[Board Response - Civil Grand Jury - San Francisco's Whistleblower Protection Ordinance is in Need of Change]

Resolution responding to the Presiding Judge of the Superior Court on the findings and recommendations contained in the 2014-2015 Civil Grand Jury Report, entitled “San Francisco's Whistleblower Protection Ordinance is in Need of Change;” and urging the Mayor to cause the implementation of accepted findings and recommendations through his/her department heads and through the development of the annual budget.

WHEREAS, Under California Penal Code, Section 933 et seq., the Board of Supervisors must respond, within 90 days of receipt, to the Presiding Judge of the Superior Court on the findings and recommendations contained in Civil Grand Jury Reports; and

WHEREAS, In accordance with California Penal Code, Section 933.05(c), if a finding or recommendation of the Civil Grand Jury addresses budgetary or personnel matters of a county agency or a department headed by an elected officer, the agency or department head and the Board of Supervisors shall respond if requested by the Civil Grand Jury, but the response of the Board of Supervisors shall address only budgetary or personnel matters over which it has some decision making authority; and

WHEREAS, Under San Francisco Administrative Code, Section 2.10(a), the Board of Supervisors must conduct a public hearing by a committee to consider a final report of the findings and recommendations submitted, and notify the current foreperson and immediate past foreperson of the civil grand jury when such hearing is scheduled; and

WHEREAS, In accordance with San Francisco Administrative Code, Section 2.10(b), the Controller must report to the Board of Supervisors on the implementation of
recommendations that pertain to fiscal matters that were considered at a public hearing held
by a Board of Supervisors Committee; and

Whistleblower Protection Ordinance is in Need of Change” (Report) is on file with the Clerk of
the Board of Supervisors in File No. 150603, which is hereby declared to be a part of this
Resolution as if set forth fully herein; and

WHEREAS, The Civil Grand Jury has requested that the Board of Supervisors respond
to Finding Nos. 1, 2, 3.1, 3.2, and 4, as well as Recommendation Nos. 1.2, 2.1, 2.2, 3, and 4
contained in the subject Report; and

WHEREAS, Finding No. 1 states: “The [Whistleblower Protection Ordinance] (WPO)
does not fully “protect” City officers and employees from retaliation for filing a complaint as
required by the Charter mandate of Proposition C, because it covers only a limited range of
complaints, it provides no effective remedy for the victim, and its secrecy provisions limit its
deterrent effect;” and

WHEREAS, Finding No. 2 states: “The WPO also fails to fulfill the Charter mandate, in
that it does not cover all whistleblower disclosures specified in the Charter;” and

WHEREAS, Finding No. 3.1 states: “While other large California cities and counties
have relatively weak laws protecting their employees from retaliation for whistleblowing, this
does not relieve the Board of its responsibility under the Charter mandate, to enact an
ordinance that genuinely protects whistleblowers;” and

WHEREAS, Finding No. 3.2 states: “Whistleblower protection laws that cover
government employees at the state and Federal level can serve as a useful model for
improving the WPO;” and

WHEREAS, Finding No. 4 states: “The WPO creates an unwarranted obstacle to
administrative complaints of retaliation filed with the Ethics Commission, by imposing a
burden of proof on the complainant during preliminary review and investigation of such
complaints;" and

WHEREAS, Recommendation No. 1.2 states: "If the Ethics Commission fails to act
within a reasonable time, that the Board of Supervisors on its own amend the WPO to provide
real protection to whistleblowers, in conformity with the Charter mandate of Proposition C;" and

WHEREAS, Recommendation No. 2.1 states: "That amendments to the WPO expand
the definition of whistleblowing to cover oral complaints to the complainant's department;
disclosures to a City department or commission other than the complainant's own; and
providing information to any of the recipients listed in the Charter mandate (hereafter "listed
recipients"), outside of the formal complaint or investigation process;" and

WHEREAS, Recommendation No. 2.2 states: "That these amendments further expand
the scope of covered disclosures to include "providing information" to any of the listed
recipients regarding improper government activities, whether or not such information is set
forth in a formal complaint, or provided during an official investigation;" and

WHEREAS, Recommendation No. 3 states: "That amendments to the WPO provide a
meaningful remedy for the effects of retaliation, by authorizing the Ethics Commission to order
cancellation of a retaliatory job action, and increasing the limit of the civil penalty available
under the WPO to an amount adequate to repay the financial losses that can result from such
an action;" and

WHEREAS, Recommendation No. 4 states: "That amendments to the WPO include a
revision of Subsection 4.115(b)(iii) providing that the burden of proof set forth therein does not
apply during preliminary review and investigation of administrative complaints to the
Commission;" and
WHEREAS, in accordance with California Penal Code, Section 933.05(c), the Board of Supervisors must respond, within 90 days of receipt, to the Presiding Judge of the Superior Court on Findings No. 1, 2, 3.1, 3.2, and 4 as well as Recommendations No. 1.2, 2.1, 2.2, 3, and 4 contained in the subject Report; now, therefore, be it

RESOLVED, That the Board of Supervisors reports to the Presiding Judge of the Superior Court that they disagree partially with Finding No. 1 for reasons as follows: the confidentiality provisions for investigations are important as they protect both the complainant and the respondent during the period when accusations are proved or disproved, but the WPO does have limitations that could potentially be enhanced based on future recommendations from the Ethics Commission; and, be it

