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August 15, 2014

SUBJECT: The Role of the Health Commission and Director of Health Under the Charter, the Role of the Health Commission as the Governing Body of the Hospitals, and Personal Liability of Commissioners

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Questions Presented

You have asked for our advice in writing regarding (1) the relative roles of the Health Commission (the "Commission") and the Director of Health (the "Director" or "Department Head") under the San Francisco Charter, (2) the role of the Health Commission as the Governing Body of San Francisco General Hospital ("SFGH") and Laguna Honda Hospital ("LHH"), and (3) exposure of individual commissioners to personal liability.

Short Answers

The San Francisco Charter and Administrative Code prescribe the roles of the Commission and the Director. The Commission establishes plans, policies and goals for the San Francisco Health Department (the "Department") and gives direction on implementation to the Director. The Director administers and manages the Department. Individual commissioners must not interfere with the Director's administration. [See, the 2010-11 Good Government Guide, An Overview of the Laws Governing the Conduct of Public Officials published by the City Attorney.]

The Center for Medicare and Medicaid Services and the California Department of Public Health require that hospitals have an effective governing body with responsibility for the conduct of the hospital. To ensure ongoing compliance with these requirements, the Commission adopted Governing Body Bylaws ("Bylaws") setting forth its governance role for

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each hospital. Each year the Commission reviews and updates these Bylaws. The Commission also created a committee for each hospital, known as Joint Conference Committees. These committees focus on hospital activities, particularly in the area of quality improvement. The Bylaws recognize that the Commission has the ultimate responsibility for operating each hospital. In exercising this responsibility, the Commission is subject to the same constraints that limit its governance of the other divisions within the Department of Public Health.

Generally, individual commissioners are not personally liable for performing their duties in office. The California Government Code requires a public entity to defend and indemnify any officer or employee for any liability arising out of the scope of the employment. As City officers, members of the Commission are entitled to this protection.

Analysis

I. Charter Authority

A. The Role of the Commission

The general duties of all boards and commissions include adopting policies for the department, submitting nominations to the Mayor for appointment of the department head, overseeing and if necessary removing the department head, approving departmental budgets and exercising oversight and inquiry power over departmental operations. (Charter § 4.102.) These duties apply to the Commission.

In addition to these general duties, the Charter requires the Commission, acting through the Department, to manage and control the City's hospitals and emergency medical services, and in general to preserve, promote and protect the physical and mental health of the City's inhabitants, except where the Charter grants such authority to another officer or department. (Charter § 4.110.) The Commission and the Department also determine the nature and character of public nuisances and provide for their abatement. (Charter § 4.110.)

B. The Role of the Director

The Commission appoints the Director who, like other City department heads, is responsible for the day-to-day "administration and management" of the Department. (Charter § 4.126.)

The Charter also authorizes the Department Head to:

1. Appoint qualified individuals to fill all positions within the Department that are exempt from the Civil Service provisions of the Charter;
2. Adopt rules and regulations governing matters within the jurisdiction of the Department, subject, if applicable, to the powers vested in the Commission; and
3. With the approval of the City Administrator, reorganize the Department.

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C. Protocols for Commissions

Charter § 4.102 establishes four basic protocols for commissions and commissioners: (1) they must deal with administrative matters solely through the Director, (2) they must refrain from interference with administrative matters, (3) they may exercise the commission's power of inquiry, and (4) individual commissioners have no power except to act as a body. We discuss these protocols briefly below.

1. Dealing With Administrative Matters Solely Through the Director

"Each board or commission, relative to the affairs of its own department, shall deal with administrative matters solely through the department head or his or her designees." (Charter § 4.102.) This limitation means that the Commission implements its policy directions through the Director. The Commission must not bypass the Director and give directions to staff. But the Charter does empower the Commission to set Department policy, direct the Director to carry out that policy, and hold the Director accountable for implementing Commission policies.

