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ETHICS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

In the Matter of Mayor ED LEE's Written Charges Against ROSS MIRKARIMI, Sheriff, City and County of San Francisco.	**SHERIFF ROSS MIRKARIMI'S CLOSING BRIEF** Hearing Date: August 16, 2012 Hearing Time: 9:00 a.m. Location: City Hall Room 263

I. INTRODUCTION

At the end of a unnecessarily protracted dog and pony show, the Mayor's proclamations that he could and would prove anything besides a pre-term-of-office act by Sheriff Mirkarimi and a subsequent guilty plea to a misdemeanor, have come to naught. The Mayor has utterly failed in his effort to prove one of the central points in his written charges of misconduct: that Sheriff Mirkarimi engaged in any act of witness dissuasion. The remaining acts alleged as official misconduct – mainly that there was some impropriety in the manner in which the Sheriff turned his firearms into law enforcement – would be laughable if they did not reveal the depths

to which the Mayor's team is willing to descend to buttress a legally flawed case. Indeed, it is telling that even though the Mayor himself admitted during his testimony that he did not believe such conduct was sufficient to remove an elected official from office, see 6/29/12 Tr. at 881: 5-10, his lawyers continue to vigorously press that argument.

What remains, then, are two facts which legally cannot constitute official misconduct. The first -- that the Sheriff grabbed his wife's arm hard enough to leave a bruise -- cannot constitute official misconduct because this act occurred before Sheriff Mirkarimi assumed the office of Sheriff. The second, that he pled guilty to a misdemeanor false imprisonment, cannot constitute official misconduct because that plea of guilty was not an act of misconduct at all, but rather the speaking of a word or words that resulted in the resolution of criminal charges. In other words, the legally operative fact, for the purpose of these proceedings, is not the fact of the guilty plea or conviction but rather the conduct underlying the conviction.

Moreover, neither of these events – the arm grab or the guilty plea -- are "wrongful behavior by a public official in relation to the duties of his office", which is what is required by the Charter. The duties of the Sheriff are clear and they are set forth in SF Charter section 6.105. They are to:

1. Keep the County jail;
2. Receive all prisoners committed to jail by competent authorities;
3. Execute the orders and legal processes issued by courts of the State of California;
4. Upon court order detail necessary bailiffs; and
5. Execute the orders and legal processes issued by the Board of Supervisors or by any legally authorized department or commission.

These are the only duties of the Sheriff of San Francisco. Anything else is mere surplusage.

Neither grabbing his wife's arm nor pleading guilty to a misdemeanor bears any relation at all to the enumerated duties of the Sheriff. In other words, he was not engaged in the performance or neglect of any of these duties when he grabbed his wife's arm or pled guilty to a misdemeanor.

In apparent recognition of this seemingly obvious fact, the Mayor has resorted to linguistic gymnastics (the Sheriff is the jail-keeper; the Sheriff was booked into the jail, etc.) to attempt to torture the Sheriff's acts into a definition of official misconduct that this Commission, the Board of Supervisors, or even the average citizen might be able to recognize.

For all these reasons, the Commission should recommend that these charges not be sustained by the Board of Supervisors.

Lastly, even if this Commission were to find that any of the allegations do constitute official misconduct, the Commission could -- and should -- recommend that the Board find that the conduct does not rise to a level which warrants removal from office. In this regard, the Charter mandates that the Commission make a recommendation to the Board, but does not define what form such a recommendation must take. Throughout these proceedings, Sheriff Mirkarimi has maintained that the Charter's lack of clarity as to both a workable standard of official misconduct, and absence of any clear rules for this proceeding, renders Section 15.105 constitutionally flawed. Any lack of clarity, however, must be construed in the light most favorable to the accused. Hence, the Commission is entitled and empowered to make a recommendation that the Board not vote to remove the Sheriff from office even if it deems that there was some measure of official misconduct. Such a recommendation would be in accord with the graduated system of discipline which governs hired employees of the City.

