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MEMORANDUM

TO: Mayor London N. Breed
Hon. Members, Board of Supervisors
Hon. Members, Health Commission
Grant Colfax, Director of Public Health
Tomás J. Aragón, Health Officer

FROM: Kate G. Kimberlin
Jon Givner
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Deputy City Attorneys

DATE: May 20, 2020

RE: Relationship between and Roles of the Board of Supervisors, Department of Public Health, Director of Public Health, Health Commission, and County Health Officer

Introduction and Summary

In this memorandum, in response to questions we have received, we summarize the legal relationship between the Board of Supervisors (the “Board”), the Department of Public Health (“DPH”) and Director of Public Health, the Health Commission and the County Health Officer (“Health Officer”). And we describe the respective authority of the Board and Director of Public Health regarding appointment, oversight, and removal of the Health Officer.

State and local law vest in the Board, DPH, and the Health Officer various duties, obligations and rights to act for the benefit of public health. As described below, the Board has authority under State law to appoint a Health Officer, and may do so by adopting a written motion. The Board also has authority under State law to set the salary of the Health Officer; the Board does this when it enacts the annual salary ordinance.

Because of the role and responsibilities of DPH under the Charter, the Health Officer must be a DPH employee. When the Board appoints a Health Officer, it may choose a qualified candidate from the ranks of DPH’s employees. The Board may not request that DPH hire someone who is not a current DPH employee so the Board can appoint that person.

Under State law, the Board may take steps to ensure that the Health Officer is faithfully performing the Health Officer’s duties. As the appointing authority, the Board may evaluate the performance of the Health Officer in closed session. If the Board were to do so, while it is not legally required to adopt evaluation criteria in advance of the closed session, we recommend that the Board adopt such criteria to improve the evaluation process and to provide notice to the Health Officer of the Board’s expectations. Also, the Director of Public Health or another DPH manager may supervise the Health Officer’s activities as a DPH employee. If the Director of Public Health is serving as the Health Officer, then the Health Commission may supervise the Director’s activities as a DPH employee. But neither the Board, the Director of Public Health

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nor the Health Commission may direct or control the Health Officer's decisions or exercise of authority under State law.

The powers of the appointed Health Officer terminate when the Health Officer's employment with DPH ends. Also, by written motion, the Board may terminate the appointment of the Health Officer without cause. If the Board takes that action, the appointee remains a DPH employee but no longer has the powers or responsibilities of the Health Officer. If the position of Health Officer becomes vacant and there is no DPH employee holding the position of deputy Health Officer, then the Director of Public Health assumes the duties and responsibilities of the office (if that person meets the eligibility requirements) or assigns a qualified employee to fulfil the duties until the Board appoints another Health Officer from the ranks of qualified DPH employees.

Background

Under State law, the Board has authority to appoint a Health Officer to carry out the duties prescribed by State law for that office. For many years until 2010, the employee appointed as Director of Public Health also served as the Health Officer. Until January 2011, the Board had never appointed a Health Officer. Rather, the City Attorney advised that the Director of Public Health served automatically as the Health Officer.

In 2010, following the resignation of Dr. Mitchell Katz, then Director of Public Health, the Mayor appointed Barbara Garcia as the new Director. Because Director Garcia was not a physician, she was not eligible under State law to hold the Health Officer position. In Motion 11-13 in January 2011, the Board appointed Dr. Tomás J. Aragón as the Health Officer. At the time of his appointment, Dr. Aragón was already an employee of DPH with existing duties and responsibilities.

Dr. Aragón has remained an employee of DPH since his appointment as Health Officer. His current classification is 1165 Manager. In that classification, Dr. Aragón is represented by the Municipal Executives Association ("MEA"), and his compensation and other benefits are set per his classification and the Memorandum of Understanding between the City and MEA. In addition to his duties as Health Officer, Dr. Aragón retains other duties and responsibilities for DPH, and in connection with those duties, he reports directly to Dr. Grant Colfax, the Director of Public Health.

