



DENNIS J. HERRERA
City Attorney

MEMORANDUM

TO: HONORABLE GAVIN NEWSOM, Mayor
HONORABLE MEMBERS, Board of Supervisors
HONORABLE JEFF ADACHI, Public Defender

FROM: BURK DELVENTHAL
THOMAS J. OWEN
AMY S. ACKERMAN
CHAD A. JACOBS
TED LAKEY
Deputy City Attorney

DATE: April 21, 2004

RE: Authority of Board of Supervisors or a Committee of the Board to Overrule the Mayor's Disapproval of a Requisition for a Position under Certain Elected Officials

Questions Presented:

You have asked a series of questions regarding a clause in section 1.1 of this year's annual salary ordinance. That clause, which is new in the current annual salary ordinance, provides:

Provided further, that if requisitions for vacant permanent positions issued by departments where Appointing Officers are elected officials enumerated in Article II and Section 6.100 of the Charter (the Board of Supervisors, Assessor-Recorder, City Attorney District Attorney, Public Defender, Sheriff and Treasurer), are not approved or rejected by the Mayor and the Department of Human Resources within 15 working days of submission, the requisitions shall be deemed approved. *If the Mayor's Office rejects such requisitions, the Appointing Officers listed above may appeal that rejection in a hearing before the Budget Committee of the Board of Supervisors, who may then grant approval of said requisitions.* [Emphasis added]

Specifically, you have asked:

1. May the Budget Committee of the Board of Supervisors ("Board") override by motion the Mayor's rejection of a requisition to fill a vacant position within the department of an elected official?
2. If the Budget Committee may not override the Mayor's rejection of a requisition, may the full Board do so by motion?

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3. Does the Office of the City Attorney have a conflict of interest that precludes it from advising the Board on this matter?

Short Answers:

The Board may not delegate to one of its committees the power to exercise any of the Board's powers. Therefore, under the annual salary ordinance only the full Board has the authority to decide whether to override the Mayor's rejection of the requisition for a position under an elected official other than the Mayor.

The Board must act by resolution when deciding whether to override the Mayor's decision to disapprove such a requisition. The Charter permits the Board to act by motion only on matters over which the Board has exclusive jurisdiction. The approval of requisitions for appointments to City positions for positions under elected officials other than the Mayor - and the Board - is not a matter solely within the jurisdiction of the Board. Consistent with the long-standing advice of this Office, the Board may not, even by ordinance, give itself the authority to act by motion over matters that are not exclusively within its jurisdiction.

The Office of the City Attorney does not have a conflict of interest that precludes it from providing advice to the Board on this matter if it is also advising the Mayor on this matter. There are two main reasons. First, under the Charter, the City Attorney represents the City and all of its constituent agencies, boards, commissions, departments and officers. The Charter has long been premised on having the City Attorney serve as a single legal advisor to the City, directly accountable to the San Francisco voters, and not beholden to any single interest. It is part of a time tested system of checks and balances. The job of the City Attorney is to give consistent, objective legal advice of the highest quality to the legislative and the executive branches of City government. Second, the California Rules of Professional Conduct, which govern the conduct of all lawyers in the State, provide that the Office of the City Attorney has a single client in this matter - the City and County of San Francisco. Because the City is the client of the Office of the City Attorney, the Office does not owe a distinct duty of loyalty to individual constituent entities of the City. Accordingly, neither the Office, nor its individual attorneys, have a conflict of interest in advising multiple persons or departments, who may have conflicting policy views about this matter.

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Background:

To answer your questions, we must first briefly review the budget and requisition processes the City uses when filling vacant positions.

The budget process begins when the Controller prepares estimates of expected revenues for the next fiscal year. He also prepares estimates of the costs of maintaining current levels of services. (Charter §9.101, 9.102) Each department prepares a budget in the form that the Controller, after consulting with the Mayor, directs in writing. (Charter § 9.114.) Each commission that oversees a department must approve the department's budget proposal and submit it to the Mayor. (Charter §4.102.)

