DENNIS J. HERRERA, State Bar #139669
City Attorney
JESSE C. SMITH, State Bar #122517
Chief Assistant City Attorney
SHERRI SOKELAND KAISER, State Bar #197986
PETER J. KEITH, State Bar #206482
Deputy City Attorneys
1390 Market Street, Suite 700
San Francisco, California 94102-5408
Telephone: (415) 554-3886 (Kaiser)
Telephone: (415) 554-3908 (Keith)
Facsimile: (415) 554-6747
E-Mail: sherri.kaiser@sfgov.org
peter.keith@sfgov.org

Attorneys for MAYOR EDWIN M. LEE

ETHICS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

| | |
|---|---|
| In the Matter of Charges Against<br><br>ROSS MIRKARIMI,<br><br>Sheriff, City and County of San Francisco. | **MAYOR LEE'S OPENING BRIEF ON THE ISSUES SPECIFIED BY THE ETHICS COMMISSION AT ITS MEETING OF APRIL 24, 2012**<br><br>Hearing Date: May 29, 2012<br>Hearing Time: 5:30 p.m.<br>Location: City Hall Room 400 |

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iii

INTRODUCTION ..... 1

QUESTIONS PRESENTED AND SHORT ANSWERS ..... 5

BACKGROUND ..... 8

I. ALLEGATIONS OF MISCONDUCT ..... 9

A. Sheriff Mirkarimi Commits Domestic Violence ..... 9

B. Sheriff Mirkarimi Threatens To Use His Power As A Public Official Against His Wife In Family Court ..... 10

C. Sheriff Mirkarimi Participates In Attempts To Persuade A Witness To Lie And Destroy Evidence During The Ensuing Police Investigation ..... 10

D. On January 8, 2012, Sheriff Mirkarimi Makes Public Statements That Conflict With The Sheriff's Duty To Enforce Domestic Violence Laws ..... 10

E. On March 12, 2012, Sheriff Mirkarimi Agrees To A Plea Deal Admitting Criminal Wrongdoing And A Criminal Sentence Incompatible With His Duties ..... 11

F. Sheriff Mirkarimi's Conduct From December 31, 2011 Through March 19, 2012 Falls Below The Standard Expected Of A Holder Of Public Office ..... 12

II. THE MAYOR SUSPENDS SHERIFF MIRKARIMI AND INITIATES REMOVAL PROCEEDINGS ..... 12

III. THE SAN FRANCISCO CHARTER PROVISIONS GOVERNING SUSPENSION, REMOVAL, AND DISQUALIFICATION OF ELECTED OFFICERS FOR OFFICIAL MISCONDUCT ..... 12

IV. SHERIFF MIRKARIMI FILES AN UNSUCCESSFUL ACTION IN SUPERIOR COURT TO STOP THESE CHARTER REMOVAL PROCEEDINGS ..... 13

DISCUSSION ..... 14

I. THE RULES GOVERNING ADMINISTRATIVE HEARINGS, NOT CRIMINAL TRIALS, APPLY TO THESE ETHICS COMMISSION PROCEEDINGS. ..... 14

A. Charter Section 15.105(a) Directs The Ethics Commission To Hold An Administrative Hearing, Transmit The Full Record Of The Hearing To The Board of Supervisors, And Make A Recommendation. ..... 14

B. The Commission May Consider The Same Types Of Evidence And Measure The Evidence Against The Same Standard As It Would In Other Administrative Hearings. ..... 17

1. The Commission should make its recommendation based on a preponderance of the evidence....17

2. With one exception, the Commission should use the administrative rules of evidence to build the administrative record. ....17

3. The discovery rules under Ethics Commission Regulation § X.A. are appropriate for this proceeding. ....19

4. In these proceedings, the Charter directs the Commission to determine its recommendation by simple majority vote....20

II. THE OFFICIAL MISCONDUCT CHARGES AGAINST SHERIFF MIRKARIMI ARE LEGALLY SOUND. ....21

A. Sheriff Mirkarimi Can Be Removed For The Acts Of Misconduct He Committed After His Election But Prior To His Swearing-In As Sheriff. ....21

B. The Charter Requires, And The Allegations Demonstrate, A Nexus Between The Alleged Acts And The Duties Or Integrity Of Office. ....24

C. Even If The Commission Could Properly Conclude—And It Cannot—That The Official Misconduct Charges Cannot Be Sustained As A Matter Of Law, It Still Must Hold A Hearing. ....26

III. EVEN THOUGH THE SHERIFF'S UNDISPUTED GUILTY PLEA AND AGREED-TO SENTENCE ARE SUFFICIENT PROOF OF OFFICIAL MISCONDUCT, THE COMMISSION STILL MUST HOLD A FULL EVIDENTIARY HEARING ON THE ENTIRETY OF THE CHARGES....26

CONCLUSION....26

## TABLE OF AUTHORITIES

**State Cases**

Application of Baker
(1976) 386 N.Y.S.2d 313 ..... 21

*City and County of San Francisco v. Padilla*
(1972) 23 Cal.App.3d 388 ..... 26

*Cranston v. City of Richmond*
(1985) 40 Cal.3d 755 ..... 25

*Hughes v. Bd. of Architectural Examiners*
(1998) 17 Cal.4th 763 ..... 17

*In re Luis B.*
(2006) 142 Cal.App.4th 1117 ..... 26

*In re Sarisohn*
(1966) 26 A.D.2d 388, 275 N.Y.S.2d 355 ..... 24

*Mann v. Dep't of Motor Vehicles*
(1999) 76 Cal.App.4th 312 ..... 17

*Matter of Bailey*
67 N.Y.2d 61 (1986) ..... 24

*Mazzola v. City and County of San Francisco*
(1980) 112 Cal.App.3d 141 ..... 21, 22

*Melkonians v. Los Angeles County Civil Serv. Comm'n*
(2009) 174 Cal.App.4th 1159 ..... 18

*Parker v. City of Fountain Valley*
(1981) 127 Cal.App.3d 99 ..... 17

*People v. Cherry*
(1989) 209 Cal.App.3d 1131 ..... 24

*People v. Cooper*
(2002) 27 Cal.4th 38 ..... 24

*People v. Superior Court (Pearson)*
(2010) 48 Cal.4th 564 ..... 24

*San Benito Foods v. Veneman*
(1996) 50 Cal.App.4th 1889 ..... 17

*State v. McInnis*
(Tex.Ct.App. 1979) 586 S.W.2d 890 ..... 21, 22

*State v. Meneley*
(2001) 271 Kan. 355 ..... 24

*Woo v. Superior Court*
(2000) 83 Cal.App.4th 967 ..... 24

**Federal Cases**

*International Ass'n of Machinists and Aerospace Workers v. Haley*
(D. South Carolina) 2011 WL 3586109, __ F.Supp.2d __, 191 L.R.R.M. (BNA) 2252 ..... 22

