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MEMORANDUM

TO: MEMBERS,
San Francisco Elections Commission

FROM: Julia A. Moll
Deputy City Attorney

DATE: July 1, 2005

RE: Powers and Duties of the San Francisco Elections Commission

In anticipation of the upcoming Elections Commission retreat, scheduled for July 22, 2005, Commissioner Matthews requested that we provide some *general* information about the role of commissions in the City and County of San Francisco, and *specific* information about the powers and duties of the San Francisco Elections Commission. This information is provided below. Please let me know if you have questions about this memorandum or would like additional information.

I. INTRODUCTION

The San Francisco Charter is the City and County constitution and regulates all aspects of local government and administration. Under the Charter, the Mayor is responsible for the general administration and oversight of all departments and governmental units in the executive branch of the City and County, and he or she appoints most commissioners (as discussed below, the Department of Elections and the Elections Commission are not in the executive branch). Charter § 3.100. The Board of Supervisors is the legislative body for the City and County. The Board, which consists of eleven members elected by district, establishes City policies and adopts ordinances and resolutions. Charter Article II.

In addition to the Mayor and Board of Supervisors, commissions play a significant role in City and County governance. Charter § 4.102. These bodies, which are created by the Charter and City ordinances, establish policy for and oversee the departments of City and County government.

II. BACKGROUND: THE SAN FRANCISCO ELECTIONS COMMISSION

The San Francisco voters created the Elections Commission by Charter amendment approved in November 2001. The Commission consists of seven members who serve five-year terms. Charter § 13.103.5. The Mayor, the Board of Supervisors, the City Attorney, the Public Defender, the District Attorney, the Treasurer, and the Board of Education of the San Francisco Unified School District each appoint one member of the Commission.

There are significant qualifications for service on the Elections Commission. The Mayor's appointee is required to have a background in the electoral process. The City Attorney's appointee is required to have a background in elections law. The Treasurer's appointee is required to have a background in financial management. The members appointed by the District Attorney, Public Defender, the Board of Education of the San Francisco Unified School District, and the Board of Supervisors are required to be broadly representative of the general public. Charter § 13.103.5.

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Members of the Commission are officers of the City and County. (A separate memorandum, included with the materials for the July 22, 2005 retreat, addresses the relationship between members of the Commission and their respective appointing authority, and an officer's duty of loyalty to the City and County.) In summary, City and County officers owe a duty of loyalty to, and must act in the best interests of, the City and County. Although each member of the Commission is appointed by a different City official or body, the Commissioners neither represent nor owe a duty of loyalty to their appointing authority. Commissioners must use their independent judgment about what is in the best interest of the City.

III. THE POWERS AND DUTIES OF THE ELECTIONS COMMISSION**A. The Specific Powers and Duties Vested in the Elections Commission**

Under the Charter, the Elections Commission is responsible for:

- Oversight of all public elections in the City and County;
- Establishment of general policies for the Department of Elections; and
- Proper administration of the general practices of the Department of Elections.

Charter § 13.103.5. These duties include, but are not be limited to:

- Approving written plans prior to each election, submitted by the Director of Elections, detailing the policies, procedures, and personnel that will be used to conduct the election;
- Approving alternative transportation and security plans, submitted by the Director of Elections, when the incumbent sheriff is running for re-election and under other limited circumstances;
- Requesting from the Board of Supervisors, upon the recommendation of the Director, a waiver of the general prohibition on City employees and officers assisting the Department of Elections; and
- Assessing how well the written plans succeeded in carrying out a free, fair and functional election.

Charter §§ 13.103.5, 13.104.5.

In addition, the Elections Commission is responsible for appointing the Director of Elections and three of the nine members of the Elections Task Force on redistricting. Charter §§ 13.104, 13.110(d). (A memorandum concerning the procedures for appointment and removal of the Director of Elections, dated December 29, 2003, is attached.)