Discussion**A. Powers and Duties of the Health Officer**

State law vests significant authority in the Health Officer, who must be a medical doctor in good standing. (Health & Safety Code § 101005.) The Health Officer's duties and responsibilities include:

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1. Taking “any preventative measure that may be necessary to protect and preserve the public health from any public health hazard during a ‘state of war emergency,’ ‘state of emergency,’ or ‘local emergency’” (Health & Safety Code § 101040(a));
2. Declaring a local health emergency when there is a local health hazard, including “whenever there is an imminent and proximate threat of the introduction of any contagious, infectious, or communicable disease” (*id.* at § 101080);
3. Sampling, analyzing, or otherwise determining the identifying and other technical information relating to the health emergency or local health emergency as necessary to respond to or abate the local health emergency and protect the public health (*id.* at § 101085);
4. Issuing isolation orders (*id.* at §§ 101080.2, 120130, 120140);
5. Taking measures deemed necessary to prevent the spread of a contagious, infectious, or communicable disease, even where there is no local state of emergency (*id.* at § 120175; Cal. Code. Regs. tit. 17, §§ 2501, 2540); and
6. Issuing orders to other governmental entities within the local health officer’s jurisdiction to take any action the local health officer deems necessary to control the spread of the communicable disease (*id.* at § 120175.5).

The Health Officer has “considerable discretion as to what actions [they] should take to control the spread of an infectious disease.” (*Derrick v. Ontario Cnty. Hosp.* (1975) 47 Cal.App.3d 145, 152.) As we explained in this Office’s March 24, 2020 public memorandum regarding the relative powers of the Board, Mayor, and Health Officer, the Health Officer’s authority to take measures to prevent the spread of infectious diseases is separate from, and not contingent upon, the Health Officer’s declaration of a local health emergency or the Mayor’s declaration of an emergency, and does not require Board ratification. The law requires only that the Health Officer conduct a “suitable investigation” before taking those steps the Health Officer “deems necessary to prevent the spread of communicable disease or a disease suspected of being communicable in order to protect the public health.” (Cal. Code Regs. tit. 17, § 2540.)

B. Relationship between the Board, DPH, Health Commission, and Health Officer

1. Appointment of the Health Officer

State law expressly grants the Board authority to appoint the Health Officer, although the Board has exercised that authority only once, in 2011. (Health & Safety Code § 101000.) Under Charter Section 2.105, the Board “may act by motion on matters over which the Board of Supervisors has exclusive jurisdiction.” The Board appoints officers by written motion requiring at least six votes.

The Board’s appointee as Health Officer must be a DPH employee. Charter Section 4.110 provides that DPH and the Health Commission “shall manage and control the City and County hospitals, emergency medical services, and in general provide for the preservation,

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promotion and protection of the physical and mental health of the inhabitants of the City and County, except where the Charter grants such authority to another officer or department.” The Charter does not provide authority to any other City department or body to regulate public health or to exercise any duties consistent with those of the Health Officer.

Because the Health Officer must be employed at DPH, which is a department within the executive branch, the Board may not hire a Health Officer to work directly for the Board or ask the Director of Public Health to hire an employee chosen by the Board to act as Health Officer. The Charter establishes a clear division between the powers and duties of the executive branch under the Mayor (Charter, Art. III) and those of the legislative branch under the Board (Charter, Art. II). Under the Charter, the Board enacts the laws and the Mayor executes them, and the Board may not interfere with the administrative affairs of the executive branch, including departments’ decisions on personnel matters. (Charter § 2.114; *Affordable Housing Alliance v. Feinstein*, 179 Cal.App.3d 484, 491 (1986).) The Charter establishes only two offices under the Board’s direction: the Office of the Clerk of the Board and the position of Budget Analyst. (*See* Charter § 2.117.) And since the Charter does not authorize the Board to hire an employee to manage public health outside DPH, the person the Board appoints as the Health Officer must be a DPH employee. In making the appointment, the Board may choose a qualified candidate from the ranks of DPH’s employees. Under Charter Section 2.114, the Board may not urge DPH to hire someone who is not a current DPH employee so the Board can appoint that person to be the Health Officer.