**State Constitution, Statutes & Codes**

Cal. Const. art. II § 1 ..... 1

Cal. Const. art. XI § 5(b) ..... 1

Cal. Evid. Code § 115 ..... 17

Cal. Evid. Code § 1240 ..... 18

Cal. Gov. Code § 11513 ..... 5

Cal. Gov. Code § 11513(a) ..... 17

Cal. Gov. Code § 11513(c) ..... 18

Cal. Gov. Code § 11514 ..... 19

Cal. Gov. Code § 1983 ..... 23

Cal. Gov. Code § 26600 ..... 8

Cal. Gov. Code, Title 2, div. 3, pt. 1, ch. 5 ..... 19

Cal. Gov.Code § 54952.1 ..... 23

Cal. Gov.Code § 82020 ..... 23

Cal. Gov't Code § 11513(d) ..... 18

Cal. Penal Code § 1203.097 ..... 11

Cal. Penal Code § 136.1(b)(1) ..... 10

Cal. Penal Code § 1536 ..... 18

Cal. Penal Code § 273.5(a) ..... 9

Cal. Penal Code § 273a(b) ..... 9

**San Francisco Ordinances & Codes**

San Francisco Camp. & Gov'tal Conduct Code § 1.103 ..... 20

San Francisco Camp. & Govt'al Conduct Code § 1.170(a) ..... 16

San Francisco Camp. & Gov'tal Conduct Code § 3.200 ..... 12

San Francisco Camp. & Govt'al Conduct Code § 3.242(a) ..... 16

San Francisco Charter § C3.699-13 ..... 15

San Francisco Charter § 4.104(b) ..... 6, 20

San Francisco Charter § 6.105 ..... 8

San Francisco Charter § 15.100 ..... 12

San Francisco Charter § 15.100(a) ..... 12

San Francisco Charter § 15.100(c) ..... 12

San Francisco Charter § 15.102 ..... 15

San Francisco Charter § 15.103 ..... 12

San Francisco Charter § 15.105 ..... 1, 14

San Francisco Charter § 15.105(a) ..... 6, 12, 14, 20, 26

San Francisco Charter § 15.105(e) ..... 5, 6, 13, 22, 24, 26

**Other Authorities and Regulations**

Ethics Comm. Bylaws, Art. VII, § 1 ..... 20

Ethics Comm. Bylaws, Art. X § 1 ..... 20

Ethics Comm. Regs. § XII(B) ..... 20

Ethics Comm. Regs. § XII(C) ..... 20

Ethics Comm. Regs. § X.A. ..... 19

Ethics Comm. Regs. § XII.A.2 ..... 17

Ethics Comm. Regs. § XII.A.3 ..... 5, 17

Ethics Comm. Regs. § XII.B ..... 17

Ethics Comm. Regs. § XII.C ..... 17

**Other References**

Robert's Rules of Order, Newly Revised, 10th Ed., Ch. I § 1……..20

## INTRODUCTION

The People of San Francisco have the right to require their elected officials to fulfill the duties of office with integrity. The California Constitution proclaims that "[a]ll political power is inherent in the People," (Cal. Const. art. II § 1), and it gives San Franciscans plenary authority to decide the manner by which their City officers are appointed or elected – and when they can be removed (*id*., art. XI § 5(b)). In adopting Charter section 15.105, San Francisco voters established a process by which elected officials may be removed from office when they commit wrongdoing related to the office or engage in conduct that falls below "the standard of decency, good faith and right action impliedly required of all public officers." (S.F. Charter § 15.105.) This removal process reflects the will of the People and their judgment that, at times, the public good requires removing an elected official from office. While Sheriff Mirkarimi has contended elsewhere that these proceedings somehow undermine the democratic process, nothing could be further from the truth. When San Francisco voters democratically elected Sheriff Mirkarimi, they did not know and could not know that he would later engage in the behavior that led to these official misconduct proceedings. That very problem is the reason why San Francisco voters democratically enacted the Charter removal provisions. The Ethics Commission advances democratic rule and fulfills its Charter mandate by following the removal process democratically established by the People themselves.

The Charter removal process begins with the Mayor, who has filed charges of official misconduct against Sheriff Mirkarimi. Under the Charter, the next step of the process requires the Ethics Commission to hold an administrative hearing on the charges. The Charter directs the Commission as follows:

> The Ethics Commission shall hold a hearing not less than five days after the filing of written charges. After the hearing, the Ethics Commission shall transmit the full record of the hearing to the Board of Supervisors with a recommendation as to whether the charges should be sustained.

(S.F. Charter § 15.105.) After receiving the Commission's recommendation, the Board of Supervisors ("Board") must make the final removal decision. If a three-fourths supermajority (nine out of eleven) sustains the charges, then Sheriff Mirkarimi will be removed from office.

While the Charter entrusts the Mayor with the initial charging decision and the Board with the ultimate removal decision, the Ethics Commission plays a critical intermediate role in the process in two respects. First, the Commission serves the essential function of compiling the "full record" necessary to inform the Board's deliberation. Indeed, this role is so important that the Charter emphasizes that the Board cannot make its decision until after it has reviewed the “complete record” developed by the Commission. Second, the Commission makes a recommendation to the Board. Although this recommendation is not binding, it is likely to have significant persuasive value because of the Commission's expertise in government ethics and its institutional role as an enforcer of ethics laws and protector of the public’s trust in government.

In determining how to conduct its hearing and reach its recommendation, the Ethics Commission should draw on its experience as the City body with specialized knowledge and expertise in matters of government ethics. Because the Commission already has established procedures for hearings to adjudicate charges of governmental misconduct, and because those procedures ensure a thorough adjudicative process, the Commission should largely follow them here. While the Commission's role in this removal proceeding is different—the Commission must hold a hearing and make a recommendation, not adjudicate a charge and impose penalties—the hearing required by the Charter is the same type of evidentiary hearing on alleged misconduct that the Commission would typically handle.

Nothing about this hearing necessitates adopting extraordinary procedures. Like other Ethics hearings, this is not a criminal proceeding. The Mayor is seeking to remove Sheriff Mirkarimi from his office, not punish him or impose any criminal sanction. Neither the Charter nor any other law requires the Commission to adopt a "beyond a reasonable doubt" standard of proof or to make its recommendation by unanimous vote. The Charter simply requires the Commission to hold a hearing, compile a record, and vote to make a recommendation as to whether to sustain the charges against Sheriff Mirkarimi. The Commission can fulfill those duties by following its own established processes, which are similar to those that other agencies generally use in administrative hearings.

In making its recommendation to the Board of Supervisors, the Commission should be guided by the fundamental purpose of this Charter process: protecting the integrity of San Francisco government. Sheriff Mirkarimi has argued that he did not commit official misconduct because he was only a Supervisor and Sheriff-Elect—and not yet the Sheriff—when he committed the crime to which he later pled guilty. That is wrong. The Charter process is designed to remove officials who commit serious misconduct after they are elected, not only those who commit misconduct after they take the oath of office. Indeed, the removal process is especially important during the period that runs from an official's election through his or her first six months in office, because voters are not able to initiate a recall during this time. Furthermore, the office of Sheriff is not just any elective office. The Sheriff is the chief executive of San Francisco's second-largest law enforcement agency and the City's only elected law enforcement officer. It was only *after* he was elected to that office that Sheriff Mirkarimi engaged in a series of acts—including at least one crime—that led to the Mayor's charges of official misconduct.

San Francisco voters did not have before them information about Sheriff Mirkarimi's conduct or his conviction and sentence at the time they elected him. Sheriff Mirkarimi, the official responsible for the lawful imprisonment of prisoners in San Francisco, committed—by his own admission—the crime of false imprisonment. The Sheriff coordinates with other San Francisco criminal justice agencies to make decisions that directly impact San Francisco probationers—but now, by virtue of the statutorily mandated domestic violence sentence to which he agreed, Sheriff Mirkarimi is himself a probationer and will remain so for three of the four years (in the parlance of these proceedings, a supermajority) of his term of office. And these are merely the *undisputed* facts about Sheriff Mirkarimi's conduct after the election. The evidence at the hearing will show even more troubling conduct by Sheriff Mirkarimi, including his active or passive participation in attempting to dissuade witnesses to a crime from speaking truthfully with officers of the San Francisco Police Department—the largest law enforcement agency in San Francisco and one with which the Sheriff must constantly cooperate. This, too, all happened *after* the election, unknowable to the voters at the critical moment when they cast their ballots.