II. ARGUMENT

A. THE CORRECT CONSTRUCTION OF SAN FRANCISCO CHARTER SECTION 15.105 IS THAT THE STANDARD OF DECENCY CLAUSE MUST BE APPLIED IN CONJUNCTION WITH THE DUTIES OF THE ELECTED OFFICE.

The Commission has requested the parties' views on the correct interpretation of SF Charter section 15.105(e)'s definition of official misconduct. The Chair has propounded two different options as possible interpretations. The first (hereafter Option 1) would disconnect the so-called "decency clause" from the "wrongful behavior in relation to duties of office" clause. The second (hereafter Option 2) would connect these two concepts so that the decency clause

must be read in conjunction with the officer's behavior in relation to the duties of his or her office. For the reasons explained below, the Commission must adopt the second option.

Statutory construction begins with the plain, commonsense meaning of the words in the statute, "because it is generally the most reliable indicator of legislative intent and purpose." (*People v. Skiles* (2011) 51 Cal.4th 1178, 1185.) "When the language of a statute is clear, we need go no further." (*People v. Flores* (2003) 30 Cal.4th 1059, 1063.)

When construing any statute, the goal is to ascertain the intent of the enacting legislative body so that the construction may be adopted that best effectuates the purpose of the law. But where a statute's terms are unclear or ambiguous, courts may "look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. (*In re M.M.* (2012) 54 Cal. 4th 530, 536.)

There is no guidance to be found in the legislative history of this section of the Charter, as it was amended and enacted by referendum in 1995. The ballot statements for and against the new Charter make no reference to the definition of official misconduct at all.

However, it is obvious that the drafter(s) of this portion of the 1995 Charter took the definition of the phrase "official misconduct" from the Court of Appeal opinion in *Mazzola v. City and County of San Francisco* (1980) 112 CA2d 141. When a central portion of the *Mazzola* case is examined, it becomes apparent that in drafting section 15.105's current definition of official misconduct, the only word that was added to the *Mazzola* definition of official misconduct was the word "decency." To explain this, it will be helpful to set forth that portion of the *Mazzola* opinion at length.

At the time Mazzola was removed from the Airport Commission for official misconduct, the San Francisco Charter did not define the term "official misconduct." In rejecting a void-for-vagueness challenge to the phrase "official misconduct", as used in former SF Charter section 8.107, the Court of Appeal stated as follows:

> The words "official misconduct," under attack here, are virtually the same words as "misconduct in office," the language relied on in article IV, section 18, subdivision (b) of

the California Constitution which provides the basis for impeachment of state officers and judges of the state courts.

Black's Law Dictionary defines "official misconduct" as "[any] unlawful behavior by a public officer in relation to the duties of his office, willful in its character, including any willful or corrupt failure, refusal, or neglect of an officer to perform any duty enjoined on him by law." (Black's Law Dict. (rev. 4th ed. 1968) p. 1236, col. 2.) The phrase includes any willful malfeasance, misfeasance or nonfeasance in office. (*Coffey v. Superior Court* (1905) 147 Cal. 525, 529.)

'To warrant the removal of an officer, the misconduct, misfeasance, or malfeasance must have direct relation to and be connected with the performance of official duties, and amount either to maladministration or to wilful and intentional neglect and failure to discharge the duties of the office. Malfeasance, as ground for removal of a public officer, has reference to evil conduct or an illegal deed, the doing of that which one ought not to do, the performance of an act by an officer in his official capacity that is wholly illegal and wrongful. Misfeasance has reference to the performance by an officer in his official capacity of a legal act in an improper or illegal manner. Malconduct in office, like misconduct in office, includes such acts as amount to a breach of the good faith and right action that are impliedly required of all officers.' (63 Am.Jur.2d, Public Officers and Employees, § 190, p. 743.)

(*Mazzola v. City and County of San Francisco, supra*, 112 Cal. App. 3d 141, 149-150.)