The Director of Public Health and the Health Commission do not have formal roles in the Board’s decision to appoint a Health Officer. But both the Director and the Commission may advise the Board and make recommendations.

2. Salary of the Health Officer

State law authorizes the Board to set the Health Officer’s salary. (Health & Safety Code § 101005.) Under local law, the Board sets salaries of all City employees by ordinance in the Annual Salary Ordinance (“ASO”), consistent with Memoranda of Understanding between the City and employee organizations representing City bargaining units. Accordingly, the Board may set the salary of the Health Officer in the ASO. The ASO for the current fiscal year does not specify a position or salary for the Health Officer. Indeed, there is no classification specifically established for the Health Officer position. Dr. Aragón is appointed as a classification 1165 Manager DPH, and he receives the salary for that position set in the ASO.

3. Oversight of the Health Officer

a. Oversight by the Board. The Board has authority under Government Code Section 25303 to “supervise the official conduct of all county officers,” particularly as that conduct relates to the use of “public funds.” (Cal. Gov. Code §§ 25303; 24000(s).) This power permits the Board to oversee the Health Officer’s conduct “to insure that they faithfully perform their duties.” (*People v. Langdon* (1976) 54 Cal.App.3d 384, 390.) But the Board has no power “to perform the county officers’ statutory duties for them or to direct the manner in which the

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duties are performed.” (*Id.*) Therefore, the Board does not have authority to direct or control the manner in which the Health Officer executes those duties.

Although the Board cannot direct or control the decisions and actions of the Health Officer, in addition to the power to review the work and terminate the appointment of the Health Officer as described above, the Board does have authority to ratify the Health Officer’s initial declaration of local health emergency, to review whether a local health emergency should continue, and to terminate the local health emergency “at the earliest possible date that conditions warrant the termination.” (Health & Safety Code § 101080.)

In light of this statutory framework and the Board’s power of inquiry under Charter Section 16.114, the Board may require the Health Officer to appear before the Board to provide information in a public hearing. During such a hearing, the Board may ask about the Health Officer’s decisions, actions, and other matters relevant to the health emergency. The Board may also receive a briefing outside a public meeting under the emergency provisions described in our April 10, 2020 public memorandum regarding policy body meetings during the emergency. But as discussed above, State law prohibits the Board from directing the Health Officer in exercising duties under State law, and prohibits the Board from supplanting or substituting its decisions for the Health Officer’s independent medical judgment in the exercise of those duties.

Also, as the appointing authority for the Health Officer, the Board may reasonably review the work of the Health Officer to ensure the Health Officer is performing the legally-prescribed duties in an appropriate manner. In the context of the COVID-19 pandemic, the Board may evaluate any steps the Health Officer reasonably believes are necessary to limit the spread of the virus. Any such performance evaluation must be in closed session because the evaluation is considered a confidential personnel process and may implicate other privacy issues.

While not legally required, we recommend here as we do in all such instances that the Board develop evaluation criteria before holding a closed session to conduct a performance evaluation. Developing clear criteria would assist the Board and the Health Officer in the evaluation process, and provide notice to the Health Officer of the Board’s expectations. If the performance criteria are general, so that they would apply to any person serving as the Health Officer, then the Board would adopt such criteria at a Board meeting in public after a public discussion and vote; but, if the evaluation criteria are specific to the performance of a particular Health Officer, then the Board must adopt those criteria in closed session because the criteria themselves reflect an evaluation of that person’s performance. And as discussed above, State law prohibits the Board from directing the Health Officer in exercising their duties, and prohibits the Board from supplanting or substituting its decisions for the Health Officer’s independent medical judgment in the exercise of those duties.

b. Supervision by DPH or the Health Commission. Because the Health Officer must be a DPH employee, the person holding that position is also subject to supervision as a City employee. When the Director of Public Health serves as the Health Officer, the Health Commission may review and evaluate the Director’s performance. (Charter § 4.102.) When a

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DPH employee such as Dr. Aragón is the Health Officer, that employee is subject to the oversight of the Director of Public Health (or whomever is that employee's direct supervisor if not a direct report to the Director of Public Health). (Charter § 4.126; Administrative Code § 2A.30.)

