

CITY OF OAKLAND

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OFFICE OF THE CITY ATTORNEY

MEMORANDUM

TO: President Larry Reid and Members of the City Council
Sabrina Landreth, City Administrator

FROM: Barbara J. Parker
City Attorney

DATE: June 19, 2018

RE: **Legal Opinions Regarding Oakland Police Commission Enabling Ordinance – Item 13 on the June 19, 2018 City Council Agenda**


Dear President Reid, Members of the City Council and City Administrator Landreth:

This memorandum transmits three public legal opinions to the Council regarding legal issues raised by the Council's draft Police Commission Enabling Ordinance ("Council's Draft Ordinance") and the Police Commission's recommendations. The opinions are posted on the City Attorney's website, oaklandcityattorney.org and can be accessed by clicking on the "Opinions and Reports" link.

On June 19, 2018, the Council will consider: (1) recommendations from the Police Commission regarding the Council's Draft Ordinance the Council provided to the Commission for its review and input; and (2) introducing the ordinance.

The Council's Draft Ordinance included language regarding the appointment of staff to the Commission that is not in compliance with the City Charter. The Police Commission's recommendations include language that is not in compliance with the City Charter with respect to the appointment of staff to the Commission and the CPRA, the hiring and oversight of legal counsel to the Commission and the CPRA, and the role of the Police Chief.

The opinions include: (1) a copy of the March 19, 2018 public opinion our Office previously issued to advise the Council of legal issues that the Council's Draft Ordinance presented; (2) a second public opinion from outside counsel regarding the legal issues the Council's Draft Ordinance raised; and (3) a public opinion from outside counsel regarding additional legal issues the Police Commission's recommendations raise.


BARBARA J. PARKER
City Attorney



18 JUN 14 PM 3: 17

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VIA EMAIL AND HAND DELIVERY

March 19, 2018

President Larry Reid and Members of the City Council
City Administrator Sabrina Landreth
One Frank Ogawa Plaza
Oakland, California 94612

**Re: Appointing Authority Over Staff to the Oakland Police Commission
Item 11 on the Council's March 20, 2018 Agenda**

Dear President Reid, Members of the City Council, and City Administrator Landreth:

I. Introduction

At its March 6, 2018 meeting, the Council continued item 11 "Police Commission Enabling Ordinance" to the Council's March 20, 2018 meeting. The City Administrator ("CAO") and City Attorney's Office ("OCA") requested the continuance to provide OCA time to consider the legal issues the City Administrator's February 23, 2018 report raised. Among other things, the CAO's report requested amendment of the enabling ordinance to clarify that the CAO is the appointing authority¹ for staff of the Community Police Review Agency (CPRA) and the staff to the Oakland Police Commission, including the civilian Inspector General and her/his staff.

This issue requires interpretation of the City Charter, regarding the relative powers of the City Council, the City Administrator and City boards/commissions and will be posted on the City Attorney's web site at www.oaklandcityattorney.org.

¹ "Appointing authority," as that phrase relates to the City's civil-service employees, refers to the ultimate authority an official or group of officials has to appoint or remove a particular employee. See Oakland Civil Service Rules §1.01(e). Under the Civil Service Rules and the Oakland City Charter, an employee so appointed is also evaluated and disciplined by the appointing authority and is said to be under the appointing authority's "jurisdiction."

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II. Brief Explanation of Changes

We have determined that certain changes are necessary for the enabling ordinance to comply with the City Charter. Those changes are reflected in the redlined version of the ordinance that is included in the agenda packet for the March 20, 2018 meeting.

As an initial matter, it is not necessary to amend or clarify the appointing authority for CPRA staff. Charter section 604I(6) gives the CPRA Director "the authority to hire and fire Agency staff, in consultation with the City Administrator." Thus, the Charter gives the CPRA Director appointing authority over CPRA staff, and this cannot be amended by ordinance.

However, if the Council authorizes administrative support for the Police Commission and/or establishes an Office of Inspector General (OIG) to audit the Police Department, the Inspector General and any other staff will be under the CAO's appointing authority; and thus cannot be under the jurisdiction of the Oakland Police Commission for purposes of personnel administration.

As we explain more fully below, the Council may budget for and require administrative support for the Police Commission. Similarly, the Council may establish an OIG, budget for OIG staff, and require that the office perform specific duties exclusively in service of the Police Commission. However, in terms of personnel administration or "appointing authority" (i.e. hiring, evaluating, disciplining, and firing employees), all the aforementioned personnel would be under the CAO's appointing authority jurisdiction. The redlined enabling ordinance has been amended to comport with the City Charter.

Changes also were necessary to preserve the reporting structure between the Chief of Police and the City Administrator. While Charter Article 604 gives the Police Commission the ability to terminate the Police Chief for cause, it does not give the Police Commission the authority to direct the Chief to perform specific tasks.

