohammed Nuru urged the administrators to campaign for the mayor. This individual recalls discussing this meeting later with two colleagues at SLUG who attended the meeting. All three of them agreed that Nuru had made it clear that they could perform this campaigning on SLUG time and still be paid their SLUG wages.

4) This individual was a landscape architect at SLUG from February 1997 to June of 1998. She reportedly was told by her crew members that they were campaigning for the stadium-mall initiative. She witnessed them going to and from the SLUG office with literature and placards relating to the stadium vote, during work hours.

5) This person ran the lead abatement program at SLUG from late 1995 to June 1998. She heard her crew members complaining about having to hang stadium-mall initiative placards in 1997.

6) This witness was a gardening educator for SLUG from approximately February of 1999 through August 2000. For much of that time, he was the de facto director of education for SLUG and in that capacity attended administrative meetings chaired by Nuru. During the 1999 election cycle, according to this witness, Nuru advocated the re-election of the mayor in the upcoming election.

The educator's work involved arranging for the sale of large "worm bins" at various locations: the Alemany Farmers Market; Goodman's Lumber; and Everett Middle School. The sale of the bins provided SLUG with a profitable activity and was partially underwritten by the City. When bin sales were scheduled, the educator would arrange with Jonathan Gomwalk, then director of the TEP program within SLUG (all our SLUG witnesses were members of this program), to use five or six TEP workers to help transport, stack and move the hundreds of bins. On one occasion, Gomwalk informed the educator that no TEP workers would be available to help him because they were all going to be sent to a political rally. This in fact occurred, which had the result that only three people – all educators – had to perform all the labor involving the sale that day, a task that created a work day for this witness that stretched from about four o'clock in the morning to about nine o'clock at night.

On another occasion, the educator saw TEP workers preparing campaign signs in the SLUG offices for a campaign rally to be held on Third Street during the 1999 mayoral election cycle. The workers were performing this activity on work time, and they were planning, according to a colleague of the educator, to attend the rally later.

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DATE: 10 May 2004
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Conclusions

1) We know from Gavin Newsom's former field director, Alex Tourk, that Mohammed Nuru, the former executive director of SLUG and now deputy director of DPW, was a frequent volunteer in the Newsom for Mayor campaign. We also know from him that one of Nuru's main responsibilities and contributions to the campaign was his recruitment of "volunteers" to the campaign. Finally, we know that the former field director's expectation was that both Nuru and the current executive director of SLUG, Jonathan Gomwalk, would bring SLUG workers to campaign events, and we have been told by several SLUG workers or former workers that between Gomwalk and Nuru, SLUG workers on work time were transported and instructed in furtherance of the GOTV effort for Gavin Newsom on at least three dates: 4 November, 2 December, and 9 December 2003. On all three of these dates, we also have independent witnesses who place our SLUG witnesses in locations and conducting activities that are consistent with the SLUG witnesses' stories. We also have been told by several former SLUG workers and administrative staff from the period between 1997 and 1999 that during that period SLUG workers in the TEP program were detailed on work time to various campaign events and that, in addition, Nuru himself reportedly urged and directed staff and workers to participate in political campaigns. There appears to be a certain historical continuity, then, in the actions of SLUG's current administration and of Nuru himself, if the statements of the eight SLUG workers and the observations of our non-SLUG witnesses about SLUG's activities in the 2003 mayoral campaign are accurate.

2) Five SLUG workers gave us consistent narratives of their activities on 9 December 2003. These activities are consistent with the kinds of "volunteer" GOTV activities that we know were Mohammed Nuru's responsibility on that date. We know from their statements that on the day of the runoff election, Jonathan Gomwalk drove some of them[14] to the Newsom for Mayor campaign office on Russia Street. We can conclude with high probability that those witnesses in fact went into that office. They accurately described two key campaign supervisors who were there (Mohammed Nuru, who the witnesses named and described; and the field organizer for that office, whose name they did not know). Newsom campaign volunteer James MacLachlan identified the photographs of two of the SLUG supervisors whom our SLUG witnesses told us were there with them. Additionally, we know from DHS executive director Trent Rhorer that he saw SLUG workers on both election days at that office, and that on the day of the general election they were wearing SLUG work vests. We also know that according to the SLUG witnesses, they did not volunteer to perform this electioneering, but rather, were directed to do so by SLUG supervisors, by Gomwalk, and by Nuru. These statements are internally consistent and they are consistent, as well, with the statement of one SLUG worker that during a prior election for a ballot measure, he was offered overtime SLUG pay to work on the campaign. That these

[14] Not all the witnesses seemed to recall clearly who drove them to the campaign office. Some of them only recalled that an administrator or supervisor at SLUG drove them there. The three witnesses who most clearly recalled that it was Gomwalk who drove them, identified the vehicle he drove as a pickup truck.

workers and supervisors were paid SLUG wages for political campaigning is also consistent with Trent Rhorer's observations on 4 November: the workers were dressed for work, wearing the SLUG vests which are to be worn only while they are on duty with SLUG.[15]

3) A SLUG worker and the former supervisor of the rail crew also gave us consistent narratives of their own GOTV activities on 9 December. While differing from the narratives of the other five SLUG workers, these narratives are internally consistent, detailing their campaigning with signs up and down the Third Street corridor during their entire shift on the day of the runoff election. Both of these witnesses, additionally, stated that the entire rail crew performed that activity with them.

4) We know from Department of Elections records that the nine SLUG workers who are our witnesses in this matter voted absentee at City Hall and did so on the day they alleged that they voted. We also know from cross-corroboration among them and from remarks overheard and body language interpreted by third party witnesses, that some of them complained contemporaneously about being coerced to vote for a candidate all but one of them did not support and to give up their ballot stubs to a SLUG supervisor.

5) We know from Controller's records and from DPW and SLUG administrative staff that the funding for the wages of the nine SLUG witnesses, as well as for the supervisors and the executive director of SLUG, derives from City and County departmental funding sources. We also know from SLUG payroll and time sheet documents – and from three witnesses' pay stubs – that the SLUG workers and supervisors were paid full wages for the time they spent on voting and electioneering activities. An internal report on this matter commissioned by SLUG's board of directors (see **Tab C**) states that no city funds were expended for election activities on 9 December. The December invoice to DPW from SLUG supports this assertion at first glance, noting that the 9 December salaries of many SLUG supervisors and approximately twenty SLUG workers were in fact not charged to the City. It is noteworthy, however, that the December SLUG invoice was not received by DPW until mid-February, after allegations about SLUG's campaign activities had surfaced in news accounts and after our investigation of those allegations had begun. All SLUG staff – including those who worked the election activities of 2 December and 9 December, as well as any who performed electioneering on 4 November (as recalled by James MacLachlan and Trent Rhorer) – have long since been paid by city monies regardless of any adjustment made after the fact by SLUG. In addition, of course, the deduction of salaries from SLUG's invoice to the city for December covers only the ninth of that month; it does not

[15] That the SLUG vests are to be worn only while on duty with SLUG is well known among SLUG workers. They reportedly are not to wear them even while on lunch break, and not at all on days off. The rigidity of this policy is confirmed by an interesting anecdote that one witness told us. He stated that he was taking his fifteen-minute break one day on the street, reading a newspaper, when Mohammed Nuru approached him aggressively and asked him *if he wanted to keep his job.* Nuru reportedly took his newspaper from him and instructed him to remove the SLUG vest while he was on a break One of the interesting features of this anecdote is that at the time, Nuru no longer was the executive director of SLUG, but rather was the deputy director of DPW.

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cover the activities of 2 December or of 4 November, nor does it cover the activities of the rail crew in the weeks between the general and the runoff elections.

T.A., G.C.

Tab A

SAN FRANCISCO ADMINISTRATIVE CODE

SEC. 12G.1. PROHIBITION.

No funds appropriated by the City and County of San Francisco for any contract, grant agreement, or loan agreement may be expended for participating in, supporting, or attempting to influence a political campaign for any candidate or ballot measure. (Added by Proposition Q, 11/5/2002)

SEC. 12G.2. AUDITS.

The Controller shall annually select for audit at least ten (10) persons or entities that enter into contracts, grant agreements, or loan agreements with the City in order to ensure compliance with this section. (Added by Proposition Q, 11/5/2002)

SEC. 12G.3. RULES AND REGULATIONS.

(a) The Controller shall promulgate any rules and regulations necessary or appropriate for the implementation of this section.

(b) All contracts, grant agreements, and loan agreements shall incorporate this Chapter by reference. (Added by Proposition Q, 11/5/2002)

SEC. 12G.4. PENALTIES.

If the Controller determines that any recipient of a contract, grant agreement, or loan agreement has violated this Chapter, the violation shall be deemed a material breach of the contract, grant agreement, or loan agreement and the recipient of the contract, grant agreement, or loan agreement shall be barred for two years from receiving any City contract, grant agreement, or loan agreement. (Added by Proposition Q, 11/5/2002)

SAN FRANCISCO CAMPAIGN AND GOVERNMENTAL CONDUCT CODE

The San Francisco Campaign and Governmental Conduct code was recently amended by Proposition E. The amendments to the law became effective 12/5/03. Below please find relevant sections of the law as they currently appear, and as they appeared before Proposition E took effect. Which section we would rely upon depends on the date of the activities in question.

The following provisions are from Article III, Chapter 2 of the Campaign and Governmental Conduct Code as amended by Proposition E. These amendments became effective 12/5/03.

SEC. 3.230. PROHIBITION ON POLITICAL ACTIVITY

(a) **Solicitation of Contributions.** No City officer or employee shall knowingly, directly or indirectly, solicit political contributions from other City officers or employees or from persons on employment lists of the City. Nothing in this section shall prohibit a City officer or employee from communicating through the mail or by other means requests for political contributions to a significant segment of the public which may include City officers or employees.

(b) **Political Activities in Uniform.** No City officer or employee shall participate in political activities of any kind while in uniform.

(c) **Political Activities on City Time or Premises.** No City officer or employee may engage in political activity during working hours or on City premises. For the purposes of this subsection, the term "City premises" shall not include City owned property that is made available to the public and can be used for political purposes.

SEC. 3.236. AIDING AND ABETTING

No person shall knowingly and intentionally provide assistance to or otherwise aid or abet any other person in violating any of the provisions of this Chapter.

SEC. 3.240. PROVISION OF FALSE OR MISLEADING INFORMATION; WITHHOLDING OF INFORMATION; AND DUTY TO COOPERATE AND ASSIST.

(a) **Prohibition.** No person shall knowingly and intentionally furnish false or fraudulent evidence, documents, or information to the Ethics Commission, District Attorney or City Attorney, or knowingly and intentionally misrepresent any material fact, or conceal any evidence, documents, or information relevant to an investigation by the Ethics Commission, District Attorney or City Attorney of an alleged violation of this Chapter.

(b) **Duty to Cooperate and Assist.** The Ethics Commission, District Attorney or City Attorney may request and shall receive from every City officer and employee cooperation and assistance with an investigation into an alleged violation of this Chapter.

SEC. 3.242. PENALTIES AND ENFORCEMENT

(a) **Criminal Penalties.** Any person who knowingly or willfully violates any of the City's conflict of interest and governmental ethics laws shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $10,000 for each violation or by imprisonment in the County jail for a period of not more than one year in jail or by both such fine and imprisonment.

(b) **Civil Penalties.** Any person who intentionally or negligently violates any City conflict of interest or governmental ethics law shall be liable in a civil action brought by the City Attorney for an amount up to $5,000 for each violation.

(c) **Injunctive Relief.** The City Attorney or any resident may bring a civil action on behalf of the people of San Francisco to enjoin violations of or compel compliance with a conflict of interest or governmental ethics law. No resident may commence a civil action under this section without first notifying the City Attorney in writing of the intent to file a civil action under this section. If the City Attorney fails to notify the resident within 120 days of receipt of the notice that the City Attorney has filed or will file a civil action, the complainant may file the action. No resident may file an action under this section if the City Attorney responds within 120 days that the City Attorney intends to file an action or has already filed a civil action. No resident may bring an action under this section if the Ethics Commission has issued a finding of probable cause arising out of the same facts, the District Attorney has commenced a criminal action arising out of the same facts, or another resident has filed a civil action under this section arising out of the same facts. A court may award reasonable attorney's fees and costs to any resident who obtains injunctive relief under this section.

(d) **Administrative Penalties.** Any person who violates any of the City's conflict of interest or governmental ethics laws shall be liable in an administrative proceeding before the Ethics Commission held pursuant to the Charter. In addition to the administrative penalties set forth in the Charter, the Ethics Commission may issue warning letters to City officers and employees.

(e) **Statute Of Limitations.** No person may bring a criminal, civil or administrative action under this section against any other person more than four years after the date of the alleged violation.

The following provisions were found in the Campaign and Governmental Conduct Code before the effective date of Proposition E, 12/5/03.

SEC. 3.400. PROHIBITION ON POLITICAL ACTIVITY.

(a) No City officer or employee shall, directly or indirectly, solicit political contributions, knowingly, from other City officers or employees or from persons on employment lists of the City. Nothing in this Section shall prohibit a City officer or employee from communicating through the mail or by other means requests for political contributions to a significant segment of the public which may include City officers or employees.

(b) No City officer or employee shall participate in political activities of any kind while in uniform.

(c) No City officer or employee may engage in political activity during working hours or on City premises. (Added by Ord. 71-00, File No. 000358, App. 4/28/2000) (Derivation: Former Administrative Code Section 16.5; added by Ord. 438-96, App. 11/8/96)

SAN FRANCISCO MUNICIPAL ELECTIONS CODE

SEC. 970. GIVING, RECEIVING ANYTHING OF VALUE IN CONSIDERATION OF VOTING PROHIBITED.

(a) No person shall directly or through any other person pay, lend, or contribute or offer or promise to pay, lend, or contribute, any money or other valuable consideration to or for any voter or to or for any other person to:

(1) Induce any person to:

(A) Vote at any municipal election;

(B) Refrain from voting at any municipal election;

(C) Vote or refrain from voting at a municipal election for or against any particular person or measure; or

(D) Remain away from the polls during a municipal election; or

(2) Reward any person for having:

(A) Voted at any municipal election;

(B) Refrained from voting at any municipal election;

(C) Voted or refrained from voting at a municipal election for or against any particular person or measure; or

(D) Remained away from the polls during a municipal election.

(b) No person may directly or through any other person solicit, accept, receive, agree to accept, or contract for, before, during or after a municipal election, any money, gift, loan, or other valuable consideration, offer, place, or employment for himself or herself or any other person because he or she or any other person:

(1) Voted or agreed to vote at any municipal election;

(2) Refrained or agreed to refrain from voting at a municipal election;

(3) Voted, agreed to vote, refrained from voting, or agreed to refrain from voting for or against any particular person or measure at a municipal election;

(4) Remained away or agreed to remain away from the polls during a municipal election; or

(5) Induced any other person to:

(A) Vote or agree to vote at any municipal election;

(B) Refrain from voting or agree to refrain from voting at a municipal election;

(C) Vote, agree to vote, refrain from voting, or agree to refrain from voting for or against any particular person or measure at a municipal election; or

(D) Remain or agree to remain away from the polls during a municipal election.

(c) Any person violating any of the provisions of this section shall be guilty of a misdemeanor and, upon a final judgment of conviction of same, shall be removed from office or in the alternative shall be subject to a penalty of not more than six months in jail and/or fine of not more than $1,000, as well as removal.

(d) "Person" means an individual, partnership, corporation, association, firm or other organization or entity, however organized.

(e) Nothing in this section shall prohibit the following:

(1) Making an expenditure for, offering, providing, accepting or receiving transportation to or from the polls; or

(2) Making an expenditure for, organizing or attending a gathering providing complementary food, beverages and/or entertainment, provided that no valuable consideration is offered, promised, solicited, accepted or received in consideration of the conduct described in subsection (a); or

(3) Making expenditures for the organization and conduct of get-out-the-vote rallies.

(f) Pursuant to the procedures set forth in San Francisco Charter Sections 15.102 and C3.699-10 et seq., the Ethics Commission shall adopt regulations consistent with this section for the purpose of implementing this Section while avoiding any application that would prohibit conduct protected by the United States Constitution or the California Constitution. (Added by Ord. 4-02, File No. 011909, App. 1/18/2002)

SAN FRANCISCO POLICE CODE

SEC. 628. COERCION OF LABORERS FOR POLITICAL PURPOSES PROHIBITED.

