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Date: November 8, 2019

To: Members of the Ethics Commission

From: Thomas McClain, Senior Investigative Analyst, Enforcement & Legal Affairs Division

Re: AGENDA ITEM 5: Whistleblower Protection under the San Francisco Campaign and Governmental Conduct Code

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This memo is provided in response to a request by the Commission at its meeting on August 16, 2019 for an informational presentation on the protections afforded under the law by the Commission through the City's Whistleblower Protection Ordinance ("WPO"). This memo is provided for informational purposes only and requires no action by the Commission. Staff will also provide a brief verbal presentation at the November meeting and will be available to respond to any questions the Commission may have regarding the Whistleblower Protection Ordinance and its implementation.[1]

Introduction

The San Francisco Ethics Commission (the "Commission") has jurisdiction over administrative complaints of retaliation under the Whistleblower Protection Ordinance within the San Francisco Campaign and Governmental Conduct Code (SFC&GCC § 4.100 et seq.).

Proposition K, approved by the voters on November 2, 1993, established the Commission and transferred jurisdiction over allegations of whistleblower retaliation from the Mayor's Office to the Commission. Whistleblower protections were amended in 2000 and again in 2002, moving the provisions of Proposition K toward the Whistleblower Protection Ordinance we have today. First, in 2000, the San Francisco Board of Supervisors enacted the San Francisco Campaign and Governmental Conduct Code. Chapter IV of the Code prohibited retaliation against City officers and employees. However, it provided only a narrow scope of protections which extended only to those City officers and employees who had filed complaints with or participated in investigations or proceedings of the Ethics Commission itself:

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[1] A version of this memorandum was attached to the Enforcement Report for the October 2019 Commission Meeting. At the request of the Chair, Staff agreed to delay presentation of this memorandum to ensure that Commissioner Lee could participate in the discussion. Apart from treating this as its own Agenda Item for the November Meeting and reflecting new dates herein, this memorandum is unaltered from the version distributed in October.

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> No City officer or employee may intimidate, threaten, coerce, or interfere with any individual because that individual has filed a complaint with, or is participating in or cooperating with an investigation or proceeding of, the Ethics Commission. No City officer or employee may discipline or otherwise retaliate against any City officer, employee or applicant for City employment because the officer, employee, or applicant has in good faith filed a complaint with the Ethics Commission, or participated or cooperated with an investigation or other proceeding of the Ethics Commission.

(SF C&GCC § 4.115, subd. (a) (2000).)

The Board of Supervisors made changes to the whistleblower protection provisions in 2002, adding much of the language that remains today. For example, the Board of Supervisors deleted the language regarding intimidation and interference in order, according to the legislative sponsor, to "clarify that protections for whistleblowers apply only when the whistleblower is subject to certain adverse employment actions." (Sup. Matt Gonzalez, Introduction Form, File No. 020017, Jan. 7, 2002 (amending Ord. No. 29-02, approved Mar. 15, 2002).) The Board likewise added language indicating that the prohibited conduct included terminating, demoting, suspending, or taking "other similar adverse employment action" against another City officer or employee "because" the officer or employee had engaged in protected activity. These changes reflected a legislative intent to protect City officers and employees from negative personnel actions causally connected to their engagement in protected activity. In addition, the 2002 amendments expanded the scope of protected activity beyond merely those officers and employees who had in good faith filed complaints with the Ethics Commission (or cooperated with an investigation of such complaints) to include also those who had in good faith filed written complaints to their own departments (or, again, cooperated with an investigation into such complaints). (SF C&GCC § 4.115, subd. (a) (2002).) This version also added the "substantial motivating factor" standard of causation and provided an affirmative defense to employers by allowing them to rebut a claim of retaliation if the employer could demonstrate by a preponderance of the evidence that he or she would have taken the same employment action irrespective of the whistleblowing. (*Id.* § 4.115, subd. (b)(iii) (2002).) Lastly, this version also gave the Ethics Commission the power to make recommendations to San Francisco's Department of Human Resources ("SF DHR") regarding reinstatement, restitution, or discipline. (*Id.* § 4.115, subd. (b)(i) (2002).)

