



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Peter Jensen, on behalf
of the Blue Ribbon Task
Force on Ethics

**SUBJECT: MODIFICATIONS TO COUNCIL
POLICY 0-28 REGARDING
CENSURE**

DATE: November 15, 2004

RECOMMENDATION

Council approval of the recommended changes to Council Policy 0-28 regarding censure, as approved by the Blue Ribbon Task Force on Ethics.

BACKGROUND

In its meetings of November 10 and November 15, the Blue Ribbon Task Force on Ethics discussed changes to the existing Council Policy regarding censure. A number of prior memos have served to shape the Task Force's discussion of this issue, including:

- Memo from City Attorney Rick Doyle to Council dated October 28, regarding item 3.5(a) of the Council's November 2 agenda
- Two memos from Councilmember Ken Yeager, chair of the Task Force, regarding item 3.5(b) of the Council's November 2 agenda
- Memo from Councilmember Dave Cortese to the Task Force, dated November 10

The Task Force considered all of these memos in its discussions of the revised policy. The revised policy, retitled "Council Conduct Policy", is included as Attachment A. The existing policy is included as Attachment B. This memo summarizes the key changes from the existing policy to the proposed revision.

ANALYSIS

Each of the key differences between the existing policy and the proposed revision is summarized below:

- Title and Scope of Policy – The title of the policy has been changed from "Censure Policy" to "Council Conduct Policy" to reflect the fact that the policy contemplates three levels of possible action in response to issues regarding the conduct of members of the Council (admonition, sanction, and censure), and describes the parameters for conducting an investigation prior to deciding to initiate any of these three forms of action.

- Purpose – The original policy focused on providing a mechanism for the Council to discipline and punish its members. The new policy allows a variety of options the Council may take in responding to conduct.
- Investigation – The old policy did not address conducting an investigation prior to a censure action, although the Charter gives Council the right to undertake an investigation at any time. The new policy explicitly mentions an investigation as the first thing that the Council may want to do when allegations of misconduct arise. The policy outlines considerations the Council may wish to take into account prior to initiating an investigation (whether an investigation may compromise other investigations or the right to a fair jury trial if the allegations may result in criminal charges, whether it may be incomplete if individuals choose to exercise their right against self-incrimination, and how to ensure that the rights of all the affected parties are protected). Finally, the new policy outlines specific steps the Council should take if it decides to initiate an investigation.
- Admonition – This is one of the potential actions added to the policy. It would be the least severe form of action, and would typically be directed to the full Council, advising them that certain types of actions could subject them to sanction or censure. The policy enumerates the steps required for an admonition to be made, including a request to the Rules Committee, Council consideration of the request, and a majority vote to approve the admonition.
- Sanction – This is the other potential action added to the policy. It represents a midlevel action between admonition and censure. It would be directed to a specific Councilmember for actions the Council deemed less serious than censure, and therefore is not defined as punitive. In the case of sanction, the policy requires a request for sanction to be reviewed by the Rules Committee, a written record of the allegation and the response from the Councilmember involved in the allegation, a public hearing of Council to consider the request, and a majority vote to approve the sanction.
- Censure – This action was the focus of the existing policy. It is the most severe action of three, and is defined as punitive. The proposed policy removes the prohibition against imposing censure while criminal charges are pending, instead making that a consideration for Council at the outset of the process before initiating an investigation. In the Procedure section, the revised policy makes some changes to how the information is organized, and specifies guidelines for ad hoc committee investigations.

PUBLIC OUTREACH

This issue has been discussed at two public meetings of the Blue Ribbon Task Force on Ethics, and was distributed to the City Clerk's Task Force distribution list, which includes many interested members of the public.

COORDINATION

This memo was coordinated with the City Attorney's Office and City Clerk's Office.