When this portion of the case is seen in full, it is clear that current section 15.105's definition is drawn almost in its entirety from the *Mazzola* opinion and the authorities cited therein. And, the case makes clear that "official misconduct" must have direct relation to and be connected with the performance of official duties. (*Id*. at 150.) Indeed, in finding the phrase "official misconduct" to be sufficiently clear to provide fair notice of what conduct is prohibited, the court referenced the fact that there has to be a connection that exists, a "requisite nexus" between the act or omission and the position held. (*Id*. at 150.) This point of law has profound implications for these removal proceedings, as it is patently clear that Sheriff Mirkarimi was not performing any official duty when he committed the acts of which the Mayor complains.

It follows from the above that the phrase "wrongful behavior by a public officer in relation to the duties of his or her office" must embrace not just "the failure, refusal or neglect of an officer to perform any duty enjoined on him or her by law," but also any "conduct that falls below the standard of decency, good faith and right action impliedly required of all public officers." There is not a stand-alone morals clause that requires absolute uprightness in a public official's behavior for things he or she does that are outside the scope of his or her duties, i.e., for actions taken when not performing the actual duties of the office.

Our position is that this is the clear import and meaning of section 15.105. If, however, the Commission views that section to be ambiguous, it should interpret it in the light most favorable to the Sheriff. This would comport with the rule of lenity which governs the construction of ambiguous penal statutes. The rule of lenity generally requires that ambiguity in a statute should be resolved in favor of the defendant, giving him the benefit of every reasonable doubt on questions of interpretation. (*In re M.M.*, 54 Cal. 4th 530, 545 (Cal. 2012).) Although this may not be a criminal prosecution, the same principle underlying the rule of lenity should apply here, as this is an exceedingly rare proceeding seeking the removal of a democratically elected official.

B. THE MAYOR HAS FAILED TO PROVE ANYTHING MORE THAN AN ARM GRAB WHICH CAUSED A BRUISE AND A MISDEMEANOR CONVICTION. NEITHER OF THESE CONSTITUTES OFFICIAL MISCONDUCT.

The Sheriff will not engage here in a lengthy recitation of what the evidence adduced in these proceedings has shown. Suffice it to say that after all the bluster, the end result of these proceedings is that there is evidence that the Sheriff grabbed his wife's arm hard enough to leave a bruise, and that he pled guilty to and was convicted of a misdemeanor false imprisonment.

With respect to the Mayor's assertion that the physical abuse was much more substantial, that claim is belied by the evidence. If, as the Mayor posits, there was pushing, pulling, shoving, and grabbing which occurred inside the house, common sense suggests that Ms. Lopez would have had more visible injuries on her body than the one bruise on her arm. Indeed, Ms. Lopez testified to that fact:

"Q. Okay. Now, if Ross was pushing and pulling and grabbing you inside your apartment, as Ms. Madison claims, wouldn't you have had a few more bruises?

…….

THE WITNESS: I'm sure, because I bruise really easily. I don't have any bruise right now because -- but just Theo playing with me, I get bruised."

(July 19, 2012 testimony of Eliana Lopez, Tr. at 1297: 5-12.)

From this essential fact, the inference can and should be drawn that the declarations of Ms. Madison and Ms. Williams contain at least one material error, and should not be relied upon for any finding against the Sheriff. If these two witnesses are mistaken on this point, then other errors are equally likely.

As for the expert witness testimony, Nancy Lemon has never spoken with Eliana Lopez and her opinion on any of these matters is sheer speculation. Additionally, as can be seen from the portions of her declaration that the Commission properly refused to admit into evidence – most notably where Ms. Lemon attempted to claim expertise, not in domestic violence, but also in the legal definition of what constitutes official misconduct, Ms. Lemon appears to bring a strong bias to her findings and opinions in this matter.

Indeed, the Commission has now been able to observe the demeanor of Ms. Lopez and get a sense of the kind of person she is. She hardly fits the description of the typically submissive battered woman described by Ms. Lemon.

