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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

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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.

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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.

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