2. Non-Interference with Administrative Matters

The Charter prohibits individual commissioners from interfering in the Department's administrative matters: "any dictation, suggestion or interference herein prohibited on the part of any member of a board or commission shall constitute official misconduct." (Charter § 4.102.) The reference to conduct "herein prohibited" is in Charter Section 2.114 which in turn derives from the 1932 Charter that imposed these prohibitions on both individual supervisors and commissioners: "nor shall they dictate, suggest or interfere with respect to any appointment, promotion, compensation, disciplinary action, contract or requisition for purchase or other administrative actions or recommendations . . . of department heads . . . under the respective boards and commissions."

3. Power of Inquiry

Section 4.102 preserves for each commission the power of inquiry: "nothing herein contained shall restrict the board or commission's powers of hearing and inquiry as provided in this Charter." "The Commission's power of inquiry includes the authority to call any Department officer or employee before the Commission to answer questions regarding the Department's operations. But if the Commission wants to make changes in Departmental operations as a result of those inquiries, it must still address its directives to the Department Head." (City Attorney Opinion 90-01, p. 4.)

4. Commission Acts As A Whole

The power and duties of the Commission repose in the Commission as a whole, and not in individual members. (Charter §4.102.) A quorum of the Commission must be present and must act at public meetings. (Charter §4.104; *see also*, Gov't. Code §54953 [requiring "legislative bodies", which include all City boards and commissions, to act in public meetings and Gov't. Code §54952.6 [defining "action taken" as a collective decision or commitment made by a majority of members of a commission].

Because the Commission must exercise its authority as a body, individual members of the Commissions have no power except to participate in and vote on matters that come before the

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Commission. The Commission may delegate to an individual commissioner such specific duties as monitoring and reporting to the Commission on the progress of a Departmental program. (See City Attorney Opinion 2003-01.)

Summary

The Charter establishes a chain of command that governs the operation of departments under commissions. The Commission sets policy and communicates that policy to the Director, who in turn is responsible for its execution. (See City Attorney Opinion 90-01, p. 2.) Individual commissioners may not interfere in Departmental operations. But the Charter does not forbid individual commissioners from seeking information from the Director about the Department's operations. Additionally, with the Director's consent, commissioners may also seek information from Department staff.

II. The Role of the Commission as the Governing Body for SFGH and LHH

A. Oversight Agencies

Federal and state laws require hospitals to have an effective governing body with legal responsibility for the conduct of the hospital. As we explain below, there are three primary regulatory oversight agencies for hospitals. Each agency conducts its affairs under a set of regulations that include requirements for governance. These regulations demand compliance with state and federal requirements for purposes of reimbursement, licensing, and accreditation

Reimbursement: The Center for Medicare and Medicaid Services ("CMS") determines whether hospitals are meeting the requirements for participating in the Medicare and Medicaid programs. 42 CFR 482 sets forth these requirements: "Conditions of Participation." A hospital's failure to maintain compliance with these Conditions could result in disqualification of entitlement to receive reimbursement from the Medicare and Medicaid programs.

Licensing: The California Department of Public Health ("CDPH") determines whether hospitals comply with state licensing requirements set forth in the California Code of Regulations, Title 22. Failure to maintain compliance with these regulations could result in revocation of the hospital's license and inability to continue to provide patient care services.

Accreditation: Unlike CMS and CDPH, the Joint Commission is a private accreditation organization and not a governmental agency. The Joint Commission determines whether health care organizations meet national requirements for accreditation. Accordingly, the Joint Commission created accreditation requirements called "Accreditation Participation Requirements", commonly referred to as "standards." A hospital's accreditation is conditioned on the Joint Commission's survey and positive findings at least once every three years. Participation in the Joint Commission's survey is not mandatory, but failure to maintain accreditation could result in adverse state and federal regulatory consequences.

Each of the oversight agencies has its own focus areas. But they coordinate activities and findings with each other. It is common for CMS to contract with CDPH to review facilities on its behalf.