The Mayor then prepares the City budget. The budget must identify all estimated revenues for expenditures and the allocation of revenues to all departments, functions and programs of the City and County, including departments headed by independent elected officials. (Charter §§ 3.100, 9.101.) All City financial assets and revenues, including money that is placed on reserve and money carried forward from the prior year, must be appropriated each year in the budget. If the Budget contains new revenue or fees, the Mayor must submit to the Board the relevant implementing ordinances at the same time he submits the budget. (Charter §9.101.) In addition, the Mayor must submit all ordinances and resolutions fixing wages and benefits for all classifications and related appropriation ordinances. (*Ibid.*)

The Board then reviews the Mayor's proposed budget. The Board may decrease, but not increase, revenue estimates. It may decrease appropriations. The Board may increase appropriations, but only if the aggregate changes do not cause the expenditure from the particular fund to exceed the amount proposed for expenditure by the Mayor from any fund. (Charter §9.103.) At the end of the process, the Board adopts three ordinances: (1) the Annual Appropriations Ordinance, which authorizes the expenditure of funds (Charter §9.103, S.F. Admin. Code §10.01); (2) the Annual Salary Ordinance ("ASO"), which authorizes the number and rates of compensation for all positions continued or created in the annual budget (Charter §9.101, S.F. Admin. Code §10.04), and (3) the *ad valorem* tax rate ordinance, which sets the tax rate. (S.F. Admin. Code §3.3.). Thereafter, the execution of the spending and appointment ordinances passes out of the hands of the Legislative Branch and moves to the Executive Branch. Once the budget is adopted, the Board may make changes to it by amending the Annual Appropriations or Salary Ordinances. (Charter §§ 9.105, 9.113.)

Central to the implementing the ASO is the "requisition." A "requisition" is the document that memorializes the executive approval to appoint an employee into a position

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authorized in the ASO. Requisitions allow the City to track positions, and trigger administrative processes that occur when a department head is contemplating hiring a new employee or making a promotion.

The Charter states: "Whenever a position controlled by the civil service provisions of this Charter is to be filled, the appointing officer shall make a requisition to the department of human resources for a person to fill it." (Charter § A8.329.) The ASO authorizes departments to "make or continue appointments" to positions enumerated in that ordinance; provided, however, "[a]ppointing officers shall not make an appointment to a vacancy in a permanent position until the requisition for such service is approved (when required) by the Mayor, the Controller and the Human Resources Department." (ASO §1.1.) The Board, in the ASO, has given the Mayor this approval power since at least 1935.¹

When a department head wishes to fill a position authorized by the ASO, the department head submits a requisition. The Controller reviews and must approve the requisition if he finds adequate funds from the appropriate source are available to pay the employee. (Charter §3.105.) The Department of Human Resources reviews and approves the requisition if the position is properly authorized within the Annual Salary Ordinance and the proposed job classification is appropriate for the duties to be performed. (Charter §§ 10.102, 10.103.) Finally, the Mayor reviews the requisition. The ASO does not specify the criteria that the Mayor applies in determining whether to approve a requisition. In the absence of stated criteria, the Mayor may determine whether the approval is in the best interest of the City. Once each of these offices approves the requisition, the department head may hire the employee. (ASO, §1.1.)

Historically, the Board has exercised a special degree of control over the number of positions in all City agencies and offices. (1932 Charter, § 73, as recodified in 1971 Charter § 6.207.) The voters eliminated the specific provision for the ASO in the 1996 Charter revision. The 1996 Charter, however, continues to require the Board to adopt legislation setting wages and benefits. (Charter § 9.101.) There is no evidence that through these changes in the 1996 Charter the voters intended to deprive the Board of the authority it had long had over the number of positions in City agencies, including departments under elected officials. Therefore, the Charter continues to contemplate that the Board play a significant role in the control of the number of positions in City government.²

¹ Attached, for your reference, is the Annual Appropriation Ordinance from Fiscal Year 1935-1936, which gives the Mayor the power to approve each requisition.