FURTHER RESOLVED, That the Board of Supervisors reports that they disagree partially with Finding No. 2 for reasons as follows: the WPO does fulfill the Charter mandate, but could be improved; and, be it

FURTHER RESOLVED, That the Board of Supervisors reports that they agree with Finding No. 3.1; and, be it

FURTHER RESOLVED, That the Board of Supervisors reports that they agree with Finding No. 3.2; and, be it

FURTHER RESOLVED, That the Board of Supervisors reports that they disagree with Finding No. 4 for reasons as follows: there is no empirical data to support this finding and it does not indicate the scope and nature of the problem nor the solution to deal with the problem; and, be it

FURTHER RESOLVED, That the Board of Supervisors reports that Recommendation No. 1.2 will not be implemented for reasons as follows: the Board of Supervisors will work with the Ethics Commission to improve the WPO; however, the Board of Supervisors cannot
predict the timing or outcome of the Ethics Commission’s actions nor the approvals by the legislative body; and, be it

FURTHER RESOLVED, That the Board of Supervisors reports that Recommendation No. 2.1 will not be implemented for reasons as follows: the Board of Supervisors will work with the Ethics Commission to improve the WPO; however, the Board of Supervisors cannot predict the timing or outcome of the Ethics Commission’s actions nor the approvals by the legislative body. The Board would also need a more specific definition of “oral complaints” in order to warrant implementation of this recommendation; and, be it

FURTHER RESOLVED, That the Board of Supervisors reports that Recommendation No. 2.2 will not be implemented for reasons as follows: The Board of Supervisors will work with the Ethics Commission to improve the WPO; however, the Board of Supervisors cannot predict the timing or outcome of the Ethics Commission’s actions nor the approvals by the legislative body. The Board would also need a more specific definition of what “providing information” entails in order to warrant implementation of this recommendation since there is no clear data that defines the problem; and, be it

FURTHER RESOLVED, That the Board of Supervisors reports that Recommendation No. 3 will not be implemented for reasons as follows: the Board of Supervisors concurs with the Mayor’s Office, which states that “under the WPO, the Ethics Commission is provided with punitive, not restorative, powers to respond to the finding of retaliatory job action. However, there are a number of other avenues a complainant can pursue in such circumstances. As the Civil Grand Jury notes, ‘City officers and employees have successfully litigated complaints of whistleblower retaliation in state court.’ Contrary to the Jury’s claim that this proves the ineffectiveness of the WPO, it in fact demonstrates that there is an established process for filing a civil action. In addition, if an employee believes that he or she has been disciplined without just cause or has suffered adverse job impact in retaliation for blowing the whistle, the
employee can file a grievance through his or her union. A grievance of this nature may be
resolved at the department or Department of Human Resources level, or be escalated to
arbitration, in accordance with the negotiated rules of the employee's Memorandum of
Understanding. If the Ethics Committee had investigated and found that the job action was in
fact retaliation for activities protected by the Whistleblower Protection Ordinance, this ruling
would likely influence the independent arbitrator, who does have the power to reverse a
retaliatory job action. While the investigation and ruling of the Ethics Commission would be a
critical step in the process, as the Ethics Commission notes in their response, labor relations
are the responsibility of the Department of Human Resources;” and, be it

FURTHER RESOLVED, That the Board of Supervisors reports that Recommendation
No. 4 will not be implemented for reasons as follows: there should be minimum evidence
requirement to justify a whistleblower complaint in order for the Ethics Commission to pursue
an investigation; and, be it

FURTHER RESOLVED, That the Board of Supervisors urges the Mayor to cause the
implementation of accepted findings and recommendations through his/her department heads
and through the development of the annual budget.
Resolution responding to the Presiding Judge of the Superior Court on the findings and recommendations contained in the 2014-2015 Civil Grand Jury Report, entitled "San Francisco's Whistleblower Protection Ordinance is in Need of Change;" and urging the Mayor to cause the implementation of accepted findings and recommendations through his/her department heads and through the development of the annual budget.

September 03, 2015 Government Audit and Oversight Committee - AMENDED, AN AMENDMENT OF THE WHOLE BEARING SAME TITLE

September 03, 2015 Government Audit and Oversight Committee - RECOMMENDED AS AMENDED AS A COMMITTEE REPORT

September 08, 2015 Board of Supervisors - ADOPTED

Ayes: 11 - Avalos, Breed, Campos, Christensen, Cohen, Farrell, Kim, Mar, Tang, Wiener and Yee

I hereby certify that the foregoing Resolution was ADOPTED on 9/8/2015 by the Board of Supervisors of the City and County of San Francisco.

Angela Calvillo
Clerk of the Board

Unsigned

Mayor

9/18/15

Date Approved
I hereby certify that the foregoing resolution, not being signed by the Mayor within the time limit as set forth in Section 3.103 of the Charter, or time waived pursuant to Board Rule 2.14.2, became effective without his approval in accordance with the provision of said Section 3.103 of the Charter or Board Rule 2.14.2.

[Signature]
Angela Calvillo
Clerk of the Board

Date
9/15/15

File No.
150603