No officer, board or commission, authorized by law to appoint subordinates or to engage the services of laborers, shall solicit or demand of such subordinates or laborers that they vote for or against any candidate for any elective office; or procure, engage, or endeavor to procure from such subordinate or laborer any sum of money or contribution to be used for the election or defeat of any candidate for any elective office; and any

officer, or member of any board or commission, who demands such contribution and any subordinate or laborer who pays any such contribution, shall be guilty of a misdemeanor, and, upon conviction thereof, shall forfeit his office or position. (Added by Ord. 1.075, App. 10/11/38)

CALIFORNIA ELECTIONS CODE

SEC. 18520. A person shall not directly or through another person give, offer, or promise any office, place, or employment, or promise to procure or endeavor to procure any office, place, or employment to or for any voter, or to or for any other person, in order to induce that voter at any election to:
(a) Refrain from voting.
(b) Vote for any particular person.
(c) Refrain from voting for any particular person.
A violation of any of the provisions of this section shall be punishable by imprisonment in the state prison for 16 months or two or three years.

SEC. 18521. A person shall not directly or through any other person receive, agree, or contract for, before, during or after an election, any money, gift, loan, or other valuable consideration, office, place, or employment for himself or any other person because he or any other person:
(a) Voted, agreed to vote, refrained from voting, or agreed to refrain from voting for any particular person or measure.
(b) Remained away from the polls.
(c) Refrained or agreed to refrain from voting.
(d) Induced any other person to:
(1) Remain away from the polls.
(2) Refrain from voting.
(3) Vote or refrain from voting for any particular person or measure.
Any person violating this section is punishable by imprisonment in the state prison for 16 months or two or three years.

SEC. 18522. Neither a person nor a controlled committee shall directly or through any other person or controlled committee pay, lend, or contribute, or offer or promise to pay, lend, or contribute, any money or other valuable consideration to or for any voter or to or for any other person to:
(a) Induce any voter to:
(1) Refrain from voting at any election.
(2) Vote or refrain from voting at an election for any particular person or measure.
(3) Remain away from the polls at an election.
(b) Reward any voter for having:
(1) Refrained from voting.
(2) Voted for any particular person or measure.
(3) Refrained from voting for any particular person or measure.
(4) Remained away from the polls at an election.
Any person or candidate violating this section is punishable by imprisonment in the state prison for 16 months or two or three years.

SEC. 18540. (a) Every person who makes use of or threatens to make use of any force, violence, or tactic of coercion or intimidation, to induce or compel any other person to vote or refrain from voting at any election or to vote or refrain from voting for any particular person or measure at any election, or because any person voted or refrained from voting at any election or voted or refrained from voting for any particular person or measure at any election is guilty of a felony punishable by imprisonment in the state prison for 16 months or two or three years.

(b) Every person who hires or arranges for any other person to make use of or threaten to make use of any force, violence, or tactic of coercion or intimidation, to induce or compel any other person to vote or refrain from voting at any election or to vote or refrain from voting for any particular person or measure at any election, or because any person voted or refrained from voting at any election or voted or refrained from voting for any particular person or measure at any election is guilty of a felony punishable by imprisonment in the state prison for 16 months or two or three years.

CALIFORNIA GOVERNMENT CODE

SEC. 8314. USE OF PUBLIC RESOURCES FOR CAMPAIGN OR PERSONAL ACTIVITIES, PROHIBITED

(a) It is unlawful for any elected state or local officer, including any state or local appointee, employee, or consultant, to use or permit others to use public resources for a campaign activity, or personal or other purposes which are not authorized by law.

(b) For purposes of this section:

(1) "Personal purpose" means those activities the purpose of which is for personal enjoyment, private gain or advantage, or an outside endeavor not related to state business. "Personal purpose" does not include the incidental and minimal use of public resources, such as equipment or office space, for personal purposes, including an occasional telephone call.

(2) "Campaign activity" means an activity constituting a contribution as defined in Section 82015 or an expenditure as defined in Section 82025. "Campaign activity" does not include the incidental and minimal use of public resources, such as equipment or office space, for campaign purposes, including the referral of unsolicited political mail, telephone calls, and visitors to private political entities.

(3) "Public resources" means any property or asset owned by the state or any local agency, including, but not limited to, land, buildings, facilities, funds, equipment, supplies, telephones, computers, vehicles, travel, and state-compensated time.

(4) "Use" means a use of public resources which is substantial enough to result in a gain or advantage to the user or a loss to the state or any local agency for which a monetary value may be estimated.

(c) (1) Any person who intentionally or negligently violates this section is liable for a civil penalty not to exceed one thousand dollars ($1,000) for each day on which a violation occurs, plus three times the value of the unlawful use of public resources. The penalty shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney or any city attorney of a city having a population in excess of 750,000. If two or more persons are responsible for any violation, they shall be jointly and severally liable for the penalty.

(2) If the action is brought by the Attorney General, the moneys recovered shall be paid into the General Fund. If the action is brought by a district attorney, the moneys recovered shall be paid to the treasurer of the county in which the judgment was entered. If the action is brought by a city attorney, the moneys recovered shall be paid to the treasurer of that city.

(3) No civil action alleging a violation of this section may be commenced more than four years after the date the alleged violation occurred.

(d) Nothing in this section shall prohibit the use of public resources for providing information to the public about the possible effects of any bond issue or other ballot measure on state activities, operations, or policies, provided that (1) the informational activities are otherwise authorized by the constitution or laws of this state, and (2) the information provided constitutes a fair and impartial presentation of relevant facts to aid the electorate in reaching an informed judgment regarding the bond issue or ballot measure.

(e) The incidental and minimal use of public resources by an elected state or local officer, including any state or local appointee, employee, or consultant, pursuant to this section shall not be subject to prosecution under Section 424 of the Penal Code.

SEC. 54964. UNLAWFUL EXPENDITURES

(a) An officer, employee, or consultant of a local agency may not expend or authorize the expenditure of any of the funds of the local agency to support or oppose the approval or rejection of a ballot measure, or the election or defeat of a candidate, by the voters.

(b) As used in this section the following terms have the following meanings:

(1) "Ballot measure" means an initiative, referendum, or recall measure certified to appear on a regular or special election ballot of the local agency, or other measure submitted to the voters by the governing body at a regular or special election of the local agency.

(2) "Candidate" means an individual who has qualified to have his or her name listed on the ballot, or who has qualified to have write-in votes on his or her behalf counted by elections officials, for nomination or election to an elective office at any regular or special primary or general election of the local agency, and includes any officeholder who is the subject of a recall election.

(3) "Expenditure" means a payment of local agency funds that is used for communications that expressly advocate the approval or rejection of a clearly identified ballot measure, or the election or defeat of a clearly identified candidate, by the voters. "Expenditure" shall not include membership dues paid by the local agency to a professional association.

(4) "Local agency" has the same meaning as defined in Section 54951, but does not include a county superintendent of schools, an elementary, high, or unified school district, or a community college district.

(c) This section does not prohibit the expenditure of local agency funds to provide information to the public about the possible effects of a ballot measure on the activities, operations, or policies of the local agency, if both of the following conditions are met:

(1) The informational activities are not otherwise prohibited by the Constitution or laws of this state.

(2) The information provided constitutes an accurate, fair, and impartial presentation of relevant facts to aid the voters in reaching an informed judgment regarding the ballot measure.

(d) This section does not apply to the political activities of school officers and employees of a county superintendent of schools, an elementary, high, or unified school district, or a community college district that are regulated by Article 2 (commencing with Section 7050) of Chapter 1 of Part 5 of the Education Code.

CALIFORNIA PENAL CODE

SEC. 424. (a) Each officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys, who either: 1. Without authority of law, appropriates the same, or any portion thereof, to his or her own use, or to the use of another; or, 2. Loans the same or any portion thereof; makes any profit out of, or uses the same for any purpose not authorized by law; or, 3. Knowingly keeps any false account, or makes any false entry or erasure in any account of or relating to the same; or, 4. Fraudulently alters, falsifies, conceals, destroys, or obliterates any account; or, 5. Willfully refuses or omits to pay over, on demand, any public moneys in his or her hands, upon the presentation of a draft, order, or warrant drawn upon these moneys by competent authority; or, 6. Willfully omits to transfer the same, when transfer is required by law; or, 7. Willfully omits or refuses to pay over to any officer or person authorized by law to receive the same, any money received by him or her under any duty imposed by law so to pay over the same;-- Is punishable by imprisonment in the state prison for two, three, or four years, and is disqualified from holding any office in this state.

(b) As used in this section, "public moneys" includes the proceeds derived from the sale of bonds or other evidence or indebtedness authorized by the legislative body of any city, county, district, or public agency.
(c) This section does not apply to the incidental and minimal use of public resources authorized by Section 8314 of the Government Code.

SEC 425. Every officer charged with the receipt, safe keeping, or disbursement of public moneys, who neglects or fails to keep and pay over the same in the manner prescribed by law, is guilty of felony.

SEC426. The phrase "public moneys," as used in Sections 424 and 425, includes all bonds and evidence of indebtedness, and all moneys belonging to the state, or any city, county, town, district, or public agency therein, and all moneys, bonds, and evidences of indebtedness received or held by state, county, district, city, town, or public agency officers in their official capacity.

Charities & Non-Profits

Exemption Requirements

To be tax-exempt as an organization described in IRC Section 501(c)(3) of the Code, an organization must be organized and operated exclusively for one or more of the purposes set forth in IRC Section 501(c)(3) and none of the earnings of the organization may inure to any private shareholder or individual. In addition, it may not attempt to influence legislation as a substantial part of its activities and it may not participate at all in campaign activity for or against political candidates.

The organizations described in IRC Section 501(c)(3) are commonly referred to under the general heading of "charitable organizations." Organizations described in IRC Section 501(c)(3), other than testing for public safety organizations, are eligible to receive tax-deductible contributions in accordance with IRC Section 170.

The exempt purposes set forth in IRC Section 501(c)(3) are charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and the prevention of cruelty to children or animals. The term charitable is used in its generally accepted legal sense and includes relief of the poor, the distressed, or the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening the burdens of government; lessening of neighborhood tensions; elimination of prejudice and discrimination; defense of human and civil rights secured by law; and combating community deterioration and juvenile delinquency.

To be organized exclusively for a charitable purpose, the organization must be a corporation, community chest, fund, or foundation. A charitable trust is a fund or foundation and will qualify. However, an individual or a partnership will not qualify. The articles of organization must limit the organization's purposes to one or more of the exempt purposes set forth in IRC Section 501(c)(3) and must not expressly empower it to engage, other than as an insubstantial part of its activities, in activities that are not in furtherance of one or more of those purposes. This requirement may be met if the purposes stated in the articles of organization are limited in some way by reference to IRC Section 501(c)(3). In addition, assets of an organization must be permanently dedicated to an exempt purpose. This means that should an organization dissolve, its assets must be distributed for an exempt purpose described in this chapter, or to the federal government or to a state or local government for a public purpose. To establish that an organization's assets will be permanently dedicated to an exempt purpose, the articles of organization should contain a provision insuring their distribution for an exempt purpose in the event of dissolution. Although reliance may be placed upon state law to establish permanent dedication of assets for exempt purposes, an organization's application can be processed by the IRS more rapidly if its articles of organization include a provision insuring permanent dedication of assets for exempt purposes. For examples of provisions that meet these requirements, download Publication 557, *Tax-Exempt Status for Your Organization.*

An organization will be regarded as "operated exclusively" for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of the exempt purposes specified in IRC Section 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose. For more information concerning types of charitable organizations and their activities, download Publication 557.

An organization must not be organized or operated for the benefit of private interests, such as the creator or the creator's family, shareholders of the organization, other designated

individuals, or persons controlled directly or indirectly by such private interests. No part of the net earnings of an IRC Section 501(c)(3) organization may inure to the benefit of any private shareholder or individual. A private shareholder or individual is a person having a personal and private interest in the activities of the organization. If the organization engages in an excess benefit transaction with a person having substantial influence over the organization, an excise tax may be imposed on the person and any managers agreeing to the transaction.

An IRC Section 501(c)(3) organization may not engage in carrying on propaganda, or otherwise attempting, to influence legislation as a substantial part of its activities. Whether an organization has attempted to influence legislation as a substantial part of its activities is determined based upon all relevant facts and circumstances. However, most IRC Section 501 (c)(3) organizations may use Form 5768, *Election/Revocation of Election by an Eligible Section 501(c)(3) Organization to Make Expenditures to Influence Legislation*, to make an election under IRC Section 501(h) to be subject to an objectively measured expenditure test with respect to lobbying activities rather than the less precise "substantial activity" test. Electing organizations are subject to tax on lobbying activities that exceed a specified percentage of their exempt function expenditures. For further information regarding lobbying activities by charities, download Lobbying Issues.

For purposes of IRC Section 501(c)(3), legislative activities and political activities are two different things, and are subject to two different sets of rules. The latter is an absolute bar. An IRC Section 501(c)(3) organization may not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office. Whether an organization is engaging in prohibited political campaign activity depends upon all the facts and circumstances in each case. For example, organizations may sponsor debates or forums to educate voters. But if the forum or debate shows a preference for or against a certain candidate, it becomes a prohibited activity. The motivation of an organization is not relevant in determining whether the political campaign prohibition has been violated. Activities that encourage people to vote for or against a particular candidate, even on the basis of non-partisan criteria, violate the political campaign prohibition of IRC Section 501(c)(3). See the FY-2002 CPE topic entitled Election Year Issues for further information regarding political activities of charities.

Charities & Non-Profits

FAQs regarding Life as an Exempt Organization

Are there limitations on the activities in which my exempt organization can engage?

Depending upon the nature of its exemption, your tax-exempt organization may jeopardize its tax-exempt status if it engages in certain activities. For example, section 501(c)(3) charitable organizations may not intervene in political campaigns or substantial lobbying activities. See Types of Tax-Exempt Organizations or Publication 557 for more information.

You may also request a ruling regarding the effect of a proposed transaction on your organization's tax-exempt status. See Rev. Proc 2003-4, 2003-1 I.R.B. 123, for the procedures to request a ruling; and Rev. Proc. 2003-8, 2003-1 I.R.B. 236, which explains the user fee charges for such rulings.

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Can my tax-exempt organization endorse candidates for public office?

The type of tax-exemption determines whether an organization may endorse candidates for public office. For example, section 501(c)(3) organizations may not engage in political activity, including endorsing candidates, but other organizations, such as section 501(c)(4) organizations, may engage in political activity so long as that is not their primary activity. In addition, section 501(c) organizations that make expenditures for political activity may be subject to tax under section 527(f). For more information, please see Election Year Issues.

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What is the difference between a private foundation and a public charity?

If an organization is recognized as exempt under section 501(c)(3), it will be classified as a private foundation unless it requests a ruling as a public charity. Generally, this is done as part of the Form 1023 application process. An organization may be a public charity based on its activities (churches, schools, and hospitals, for example). An organization may also be a public charity because it is "publicly supported", i.e., it receives a specified portion of its total support from specified "public" sources.

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What is an advance ruling period and what are the requirements?

rganization normally may be granted an advance ruling period of five taxable years, wing it to operate as a publicly supported organization (and a public charity) rather than as a private foundation. Should your organization wish to continue to be treated as a public charity, you should submit Form 8734, *Support Schedule for Advance Ruling Period*, within ninety days after the end of the advance ruling period. Failure to submit Form 8734 results in your organization automatically being reclassified as a private foundation required to file Form 990PF.

Return to List of FAQs

Tab B

Law Office of
Floyd Andrews
507 Polk Street, Suite 240
San Francisco, CA 94102
415.567.9070
FAX 415.771.6734
fdandrews@earthlink.net

March 8, 2004

Lori Georgi
Chief Attorney, Office of the City Attorney
City Hall, Room #234
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4682

Dear Ms. Georgi:

Several employees of the San Francisco League of Urban Gardeners have received letters from Tim Armistead asking that they contact him to be interviewed. These individuals have spoken to me and asked me to tell you that they do not wish to be interviewed.

They are: Marion Spagner, Jerry Young, Ernest Haywood, Joseph Bluford, Jr. and Anthony Nisby.

Also, Mr. Armistead sent a letter to Hector Guerra of SLUG requesting complete copies of Slug's payroll records for the fiscal years 1998/99 and 1999/2000. Mr. Guerra has informed me that he looked for those records but cannot find them.

Thank you for your attention in this matter.