Recent Ethics Commission Legislative Actions to Clarify and Strengthen the Whistleblower Protections

Ensuring the effectiveness of the City's Whistleblower protections has been the focus of legislative action by the Ethics Commission in recent years. Following its review and analysis of the substantive recommendations contained in a 2014-2015 San Francisco Civil Grand Jury report, the Ethics Commission in early 2016 proposed changes to strengthen and clarify the City's Whistleblower Protection Ordinance. In addition to clarifying regulations it adopted at its March 2016 meeting, the Commission adopted proposed statutory amendments to the WPO and transmitted them to the Board of Supervisors on April 11, 2016, for enactment.

Following the Commission's transmittal of its proposed ordinance revisions to the Board of Supervisors, it reached out to then-President of the Board London Breed to seek her sponsorship of the ordinance. After introduction of the WPO which the Commission approved in June 2016 (File

No.160689), the Commission worked closely at the President's request with the Controller's Office and the Department of Human Resources to review the language and conduct a meet and confer process with interested bargaining units. That process finished on January 24, 2018, with agreement reached by participants and negotiations concluded. Due to the pendency of those discussions, in October 2017 the ordinance was filed pursuant to Rules of Order 3.41 due to six months or more of legislative activity. After engaging the Controller's Office, Department of Human Resources, and interested bargaining units, the version of the WPO that reflected feedback and requested changes from that consultative process was approved by action of the Ethics Commission at its January 2018 regular meeting. After its introduction by then-Board President Malia Cohen on April 3, 2018, the Commission's recommended ordinance (File No. 180317) received final approval by the Board on December 11, 2018, was signed into law by the Mayor on December 21, 2018, and took effect on January 21, 2019.

The current version of the Whistleblower Protection Ordinance includes additional procedural safeguards for complainants and expands the class of individuals who receive protection under the Ordinance. First, these amendments removed the requirement that the underlying complaint which constitutes the protected activity must be made in writing. Now, a complainant may make an oral complaint alleging retaliation. (*See* SF C&GCC § 4.105, subd. (a).) Second, this version added additional duties for supervisors who receive complaints of retaliation, including required training regarding their obligations under the WPO. Supervisors now "must keep the complaint confidential and immediately assist the complainant by referring the complainant to the Ethics Commission and documenting the referral in writing." (SF C&GCC § 4.115, subd. (b)(4).) Third, this version expands the protections of the Whistleblower Protection Ordinance to officers and employees of City contractors. (SF C&GCC § 4.117, subds. (a)-(d).) Pursuant to requirements under this version of the Ordinance, Commission Staff are currently collaborating with Staff at the Controller's Office and SF DHR to develop new materials to publicize and promote these changes and to improve the materials the City uses in training officers, employees, and supervisors regarding whistleblower protections. The ordinance clarified the law to delineate responsibilities for two different functions of City government: the investigation by the Controller's Whistleblower Program of whistleblower complaints and, separately, the investigation by the Ethics Commission of complaints alleging retaliation for having engaged in protected activity. Fourth the new amendments strengthen the protections to complainants who wish to remain anonymous by providing for penalties to City officers and employees who release the identity of any individual—whether or not they file anonymously—who files a whistleblower complaint or a whistleblower retaliation complaint. (SF C&GCC § 4.120, subd. (c).) The penalties to a City officer or employee who releases a complainant's name include dismissal by his or her appointing authority or an administrative fine of up to $5,000. (*Id.*)

Elements of the City's Whistleblower Protection Ordinance

In the employment context generally, and as reflected in the legislative history above, there are three elements to a claim of employment retaliation. First, an individual engages in conduct designated by federal, state, or local law as "protected activity." This may include filing a particular type of complaint, exercising rights protected by the federal or a state constitution, or participating in a particular type of investigation. Second, the employer takes an "adverse employment action" against the individual, such as firing or disciplining that individual. Third, there must be a causal connection between the protected activity and the adverse employment action, namely, the individual's engaging in the protected activity meaningfully caused the employer to take the adverse employment action.

Different jurisdictions use different categories of protected activity and adverse employment action and may utilize different causation standards.