To summarize, the draft Police Commission enabling ordinance has been amended to:

- place the Police Commission's Inspector General and her/his office staff under the personnel jurisdiction of the City Administrator;
- require that the Police Commission provide an annual assessment of the Inspector General's job performance to the City Administrator;

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- place the Police Commission's administrative support staff under the personnel jurisdiction of the City Administrator;
- require that the Police Commission ask (rather than direct) the Chief of Police to notify the Commission of certain types of serious incidents;
and
- remove the provision that directed the Chief of Police to appoint a sworn liaison to the OIG.²

III. Discussion

Charter sections 604(b)(12) and 604(h) authorize the Council to assign additional functions and duties to the Police Commission by ordinance to further the goals and purposes of Measure LL. Measure LL, however, must be read in harmony with the rest of the City Charter. So the functions and duties the Council assigns to the Police Commission cannot alter the powers or duties that the Charter reserves to other offices in the City.

The Council's authority to establish an OIG and/or other Commission staff positions also derives from Charter sections 600 and 902, which authorize the Council to create, organize and reorganize City functions. Specifically, Charter section 600 empowers the Council to establish "duties, powers and functions which in the judgment of the Council will provide the most efficient and economical service possible." It goes on to say that "[a]ll departments or administrative agencies so created shall be administered by the City Administrator or by a department head or other officer appointed by and responsible to him/her." Charter Section 503 reserves to the City Administrator, subject to civil service rules, "the power to appoint, assign, reassign, discipline and remove all directors or head of departments and all employees under his [or her] jurisdiction."

There are two categories of exceptions to the default rule that personnel administration is under the City Administrator's jurisdiction. The first category is elected officials. The City Administrator obviously is not the appointing authority for elected officials such as the Mayor, Auditor, Council Members and City Attorney and they are

² Lastly, Section 2.45.150 previously required the Commission to obtain Council approval before establishing "other standing committee[s]." OCA recommends striking the word "other" as the Commission does not yet have any standing committees. The Commission's discipline committees are not standing committees because will be formed as-needed, on a case-by-case basis with changing membership, and they have no predetermined meeting times.

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the appointing authorities for staff in their offices.³ The second, category is City offices, departments, agencies, boards/commissions and positions that the Charter explicitly provides are outside of the City Administrator's jurisdiction. The Charter provides the following exceptions to the City Administrator's jurisdiction:

- Charter section 603(g)(3) provides that the Executive Director of the PEC serves "at the pleasure of the Commission" such that the "City Administrator shall not have the authority to remove the Executive Director";
- Article VII of the Charter creates the Port Department and vests in the Port Board of Commissioners exclusive control and management of the department. Consistent with the Port Board's jurisdiction over the Port Department, Charter sections 706(20) and 706(21) give the Port Board the power to "appoint a Port Attorney" and fix her/his compensation, as well as the power to "employ and appoint and Executive Director, and such other officers, employees and agents as may be necessary" to Port business;
- Charter section 604(e)(6) explicitly gives the Police Commission the power to "periodically conduct a performance review of the Agency Director" but stops short of giving the Police Commission full appointing authority. The Police Commission may terminate the CPRA Director, but the City Administrator appoints new directors from among candidates the Commission submits;
- Charter section 604(e)(6) gives the CPRA Director "the authority to hire and fire Agency staff, in consultation with the City Administrator"; and
- Charter section 604(b)(10) gives the Police Commission the power to terminate the Police Chief for just cause, grants the Mayor authority to terminate the Police Chief and the authority to appoint the Police Chief from a list of not less than four candidates presented by the Commission.

³ Consequently, Charter section 218, which prohibits Council interference in administrative services, only contemplates administrative services being delivered by "the City Administrator, Mayor and other appointed or elected officers."

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In each of these instances, the exception to or limitation on the City Administrator's usual authority is in the Charter.⁴ Administrative support for boards and commissions is provided by the City Administrator by employees under the City Administrator's jurisdiction, except when the Charter explicitly provides an exception. For example, Charter Article IX established the Civil Service Board, and section 904 required the Council to "by ordinance provide a modern system of personnel administration for the competitive civil service." The Council's ordinance, at 2.08.040 provides "[t]he City Administrator shall provide the [Civil Service] Board with assistance from City employees under his/her jurisdiction."

IV. Conclusion

The Council may authorize and budget for staff to support the Police Commission to further the goals of Measure LL, and, subject to the Civil Service Rules, the Council may give that staff certain functions or duties to carry out in service of the Police Commission. But the staff who provide services to the Commission are under the City Administrator's personnel jurisdiction (i.e. appointing authority) because the Charter does not provide an exception to the City Administrator's jurisdiction. Based on the foregoing we have presented redlined amendments to the enabling ordinance that were included in the supplemental agenda packet for the Council's March 20, 2018 meeting.