The need for an effective removal process, with appropriate checks and balances, is particularly strong in circumstances such as this when the voters have no direct means of removing an official who has proven himself unfit for office. The Commission is uniquely suited to play a role in this process. The Commission's oversight of the conduct of government officials is fundamental to the integrity of the democratic process in San Francisco. As the Board of Supervisors explained when it proposed a comprehensive ethics reform measure in 2003, "[f]aith in government is the cornerstone of democracy," and imposing high ethical standards on City officials "is a vital step towards keeping democracy alive and well in San Francisco." (Proponent's Argument In Favor Of Proposition E, November 2003 Voter Information Pamphlet at 84, available at http://sfpl4.sfpl.org/pdf/main/gic/elections/November4_2003.pdf.) Protecting the public faith in government is the purpose of this proceeding and the reason why Sheriff Mirkarimi ultimately should be removed from the office of Sheriff.

## QUESTIONS PRESENTED AND SHORT ANSWERS

**Question 1.** What is the applicable standard of proof?

The Charter has assigned this removal proceeding to the Ethics Commission for an administrative hearing, not to the District Attorney for prosecution in criminal court. The preponderance of the evidence standard applies here, just as it does in all other administrative hearings charged to the Ethics Commission. (*See* Discussion Section I.B.1, *infra*.)

**Question 2.** On what type of evidence may the Commission rely?

As the Commission does in its enforcement proceedings, the Commission may rely on the same type of evidence that is admissible under Ethics Commission Regulation XII.A.3., which incorporates the provisions of the California Administrative Procedures Act, Gov. Code § 11513. This includes evidence of the facts about Sheriff Mirkarimi's acts and omissions, as well as testimony from subject matter experts that will assist the Commission in determining the relationship between those acts and omissions and the duties of Sheriff. (*See* Discussion Section I.B.2, *infra*.)

**Question 3.** Can the Sheriff engage in official misconduct subjecting him to removal from office prior to the time that he held that office?

Yes. Charter section 15.105(e) provides the controlling definition of official misconduct. That definition applies to acts by "public officers." An officer-elect is a public officer, not a private citizen, as the Ethics Commission itself informed Supervisor-Elect Mirkarimi in a 2004 advice letter, and as Mr. Mirkarimi's own conduct as Sheriff-Elect bears out. Further, Section 15.105 neither explicitly nor implicitly restricts official misconduct to acts committed by public officials after taking the oath of office, nor does it bar removal from current office based on acts of misconduct committed while a public official was in a prior office. If such restrictions are to be added to Section 15.105, only the voters may do so. Finally, in light of the evidence in this case, the legal discussion of this timing question becomes merely academic. As a sitting Supervisor and after his election as Sheriff –but shortly before he was sworn in – Sheriff Mirkarimi committed a crime of domestic violence against his wife, threatened to use his official power for personal advantage in a child custody dispute, and interfered with another law enforcement agency's investigation of his crime. And, it was not until March 2012 – two months after the Sheriff was sworn in – that the Sheriff admitted that he committed the crime of falsely imprisoning his wife, and was sentenced to three years' probation . His March 2012 guilty plea and the institutional consequences of having a freshly convicted criminal and probationer as Sheriff are also a central component of the misconduct charges. (*See* Discussion Section II.A, *infra*.)

**Question 4.** Does "official misconduct" under the Charter require that the alleged misconduct relate to the Sheriff's duties? If so, does the conduct alleged relate to Mr. Mirkarimi's duties as Sheriff?

(a) No, the Charter does not require that the official misconduct relate to Mr. Mirkarimi's duties as Sheriff. The definition of official misconduct in

Section 15.105(e) has two different prongs: (1) "any wrongful behavior by a public officer in relation to the duties of his or her office, willful in its character" and (2) "conduct that falls below the standard of decency, good faith and right action impliedly required of all public officers." Under the first prong, the official misconduct would have to relate to Mr. Mirkarimi's duties as Sheriff and/or Supervisor, since he held each position at some point during the acts in question. Under the second prong, the misconduct would have to relate not to particular duties of office, but instead to the commonly accepted standards of professional conduct for a sheriff and/or a member of a legislative body. (*See* Discussion Section II.B, *infra*.)

(b) Although it is not required by the Charter, in this case the alleged misconduct charges amply relate to the duties of the Sheriff, including his duty to enforce the law, his duty to maintain lawful custody of prisoners, and his duty to discipline deputies and staff for *their* misconduct. Moreover, public officers who administer criminal justice, like the Sheriff, have a heightened duty to obey the laws and maintain their integrity, regardless of whether they are acting in their personal or their official capacity. (*See* Background Section I and Discussion Section II.B, *infra*.)

**Question 5.** Is the Sheriff's plea to the misdemeanor charge of false imprisonment sufficient to sustain a finding of official misconduct?

Yes. The Sheriff's guilty plea to false imprisonment and concomitant agreement to a domestic violence sentence that includes three years of probation to be supervised by the San Francisco Adult Probation Department are in themselves sufficient to sustain a finding of official misconduct. But even if the Commissioners conclude that these undisputed facts establish official misconduct as a matter of law, the Commission still must hold a hearing, create a full record in regard to all of the charges, and make a recommendation to the Board. That is its charge under the Charter. (*See* Discussion Sections II.A-C, *infra*.)

**Question 6.** Must the Ethics Commission act unanimously relating to this matter?

No. The Charter charges the Ethics Commission to conduct an ethics hearing and make a recommendation, not to sit as a criminal jury. Charter section 4.104(b) provides the rule for this Commission: “Unless otherwise required by this Charter, the affirmative vote of a majority of the members shall be required for the approval of any matter. . . .” Although Charter section 15.105(a) imposes a supermajority requirement on the Board’s ultimate decision whether to remove the Sheriff, the Charter does not place any such special voting requirement on the Ethics Commission in determining its recommendation to the Board. Accordingly, under the Charter, a simple majority vote applies. (*See* Discussion Section I.B.4, *infra*.)

**Question 7.** Even if all the charges alleged against the Sheriff are true, should the Commission dismiss the matter because the charges do not constitute official misconduct?

No. At the threshold, the Commission does not have the authority under the Charter to dismiss these removal proceedings. While the Commission may decide to recommend against sustaining the official misconduct charges, it has a mandatory duty under the Charter to hold a hearing and transmit a full record to the Board. But even if the Charter authorized a motion to dismiss,

dismissal would not be appropriate here. There can be no question that the facts stated in the charges—committing crimes after being elected as head of a law enforcement agency, interfering with another agency's investigation, and being sentenced to three years of probation concurrent with a four-year term in an office whose duties include taking probationers into custody, just to name a few—constitute official misconduct. (*See* Discussion Section II.C, *infra*.)

## BACKGROUND[1]

On November 8, 2011, San Francisco voters elected Ross Mirkarimi, an incumbent member of the San Francisco Board of Supervisors, to a four-year term as Sheriff. The San Francisco Director of Elections certified the results of the election on November 22; the Board of Supervisors declared the results on December 6; and Mr. Mirkarimi was sworn in to his new position and assumed the full duties of the Office of Sheriff on January 8, 2012.

In the post-election period between November 8 and January 8, Mr. Mirkarimi continued to serve as Supervisor. The evidence will show that Supervisor Mirkarimi also took on new duties in his official capacity as Sheriff-Elect to prepare to assume office. The office of Sheriff has far-ranging responsibilities under the San Francisco Charter and state law. Under Charter section 6.105, the duties of the Sheriff include keeping the County jails, receiving all prisoners, and executing the orders and legal processes issued by the California courts, the San Francisco Board of Supervisors, or by any legally authorized department or commission. Under California Government Code section 26600, the Sheriff is also responsible for preserving the peace, "and to accomplish this object may sponsor, supervise, or participate in any project of crime prevention, rehabilitation of persons previously convicted of crime, or the suppression of delinquency." And, of course, every day the Sheriff leads the several hundred members of the San Francisco Sheriff's Department by setting its policies, overseeing its functions and ensuring members' proper conduct.

