



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: RICHARD DOYLE
City Attorney

SUBJECT: Censure Policy

DATE: 10/28/2004

Background

At its October 19, 2004 City Council Meeting, the Council discussed the City's Censure Policy (Council Policy 0-28) and approved the recommendations by Mayor Gonzales in his memorandum dated October 15, 2004, and attached Resolution. The Resolution urged the District Attorney to complete his inquiry into the allegations relating to the conduct of Councilmember Gregory as soon as possible and to provide the Council with information about the status of the inquiry so that appropriate actions could be considered by the Council. In addition, the Resolution stated that the Council would act without hesitation to begin a censure process to express strong disapproval if it learned as a result of the District Attorney's efforts or from other facts that come to light that ethical, legal, or policy principles have been violated.

This report will address the following questions raised by the Mayor in his memorandum:

- Relationship between the District Attorney's criminal inquiry and a City Council censure proceeding
- Differences between "censure" as a punitive action and "condemnation" that is not punitive
- Other issues of conduct, in addition to matters of violation of law and policy, that would warrant censure
- Consideration of evidence and facts needed to sustain a decision to censure (Investigation and Hearing procedures and issues)
- Powers of the City Council to require witnesses to appear and testify in a censure proceeding (Hearing procedural issues)

Additional issues raised by the Council concerning previous actions by the City Council on the conduct of former Councilmembers and policies and procedures in other cities will also be addressed in this report.

Discussion

A. District Attorney Inquiry and City Council Consideration of Censure

The City Council Censure Policy provides that in order to ensure the right to a fair jury trial, the Council shall not impose "censure" for the violation of any law while criminal charges are pending. When the criminal proceedings are final, then a "censure" hearing may be held. (Policy No. 0-28). The District Attorney is currently investigating allegations relating to possible violations of law but there are no criminal charges pending against Councilmember Gregory.

A literal reading of the Policy would allow the Council or a Councilmember to initiate a request for a censure hearing to the Rules Committee in accordance with the Policy because there is only a criminal investigation pending, not formal charges. However, it is clear that the same due process protections and an individual's right not to incriminate themselves under the Constitution will apply to a Council investigation or a public censure hearing whether criminal charges are pending or only an inquiry or investigation is pending. A strong argument can be made that the intent of the Censure Policy is to not pursue any censure while any criminal proceedings, including criminal investigations, are pending. The Policy appears to contemplate that once the criminal process is completed, the issue of censure may be considered.

When a criminal inquiry is being conducted by the District Attorney before any charges are filed, the subject of the investigation or prospective witnesses may choose not to cooperate or provide testimony in any censure investigation or proceeding. The Fifth Amendment privilege against self incrimination can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory, in which the witness reasonably believes that the information sought, or discoverable as a result of his testimony, could be used in a subsequent state or federal criminal proceeding. U.S. v. Balsys, 118 S.Ct 2218; 141 L.ED 2nd 575 (June 25, 1998).

There can be no penalty for non-cooperation based on the Fifth Amendment privilege by a Councilmember who is the subject of formal censure under these circumstances. If the Fifth Amendment right is asserted, the formal censure investigation or hearing should be suspended pending resolution of the criminal investigation and/or charges.

It is important to note that where a criminal matter and civil matter arising from the same incident are both pending, the civil courts will typically stay the civil proceeding until the criminal matter is completed (See for example Gov. Code Section 945.3).

B. Practical Difference Between “Censure” and “Condemnation”

“**Censure**” is defined in the City Council Policy as a “formal resolution of the City Council officially reprimanding one of its members.” As a form of punishment or discipline for wrongdoing, “censure” requires a formal policy and procedure for an official reprimand. The City Council Censure Policy ensures due process and a right to a fair hearing which is required for an official reprimand or discipline.

“**Condemnation**” by the City Council is an expression of strong disapproval of certain conduct by a Councilmember. Because “condemnation” is not a form of punishment or discipline, the City Council can condemn inappropriate conduct or speech, without a formal investigation and hearing. Such an action must be taken in compliance with the Brown Act.

An “admonition” by the City Council constitutes a warning or an expression of caution and like “condemnation,” is not a form of formal punishment or discipline and thus, does not require a formal investigation and hearing.