Very truly yours,


BARBARA J. PARKER
City Attorney

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⁴ Notably, the City Attorney's appointing authority, unlike other elected officials, is explicitly spelled out in the Charter. See City Charter §401(6). This makes sense when one recalls that the City Attorney was not always elected. Thus, back when the City Attorney was appointed, the Charter explicitly provided independent jurisdiction for that office, whereas independent jurisdiction was a given for the elected offices.



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MEMORANDUM

VIA EMAIL

To: Barbara J. Parker
Oakland City Attorney

From: Karen Getman

Date: June 14, 2018

Re: Authority of the Police Commission Under the City Charter With Regard to the Proposed Civilian Inspector General and the Police Chief

INTRODUCTION

You have asked that we provide a legal opinion on the questions presented below. In preparation, we reviewed, among other things: the City Charter; the ballot materials presented to the voters regarding Measure LL, which amended the Charter to create the Police Commission and the Community Police Review Agency; the March 19, 2018 public opinion of the City Attorney previously presented to the Council regarding the implementation of Measure LL; the text of a proposed ordinance to implement Measure LL; and comments dated April 14, 2018 from the Police Commission on that proposed ordinance.

QUESTIONS PRESENTED

Question: Does the City Charter grant the Police Commission the power to hire and fire the City employee who will serve as the citizen Inspector General?

Answer: No. Under the Charter, the City Administrator must be the appointing authority for the Inspector General, and will have the ability to discipline and dismiss the person who holds that office.

Question: Can an ordinance implementing Measure LL require the Police Chief to perform certain duties, such as assign a liaison to the Commission,

personally attend Commission meetings; or prepare reports for the Commission?

Answer: No. Under the Charter, and with few explicit exceptions provided for in Measure LL, the Police Department and its Chief are under the administrative control of the City Administrator, who alone is authorized to direct the Chief in the performance of her duties.

FACTUAL BACKGROUND

Measure LL, passed by City voters in 2016, amended the City Charter to create a Police Commission to provide civilian oversight of the Police Department, and a Community Police Review Agency ("Agency") to investigate allegations of police misconduct and recommend discipline where appropriate. Oakland City Charter ("Charter") § 604(a)(1) & (2); (c)(1) & (2). The measure also dissolved the Community Police Review Board that previously had been authorized by ordinance. *Id.* § 604(e)(2). Both the Police Commission and the Agency have "the functions and duties enumerated in" the Charter, "as well as those assigned . . . by Ordinance." *Id.* § 604(a)(1) & (2).

As part of its implementation of Measure LL, the Council is considering an ordinance that would create a new civilian Office of the Inspector General ("OIG").¹ Under the proposed ordinance, the OIG would have such tasks as the Commission determines may be necessary or helpful for the Commission to fulfill its duties, plus any other tasks specified in the ordinance, which could include performing audits and reviews as requested by the Mayor, the City Administrator or the City Council. The new OIG head, to be named the Inspector General, would be a civil servant whose job duties and qualifications would be proposed by the Commission, which also would establish the priorities for the OIG. The Inspector General would supervise any OIG staff. The Commission in its comments would make the Inspector General responsible to the Commission rather than the County Administrator, for the performance of his or her job duties.

¹ The Police Department currently houses an Office of Inspector General, which is led by a police lieutenant who reports directly to the Police Chief.

The proposed ordinance also would direct the Chief of Police to perform additional tasks, including: assign a sworn liaison to the Commission; personally attend Commission meetings; and provide various reports to the Commission.

ANALYSIS

I. The Charter Prohibits Allowing the Police Commission to Hire and Fire the Inspector General

The first question is whether the Police Commission can be given the authority by ordinance over the staff of the OIG, including authority to hire and fire the Inspector General. The City Attorney has opined that the City Administrator must be authorized to appoint, discipline and remove the Inspector General, while others suggest the Police Commission can be the appointing authority.

To resolve this question, the starting point must be the language of the Charter, as amended by Measure LL. The Charter, adopted by the Oakland electorate, “represents the supreme law of the City . . .” *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 170 (1994). As a result, “it is well settled that a charter city may not act in conflict with its charter.” *Id.* at 171. In determining whether a proposed ordinance conflicts with the Charter, the courts apply long-established rules of statutory construction. “We look first to the language of the charter, giving effect to its plain meaning. Where the words of the charter are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the charter or from its legislative history.” *Kreeft v. City of Oakland* 68 Cal. App. 4th 46, 54 (1998), quoting *Domar Electric, Inc.*, 9 Cal. 4th at 172 (citation omitted).

Under the Charter, the Council by ordinance establishes “the form of organization through which the functions of the City under the jurisdiction of the City Administrator are to be administered.” Charter § 600.