As the incoming Sheriff, Mr. Mirkarimi participated in a series of transition meetings and briefings with incumbent Sheriff Michael Hennessey and Sheriff's Department command staff. These meetings began on November 22—the very day the Director of Elections certified Mr. Mirkarimi's election, and still two weeks before the Board of Supervisors officially declared the results—and there were at least eight of them within the first three weeks alone. At these meetings, Captains and other personnel in the Sheriff's Department made presentations to the Sheriff-Elect on a range of subject matter areas in which the Sheriff's Department is involved, including jail

[1] This brief draws from the Written Charges of Official Misconduct against Sheriff Mirkarimi and references additional information gathered in the City Attorney's investigation. The Mayor expects to stipulate to or prove all these facts at the hearing.

management, the lawful confinement of prisoners, enforcing stay-away orders and other court processes, probation, rehabilitation, and crime prevention. The participants at these meetings understood that Mr. Mirkarimi was present in his capacity as the incoming Sheriff, not as a private citizen. In addition, Sheriff-Elect Mirkarimi attended at least two confidential disciplinary hearings regarding alleged misconduct by Sheriff's Department personnel to prepare him for his own role as the final decisionmaker in disciplinary matters. He also attended monthly Department management meetings in November and December 2011 as Sheriff-Elect and made public appearances as the Sheriff-Elect at departmental events, including the public ceremony celebrating the official demolition of the old jail facility that took place on January 4, 2012.

On January 8, 2012, Sheriff-Elect Mirkarimi left his seat on the Board of Supervisors to be sworn in as Sheriff. That swearing-in ceremony occurred just eight days after the Sheriff-Elect had criminally assaulted his wife and threatened to use the power of his office to gain custody of their son, and just four days after the police opened an investigation into that incident and the Sheriff-Elect's campaign manager, Linnette Peralta Haynes, encouraged a witness to lie to the police and send them away.

## I. ALLEGATIONS OF MISCONDUCT

Beginning with a well-publicized domestic dispute on New Year's Eve 2011, a series of events unfolded that culminated in the Mayor's decision to charge Sheriff Mirkarimi with official misconduct, suspend him from office, and initiate these removal proceedings.

### A. Sheriff Mirkarimi Commits Domestic Violence

On or about December 31, 2011, during a domestic dispute, the Sheriff physically assaulted his wife, Eliana Lopez, grabbing her with such force that he bruised her upper right arm. He also restrained Ms. Lopez and violated her personal liberty.

The police opened an investigation into the matter on January 4, 2012. On January 13, on the basis of that investigation, the District Attorney initiated a criminal complaint against Sheriff Mirkarimi and charged him with three violations of the California Penal Code: (1) section 273.5(a), for unlawfully inflicting a corporal injury on his wife; (2) section 273a(b), for endangering the

person and health of his two-year-old son; and (3) section 136.1(b)(1), for attempting to prevent and dissuade Ms. Lopez from making a report of the incident to law enforcement.

### B. Sheriff Mirkarimi Threatens To Use His Power As A Public Official Against His Wife In Family Court

At or around the time of the violent incident with his wife on December 31, Sheriff Mirkarimi told Ms. Lopez that he was "very powerful" and could therefore take custody of their two-year-old child if she attempted to end their relationship. The most reasonable interpretation of Sheriff Mirkarimi's statement to Ms. Lopez is that Sheriff Mirkarimi was threatening to use the powers and stature conferred by his official positions as Supervisor and incoming Sheriff to obtain advantage.

### C. Sheriff Mirkarimi Participates In Attempts To Persuade A Witness To Lie And Destroy Evidence During The Ensuing Police Investigation

On January 1, 2012, Ms. Lopez told her friend and neighbor, Ivory Madison, about Sheriff Mirkarimi's actions the prior day. Ms. Lopez made a videotape to document her injury and describe the events. On January 4, after a further personal conversation with Ms. Lopez, Ms. Madison telephoned the San Francisco Police Department to find out what they would do if they received a report of domestic violence. During the course of the conversation, Ms. Madison identified the perpetrator of domestic violence and the victim, and the officer followed the required procedure and initiated a criminal investigation.

Upon learning that the police were investigating his actions, Sheriff Mirkarimi engaged in an attempted cover-up. Specifically, Ms. Lopez and Linnette Peralta Haynes, Sheriff Mirkarimi's campaign manager, acting on behalf of Sheriff Mirkarimi, as his agents, or in coordination with him, spoke to Ms. Madison directly and also left messages with her husband, Abe Mertens, attempting to dissuade her from talking to the police. Ms. Haynes encouraged Ms. Madison to lie to the police, and Ms. Lopez asked her to destroy the evidence on the videotape.

### D. On January 8, 2012, Sheriff Mirkarimi Makes Public Statements That Conflict With The Sheriff's Duty To Enforce Domestic Violence Laws

Immediately after being sworn in as Sheriff on January 8, 2012, Sheriff Mirkarimi made public statements to the effect that the December 31, 2011 incident was a "private" and "family

matter." These public statements were contrary to the duty of the Sheriff to treat domestic violence as a crime, not as a private or family matter. These public statements also damaged the credibility and effectiveness of the Sheriff's Department regarding domestic violence prevention, treatment, and corrections. Sheriff's deputies can request and must enforce emergency protective orders in domestic violence cases. The Office of the Sheriff regularly interacts with local programs for perpetrators and victims of domestic violence. This interaction includes providing grant funding to one or more rehabilitation programs for perpetrators of domestic violence. The Sheriff's Office also provides recovery programs for persons in jail who are victims of domestic violence.

### E. On March 12, 2012, Sheriff Mirkarimi Agrees To A Plea Deal Admitting Criminal Wrongdoing And A Criminal Sentence Incompatible With His Duties

On March 12, 2012, after months of the Sheriff's denials, a negotiated plea agreement was announced. Under the agreement, the District Attorney amended the criminal complaint to add a fourth charge against the Sheriff: that he committed misdemeanor false imprisonment in violation of Penal Code section 236 during the December 31, 2011 incident. Sheriff Mirkarimi pleaded guilty to this new charge and agreed to accept a sentence of one day in jail, three years' probation, 52 weeks of domestic violence counseling, community service and a fine. (A three year term of probation and a year's participation in a rehabilitation program are the minimum allowable conditions for domestic violence probationers. (*See* Penal Code section 1203.097.)) On March 19, 2012, Sheriff Mirkarimi was formally sentenced. Under his sentence of probation , he is and will remain subject to the control of local correctional authorities for three of the four years that he was elected to serve as Sheriff. His conviction of a crime of false imprisonment is subject to discovery in criminal proceedings in which he might testify as a law enforcement officer. He is subject to a stay-away order that prohibits him from carrying a firearm. His conduct has fallen well below the standard of conduct that all enforcement officers are expected to follow—including the hundreds of deputies whom he must supervise. And he has been convicted of a crime of domestic violence, as head of an agency that is intimately involved in domestic violence prevention, treatment, and punishment. His conviction and sentence impact his fitness for office and his ability to perform the duties of Sheriff.

### F. Sheriff Mirkarimi's Conduct From December 31, 2011 Through March 19, 2012 Falls Below The Standard Expected Of A Holder Of Public Office

Sheriff Mirkarimi's entire course of conduct has dishonored the office of Supervisor and the office of the Sheriff. Sheriff Mirkarimi's conduct has particularly undermined the authority, dignity, and mission of the Sheriff's Department. Sheriff Mirkarimi's course of conduct is incompatible with holding the office of Sheriff and falls below the level of ethical conduct expected of all public officials, let alone the office of the Sheriff of the City and County of San Francisco.

## II. THE MAYOR SUSPENDS SHERIFF MIRKARIMI AND INITIATES REMOVAL PROCEEDINGS

On March 19, 2012, the same day that Sheriff Mirkarimi was officially sentenced, the Mayor gave Sheriff Mirkarimi 24 hours to resign or face suspension for official misconduct. The Sheriff refused to resign. On March 21, 2012, the Mayor initiated the suspension and removal process set forth in Section 15.105(a) of the San Francisco Charter by serving the Sheriff with written charges of official misconduct and transmitting the charges to the Ethics Commission and the Board of Supervisors.