Sincerely,

Floyd Andrews

cc: Tim Armistead

GOGGIN & GOGGIN
ATTORNEYS AT LAW
555 MONTGOMERY STREET
SUITE 850
SAN FRANCISCO, CALIFORNIA 94111
TELEPHONE (415) 352-2600
FACSIMILE (415) 352-2306

TERRENCE P. GOGGIN
JAMES W. HAAS

OF COUNSEL
PATRICK D. GOGGIN
VICTOR M. MARQUEZ

GEORGE T. GOGGIN
1905-1972

January 20, 2004

Tim Armistead
Head Investigator of the City Attorney
City of San Francisco
1390 Market Street, 2nd Floor
San Francisco, CA 94102

RE: Request for an Interview of Jonathan Gomwalk

Dear Mr. Armistead,

This firm has been retained by Jonathan Gomwalk to represent him regarding allegations made in the San Francisco Chronicle.

We intend to cooperate with the appropriate agency investigating this matter. However, we seek clarification regarding jurisdiction.

It is our understanding that the Secretary of State's office has announced an investigation. If the Secretary of State has taken jurisdiction of this matter, he may well have preempted the City of San Francisco's jurisdiction. This firm is reviewing the law on this matter and it would be helpful if your office could provide this firm with a legal memorandum which addresses this issue.

Thank you for your consideration in this matter. In the future, your office may contact this firm regarding interview requests or other matters relating to your investigation.

Very Truly Yours,

Terrence P. Goggin

cc: Jonathan Gomwalk

CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

LORETTA M. GIORGI
Chief Attorney
DIRECT DIAL: (415) 554-4655

01/22/04

Terrence P. Goggin
Attorney at Law
555 Montgomery Street, Suite 850
San Francisco, CA 94111

VIA FACSIMILE AND MAIL

Re: Response to Letter of January 20, 2004

Dear Mr. Goggin:

I write in response to your letter of January 20, 2004 to Timothy Armistead, Chief of Investigations for the City Attorney's Office. I am the head of the City Attorney's Public Integrity Task Force.

We are pleased to hear that you and your client intend to cooperate with the appropriate investigating agency regarding this matter. Because this matter involves a City employee and because SLUG has numerous contract and grants from the City, the City Attorney's Office has clear jurisdiction over this matter. While the Secretary of State is looking at this matter regarding potential violations of the State Elections Code, his jurisdiction, even by his own statements to this office and in the press, is limited and does not preempt the jurisdiction of the City Attorney. We will investigate this matter concurrently and cooperatively with the Secretary of State's office.

The SLUG Board President, Roger Gordon, has assured this office that SLUG will cooperate completely with this investigation so that we can investigate this matter as thoroughly and expeditiously as possible. We assume Mr. Gromwalk, as SLUG's Executive Director understands the need for a thorough investigation as well and will make himself available for an interview as soon as possible. Mr. Armistead will contact you to discuss dates for this interview.

Thank you for your cooperation in this matter.

Very truly yours,

DENNIS J. HERRERA
City Attorney

Loretta M. Giorgi

LORETTA M. GIORGI
Chief Attorney

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CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

TIMOTHY ARMISTEAD, CHIEF
Division of Investigation

DIRECT DIAL: (415) 554-4264
E-MAIL: tim.armistead@sfgov.org

26 January 2004

Terrence P. Goggin, Attorney at Law
Goggin and Goggin
555 Montgomery Street, Suite 850
San Francisco, California 94111

Re: Your letter of 20 January 2004

Dear Mr. Goggin:

This Office is investigating certain allegations made to us by several individuals regarding the activities of SLUG in the most recent San Francisco election as well as in prior elections. We understand that you are representing Jonathan Gomwalk for the purposes of our investigation.

We need to interview Mr. Gomwalk regarding a number of matters, including his own history with SLUG, his role if any in election-related activities of SLUG supervisory staff and workers, and related topics. We have blocked out four dates and times for the interview, and we ask that you choose the most convenient and advise us. Please note that for purposes of ensuring accuracy of recall, our interviews are tape-recorded. The interview (or interviews, if more than one is necessary) will take place at our Fox Plaza office, 1390 Market Street, Suite 250.

The times available are as follows:

1) Friday, 30 January, 2:00 p.m.

2) Monday, 2 February, 1:00 p.m.

3) Wednesday, 4 February, 10:00 a.m.

4) Thursday, 5 February, 2:00 p.m.

Please advise by calling me at (415) 554-4264.

Sincerely,

Timothy Armistead, Chief
Division of Investigation

Tab C

SAN FRANCISCO LEAGUE OF URBAN GARDENERS

REPORT OF INTERNAL INVESTIGATION

INTO EVENTS SURROUNDING THE

DECEMBER 9, 2003 RUNOFF ELECTION

March 8, 2004

Submitted by the Board of Directors of

The San Francisco League of Urban Gardeners

TABLE OF CONTENTS

I. PREFACE

This report details the results of internal investigations conducted by the board of directors of the San Francisco League of Urban Gardeners (SLUG) into alleged improprieties surrounding the December 9, 2003 runoff election. The Law Office of Floyd Andrews and Donovan Investigations assisted the board in its inquiries. It is providing this report to assist various agencies with their own investigations and to respond to allegations reported in the media. This report also outlines steps SLUG is taking to address similar allegations from arising in the future.

II. CURRENT SITUATION

A. Allegations

On January 15, 2004, the San Francisco Chronicle ran a front-page article in which certain former employees of SLUG alleged that improper actions were committed by persons associated with SLUG in the week before and on the day of the December 9, 2003 citywide mayoral runoff election. The following improprieties were alleged:

- Individuals employed by SLUG allegedly were involved in electioneering activities (e.g., distributing campaign literature, displaying signs, etc.) on December 9, while being paid with City funds.
- SLUG employees allegedly were coerced into participating in the alleged electioneering activities and into casting their votes for a particular candidate.
- Certain SLUG employees allegedly were terminated in retaliation for talking to the Chronicle and/or to the City Attorney's office about these events.

III. BACKGROUND

The San Francisco League of Urban Gardeners is a 20-year old 501(c)(3) organization that beautifies San Francisco by building community gardens, conducting educational workshops and providing environmentally-related employment opportunities and training to individuals. It has active programs in landscape construction, open space maintenance, habitat restoration, job training and youth development and provides a range of services to its gardener members. In 1991, SLUG lost a long-time donor and moved its headquarters to the Bayview District to take advantage of federal subsidies available to nonprofit organizations operating in low-income neighborhoods. Since then it has established itself as a leading provider of neighborhood beautification, workforce development and youth training services in San Francisco's southeast sector.

A. Recent Events

On July 22, 2003 (twenty years to the day from its founding) SLUG announced that it was ceasing operations effective immediately. All but three employees were laid off and the board and remaining staff scrambled to find homes for what parts of SLUG they could, including the Tool Lending Center, the Transitional Employment Program, Design, Conservation & Construction, and the Education Program. However, after a review of the organization's financial statements and discussions with former and existing staff and board members, it became clear that the need to dissolve SLUG was far from certain. In fact, it appeared that SLUG could be saved if its staff and the City departments that contracted with it were willing to cooperate.

B. Bankruptcy

In the early summer of 2002, SLUG's balance sheet had approximately $950,000 in debt including $400,000 for back

payroll taxes and $550,000 owed to unsecured creditors. Although it had little cash on hand, the sale of its Page Street garden (which had already been negotiated) was expected to bring in $641,250. This would satisfy the tax liability and give the remaining creditors approximately 25 cents on the dollar.[1]

Having labored for over a year to save SLUG, the board in 2003 was depleted both in size and energy and there was a move among it to dissolve the organization through Chapter 7 liquidation. After consulting attorneys and accounting professionals, it was determined that although unsecured creditors would likely be able to secure judgments against the corporation in court, they would be unable to force SLUG into Chapter 7 (dissolution) or even Chapter 11 (restructuring). Moreover, a review of the list of creditors also suggested that they were sophisticated enough to prefer a cash settlement to litigation. In the event, Wells Fargo Bank proved very willing to work with SLUG outside of bankruptcy or litigation.

Finally, SLUG's programs were operationally sound and its managers remained committed to the organization. Conversations with City officials led the board to believe that it would be possible to execute awarded contracts for the 2003-2004 fiscal year or to credibly compete for them again if SLUG adopted and implemented a turnaround plan. Accordingly, SLUG proposed to reconstitute its board, sell the Page Street garden to satisfy its tax liabilities, and come to terms with the remaining creditors.

On August 13, 2003 the board of directors adopted a Rescue Plan and set about trying to preserve programs that had been marked

[1] Corporations that are insolvent are able to seek protection from their creditors under the U.S. Bankruptcy Code. Chapter 7 of the Code is the "liquidation" chapter and is used by businesses that wish to liquidate and terminate their operations. Under Chapter 11, a debtor usually proposes a plan of reorganization to keep its business alive and pay its creditors over time.

for termination or re-assignment. Unfortunately, SLUG was unable to retain either the Tool Lending Center, which was awarded by the Public Library to the Clean City Coalition, or the Education Program, whose staff declined to join the turnaround effort.[2] The City immediately awarded SLUG's education grant to the Haight Ashbury Neighborhood Center, which then hired SLUG's former education staff.

C. Labor Issues

Several former employees of SLUG filed complaints against the organization after it closed its doors on July 22, 2003 for various reasons, the majority of which were relatively minor and had in fact been remedied. It also came to SLUG's attention that a number of individuals continued to collect unemployment insurance benefits even after SLUG re-opened its doors in August and they had been rehired.

D. Page Street Garden Sale

Key to SLUG's survival was the settlement of outstanding payroll tax debts owed to the IRS and to the State of California. Although the organization had almost no cash on hand, it did own a community garden on Page Street (in District 5, Matt Gonzalez's district) that had been valued at $675,000 by an independent appraiser retained by the City. Negotiations to sell the garden to the City using Open Space Fund money began in early 2002. Although a price of $641,250 had been agreed upon early on, by mid-summer 2003 these negotiations were still not complete.

[2] SLUG and the San Francisco Public Library determined that while it was unclear whether SLUG owed any funds to the library, it was likely that SLUG had not billed the Library for all expenses incurred by the Tool Lending Center and that there was no sign of malfeasance or misspending.

E. The Garden

The property on Page Street has been a community garden for nearly 30 years and is managed by Community Garden Coordinator Jude Koski, one of the nearly 100 local residents who maintain plots there. Numerous neighborhood and educational groups also use the garden.

F. IRS Lien

In late August 2003, the Internal Revenue Service notified SLUG that it intended to place a lien on the Page Street property. Fearing that this would complicate the sale, SLUG preemptively appealed the IRS's decision arguing that a sale was imminent. This effort was was unsuccessful and a Notice of Federal Tax Lien was subsequently recorded. In early February 2004, SLUG received a summons to appear before an IRS revenue officer to explain the status of the sale and SLUG's plans for paying its debt.

G. Collaboration with Page Street Gardeners

Throughout the 19-month process of selling the garden to the City, SLUG has maintained an open and continuous dialogue with the Page Street gardeners and signaled its intent at every juncture to complete the sale.

H. Efforts to Block the Sale

Between late summer and December 2003, SLUG got wind of an effort within City Hall to obstruct the purchase of the garden. SLUG made it clear to numerous individuals and departments that not only was the sale essential to SLUG's survival but that whether the garden was purchased by the City or by another party, it would be sold - the IRS would make sure of that. A sale to a private party would almost certainly mean the development of the garden into condominiums.

I. Private Listing

With the sale to the City stalled, SLUG listed the Garden with McGuire Real Estate and soon received a good offer from a private housing developer.

J. Finance Committee

On early December 2003, the Finance Committee of the Board of Supervisors heard Board President Matt Gonzalez's motion for the City to acquire the Garden. If all had gone as expected, the Committee would have then referred the matter back to the full Board for final approval with either a positive, negative or neutral recommendation. However, at the request of Supervisor Daly, who did not attend the hearing, the motion was continued for another week.

K. Finance Committee – Second Hearing

On December 10, the day after the runoff election, the motion to acquire the Garden was heard again before the Finance Committee. Elizabeth Goldstein, Director of the Department of Recreation & Parks, and representatives from the City Attorney's office, the Budget Analyst's office and the Dept of Real Estate spoke in favor of the acquisition, as did several gardeners from Page Street.

Bill Barnes, aide to Supervisor Chris Daly, argued that the City should not acquire the Garden until it determined whether SLUG owed it any money. The Controller's office, which had been conducting a financial review of SLUG's operations, stated that it had no reason to believe that SLUG owed the City any money. Representatives of SLUG argued that the organization had in fact under-billed the City for services in the past. The City Controller did not dispute this.

There was also some discussion regarding the increase in the purchase price from $641,250 to the fully appraised value of $675,000. Representatives of SLUG explained that the lower figure had been negotiated over a year before and reflected a 5% discount since there had been no broker involved. Nearly 19 months later, SLUG's debts had increased substantially and it no longer felt that it was in a position to extend this discount to the City.

Board President Matt Gonzalez, who was not on the Committee but who had stepped in to hear the arguments, accepted this explanation and, at his urging, the Committee voted to recommend the acquisition of the Page Street Garden to the full board. A week later, the Board passed the resolution 10-0, Mr. Daly being absent from the Chambers. All that was left was to finalize the Purchase & Sale Agreement and for the Mayor and Board to sign.

L. City Contracts

With the loss of its Tool Lending Center and its education grants, SLUG was left with two remaining contracts. The largest was for its Transitional Employment Program (TEP), which was funded by the Department of Public Works, MUNI, the Department of Human Services, and the Neighborhood Beautification Fund (NBF). The other contract was for the Design, Conservation & Construction program, funded by the Department of Recreation & Parks. Both contracts were suspended when SLUG shut its doors on July 22, 2003.

SLUG recognized that it needed to regain the confidence of its City grantors and establish its ability to spend City funds wisely. Accordingly, in the fall of 2003, SLUG retained the San Francisco Study Center, a 30-year old nonprofit organization, to provide fiscal sponsorship services for the TEP program. Under this arrangement, the Study Center assumed control of SLUG's finance and accounting activities. The relationship was later

expanded to cover all programs and contracts and all fiscal operations. With the agreement with the Study Center in place, both DPW (which also managed funds for MUNI, DHS and NBF) and Recreation & Park agreed to allow SLUG to continue to perform work on its existing contracts.

An independent review board also awarded SLUG a new TEP contract with the caveat that the fiscal sponsorship arrangement with the Study Center be maintained until the City deemed it unnecessary.

M. Outside Counsel

The law firm of Gibson Dunn & Crutcher played a crucial role throughout this effort by providing over $100,000 in pro bono legal services covering real estate, bankruptcy, employment, contracts and other matters.

III. THE CHRONICLE INVESTIGATION

A. Cooperation with the Chronicle

In mid-December 2003, the San Francisco Chronicle informed SLUG that it was working on a story in which certain employees would allege that they had participated in electioneering activities on December 9, 2003. In response, SLUG informed the Chronicle that it was free to speak with whomever it wanted to at SLUG and in fact invited a Chronicle reporter to attend a small holiday party at which all crew members, supervisors and staff would be present.

The Chronicle attended the reception and spoke with numerous SLUG employees one-on-one and without supervision. It was represented to the Chronicle at the time that a number of individuals were unhappy about coming layoffs and that statements should be taken with "a grain of salt". Furthermore, SLUG attempted to explain the highly politicized environment in which it had been operating even before the election. Finally, SLUG asked why the as-yet

unnamed individuals had been complaining to the Chronicle and not to the City. Several days later a number of former SLUG employees filed complaints with the City Attorney. The Chronicle's article appeared a few days after.

B. SLUG's Clientele

SLUG hires and trains low-income men and women who find it difficult to obtain and maintain steady employment. Nearly all its employees are referred to it from the Department of Human Services' Welfare-to-Work program. Many are either in recovery or have active substance-abuse problems. Others are struggling with emotional and psychiatric problems. Criminal histories are not uncommon.

Nevertheless, SLUG manages to provide employment-stabilization and training services, including flexible work schedules to accommodate therapeutic and court-related appointments, reading instruction, a career path, and a warm, safe and welcoming team environment for its clients. A unique component of SLUG's program is the involvement of its clients in gardening, neighborhood beautification, native habitat restoration and other projects. SLUG believes in the power of nature to improve the lives of individuals.

IV. ALLEGATIONS IN DETAIL

A. Electioneering on City Time in 1999

A former SLUG board member has alleged that SLUG employees engaged in electioneering activities while wearing SLUG uniforms. This matter is public record and noted in the minutes of two board meetings in 1999. At the time, it was determined that SLUG employees had in fact been engaged in electioneering although not on SLUG time. A debate ensued as to whether SLUG could prohibit its employees from wearing SLUG clothing during these

activities.[3] Afterward, then executive director Mohammed Nuru circulated several memoranda expressly prohibiting electioneering during SLUG work hours.