Any combination of authorized duties, powers and functions which in the judgment of the Council will provide the most efficient and economical service possible . . . may be authorized by such ordinance. ***All departments or other administrative agencies so created shall be administered by the City Administrator or by a department head or other officer appointed by and responsible to him/her.***

Id. (emphasis added).

The City Administrator’s administrative authority over the departments and agencies created by ordinance extends to hiring authority. *See id.* § 503 (“the City Administrator is the hiring

authority for all directors, heads of departments and employees, except as expressly specified in the Charter, and subject to the civil service system established by Article IX”).

Under Charter section 600, when the Council by ordinance creates a new office – as it proposes to do with the OIG – then that new office “shall be administered by the City Administrator or by a department head or other officer appointed by and responsible to him/her.” As the head of that new office, the Inspector General must be “appointed by and responsible to” the City Administrator, either directly or through someone she appoints and supervises. *Id.* Where the plain language of the Charter is so clear and unequivocal, it controls and there is no need to resort to other interpretive aids. *Sacks v. City of Oakland*, 190 Cal. App. 4th 1070, 1082 (2010) (“If we conclude that the statutory meaning is free of doubt, uncertainty, or ambiguity, the language of the statute controls, and our task is completed.”) (quoting *Cummings v. Stanley*, 177 Cal. App. 4th 493, 507-08 (2009)).

The City Administrator does not appoint the members of the Police Commission, and thus the Commission cannot appoint or fire the Inspector General.² No ordinance enacted by the Council can alter this result. *See St. Croix v. Superior Court*, 228 Cal. App. 4th 434, 446 (2014) (“[A]n ordinance must conform to, be subordinate to, not conflict with, and not exceed the [city’s] charter, and can no more change or limit the effect of the charter than a legislative act can modify or supersede a provision of the constitution of the state.”) (citation omitted); *Citizens for Responsible Behavior v. Super. Ct.*, 1 Cal. App. 4th 1013, 1034 (1991) (“While a city charter may be amended by a majority vote of the electorate (Cal. Const. Art. XI, § 3), an ordinance cannot alter or limit the provisions of a city charter.”) (citation omitted).

Measure LL’s grant of specific, narrow hiring and firing authority to the Police Commission and the Agency confirms this analysis. For example, the Police Commission is authorized to remove the Chief of Police (for cause or with concurrence of the Mayor), and with assistance of the City Administrator identify and transmit a list of candidates for Chief, although the Mayor makes the final appointment. Charter § 604(b)(10). With regard to the Agency, the Executive Director of the former Citizens’ Police Review Board becomes its first Interim Director, and the staff of that former Board

² The Mayor appoints three members of the Commission; all other commissioners and alternates are appointed by a Selection Panel established through the Charter, subject to approval by the City Council. Charter § 604(c)(2) & (3). Commissioners may be removed for cause by the Council, or by a majority vote of the Commission but only for certain specified reasons. *Id.* § 604(c)(10).

become Agency staff. *Id.* § 604(e)(2). Subsequent Agency Directors are hired by the City Administrator from among candidates submitted by the Commission, but the Commission reviews and can terminate the Director subject to approval of the City Administrator. *Id.* §§ 604(e)(6) & (7). The City Attorney assigns the legal advisor to the Agency, after consultation with the chair of the Police Commission. *Id.* § 604(e)(1). Any additional Agency staff are hired and fired by the Agency Director, in consultation with the City Administrator. *Id.* § 604(e)(6).

Under Measure LL, the Charter relies on the City Administrator to appoint an administrative support staff member to the Commission. Charter § 604(e)(5). The Charter allows the Commission to “identify special qualifications and experience that candidates for *Agency* staff positions must have,” but says nothing about its authority to identify qualifications for Commission staff. *Id.* § 604(e)(3) (emphasis added). Under section 604(e)(7), both Agency and Commission staff “shall be civil service employees in accordance with Article IX of the City Charter.”

There are instances where Measure LL usurps the City Administrator’s authority otherwise granted by the charter. For example, the City Administrator “shall not have the authority to reject or modify” the discipline decisions for sworn police officers. Here again, however, such exceptions are clearly spelled out in the charter.

Thus while the Charter as amended by Measure LL grants the Police Commission and the Agency express but limited authority over the Police Chief and the Agency staff, nothing in the Charter grants the Commission blanket authority to make hiring or firing decisions for other offices or departments. In light of that silence, the general Charter provisions regarding the creation and staffing of new city departments must be followed with regard to the OIG. That places the hiring and firing authority squarely with the City Administrator.³

Nor does Charter section 604 provide a contrary result. It allows the Council by ordinance to place additional duties *on* the Police Commission. Charter § 604(b)(12) (the Commission shall “[p]erform such other functions and duties as may be prescribed by this Charter, or by City ordinance.”). However, the Charter must be read as a whole, and each of its provisions “must be

³ Nothing would prevent the Police Commission from providing input to the City Administrator on the performance of the Inspector General, as the proposed ordinance provides, but the City Administrator can choose to ignore that input or take it into account.

construed together so as to give effect to each.” *Waters v. Civil Service Board of the City of Oakland*, 133 Cal. App. 2d 733, 737 (1955) (citations omitted). If the ordinance creates a new department to perform those additional duties *for* the Commission, the new department must be created in conformance with Charter section 600, meaning it must be placed under the administrative control of the City Administrator, even if its function is to assist the Commission.

