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MEMORANDUM OF LAW

DATE: September 21, 2010

TO: Danell Scarborough, Executive Director, Citizens' Review Board on Police Practices

FROM: City Attorney

SUBJECT: Role of the Members of the Citizens' Review Board on Police Practices

INTRODUCTION

The Citizens' Review Board on Police Practices was established by a vote of the people in 1988. It is codified in the San Diego Charter at section 43(d). The Citizens' Review Board on Police Practices ensures public participation in the review of citizens' complaints filed against San Diego Police Department officers. The Citizens' Review Board on Police Practices also provides public input in the evaluation of the complaint process and departmental policies and procedures.

Recently there has been some debate among Citizens' Review Board on Police Practices' members, San Diego Police Department staff, and the Citizens' Review Board on Police Practices' staff regarding the scope of authority of the Citizens' Review Board. You have requested that the City Attorney provide a formal opinion regarding the role and duties of Citizens' Review Board on Police Practices' members.

QUESTION PRESENTED

1. What are the duties of members of the Citizens' Review Board on Police Practices (CRB or Board) with respect to the review of citizens' complaints against San Diego Police Department (SDPD) officers?

SHORT ANSWER

2. The member's role is limited to the authority granted by the San Diego Charter (Charter). That role is to "review and evaluate citizens' complaints against members of the San Diego Police Department and the San Diego Police Department's administration of

discipline arising from such complaints.” San Diego Charter § 43(d). The duties of the CRB may be expanded by consent of the Mayor and the Chief of Police, provided that any additional duties do not conflict with the provisions of Charter section 43(d) or other sections of the Charter.

BACKGROUND

The SDPD Internal Affairs Unit (IA) does the initial investigation of a complaint filed against an SDPD officer. At the conclusion of the investigation, IA reaches a finding of sustained, not sustained, unfounded or exonerated. Sustained means the officer committed all or part of the alleged acts of misconduct. Not sustained means the investigation produced insufficient information to prove or disprove the allegation, such as when there are no independent witnesses. Unfounded means the alleged acts did not occur. Exonerated means the alleged acts occurred but were appropriate under the circumstances.

CRB members review and evaluate the findings of IA after IA has completed an investigation prompted by a complaint made by an individual against a SDPD officer. After the team assigned to the case thoroughly reviews the IA investigation, the team recommends to the full Board one of the following findings: (1) agree with IA with no comment; (2) agree with IA with a comment; (3) disagree with IA with a comment; or (4) request additional information. California Penal Code section 832.5(d)(3) states that “[e]xonerated’ means that the investigation clearly established that the actions of the peace or custodial officer that formed the basis for the complaint are not violations of law or department policy.” Similarly, SDPD Department Procedure 1.10 defines exonerated to mean “the alleged act occurred but was justified, legal and proper or was within policy.” Because of the way exonerated is defined, some members feel it is incumbent upon them to determine the legality of the officer’s actions before they can determine whether or not the officer acted within the relevant policies and procedures and the action can, therefore, be exonerated. These members have decided, therefore, that they must do a legal analysis to determine the lawfulness of the officer’s action, before they can reach a decision to agree or disagree with an IA finding of exonerated. Although exonerated is the only finding that refers to the legality of an officer’s actions, the question of whether or not the officer’s actions were legal has also been debated with respect to other IA findings.

Consequently, you have specifically asked if the role of the CRB includes the task of making legal analyses to determine the legitimacy of a particular police action.

ANALYSIS

The CRB gets its grant of authority from Charter section 43(d). The language of the Charter says the CRB is to “review and evaluate citizens’ complaints against members of the San Diego Police Department and the San Diego Police Department’s administration of discipline arising from such complaints.” The Charter also provides that “[t]he board shall submit semiannual reports to the City Manager and City Council concerning its evaluation of the San Diego Police Department’s investigation of citizen’s complaints.” Since 1990, the CRB has

been granted authority by the Chief of Police to review investigations of all in-custody deaths and all police shootings, regardless of whether a complaint has been filed. However, this limited expansion of duties does not alter the fundamental duties of the CRB granted by the Charter.

To determine the extent of the CRB's duties, one must look to the language of the Charter. Charter provisions are construed in the same manner by courts as are constitutional provisions. *Woo v. Superior Court*, 83 Cal. App. 4th 967, 974-75 (2000). The principal determination is what voters intended in approving the charter provisions. Courts look first to the actual words of the provisions, giving "the usual, ordinary, and commonsense meaning to them . . ." *Howard Jarvis Taxpayers Ass'n v. County of Orange*, 110 Cal. App. 4th 1375, 1381 (2003). If the language is clear and unambiguous, the courts will presume the voters intended the meaning apparent on the face of the measure and end their inquiry. *Woo*, 83 Cal. App. 4th at 975. If there is some ambiguity in the language, courts may look to extrinsic aids, such as the information and arguments contained in the official ballot pamphlet, to "indicate the voters' understanding of the measure and their intent in passing it." *Id.* at 976. The Charter language limits the CRB's role to the review and evaluation of citizens' complaints and any subsequent discipline, and evaluation of the SDPD's investigation of those complaints. None of the language in Charter section 43(d) grants authority to the CRB to determine the legality of a police action. Under ordinary rules of statutory construction, courts have repeatedly said "it is not the court's place to insert words into the statute. 'An appellate court should be 'loathe to construe a statute which has the effect of "adding" or "subtracting" language.'" *Friends of Lagoon Valley v. City of Vacaville*, 154 Cal. App. 4th 807, 826 (2007) (quoting *People v. Pecci*, 72 Cal. App. 4th 1500, 1504 (1999) (footnote omitted)); see *Jurcoane v. Superior Court*, 93 Cal. App. 4th 886, 894 (2001). Following these well-established legal principles, it is highly unlikely a court would read into the Charter section a requirement that CRB members reach legal conclusions regarding police actions, particularly since the Charter does not impose a requirement on CRB members that they be members of the state bar or, indeed, a requirement that they have any legal training at all.