B. **Electioneering on City Time in 2003**

SLUG's investigation determined that some individuals may have participated in electioneering activities on December 9, 2003 however there was no coercion and some individuals did opt out. There was no systematic or regular participation in campaigning activities either on the day of the election or in the days preceding it. Rather, this appears to be an isolated spontaneous event enabled by poor management and poor judgment.

As soon as allegations concerning the December 9 activities came to SLUG's attention, it immediately modified its invoice to the City to ensure that **SLUG expended no City funds on December 9, 2003.**

C. **Coercion**

1) Coercion to Electioneer

SLUG's investigation of the events of December 9, 2003 was hampered by its inability to question those making the allegations or even to see the specific complaints that were filed. Rather, it has had to rely on statements made to the press by individuals who are not always named. Nevertheless, **SLUG's investigation found that no coercion to electioneer occurred but that all activities took place voluntarily.** Indeed, several individuals opted out, including workers who were subsequently laid off and did not file complaints.

[3] SLUG provides its employees with uniforms appropriate for all seasons, including overalls, T-shirts, rain gear and baseball caps to ensure protection from the elements and sturdy gear for outdoor work-related activities

2) Coercion to Vote

A number of former workers are quoted in the press as saying they were pressured into voting for a particular candidate. SLUG's investigator looked into a number of events, including:

- Voter awareness and civic participation events at SLUG
- Oral statements made in support of a particular candidate
- Transportation to City Hall to Vote; and
- Improper interference in the ballot marking process

3) Voter awareness and civic participation events at SLUG

SLUG's investigation determined that in the days preceding the November general election, a representative of the African American Voter Awareness Project made a nonpartisan presentation at SLUG in support of exercising one's franchise. No statements were made in support of any candidate and no SLUG supervisor or manager participated other than to give a brief introduction.

SLUG's clients often fail to participate in aspects of civic life which others take for granted, including voting, due to feelings of alienation, disaffection, cynicism, hopelessness or confusion over their voting rights. This problem is endemic throughout the Bayview and in the African American community

4) Oral statements in support of a particular candidate

SLUG's investigation determined that while no instructions to vote for a specific candidate were given to any SLUG worker, some supervisors did voice their sentiment that one candidate would be more sympathetic to the needs of SLUG and the Bayview than the other. Although we believe this to be a legal exercise of the right to free speech, we are concerned that it creates the appearance of impropriety.

Furthermore, much import was given to comments allegedly made by Mohammed Nuru, a City worker who had taken the day off to campaign, to SLUG members along the lines of 'If our candidate doesn't win, we are all out of a job.' Again, we believe this to be an expression of opinion and protected free speech. In any event, Mr. Nuru was not employed by SLUG and was not in a position to threaten any SLUG worker.

5) Transportation to City Hall to Vote

SLUG workers were transported to City Hall so they could vote in the week before the runoff election. We do not believe that transporting workers to City Hall so they could exercise their right to vote was improper.

6) Improper interference in the ballot marking process

The Chronicle article alleged that SLUG supervisors watched workers mark their ballots in order to ensure that they were cast for a certain candidate. SLUG's investigator interviewed supervisors and crewmembers who cast ballots in the week before the December election (with the exception of those who were laid off at the end of December, a group which includes those who made the allegations in the Chronicle). In addition, the investigator visited the polling place in the basement of City Hall, interviewed Department of Elections staff, and obtained copies of Voter Assistance logs to see whether any SLUG member had requested assistance in voting. The investigator established that:

1. It was physically impossible for an authorized person to accompany a voter into the voting booth without being documented.

2. That no SLUG employee requested assistance with voting. No SLUG supervisor's name appears on any Voter

Assistance log kept by the Department of Elections for the time in question.

3. It was impossible for an unauthorized person to enter into the polling place for the purpose of observing or assisting a voter or of observing how the ballot had been marked before it was handed to elections officials.

Thus, the allegation that SLUG supervisors observed or directed how the ballots of SLUG employees were marked appears to be untrue.

7) Collection of Voting Stubs

The *Chronicle* articles made much of the fact that voting stubs were collected from SLUG employees after they had cast their ballots. Officials of the Department of Elections confirm that the stubs, which are torn off the bottom of ballots and handed back to the voter by poll workers, do not indicate how individuals voted and serve only as proof that a ballot was cast. Companies that allow their workers time off to vote (as they are required to by law) sometimes request to see these stubs as proof that the employee did in fact use the time off to vote.

8) Retaliatory Firings

Although we have not seen the complaints filed with the City Attorney's office, it has been alleged in the press that employees who complained about the electioneering activities or who spoke with the press were fired in retaliation. This allegation is untrue.

As is documented in the appendices to this report, the individuals alleging that they were terminated in retaliation for speaking out were employed on the Polk Street crew under a

program funded by the Neighborhood Beautification Fund.[4] Funding for the program expired on December 31, 2003. Only the two top-performing members of this crew were transferred to other crews. The other 13 were laid off.

It should also be considered that the members of the Polk Street crew had been warned long in advance that they would be laid off on December 31, 2003. This is standard SLUG practice when funding constraints necessitate layoffs and is documented in numerous e-mails and notices to crewmembers and by our investigator's interviews with representatives of the neighborhood improvement group that was instrumental in securing the grant.

Finally, our investigator determined that some members of the Polk Street crew were disgruntled at the prospect of losing their jobs and spoke openly about retaliating against the organization. These facts were brought to the Chronicle's attention in late December, weeks before it ran its first article on SLUG.

V. SLUG'S FUTURE

A. Commitment to Environmental Mission

SLUG remains committed to improving San Francisco through environmental projects such as native habitat restoration, the protection of natural areas, environmentally friendly landscaping, and the construction and maintenance of community gardens.

B. Commitment to Client and Members Base

We remain equally committed to continuing to aid the rehabilitation of individuals in recovery and ex-offenders and to helping low-income San Franciscans reenter the workforce. This includes youth programs such as the Green Team, which works with

[4] The Chronicle incorrectly reported that the Neighborhood Beautification Fund did not fund the Polk Street cleaning crew.

juvenile offenders, and our program at the Log Cabin Ranch in La Honda.

VI. NEW PROTECTIONS

A. Client Member Ombudsperson

In the next 30 days, SLUG will appoint a client/member ombudsperson who will serve as a non-staff liaison for crewmembers and community gardeners who may have concerns about SLUG's programs or staff or about their treatment by them.

B. Additions to Managerial Staff

SLUG will also recruit an administrator/controller to assist in program reporting, contract negotiations, and the rebuilding of its accounting systems. This will allow management to focus on service delivery, program development and strategic planning.

C. Observers on Election Days

For the next three years, SLUG will request Department of Elections observers to be present at SLUG's headquarters on elections days. A request for an observer was made on the day of the last primary election (March 9, 2004).

VII. CONCLUSION

We believe the allegations made in the Chronicle to be largely out of context but are concerned about instances of poor judgment and the appearance of impropriety. If these problems were endemic to the organization however, they would have happened on the days leading up to the election as well and not only on Election Day. Rather, it appears that these were spontaneous and isolated events.

Ultimately, people see what they want to see. Some see an environmental organization with significant assets that chooses to serve low income people and conclude they could do better. Others see an independent Bayview-based organization that is not afraid to go to City Hall and conclude something is wrong.

SLUG is the only organization in San Francisco that pursues the twin mission of environmental advocacy and social justice. Many people see no connection between the two and there is much insistence from advocates from both sides that SLUG choose one or the other. We will not do that.

We are saddened that a few hours of imprudent activity, and other efforts taken out of context, have garnered more media attention than the past nine months of labor to save this venerable organization.

We pledge to continue to rebuild SLUG and to make it even more effective at improving the lives of everyday San Franciscans by championing the environment.

Tab D

CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

TIMOTHY ARMISTEAD, CHIEF
Division of Investigation

DIRECT DIAL: (415) 554-4264
E-MAIL: tim.armistead@sfgov.org

MEMORANDUM

TO: LORI GIORGI, Chief Attorney, Public Integrity Task Force

FROM: TIMOTHY ARMISTEAD, Chief, Division of Investigation
GEORGE COTHRAN, Investigator

DATE: 10 May 2004

RE: Supplemental Report of Investigation: Interview of SLUG Supervisor

For the first time since we began the investigation of alleged political campaign activities of SLUG in the 2003 mayoral election, an employee of supervisorial rank at SLUG came forward, on 26 April, to grant us an interview. Prior to his recent resignation from SLUG, this individual worked for SLUG for approximately three years. At all times during the Fall months of 2003, he was the supervisor of the Third Street Light Rail crew, a crew wholly funded by MUNI Railway to keep the Third Street corridor clean from approximately Evans Avenue to Williams Avenue.

In the weeks prior to our interview of this witness, we had interviewed two SLUG employees, one current and one former, who had told us that this supervisor's crew (hereafter, "rail crew") engaged in three kinds of campaign activity for the Newsom campaign in addition to participating in the December 2nd early absentee voting at City Hall with the rest of SLUG's employees. First, one witness who still works on the rail crew advised us that members of that crew were rotated daily or nearly daily through the Bayview office of the Newsom campaign during the five weeks between the general and runoff elections, alternately doing "phone banking," polling, and other activities including the transporting of clients of another non-profit agency to Newsom headquarters on Van Ness Avenue. Second, this same witness also told us that the rail crew attended the November 23rd debate between Newsom and Supervisor Matt Gonzalez, and that their instructions were to support Newsom at the debate. Third, a former member of a different crew advised us that he was detailed on December 9th to join the rail crew in walking along Third Street and major side streets holding Newsom campaign signs. This witness told us that he and the rail crew did that for their entire shift on December 9th, from approximately noon until about 8:00 p.m.

In our interview on April 26th, the former rail crew supervisor essentially confirmed that all three of these activities occurred, and he also stated that they occurred under the general direction and supervision of SLUG executive director Jonathan Gomwalk and Gomwalk's lead supervisor. Following are the salient details of his statement.

CITY AND COUNTY OF SAN FRANCISCO OFFICE OF THE CITY ATTORNEY

Memorandum

TO: LORI GIORGI, Chief Attorney, Public Integrity Task Force
DATE: May 10, 2004
PAGE: 2
RE: Supplemental Report of Investigation: Interview of SLUG Supervisor

1) On numerous occasions during the months September through December 2003, Jonathan Gomwalk and his lead supervisor variously urged, directed, and made arrangements for SLUG employees to campaign for Gavin Newsom while remaining "on the clock," that is, paid their normal wages by SLUG as if they were working legitimately on their normal, contracted cleanup duties. The campaign activities, according to this witness, included attendance at rallies and a debate, as well as many person-hours doing phone-banking, polling, walking precincts, and other GOTV activities.

2) The lead supervisor at SLUG directed this witness and the other SLUG employees who voted early absentee on 2 December 2003 to surrender their voting stubs to him. This still angers the former supervisor, even though he himself favored Newsom in the mayoral race.

3) At the lead supervisor's direction, this witness gave four hours of overtime to himself and all his crew members who attended the November 23rd debate, and further at the direction of the lead supervisor he filled out the crew members' time sheets in such a way as to disguise that activity, making it appear to be legitimate cleanup work billable to MUNI Railway.

4) At the direction of Gomwalk and the lead supervisor, the witness himself and his rail crew rotated through the Bayview office of the Newsom campaign during the five weeks between the general and runoff elections, largely doing phone-banking. The witness did the phone-banking on Fridays and Saturdays (he worked a Tuesday through Saturday week). He also confirmed that our other rail crew witness did transport people to the main Newsom headquarters, as that witness told us. For all these campaign activities, this former supervisor and his crew were instructed to remove all their SLUG regalia. He and his crew were paid by SLUG for this campaigning as if they had been cleaning the Third Street corridor. According to the witness, while the activity itself was mandated by Gomwalk and the lead supervisor, at the level of the line worker the campaigning actually was presented as "voluntary" in this sense: workers could clean the streets on a given day or they could report to the Newsom campaign office on Third Street, with the understanding that the campaigning was easier and cleaner work than street-sweeping, and that if they phone-banked for, say, four hours, they would be allowed to leave for the day and still be paid by SLUG for eight hours. According to the witness, this policy resulted in constant coverage for the Newsom campaign by the rail crew at the same time that some members of the crew were also sweeping the streets as per the contract between MUNI Railway and SLUG.

5) The witness confirmed by photo spread identification the identity of our non-rail crew witness who claimed to have walked the Third Street area all day on December 9th holding Newsom campaign signs. The witness told us that he himself and his entire crew of ten men, in addition to our non-rail crew witness, performed that campaign activity their entire shift (noon through 8:00 p.m.), and were paid by SLUG as if they had worked that day.

Memorandum

TO: LORI GIORGI, Chief Attorney, Public Integrity Task Force
DATE: May 10, 2004
PAGE: 3
RE: Supplemental Report of Investigation: Interview of SLUG Supervisor

6) This former supervisor is the second witness to report what may be retaliation by SLUG against two current SLUG employees who have given this Office an interview. The day after this witness advised his superiors that he intended to give us an interview, the lead supervisor at SLUG reportedly picked him up on his route and drove him to a more difficult and far-removed route, where he was reportedly instructed to clean up that area instead of his normal one. According to the witness, this was an unusual experience and contributed to his eventual decision to resign. Our immediately prior witness, still employed by SLUG, was reprimanded and docked a day's pay for an alleged unexcused absence from his route on the day following our interview. He denies that he was absent from his route.

T.A., G.C.

CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE CITY ATTORNEY

DENNIS J. HERRERA
City Attorney

DIRECT DIAL: (415) 554-4748
E-MAIL: tara.collins@sfgov.org

MEMORANDUM

TO: Mayor Gavin Newsom
President Aaron Peskin, and Members, Board of Supervisors

FROM: Dennis J. Herrera
City Attorney

DATE: April 11, 2007

RE: Report on Legal Issues Involving City Payments to Former Mayor Staff Member Ruby Rippey-Tourk

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Please find attached the report that my Office completed on legal issues involving City payments made to former Mayor's Office staff member Ruby Rippey-Tourk.

I have reviewed the report and concur with it, including its conclusions.

Please contact me if you have any questions regarding the report or if my Office may be of further assistance regarding any of the matters raised in the report.

cc: Ed Harrington, Controller
Dr. Mitch Katz, Director of Public Health
Philip Ginsburg, Chief of Staff, Mayor's Office

CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

THOMAS BOYD
Chief of Investigations
DIRECT DIAL: (415) 554-4264
E-MAIL: Thomas.Boyd@sfgov.org

PETER KEITH
Deputy City Attorney
DIRECT DIAL: (415) 554-3908
E-MAIL: Peter.Keith@sfgov.org

MEMORANDUM

TO: Dennis J. Herrera
City Attorney

FROM: Thomas Boyd
Chief of Investigations

Peter Keith
Deputy City Attorney

DATE: April 11, 2007

RE: Legal Issues Involving City Payments to Former Mayor Staff Member Ruby Rippey-Tourk

I. INTRODUCTION

On February 1, 2007, various City departments received the first of a number of requests under the California Public Records Act and the San Francisco Sunshine Ordinance for records ("Sunshine requests") regarding compensation and other employment information for Ruby Rippey-Tourk, who formerly served as the Commission Liaison in the Mayor's Office. Based on the records that the City departments produced in response to the Sunshine requests and other information described in the press, public news media reports and City officials raised questions regarding certain payments Ms. Rippey-Tourk received from the City, especially her receipt of a one-time, retroactive payment under the City's Catastrophic Illness Program (the "CIP") shortly after she separated from City employment. In particular, they asked questions about whether Ms. Rippey-Tourk was legally entitled to those payments or received special treatment because of her senior staff status in the Mayor's Office or the personal relationship that Mayor Newsom had with her.

The Charter for the City and County of San Francisco vests the City Attorney with the responsibility to provide legal advice to the City and its officers and employees, including advice relating to compliance with City laws. The Charter also provides for the City Attorney to pursue legal actions on behalf of the City, including claims against persons receiving payments from the City to which they are not entitled. That responsibility encompasses the power to conduct investigations necessary to determine the legality of payments made by the City. The Charter makes the City Attorney directly accountable to the public for performing these functions. In discharging these responsibilities, the City Attorney's Office independently reviewed legal questions raised in connection with the payments to Ms. Rippey-Tourk. During the course of our review, additional information came to our attention that presented legal questions regarding the authorization for Ms. Rippey-Tourk's payroll time sheets, her use of paid and unpaid leave, and

her possible work for a private entity while she was on paid leave from the City. The purpose of this report is to provide the City's policy-makers and the public with the results of this Office's review of these matters.