Moreover, while Measure LL authorizes the Council to “enact legislation or regulations that will further the goals and purposes of this section 604” (Charter § 604(h)), the Measure does not amend or alter the provisions of the Charter that proscribe the City Administrator’s scope of authority over city employees except in narrow circumstances for certain named positions (e.g., firing the Police Chief). The authority to implement Measure LL by ordinance does not provide authority to diminish the City Administrator’s charter-proscribed functions. *See Scott v. Common Council*, 44 Cal. App. 4th 684, 695 (1996) (“[T]he city council cannot relieve a charter officer of the city from the duties devolving upon him by the charter[. . .].”) (citation, quotation omitted); *Citizens for Responsible Behavior*, 1 Cal. App. 4th at 1034 (“While a city charter may be amended by a majority vote of the electorate (Cal. Const. Art. XI, § 3), an ordinance cannot alter or limit the provisions of a city charter.”) (citation omitted). Thus in light of the Commission’s lack of express authority in the Charter over its own staff, and reading the Charter as a whole, the personnel authority for staff assigned to the Commission must reside with the City Administrator or with a designee appointed by and responsible to her.

II. An Ordinance Implementing Measure LL Cannot Direct the Police Chief in His/Her Daily Tasks Beyond Those Specified in the Charter

Questions also have been raised about whether an ordinance implementing Measure LL can direct the Police Chief to take particular actions at the direction of the Police Commission. For example, the Commission has requested that the ordinance require the Police Chief to assign a sworn liaison to the Commission; require the Chief (or her designee) to appear in person at Commission meetings unless such appearance is impracticable; and require the Chief to prepare various reports for the Commission.

Here again, the starting point is the Charter, which divides the powers of government among the various City officers, including the City Council and the City Administrator. As noted above, under Charter section 600, the City Council, exercising its legislative power, creates the structure of City government. While the Council creates City departments and assigns broad areas of responsibility to

each, the administration of those departments is left to the City Administrator, who also appoints and directs the department heads.

The City Administrator shall be responsible to the Council for the proper and efficient administration of all affairs of the City under his jurisdiction, and shall, subject to the provisions of Article IX of this Charter and except as otherwise provided in this Charter, have the power to appoint, assign, reassign, discipline and remove all directors or heads of departments and all employees under his jurisdiction. . . .

Charter § 503.

Accordingly, the Council by ordinance created the Police Department, headed by a Chief of Police, and placed the department under the administrative control of the City Administrator:

There is established in the City government a Police Department which shall be under the supervision and administrative control of the City Administrator. The powers, functions and duties of said Department shall be those assigned, authorized and directed by the City Administrator. The management and operation of the Police Department shall be the responsibility of the Chief of Police who shall serve as Director of said Department, subject to the direction of the City Administrator.

Oakland Mun. Code § 2.29.020.

Importantly, the Charter specifically precludes the Council from interfering in the administrative affairs of the City Administrator and the department heads under her jurisdiction.

Except for the purpose of inquiry, the Council and its members shall deal with the administrative service for which the City Administrator . . . [is] responsible, solely through the City Administrator. . . . Neither the Council nor any Council member shall give orders to any subordinate of the City under the jurisdiction of the City Administrator . . . either publicly or privately. . . nor in any matter take part in the appointment or removal of officers or employees in the administrative service of the City. Violation of the provisions of this section by a member of the Council shall be a misdemeanor, conviction of which shall immediately forfeit the office of the convicted member.

Charter § 218.

Measure LL carves out specific exceptions to this general division of authority with regard to the Chief of Police's duties relating to the Police Commission and the Community Police Review Agency. The Charter now allows the Commission, the Agency, and the City Council to play a greater role in the administration of the Police Department in a number of ways, briefly summarized here:

1. The Commission can hold public hearings on Police Department policies and procedures, and can subpoena documents and compel testimony from the Department, including presumably the Chief of Police. *Id.* § 604(b)(2) & (3).
2. The Commission can propose changes to Department policies on use of force, profiling based on race or other protected characteristics or which contain elements expressly listed in federal court orders or settlement; the proposed changes are submitted to the Council for approval or rejection, and if no action is taken, the changes become final. *Id.* § 604(b)(4).
3. The Commission can approve or reject the Department's proposed changes to its policies on use of force, profiling based on race or other protected characteristics or which contain elements expressly listed in federal court orders or settlements; if the Commission rejects the Department's proposed changes, the matter is submitted to the Council for review. *Id.* § 604(b)(5).
4. The Commission can review or comment on any Department policies and procedures, and can request a written response to its comments from the Chief of Police. *Id.* § 604(b)(6).
5. The Commission can require the Chief of Police to submit an annual report on such matters as the Commission shall require. *Id.* § 604(b)(8).
6. Acting separately or with the Mayor, the Commission can remove the Chief of Police and can make recommendations for an interim Chief of Police to be appointed by the Mayor. *Id.* § 604(b)(10).⁴
7. The Agency and the Police Chief share responsibility for determining discipline after investigations following complaints against sworn officers and if they disagree on recommended discipline, a committee of the Commission makes the final

⁴ Because the Commission has authority to act separately to remove the Chief of Police for cause, the implementing ordinance can, as the Commission requests, allow the Commission to conduct performance evaluations for the Chief.

determination, which the Chief must apply. The City Administrator cannot reject or modify these recommendations or the final decision. *Id.* § 604(g).

However, except in these specific areas, Measure LL does not change the authority of the City Administrator over the administration of the Police Department and the performance of the Police Chief.

The Charter must be read as a whole, and each of its provisions “must be construed together so as to give effect to each.” *Waters v. Civil Service Board of City of Oakland*, 133 Cal. App. 2d 733, 737 (1955). In this regard, a specific provision controls over a general one “and the general and special provisions operate together, neither working the repeal of the other.” *Diamond Int’l Corp. v. Boas*, 92 Cal. App. 3d 1015, 1031 (1979) (citations omitted); see *Apartment Ass’n of Los Angeles County, Inc. v. City of Los Angeles*, 173 Cal. App. 4th 13, 19, 22 (2009). Where the Charter explicitly grants authority to an officer or department, and does not expressly grant the same authority to another, the courts assume the voters intended to make that distinction. See, e.g., *Diamond Int’l Corp.*, 92 Cal. App. 3d at 1036 (registrar is subject to the budgetary oversight of the chief administrative officer [“CAO”] under the city charter, notwithstanding language granting the registrar exclusive authority over elections, where nothing in the language or design of the charter evidences an intent to exempt the registrar from the CAO’s broad authority).

The Charter specifically grants the City Administrator sole administrative control over city department heads and staff, except where expressly provided otherwise. Nothing in the amendments made to the Charter by Measure LL takes away that authority when it comes to directing the day-to-day duties of the Police Chief, except in the narrow circumstances described above. Those specific duties now placed on the Police Chief by the Charter are the only duties she *must* perform for the Commission. In all other respects, she reports to the City Administrator on the duties she performs as department head, and only the City Administrator can require her specific performance.⁵

⁵ For similar reasons, and as we explain more fully in our memorandum on the City Attorney’s relationship to the Police Commission, the City Attorney is an independent elected official whose duties are set forth in the Charter. Only the City Attorney can direct the staff in her office. Therefore the proposed ordinance cannot require the City Attorney or her staff to conduct trainings of the Selection Committee, as the Commission proposes in its April 30, 2018 comments on the proposed ordinance.

Barbara J. Parker
Oakland City Attorney
June 14, 2018
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CONCLUSION

Based on the plain language of the Charter, and respecting these principles of statutory interpretation, we conclude that an ordinance implementing Measure LL can add additional duties to the Commission or the Agency, provided those duties do not conflict with other Charter provisions; but it cannot create a new office under the direction and control of the Commission or the Agency, and it cannot direct the Police Chief to perform specific tasks at the direction of the Commission beyond those expressly stated in the Measure.

KG:NL
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MEMORANDUM

To: Barbara J. Parker
Oakland City Attorney

From: Karen Getman

Date: June 14, 2018

Re: Authority of City Attorney to Appoint Legal Counsel for the Police Commission and the Community Police Review Agency

INTRODUCTION

You have asked for a legal opinion on the questions below concerning the appointment of legal counsel for the Police Commission and the Community Police Review Agency. In formulating our opinion, we have reviewed the City Charter as amended by Measure LL, an initiative measure approved by the voters in 2016 which established the Police Commission and the Community Police Review Agency; the Title and Summary and Impartial Analysis of Measure LL; the City Attorney's Opinion dated March 19, 2018 regarding Appointing Authority Over Staff to the Oakland Police Commission; a proposed ordinance implementing Measure LL; the Police Commission's April 30, 2018 comments on the proposed ordinance; and relevant case law.

QUESTIONS AND BRIEF ANSWERS

Question No. 1:

Does the City Attorney have the authority to select and assign the outside attorney who will serve as legal advisor to the Community Police Review Agency, subject to consultation with the chairperson of the Police Commission?

