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MEMORANDUM

TO: Honorable Mayor London Breed
Honorable Members, Board of Supervisors

FROM: Anne Pearson
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Deputy City Attorneys

DATE: September 27, 2022

RE: Enforceability of Pre-Appointment Letters of Resignation

INTRODUCTION AND SHORT ANSWER

On September 23, 2022, the San Francisco Standard reported that in April 2022, Mayor London Breed asked Commissioner Max Carter-Oberstone to sign an undated resignation letter as a condition for her to reappoint him to the Police Commission. In support of its reporting, the publication released documents obtained through a public records request, including a copy of an undated resignation letter signed by Commissioner Carter-Oberstone and related correspondence between him and the Mayor's Office. On September 25, 2022, the Mayor issued a statement that she would no longer request resignation letters from individuals as a condition of their appointment to commissions.

In light of questions that members of the Board of Supervisors (the "Board") and others have raised about this prior practice, we write to address whether a letter of resignation submitted by an individual seeking appointment or reappointment to a City commission is legally enforceable.

As we describe in more detail below, a court would very likely conclude that a letter of resignation is unenforceable where: 1) the commissioner submitted the resignation letter before or as a condition of appointment; and 2) the Charter allows the appointing authority to remove the commissioner only for cause or with the concurrence of another City body, such as approval by the Board for the Mayor's removal of a Police Commissioner.

Although the Charter does not prohibit appointing authorities from requesting pre-appointment letters of resignation, such requests are inconsistent with the purposes underlying the Charter's removal provisions and could threaten the independence of appointed officials from undue influence by the Mayor, the Board, and other appointing authorities. For these reasons, appointing authorities should not require resignation letters before or as a condition of appointment for commissioners who may only be removed for cause or with the concurrence of a City body other than the appointing authority.

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APPLICABLE LAW

In public memoranda dated [September 21, 2007](#) and [July 11, 2018](#), the City Attorney's Office has summarized the laws governing appointing members of City boards and commissions, the process for removing those members, and the process for the *voluntary* resignation by those members.

Members of commissions are generally subject to removal based on four different processes:

- At-Will Commissioners. First, many commissioners serve at the pleasure of their appointing authority. These commissioners serve an at-will tenure, and the appointing authority may remove them for any or no reason (other than an unlawful one) by a simple written communication, and with no action required by other City officials or bodies.
- For-Cause Commissioners. Second, appointees to many Charter commissions may only be removed for cause; specifically, for official misconduct under Charter Section 15.105. The official misconduct process requires the appointing authority to file charges with the Ethics Commission and the Board. The appointee is entitled to notice and an opportunity to be heard, including a hearing by the Ethics Commission, and may be removed from office only if the Board sustains the charges and finds by a three-fourths vote the appointee committed official misconduct.
- Commissioners Convicted of Certain Felonies. Third, separate from the official misconduct process, Charter Section 15.105 requires that the appointing authority must immediately remove any appointee who has been convicted of a felony involving moral turpitude where the Ethics Commission concludes that the conviction warrants removal.
- At-Will Commissioners Whose Removal is Subject to Approval by Another City Body. The Police Commission fits a fourth category for commissioners appointed by the Mayor: the Mayor may remove a commissioner without cause, but only if the Board concurs with the removal (i.e., approves the removal by motion of the Board acting as a body). The voters established this process for the Police Commission in 2003 by adopting Proposition H. Until 2003, the Mayor appointed all five members of the Police Commission and could remove those members at will. But Proposition H amended the Charter to split the authority to make Police Commission appointments between the Mayor and the Board, and to require Board approval before the Mayor could remove members nominated by the Mayor. Proponents of Proposition H argued that the Police Commission lacked independence, and that the measure would lead to a less political and more accountable Police Commission.

Also, all appointed commissioners have the right to resign, and may do so by providing written notice to their appointing officer, as set forth in Article IV-A of Chapter 16 of the Administrative Code. Neither the Charter nor the Administrative Code provisions governing resignations prohibit appointing authorities from requesting that an appointee resign voluntarily. Indeed, it is not uncommon for appointing authorities to publicly or privately ask a commissioner

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to resign following allegations of wrongdoing by that commissioner (even if those allegations would not amount to official misconduct if true or a felony involving moral turpitude if the commissioner were convicted of wrongdoing). And sitting commissioners are free to decline such requests.

We are unaware of any caselaw that explores the enforceability of an undated letter of resignation from an appointed volunteer commissioner before the commissioner assumes office.

DISCUSSION

The Charter rules governing the removal of commissioners are designed to protect the independence of commissioners, and the bodies on which they serve, against undue influence by the Mayor, the Board, or other appointing authorities. To this end, the Charter constrains the ability of the appointing authority to remove appointees of many commissions, either by allowing removal only after a finding of official misconduct or, in the case of the Police Commission, by allowing the Mayor to remove an appointee only with the concurrence of the Board. The official misconduct standard in Section 15.105 enables for-cause commissioners to exercise their independent judgment without fear that they will be removed from office if their appointing authority disagrees with their policy positions. The requirement of Board concurrence—which applies to Police Commissioners under Section 4.109—is less exacting but serves a similar purpose by providing a check against the Mayor’s ability acting alone to remove an appointed commissioner who otherwise serves at-will.

Where commissioners are subject to Charter Section 15.105 or 4.109 (i.e., for-cause commissioners or commissioners whose removal is subject to approval by another City body), requiring them to submit an open-ended resignation letter before their appointment could impede their independence and allow the appointing authority to circumvent the removal process set forth in the Charter. If an appointing authority were to seek to end a commissioner’s tenure based on such a letter, a court would very likely conclude that the appointing authority must follow the rules for removal instead, and decline to enforce the resignation letter. While a sitting commissioner could always voluntarily resign under the Administrative Code, the appointing authority could not compel the resignation of a sitting commissioner using a pre-appointment letter, against that commissioner’s will. That is true regardless of whether the commissioner sought to withdraw the pre-appointment resignation letter before the appointing authority sought to enforce it.

For these reasons, appointing officers should not request letters of resignation before or as a condition of appointment from prospective commissioners who are subject to Section 15.105 or 4.109. Although such requests are not themselves expressly prohibited by the Charter or the Code, they could threaten the independence of commissioners and the bodies on which they sit. If it wishes to do so, the Board may amend the existing provisions of the Administrative Code governing resignations by adding additional procedural safeguards in these instances.

As to at-will commissioners who may be removed solely by their appointing authority, because those appointees may be removed at any time without cause and without concurrence of another City body, a pre-appointment resignation letter in that circumstance would fail to achieve

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any purpose that the appointing authority could not effect directly. Accordingly, while that practice for at-will commissioners may create appearance issues, it does not raise the legal issues we discuss above in this memorandum.

Finally, as noted above, our opinion does not limit the ability of a sitting commissioner to offer a resignation letter after the commissioner's tenure has begun in compliance with the rules set forth in the Administrative Code. Commissioners may choose to tender a letter of resignation voluntarily during their tenure, and the appointing authority may accept such a letter, as we discussed in our [September 21, 2007](#) public opinion mentioned toward the beginning of this memorandum.