II. SCOPE OF REVIEW

During the course of this review, we focused on legal issues arising in connection with the following five matters:

1. Whether the City's handling of Ms. Rippey-Tourk's CIP application in 2006 was consistent with the standards for qualification and procedures and practices that govern employees who seek to participate in the CIP;
2. Whether the one-time retroactive payment Ms. Rippey-Tourk received in September 2006 under the CIP, just after she left the City's employ, was legally permissible;
3. Whether Ms. Rippey-Tourk's use of City paid and unpaid leave from the commencement of her City employment in January 2004 through her date of separation from City employment in August 2006 exceeded that to which she was entitled;
4. Whether the submittal and authorization of payroll time sheets for Ms. Rippey-Tourk from the commencement of her City employment in January 2004 through her date of separation from City employment in August 2006 was consistent with City policies and practices and whether payments made to her in connection with those times sheets were lawful; and
5. Whether Ms. Rippey-Tourk worked as a paid employee or unpaid volunteer for a private entity, Benefit Magazine, while she was on leave from the City in 2006; and, if so, whether any such work created a legal conflict with her receipt of paid leave or otherwise violated City laws.

In conducting this review, we examined public and confidential City records, including the files that the Department of Public Health ("DPH") maintains for the CIP and Ms. Rippey-Tourk's payroll records, and interviewed City officials involved in the CIP and payroll processes, including the Director of Public Health, the former Director of Human Resources and the Mayor's current Chief of Staff, the Mayor's former Chief of Staff, the Controller, the Deputy Director of the Controller's Office, the head of the payroll division under the Controller, and the employee in charge of human resources for the Mayor's Office. We also reviewed records from Benefit Magazine that we obtained through a City administrative subpoena.

While we are confident of the accuracy of the conclusions we set forth below, we note four serious limitations on the scope of our review. First, under the City's CIP ordinance, participation in the program and related medical information is confidential owing to employee privacy issues. Certain assertions regarding Ms. Rippey-Tourk's CIP application and her medical condition have been widely reported in the press. These assertions include statements made by Ms. Rippey-Tourk's own public relations spokesperson, Sam Singer, that she participated in the CIP and attended an alcohol rehabilitation program while on leave from the Mayor's Office. (See, e.g., "More on Tourk Payments, Steven T. Jones, *The Bay Guardian*, February 15, 2007; "Did Tourk Receive Special Treatment," Dan Noyes, *ABC 7 I-Team*,

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TO: Dennis J. Herrera
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February 16, 2007; "City Attorney Launches Investigation," Joshua Sabatini, *The Examiner*, February 16, 2007; "SF Reviews Back Pay to Newsom Aide," *San Francisco Chronicle*, February 16, 2007; "Sick Leave Pay Isn't for Rehab," Cecilia M. Vega, Charlie Goodyear, *San Francisco Chronicle*, February 17, 2007.)

Based on these reports, Ms. Rippey-Tourk has waived any confidentiality protection under the CIP ordinance as to her participation in the program. But despite our requests that Ms. Rippey-Tourk consent to allow the City Attorney's Office to discuss in this report the medical information at issue, even if limited to a general description of the basis for her application, she has declined to do so. Accordingly, because of laws protecting the privacy of medical information that may apply, in this report we do not comment on the accuracy of the statements of Ms. Rippey-Tourk's spokesperson or other press accounts regarding her participation in a substance abuse rehabilitation program, nor discuss the medical reasons for Ms. Rippey-Tourk's participation in the CIP or other medical information relating to Ms. Rippey-Tourk.

Second, our review is based on the information we were able to obtain through review of public and confidential documents and interviews as described generally above. We were unable to verify certain information. For example, despite repeated requests, both Ms. Rippey-Tourk and Alex Tourk declined through their lawyers to be interviewed as part of this report. Where we were not able to verify information, we identify that limitation in the discussion section of this report.

Third, we did not conduct this review as part of a performance audit of the CIP, the payroll practices of the Mayor's Office, or any other relevant City programs or procedures. Such an audit is typically under the purview of the City's Controller. Instead, our review is limited to whether the City's laws and procedures were followed in connection with the five matters described above.

Fourth, we did not review the issue that has been raised in certain press reports about whether Ms. Rippey-Tourk's attendance at work comported with her time sheets. Again, such matters are not within the scope of questions the City Attorney ordinarily reviews and would usually be under the auspices of the Department of Human Resources, the City Controller and the Mayor's Office. In addition, because of the passage of time and the lack of definitive data regarding this question, we believe it would be difficult, if not impossible, to answer with any reasonable certainty.

While this report focuses on legal issues, to the extent our review revealed broader questions of City policy, we identify those matters in our findings below for the benefit of the City's policy-makers, in the event they may wish to consider possible changes to the City's laws or policies going forward.

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TO: Dennis J. Herrera
City Attorney
DATE: April 11, 2007
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III. EXECUTIVE SUMMARY

Based on the scope of our review and the information available to us as described in the preceding section of this report, we reach the following conclusions. We discuss in more detail the law, facts and our conclusions in the next section of this report.

1. Qualification to Participate in the CIP

The CIP ordinance defines a catastrophic illness as "a life-threatening illness or injury, as determined by the Department of Public Health." A City employee seeking approval to participate in the CIP must submit a physician's certification that the employee has a catastrophic illness. (See Exhibit B attached to this report for a copy of this form currently used by DPH.) As required by the CIP ordinance, Ms. Rippey-Tourk submitted a completed written application to DPH, together with the necessary certification from her attending physician. Dr. Katz, Director of Public Health, reviewed her application, and determined that she qualified for the CIP. He did not personally contact the attending physician, and it is not the general practice of DPH to do so in reviewing CIP applications. Because Ms. Rippey-Tourk would not agree to authorize the release of medical information, we could not confirm the facts set forth in her attending physician's certification or authenticate the physician's submittal of the certification to the City. Based on the face of the CIP application and the information available to us, Dr. Katz' determination appears to be consistent with the broad discretion that the CIP ordinance grants to DPH to decide what illnesses and injuries qualify as life-threatening.

As mentioned above in the discussion of the scope of our review, because Ms. Rippey-Tourk would not consent to allow the City Attorney's Office to address in this report the medical information at issue, in this report we do not comment on the accuracy of reports that Ms. Rippey-Tourk participated in the CIP because of alcohol or substance abuse or otherwise discuss details of her medical condition.

Based on the information we reviewed as further described in this report, we found no evidence of undue influence by Mayor Newsom regarding the City's authorization of the CIP payment or granting of leave relating to Ms. Rippey-Tourk. It is difficult for us to assess in this report whether other City officials treated her application more favorably than other City employees owing to her senior staff status in the Mayor's Office or otherwise, in large part because of her refusal to grant us authorization to discuss here how the basis for her application compares to the grounds for other CIP applications.

In light of news media reports questioning the appropriate criteria for employee participation in the CIP, particularly for substance abuse, we did conduct a general review of DPH's files of all CIP applications since the program's inception. The results of that review (excluding Ms. Rippey-Tourk's application) follow:

- We found that the vast majority of CIP applications are for chronic illnesses that are commonly considered by laypersons to be life-threatening, such as metastatic cancer, AIDS and end-stage organ disease, as well as severe physical traumas, such as a heart attack, stroke or serious accident.
- We found fewer than a dozen CIP applications based solely on conditions that could cause life-threatening behavior, such as substance abuse or mental illness.

- We did not find any case in which DPH certified eligibility for the CIP based solely on substance abuse. We found at least one approval for liver disease that resulted from alcohol abuse; there were other instances where DPH approved CIP applications for life-threatening physical illnesses, such as liver disease, that could have been caused by alcohol or substance abuse, but the cause was not stated on the face of the application or accompanying doctor's certification.
- We did find a few denials by DPH of applications where the catastrophic illness was substance abuse, but apparently unaccompanied by any life-threatening physical condition or behavior. We did not discover any DPH approval of a CIP application based solely on alcohol or substance abuse, including attending a treatment program.

The CIP ordinance expressly grants broad discretion to DPH to make the determination as to what is a life-threatening illness or injury for purposes of participation in the program. Whether there should be amendments to the CIP ordinance to set forth additional direction or criteria for making future determinations about what qualifies as a life-threatening illness or injury, and what any such criteria ought to be, are policy matters for the Board of Supervisors and the Mayor.

2. Receipt of One-Time Retroactive Payment Under the CIP Shortly After Ms. Rippey-Tourk Separated from City Employment

The CIP ordinance allows for the transfer to a CIP employee of donated sick or vacation hours retroactively "from the date of eligibility back to the date of [the CIP] application." Ms. Rippey-Tourk received a CIP payment for a period that began before the date she submitted her application to participate in the program. The ordinance grants broad discretion to the Controller, in consultation with DPH, to administer the CIP. We understand that Ms. Rippey-Tourk did not become aware that she was potentially eligible to participate in the CIP until late July or early August 2006. Upon examining Ms. Rippey-Tourk's CIP application, Dr. Katz determined that she was eligible to participate in the CIP beginning before the date she submitted her CIP application, based on the earlier onset of her illness as certified by her attending physician.

While neither the Controller nor DPH have written rules or procedures regarding their roles in implementing the CIP, they have interpreted the CIP ordinance to allow retroactive participation before the date of CIP application, due to an earlier onset of a qualifying illness or injury as determined by the employee's attending physician. Based on our general review of DPH records of CIP applications and the Controller's payroll information, there have been a number of occasions since the inception of the CIP in which the Controller has approved payment under the CIP retroactive to the date of onset of illness or injury as approved by DPH, even if the illness predated the submittal of the CIP application. One can imagine a situation in which a City employee may have metastatic cancer and not even know she is catastrophically ill until many months after she begins experiencing symptoms that make her unable to work. We also understand that eligibility for other employee benefits depends on the onset of the illness or injury, not on the date of application for the benefit.

While the CIP ordinance could be interpreted more literally to allow payment only for leave taken after the date the CIP application is submitted, the interpretation that DPH and the Controller have consistently given appears to be consistent with the purpose of the ordinance, which is to reduce hardship and suffering of catastrophically ill City employees. It is a policy

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TO: Dennis J. Herrera
City Attorney
DATE: April 11, 2007
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matter for the Board of Supervisors and the Mayor whether to clarify the ordinance to reflect this interpretation given by the Controller and DPH, or to change the CIP ordinance to make it clear that the donation of sick and vacation hours retroactively is limited by the actual date of the CIP application instead of the onset of the catastrophic illness.

Based on the information available to us, Ms. Rippey-Tourk was a City employee eligible for the CIP payment when DPH certified the CIP application and the Controller authorized the retroactive payment. But we could find no other instance where, as here, an employee received approval by the Controller for payment under the CIP after she indicated her intent to resign from City employment and received the payment just as she was starting a new job. There is nothing in the ordinance, nor are there any City policies or procedures, that preclude CIP payments under such circumstances. Whether the City should have policies or procedures for the processing of CIP applications where City employees are separating from City employment, including circumstances where they are capable of working or have accepted new employment, is a policy question for the City's Board of Supervisors and the Mayor.

3. Use and Authorization of Leave

At our request, the Controller's Office prepared a report setting forth the dates of Ms. Rippey-Tourk's use of various types of paid and unpaid leave and calculating her leave accrual from the beginning of her employment with the City as Commission Liaison on January 9, 2004 until she separated from City employment on August 31, 2006. This report, which contains information that must be kept confidential under privacy laws, establishes that Ms. Rippey-Tourk's paid and unpaid leave did not exceed the maximum amounts she was entitled to take for each type of leave or compensation under applicable City laws, based on her term of service.

4. Submittal and Authorization of Payroll Time Sheets

We did not find evidence that any payments the City made to Ms. Rippey-Tourk based on her payroll time sheets violated any City law or procedure. During the time she served in the Mayor's Office, there was no written City-wide or Mayor's Office policy regarding the submission or approval of time sheets. During most of the time Ms. Rippey-Tourk worked for the City, the practice in the Mayor's Office was that senior staff members such as Ms. Rippey-Tourk did not need to obtain a supervisor's signature on their time sheets. This practice changed around the end of 2005, when the Mayor's Chief of Staff during that period, Steve Kawa, began signing the time sheets of senior staff members. Under this practice, when Mr. Kawa was absent, the Mayor's Deputy Chief of Staff, Alex Tourk, signed time sheets. In several instances during this period, Mr. Tourk signed off on his wife's time sheets. Some other time sheets for Ms. Rippey-Tourk were unsigned, or appear to have been signed for Ms. Rippey-Tourk by others in the Mayor's Office.

Under the City's Charter, City employment is a public trust and employees are required to exercise their public duties in a manner consistent with that public trust. (S.F. Charter, § 15.103.) Even though Mayor's Office approval of senior staff time sheets was merely an internal departmental control and was not legally required for salary payments by the Controller, authorization of a spouse's times sheets is not appropriate in light of this public trust. But the City's anti-nepotism law prohibiting participation by an employee "in employment actions" involving that employee's relatives does not appear to extend to this situation; it covers only hiring, promotion and discipline. (S.F. Campaign and Governmental Interest Code, § 3.212.)

Memorandum

TO: Dennis J. Herrera
City Attorney
DATE: April 11, 2007
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Although the Controller's Office and others have since questioned some of the practices by which Ms. Rippey-Tourk's times sheets were submitted or approved, and while in some cases the authorization of her times sheets by her husband was not appropriate as described above, the payments made to her reflected by those time sheets did not violate City law or policy. We understand that the Mayor's Office recently changed the prior practice and instituted a new internal policy that requires approval of an employee's time sheets by the employee's supervisor. It is a policy matter for the Board of Supervisors and the Mayor whether to amend the City's anti-nepotism law to cover this type of situation going forward, and a policy matter for the Board of Supervisors, the Mayor, the Controller, the Department of Human Resources and the Ethics Commission whether to institute a formal City policy requiring approval of employee time sheets in a particular manner, or not at all.

5. Outside Employment

In response to a City administrative subpoena that we served during the course of this review, Benefit Magazine produced several pages of employment records relating to Ms. Rippey-Tourk. According to these records, Ms. Rippey-Tourk was formally engaged as a host for the Benefit Radio show on October 4, 2006. She first received an advance payment from Benefit Magazine on September 19, 2006, after she had separated from City employment on August 31, 2006. Those records also show her participation as an unpaid co-host for a charitable event in April 2006; they do not indicate any other work as an intern or volunteer in 2006 before she separated from City employment. Based on these records, Ms. Rippey-Tourk's work for Benefit Magazine does not appear to violate any City law or rule.

IV. DISCUSSION

A. CATASTROPHIC ILLNESS LEAVE PROGRAM

1. City Law and Procedure.

The Catastrophic Illness Program (CIP) is set forth in Section 16.9-29A of the San Francisco Administrative Code (the "Ordinance"). A copy of the Ordinance is attached as Exhibit A to this report. The Ordinance, entitled the "T.J. Anthony Employee Catastrophic Illness Program–Transfer of Sick Leave and Vacation Credits to Individual Catastrophically Ill Employees or a Pool of Catastrophically Ill Employees," was adopted by the City in 2001. The stated purpose of the Ordinance is to "enable catastrophically ill employees to continue to be paid through donations of sick leave and vacation hours from other employees." (S.F. Admin. Code, §16.9-29A(a).)

There are four criteria an employee must meet to qualify for participation in the CIP. The employee must: (1) be eligible to accumulate and use sick leave and vacation credits; (2) be catastrophically ill, meaning that the employee has "a life-threatening illness or injury, as determined by the Department of Public Health"; (3) have exhausted all of his/her available paid leave; and (4) not be receiving short or long-term disability payments for which the City pays directly or indirectly, subject to certain exceptions. (§ 16.9-29A(d)(1)-(4).) The employee must submit a written application, which includes a medical documentation. (§ 16.9-29A(c)(1).) The Director of Public Health may use this information to make a determination or may ask for more information from the employee's submitting physician and/or require the employee to submit to a doctor's examination. (§ 16.9-29A(e)(2).)

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The Ordinance does not specifically address whether any particular illness or injury, including addiction or substance abuse, may be considered a life-threatening illness and, if so, under what circumstances. Notably, another City law does address the issue of whether addiction or substance abuse may justify the use of sick leave. Civil Service Rule 120.7.1 provides, in relevant part, that "[a]bsence because of illness, including alcoholism" qualifies as a basis for sick leave, including paid sick leave.