Answer:

Yes. The Charter amendments made by Measure LL regarding the Police Commission and the Community Police Review Agency (City Charter Article VI, § 604 et

seq.) clearly specify that the City Attorney, after consultation with the chair of the Police Commission, is authorized to select and appoint an outside attorney to serve a limited role as legal advisor to the Community Police Review Agency. The outside attorney will not serve as conflict counsel. Measure LL provides that the legal advisor to the Community Police Review Agency will provide legal services related to investigations and recommended discipline. Charter § 604(e)(1).

Question No. 2:

Does the City Attorney have the authority to unilaterally select and assign either a deputy city attorney or outside attorney to serve as counsel to the Police Commission and the Community Police Review Agency?

Answer:

Yes. Measure LL is silent as to the appointment of other counsel to the Police Commission and the Community Police Review Agency, and as such those appointments fall within the broad authority given the City Attorney under the Charter. Accordingly, the City Attorney has authority to assign a deputy city attorney or an outside attorney to advise the Police Commission and the Community Police Review Agency on matters that are not within the limited scope of the outside attorney who will serve as legal advisor to the Community Police Review Agency.

ANALYSIS

In 2016, the voters passed Oakland Measure LL, which amended the Oakland City Charter to create a Police Commission charged with providing civilian oversight of the Police Department, and a Community Police Review Agency (“Agency”) charged with investigating allegations of police misconduct and recommending discipline where appropriate. Oakland City Charter § 604 et seq (hereinafter “Charter”). The measure also dissolved the Community Police Review Board that previously had been authorized by ordinance. *Id.* § 604(e)(2). Both the Police Commission and the Agency have “the functions and duties enumerated in” the Charter, “as well as those assigned . . . by Ordinance.” *Id.* § 604(a)(1) & (2).

As amended, the Charter now requires that the budget for the Commission must be sufficient to provide for the appointment of a “legal advisor” to the Agency. The relevant section reads:

The City shall allocate a sufficient budget for the Commission, including the Agency, to perform its functions and duties as set forth in this section, including budgeting at least one full-time-equivalent non-City Attorney legal advisor that is specifically charged with providing legal services to the Agency related to investigations and recommended discipline. The one full-time-equivalent non-City Attorney legal advisor shall be assigned by the City Attorney after consultation with the Chair of the Commission. The non-City Attorney legal advisor shall not in the regular course of his or her legal practice defend law enforcement officers and shall not participate in, nor serve as counsel to the City or any of its Council members or employees in defense of any lawsuit arising from any incident involving an Oakland police officer.

Charter § 604(e)(1).

The plain language of this Charter amendment is clear: only the City Attorney, in consultation with the Chair of the Police Commission, “assigns” – i.e., selects and appoints – an outside attorney to serve as legal advisor to the Agency. Where the plain language of the Charter is so clear and unequivocal, there is no need to resort to other interpretive aids. *Sacks v. City of Oakland*, 190 Cal. App. 4th 1070, 1082 (2010) (“If we conclude that the statutory meaning is free of doubt, uncertainty, or ambiguity, the language of the statute controls, and our task is completed.”) (quoting *Cummings v. Stanley*, 177 Cal. App. 4th 493, 507-08 (2009)).

This particular outside attorney, or “legal advisor,” has a narrowly delineated role under the Charter: he or she “is specifically charged with providing legal services to the Agency *related to investigations and recommended discipline.*” Charter § 604(e)(1) (emphasis added). Indeed, the narrow scope of the Agency legal advisor’s duties contrasts sharply with the broad role the Charter assigns to the independent Port Attorney, “whose duty it shall be to pass upon the form and legality of all contracts within the jurisdiction of the board, give legal advice to the Board on official matters, defend and (subject to direction from the Board) prosecute or compromise all actions at law or in equity and special proceedings for or against the City or any officers thereof in his official capacity, pertaining to matters within the jurisdiction of the Board.” *Id.* § 706(20). Moreover, unlike the Port Attorney, who can defend or prosecute lawsuits “for or against the City or any officers thereof” pertaining to the Port, the Agency’s legal advisor cannot serve as counsel to the City, the Council Members or any City employees in lawsuits arising from any incident involving an Oakland police officer. *Id.* § 604 (e)(1).

However, the Police Commission and the Agency are likely to require general legal advice and representation on matters common to City boards and commissions, such as interpretations of their enabling statutes, questions about public records and open meetings laws, drafting of contracts and

policies, litigation defense, and the like. The Police Commission has suggested that it be given authority to employ a second non-city attorney, independent of the City Attorney's office, to serve as a legal advisor to the Commission. In our opinion, however, if the Commission and Agency require general legal services, the City Attorney will have sole discretion to assign an attorney to provide those services and to determine whether the attorney will be one employed by her office, or one who contracts with her office. Either way, that legal advisor will be under the direction and control of the City Attorney, and not the Police Commission.