² Our conclusion that the Board may, by ordinance, review appeals by elected officials of requisitions rejected by the Mayor is limited to these specific facts and circumstances. There are limits to the exercise by the Board of review

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As noted above, Section 1.1 of the ASO has historically required the approval of the Department of Human Resources, the Controller and the Mayor of all requisitions. At the meeting beginning on July 22 and extending into the early hours of July 23, 2003, the Board added the new clause to the 2003-2004 ASO, subjecting the Mayor's decision to reject a requisition to review by the Board's Budget Committee. This new clause was added near the end of the meeting with many other changes. And the Board added it at the deadline for adopting the budget. Unfortunately, our Office did not have an opportunity to review and approve the new language that ended up being incorporated in section 1.1. At that meeting, our Office expressed reservations to individual members of the Board as to the legality of this provision. Given the late hour, the number of other changes, and the impending deadline for adopting the budget, there was insufficient time for any formal or thorough review. In fact, the amendment was added at such a late hour that it was not included in the published version of the ASO. On September 26, 2004, the Director of Human Resources wrote the Clerk of the Board a letter informing her of the omission and requesting that this new clause be incorporated into section 1.1 of the ASO.

Public Defender Adachi has appealed to the Budget Committee of the Board a decision by the Mayor to reject a requisition for the Public Defender's department. This is the first time that an elected official has invoked the new provision in section 1.1 of the ASO. On March 31, 2004, the Budget Committee had before it a proposed resolution granting the appeal and approving the requisition. During the Committee's consideration of the item, Committee members and Public Defender Adachi raised questions as to whether the Committee rather than the Board could act on the appeal, as the text of the ASO provision reads. In addition, they raised questions as to whether the appropriate vehicle for action by the Board was a motion rather than a resolution, if the Committee could not itself approve the appeal. The Committee referred both a resolution and a motion to the Board for consideration at its April 12th meeting. Members of the Committee and Public Defender Adachi have asked us to answer these questions regarding this provision of the ASO. They also asked us to address whether this Office has a conflict in advising on this matter if we also advise the Mayor's Office.

over specific exercises of the executive functions and we do not reach questions here relating to the limits of those powers.

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Analysis:**I. The Budget Committee Of The Board May Not Override By Motion The Mayor's Rejection Of A Requisition To Fill A Vacant Position Within The Department Of An Elected Official.**

The Charter does not provide for the Board to take action or exercise any of the Board's powers through committee. Section 2.105 of the Charter states that

The Board of Supervisors shall act only by written ordinance or resolution, except that it may act by motion on matters over which the Board of Supervisors has exclusive jurisdiction. All legislative acts shall be by ordinance. An ordinance or resolution may be introduced before the Board of Supervisors by a member of the Board, a committee of the Board or the Mayor, and shall be referred to and reported upon by an appropriate committee of the Board. An ordinance or resolution may be prepared in committee and reported out to the full Board for action, consistent with the public notice laws of the City. Except as otherwise provided in this Charter, passage of an ordinance or a resolution shall require the affirmative vote of a majority of the members of the Board."

Thus, committees hear and report on proposed ordinances and resolutions, but only the full Board can take action.

"As a general rule, powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of public trusts and cannot be surrendered or delegated to subordinates in the absence of statutory authorization." (*American Federation of Teachers v. Board of Education* (1980) 107 Cal.App.3d 829, 834; see also *Sacramento Chamber of Commerce v. J.H. Stephens* (1931) 212 Cal. 607 ["legislative or discretionary powers or trusts devolved by charter or law on a council or governing body, or a specified board or officer, cannot be delegated to others . . ."]; *Schechter v. County of Los Angeles* (1968) 258 Cal.App.2d 391, 397 ["An administrative board cannot legally confer upon its employees authority that under the law may be exercised only by the board."].)