As highlighted above, the City's Whistleblower Protection Ordinance prohibits a City officer or employee from taking an adverse employment action against another City officer or employee because that other officer or employee engaged in good faith in protected activity. (SF C&GCC § 4.115, subds. (a)(1)-(3), (b)(3) (providing that "because" means the retaliation complainant's engagement in protected activity was a "substantial motivating factor" for the adverse employment action.) A complaint alleging retaliation must be filed with the Ethics Commission within two years of the alleged retaliatory act. (SF C&GCC § 4.115, subd. (b)(1).)

<u>"Protected Activity"</u>

When determining whether the Commission has jurisdiction over a complaint alleging retaliation, Enforcement Staff determines whether the individual engaged in activity protected by the Whistleblower Protection Ordinance of the San Francisco Campaign and Governmental Conduct Code.

"Protected activity" under the Whistleblower Protection Ordinance is when an employee files or attempts to file a particular type of complaint or participates in or cooperates with a particular type of investigation. (SF C&GCC § 4.115, subd. (a)(1)-(3).) Commission Staff can typically determine whether a complainant has engaged in protected activity with little to no investigation by determining whether they took the necessary steps in filing the underlying complaint, as outlined below.

<u>Protected Activity: Filing or Attempting to File a Complaint</u>

To receive protection under the Whistleblower Protection Ordinance, the individual must make a complaint alleging a particular type of conduct. The complainant must allege that a City officer or employee has "engaged in improper government activity, misused City funds, caused deficiencies in the quality and delivery of government services or engaged in wasteful and inefficient government practices, or that a City contractor or employee of a City contractor has engaged in unlawful activity in connection with a City contract." (SF C&GCC § 4.105, subd. (a).)

The Whistleblower Protection Ordinance further defines each of these terms. "Improper government activity" means

> violation of any federal, state, or local law, regulation, or rule, including but not limited to laws, regulations, or rules governing campaign finance, conflicts of interest, or governmental ethics laws; or action which creates a danger to public health or safety by the failure of City officers or employees to perform duties required by their positions.

(SF C&GCC § 4.110.) However, this does not include employment actions for which other remedies exist. (*Id.*) "Misuse of City funds" means "any use of City funds for purposes outside of those directed by the City." (*Id.*) "Deficiencies in the quality and delivery of government services" means "the failure to perform a service, when performance is required under any law, regulation or policy, or under a City contract or grant." (*Id.*) "Wasteful and inefficient City government practices" means "the expenditure of City funds that could be eliminated without harming public health or safety, or reducing the quality of government services." (*Id.*) "Unlawful activity" means

> violations of any federal, state or local law, regulation or rule including but not limited to those laws, regulations or rules governing campaign finance, conflicts of interest or governmental ethics laws; or actions which create a danger to public health or safety by the failure of City officers or employees to perform duties imposed by a City contract.

(*Id.*)

The complainant must file the complaint with the Office of the Controller's Whistleblower Program, the Ethics Commission, the District Attorney's Office, the City Attorney's Office, or the complainant's own department. (SF C&GCC § 4.105, subd. (a).) If the complainant files the complaint in her or his own department, the complainant must file the complaint with her or his supervisor, the executive director or highest-ranking officer in the complainant's department, or the board or commission overseeing the department. (SF C&GCC § 4.110.) Under the Whistleblower Protection Ordinance, a "supervisor" means

> any individual having the authority, on behalf of the City, to hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees, or the responsibility to routinely direct them, to adjust their grievances, or to effectively recommend such action, if, in connection with the foregoing, the exercise of that authority is not merely routine or clerical, but requires the use of independent judgment.

(SF C&GCC § 4.110.) Individuals are likewise protected if in good faith they attempt to file a complaint, but file it with the wrong City official or department. (SF C&GCC § 4.115, subd. (a)(2).) The Whistleblower Protection Ordinance also protects City officers and employees for providing any information in connection with or otherwise cooperating with any investigation related to any of the above-mentioned types of complaints. (SF C&GCC § 4.115, subd. (a)(3).)