B. The General Powers and Duties of City and County Commissions

In addition to the specific powers conferred and duties imposed on the Elections Commission, the Charter also describes the powers and duties of commissions *in the executive branch*. Because the Mayor does not appoint the Commission and does not have overall responsibility for general administration and oversight of the Department of Elections, the Elections Commission is not in the executive branch. Nonetheless, these general rules apply to the Commission to the extent that these general rules do not conflict with or are inherently incompatible with the specific powers and duties vested in the Elections Commission.

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Charter § 4.100. The general provisions that apply to the Elections Commission require the Commission to:

- Formulate, evaluate and approve goals, objectives, plans and programs and set policies consistent with the overall objectives of the City and County, as established by the Mayor and the Board of Supervisors through the adoption of City legislation;
- Develop and keep current an Annual Statement of Purpose outlining its areas of jurisdiction, authorities, purpose and goals, subject to review and approval by the Mayor and the Board of Supervisors;
- After public hearing, approve applicable departmental budgets or any budget modifications or fund transfers requiring the approval of the Board of Supervisors, subject to the Mayor's final authority to initiate, prepare and submit the annual proposed budget on behalf of the executive branch and the Board of Supervisors' authority under [Charter] Section 9.103;¹
- Recommend to the Mayor for submission to the Board of Supervisors rates, fees and similar charges with respect to appropriate items coming within their respective jurisdictions;²
- Conduct investigations into any aspect of governmental operations within its jurisdiction through the power of inquiry, and make recommendations to the Mayor or the Board of Supervisors;
- Exercise such other powers and duties as shall be prescribed by the Board of Supervisors;
- Prepare an annual report describing its activities, and file such report with the Mayor and the Clerk of the Board of Supervisors; and
- Appoint an executive secretary to manage the affairs and operations of the board or commission.

¹ Each City and County department is responsible for providing the Mayor and Board of Supervisors with a mission-driven budget that describes each proposed activity of the department and the cost of the activity. Charter § 9.114.

² However, Charter section 13.109 provides a specific rule for proposal and adoption of certain election-related fees, as follows:

The amount of fees to be charged for candidate filings, candidate statements, paid arguments and any other fees to be collected in the conduct of elections shall be proposed by the Director of Elections for approval by the Board of Supervisors on or before the second Monday in December immediately prior to the election in which the fees apply.

Signatures of registered voters in the City and County may be submitted in lieu of any filing fee. At the same time the Board of Supervisors approves the schedule of fees for the election, the Director of Elections, with the approval of the Board of Supervisors, shall establish the dollar value equivalent of each valid signature submitted.

Accordingly, to the extent there is a conflict between the general rule set forth in section 4.102(4) and the more specific rule established by section 13.109, section 13.109 would apply. Charter § 4.100; *Woods v. Young* (1991) 53 Cal.3d 315, 325.

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Charter §§ 4.102(1)-(4), (7)-(10), 4.103, 4.104.

To ensure its orderly operation, each commission is required to:

- Adopt rules and regulations consistent with the Charter and City and County ordinances. No rule or regulation may be adopted, amended or repealed, without a public hearing. At least ten days' public notice is required in advance of such public hearings. All rules and regulations must be filed with the Clerk of the Board of Supervisors;
- Hold meetings open to the public and encourage the participation of interested persons. Closed sessions may be held only in accordance with applicable State and local laws; and
- Keep a public record of its proceedings that indicate how each member voted on each question.

Charter § 4.104.

Finally, to carry out its duties, a commission may hold hearings and take testimony. Charter § 4.102(10). In addition, relative solely to the affairs under its control, a commission may examine the department's documents, subpoena witnesses and compel production of documents. Charter § 16.114.

IV. THE POWERS AND DUTIES OF THE DIRECTOR OF ELECTIONS

A. The Specific Powers and Duties Vested in the Director of Elections

Under the Charter, the Department of Elections is responsible for conducting all public elections in the City and County. Charter § 13.104. For purposes of this section, the conduct of elections includes, but is not limited to: voter registration; the nomination and filing process for candidates to City and County offices; the preparation and distribution of voter information materials; ballots, precinct operations and vote count; the prevention of fraud in such elections; and the recount of ballots in cases of challenge or fraud.