Our conclusion is based on the longstanding principles of statutory construction that apply to the interpretation of city charters. In sum, “[w]e look first to the language of the charter, giving effect to its plain meaning. Where the words of the charter are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the charter or from its legislative history.” *Kreeft v. City of Oakland* 68 Cal. App. 4th 46, 54 (1998), quoting *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171-72 (1994) (citation omitted). Moreover, the Charter must be read as a whole, and each of its provisions “must be construed together so as to give effect to each.” *Waters v. Civil Service Board of City of Oakland*, 133 Cal. App. 2d 733, 737 (1955). In this regard, a specific provision controls over a general one “and the general and special provisions operate together, neither working the repeal of the other.” *Diamond Int'l Corp. v. Boas*, 92 Cal. App. 3d 1015, 1031 (1979) (citations omitted); see *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles*, 173 Cal. App. 4th 13, 19, 22 (2009). Where the Charter explicitly grants authority to an officer or department, and does not expressly grant the same authority to another, the courts assume the voters intended to make that distinction. See, e.g., *Diamond Int'l Corp.*, 92 Cal. App. 3d 1015 (registrar is subject to the budgetary oversight of the chief administrative officer (“CAO”) under the city charter, notwithstanding language granting the registrar exclusive authority over elections, where nothing in the language or design of the charter evidences an intent to exempt the registrar from the CAO's broad authority).

1. Measure LL is silent as to the appointment of an attorney to perform legal work for the Police Commission and the Agency. In that situation, the assumption is that the electorate intended to maintain the existing structure of City government. “We assume the electorate, when enacting [the measure], was aware of preexisting related laws and intended to maintain a consistent body of rules that harmonizes and gives effect to both.” *Sacks*, 190 Cal. App. 4th at 1085 (citations omitted).

2. Under current law, the City Attorney has sole authority to advise the Commission and the Agency. Article IV, section 401(6) of the Charter provides that the elected City Attorney “shall serve as counsel to the Mayor, City Council, and each and every department of the City, except departments specifically enumerated by this Charter as an independent department of the City” and “shall advise all officers, boards, commissions, and other agencies of the City on legal matters referred to him or her.” *Id.* This includes the Police Commission and the Agency, which is designated in the Charter as a department of the City. Charter § 604(e)(8). The City Attorney’s broad authority includes issuing written opinions; drafting ordinances, resolutions, and other legal documents; representing the City and its boards, commissions, and departments in litigation; reviewing for form and legality all City contracts; hiring and supervising all employees of the City Attorney’s office; and employing special legal counsel and other experts. *Id.*

3. The City Attorney’s broad authority over the provision of legal services to the City and its governmental agencies is circumscribed only when a conflict of interest exists, or as explicitly specified in the Charter for independent City departments. Charter, § 401(6). Neither situation is present here. The creation of the Police Commission and the Agency poses no inherent conflict for the City Attorney. Moreover, neither the Police Commission nor the Agency is designated as independent in the Charter. *Compare* Charter § 706 (granting the Board of Port Commissioners “complete and exclusive power . . . for and on behalf of the City” over all Port-related matters), *with id.* § 604.

4. An ordinance implementing Measure LL cannot impede the broad authority of the City Attorney under the Charter. While Measure LL authorizes the Council to “enact legislation or regulations that will further the goals and purposes of this section 604” (Charter § 604(h)), the Measure does not amend or alter the provisions of the Charter that proscribe the City Attorney’s scope of authority, and it cannot give the City Council authority to do so under the guise of implementing the measure. *See Scott v. Common Council*, 44 Cal. App. 4th 684, 695 (1996) (“[T]he city council cannot relieve a charter officer of the city from the duties devolving upon him by the charter[. . .].”) (citation, quotation omitted); *Citizens for Responsible Behavior v. Super. Ct.*, 1 Cal. App. 4th 1013, 1034 (1991) (“While a city charter may be amended by a majority vote of the electorate (Cal. Const., Art. XI, § 3), an ordinance cannot alter or limit the provisions of a city charter.”) (citation omitted); *City and County of San Francisco v. Patterson*, 202 Cal. App. 3d 95, 104 (1988) (“The initiative ordinance as drafted sought to change this discretionary power of the board granted by the charter. Such attempt to *amend* the charter by the proposed initiative measure is patently invalid.”).

Barbara J. Parker
June 14, 2018
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We conclude, therefore, that:

1. The City Attorney must appoint an outside attorney to provide legal assistance to the Agency related to investigations and recommended discipline, subject to consultation with the chairperson of the Police Commission, and

2. The City Attorney has sole discretion to determine how best to provide all other legal services required or requested by the Police Commission and the Agency.

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