Peter Jensen
Assistant to the City Manager

HONORABLE MAYOR AND CITY COUNCIL

November 15, 2004

Subject: Modifications to Council Policy 0-28 Regarding Censure

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CITY OF SAN JOSE, CALIFORNIA

CITY COUNCIL POLICY

TITLE	PAGE	POLICY NUMBER
CITY COUNCIL CONDUCT POLICY	1 of 6	0-28
	EFFECTIVE DATE	REVISED DATE
	11/8/94	

APPROVED BY COUNCIL ACTION

PURPOSE

To establish a policy describing possible actions the City Council, acting as a whole, may take in response to conduct by any of its members that may violate federal or state laws, City ordinances, or City policies, including the Code of Ethics.

SCOPE OF APPLICATION

This policy applies only to the Mayor and City Council members, and amends and supersedes the original City Council Policy 0-28, the Censure Policy.

POLICY

It is the policy of the City Council that all of its members shall abide by federal and state law, City ordinances, and City policies, including the Code of Ethics. Violation of such law or policy tends to injure the good name of the City and to undermine the effectiveness of the City Council as a whole.

Depending on the circumstances of alleged violations of law or policy, the Council may initiate an investigation of the allegations prior to the filing of a request for any of the actions described in this policy.

Nothing in this policy shall preclude individual Council members from making public statements regarding such alleged conduct.

Considerations

In deciding whether or not to open an investigation, Council should consider:

- whether an investigation may compromise investigations regarding the same alleged actions, and, if the actions may result in criminal charges, whether the right of the accused Councilmember to a fair jury trial may be compromised by proceeding with an investigation;
- if persons involved in the allegations may choose to exercise their constitutional right against self-incrimination, which may limit the investigation's ability to present a full picture of alleged events;
- how to ensure that it ensures protection of the rights of those accused of violations of law or policy, those making such accusations, and those who have information regarding the accusations.

At any point during any of the processes described in this policy, the Council may refer the matter, as appropriate, to the Santa Clara County District Attorney or to the San Jose Elections Commission for investigation. Following such a referral, the Council may proceed with any actions it chooses to undertake under the provisions of this policy. While the Council has broad discretion in deciding actions it may choose to take in response to violations of law or policy, this policy provides definitions and procedures related to three types of action: admonition, sanction, and censure.

DEFINITIONS

- **Admonition**

This is the least severe form of action. An admonition may typically be directed to all members of the City Council, reminding them that a particular type of behavior is in violation of law or City policy, and that, if it occurs or is found to have occurred, could make a member subject to sanction or censure.

An admonition may be issued in response to a particular alleged action or actions, although it would not necessarily have to be triggered by such allegations. An admonition may be issued by the City Council prior to any findings of fact regarding allegations, and because it is a warning or reminder, would not necessarily require an investigation or separate hearings to determine whether the allegation is true.

- **Sanction**

This is the next most severe form of action. Sanction should be directed to a particular member of the City Council based on a particular action (or set of actions) that is determined to be in violation of law or City policy, but is considered by the Council to be not sufficiently serious to require censure. A sanction is distinguished from censure in that it is not a punishment.

A sanction may be issued based upon Council's review and consideration of a written allegation of a policy violation. The member accused of such violation will have an opportunity to provide a written response to the allegation. A sanction may be issued by the City Council and because it is not punishment or discipline, would not necessarily require an investigation or separate hearings.

- **Censure**

Censure is the most severe form of action contemplated in this policy. Censure is a formal statement of the City Council officially reprimanding one of its members. It is a punitive action, which serves as a penalty imposed for wrongdoing, but it carries no fine or suspension of the rights of the member as an elected official. Censure should be used for cases in which the Council determines that the violation of law or policy is a serious offense.

In order to protect the overriding principle of freedom of speech, the City Council shall not impose censure on any of its members for the exercise of his or her First Amendment rights, no matter how distasteful the expression was to the Council and the City. However, nothing herein shall be construed to prohibit the City Council from collectively condemning and expressing their strong disapprobation of such remarks.