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As one means of ensuring compliance with these regulatory requirements, the Commission adopted nearly identical Bylaws for both SFGH and LHH. The objective of these Bylaws is to ensure compliance with the regulatory requirements of all three oversight agencies. The Commission reviews them annually. They identify the roles and responsibilities of the Commission as the Governing Body, the Director of Health, the Hospital Chief Executive Officer, and the Medical Staff. The Bylaws also establish a Joint Conference Committee for each hospital and delegate certain governance responsibilities to these committees, primarily in the area of quality improvement. A member of the Commission chairs each of these committees and reports on the committee's activities at the meetings of the Commission.

B. Joint Conference Committees

The "Joint Conference Committee" or "JCC" is a common name in the hospital industry for committees established to maintain a forum in which members of the governing body, hospital administration, and the medical staff can discuss hospital matters. These committees discuss specific matters in greater detail than would normally occur at a meeting of the full governing body. The JCCs are subordinate to the governing body. The governing body delegates specific duties to these committees but retains ultimate responsibility and control over the institutions.

JCCs are "legislative bodies" under state law and "policy bodies" under the San Francisco Sunshine Ordinance. [Gov't Code § 54950 et. seq., (the Ralph M. Brown Act), and the S. F. Adm Code Chapter 67.] Accordingly, they must conduct their business at publicly noticed meetings.

Nevertheless, state law carves out areas that JCCs may discuss and act on in closed sessions. State law prohibits disclosing any information or records of the proceedings and records of any committee established by a local governmental agency to monitor, evaluate, and report on the necessity, quality, and level of services provided by a general acute care hospital [Cal. Evid. Code § 1157.7 (specifically stating that the provisions of the Brown Act shall not apply to meetings of such bodies on hospital quality).]

The JCC reviews and approves the appointment and reappointment of medical staff members, bi-annual reports from the clinical services, and reports from the Quality Improvement and Patient Safety Committee. The Chief of Staff refers these matters to the JCC, which provides a mechanism for monitoring, evaluating, and reporting on the necessity, quality and level of services. Further, the State has licensed SFGH and LHH as acute care hospitals (LHH is also licensed as a Skilled Nursing Facility). Accordingly, under Evidence Code Section 1157.7, the JCCs meet in closed session for the limited purpose of considering quality improvement matters. In those closed sessions, the JCC may admit only individuals with specialized knowledge whose input is necessary for the JCC's consideration of the matter discussed.

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C. Charter Limitations on Role of Commissioners

While state and federal law mandate the creation of these governing bodies for SFGH and LHH, neither state nor federal law dictates how local governments accomplish creating the hospital governing bodies and executing their functions. As a result, the Commission and the Director remain ultimately responsible and accountable for the governance and administration of SFGH and LHH. In discharging their oversight of these intuitions, the Commission and its members are subject to the Charter constraints and protocols regarding the roles of the Commission and individual commissioners discussed above.

III. Personal Liability of Commissioners

The California Government Code governs the liability of public entities and employees. (Cal. Govt. Code sec. 815 *et. seq.*) Section 825 requires a public entity to defend and indemnify a public employee from any liability arising out of the scope of employment as long as the employee cooperates in good faith in the defense. Section 810.2 defines employee to include officers of the public agency. A member of the Commission is a City officer. (S. F. Admin. Code § 1.50.)

The Government Code does not require indemnification for liability for punitive damages. The Civil Code sets the standard for punitive damages: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." (Cal. Civil Code sec. 3294(a).)

But the Government Code allows such indemnifications where the "governing body (in San Francisco, the Board of Supervisors) finds: that the conduct occurred in the course and scope of employment, the employee acted in good faith, without malice and in the best interest of the public entity and payment of the damages is in th

e best interests of the public entity. (Cal. Govt. Code sec 825(b).) City commissioners have rarely, if ever, faced a claim for punitive damages.

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Conclusion

Attached are published City Attorney Opinions No 90 -01 and 2003-01 and relevant sections from the Good Government Guide published by the City Attorney's Office. These materials address the roles of Commissions in greater detail. If we can provide any further assistance, please do not hesitate to contact us.

Very truly yours,

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