C. Conduct Which Would Warrant “Censure”

The City Council Censure Policy provides that the City Council acting as a whole, can discipline and punish any of its members who violate state or federal laws, City ordinances or policies. Generally, “censure” or formal discipline is appropriate for violations of law or policy as determined by the Council to be serious offenses.

For example, violations of the City’s Municipal Code, Code of Ethics (Council Policy No. 0-4), the City’s Harassment Policy or unauthorized disclosure of confidential information can be offenses which the Council can deem to be serious enough to warrant “censure” of a Councilmember.

The Censure Policy provides that the Council cannot impose “censure” for the exercise of First Amendment rights in order to protect the principle of the freedom of speech. However, the City Council is not prohibited from “condemning” or expressing strong disapproval of inappropriate and distasteful speech such as racial epithets.

D. Censure Investigation and Hearing Procedures

The Censure Policy provides that a request for a “censure” hearing must be submitted to the Rules Committee in writing by a member of the Council. The request must contain the specific charges for the proposed censure and served on the Councilmember. The Rules Committee is charged with the responsibility to determine if further investigation is required, to set the matter for public hearing or to determine that no action is required subject to confirmation by the City Council.

The Council's Rules Resolution provides that Robert's Rules of Order, 9th Edition, shall apply to procedures which are not covered by the Resolution. The disciplinary procedures in Robert's provide general guidelines. The requirements of state law, specifically, the Brown Act, would supercede any conflicting guidelines.

1. Censure Investigation

The Council Censure Policy provides that the Rules Committee may determine that further investigation is required. Further investigation is done by an *ad hoc* committee appointed by the Mayor. If the Mayor is the subject of the investigation then the *ad hoc* committee is formed by the Vice-Mayor. If the *ad hoc* committee is comprised of less than six members of the Council, the committee is not subject to the Brown Act.

The *ad hoc* committee may be staffed by administrative and legal staff. Interviews may be conducted by the entire *ad hoc* committee or individual members may conduct interviews and report back to the entire committee.

The Rules Committee may recommend that the *ad hoc* committee *be* authorized to issue subpoenas for witness testimony and for documents. This authority would need to be confirmed by the entire City Council pursuant to its City Charter powers.

In conducting its investigation, the *ad hoc* committee would apply a "probable cause" standard to the facts and evidence. In other words, the committee should determine if taking all of the facts and evidence into consideration, there is reasonable grounds to believe or not believe that the conduct, violation or offense occurred.

The *ad hoc* committee should issue a report and recommendations to the City Council. The final committee report when issued would be available to the public.

If the City Council wishes to change the current investigation procedures in the Censure Policy such as, for example, to have the option of using an outside investigator to conduct an investigation, then the Censure Policy should be amended to incorporate this change.

2. Censure Hearing

The Censure Policy provides for a public hearing conducted by the City Council. The member of the Council subject to the request must be given the opportunity to make opening and closing statements and to question his or her accusers. The member may have a representative who may speak or question on his or her behalf.

A City Council decision to censure requires the adoption of a Resolution making findings with regard to the specific charges, based on substantial evidence, approved by

two-thirds vote of the City Council. Generally, substantial evidence is evidence that a reasonable person could accept as adequate to support a conclusion or decision.

The City Charter provides the City Council with authority to subpoena witnesses to testify or to subpoena records for the censure hearing.

The Mayor, or Vice-Mayor if the Mayor is the subject of censure, would preside at the censure hearing and be responsible for making procedural rulings. The rules of evidence should not apply to the censure hearing which is not a formal adversarial proceeding. The Policy provides for questioning of his or her accusers by the official who is the subject of the censure hearing. The City Attorney or designee provides legal advice to the Mayor and Council during the hearing.

If the City Council wishes to add or change the current procedure, then the Censure Policy should be amended to reflect the change.

E. Former City Councilmembers - Past City Council Actions

A review of records provided by the City Clerk discloses the following City Council actions with regard to the conduct of former City Councilmembers:

Kathy Cole

The May 25, 1993 Council Meeting minutes indicate that the City Council unanimously approved the recommendation to condemn former Councilmember Kathy Cole for her actions/speech during a public meeting. Ms. Cole was recalled from Office in a Special Election conducted on April 12, 1994.

