



COUNTY OF SAN MATEO

INTERDEPARTMENTAL CORRESPONDENCE

To: Honorable Members, Board of Supervisors
From: County Counsel
Subject: Review of Options to Allow Board of Supervisors' Action With Respect to Elected County Officials
Date: July 14, 2008

At its meeting on April 22, 2008, the Board directed me to report back with information concerning actions that the Board might take to provide more oversight of the conduct of County elected officials. Specifically, the Board requested that my office explore the options of creating an independent ethics commission and amending the San Mateo County Charter to provide for greater oversight.

Our investigation included research and analysis of existing laws that govern oversight and discipline of elected officials; collection of existing local regulations of selected counties and cities, with particular attention to charter counties; and discussions with representatives of selected entities with charter provisions which address the issue.

As a preliminary matter, we can find no California legal authority which would allow a board of supervisors, whether operating under a charter or pursuant to general law only, to impose any type of discipline short of temporary or permanent removal from office. (The scope of this analysis does not include violations of provisions of the Political Reform Act, which is regulated by the Fair Political Practices Commission, or criminal penalties upon conviction of a crime, which apply to any public official.) The alternatives discussed below, therefore, only address alternatives that would result in removal from office.

Discussion

I. Creating a Board Appointed Ethics Commission Under Current Charter

We first explored whether there is any mechanism available under current general state law or the San Mateo County Charter that would allow the appointment of an independent "ethics commission" with the responsibility for overseeing the conduct of elected officials. Several cities and counties have created ethics commissions; however, these commissions, for the most part, are focused on the areas of: (1) campaign activities relating to contributions, (2)

officeholder activities relating to officeholder accounts, gifts, and incompatible activities, and (3) lobbying. (One notable exception, discussed below, is the ethics commission created by the charter of the City and County of San Francisco.)

Under general statutory law, the Board is authorized to “appoint commissions or committees of citizens to study problems of general or special interest to the board and to make reports and recommendations to the board.” (Gov. Code §31000.1.) Section 414 of the County Charter provides that “County boards and commissions are those required by general law and those established by ordinance.” As we have previously advised, the Board has the authority to supervise “the official conduct of all county officers” and to see “that they faithfully perform their duties.” (Gov. Code § 25303.)

Under Government Code section 31000.1 and section 414 of the County Charter, the Board could create an “ethics commission”, or similar commission, to assist the Board in carrying out its responsibilities under Government Code section 25303. An ethics commission created by the Board under current law could not exercise authority any greater in scope than the authority that the Board already has by virtue of the San Mateo County Charter or general law. Further, under Government Code section 31000.1, the authority of such a commission would be limited to conducting investigations and making reports and recommendations to the Board, with the Board retaining responsibility for taking final action. Finally, a Board-created “ethics commission” would be subject to the state law imposed limitation that the authority to supervise the official conduct of all County officers cannot be exercised in a way that interferes with the “constitutionally and statutorily designated investigative and prosecutorial functions” of the District Attorney or Sheriff. (Gov. Code § 25303.)

An ethics commission created by the Board under current law would also be limited in the sanction that it could recommend. We have previously concluded that the Board’s power of supervision, under current law, does not include the power to suspend, remove or otherwise discipline elected County officers. Because, under current law, any commission created by Board action could not exercise powers that the Board itself cannot exercise, a Board-created commission would not have the power to suspend, remove or discipline. How an “ethics commission” with broader authority might look if created through the charter amendment process is discussed in section II.C, below.

II. Amending the County Charter to Provide for Oversight of Elected Officials

Under the California Constitution, the San Mateo County electorate has authority to adopt a charter specifying, with certain limitations, how County government will be constituted. In those areas where the electorate can legislate through a charter, the charter provisions will prevail over general law. The “home rule” power to provide for the governing structure is more limited in the case of a charter county than in the case of a charter city, however.