Even though the Charter language is clear, the November 8, 1988, ballot argument in favor of Proposition G provides some additional understanding of the legislative intent behind the proposition. The ballot argument said:

Proposition G creates a citizens' review board on police practices which will evaluate complaints against police officers as well as the administration of discipline arising from those complaints.

Proposition G:

Will assure that complaints are handled in a fair and impartial manner.

...

Proposition G will create a citizens' review board on police practices that will assure public participation in the review process.

Both the language of the Charter section and the ballot argument stress that the intent of Proposition G was to provide an avenue for public participation in the evaluation of complaints against officers, and the process by which the complaints are handled. There is no language that supports a legal role for CRB members.

While the language of Charter section 43(d) is clear, it provides only the broad parameters of the CRB's duties and lacks specificity about how the duties are to be carried out. However, Charter section 43(d) also provides that the City Manager, now Mayor, is charged with the duty to establish the rules and regulations necessary for the CRB to carry out its functions. This is accomplished by the adoption of the CRB Policies and Procedures Bylaws (Bylaws). Under article III, section 3, the Bylaws state that "[t]hese rules provide for the impartial, independent, prompt review and evaluation of complaints in a manner which protects both the public and the City." Again, there is no mention that a legal analysis of an officer's actions is contemplated as part of the review and evaluation process.

Moreover, Charter section 40 provides that "[t]he City Attorney shall be the chief legal advisor of, and attorney for the City and all departments and offices thereof . . ." And further, Charter section 40 provides that "[i]t shall be the City Attorney's duty, either personally or by such assistants as he or she may designate, to perform all services incident to the legal department . . ." Pursuant to this Charter section, the City Attorney has a legal duty to provide all legal services, including giving legal advice, to the City's departments, boards and commissions, either personally or by assistants that he or she designates. The authority to make legal decisions cannot be delegated to a board or department through bylaws drawn up by the Mayor or his designee. To do so would violate the express provisions of Charter section 40. The courts have frequently said "[I]t is well settled that a charter city may not act in conflict with its charter Any act that is violative of or not in compliance with the charter is void." *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171(1994) (citations omitted).

To carry out the duty to provide legal advice to the SDPD, the City Attorney's Office has several deputy city attorneys who act as police legal advisors. One of the police legal advisor's duties is to review the SDPD's policies and procedures for accuracy and legality. Policies and procedures are revised when necessary to bring them into compliance with any changes in the law that occur as a result of new legislation or court decisions. Officer training regarding police department policies and procedures is based on the City Attorney's analysis of the legal principles involved. It would be inappropriate and unfair to expect officers to act in accordance with legal interpretations made by CRB members that may conflict with advice given to the SDPD by this Office.

Questions regarding the legality of a specific police action, such as whether or not a detention or other action by an officer which leads to an arrest is legal, are also determined by this Office. Criminal Division deputies issue misdemeanor cases received from SDPD officers. If there are questions regarding the legality of any of the officer's actions, the deputy may refuse to issue the case. Otherwise, questions regarding the legality of an officer's action are left to a determination by a court.

The courts have specifically held that requiring an individual to take questions regarding the lawfulness of an officer's actions to the courts for resolution has not "altered or diminished the remedies available against the illegality of an arrest without probable cause; *it has merely required a person to submit peacefully to the inevitable and to pursue the available remedies through the orderly judicial process.*" *People v. Curtis*, 70 Cal. 2d 347, 353 (emphasis added). It would be wholly inappropriate for CRB members to usurp the authority that the legislature and courts have clearly determined is the sole responsibility of the courts.

Finally, while the Bylaws do not specifically address the way the CRB is to carry out its duties to "review and evaluate citizens' complaints," the Guidelines for Reviewing Cases in the current CRB Practices Manual (Guideline or Guidelines) are very clear on that issue. Guideline three says the two guiding principles for reviewing cases are: (1) to "[a]ssess the credibility of the complainants, officers and witnesses;" and (2) to "[a]ssess the relevance of the information obtained from the interviews and the information to be presented to the Board." Guideline eight says: "[t]ry to review a case and report on team findings with a logical and practical point of view in mind, *without concentrating on technical legal analysis which often is open to legal arguments, which often clouds the basic issues.*" (emphasis added). This language demonstrates that when the Guidelines were developed, those who drafted the Guidelines understood that protracted debate over legal issues, especially by a board that is composed primarily of individuals with no legal background, would unduly hamper the ability of the CRB to function effectively and efficiently.

CONCLUSION

Charter section 43(d) provides that the CRB is to "review and evaluate citizens' complaints against members of the San Diego Police Department and the San Diego Police Department's administration of discipline arising from such complaints." The language of the Charter is clear that the role of the CRB is limited to the review and evaluation of complaints. There is no language, either in the Charter or the Bylaws, that grants CRB members the authority to reach legal conclusions regarding the actions of police officers. That authority is granted solely to the City Attorney and his or her assistants through Charter section 40.

The Bylaws are approved by the Mayor and are the guidelines the CRB uses to assist members in performing their duties. In light of the confusion regarding the role of CRB members, this Office recommends that the Bylaws be amended to more clearly explain the roles of CRB members.

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By _____

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ML-2010-18