The Ordinance provides a number of confidentiality protections for participants in the program and donors of sick and vacation leave. For example, it provides: "In all cases, the Department of Public Health and its designees shall shield and protect the true identities of CIP employees" (§ 16.9-29A(f)(4)) [as noted elsewhere in this report, based on the many statements made by Ms. Rippey-Tourk's spokesperson in press reports this protection has been waived]; "All medical records submitted by an employee pursuant to this statute are to be kept confidential by the Department of Public Health or its designee" (§ 16.9-29A(j)(1)); "The names of employees donating hours pursuant to this provision are to remain confidential" (§ 16.9-29A(j)(3)); and "Violation of the provisions of this subsection or any provision relating to confidentiality protections shall be grounds for disciplinary action" (§ 16.9-29A(j)(4).)

The Ordinance grants the City's Controller authority to administer this program, including the authority to make and enforce rules for the CIP under the Ordinance, in consultation with the Director of Public Health. (§ 16.9-29A(b).) While neither the Controller nor DPH have adopted any written rules or procedures to implement the CIP, we understand based on interviews with their offices that their practice is as follows.

Typically, an employee begins the process by submitting an application to human resources personnel in the employee's department. DPH has prepared a four-page form application, a copy of which is attached as Exhibit B to this report. The application includes two parts. The first part of the form is to be filled out by the City employee, including an authorization for the City to contact the employee's short-term and long-term disability providers as part of the evaluation of the employee's qualifications for the program. The second part is to be completed by the applicant's physician, certifying that the patient has a life-threatening illness or injury and specifically providing for the physician to describe the "onset of catastrophic illness."

After receiving the completed CIP application, the human resources employee then sends it to DPH. Most of the time, Dr. Katz reviews the CIP applications himself. In some instances, Dr. Rajiv Bhatia reviews the applications. Dr. Katz has been reviewing CIP applications since the inception of the program. When Dr. Katz reviews an application, he checks to ensure that the form is signed, that the physician's diagnosis matches the applicant's description of the illness or injury, and that the time-period for which leave is sought is consistent with the physician's diagnosis. As described above, the CIP ordinance gives DPH broad discretion to make medical judgments on the applications.

Dr. Katz informed us that in determining whether an employee's illness or injury qualifies for the CIP, he relies largely on the certifying physician's diagnosis and does not question that diagnosis. He considers whether the illness or injury places the applicant in jeopardy of dying in the near future. He approves a request only if he concludes that there is a reasonable chance that the employee is at risk of dying. He approves a term for participation in the CIP of one week to six months, depending on the circumstances of the applicant. He does not approve CIP leave for more than six months, thus ensuring that the applicant's status, if prolonged, will be periodically

reviewed through renewal applications. He uses the end of the month as an ending date for leave to standardize administration. He consistently encourages employees who may be qualified to apply for the program. Dr. Katz believes the CIP is a compassionate program designed to help employees who are in dire need. He makes his decisions with the applicant's best interest as his prime concern.

If Dr. Katz denies an application, the applicant may appeal the denial to the Public Health Commission. (§ 16.9-29A(c)(4).) About 10% of the CIP applications are denied. If Dr. Katz approves an application, he forwards it to DPH records personnel to process administratively. Among other things, DPH staff evaluate whether the employee is eligible for long-term or short-term disability. Under the Ordinance, an employee does not qualify for CIP payments until she has exhausted disability benefits, subject to certain exceptions. Once the final review is complete, DPH then informs the Controller of the approval. City employees are notified that they may donate their sick or vacation leave to an individual designated employee, using a confidential number, or to the general leave pool for the CIP.

2. Facts.

While there were a number of press reports, including statements by her own spokesperson, that she attended an alcohol and substance treatment program, Ms. Rippey-Tourk has refused to authorize the City Attorney's Office to disclose medical details regarding the basis for her receipt of payments under the CIP. Accordingly, because of potentially applicable medical privacy laws, in this report we do not confirm or deny information in the press reports regarding her medical condition or discuss the specific medical reasons for Ms. Rippey-Tourk's CIP application. But in the course of performing this review, we did review and consider available documents in the City's records supporting the basis for Ms. Rippey-Tourk's receipt of payment under the CIP.

On May 17, 18, and 19, 2006, Ms. Rippey-Tourk took paid leave from her assignment in the Mayor's Office. On May 22 and 23 she took a combination of paid leave and unpaid leave, and in doing so exhausted her available paid leave time. Beginning on May 24, and continuing to her separation date of August 31, 2006, Ms. Rippey-Tourk took leave that was unpaid, except to the extent it was later covered by the CIP. At about this time Steve Kawa, then Chief of Staff, was contacted by Alex Tourk, then Deputy Chief of Staff. We understand that Mr. Tourk told Mr. Kawa that his wife, Ms. Rippey-Tourk, wanted to go on unpaid leave. (Because Mr. Tourk would not consent to our interview, we were unable to confirm Mr. Kawa's account of his discussions with Mr. Tourk.)

Mr. Kawa approved the leave and notified Shalonda Baldwin, Director of Operations for the Mayor's Office, that Ms. Rippey-Tourk would not be coming to work and that her status on the time sheets should be unpaid leave. Mr. Kawa was not sure how long Ms. Rippey-Tourk would be on leave. Ms. Baldwin understood that after Ms. Rippey-Tourk had exhausted her sick, vacation, and holiday leave banks, she would be designated as an employee on unpaid leave on the payroll. Ms. Baldwin gave standard leave request forms to Mr. Tourk and asked that Ms. Rippey-Tourk complete and return them to her to verify her leave request. This form would normally be placed in an employee's personnel file. These standard leave request forms were not returned.

According to reports published by newspapers, broadcast media, and websites, after leaving the Mayor's Office Ms. Rippey-Tourk "went on unpaid sick leave from her job as

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Newsom's appointments secretary to attend alcohol rehab, according to her spokesman." (See, e.g., "More on Tourk Payments, Steven T. Jones, *The Bay Guardian*, February 15, 2007; "Did Tourk Receive Special Treatment," Dan Noyes, *ABC 7 I-Team*, February 16, 2007; "City Attorney Launches Investigation," Joshua Sabatini, *The Examiner*, February 16, 2007; "SF Reviews Back Pay to Newsom Aide," *San Francisco Chronicle*, February 16, 2007; "Sick Leave Pay Isn't for Rehab," Cecilia M. Vega, Charlie Goodyear, *San Francisco Chronicle*, February 17, 2007.) Again, due to Ms. Rippey-Tourk's refusal to consent to allow the City Attorney's Office to discuss in this report the medical information at issue, in light of potentially applicable medical privacy laws we do not comment here on the accuracy of these published reports.

In mid-July, 2006, Mr. Kawa received a call from Ms. Rippey-Tourk in which she notified him that she had decided to resign and that she would be sending him her resignation letter. Soon after, he received her unsigned resignation letter, dated July 21, 2006 and addressed to Mayor Newsom and Mr. Kawa. The letter noted her intention to resign, but did not cite a date of resignation. Mr. Kawa gave a copy of this letter to Ms. Baldwin.

Some time at the end of July or beginning of August 2006, Alex Tourk, then Deputy Chief-of-Staff in the Mayor's Office, contacted Phil Ginsburg, then Director of Human Resources for the City. (Again, because Mr. Tourk would not agree to be interviewed by us, we could not confirm with him Mr. Ginsburg's account of their conversations.) Mr. Tourk told Mr. Ginsburg that his wife, Ms. Rippey-Tourk, was on unpaid leave and described the reason for the leave. He asked Mr. Ginsburg if there were any City benefits still available to his wife. As Human Resources Director, Mr. Ginsburg was charged with interpreting and implementing policy issues relating to human resources. Mr. Ginsburg told Mr. Tourk that he would look into the matter.

Based on information provided by Mr. Tourk during their conversation, Mr. Ginsburg called Dr. Katz to discuss options. One option discussed was the CIP. Dr. Katz advised Mr. Ginsburg that an employee seeking to participate in this program would have to submit an application on approved forms, including a certification by an attending physician that the employee is catastrophically ill. Mr. Ginsburg informed Mr. Tourk of the CIP and described the process. He forwarded the CIP application forms to Mr. Tourk, in or about early August. Mr. Ginsburg received a CIP application several days later from Mr. Tourk and forwarded it to DPH.

Ms. Rippey-Tourk's application was stamped received by the Human Resources Office of DPH on Friday, August 18, 2006. When Dr. Katz received the CIP application and the accompanying physician's certification, he reviewed these materials. (The application and physician's certification were on DPH's earlier form, which is formatted slightly differently from the current form attached as Exhibit B but is substantively nearly identical.) Dr. Katz noted that the attending physician had made the required certification. Dr. Katz approved Ms. Rippey-Tourk's application to participate in the CIP. By letter dated August 21, 2006, DPH notified Ms. Rippey-Tourk that she qualified to participate in the CIP.

As we have discussed, the attending physician's certification is the most critical factor in DPH's determination of eligibility for the CIP. Here Dr. Katz relied on it in approving Ms. Rippey-Tourk's application. He did not personally contact her attending physician, and he does not usually do so in reviewing CIP applications because he says it is not DPH's role to second-guess the diagnosis of the attending physician. The certification form that is attached to her application on file with DPH looks like a faxed copy and upon close examination appears to

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show different handwriting for a portion of the information under "Course of Treatment(s) and Date(s)," although Dr. Katz informed us that he did not consider the difference relevant to his decision-making regarding her application. The physician's signature appears to correspond to the handwriting on all of the rest of the completed application except the patient's name. We understand that it is common for nurses and other employees of a medical office to fill in information on the form and for the attending physician to approve the completed form.

We were unable to confirm the facts set forth in the physician's certification or verify that the certificate attached to Ms. Rippey-Tourk's CIP application was actually signed and submitted by her physician because the attending physician and medical office not provide this information to us without an authorization from Ms. Rippey-Tourk, which she declined to provide. Subject to that limitation and based on the information that was available to us, Ms. Rippey-Tourk's CIP application and physician's certification appear on their face sufficient to support Dr. Katz's determination that Ms. Rippey-Tourk was eligible for the CIP.

We asked Dr. Katz if he had ever had a conversation with the Mayor regarding Ms. Rippey-Tourk's CIP application. Dr. Katz stated that he has never had a conversation with the Mayor about the CIP in general and that he never had a conversation with the Mayor about Ms. Rippey-Tourk. We also asked the Controller, the Deputy Controller and Mr. Ginsburg if the Mayor had talked with any of them about Ms. Rippey-Tourk or her eligibility for participation in the CIP. They each told us that the Mayor did not directly or indirectly make any inquiry about this issue at the time and that they did not discuss these matters with him until after reports became public in February 2007 about Ms. Rippey-Tourk's relationship with the Mayor and her receipt of a payment under the CIP.

As we mentioned above, the procedure for processing a CIP application after DPH determines that the employee has a life-threatening injury or illness, is for DPH personnel to complete the review and forward the approved application to the Controller. Here, DPH personnel evaluated whether Ms. Rippey-Tourk was eligible for short-term or long-term disability paid for by the City and determined that she was not. They then forwarded the approved application to the Controller and sent out a letter dated August 21, 2006 to Ms. Rippey-Tourk confirming approval.

In light of the public media reports about substance abuse and the questions those reports and City officials raised about substance abuse as a basis for participation in the CIP, we asked Dr. Katz to describe in general terms–and unrelated to any particular CIP application–his opinions about substance abuse being a factor in qualifying applicants for the CIP. He explained that substance abuse alone was not sufficient to qualify. He believed that substance abuse, coupled with other concerns or manifestations of life-threatening behavior, could qualify an applicant. Dr. Katz said that substance abuse is one of the top ten causes of death in San Francisco–"people die from alcohol over a long time."

In explaining his decision-making regarding illnesses that may be life-threatening for a relatively short period of time under the CIP, Dr. Katz used the analogy of a stroke victim. He said that he would approve a short-term request for the initial medical treatment to stabilize the patient, but would not be as willing to continue qualification after the applicant was in rehabilitation and not in a life-threatening situation. He sees the danger in the actual stroke, not in recovery. Although the person recovering from the stroke may be seriously disabled, he views the CIP as not a benefit for disability but only for life-threatening illness or injury. Dr. Katz

noted that there are other programs that provide benefits to persons with disabilities who are no longer in a life-threatening situation.

As part of this review, we reviewed the CIP files in DPH. Generally, each application is given a confidential number. The application forms and all attendant documents are kept together in a file cabinet. At the time of our review, there were 1,297 application numbers issued. We could not locate files for all of the assigned numbers. There is a separate file for denied applications. Most of these files had numbers assigned to them and many of these accounted for the missing numbers in the regular files, but there were also unnumbered denied applications.

In view of the questions raised in public reports and by City officials about whether alcoholism or substance abuse is a basis for participation in the CIP, we reviewed these files (excluding Ms. Rippey-Tourk's application) for approvals or denials relating to alcoholism or substance abuse. We found that the vast majority of CIP applications involved medical conditions commonly understood by laypersons to be life-threatening, such as cancer, AIDS, heart attacks, and serious accidents. We found fewer than a dozen applications based on conditions that could cause life-threatening behavior, such as alcoholism or substance abuse.

We did not find any DPH approvals based solely on alcoholism or substance abuse, including attending a treatment program. A few applications involving alcoholism or substance abuse were denied on the ground that the condition was not life-threatening at the time. For example, we found the following written reasons for denial of particular applications: "Alcoholism may be disabling but not life threatening" (2002); "Receiving treatment for a panic attack and substance use cannot be considered a life threatening illness" (2003). These comments were made in response to the medical information provided under particular CIP applications, and may not necessarily reflect DPH policy on CIP applications generally. We could not determine whether from the face of the applications whether Dr. Katz reviewed them for DPH; in at least one instance it appeared that Dr. Bhatia was the DPH reviewer. We also found a number of approved applications involving physical illnesses, such as liver disease, that could have been caused by substance abuse. On one such application, alcoholism was explicitly listed by the attending physician as a contributing factor.

3. Conclusion.

Based on the information we reviewed, Ms. Rippey-Tourk's CIP application was sufficient to support a determination that she was eligible to participate in the CIP. She submitted the proper application form to DPH, including a physician's certification. Dr. Katz, Director of Public Health, reviewed her application and made a determination that she qualified for the CIP. Dr. Katz exercised his medical discretion in making this decision, as granted under the CIP ordinance.

In light of public media reports, questions have been raised as to whether the CIP was intended to extend to certain employee illnesses or injuries that relate to substance abuse, and whether employees with such illnesses or injuries should qualify for participation in the CIP. The Ordinance expressly grants broad discretion to the DPH to make the determination about what is a life-threatening illness or injury for purposes of participation in the program. Whether there should be amendments to the Ordinance to set forth additional direction or criteria for making this determination is a policy matter for the Board of Supervisors and the Mayor.

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B. RETROACTIVE PAYMENT TO SEPARATING EMPLOYEE

1. City Law and Procedure.

As discussed above, once the Director of Public Health has determined that an employee is eligible to participate in the CIP, DPH notifies the Controller's Office of that determination. The Controller's Office then sets up a manual tracking system for each approved application. When an employee is eligible to participate in the CIP, any employee who has accumulated sick or vacation time may donate credits to the CIP employee, subject to certain conditions and limits on the amount of transferred credits. (S.F. Admin. Code, § 16.9-29A(g).) The Controller's Office does not question the validity of the qualification to participate in the CIP once DPH has approved the application. It simply tracks the donations, administers the donation of sick and vacation time, and issues paychecks to the CIP employee.

The Ordinance provides that "a CIP employee may use transferred hours retroactively *from the date of certification of eligibility back to the date of application.*" [Emphasis added.] (§ 16.9-29A(h)(2).) This provision explicitly authorizes retroactive pay under the CIP back to the date of the CIP application. Read literally, one could view this provision of the ordinance as an implied prohibition against any retroactive pay for periods prior to the date of application. But as discussed further below, our review determined that in practice, it is not unusual for the City to award pay under the CIP for periods before the date of the CIP application based on an earlier onset of a catastrophic illness, and DPH and the Controller interpreted this section to mean that CIP payments could go back to the date of onset of the illness as established by the attending physician.