Article XI, section 4 of the California Constitution requires a county charter to provide for certain enumerated elected county officers, their election, compensation, terms and removal. Section 412 of the San Mateo County Charter provides: "The term of office of all elected officers is four years. The officers shall serve until their successors are qualified unless sooner removed as provided by this Charter or general law." Section 102 of the Charter provides that "The electors of the County may by majority vote and pursuant to general law: . . . c. Recall an elected officer who has held office for six months." Thus, the only removal mechanism specifically provided for in the current San Mateo County Charter is the electors' right to recall.

The mechanisms for removal set forth in general law (which also apply in San Mateo County) are recall (which as noted above has been incorporated into the County Charter), forfeiture of office as a result of a conviction for specified crimes (Government Code section 1770), and the civil grand jury accusation process "for willful or corrupt misconduct in office." (Government Code §§ 3000, 3060.) Under this process, the grand jury must first return an accusation, with the concurrence of at least 12 grand jurors. The accusation is served on the accused by the District Attorney. If the accused official denies the matters charged, the accusation is tried by the District Attorney before a jury in the same manner as a trial by criminal indictment. As noted above, the sanction upon conviction is removal from office. Case law indicates that, generally, convictions are sustained only when an official either fails to carry out a mandatory duty of office, or commits a crime or violates a specific statute while in office.

The Charter could be amended to provide for additional methods for the removal of elected County officials. We have reviewed the charters of the other thirteen charter counties in order to determine whether and how these counties have provided for the removal of elected officials in a way other than through the recall process. Most counties have provisions similar to San Mateo County's provision, with recall being the only designated method of removal.

A. Removal for Cause (San Bernardino County)

The San Bernardino County charter provides that any County officer other than supervisor may be removed from office by a four-fifths vote of the Board of Supervisors, "for cause". This provision was part of the original charter that was enacted in 1913 and has never been used. In 2002, the San Bernardino County Board of Supervisors adopted an ordinance that implements the charter provision and specifies the grounds for removal as (1) "Flagrant or repeated neglect of duties", (2) "Misappropriation of public property", (3) "Violation of any law related to the performance of the official's duties", and (4) "Willful falsification of a relevant official statement or document." While this ordinance provision has survived a facial legal challenge and was deemed to be constitutional, it has never been applied.

B. Suspension Pending Trial on Criminal Charges (Alameda and San Diego Counties)

The Alameda County charter grants the Board of Supervisors the authority to suspend an elected county officer who has been charged with a felony related to misconduct in office, pending the trial of such charges. Similarly, the San Diego County charter authorizes the Board to suspend an officer who has been indicted for official misconduct, an offense involving moral turpitude, or an infamous crime. (While, as noted above, we do not believe there is authority in the Constitution or state statutory law to discipline an elected official short of removal from office, we believe that suspension provisions of the type set forth in the Alameda County and San Diego County charters could be sustained under the Constitution as a temporary "removal" pending the resolution of the charges.) Under state law an elected official is automatically deemed to have vacated his or her office upon "his or her conviction of a felony or of any offense involving a violation of his or her official duties." (Government Code §1770 (h).) Thus, under the San Diego and Alameda models, a suspension would be lifted in the event that a conviction was not obtained, and the office would be automatically vacated in the event of a conviction.

While the charter provisions in Alameda, San Diego and San Bernardino counties all provide for hearings before the Board prior to action being taken, the parameters of such a hearing are not specified in any detail. Because the elected office holder has a right to hold the office to which he or she was elected, subject only to recall or removal under Government Code §3060 or §1770(h), the application of any charter provision allowing removal by vote of the Board of Supervisors would raise issues of due process (such as notice, right to cross examination, and right of representation) that would have to be carefully addressed. These same procedural protections are not available during a recall. In a recall, however, there are threshold petition signature requirements and the ultimate requirement of a majority vote of the electorate to remove.

C. Standing Ethics Commission (City and County of San Francisco)

A charter provision could create an ethics commission that has broad responsibilities including not only the ongoing oversight of campaign activities, officeholder activities and lobbying, but also responsibility to investigate whether the conduct of the elected official merits consideration of removal from office. Such a committee would be more in the nature of a standing committee that would require a certain amount of supporting administrative infrastructure. Another option could be a committee more in the nature of an ad hoc committee that is convened by the Board only on a case by case basis to investigate the conduct of the elected official and to recommend to the Board whether such conduct merits removal from office.