The Director of Elections is responsible for administering the Department of Elections, and is vested with the day-to-day conduct and management of the Department. Charter § 13.104. Subject to the civil service provisions of the Charter, the Director may appoint and remove employees of the Department. As indicated above, the Director of Elections is appointed by and reports to the Elections Commission.

B. The General Powers and Duties Vested in City and County Department Heads

In addition to the specific responsibilities of the Director of Elections, Charter section 4.126 lists general powers and duties that apply to City and County department heads *in the executive branch*. As indicated above, because the Mayor does not have overall responsibility for administration and oversight of the Department of Elections, and does not play a role in selection of the Director of Elections, the Department is not in the executive branch. Nonetheless, the general provisions of section 4.126 apply to the Director of Elections to the extent that these responsibilities and duties do not conflict with the specific responsibilities and duties vested in the Director. Charter § 4.100.

The provisions of Section 4.102 that apply to the Director of Elections provide that the Director is responsible for the "administration and management of" the Department, and may:

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- Appoint qualified individuals to fill all positions within their departments that are exempt from the Civil Service provisions of this Charter;
- Adopt rules and regulations governing matters within the jurisdiction of the department, subject to the powers of the Elections Commission; and
- With the approval of the City Administrator, reorganize the department.

Finally, unless the Charter or specific sections of the Municipal Code expressly provide otherwise, the department head is not required to seek commission approval before signing contracts and making other decisions on behalf of the department. (A memorandum addressing the role of the Elections Commission in awarding contracts, dated November 19, 2003, is attached.) We recommend that each commission and department head jointly determine which contracting and other matters require commission consideration and approval.

**V. RESTRICTIONS ON COMMISSIONS AND INDIVIDUAL COMMISSIONERS:
PROHIBITING INTERFERENCE WITH ADMINISTRATIVE AFFAIRS**

A. Restrictions on Commissions

Although the Charter confers broad authority to commissions to set policy and oversee the operations of their departments, the Charter also restricts how a commission may deal with the administrative affairs of its department, as follows:

Each board or commission, relative to the affairs of its own department, shall deal with administrative matters solely through the department head or his or her designees, and any dictation, suggestion or interference herein prohibited on the part of any member of a board or commission shall constitute official misconduct; provided, however, that nothing herein contained shall restrict the board or commission's power of hearing or inquiry as provided in this Charter.

Charter § 4.102. This restriction establishes a chain of command that governs the operation of departments under commissions. The commission sets policy and communicates that policy to the department head, who in turn is responsible for its execution. *City Attorney Opinion 90-01*, p. 2. As we stated in a 1990 Opinion:

[T]here is no prohibition...against a commission dictating administrative policy for its department, so long as the board or commission proceeds in the manner provided by the charter...[a] board or commission may act only at a noticed meeting attended by a quorum of the commission or its committees, and only by means of a vote of the commission or its committees. So long as a commission complies with these Charter requirements, it enjoys a broad authority to address administrative matters within its own department.

City Attorney Opinion 90-01, p. 3.

The requirement that a commission deal with administrative matters solely through the department head does *not* apply to actions taken through the commission's power of hearing or inquiry. Charter § 4.102. "The commission's power of inquiry includes the authority to call any department officer or employee before the commission to answer questions regarding the operations of the department. But if the commission wants to make changes in departmental operations as a result of those inquiries, it must still address its directives to the department's chief executive officer." *City Attorney Opinion 90-01*, p. 4.

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B. Restrictions on Individual Commission Members

Individual commission members lack the authority to exercise powers of the commission *as individuals*. Charter §§ 4.102, 4.104, Govt. Code §§ 54953, 54952.6. Although commissions may designate individual commissioners to perform assigned duties, such as monitoring the progress of a departmental program and reporting information on the program to the commission, individual commissioners may not otherwise act on behalf of the commission without the commission's express authorization.

