

CITY OF OAKLAND
CITY ATTORNEY'S OFFICE

LEGAL OPINION

TO: City Council¹

FROM: Barbara J. Parker
City Attorney

DATE: July 11, 2013

File No:

RE: **CITY COUNCIL CENSURE LAW AND PROCEDURES**

I. Question

What options does the City Council have to address violations of the City Charter's non interference clause (City Charter section 218)?

II. Summary Conclusion

The Council has the following options to address violations of the City Charter's non interference clause: (1) censure; (2) refer the matter to the District Attorney, (3) refer the matter to the Grand Jury, and/or (4) remove the subject Councilmember from committee chairpersonship and/or a council committee or committees.

III. Analysis

A. Censure Generally – A City Council Power

Rule 1 of the City Council's Rules of Procedure Resolution No. 82580 provides that the business of the Council shall be conducted "so far as it is practicable, in accordance with parliamentary rules as contained in Roberts Rules of Order Revised . . ." except to the extent Roberts Rules of Order is inconsistent with the Council's Rules of Procedure or open meeting laws.

¹ Several Councilmembers have requested an opinion regarding due process and other legal requirements that must be met to censure a Councilmember. This opinion was included in materials Council President Kernighan provided to the Council in support of her motion to censure a councilmember in the summer of 2013. We are publishing the opinion on our website so that it will be readily available.

Censure is a disciplinary procedure naming a particular member of the legislative body as an offender. (Robert's Rules of Order, Newly Revised ("*Roberts*"), p. 627, Section 61 (2000).)

The Oakland City Council has the power to censure one of its members. The Council's Code of Conduct, which is part of the Council's Rules of Procedure states that the City Council may censure any member "who willfully violates the rules of conduct contained in this Code of Ethics." (City Council Resolution No.82580, Code of Conduct No. 12, see also, Sunshine Ordinance, Oakland Municipal Code section 2.20.170 (censure for release of confidential information).) Moreover, censure is an inherent power of a legislative body that follows Robert's Rules of Order. (*Roberts*, p. 627-28, Section 61.)

B. Censure Is Protected by the First Amendment

When there is no penalty included, censure is only the expression of an opinion by the majority of the legislative body. (*Phelan v. Laramie County Community College Board Of Trustees*, 235 F.3d 1243 (10th Cir., 2000).) "In censuring Ms. Phelan, Board members sought only to voice their opinion that she violated the ethics policy and to ask that she not engage in similar conduct in the future."² (Id. at 1248.) A board's censure opinion is protected by the First Amendment. (*Westfall v. City Of Crescent City*, ("*Westfall II*") 2011 WL 4024663 (unpublished) (N.D.Cal. 2011) (granting City's motion to dismiss).)³ ". . . Council members had a corresponding First Amendment right to 'vot[e] their conscience on the important issues' they identified in the censure resolution." (*Westfall II* at *4.) The *Westfall II* court considered the censure First Amendment activity even though the censure resolution also stripped the respondent of her committee memberships.

Censure Protected By Anti-SLAPP Statutes. As an expression of an opinion, the resolution of censure is protected by the anti-SLAPP statutes of the state. (*Californians Aware v. Orange Unified School District* ("*Californians Aware*"), 2008 WL 4078764 at *11 (unpublished) (Cal.App. 4 Dist.)) "[A] governmental entity enjoys a right to freedom of speech, which is consequently enforceable under the anti-SLAPP law." (See also *Rodriguez, v. Jurupa Unified School District* ("*Rodriguez*"), 2010 WL 3135386 (Cal.App. 4 Dist.)⁴; *Shivers, v. Yuba Community College District* ("*Shivers*"), 2002 WL 22783 (unpublished) (Cal.App. 3 Dist. 2002) (District Administrator's lawsuit stricken on District's anti-SLAPP motion. Lawsuit challenged District board censure of Administrator.) *Westfall v. City Of Crescent City* ("*Westfall I*"), 2011 WL 2110306 (unpublished) (N.D.Cal.) (partially granting City's motion to strike).)

Even when a respondent is stripped of his or her committee memberships, he or she may be barred from bringing actions for intentional infliction of emotional distress and

² Wyoming college board censures board member for violating ethics policy. Court finds board did not violate member's First Amendment rights. Member had placed ad in newspaper criticizing a board decision.

³ Most of the cases discussing censure are unpublished cases. Unpublished cases cannot be cited in California courts. California Rules of Court, Rule 8.1115.

⁴ School district censure board member for "Unacceptable Conduct" arising out of an investigation into inappropriate workplace conduct, including making sexually-charged comments, inappropriate physical contact, and threats against district employees.

defamation under the Anti-SLAPP statute. (*Westfall II* at *11.)

C. Due Process Is Limited

Numerous legislative bodies issue a censure by resolution. (See *Braun v. City of Taft*, 154 Cal.App. 3d 332, 339 (1984); *Californians Aware* at *5; *Westfall II* at *1; *Rodriguez* at *3.)