An example of a standing ethics commission with broad powers can be found in the charter of the City and County of San Francisco which provides for an "Ethics Commission", the members of which are appointed by the Mayor, the Board of Supervisors, the District Attorney and the Assessor. Any elected official in the City and County of San Francisco is subject to suspension and removal for official misconduct. Under the charter, an official alleged to have engaged in official misconduct may be suspended by the Mayor, who then refers the matter to the Ethics Commission. After the Ethics Commission hears the matter, it makes a recommendation to the Board of Supervisors. Upon a three-fourths vote of the Board, an officer can be removed. "Official misconduct" is defined as "wrongful behavior by a public officer in relation to the duties of his or her public office, willful in its character," and includes "any violation of a specific conflict of interest or governmental ethics law."

The San Francisco Ethics Commission was created by a 1993 charter amendment. Prior to 1993, the charter provided that the Mayor could refer the matter to the Board of Supervisors. It is our understanding that this process was set up in the 1930's and that the removal process was used only twice: once, successfully, in the case of the elected Public Defender who was convicted of murder, and once, unsuccessfully, in a case involving the allegedly incompatible activities of an Airport Commissioner. The removal process using the current ethics commission has been initiated one time, in regards to the matter of Supervisor Ed Jew's residency requirement. The City Attorney also filed a separate *quo warranto* action with the approval of the Attorney General (based on the allegation that Mr. Jew did not meet residency requirements entitling him to hold office). Mr Jew ultimately resigned.

III. Process for Amending the Charter

San Mateo County's Charter was last amended in November 2004. Section 801 of the Charter provides that:

"The Board of Supervisors shall convene a Charter review committee within eight years of the last complete Charter review. The committee shall review the Charter and, after public hearings, make appropriate recommendations for amendment or revision to the Board."

There are no set requirements for the composition of a Charter review committee. The last Charter review committee had ten members from ten different cities in the County. The Committee met eight times and received input from members of the Board, County management, and employee organizations. Other Charter review committees have had as few as five members, one from each supervisorial district. Although historically the Charter has only been amended as a result of the charter review process, a charter amendment can be proposed at any time following the process outlined below.

The Charter can only be amended by a measure submitted to the voters. Charter § 102 (c) provides that this measure can be placed on the ballot by the Board or through the initiative process. This election must be held at a special election on the next established election date not less than 88 days from the Board's submission of the proposal to amend the charter. (Gov. Code § 23722.) This proposal must be made in the form of an ordinance. While the ordinance would be effective immediately upon passage, it would have to be read twice at regular meetings. (Gov. Code §§ 25123(a), 25131.)

Conclusion

The above discussion of various charter provisions, copies of which we have also attached for your review, is intended to give a sense of the various alternative approaches taken by the electors of those counties which have chosen to address the issue of removal by methods other than recall. In each case (including the "ethics commission" model used by the City and County of San Francisco) the ultimate decision regarding removal is made by the Board of Supervisors. The Constitution does not necessarily preclude a charter provision which would allow removal by a body other than the electorate or a board of supervisors, but further research would be necessary to ensure that removal by other than a board of supervisors or the electorate is in compliance with all provisions of the Constitution and statutory law.

The Board could convene a special charter review committee to evaluate and recommend whether the Charter should be amended to provide for an alternative method for removal of an elected official. Such a commission, if formed, should review, at a minimum: (1) the need for the provision, given existing provisions of law addressing the removal of an elected official; (2) the potential effects of the provision on the elected official's performance of his or her constitutional or statutory duties; (3) the procedural protections that may need to be built into the provision to ensure due process requirements are met, where applicable; and (4) the logistics of applying and administering the provision, including the costs of administering the provision.