PROCEDURES

Investigation

1. Any member of the City Council may submit, in writing, an allegation concerning a violation of law or policy to the Rules Committee.
2. The Rules Committee shall determine whether to forward a recommendation to conduct an investigation to the full Council for consideration as part of the Rules Committee report agenda item at the appropriate subsequent Council meeting. Part of the determination should include allowing the Councilmember who is the subject of the allegation the opportunity to address the allegation in writing or by appearing at the Rules Committee meeting at which the allegation is discussed.

3. If the Council determines, by majority vote, that:
 - a. An investigation is warranted, it may designate a standing or special committee or one of its members, including the Mayor, to conduct the investigation. The Council may select an independent investigator to assist in conducting the investigation. The independent investigator would be managed by the committee or individual designated by Council to conduct the investigation.
 - b. An investigation is not warranted, an individual Councilmember is not precluded from submitting a request for admonition, sanction, or censure in accordance with the provisions of this policy.
4. In the course of the investigation, the individual or committee designated to manage it must determine the process by which statements are taken. A witness may choose to provide a signed declaration under penalty of perjury attesting to his or her knowledge of the facts surrounding the allegations. If a witness is unwilling to submit such a declaration, the Council, or designated committee, may issue a subpoena to compel the witness' testimony, consistent with its subpoena power granted under the City Charter.
5. At the conclusion of the investigation, the results should be presented in writing to the full Council. Based on the results, any individual Council member may file a request for admonition, sanction, or censure.

Admonition

1. A request for an admonition must be submitted to the Rules Committee in writing by a member of the Council. The request should contain the specific language of the proposed admonition.
2. The Rules Committee shall determine whether to forward the proposed admonition to the full Council for consideration as part of the Rules Committee report agenda item at the appropriate subsequent Council meeting.
3. An admonition can be approved by a majority vote of the Council.

Sanction

1. A request for sanction must be submitted to the Rules Committee in writing by a member of the Council. The request should contain specific allegations of conduct in violation of federal or state law, City ordinances, and City policies, including the Code of Ethics.

2. A copy of the request for sanction shall be provided to the Council Member accused of the conduct prior to the Rules Committee meeting at which it will be considered.
3. The Rules Committee shall determine that either:
 - a. The proposed sanction should be forwarded to the City Council for consideration as part of the Rules Committee report agenda item at the appropriate subsequent Council meeting; or
 - b. No action is required.
4. This determination is subject to confirmation by the City Council as part of the Rules Committee report at the next Council meeting.
5. A sanction is based on the Council's review of the written record and of the information provided as part of the public hearing of the issue as part of the Council meeting. A sanction action must be approved by a majority vote of the Council.

Censure

1. 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 allegations of conduct in violation of federal or state law, City ordinances, and City policies, including the Code of Ethics, upon which the proposed censure is based.
2. A copy of the request for censure and the charges shall be served on the Council Member accused of the conduct at least twenty-four (24) hours prior to the Rules Committee meeting at which it will be considered.
3. The Rules Committee shall determine that either:
 - a. Further investigation of the charges is required; or
 - b. The matter is to be set for a separate public hearing; or
 - c. No action is required.
4. This determination is subject to confirmation by the City Council as part of the Rules Committee report at the next Council meeting.
5. Depending on the determination of the Rules Committee and the confirmation of the City Council;

- a. If further investigation is required, it shall be done by an ad hoc committee appointed by the Mayor. If the Mayor is the subject of the charges, the committee shall be appointed by the Vice Mayor.