## III. THE SAN FRANCISCO CHARTER PROVISIONS GOVERNING SUSPENSION, REMOVAL, AND DISQUALIFICATION OF ELECTED OFFICERS FOR OFFICIAL MISCONDUCT

The removal of elected officials who violate the public trust is a core municipal function addressed by the San Francisco Charter. The Charter states the foundational tenet that "[p]ublic office is a public trust." (S.F. Charter § 15.103; *see also* S.F. Camp. & Gov'tal Conduct Code § 3.200.) When an official breaks that trust by committing official misconduct, Section 15.105(a) of the Charter provides a mechanism for the official's removal.

The voters added current Section 15.105(a) to the San Francisco Charter in 1993, at the same time they created the Ethics Commission.[2] That provision vests the Mayor with the power to suspend and charge an elective officer with official misconduct, but the actual power of removal

[2] The Ethics Commission is designed to be an apolitical body. Its five members are appointed by five different authorities, and each member serves only one six-year term. (S.F. Charter § 15.100.) During their tenure, Ethics Commissioners may not hold any other City office, accept gifts from campaign consultants, or participate in any way in local political campaigns. (*Id.* § 15.100(a)-(c).)

lies with the Board of Supervisors. (*Ibid.*) Once the Mayor files written charges of misconduct, the suspended officer, who may be represented by counsel, is entitled to a hearing on the misconduct charges before the Ethics Commission. The Commission, in turn, forwards the full transcript of the hearing to the Board of Supervisors and makes a recommendation whether the charges should be sustained. On the basis of these materials and their own deliberations, Board members vote whether to sustain the charges. The accused officer will be removed if nine or more of the Board members vote to sustain. (*Id.*)

In 1995, the voters added the current definition of the term "official misconduct:" [3]

> Official misconduct means any wrongful behavior by a public officer in relation to the duties of his or her office, willful in its character, including any failure, refusal or neglect of an officer to perform any duty enjoined on him or her by law, or conduct that falls below the standard of decency, good faith and right action impliedly required of all public officers and including any violation of a specific conflict of interest or governmental ethics law. When any City law provides that a violation of the law constitutes or is deemed official misconduct, the conduct is covered by this definition and may subject the person to discipline and/or removal from office. (S.F. Charter Section 15.105(e).)

Prior to 1995, the Charter provided for removal for "official misconduct" but did not define it.

## IV. SHERIFF MIRKARIMI FILES AN UNSUCCESSFUL ACTION IN SUPERIOR COURT TO STOP THESE CHARTER REMOVAL PROCEEDINGS

On March 27, 2012, Sheriff Mirkarimi filed a petition in Superior Court seeking a writ of mandate to reinstate him as Sheriff, a writ of prohibition to stop the Charter removal proceedings, and a declaration that the "decency, good faith and right action" clause of Section 15.105(e) is unconstitutionally vague and cannot be enforced against him. The Sheriff also asked the Court to issue a mandatory injunction against the City requiring it to pay him during his suspension. On April 20, 2012, Judge Kahn of the San Francisco considered and denied each of these requests.

[3] In November 2003, another Charter amendment re-numbered the definition without substantive change, leaving it in its current form in Section 15.105(e).

## DISCUSSION

### I. THE RULES GOVERNING ADMINISTRATIVE HEARINGS, NOT CRIMINAL TRIALS, APPLY TO THESE ETHICS COMMISSION PROCEEDINGS.

#### A. Charter Section 15.105(a) Directs The Ethics Commission To Hold An Administrative Hearing, Transmit The Full Record Of The Hearing To The Board of Supervisors, And Make A Recommendation.

Charter Section 15.105 governs suspension and removal from office. The Charter dedicates the responsibility to suspend and file charges against an official who has committed misconduct to the Mayor, the City's elected chief executive. It assigns the task of determining whether to sustain the charges and remove the official from office to the Board of Supervisors, the City's elected legislative body. Between suspension and removal, however, lies this proceeding before the Ethics Commission. The Commission's charge is to "hold a hearing [and] transmit the full record of the hearing to the Board of Supervisors with a recommendation as to whether the charges should be sustained." (Section 15.105(a).) The Board, in turn, votes whether to sustain the charges based on its review of the record the Ethics Commission is entrusted to create. Accordingly, the paramount goal of these proceedings is to ensure that the Board receives the full panoply of information it will need to render an informed judgment on the charges.

The Ethics Commission has experience and expertise in similar matters that it can bring to bear. An ethics hearing is no novelty to the Commission. To the contrary, one of the core functions of the Commission is to conduct administrative hearings and, on the basis of the resulting administrative record, decide whether a government official has committed an ethical violation. The Charter provides no indication that it expects anything else to happen here. Had the voters envisioned a criminal or quasi-criminal proceeding as the prelude to the Board's removal decision, they could have placed the prohibition on official misconduct into the San Francisco Police Code and charged its enforcement to the District Attorney in criminal court after a grand-jury indictment. Alternatively, the voters could have given the City Attorney the power and the duty to prosecute a cause of action for official misconduct in a civil proceeding, perhaps requiring a heightened burden of proof. Or, the voters could have assigned the hearing to the Ethics Commission and imposed a heightened voting requirement (as they did in the very next sentence in regard to the Board of Supervisors) or a more exacting burden of proof or special evidentiary rules. They did none of

these things. Rather, the Charter charges the Ethics Commission to conduct an administrative ethics hearing in the fashion best suited to creating a complete evidentiary record for the Board and, on the basis of its expertise in government ethics, its evaluation of the evidence, and its customary rules for decision, to make a recommendation to the Board.

Thus, in deciding how to proceed in this official misconduct hearing, the Ethics Commission need not—and should not—create a hearing process from whole cloth. The Commission already has promulgated Regulations for Investigations and Enforcement Proceedings under its rule-making power. *See* S.F. Charter § 15.102. Although those regulations apply to charges initiated by Commission's Executive Director under Charter section C3.699-13, and some of the procedural steps described in those regulations (including rules governing dismissals, probable cause hearings, and imposition of penalties) would not apply here, they provide a sound, well-tested framework for the Commission's handling of misconduct charges against City officials. The Commission initially adopted the regulations in 1997, and has amended them several times. Further, the regulations provide answers to most of the procedural questions that will likely arise during this official misconduct proceeding. The regulations set processes for issuing subpoenas, receiving hearing briefs, taking testimony and other evidence, and deliberating regarding alleged violations of ethics laws. And, like many cases under the Commission's usual enforcement proceedings, this official misconduct hearing will require the Commission to assess whether a City official's conduct is compatible with his office and whether he has complied with mandatory ethical duties. Rather than starting from scratch, the Commission should use its existing procedures to the extent possible here. Section 15.102 gives the Commission the power to adopt rules and regulations to perform its duties, and the Commission can exercise that power to adapt its existing procedures to this removal hearing.

Contrary to Sheriff Mirkarimi's assertion before the Commission on April 23, these Commission proceedings bear no analogy to a criminal proceeding. Criminal proceedings have already occurred for Sheriff Mirkarimi, and he is serving the sentence for his crime. There is no further prospect of criminal penalties here, and the subject matter of the hearing is also distinct. A criminal proceeding involves a judicial determination whether an individual's conduct has fallen

below the bare minimum standard of conduct expected of every adult in a civilized society and warranting criminal punishment of that individual, usually including a constraint on liberty. In contrast, this removal hearing involves an administrative determination whether Sheriff Mirkarimi's behavior has met the high standards expected of an officeholder, and no punishment will result; rather, this hearing will conclude with a *recommendation* to the Board of Supervisors. And even if nine of eleven Supervisors vote to sustain the charges, Sheriff Mirkarimi will not then lose his liberty. Rather, as a result of a legislative finding of official misconduct, Sheriff Mirkarimi will be removed so that public confidence in the office of Sheriff may be restored. The ultimate purpose of enforcement proceedings like this one is to protect the public, not to punish an officeholder. Such proceedings are not criminal in nature.