<u>Protected Activity Falling Outside the Commission's Jurisdiction</u>

Other governmental agencies at the federal, state, and local level have jurisdiction over retaliation related to different types of underlying protected activity. The Equal Employment Opportunity ("EEO") division of the San Francisco Department of Human Resources ("DHR") investigates claims of retaliation for City and County of San Francisco employees who file complaints alleging discrimination with the complainant's respective department or DHR. State and local government (including San Francisco) and private-sector employees who file complaints or participate in investigations related to discrimination based on race, sex, sexual orientation, or national origin are protected by the California Fair Employment and Housing Act ("FEHA"), which is enforced by the California Department of Fair Employment and Housing. The State Labor Commissioner's Office of the California Department of Industrial Relations investigates retaliation based on underlying public and private-sector workplace complaints related to termination, reduction in pay or hours, disciplinary actions or threats, certain immigration-related practices, and pay inequity. The Public Employment Relations Board investigates and prosecutes claims of retaliation based on state and local government employees exercising their rights to participate in labor union and collective bargaining activities.

<u>"Adverse Employment Action"</u>

The Whistleblower Protection Ordinance defines "adverse employment action" as terminating, demoting, suspending, or taking another similar adverse employment action against a City officer or employee. (SF C&GCC § 4.115, subd. (a).) "Other similar adverse employment action includes effecting any reprisal; or taking or directing others to take, or recommending, or approving, any negative personnel action with regard to any appointment, promotion, transfer, reassignment, performance evaluation, suspension, termination, or other disciplinary action." (WPO Regs. § 4.115(a)-1, subd. (a).)

Because the meaning of "adverse employment action" under the Whistleblower Protection Ordinance and its regulations remains subject to some ambiguity, Commission Staff looks to analogous legal contexts for additional interpretation. Specifically, Title VII of the 1964 Civil Rights Act ("Title VII") and the California Fair Employment and Housing Act ("FEHA") are federal and state statutory schemes which prohibit "adverse employment actions" by employers against employees who report incidents of discrimination. The case law interpreting these statutory schemes uses the term "adverse employment action," thus cases interpreting these statutes informs the meaning of the term "adverse employment action" in the Whistleblower Protection Ordinance.

To have a right to sue under the provisions of Title VII prohibiting retaliation, a plaintiff "must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" (*Burlington Northern v. White* (2006) 548 U.S. 53, 68 [quoting *Rochon v. Gonzales* (D.C. Cir. 2006) 438 F.3d 1211, 1219].) Title VII utilizes a "materiality" standard "to separate significant from trivial harms," and a "reasonable employee standard" because "the provision's standard for judging harm must be objective." (*Burlington Northern*, *supra*, 548 U.S. at p. 69.) In FEHA cases, "adverse employment action" encompasses both "ultimate employment actions" such as termination or demotion and "the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1053-1054.) "The determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim." (*Id.* at p. 1052.)

<u>Causation: "Substantial Motivating Factor"</u>

As noted above, to establish liability for retaliation under the Whistleblower Protection Ordinance, the Commission must show by a preponderance of the evidence that "the complainant's engagement in [protected activity] was a substantial motivating factor for the adverse employment action." (SF C&GCC § 4.115, subd. (b)(3).) However, a respondent "may rebut this claim if the respondent demonstrates by a preponderance of the evidence that he, she, or it would have taken the same employment action irrespective of the complainant's participation in protected activity." (SF C&GCC § 4.115, subd. (b)(3).) By using the "substantial motivating factor" standard, the Whistleblower Protection Ordinance uses the same burden of proof as FEHA. Commission Staff's analysis of "substantial motivating factor" is thus based on FEHA and sources interpreting FEHA because neither the Whistleblower Protection Ordinance nor its regulations further define or clarify the term "substantial motivating factor."

Under the regulations interpreting FEHA, "[a] substantial factor motivating the denial of the employment benefit is a factor that a reasonable person would consider to have contributed to the

denial. It must be more than a remote or trivial factor. It does not have to be the only cause of the denial." (2 Cal. Code Regs. § 11009.) The California Supreme Court has further clarified the meaning of "substantial motivating factor," observing that "[r]equiring the plaintiff to show that discrimination was a substantial motivating factor, rather than simply a motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232.) Finally, the Judicial Council of California's Civil Jury Instructions define "substantial motivating reason" to mean "a reason that actually contributed to the [adverse employment action]. It must be more than a remote or trivial reason motivating the [adverse employment action]." (Cal. Civ. Jur. Instr. No. 2507 (Sept. 2018).)