In addition, as indicated above, Charter section 4.102 provides that “any dictation, suggestion or interference [in administrative affairs] herein prohibited on the part of any member of a board or commission shall constitute official misconduct . . .” Accordingly, in addition to requiring that a commission deal with administrative matters solely through the department head or his or her designees, section 4.102 prohibits *individual members* of boards and commissions from dictating, suggesting or interfering in administrative matters. *City Attorney Opinion* 90-01. The prohibition does not prevent individual commissioners from seeking information from the department head about the department’s operations. Further, *with the department head’s consent*, commissioners may also seek information from department staff.

Finally, commissioners should be aware that they are subject to restrictions on their political and other outside activities, and to State and local conflict of interest laws. A separate memorandum, included with the materials for the July 22, 2005 retreat, addresses the restrictions on political and other outside activities, and the City Attorney's *Good Government Guide: An Overview of the Laws Governing the Conduct of Public Officials* summarizes applicable conflict of interest laws. Please contact me if you have any questions about these laws and rules.

VI. THE RESPECTIVE ROLES OF THE ELECTIONS COMMISSION AND DIRECTOR OF ELECTIONS

As discussed above, there are numerous rules and requirements that govern the Elections Commission and Department of Elections. Nonetheless, these rules and requirements do not address every situation and contingency. From time to time, questions arise concerning the respective roles and responsibilities of the Commission and Director that cannot be answered by reference to the Charter or other laws. Under these circumstances, the Commission and Director should discuss and reach agreement concerning which matters require commission consideration and approval.

J.A.M.

cc: John Arntz
Shirley Rodriques



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MEMORANDUM

TO: MEMBERS
San Francisco Elections Commission

JOHN ARNTZ
Director of Elections

FROM: JULIA A. MOLL
Deputy City Attorney

DATE: July 6, 2005

RE: Amendments to Civil Service Rule 114

On November 17, 2003 the Civil Service Commission ("CSC") amended Civil Service Rule 114 concerning the Director of Elections position. This office previously provided you with a copy of the amended rule. As requested by Commissioner Tom Schulz, this memorandum briefly summarizes the key provisions of the amended rule. Please let me know if you have questions or want additional information about this matter.

SUMMARY

The amended rule addresses: selection and appointment of the Director of Elections; the probationary period; removal; appeal to the CSC; and limitations on interim appointments. Codification of these procedures and requirements does not affect the Charter mandate that the Director be responsible for the day-to-day conduct and management of the Department of Elections, or the balance of powers and duties between the Director and the Elections Commission.

1. Permanent Civil Service designation; Limited Civil Service rights.

The Director of Elections position is designated "permanent civil service" rather than "exempt." In general, this means that the CSC has jurisdiction to determine whether the procedures for selection, appointment, probation and removal of the Director are properly administered. But the amended rule also specifies that certain civil service rules and procedures do not apply to this position. For example, a former Director has no right to reclaim the position if the position is vacant, or to "bump" back into the position if laid-off from another City position. Similarly, there is no preference given to applicants for the Director position based on civil service seniority in the class.

2. Competitive selection process.

In general, the competitive selection process for permanent civil service appointments applies. There must be at least three qualified applicants to proceed with selecting a new Director, unless the CSC waives this requirement. The Elections Commission must establish a non-discriminatory merit-based process for selection among the qualified applicants.

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3. Designation of acting Director.

If the Director position is vacant, the Elections Commission may designate an acting Director with a temporary out-of-class assignment or provisional appointment. There is a 90-day limitation on this acting assignment or appointment, although the CSC may extend this limit in 60-day increments.

4. Determination of the date of appointment.

The date of appointment of the Director is significant because it determines when the probationary period starts and ends, and when the five-year term starts and ends. The amended rule specifies the date of appointment when the Elections Commission: re-appoints the incumbent at the end of a term; appoints a new Director at end of a term; and appoints a new Director under circumstances other than at the end of a five-year term.