This official misconduct proceeding is no different in kind from other enforcement matters that the Commission regularly handles under its existing regulations without engrafting criminal procedures. Those enforcement cases have significant implications for the individuals involved—including potentially large financial penalties—and they often involve conduct that could be charged criminally. Indeed, intentional violations of the Campaign Finance Reform Ordinance and the Government Ethics Ordinance could be charged as crimes, and those laws can be enforced by the District Attorney in addition to the Ethics Commission. (*See* Camp. & Govt'al Conduct Code §§ 1.170(a), 3.242(a).) Notwithstanding the gravity of such enforcement proceedings, the Ethics Commission need not, and does not, use criminal procedures in order to comport with due process.

The Charter contemplates that the Ethics Commission will fulfill the role it is uniquely able to perform: conduct a full administrative hearing into charges that a public official has committed an actionable ethical breach. Nothing in the Charter suggests that the hearing should be governed by the rules of criminal procedure or that any aspect of the removal process is criminal in nature. No grand jury indictment is required. There is no provision for criminal punishment. There is no reference to an enhanced standard of proof. There is no requirement of unanimity for the Commission's recommendation. Indeed, even the Board of Supervisors' actual decision to remove need not be unanimous. In short, this is not a criminal proceeding, and it does not require criminal procedures.

### B. The Commission May Consider The Same Types Of Evidence And Measure The Evidence Against The Same Standard As It Would In Other Administrative Hearings.

#### 1. The Commission should make its recommendation based on a preponderance of the evidence.

The Commission's enforcement regulations provide that the standard of proof in enforcement matters is by a preponderance of the evidence. (Ethics Commission Regulations for Investigations and Enforcement Proceedings §§ XII.A.2., B., C.) The burden of proof is on the party seeking enforcement. (*Id.* § XII.A.2.) Those standards are appropriate to this official misconduct hearing.

The preponderance of the evidence standard applies here, because this is a civil proceeding, and the Charter does not specify a different standard. An administrative enforcement proceeding is civil in nature. (*See Hughes v. Bd. of Architectural Examiners* (1998) 17 Cal.4th 763, 784-85.) In a civil proceeding, the normal standard of proof is preponderance of the evidence. (Cal. Evid. Code § 115 ["Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence"].) Thus, when an administrative proceeding does not specify a standard of proof, courts hold that the preponderance of the evidence standard applies under Section 115 of the Evidence Code. (*See, e.g., Mann v. Dep't of Motor Vehicles* (1999) 76 Cal. App. 4th 312, 318; *San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1892-93.) That is the case here. And as both parties agree, the burden of proof in this proceeding lies with the Mayor. (*See Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113.)

#### 2. With one exception, the Commission should use the administrative rules of evidence to build the administrative record.

As the Commission does in enforcement proceedings, the Commission should rely on the same type of evidence that is admissible under Ethics Commission Regulation § XII.A.3. That provision incorporates the evidentiary rules applicable to hearings under the California Administrative Procedures Act (APA), which provide both parties with the right to call witnesses, cross-examine witnesses, and submit documentary evidence. (*See* Reg. § XII.A.3.; Cal. Gov. Code § 11513(a).)

The rules of evidence in administrative hearings are somewhat less stringent than in civil disputes. The APA provides, in pertinent part:

> The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

(Cal. Gov. Code § 11513(c).) This relaxed rule of evidence, while less technical, still demands evidence that most people would consider to be reliable. And while this rule permits the consideration of hearsay, it does so within limits.

> Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

(Cal. Gov't Code § 11513(d).) This, the Commission's findings may not be based on hearsay alone.

Of course, if evidence that would otherwise be hearsay falls within an exception to the hearsay rule, then it is admissible and sufficient – just like in a civil proceeding. Thus, in the present case, the Commission could rely on Ms. Lopez's videotaped January 1 statement as sufficient evidence that Sheriff Mirkarimi committed the acts of domestic violence that caused the injury described in her statement.[4] (*See People v. Mirkarimi* (Feb. 27, 2012) Reporter's Transcript at 21-30 [ruling that Ms. Lopez's videotaped statement admissible under Evidence Code section 1240]; *see also, e.g.*, *Melkonians v. Los Angeles County Civil Serv. Comm'n* (2009) 174 Cal.App.4th 1159, 1170 [holding transcript of domestic violence victim's telephone call to sheriff's department was admissible in administrative proceeding against law enforcement officer who committed the domestic violence, because it was a spontaneous statement under Evid. Code § 1240].)

---

[4] The Mayor has been forced to resort to court processes to obtain a copy of this videotape because Sheriff Mirkarimi has refused to provide the copy he obtained during criminal discovery. The only other copies of this videotape are being held on behalf of the Court, and the City has filed a motion for their release. (Cal. Penal Code § 1536.) As described below, we urge that this Court adopt discovery rules that would enable mutual discovery of relevant documentary evidence like this videotape.

There is one provision of the APA, however, that is not well-suited to this proceeding. The APA permits testimony by written affidavit, subject to the right to cross-examine. (Gov. Code § 11514.) But if cross-examination is requested and a declarant does not appear, the APA nonetheless allows the affidavit to be introduced as hearsay evidence, and given the weight of hearsay. (*Id.*) Given the heightened need for public accountability in this matter, this rule should not apply: rather, the declaration of a witness who refuses or fails to appear for requested cross-examination should not be admitted or considered at all.[5] The erosion of public confidence in the office of Sheriff will not be restored if contested statements that have been shielded from challenge can be considered as evidence of any weight.

**3. The discovery rules under Ethics Commission Regulation § X.A. are appropriate for this proceeding.**

The Commission has adopted the discovery rules under the APA for its enforcement proceedings. (Ethics Commission Reg. § X.A. [incorporating discovery rules under Gov. Code, Title 2, div. 3, pt. 1, ch. 5].) We request that the Commission adopt those rules here as well in order to speed hearing preparation and ensure a mutually informed presentation of the facts. The goal of these proceedings is to establish a full factual record for the consideration of the Board. At the April 23 meeting of the Commission, counsel for the Sheriff argued that the Mayor's and City Attorney's investigations into his client's conduct put the Sheriff at an information disadvantage such that he was being forced to fight with one hand behind his back. As described in the accompanying letter brief, what the Sheriff characterizes as an unfair advantage is simply the normal process of investigating a case of this nature. The Mayor has acted diligently and fairly to develop the evidence. But the Mayor certainly does believe that both parties should have the tools they need to prepare their case. Adopting the administrative discovery rules would serve that goal.

[5] The Executive Director's April 17, 2012 Memorandum to the Commission similarly recommended a position stricter than the APA rule. (Mem. at p. 4 ["The declaration of any individual who does not agree to testify in person under oath should be disregarded, or at a minimum its weight should be substantially diminished"].)

### 4. In these proceedings, the Charter directs the Commission to determine its recommendation by simple majority vote.

The Charter does not specify the number of Commissioners who must vote to sustain the official misconduct charges for that to be the Commission's recommended course of action to the Board, but that does not mean the Charter does not address this question. In fact, the Charter expressly provides that a simple majority vote of Board or Commission members is sufficient to take any action unless the Charter requires something more. "Unless otherwise required by this Charter, the affirmative vote of a majority of the members shall be required for the approval of any matter. . . ." (Charter § 4.104(b).) Here, although Section 15.105(a) explicitly requires a three-fourths supermajority of votes at the Board of Supervisors to sustain the charges and remove the Sheriff, Section 15.105(a) is silent on the number of votes required at the Ethics Commission. Accordingly, the simple majority rule of Section 4.104(b) controls.