Staff's Investigative Review of Alleged Violations of the Whistleblower Protection Ordinance

When it receives a complaint alleging whistleblower retaliation under the Whistleblower Protection Ordinance, Commission Staff must first determine whether the Commission has jurisdiction over the allegations in the complaint. When the Commission receives complaints alleging retaliation that falls outside the Commission's jurisdiction, Commission Staff either forwards the complaint to the appropriate agency or informs the complainant of the correct agency to file the complaint. Commission Staff have developed relationships with counterparts in the City's EEO division, the State Labor Commissioner's Office, and the Department of Fair Employment and Housing, both to support Staff's capacity to implement the Commission's whistleblower protection jurisdiction and to refer complainants to peer agencies whenever jurisdiction lies elsewhere.

As highlighted above, the 2018 amendments to the Whistleblower Protection Ordinance expanded the scope of who receives protection and made it easier procedurally for those seeking protection by allowing employees to complain verbally to their departments and by allowing complainants to make good faith mistakes about where to file complaints, and likewise clarified the types of complaints which constitute protected activity by providing new definitions clarifying the scope of whistleblowing. While the definitions of qualifying allegations in the Whistleblower Protection Ordinance may appear narrow or precise, in adopting those definitions the City sought as a matter of policy to encourage specific, widely agreed upon forms of whistleblowing, rather than to provide unique remedies through the Ethics Commission for all employees to complain more broadly about issues arising in the City. Because the Whistleblower Protection Ordinance has specific definitions for the type of protected activity in which a complainant must engage, determining whether a complainant has engaged in protected activity is typically a relatively short portion of Commission Staff's Preliminary Review and Investigation of a complaint.

Commission Staff next must determine whether the complainant suffered an adverse employment action. The extent of Commission Staff's investigation into whether a given employment action constitutes an adverse employment action depends on the given circumstance. In the case of when an officer or employee is terminated, suspended, or given a low score on a performance evaluation, for example, Commission Staff does not need to conduct an extensive investigation to identify whether some adverse action occurred. On the other hand, a more extensive factual investigation for this element may be necessary when evaluating whether a pattern of conduct by a supervisor or determining whether an employment action would "dissuade[] a reasonable worker from making or supporting a charge," (*Burlington Northern*, *supra*, 548 U.S. at p. 68), or whether an employment action is "reasonably likely to adversely and materially affect an employee's job

performance or opportunity for advancement in his or her career." (*Yanowitz*, *supra*, 36 Cal.4th at pp. 1053-1054.)

Because of the fact-specific nature of causation analyses, gathering evidence to show that an adverse employment action is substantially motivated by an officer's or employee's having engaged in protected activity typically occupies the majority of an investigative focus for complaints alleging retaliation under the Whistleblower Protection Ordinance. In applying the "substantial motivating factor" standard, the protected conduct need not be the only cause for the adverse employment action, but the protected conduct must be a reason that actually contributed and must be more than a remote or trivial factor motivating the adverse employment action. This standard of causation attempts to balance the need for employees to report improper government activities and receive adequate protection for doing so with the need of the City to render necessary, business-justified employment decisions about the officers and employees who work with the City.

The Whistleblower Protection Ordinance provides that the employer may rebut a finding of retaliation by demonstrating by a preponderance of the evidence that he or she would have taken the same employment action irrespective of the complainant's protected activity. (*See* SF C&GCC § 4.115, subd. (b)(3).) Such an opportunity to rebut accounts for the fact, as described above, that the standard of causation requires a demonstration that the whistleblowing more than remotely or trivially motivated the employer to take the adverse employment action.

<u>Conclusion</u>

As the City's training of supervisors is implemented this year, Staff anticipates a corresponding opportunity to provide further information to support heightened awareness Citywide of the City's Whistleblower Protection Ordinance. Even as that work continues to develop, any person who believes they have been retaliated against for having engaged in protected activity should contact the Commission's Enforcement and Legal Affairs Division at (415) 252-3100.