1. Minimal Due Process. “In determining applicable due process safeguards, it must be remembered that ‘due process is flexible and calls for such procedural protections as the particular situation demands.’” (*People v. Ramirez*, 25 Cal.3d 260, 268 (1979).) Only minimal due process standards here should apply: notice and an opportunity to refute the allegations. One court has said that it could find “no required policies or procedures on censure that a city must follow.” (*Westfall II* at *6.) The *Westfall II* court rejected the charge that the legislative body had no censure policy, and therefore could not impose a censure. (*Westfall II* at *5.) The court noted that there was no violation of due process as the respondent had “received notice of the Council’s decision to vote to censure her at an upcoming public meeting, had communicated with [the City Attorney] regarding the procedural mechanism for the sanction, and attended the public meeting where the remaining Council members unanimously voted to censure her.” (*Westfall II* at *6.) This was sufficient due process even when the censure resolution included stripping the respondent of committee membership. The court also noted that the transgressions were observed directly by other councilmembers no further investigation was necessary.

Especially when a censure motion is “not a formal legal finding” and does not “diminish” a Councilmember’s right as a Councilmember, due process is limited. At most, a respondent is entitled only to notice and an opportunity to refute the allegations. (*Rodriguez* at *12.)⁵ Even when the matters occur outside the view of the council, the court was not concerned that the allegations were submitted to the legislative body by just an oral report. (*Rodriguez*, at *8 (Investigators presented oral report on board member’s unacceptable conduct involving allegations of sexually-charged comments, inappropriate physical contact, and threats against district employees).)

Other entities, such as licensing boards, do allow for a specific procedure before censure. These procedures, however, are required by the body’s own rules. (See, e.g., Commission on Judicial Performance, Rule 123.) As noted by the *Westfall II* court, *supra*, no rule or statute mandates a specific process for a City Council censure.

2. No Cross-examination. Due process does not require that the subject have the “right of cross examination at a name-clearing hearing.” (*Binkley v. City of Long Beach*, 16 Cal.App. 4th 1795, 1809 (1993) (Chief of Police, who held the position at the pleasure of the City Manager, could be fired without “just cause,” so long as he was given an adequate opportunity to convince the agency to reverse its decision).) In the context of a censure of a City Councilmember, since not even firing is at stake, certainly there is no right to cross examination.

⁵ The president of the Board, explained that adoption of the “resolution is not a formal legal finding and its adoption would not diminish Mr. Rodriguez’s rights as a Trustee.” “Under these circumstances, Rodriguez was, at most, entitled to notice of the censure resolution and an opportunity to refute the allegations and clear his name.”

D. Procedural Steps

- Draft resolution or motion of censure and prepare any reports for the City Council agenda. The report could be a City Auditor's report and/or a Grand Jury report
- Agendize resolution or motion of censure at Rules and Legislation Committee.
- Submit resolution or motion of censure with supporting staff report for ten-day agenda
- Publish agenda.
- Serve the member who is the subject of the resolution or motion a copy of the resolution and report.
- On the day of the meeting, allow the subject member an opportunity to present a rebuttal. No cross-examination of witnesses is required. A majority vote is necessary for passage; however, if Council proceeds by resolution, five affirmative votes are required.⁶ Since the censure has no financial effect on the member, the member is entitled to vote. (*Acker v. City Of Ontario, 2006 WL 540888* (unpublished) (Cal.App. 4 Dist.) at *8.)

The enabling ordinance of the Oakland Public Ethics Commission (PEC) contains some language that implies the PEC has jurisdiction over some areas that are enforceable by censure. OMC section 2.24.020 states that the PEC has the "function and duty" to "Oversee compliance with the city Code of Ethics." While there is not city-wide code of ethics, there is a City Council code of ethics in the Council's Code of Conduct which is part of the Council's Rules of Procedure - Resolution No. 82580, which we discussed earlier. Arguably, the PEC has jurisdiction over violations of the Council Code of Conduct. The PEC takes this position. Note however, that if the PEC has the power, it cannot be exclusive or be a precondition to the Council procedures. The City Council has the authority under the City Charter to pass resolutions, including censure resolutions. A mere ordinance cannot take away such express power from the City Council.

IV. Conclusion

The City Council has the power to pass a motion or resolution censuring a councilmember. A formal hearing and cross examination are not required. At a minimum (1) the item must be noticed on the public agenda in accordance with the Sunshine Ordinance requirements, (2) the agenda packet must contain the proposed motion or resolution and a report documenting the acts, and (3) the subject councilmember must be given an opportunity to rebut the charges against him/her. The City Council may censure a member by a majority vote; however, a censure resolution requires five affirmative votes. A motion requires a majority of those members present and participating.

In addition to or instead of censuring a member, the City Council could (1) refer the matter to the District Attorney, if the allegations involve criminal conduct, (2) refer the matter

⁶ The Charter provides that Council can act by motion, resolution or ordinance except when a resolution or ordinance is required. Council could proceed by written motion that is noticed on the agenda, in which case the motion would pass with a majority of those present and participating. (City Charter, section 210.)

to the Alameda County Grand Jury, and (3) the City Council could remove a member from a City Council committee and/or revoke a committee chairpersonship.⁷

Very truly yours,

A handwritten signature in cursive script, appearing to read "Barbara J. Parker".

BARBARA J. PARKER
City Attorney

Attorney Assigned:
Mark Morodomi

⁷ The Council must pass a resolution to remove a Councilmember from a committee or revoke a Councilmember's chairpersonship as committee appointments are confirmed by a Council resolution. (Council Rule of Procedure No. 4.)