But regardless of the Director's and Health Commission's oversight authority under local law, under State law the individual appointed or serving as the Health Officer has sole authority to make decisions and take actions in their capacity as the Health Officer. When the Health Officer is a DPH employee, as with Dr. Aragón, the Director of Public Health may not dictate or control the Health Officer's decisions or actions. But the Director has an obligation under local law to manage the City's public health responses, and DPH's authority and responsibilities overlap significantly with the Health Officer's jurisdiction. (*See, e.g.*, Health Code, Art. 2 [authorizing Director of Public Health to take actions to control and prevent communicable diseases].)

4. Removal of the Health Officer

The City may remove the authority of the Health Officer in two ways: by ending the appointee's employment with DPH; or by the Board adopting a motion ending the Health Officer's appointment.

First, the Health Officer's appointment and legal authority terminates when the appointed Health Officer's employment at DPH ends. For example, if the Health Officer resigns from City employment—as did Dr. Katz, the Health Officer before Dr. Aragón—that separation from employment also ends the Health Officer appointment. If the appointed Health Officer is the Director of Public Health, then the Health Commission could end the appointment as Health Officer by dismissing the Director from employment under Charter Section 4.102(6). If the appointed Health Officer is a DPH employee, then the Director of Public Health could end the appointment by dismissing the appointee from employment under Administrative Code Section 2A.30.

Second, the Board may terminate the Health Officer's appointment, and if it does so, such termination does not affect that employee's underlying employment at DPH. State law does not expressly address authority to remove the Health Officer. But the Constitution grants counties the ability to designate both the manner of appointment and removal of county officers. (*See* Cal. Const. Art. 11, § 4(e).) In light of the Board's State law authority to appoint the Health Officer, the Constitutional authority to adopt local procedures to remove county officers, and the absence of any statutory restriction on the Board's removal authority, the authority to appoint includes the attendant authority to remove the Health Officer in the same manner.

If the Board were to choose to remove the Health Officer, it may do so by written motion and may do so without cause. Article XV of the Charter provides that certain City officers—not including the Health Officer—may be removed from office only for official misconduct. All other City officers, including the Health Officer, may be removed without cause unless otherwise

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provided in State or local law. The Director of Public Health and the Health Commission do not have a formal role in the Board's decision but may advise the Board and make recommendations.

If the Board adopts a motion terminating the appointment of the Health Officer, the appointee would remain a City employee working at DPH, but would no longer have the duties and powers of the Health Officer.

5. Vacancies in the Position of Health Officer.

If the office of Health Officer becomes vacant, either because the Board removes the incumbent or for another reason, the duties of the Health Officer transfer to the “next in authority . . . until the vacancy in the office is filled in the manner provided by law”—which, here, means the Board appointing a new Health Officer. (Gov. Code §§ 24000(s), 24105.) If the Director of Public Health has assigned a qualified DPH employee (i.e., a medical doctor in good standing) to serve as a chief deputy or assistant deputy Health Officer, then that person would fill the vacancy until the Board makes an appointment. Otherwise, given the Charter authority of the Director of Public Health and the long history in the City of the Director serving as the Health Officer in the absence of action by the Board to appoint another DPH employee as Health Officer, the Director of Public Health would assume the duties and authority of the Health Officer in the event of a vacancy so long as the Director is a licensed physician in good standing.