5. Probationary period.

All new Directors must serve a probationary period. The term of the probationary period is set by Memorandum of Understanding ("MOU") with the Director's union. Under the current MOU, the probationary period is one year. If an incumbent Director is reappointed at the end of a five-year term, the Director does not serve a second probationary period.

6. Method of re-appointment of incumbent Director.

The Elections Commission may vote to re-appoint the Director without a competitive selection process. Alternatively, the Commission may conduct a competitive selection process, in which the incumbent may compete.

7. Removal for cause; Status of Director pending removal.

If the Elections Commission charges the Director with a specified act of misconduct, such as misappropriation of public funds, the Elections Commission could place the Director on unpaid administrative leave pending a hearing on removal. If the Elections Commission seeks to remove the Director for misconduct other than what is specified in the amended rule, the Director would remain on the job pending the decision on removal.

8. Procedure for removal; Appeal to CSC.

After the probationary period ends, the Elections Commission may remove a Director only for cause, following the presentation of written charges and a hearing. In general, the Commission must conduct the hearing at least 30 days and no more than 45 days after presenting the written charges, and must announce its decision on removal within 10 days of the hearing.

The Director may appeal to the CSC the Elections Commission's decision to remove, but must file the appeal within 20 days of the date of the Elections Commission's decision. In general, the CSC must hear the appeal within 60 days of the date of filing.

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MEMORANDUM

TO: MEMBERS
San Francisco Elections Commission

JOHN ARNTZ
Director of Elections

FROM: JULIA A. MOLL
CHAD A. JACOBS
Deputy City Attorneys

DATE: November 19, 2003

RE: Commission's Role in Awarding a Contract for a new Voting System

You requested advice regarding what role the Elections Commission ("Commission") may play in the process of awarding a contract for a new voting system.

SUMMARY OF ADVICE

Although the authority to award a new voting system contract rests with the Director of Elections, the Commission may hold hearings and pass resolutions to provide guidance to the Director on topics such as the process by which the Director selects a voting system or the type of voting system that would be best for the City to use. In addition, because the Board of Supervisors has not yet appropriated funds for a new voting system contract, the Commission may review any funding request for a contract for a new voting system that the Director wishes to award, and the Commission may, during the public hearing to consider any request for funding, review and discuss the proposed contract for a new voting system.

DISCUSSION

It is well settled that administrative bodies, such as the Commission, have only those powers that have been conferred upon them by the law either expressly or by implication. *See Ferdig v. State Personnel Board*, 71 Cal.2d 96, 103 (1969); *City and County of San Francisco v. Padilla*, 23 Cal.App.3d 388, 399 (1972).

A. *Express Powers Related to Awarding Contracts*

The duties and powers of the Commission are set forth in the Charter. *See, e.g.*, S.F. Charter §§ 4.102, 13.103.5 and 13.104.5. Except for limited circumstances related to hiring outside counsel, the Charter does not expressly provide the Commission with the power to award contracts. Instead, the Charter expressly grants to the Commission general oversight and policy-

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making powers. *See id.* Conversely, state and local law expressly provide that the Director of Elections ("Director") is responsible for the award of contracts for goods and services used by the Department of Elections ("Department"). The Charter states that the Department "shall be administered by the Director of Elections, who shall be vested with the day-to-day conduct and management of the Department." *See* S.F. Charter § 13.104. As part of these duties, local law requires the Director to "issue or authorize all requisitions for the purchase of materials, supplies and equipment required by [the] Department," and state law provides the Director, as the county elections official, with the authority to purchase supplies that are necessary for election-day activities without going through the City's purchasing processes. *See* S.F. Admin. Code § 2A.30; Cal. Elections Code § 14100.¹ Accordingly, the law has not expressly conferred upon the Commission the power to award a contract for a new voting system.