There is nothing unusual about the Commission applying a simple majority requirement here. For example, the Commission's bylaws provide that "[t]he act of the majority of the members of the Commission shall be the act of the full membership." (Ethics Comm. Bylaws, Art. VII, § 1.) For parliamentary matters, the Commission's bylaws incorporate Robert's Rules of Order, which also state as a default rule that "basic principle of decision is that . . . a proposition must be adopted by *majority vote.*" (Ethics Comm. Bylaws, Art. X § 1; Robert's Rules of Order, Newly Revised, 10th Ed., Ch. I § 1.) And in enforcement matters, the Commission also follows the majority-vote rule. The Commission's enforcement regulations specify that "[t]he votes of at least three Commissioners are required to find a violation of law" or to "impose orders and penalties for a violation." (Ethics Comm. Regs. §§ XII(B), (C).)[6] Here, too, a majority vote will decide the matter.

[6] In the exceptional cases where an applicable ordinance (such as the City's Campaign Finance Reform Ordinance) specifically requires more than three out of five votes, the Commission follows that specific requirement. (*See* Camp. & Gov'tal Conduct Code § 1.103.)

## II. THE OFFICIAL MISCONDUCT CHARGES AGAINST SHERIFF MIRKARIMI ARE LEGALLY SOUND.

### A. Sheriff Mirkarimi Can Be Removed For The Acts Of Misconduct He Committed After His Election But Prior To His Swearing-In As Sheriff.

In the writ proceedings before the Superior Court, Sheriff Mirkarimi argued that he is only subject to removal as Sheriff for acts of misconduct committed after being sworn into the office of Sheriff. In his view, a public official cannot commit "official" misconduct unless he or she is "in office," and technically that requires taking the oath.

At the threshold, at least in the circumstances of this case, Sheriff Mirkarimi's protestations on the basis of timing are purely academic, because he is also charged with acts of official misconduct that occurred after he took the oath of office on January 8, 2012. Of greatest significance, of course, are the Sheriff's admission of criminal guilt and his acceptance of a term of three years' probation, a year of domestic violence counseling, and other conditions that are mandatory components of domestic violence probation—and which are entirely incompatible with exercising the duties of Sheriff. Where there is an intervening period of denial between the act and the eventual admission, the misconduct relates forward to the later date. (*See, e.g., State v. McInnis* (Tex.Ct.App. 1979) 586 S.W.2d 890, 896;; *Application of Baker, supra,* 386 N.Y.S.2d at p. 316.)

But even the Sheriff's misconduct truly were limited to the period before he took the oath of office, his position would still lack all support in both law and logic. First and foremost, there is no "in office" requirement in the Charter. That argument is just plain made up.[7] Nor does the Charter

[7] Before the Superior Court, Sheriff Mirkarimi placed the entire weight of his oath-of-office argument on extrapolations from dicta in a single case, *Mazzola v. City and County of San Francisco* (1980) 112 Cal.App.3d 141, which offered a passing description of official misconduct as "a violation or omission of a proscribed act committed while *in office*." (*Id*. at p. 150 [emphases added.) Ironically, the court only came up with even that much of a description in the first place because there was no Charter definition at the time, and Mazzola had raised a vagueness challenge based on that absence. The task of the court in responding that challenge was only to determine whether official misconduct had a sufficiently specific meaning to be enforceable, not to determine its precise contours. After consulting a few different authorities from various jurisdictions that addressed a variety of different terms, the court offered its one-sentence summary and concluded that, in general, "official misconduct" had a sufficiently concrete meaning to survive a vagueness objection. (*See id.* at pp. 149-151.) In its survey, the court consulted Black's Law Dictionary, which provided a definition of official misconduct that is virtually identical to the first prong of the current Charter definition, but the remaining authorities all addressed various forms of wrongdoing "in office." As a result, it is as unsurprising as it is unremarkable that the Court included the phrase "in office" in its own one-sentence summary of what it found. And, in any event, the voters added

(continued on next page)

limit official misconduct to acts by sworn officials in any other way. Section 15.105(e) defines "official misconduct" as "[1] any wrongful behavior by a public officer in relation to the duties of his or her office, willful in its character, … or [2] conduct that falls below the standard of decency, good faith and right action impliedly required of all public officers." Under either prong of the definition, the misconduct must be attributable to a "public officer," but nothing in the language suggests any distinction between a "sworn public officer" and an "elected but unsworn" public officer. The definition makes perfect sense when read to encompass both: "Official misconduct means any wrongful behavior by a [sworn or unsworn] public officer in relation to the duties of his or her office, willful in its character, . . . or conduct that falls below the standard of decency, good faith and right action impliedly required of all [sworn or unsworn] public officers."

And indeed, even setting aside his status as an incumbent Supervisor,[8] Sheriff Mirkarimi was already a public official in his capacity as Sheriff-Elect. The actions of a person elected to public office but not yet been sworn into that office can constitute state action, taken under color of law. (*See International Ass'n of Machinists and Aerospace Workers v. Haley* (D. South Carolina) 2011 WL 3586109, __ F.Supp.2d __, 191 L.R.R.M. (BNA) 2252 [statements of Governor-elect of South Carolina, made after election but before she was sworn in, were "made under color of law"

---

(footnote continued from previous page)
the Charter definition of official misconduct in 1995. The text of the Charter, not *Mazzola*, controls this case.

[8] As a threshold matter, the Sheriff's argument that he cannot be removed because he was not yet "in office" as Sheriff ignores the critical fact that he was in office as Supervisor. Nothing in the language of Section 15.105(e) suggests that official misconduct in a prior term of office cannot serve as the basis for removal from current office. And if there is a line to be drawn at a prior term, existing case law in a number of jurisdictions makes the persuasive case that misconduct in a prior term should only be unreachable if it was disclosed to the voters before the election and forgiven by them at the polls. The principal rationale of what is alternatively known as the "prior term rule" and the "voter forgiveness doctrine" is that reelection of the officer on the basis of full disclosure amounts to voter condonation of his prior misconduct. (*See, e.g., State v. Meneley* (2001) 271 Kan. 355, 390; *accord State v. McInnis, supra*, 586 S.W.2d at pp. 893, 895 [under the "forgiveness doctrine," removal may not "be predicated on acts antedating the election . . . when such acts were a matter of public record or otherwise known to the electors and were sanctioned and approved or forgiven by them at the election" [internal quotations omitted]. ) This appears to be a particularly sound rule of public policy, protecting the will of the voters from override and protecting officials elected on the basis of honest disclosure from the specter of past misdeeds, while at the same time maintaining the public trust and confidence in elected officeholders by providing for removal of officers whose misconduct was not known at the time of the election.

for purposes of Section 1983 claim].) Similarly, the California Legislature expressly requires unsworn elected officials to adhere to the same open meeting laws as sworn officials. (Cal. Gov.Code § 54952.1.) In like fashion, the California Political Reform Act defines "elected officer" to mean "any person who holds an elective office or has been elected to an elective office but has not yet taken office." (Cal. Gov.Code § 82020.) And as the Ethics Commission explained to then Supervisor-Elect Mirkarimi in 2004 when he asked whether private donations for "transitional expenses" were subject to contribution limits, "[t]he gathering of information and performance of acts to ensure the continuity of a particular City office are duties that *public officials* are expected to perform when assuming a new office." (San Francisco Ethics Commission Advice Letter to Ross Mirkarimi (Dec. 20, 2004) [emphasis added] available at http://www.sfethics.org/ethics/2004/12/advice---december-20-2004-letter.html.)