With respect to the Mayor's claim that the Sheriff dissuaded witnesses or impeded a police investigation, the end result of his lengthy investigation into text messages, cell phone records, and emails turned up no evidence whatsoever to support these charges. In fact, during the one exchange between the Sheriff and his wife in which Ms. Lopez implored him to use his power to do something, the Sheriff replied emphatically that he could not and would not do any such thing.

The remaining grab bag of claims of official misconduct involving the turning over of firearms and improper treatment of Ms. Madison are not worthy of any discussion herein, but counsel will answer any questions the Commission may have on these issues.

C. OFFICIAL MISCONDUCT MEANS CONDUCT DONE WHILE IN OFFICE, WHICH HAS DIRECT RELATION TO AND IS CONNECTED WITH THE PERFORMANCE OF OFFICIAL DUTIES.

We have previously explained that official misconduct must consist of conduct done while in office which has direct relation to and is connected with the performance of official duties. The Sheriff has not invented these concepts. They were laid down by the Court of Appeal in the *Mazzola* decision.

One or more members of the Commission has expressed the idea that because the Charter's definition of official misconduct was different at the time of the *Mazzola* decision (actually, the term was not even defined in the Charter at that time), the current definition of the term must stand alone and be applied in a vacuum, without regard to case law. But this is not the case, because, as shown above, the current definition of official misconduct was drawn almost in its entirety from the *Mazzola* opinion. It follows that the pronouncements made by that court still constitute legal authority on what the phrase means. This Commission is obliged to follow these pronouncements.

These principles of law must remain foremost in the Commission's mind as it decides this case:

"To warrant the removal of an officer, the misconduct, misfeasance, or malfeasance must have direct relation to and be connected with the performance of official duties, and amount either to maladministration or to wilful and intentional neglect and failure to discharge the duties of the office."

"Thus, there must be a violation or omission of a *proscribed act* committed *while in office*."

(*Id.* at 150, underscoring supplied, italics in original.)

In this regard, the phrase "performance of official duties" is critical. It cannot seriously be contended that Sheriff Mirkarimi was performing any official duty when he grabbed his wife's arm or when he pled guilty.

The Mayor has consistently branded as *dicta* the *Mazzola* court's extensive discussion of the definition of official misconduct. However, this definition was central to the opinion. The

Mazzola court engaged in such a lengthy and detailed exposition on the meaning of official misconduct precisely because Mazzola had made a void-for-vagueness challenge. Thus, the definition of official misconduct by the court was essential to its decision that the phrase was not unconstitutionally vague. It is hard to conceive of any part of of judicial opinion that could less accurately be called *dicta*.

However, even if it were *dicta*, that definition 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. (*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, such as the Court of Appeal, then surely this Commission must as well.

III.

CONCLUSION

With the exception of the guilty plea and conviction, all the conduct listed in the Mayor's written charges concerns events which occurred before Ross Mirkarimi became Sheriff. Anything which occurred prior to the time the Sheriff assumed his office by definition cannot constitute official misconduct.

Even when the guilty plea and conviction are added to the equation, it remains the case that none of these allegations of official misconduct involved the performance of any of the

Sheriff's official duties. When he grabbed Ms. Lopez' arm, and when he pled guilty and was convicted of a misdemeanor, Sheriff Mirkarimi was not keeping the county jail. He was not receiving prisoners committed to jail by competent authorities. He was not executing the orders and legal processes issued by courts of the State of California. He was not detailing bailiffs. And he was not executing orders or legal processes issued by the Board of Supervisors, or by any legally authorized department or commission. These are the duties of the Sheriff of the City and County of San Francisco, and none other.

Before the will of the electorate can be contravened, and one publically elected official can be removed from office by another publically elected official, there must be a definitive showing that the official committed misconduct that had a direct relation to and was connected with the performance of official duties. Such a showing has not been made. The Commission should recommend that the Board of Supervisors not sustain these charges.

Dated: August 11, 2012

By:

/s/ *David P. Waggoner*
DAVID P. WAGGONER

/s/ *Shepard S. Kopp*
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