Nevertheless, the Charter expressly grants to the Commission the power to "conduct investigations into any aspect of governmental operations within its jurisdiction through the power of inquiry," and to "hold hearings and take testimony." *See* S.F. Charter §§ 4.102(7) & 4.102(10). With regard to the award of a contract for a new voting system, these express powers would permit the Commission to discuss and provide guidance to the Director of Elections on topics such as the process by which the Director selects a voting system or the type of voting system that would be best for the City to use. *See Diamond Int'l Corp. v. Boas*, 92 CalApp.3d 1015, 1037 (1979). In *Boas*, the court analyzed who in the City was responsible for choosing a voting system. The court concluded that the Chief Administrative Officer, who preceded the Commission in overseeing the Department, did not have the authority to choose a voting system or prohibit the Director from recommending and issuing a requisition for a particular kind of voting equipment. Instead, the court determined that the Chief Administrative Officer had the authority to investigate and recommend the type of equipment that would best serve the City. *See id.*² We conclude that the Commission likewise maintains such power in awarding a new voting system contract.

¹ Except in limited circumstances governed by California Elections Code section 14100, local law requires the Purchaser to enter into contracts on behalf of the Department for the acquisition of supplies and services. *See* S.F. Admin. Code §§ 21.03(a) (The Purchaser shall purchase all Commodities or Services required by City departments and offices of the City and 21.05(b)(2) (The Director of Purchasing shall be the Contracting Officer for Professional Service contracts unless a Contracting Officer other than the Purchaser is authorized to enter into the contract directly). But such contracts must be based on requisitions issued or contracts awarded by the Department. *See* S.F. Admin. Code §§ 21.03(b) (All purchases made by the Purchaser shall be made on the basis of requisitions of ordering departments) and 21.05(b) (Departments shall be responsible for defining the scope of a project for contracting purposes, establishing fair evaluation criteria and selection processes for solicitations, and for the negotiation and award of contracts for Professional Services).

² Based on powers expressly granted to the Chief Administrative Officer in the former Charter that were not provided to the Commission, the *Boas* court concluded that the Chief Administrative Officer could decide not to approve the contract that would be entered into under the requisition issued by the Director. *See id.* (relying on former Charter section 7.103, which required the Chief Administrative Officer to approve all contracts under his jurisdiction with a value in excess of \$50,000).

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Furthermore, the Charter expressly provides that the Commission must, after a public hearing, approve any request to the Board of Supervisors for an appropriation. *See* S.F. Charter § 4.102(3). The Board of Supervisors has not yet appropriated any funds for a contract for a new voting system. Under these circumstances, the Charter expressly provides the Commission with the power to review any funding request for a contract for a new voting system that the Director wishes to award, and the Commission may, during the public hearing to consider any request for funding, review and discuss the proposed contract for a new voting system.

B. Implied Powers Related to Awarding Contracts

A public agency possesses implied powers that are "necessary or reasonably appropriate to the accomplishment of their express powers." *See County of San Joaquin v. Stockton Swim Club*, 42 Cal.App.3d 968, 972 (1974). An agency's implied powers, however, are not without limitation. For an agency to possess an implied power, the power "must be essential to the declared objects and purposes of the enabling act-not simply convenient, but indispensable." *Addison v. Department of Motor Vehicles*, 69 Cal.App.3d 486, 498 (1977) (*quoting*, 2 Cal.Jur.3d, Administrative Law, § 39, pp. 257-258).

In addition to the powers discussed above, the Charter expressly provides that the Commission is responsible for the "proper administration of the general practices of the Department, subject to the budgetary and fiscal provisions of this Charter." *See* S.F. Charter § 13.103.5. Implied within this express power is the power to hold hearings, take testimony and pass resolutions to provide guidance to the Director on issues related to the award of a contract for a new voting system. But implied within this power is not the power to actually award a contract for a new voting system. It is not essential or indispensable for the Commission to be able to award contracts in order to perform its oversight duties. The Commission can ensure the proper administration of the general practices of the Department by holding hearings, approving resolutions and motions, using its power of inquiry, and otherwise asking the Director to report on matters of interest. As a result, the Charter does not by implication grant to the Commission the power to award contracts including a contract for a new voting system.

Please let us know if you have any questions related to this memorandum.

J.A.M.

C.A.J.