In *Webster v. Board of Education* (1903) 140 Cal. 331, the California Supreme Court held that the superintendent of San Francisco's schools could not delegate to a deputy his authority to sit on the school board. The Court held, as a member of the board of education "he has no power under the law to appoint a deputy to act for him in that capacity. The duties of that board are legislative and quasi-judicial, and the general rule is, that such duties cannot be delegated . . ." (*Id.* at p. 332.)

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This Office has long advised City officials of this restriction. (See City Attorney memorandum to Board, entitled, "Power of the Board of Supervisors to Place Reserves on Appropriations," dated May 21, 1993, p. 7 [Board, not a committee of a Board, must act to release funds on reserve]; see also City Attorney Opinions 83-29 [Presiding Judge of the Superior Court may not act as the appointing officer for the Office of the County Clerk, when Charter gave Superior Court power to act as appointing officer] and 78-59 [Sheriff may not delegate to the Under-sheriff the appointing officer's Charter power to suspend subordinates for periods of up to 30 days].) In City Attorney Opinion 78-60, we advised the Board that it may not delegate to a committee its duty to conduct quasi-judicial hearings. We concluded that City law conferred on the Board the authority to hear appeals from the administrative decisions of various City agencies. Accordingly, the Board could not delegate that responsibility to a committee.

Here, the Charter authorizes the Board to act as the legislative branch. (Charter Article II.) As mentioned above, the Charter requires the full Board to act on resolutions and ordinances. (Charter § 2.105.) Also as noted above, the Charter charges the Board with approval of the budget and the positions established within the ASO. (Charter § 9.101.) The Board may not delegate that power to act to a committee. Accordingly, the Budget Committee may not finally act upon the Mayor's rejection of a requisition for a position within the department of an elected official. Instead, as with all other exercises of Board authority under the Charter, the full Board, rather than the Budget Committee, must decide whether to override the Mayor's decision to disapprove the requisition.

II. The Board May Only Override the Mayor's Rejection of a Requisition By Resolution.

As previously mentioned, Charter section 2.105 provides, in relevant part, that "[t]he Board of Supervisors shall act only by written ordinance or resolution, except that it may act by motion on matters over which the Board of Supervisors has exclusive jurisdiction."

Consistent with that provision, Rule 48 of the Board of Supervisors' Rules of Order provides:

Action by Motion. Action by motion includes parliamentary actions, actions on matters which concern only the internal functioning of the Board, directives to the Clerk of the Board to perform some specific act in the line of official duty, directives to the several officers or departments of the City and County, adoption of the annual budget, submission of Charter amendments to the electorate, inquiries, actions of a

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ceremonial or commemorative nature, and such other actions as may be approved by the City Attorney.

The Board's action in overriding the Mayor's rejection of a requisition is not a parliamentary action. It does not concern only the internal functioning of the Board, or direct the Clerk to perform some specific act in the line of official duty. The action does not adopt a budget, submit a charter amendment, or make an inquiry. It is not a commemorative or ceremonial act. And it is not simply a directive to another officer or department of the City—it actually provides the authority for other City officers and departments to perform various official acts as part of the hiring process.

For these reasons, the Board's action in overriding the Mayor's rejection of a requisition is not a matter over which the Board has exclusive jurisdiction. As discussed above, the Board's action in reviewing requisitions is derived from its authority—as part of the budget process—to set the number of positions in City service and is just one step in an elaborate and extensive process that involves both the legislative and executive branches of City government.

Although the ASO provision in question refers to an “appeal” of the Mayor's rejection, this is not the type of quasi-judicial appeal, such as a conditional use appeal, that might fall within the Board's exclusive jurisdiction. The Board's override of the Mayor's rejection is not a decision on particular individual's right to hold a job, a decision that would constitute impermissible interference with an individual personnel decision under Charter section 2.114. Nor is the Board applying pre-existing standards to an individualized set of facts to resolve a controversy. Rather, the Board is making a general determination, consistent with its role in the budget process, regarding the desirability of filling the position in light of the City's overall needs and resources, a determination that the Board properly shares with the executive branch.