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EXCERPTS FROM SELECTED COUNTY CHARTER PROVISIONS

The Alameda County Charter provides:

Section 20.5: The Board of Supervisors shall have the authority to suspend an elected county officer who has been charged by information or indictment with a felony related to misconduct in office, pending the trial of such charges. Such authority to suspend shall be exercised by the adoption by resolution of the Board of Supervisors of a declaration of intention to suspend such official, which declaration shall set forth the grounds upon which such action is proposed to be taken and specify the time and place of the meeting at which the Board of Supervisors will meet to consider such action, which hearing shall be held not less than 5 days after the adoption of such resolution. The Clerk of the Board of Supervisors shall immediately furnish a copy of such resolution to such officer by delivering it to him personally, or by mailing a copy thereof by registered mail to his official business address and to his residence address. If the charges are sustained by not less than a majority of the members of the Board of Supervisors, such officer shall be suspended forthwith without compensation pending the trial of such charges, and the Board of Supervisors shall appoint a qualified person to discharge the duties of the office during the period of such suspension, and require the person so appointed to furnish an official bond in an amount to be fixed by the Board of Supervisors.

The San Diego County Charter provides:

Section 500.3: The Board may suspend from office, at its discretion, an officer who has been indicted for official misconduct, an offense involving moral turpitude, or an infamous crime. The Board shall fill the vacancy until final legal action is determined.

The San Bernardino County Charter provides:

Section 6. Any County officer other than supervisor may be removed from office in the manner provided by law; also any such officer may be removed by a four-fifths vote of the Board of Supervisors, for cause, after first serving upon such officer a written statement of alleged grounds for such removal, and giving him a reasonable opportunity to be heard in the way of explanation or defense.

The San Francisco City and County Charter provides, in pertinent part:

SEC. 15.100. COMMISSION.

The Ethics Commission shall consist of five members who shall serve six-year terms;

...

The Mayor, the Board of Supervisors, the City Attorney, the District Attorney and the Assessor each shall appoint one member of the Commission. The member appointed by the Mayor shall have a background in public information and public meetings. The member appointed by the City Attorney shall have a background in law as it relates to government ethics. The member appointed by the Assessor shall have a background in campaign finance. The members appointed by the District Attorney and Board of Supervisors shall be broadly representative of the general public.

SEC. 15.105. SUSPENSION AND REMOVAL.

(a) ELECTIVE AND CERTAIN APPOINTED OFFICERS. Any elective officer, ... is subject to suspension and removal for official misconduct as provided in this section. Such officer may be suspended by the Mayor and the Mayor shall appoint a qualified person to discharge the duties of the office during the period of suspension. Upon such suspension, the Mayor shall immediately notify the Ethics Commission and Board of Supervisors thereof in writing and the cause thereof, and shall present written charges against such suspended officer to the Ethics Commission and Board of Supervisors at or prior to their next regular meetings following such suspension, and shall immediately furnish a copy of the same to such officer, who shall have the right to appear with counsel before the Ethics Commission in his or her defense. 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. If, after reviewing the complete record, the charges are sustained by not less than a three-fourths vote of all members of the Board of Supervisors, the suspended officer shall be removed from office; if not so sustained, or if not acted on by the Board of Supervisors within 30 days after the receipt of the record from the Ethics Commission, the suspended officer shall thereby be reinstated.

...

(c) REMOVAL FOR CONVICTION OF A FELONY CRIME INVOLVING MORAL TURPITUDE.

(1) Officers Enumerated in Subsections (a) and (b).

(A) An appointing authority must immediately remove from office any official enumerated in subsections (a) or (b) upon:

- (i) a court's final conviction of that official of a felony crime involving moral turpitude; and
 - (ii) a determination made by the Ethics Commission, after a hearing, that the crime for which the official was convicted warrants removal.
- (B) For the purposes of this subsection, the Mayor shall act as the appointing authority for any elective official.
- (C) Removal under this subsection is not subject to the procedures in subsections (a) and (b) of this section.
- (2) Other Officers and Employees.

...

(e) OFFICIAL MISCONDUCT. 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.