The following guidelines apply to ad hoc committee investigations:

- i) The committee may be staffed by administrative and legal staff.
 - ii) If authorized by City Council, the committee may subpoena witnesses and documents.
 - iii) In making a determination, the committee should determine if taking all of the facts and evidence into consideration, there are reasonable grounds to believe or not believe that the conduct, violation, or offense occurred.
 - iv) The committee shall issue a final report and recommendations to the City Council. The final report shall be made available to the public.
- b. If a separate public hearing is set, it must be set far enough in advance to give the member of Council subject to the charges adequate time to prepare a defense, and that member shall be given the opportunity to make an opening and closing statement and to question his or her accusers. The member subject to the charges may be represented and may have the representative speak or question on his or her behalf. The Mayor, or Vice Mayor if the Mayor is the subject of the charges, would preside at the hearing. The rules of evidence shall not apply to the hearing, which is not a formal adversarial proceeding. The City Attorney or designee shall provide legal advice to the City Council during the hearing.
6. A decision to censure requires the adoption of a Resolution making findings with regard to the specific charges, based on substantial evidence, and approved by a two-thirds vote of the Council.

CITY OF SAN JOSE, CALIFORNIA

CITY COUNCIL POLICY

TITLE	PAGE	POLICY NUMBER
CENSURE POLICY	1 of 2	0-28
	EFFECTIVE DATE	REVISED DATE
	11/8/94	

APPROVED BY COUNCIL ACTION

November 8, 1994, Item 9c

BACKGROUND

The City of San Jose has a strong commitment to ethics. Charter Section 204 specifies that “The citizens of San Jose expect and must receive the highest standards of ethics from all of those in public service.” In order to be able to enforce conformance to its ethical policies as well as its ordinances, the City Council must have a procedure by which it can punish it’s own members for violation from its duly adopted ethical laws and policies.

PURPOSE

This Policy and Procedure is intended to provide the mechanism by which the City Council acting as whole, can discipline and punish any of its members who violate state or federal laws, City ordinances or policies.

POLICY

It is the Policy of the City Council that all of its members shall abide by federal and state law, City ordinances and City Council policies. Violation of such law or policy tends to injure the good name of the City and to undermine the effectiveness of the City Council as a whole. Such conduct is deemed to be a dereliction of duty.

Censure is a formal resolution of the City Council officially reprimanding one of its members. An official reprimand is a punitive action which serves as a penalty imposed for wrongdoing but carries no fine or suspension of the rights of the member as an elected official. It is distinguished from condemnation of the actions of a Council Member, which while expressing strong disapproval, is not a punishment. Censure is an appropriate punitive measure when the violation of law or policy is deemed by the City Council to be a serious offense.

In order to protect the overriding principle of freedom of speech, the City Council shall not impose “censure” on any of its members for the exercise of his or her First Amendment rights no matter how distasteful the expression was to the Council and the City. However, nothing herein shall be construed to prohibit the City Council from collectively condemning and expressing their strong disapprobation of such remarks.

In order to ensure the right to a fair jury trial, the City Council shall not impose “censure” on any of its members for the violation of any law while criminal charges are pending. However, when the criminal proceedings are final, the City Council need not be bound by the conclusions of the Court and may hold a “censure” hearing.

PROCEDURE

1. 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 on which the proposed censure is based.
2. A copy of the request for censure and the charges shall be served on the Council Member at least twenty-four (24) hours prior to the Rules Committee meeting at which it will be considered.
3. The Rules Committee shall determine that either:
 - A. Further investigation of the charges is required; or
 - B. The matter is to be set for public hearing; or
 - C. No action is required.
4. This determination is subject to confirmation by the City Council as part of the rules report at the next Council meeting.
5. Further investigation, if required, shall be done by an *ad hoc* Committee appointed by the Mayor. If the Mayor is the subject of the request the Committee shall be formed by the Vice Mayor.
6. If the matter is set for public hearing, it must be set far enough in advance to give the accused member adequate time to prepare a defense.

Attachment #B

Existing Policy

7. At the hearing, the Member of Council subject to the request shall be given the opportunity to make an opening and closing statement and to question his or her accusers. The member subject to the charges may be represented and may have the representative speak or question on his or her behalf.
8. A decision to censure requires the adoption of a Resolution making findings with regard to the specific charges, based on substantial evidence, and approved by a two-thirds vote of the Council.