2. Facts.

Under the Ordinance, DPH certifies eligibility for participation in the CIP and establishes the dates for participation. As noted above, the CIP application form includes a space for the physician to describe the onset of the catastrophic illness. In the case of Ms. Rippey-Tourk's CIP application, Dr. Katz certified a date for commencement that preceded the date on which she applied for the CIP. Dr. Katz explained that in establishing the commencement date, he relied solely on the date of onset of the illness noted by Ms. Rippey-Tourk's doctor on the physician's certification sheet. He reasoned that standard qualification for social security, state disability, and workers compensation all use the date of onset of illness or injury as the beginning date of qualification for those programs, and he believed that the CIP was a similar benefit. Dr. Katz had treated other applications in a similar fashion where the attending physician certified that an employee's illness began before the date of the CIP application.

Once DPH approves a CIP application, under the Ordinance it is then the Controller's responsibility to calculate the payment due under the CIP. Here, the Controller's approval came after Ms. Rippey-Tourk had tendered her resignation letter on July 21, 2006. Ms. Rippey-Tourk signed her separation report on August 22, 2006. Her resignation date was set in that report for August 31, 2006. In light of her resignation, when processing the CIP payment for Ms. Rippey-Tourk the Controller's Office specifically considered how to credit her with the time and eventually pay her under the program.

Monique Zmuda, Deputy Director of the Controller's Office, made the decisions regarding Ms. Rippey-Tourk's CIP application because Ed Harrington, the Controller, was out of the office during this period. (Mr. Harrington was on vacation from August 15 to

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September 8, 2006, and he informed us he did not learn about this matter until Ms. Zmuda briefed him after he returned to the office.) Ms. Zmuda told us that she considered this question about how to credit time and make CIP payments in late August after DPH forwarded the approved application. Ms. Zmuda believed that this situation was unusual in that the CIP payment would be made retroactively to an employee who was separating from City employment. Ms. Zmuda said that she considered advice from Mr. Ginsburg, Dr. Katz, and Sandra Holmes, Director of Payroll for the Controller, regarding the procedure that the Controller's Office should follow.

Mr. Ginsburg informed Ms. Zmuda that he was not aware of any City law or rule that prevented the retroactive payment for the CIP to the date of onset of the illness. Therefore, he believed that the City should apply donated sick leave and make payment to cover leave that qualified under the CIP even if the leave period occurred before the date of the application. Ms. Zmuda conducted her own research and reached the same conclusion that the Ordinance did not prohibit this practice. Ms. Zmuda talked with Ms. Holmes, who told her that while it was not unusual for the City to make lump sum payments retroactive to the date of the qualifying illness or injury even if before the date of a CIP application, she was not aware of any prior lump sum payments being made to a separating employee.

Ms. Zmuda also consulted with Dr. Katz about this issue. Dr. Katz told her of his view that the beginning date for the CIP approval should begin on a medically established date for onset of illness. In the case of Ms. Rippey-Tourk, this was set by Ms. Rippey-Tourk's attending physician who completed the CIP certification. Both Dr. Katz and Mr. Ginsburg expressed their view that questions about availability of the CIP benefit should generally be decided in favor of the employee, because not doing so would deprive the employee of this benefit.

Ms. Holmes told us that she first became aware of this issue when Ms. Zmuda called her and asked if the Controller ever made a lump sum retroactive payment to a departing employee. She told Ms. Zmuda that, to her knowledge, a similar payment had not been made. Ms. Holmes told us that she and other employees track CIP participant payments manually. Each pay period, after being notified by the CIP participant's human resources office to make payment, they check that leave balances and donated leave balances are appropriate and then issue pay warrants accordingly.

Ms. Holmes explained to us that the Controller has made a number of retroactive lump-sum payments to CIP participants in the past. Retroactive payments are inherent in the program, since many participants apply for CIP after they recover and return to work. Approval of the CIP application after the fact requires the payroll staff to calculate how much time a participant will be credited and how much they will be paid. These payments have been made in retroactive lump sums. But she told us that Ms. Rippey-Tourk's payment was different. Ms. Holmes said that, to her knowledge, the Controller had never been presented with a situation where a pay warrant under the CIP was issued to an employee who was leaving City employment.

Once the CIP payment was approved, Controller's Office personnel calculated the amount of City paid leave Ms. Rippey-Tourk was due, based on the amount of donated leave time she had in her CIP leave bank. From May 22 through August 31, 2006, Ms. Rippey-Tourk took 521 hours of unpaid leave. Employee leave donations totaling 264 hours were submitted for Ms. Rippey-Tourk under the CIP. The amount of donated time compensated Ms. Rippey-Tourk for about one-half of the unpaid leave time she took in 2006. The compensation in her

last paycheck consisted of amounts due under the CIP as calculated by the Controller's Office and the final holiday pay balance that she had properly accrued.

3. Conclusion.

The fact that Ms. Rippey-Tourk was credited for donated time under the CIP for periods predating her CIP application is not unusual. There have been a number of instances in which the CIP program has been administered in this way. Under many circumstances, an employee who otherwise qualifies for the CIP will exhaust her paid leave before filing a CIP application. For example, the employee may not have very much paid leave banked, or the employee may not be aware that her condition qualifies for the CIP, or even that the CIP exists, until long after the onset of illness.

This practice raises a policy issue. The Ordinance states that payments may be made retroactively from the "date of certification of eligibility back to the date of the application." The Board of Supervisors and the Mayor may wish to amend the Ordinance either to conform to practice by clarifying that payments may be made retroactive to the onset of illness, even if before the date the application is submitted, or to state more precisely a rule allowing payments retroactively only to the date of the CIP application.

The unique aspect of this situation is the fact that Ms. Rippey-Tourk had given notice that she intended to leave City employment and was seeking other work at the time her CIP application was approved. While payment in these circumstances was unusual, the Ordinance does not prohibit it. Consistent with the Ordinance, her CIP application was approved and the retroactive payment authorized while she was still a City employee eligible for these payments. A similar situation could arise in the future, and current City policy and practice would allow a CIP payment to be approved or processed after an employee has left City employment, whether through voluntary separation, permanent disability, or death. Depending on the circumstances, such payments may be consistent with the goals of the CIP. Again, if as a policy matter the Board of Supervisors and the Mayor would prefer a rule prohibiting payments to employees who are separating from City employment, including circumstances where they have accepted a new job, they could amend the CIP ordinance to incorporate such a limitation.

C. LEAVE USE

1. City Law and Procedure.

City employment rules specify the amount of leave time–including paid vacation and paid sick leave–earned by employees based on their service. The Charter establishes vacation and certain other special forms of leave; Civil Service rules cover sick leave and other leaves of absence (see Exhibit C for a web link to the City's Civil Service rules); memoranda of understanding (MOUs) between the City and employee bargaining units cover floating holidays, administrative leave and the like. Questions have been raised concerning whether Ms. Rippey-Tourk took more leave than she was entitled to.

2. Facts.

This issue arose after City departments responded to Sunshine requests for Ms. Rippey-Tourk's payroll records. To protect her privacy, and consistent with past City practice in responding to Sunshine requests regarding employee time sheets, the nature of the leaves taken were redacted to show only "leave taken" and not the specific type of leave. In some news

accounts reporters attempted to tally these leave numbers and claimed that they did not appear to correspond with the leave amounts Ms. Rippey-Tourk was due as a City employee.

We requested a report from the Controller's Office regarding the leave that Ms. Rippey-Tourk accrued and the leave she took from 2004 through 2006. This report establishes that Ms. Rippey-Tourk accrued leave consistent with her employment contract and City regulations. She took only what she had a right to take in paid sick leave, vacation leave, holiday leave, floating holiday leave, and compensatory leave. Since the report from the Controller's Office specifies the dates and types of all leaves taken by Ms. Rippey-Tourk, it is subject to the same privacy protections as her time sheets, discussed above.

In 2004, Ms. Rippey-Tourk took 341 hours of unpaid leave. Based on a properly submitted and approved unpaid leave request form, present in her personnel file, this leave was her right to take and was taken appropriately. She used less than the original amount of leave approved in this instance.

In 2006, Ms. Rippey-Tourk took unpaid leave beginning in mid-May. This leave was discussed above in the Retroactive Payment section of this report.

3. Conclusion.

Based on the report from the Controller's Office, Ms. Rippey-Tourk's use of paid leave (which may include sick leave, vacation leave, holiday leave, and administrative leave), and unpaid leave as a City employee was consistent with City law and rules.

D. PAYROLL TIME SHEET APPROVAL

1. City Law and Procedure.

Questions have been raised about whether City law and procedures were followed with respect to Ms. Rippey-Tourk's time sheet approval. Our review indicates that during the majority of time that Ms. Rippey-Tourk was employed by the Mayor's Office, senior staff members were not required by any policy or practice of the City or the Mayor's Office to have a supervisor approve their time sheets. Ms. Rippey-Tourk was considered senior staff. Therefore, Ms. Rippey-Tourk was not required to have a supervisor sign her time sheets. The Mayor's Office changed its policy sometime around the end of 2005, and Steve Kawa, then Chief of Staff, began signing time sheets for senior staff.

2. Facts.

Redacted versions of Ms. Rippey-Tourk's time sheets have been produced pursuant to Public Records Act requests. The time sheets are all in a similar format, and have signature blocks for the employee and for an "authorized signature." No redactions were made regarding these signature blocks. On many of Ms. Rippey-Tourk's time sheets, there are no signatures on one or both of these signature blocks.

All departments, including the Mayor's Office, now use the payroll "roster" to inform the Controller who to pay and the amount to pay. The human resources unit of each office inputs payroll data directly into the automated roster program in the City's payroll system. This system completes an automated review of leave balances and other factors to ensure that the data are accurate for payroll purposes. Only the employee in charge of human resources for each department needs to certify the data for all employees in their specific department. Employees

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begin the process by inputting their own data into the roster and are responsible for its accuracy. But, signatures generally are not required. According to Ms. Holmes, there are many ways that individual departments collect data to put into the payroll roster.

According to Monique Zmuda of the Controller's Office, the Mayor's Office is one of the last offices in the City to use time sheets. Shalonda Baldwin explained how the Mayor's Office payroll system works. The individual employee provides individual input into a computerized time sheet. At the end of the payroll cycle, the employee prints the sheet and submits it to Human Resources. Human Resources then reviews the employee input. At times an employee enters incorrect data or draws from a leave bank that does not have sufficient time in it. In these cases the payroll clerks make corrections by hand. This accounts for the many marks one would see on a seemingly automated time sheet, and this is a common payroll practice.

As mentioned above, before the end of 2005 there was no requirement that senior staff in the Mayor's Office obtain a supervisor's signature on their time sheets. The absence of such signatures before that time, therefore, is not surprising. Similarly, the fact that Ms. Rippey-Tourk occasionally signed as her own "authorized signature" during this period was not legally improper, as no such signature was required. The fact that Ms. Rippey-Tourk occasionally did not sign her own time sheets did violate the practice in place at the Mayor's Office during this time. Most of these unsigned time sheets were submitted in 2004 and 2006, during periods in which Ms. Rippey-Tourk was absent from the office on unpaid leave.

In late 2005, the Mayor's Office policy changed. Under the new policy, then Chief of Staff Steve Kawa would sign off on the time sheets of senior staff members. In his absence, Deputy Chief of Staff Alex Tourk would sign off on the time sheets. Because of this policy, Mr. Tourk signed off as "authorized signature" for several of his wife's time sheets. Because Mr. Tourk approved his wife's time sheets, this practice was inappropriate and at least created the appearance of impropriety though it does not appear to have violated City laws. Ms. Baldwin told us that she noticed that Mr. Tourk was signing Ms. Rippey-Tourk's time sheets and discussed the practice with Mr. Kawa. Ms. Baldwin said that this practice was then stopped. Review of the time sheets confirms that, with two exceptions, a supervisor did sign off on Ms. Rippey-Tourk's time sheets from November 2005 through April 2006. Mr. Tourk did not sign any of his wife's time sheets after January 2006.

As discussed above, Ms. Rippey-Tourk was absent from the Mayor's Office on unpaid leave from May 24, 2006 forward. Ms. Baldwin told us that once Ms. Rippey-Tourk left on unpaid leave, Ms. Baldwin or her staff began to complete her time sheets and place them in the file as a record of what was happening with Ms. Rippey-Tourk. A review of the time sheets confirms that Ms. Rippey-Tourk did not sign any time sheets from the time she left in May 2006.

We understand that after Mr. Ginsburg became Chief of Staff and became aware of the past practices involved here that he changed the Mayor's Office internal policy in March 2007 to require approval of an employee's time sheets by the employee's supervisor.

3. Conclusion.

As stated above, there was a great deal of inconsistency in the manner in which Ms. Rippey-Tourk's time sheets were signed and approved. Before the end of 2005, the policy of the Mayor's Office did not require any supervisor to sign off on the time sheets of senior staff. After that time, the Mayor's Office changed the policy to require a signature for time sheets for senior staff and in most cases after this change Ms. Rippey-Tourk's time sheets were approved.

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In several instances during this period Mr. Tourk signed his wife's time sheets and such approval was inappropriate. But there is no indication that any unlawful payments were made to Ms. Rippey-Tourk in connection with the completion and approval of her time sheets during her tenure in the Mayor's Office. Nor did our review demonstrate that the practices of the Mayor's Office involving her time sheets violated established City policies or procedures.

As mentioned above, we understand that the Mayor's Office recently adopted a new policy requiring the time sheets for a Mayor's Office employee to be signed and approved by the employee's supervisor. It is a policy matter for the Board of Supervisors and the Mayor whether to amend the City's anti-nepotism law to cover the sort of situation that occurred here regarding approval of Ms. Rippey-Tourk's time sheets by her husband, and a policy matter for the Board of Supervisors, the Mayor, the Controller, the Department of Human Resources and the Ethics Commission whether to institute a formal City policy requiring approval of employee time sheets in a particular manner, or not at all.

E. OUTSIDE EMPLOYMENT

1. City Law and Procedure.

Under Civil Service rules, City employees are generally prohibited from being paid by another employer while on sick leave from the City. (Civil Service Rules, §§ 120.11, 120.21.) Published information indicates that Ms. Rippey-Tourk was working for Benefit Magazine by September 2006, and has raised questions concerning whether she may have been working (or volunteering) for Benefit Magazine before that time, and whether she may have violated Civil Service rules.

2. Facts.

According to an article published in the Focus section of the November/December 2006 edition of Benefit Magazine, Ms. Rippey-Tourk began hosting a weekly, hour-long radio show (Benefit Radio) on September 9, 2006. The show debuted a little over a week after Ms. Rippey-Tourk formally separated from City employment. Other published accounts suggest that Ms. Rippey-Tourk may have begun working for Benefit Magazine, on either a paid or an unpaid basis, before September 2006.

During the course of this review, the Controller and the City Attorney's Office issued an administrative subpoena to Benefit Magazine seeking certain records relating to this issue. In a verified response to that subpoena, Benefit Magazine produced several pages of records relating to Ms. Rippey-Tourk. Based on these records, it appears that Ms. Rippey-Tourk was not formally engaged as a host and producer of Benefit Radio until October 4, 2006. Payment records indicate that Ms. Rippey-Tourk received an "advance" from Benefit Magazine on September 19, 2006. There is no indication of any payment before that time.

There is also a statement in the records that Benefit Magazine produced indicating that Ms. Rippey-Tourk served as an unpaid co-host for a charitable event held in April 2006. Other than that, there is no indication in these records of work performed by Ms. Rippey-Tourk, on either a paid or unpaid basis, before September 1, 2006. Because Ms. Rippey-Tourk would not consent to be interviewed by us, we could not verify with her the information contained in the records produced by Benefit Magazine, including the information regarding her date of hire as a

paid employee or determine whether she worked as an unpaid intern or volunteer during times when she was on leave from her job with the City.

3. Conclusion.

Our review, including our review of the records discussed above, has not uncovered evidence that Ms. Rippey-Tourk's work for Benefit Magazine violated City law, including Civil Service rules.

LIST OF EXHIBITS

Exhibit A: CIP Ordinance
Exhibit B: CIP Application Form
Exhibit C: Civil Service Rules

EXHIBIT A

CIP ORDINANCE

The City's CIP ordinance is set forth in Section 16.9-29A of the City's Administrative Code. This ordinance and any other City code provisions may be searched on-line at http://www.municode.com/resources/ClientCode_List.asp?cn=San%20Francisco&sid=5&cid=4201.