III. The City Attorney Has No Conflict of Interest Prohibiting It From Advising the Board On This Matter.

You have asked whether the Office of the City Attorney has a conflict of interest that would preclude it from advising the Board of Supervisors on this matter because it is also advising the Mayor, who may have a different interest than the Board in this matter. Because the City Attorney has only a single client in this matter, neither the Office, nor its individual attorneys, have a conflict of interest in advising multiple persons or departments who may have conflicting policy views about this matter. This legal principle stems from two authorities: San Francisco's Charter and the California Rules of Professional Conduct.

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San Francisco Charter section 6.102 designates the elected City Attorney as the legal representative of the City. The Charter requires the Office of the City Attorney, upon request, to provide advice or a written opinion to any officer, department head or board, commission or other unit of government of the City and County and authorizes the Office of the City Attorney to bring legal actions in which the City has an interest. The role of the City Attorney as an independent legal advisor was long ago established in the Charter. The purpose of creating an elected City Attorney was to ensure that the City Attorney would owe his or her loyalty to the people of San Francisco. "Made appointive by either a Mayor or Chief Administrative Officer, [the City Attorney] would be exposed to the possibility of conflicting allegiances." (Francis V. Keesling, (1933) *San Francisco Charter of 1931*, p. 41.) In addition, a single City Attorney allows the City to speak with one voice on legal issues, and avoids the chaos, as well as tremendous taxpayer expense, that would result if each City department could hire its own counsel to represent its view of the City's interests.³

The California Rules of Professional Conduct govern the conduct of all lawyers in the State. These rules provide that when representing any organizational client, whether a corporation or a municipality, the lawyer must treat the organization as the client, acting through the highest officer, employee, or constituent party overseeing the particular issue. (Rule 3-600(A), Cal. Rules of Prof. Cond.; see also Rule 1.13, ABA Model Rules of Prof. Cond.) Because the City is the client of the Office of the City Attorney, the Office does not have a conflict in representing multiple persons and entities. Thus, as explained in a formal opinion of the State Bar, a City Attorney does not have a conflict of interest when asked to advise both a Mayor and a City council regarding the power to adopt an ordinance, where the two City actors disagreed on the legality and appropriateness of the action because both have a role, at different times, in speaking for the City on the legislation, and neither may sue each other over the dispute. (See Cal. State Bar Ethics Op. 2001-156).⁴

³ Attached, for your reference, is a copy of a letter dated July 3, 2001, from the former City Attorney to the Board of Supervisors, which addresses in greater detail the historical principles that underlie having a single elected City Attorney.

⁴ Under Charter section 6.102, the Board of Supervisors could request outside counsel to advise them on this issue if the City Attorney has a prohibited financial conflict of interest under California law or a prohibited ethical conflict of interest under the California Rules of Professional Conduct. The Board must request outside counsel in writing and explain in the document why it believes the Office of the City Attorney has a prohibited conflict of interest. (See S.F. Charter § 6.102.) This office must, within five days, respond to the Board's request by explaining whether it consents to the provision of outside counsel, and if it does not the reasons why it believes no conflict of interest exists. (*Ibid.*) If the Board disagrees with this conclusion, the Board, at its expense, may refer the issue to a retired judge or justice of the state courts of California for resolution. (*Ibid.*)

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For these reasons, the Office of the City Attorney does not have a conflict of interest that would preclude it from advising the Board of Supervisors on this matter even though it is also advising the Mayor.

We hope you have found this information to be helpful. If we can provide you with any further assistance, please do not hesitate to call on us.

B.E.D.
T.J.O.
A.S.A.
C. A. J.
T.L.

cc: Ed Harrington, Controller
Andrea Gourdine, Director of Human Resources