Understanding Sheriff Mirkarimi to be a "public official" at all times after his election as Sheriff is also consistent with the evidence that, at the time of the pre-oath misconduct, Sheriff Mirkarimi was routinely acting in an official capacity as Sheriff-Elect. No mere private citizen would seek or receive, as he did, numerous special briefings on the inner workings of the Sheriff's Department; no private citizen would be allowed to attend, as he did, confidential disciplinary hearings of Sheriff's Department personnel; and no private citizen would appear, as he did, as a representative of the Sheriff's Department at public events. Indeed, one such event took place on the morning of January 4, when Sheriff Mirkarimi appeared in his public capacity as Sheriff-Elect at the ceremony celebrating the demolition of the old jail. Later on the very same day, he allegedly participated in efforts to encourage a witness to lie to the police and destroy evidence. It is difficult to reconcile Sheriff Mirkarimi's public appearance as an elected public official in the morning with his contention that he was not a public official in the afternoon.

Sheriff Mirkarimi will look in vain for a Charter limitation immunizing his misconduct based on its timing because, so long as he was a public officer at the time of the alleged act (which he was, sometimes several times over), there simply is none. A number of other jurisdictions take a similar approach, rejecting strict limitations in favor of greater public accountability, particularly among members of the criminal justice system. (*See, e.g.*, *People v. Cherry* (1989) 209 Cal.App.3d

1131, 1134-36 [explaining that California law permits "removal from office for willful misconduct at any time within six years immediately preceding the presentation of an accusation"]; *Matter of Bailey, supra,* 67 N.Y.2d at pp. 62-64 ["it would be an unseemly and unsound distinction with respect to a matter affecting general character and fitness to immunize a Judge from his prior misconduct as a Judge of lesser or higher rank']; *In re Sarisohn* (1966) 26 A.D.2d 388, 275 N.Y.S.2d 355, 390 [explaining that it is appropriate to remove a judge from office for "any misconduct, even if committed prior to the taking of judicial office, as would disclose that the Judge's retention in office is inconsistent with the fair, proper and wholesome administration of justice."]; *State v. Meneley, supra,* 271 Kan. at p. 391 [denying Sheriff the benefit of prior term rule because "[h]is duties as sheriff are an important and vital part of the criminal justice system and, as such, it would be inappropriate"].)

Finally, even if the Ethics Commission is persuaded that some acts of public officers should be shielded from public scrutiny for official misconduct, the Commission is barred from adding a limitation on removal that does not exist in the Charter. The Charter is the "the city's constitution," and can be amended only with voter approval. (*See Woo v. Superior Court* (2000) 83 Cal. App. 4th 967, 974.) Because the Charter was adopted by the voters, the Commission may not unilaterally "prohibit[] what the initiative authorizes, or authorize[] what the initiative prohibits." (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.) "A statute enacted by voter initiative may be changed only with the approval of the electorate," so the Commission cannot change the Charter "by adding or taking from it some particular provision." (*People v. Cooper* (2002) 27 Cal.4th 38, 44.) Neither a pre-oath nor a prior-term exclusion is anywhere to be found in the Charter, and the Commission may not properly add either one.

### B. The Charter Requires, And The Allegations Demonstrate, A Nexus Between The Alleged Acts And The Duties Or Integrity Of Office.

The Charter does not require that the official misconduct relate to Mr. Mirkarimi's duties as Sheriff. The definition of official misconduct in Section 15.105(e) has two different prongs: (1) "any wrongful behavior by a public officer *in relation to the duties of his or her office*, willful in its

character"[9] and (2) "conduct that falls below the standard of decency, good faith and right action *impliedly required of all public officers*." (Emphasis added.) For charges pressed under the first prong, the Charter requires a showing that Mr. Mirkarimi's misconduct has a relationship to his duties as Sheriff and/or (until January 8) as Supervisor. For charges pressed under the second prong, the misconduct need not be related to particular duties of office, but instead to the commonly accepted standards of professional conduct for a sheriff and/or a member of a legislative body. (*See Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 769 [explaining that laws prohibiting "immoral" or "unprofessional" or "unbecoming" conduct, however phrased, even when directed to a broad and varied group, implicitly refer to the commonly accepted understanding of unprofessional conduct among others in the same profession as the person challenging the law].) Either way, whether the relationship is to the duties of office or to the commonly accepted standards of ethical conduct associated with his office, the Charter requires the alleged acts of official misconduct to bear a demonstrable nexus to Mr. Mirkarimi's public position.

Even though a number of different types of relationships would satisfy the Charter's nexus requirement, the evidence in this case will establish an ample relationship between the Sheriff's misconduct and his specific duties as Sheriff. Under both state and local law, a sheriff has a duty to enforce the criminal laws; Sheriff Mirkarimi committed a serious crime. A sheriff is the county jail-keeper; Sheriff Mirkarimi falsely imprisoned his wife. A sheriff is charged to preserve the peace, prevent crime and rehabilitate offenders; Sheriff Mirkarimi breached the peace, committed a crime and became an offender. A sheriff arrests and brings before a magistrate all persons who commit a public offense; Sheriff Mirkarimi was arrested and arraigned. A sheriff has the duty to investigate public offenses; Sheriff Mirkarimi sat by as his campaign manager and his wife tried to tamper with an investigation. A sheriff may grant a license to carry a concealed weapon; Sheriff Mirkarimi is not allowed to carry a firearm. A sheriff tries to rehabilitate domestic abusers; Sheriff Mirkarimi is a domestic abuser required to attend rehabilitation. The list goes on.

[9] Note that there is no requirement under the Charter that the public officer must have abused the powers of his office to have committed official misconduct. Any concern that official misconduct is limited to abuse of office under the Charter is unfounded.

### C. Even If The Commission Could Properly Conclude—And It Cannot—That The Official Misconduct Charges Cannot Be Sustained As A Matter Of Law, It Still Must Hold A Hearing.

The Commission does not have the authority to dismiss these removal proceedings even if it concludes that the charges are legally flawed (which they are not). Under Charter Section 15.105(a), the Ethics Commission "shall hold a hearing" and "shall transmit the full record of the hearing to the Board of Supervisors with a recommendation as to whether the charges should be sustained." The word "shall" creates a mandatory duty. (*In re Luis B.* (2006) 142 Cal. App. 4th 1117, 1123.) The Commission cannot discharge its mandatory duty to hold a hearing if it dismisses the misconduct charges. It can recommend that the official misconduct charges not be sustained, but no more. An administrative agency may only exercise " 'such powers as have been conferred on them, expressly or by implication, by constitution or statute.' " (*City and County of San Francisco v. Padilla* (1972) 23 Cal. App. 3d 388, 400 [quoting *Ferdig v. State Personnel Bd.* (1969) 71 Cal.2d 96, 103].) While the Charter grants the Commission a critical role in these proceedings, the Charter does not grant it the power to dismiss.

## III. EVEN THOUGH THE SHERIFF'S UNDISPUTED GUILTY PLEA AND AGREED-TO SENTENCE ARE SUFFICIENT PROOF OF OFFICIAL MISCONDUCT, THE COMMISSION STILL MUST HOLD A FULL EVIDENTIARY HEARING ON THE ENTIRETY OF THE CHARGES.

Likewise, for all of the reasons just stated, while the undisputed facts of Sheriff Mirkarimi's guilty plea and criminal sentence are more than enough to satisfy either prong of the official misconduct definition in Section 15.105(e), that does not change the course of the required proceedings. The Commission still must hold a hearing and create a full record on all the charges. (*See* Discussion Section II.C, *supra*.)

## CONCLUSION

For the foregoing reasons, the Mayor respectfully requests that the Ethics Commission hold the administrative hearing contemplated by the Charter and create a full evidentiary record to transmit to the Board. As in all other administrative hearings, Commissioners should evaluate the charges on the basis of the preponderance of the evidence. And as directed by the Charter, the

Commission should reach its decision whether to sustain the charges by means of a simple majority vote.

Dated: April 30, 2012

DENNIS J. HERRERA
City Attorney
JESSE C. SMITH
Chief Assistant City Attorney
SHERRI SOKELAND KAISER
PETER J. KEITH
Deputy City Attorneys

By: s/Sherri Kaiser
SHERRI SOKELAND KAISER

Attorneys for MAYOR EDWIN M. LEE