The text of the CIP ordinance reads as follows:

SEC. 16.9-29A. T. J. ANTHONY EMPLOYEE CATASTROPHIC ILLNESS PROGRAM - TRANSFER OF SICK LEAVE AND VACATION CREDITS TO INDIVIDUAL CATASTROPHICALLY ILL EMPLOYEES OR TO A POOL OF CATASTROPHICALLY ILL EMPLOYEES.

(a) Purpose. To enable catastrophically-ill employees to continue to be paid through donations of sick leave and vacation hours from other employees, as authorized by Charter Sections A8.364 and A8.441. This program shall be known as the Catastrophically Ill Program, or "CIP." This Section only provides for receipt of such credits as are donated and does not provide for an absolute right of continued paid leave.

(b) Establishment of Pool; Administration and Rule-Making Authority. There is hereby established a pool into which employees may donate sick leave and/or vacation credits to benefit catastrophically-ill employees. The Controller shall have authority to administer the CIP program, including the authority to make and enforce rules not inconsistent with this Section, with consultation from the Director of Health.

(c) Definitions.

(1) A "catastrophic illness" shall mean a life-threatening illness or injury, as determined by the Department of Public Health.

(2) An "active participant" in the CIP is defined as a City employee who has applied for Catastrophic Illness Status and been notified of his or her acceptance in the CIP by the Department of Public Health or its designee and whose participation in the CIP has not terminated, regardless of whether or not the employee has actually received or used any donated sick leave and/or vacation credits.

(d) Eligibility of Employees To Participate in CIP. Any employee of the City and County of San Francisco may participate in the CIP if the employee meets all of the following conditions:

(1) The employee is eligible to accumulate and use sick leave and vacation credits;

(2) The employee is catastrophically ill;

(3) The employee has exhausted all of his/her available paid leave; and

(4) The employee does not participate in a short or long-term disability program for which the City pays in whole, directly or indirectly, or if the employee participates in such a program, the employee agrees to, and does, apply for disability benefits immediately upon becoming eligible for such benefits. Any employee who participates in a short or long-term disability program for which the City pays in whole, directly or indirectly, may participate in the CIP program until the employee receives or is qualified to receive benefits under the terms of a short or long-term disability program for which the City pays in whole, directly or indirectly. Any employee who is receiving or is qualified to receive short or long term disability benefits from a short or long term disability program for which the City pays in whole, directly or indirectly, may not participate in the CIP program until and unless the employee's disability benefits terminate. Any employee who, while or after participating in the CIP program, retroactively receives or is qualified to receive short or long term disability benefits from a short or long term disability program for which the City pays in whole, directly or indirectly, must reimburse the City for the CIP payments received during the period which the short or long term

disability program applies. Failure to do so will result in the City's placing a lien for the unreimbursed amount on the employee's future wages and benefits (not including workers' compensation or retirement.) This paragraph does not apply to employees who are active participants in the CIP as of the effective date of this Amendment and have been active participants since March 29, 2002.

(e) Procedure for Applying for Catastrophic Illness Status.

(1) An employee must complete a prescribed application form and return it to the Department of Public Health, together with supporting medical documentation. The Department of Public Health shall produce and maintain sufficient quantities of the prescribed application for employee access and distribution.

(2) The Department of Public Health or its designee shall examine the documentation supporting the application. The Department of Public Health or its designee may ask the applicant to submit further documentation and/or to submit to examination by a physician that it designates to determine in fact that the applicant does suffer from a catastrophic illness within the meaning of this Section. An applicant's failure to comply with these requirements may be grounds for rejection of the application.

(3) In order to continue to qualify as catastrophically ill, a CIP employee may from time to time be required to submit to specified examination, or to supply further documentation of current medical status, as is necessary in the opinion of the Department of Public Health or its designee; provided, however, that such requests shall not be made for the purpose of harassing said employee. In addition, an employee may be required to submit documentation of application for and/or status of disability benefits.

(4) If the Department of Public Health determines that an employee is not catastrophically ill, the employee shall have a right to appeal the decision through an administrative appeal process to be established by the Health Commission, which shall include the right to a review by the Director of Health and, finally, a hearing before the Health Commission. The Department of Public Health shall provide the employee with a written letter setting forth the reasons for denial and the procedure for filing an administrative appeal. The Health Commission shall promulgate and post the administrative appeal rules within 60 days of the effective date of this ordinance. The administrative appeal process in its entirety shall not exceed 60 days. An employee whose application has been disapproved is not obligated to exhaust the administrative appeals process before reapplying. Instead, the employee may reapply after observing a 30-day waiting period from the date of the initial denial.

(f) Posting of Eligible Recipients.

(1) The Department of Public Health shall assign an exclusive number to each catastrophically ill employee deemed eligible to participate in the CIP.

(2) The Department of Public Health shall maintain, reproduce and post a running list of CIP employees, to be identified only by their exclusive numbers, in order to let transferring employees designate a recipient.

(3) The list may include the amounts of sick leave and vacation credits already transferred or on reserve to each CIP employee.

(4) In all cases, the Department of Public Health and its designees shall shield and protect the true identities of CIP employees.

(g) Eligibility to Transfer Sick Leave and/or Vacation Credits. Any employee of the City and County of San Francisco who is eligible to accumulate and use vacation credits and sick leave may transfer sick leave and/or vacation credits to the CIP pool or to an individual CIP employee, subject to the following conditions:

(1) The transferring employee must retain a minimum sick leave balance of 64 hours.

(2) Transfers must be in units of eight hours.

(3) All transfers are irrevocable.

(4) The transferring employee may transfer hours to the CIP (pool or individual) only once per pay period.

(5) The transferring employee may transfer a maximum of 160 hours per pay period, of which no more than 80 hours may be to individual CIP employees.

(6) The transferring employee may transfer a maximum of 480 hours per fiscal year to the pool and to individual CIP employees combined.

(7) Neither a transferring employee nor a CIP employee may be in violation of Subsection (k).

(h) Use of Transferred Sick Leave and Vacation Credits.

(1) All hours transferred shall be credited as sick leave for the CIP employee. As they are used, they shall be treated as the employee's own sick leave for all purposes, including for continued accrual of vacation credits, sick leave, and retirement service; service for pay increments; and eligibility for holiday pay.

(2) At the beginning of each pay period, a CIP employee must use all sick leave and vacation credits accrued during the previous pay period before using any transferred hours.

(3) A CIP employee may use transferred hours retroactively from the date of certification of eligibility back to the date of application.

(4) A CIP employee may use transferred credits in a pay period to the extent that when combined with other compensation from the City and County and all other benefits from public sources, the total does not exceed the pay for 100 percent of the employee's regularly scheduled hours for such pay period (excluding regularly scheduled overtime and premium pay). A CIP employee may be required to provide financial records to prove compliance with this subsection. Failure to provide such records is grounds for exclusion from the CIP.

(i) Redistribution of Transferred Hours Upon Termination of Participation In CIP. If a CIP employee dies, retires, resigns or begins receiving disability benefits before having used all hours transferred pursuant to this Section, the unused hours shall be transferred to the CIP pool. If a CIP employee's participation in the CIP expires or is terminated before the employee has used all hours transferred pursuant to this Section, all unused hours in excess of 64 hours shall be transferred to the CIP pool.

(j) Confidentiality.

(1) All medical records submitted by an employee pursuant to this statute are to be kept confidential by the Department of Public Health or its designee.

(2) Until the Department of Public Health has rendered its opinion pursuant to Subsection (d) that the employee is catastrophically ill, the fact of an employee's application is to be kept confidential by the parties processing the application and not shared with the employee's department head.

(3) The names of employees donating hours pursuant to this provision are to remain confidential.

(4) Violation of the provisions of this subsection or any other provision relating to confidentiality protections shall be grounds for disciplinary action.

(k) No Selling or Coercion.

(1) No individual shall directly or indirectly solicit the receipt of, or accept, any compensation in full or partial exchange, directly or indirectly, for sick leave or vacation credits to be transferred pursuant to this Section.

(2) No individual shall solicit the receipt of, or accept, the transfer of any sick leave or vacation credits pursuant to this Section in full or partial exchange, directly or indirectly, for any compensation.

(3) No individual shall threaten or in any way attempt to coerce an employee with respect to transfer of sick leave or vacation credits pursuant to this Section.

(4) Violation of the provisions of this subsection shall be grounds for termination of participation in the CIP and for disciplinary action.

(l) Notices. The Civil Service Commission shall develop notices with relevant information about the CIP. These notices shall be distributed to all appointing officers who shall then post them in public places where other notices advising employees of rights and benefits are posted.

(m) Termination of this Provision. Unless otherwise specified by ordinance or Charter provision, the provisions of this Section shall expire upon the effective date of an ordinance or Charter section instituting, or upon the effective date of the last MOU through which all City employees are covered by, a long-term disability program.

(n) Limitation. In undertaking the adoption and enforcement of this ordinance, the City and County of San Francisco is assuming an undertaking only to promote the general welfare. It is not assuming, nor is it imposing on its officers and employees, an obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury. (Added by Ord. 175-01, File No. 010059, App. 8/17/2001; amended by Ord. 34-02, File No. 011741, App. 3/29/2002; ; Ord. 84-04, File No. 040194, App. 5/20/2004

EXHIBIT B

BLANK FORM OF CIP APPLICATION

City and County of San Francisco | Department of Public Health

APPLICATION FOR CATASTROPHIC ILLNESS PROGRAM (CIP)

(Administrative Code Section 16.9 – 29A)

INSTRUCTIONS: Applicant **must** complete Section I; Sections II, III & IV are completed by Department of Public Health; Employee's Physician must complete the entire page 3; Mail complete form to: Catastrophic Illness Program – Department of Public Health (DPH), Human Resources Services/Personnel, 101 Grove Street, Room 212, San Francisco, CA 94102.

I. Application ☐ **New** ☐ **Extension**

Employee Name: _____ **SSN:** _____ **DATE:** _____

Address: _____ **City:** _____

State: _____ **Zip Code:** _____ **Telephone: ( )**_____

Department: _____ **Class:** _____

Applicants are required to disclose all benefits received from public sources. These benefits include but are not limited to payment for unemployment, disability, workers compensation and social security. Applicant may be required to provide financial to prove compliance to this policy.

Are you covered by a City paid long or short term disability (premiums paid by the City) Specify: _____

_____

Eligibility of Employee to Participate in CIP Program:

Any employee of the City and County of San Francisco may participate in the CIP if the employee meets all of the following conditions: 1) the employee is eligible to accumulate and use sick leave and vacation credits; 2) the employee is catastrophically ill; 3) the employee has exhausted all of his/her available paid leave; and 4) the employee does not participate in a short or long-term disability program for which the City pays in whole, directly or indirectly, or if the employee participates in such a program, the employee agrees to, and does, apply for disability benefits immediately upon becoming eligible for such benefits. Any employee who participates in a short or long-term disability program for which the City pays in whole, directly or indirectly, may participate in the CIP program until the employee receives or is qualified to receive benefits under the terms of a short or long-term disability program for which the City pays in whole, directly or indirectly. Any employee who is receiving or is qualified to receive short or long term disability benefits from a short or long term disability program for which the City pays in whole, directly or indirectly, may not participate in the CIP program until and unless the employee's disability benefits terminate. *Any employee who, while or after participating in the CIP program, retroactively receives or is qualified to receive short or long term disability benefits from a short or long term disability program for which the City pays in whole, directly or indirectly, must reimburse the City for the CIP payments received during the period which the short or long term disability program applies. Failure to do so will result in the City's placing a lien for the unreimbursed amount on the employee's future wages and benefits (not including worker's compensation or retirement).* This paragraph does not apply to employees who are active participants in the CIP as of the effective date of this Amendment *and have been active participants since March 29, 2002.*

AUTHORIZATION FOR RELEASE OF MEDICAL RECORDS/NOTIFICATION TO SHORT TERM DISABILITY (STD)/LONG TERM DISABILITY (LTD) PROVIDER:

I hereby authorize my physician to release my medical records to the San Francisco Department of Public Health for its evaluation of my application for Catastrophic Illness Status. I also authorize the DPH to contact my physician as part of its evaluation. I authorize the City and County of San Francisco to contact my STD and LTD providers, notify them of approval of my application, and request and receive information from my STD and LTD providers regarding my coverage.

Employee's Signature: _____ **Date :** _____

II. DPH Determination ☐Approved ☐ Denied

DPH has provisionally determined that you are Catastrophically Ill. This determination of Catastrophic Illness is valid until _____ and must be re-evaluated at that time. If you wish to have your Catastrophic Illness Status extended beyond the above date, you **must** submit a new application.

Name _____

Your eligibility to receive donated sick pay and vacation credits is subject to the following:

1. You must be eligible to accumulate and use sick leave and vacation credits; and,
2. You must have exhausted all available paid sick, vacation, compensatory and in-lieu time. See instructions in Part III below.

Your Recipient Identification Number RIN) is: _____
(six digit number)

DPH has determined that you are not Catastrophically Ill for the following reasons:

_____

_____

You may appeal this decision to the Director of Health. Please call the DPH Personnel Office (415) 554-2580 for appeal procedures.

DPH Designee:_____ _____
Signature **Date**

III. INSTRUCTIONS FOR PROCESSING

Call your payroll Office if you have questions on your balances.

1. Your Department Payroll Office must certify the following on this form.

   Employee has exhausted all available paid sick, vacation, compensatory and in-lieu time.

   CERTIFIED: _____ _____
   Name and Title **Department**

2. The Department Payroll Office will submit this form to either PPSD, SFUSD or SFCCD Payroll once the certification above is made.

IV. DISTRIBUTION

1.) Following completion of Part II, DPH will distribute the form to:
Applicant (with RIN)
Applicant's Department Head (w/o RIN)
PPSD or SFUSD or CCSF Payroll (with RIN)
DPH File Copy (w/o RIN)
Retirement (w/o RIN)
STD/LTD Providers

2.) following completion of Part III, Department Payroll Office distributes this form to:
PPSD or SFUSD Payroll Office
Applicant
Department File Copy

City and County of San Francisco Department of Public Health

PHYSICIAN'S CERTIFICATION OF CATASTROPHIC ILLNESS

Date Physician Completes this form: _____

Patient Name: _____

Patient Diagnosis:

_____

_____

Onset of Catastrophic Illness:

_____

_____

Course of Treatment(s) and Date(s):

_____

_____

_____

_____

_____

_____

Symptoms which result in inability to work (Explain):

_____

_____

_____

Current Prognosis:

_____

_____

_____

When do you anticipate Patient will be able to return to work? (Please provide the anticipated or exact date of return to work)

_____

I certify that the above-named patient should be considered for approval of catastrophic illness status. She/He has a life-threatening illness or injury.

Attending Physician Only

Signature: _____ Date: _____

Physician's Name/Title (print):
_____

Business Address/Street:
_____

City: _____ State: _____ Zip Code: _____

Work Phone Number and Extension: _____ License #: _____

EXHIBIT C

CIVIL SERVICE RULES

All of the City's Civil Service Rules that apply to the matters discussed in this report are too voluminous to set forth here. They may be found on line at the following web address: http://www.sfgov.org/site/civil_service_index.asp?id=4519. In particular, Civil Service Rule 120, Leaves of Absence (applicable to City employees except police, fire and MTA service critical), which includes Sick Leave, may be found at: http://www.sfgov.org/site/civil_service_page.asp?id=6305.

The full text of specific Civil Service Rules cited in the report include the following:

120.7.1 Sick Leave - Medical Reasons
Absence because of illness, including alcoholism, or injury other than illness or injury arising out of and in the course of City and County employment; absence due to illness or injury arising out of and in the course of employment is administered either under the Rules of the Retirement Board and is referred to as "disability leave" and may be supplemented as provided elsewhere in this Rule or under the provisions of this Rule and the Administrative Code for those employees injured by battery ("leave due to battery"); and absence because of medical or dental appointments.

Sec. 120.11 Prohibition Against Employment While on Sick Leave with Pay
120.11.1 Employees are prohibited from working in any other employment while on sick leave with pay unless, after considering the medical reason for the sick leave with pay, the appointing officer with the approval of the Human Resources Director, grants permission for the employee to engage in a secondary employment subject to the provisions of these Rules governing such employment.
120.11.2 Violators of this section are subject to disciplinary action as provided in the Charter.

Sec. 120.21 Prohibition Against Employment While on Sick Leave Without Pay
120.21.1 Employees are prohibited from working in any other employment when on sick leave without pay unless, after considering the medical reason for the sick leave without pay, the appointing officer with the approval of the Human Resources Director, grants permission for the employee to engage in outside employment.
120.21.2 Violators of this section are subject to disciplinary action.