Claude Fletcher

The March 27, 1984 Council meeting minutes indicate that the Council discussed questions raised by then Councilmember Claude Fletcher's actions with regard to Economic Social Opportunities, Inc. as they related to the City's Code of Ethics. A motion was made to defer action until after the District Attorney completed his investigation. No action was taken. On May 1, 1984, the Council Meeting minutes indicate that former Mayor and Councilmember Susan Hammer alleged by memorandum that former Councilmember Claude Fletcher violated the City's Code of Ethics and moved for censure. The motion was not approved. According to the City Clerk's Office, Mr. Fletcher was defeated in a subsequent election for a second term.

Alfredo Garza, Jr.

The August 19, 1980 Council Meeting minutes indicate that the Council acted to fill the vacant City Council seat vacated by the resignation of former Councilmember Alfredo Garza, Jr. The records do not reflect any action with regard to censure or condemnation by the City Council related to Mr. Garza's conduct.

David Runyon

The August 22, 1978 Council Meeting minutes indicate that the Council accepted the resignation of former Councilmember David Runyon. A San Jose Mercury News Editorial dated June 13, 2004 states that Mr. Runyon “committed two embarrassing public incidents in the late ‘70s, demonstrating poor judgment – and a serious alcohol problem.” The records do not reflect any action with regard to censure or condemnation by the City Council related to Mr. Runyon’s conduct.

F. Censure Policies/Procedures – Other Cities

1. Los Angeles

Censure procedures are contained in the Los Angeles City Council Rules. A request for censure may be submitted by any member of the Council. The request is considered by a five member *ad hoc* committee established by the President of the Council. At the first meeting of the committee, the member making the request for censure and the member subject to the request. The committee determines if (a) further investigation is warranted; or (b) the matter is to be set for censure hearing; or (c) no further action should be taken with regard to the request.

If further investigation is required then the *ad hoc* committee conducts an investigation, arrives at a recommendation, and reports it’s conclusions to the Council. If the *ad hoc* committee fails to report within 30 days, the matter is sent to the Council for its consideration.

Upon receipt of the *ad hoc* committees report, the Council then places the matter on the agenda to determine whether or not a censure hearing is warranted. If the Council decides to set the matter for a censure hearing, it is set no sooner than two weeks after its meeting.

At the censure hearing, the member of the Council subject to the request for censure is giving the opportunity to give opening and closing statements, to call witnesses and to question his or her accusers. The member may be represented by any person. The rules of evidence and judicial procedure are not applicable to the hearing which is generally considered an informal proceeding.

2. San Diego

San Diego’s Ethics Commission is authorized by Municipal Code to conduct investigations and take administrative enforcement actions against all elected officials of the city’s ethics laws such as campaign finance, conflicts and gifts. San Diego does not have a censure policy or procedures which addresses conduct of elected officials.

3. Oakland

The city of Oakland has a Code of Ethics for elected officials. Violation of the Code of Ethics is subject to censure. Oakland does not have a written censure policy or censure procedures.

4. San Francisco

Under the city charter, the San Francisco Ethics Commission has the authority to investigate and conduct a hearing on the suspension or removal of any elective officer of the city. The commission must transmit the record of its hearing to the Board of Supervisors with a recommendation as to whether charges should be sustained.

Official misconduct under the charter means any wrongful behavior by a public officer including any failure, refusal or neglect of duty 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. An elected officer is subject to discipline and/or removal from office for official misconduct. According to San Francisco Ethics Commission staff, San Francisco does not have a censure policy or censure procedures.

5. Seattle

Seattle's Campaign and Ethics Commission administers and investigates complaints alleging violations of the ethics laws, including the code of ethics, conflicts, revolving door violations. The Commission investigates complaints against employees and city officials including elected officials, and conducts hearings to determine whether an ethics laws has been violated. The commission has the authority to recommend discipline of employees by the appropriate appointing authority. The Seattle City Charter provides for the suspension or removal of Councilmembers from office. Seattle does not have a censure policy or censure procedures.

Conclusion

The City of San Jose Censure Policy provides guidelines for formal discipline of a Councilmember by the City Council to ensure protection of Constitutional rights. Other City Council actions which are less than a formal censure or reprimand such as condemnation or admonition do not require a formal hearing in accordance with the Policy.

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Public Outreach

Not applicable.

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