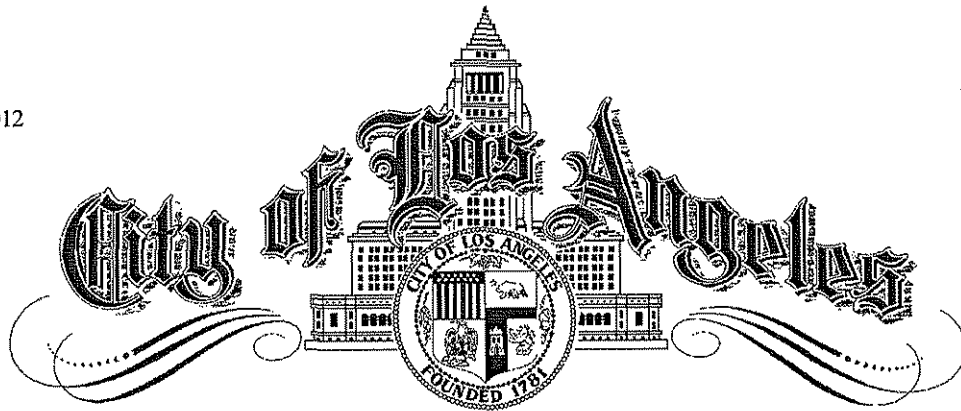


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REPORT NO. R 1 1 - 0 2 1 1

JUN 0 6 2011

REPORT RE

**IMPLEMENTATION OF CHARTER AMENDMENT I
(OFFICE OF PUBLIC ACCOUNTABILITY)**

The Honorable Energy and Environment Committee
of the Los Angeles City Council
Room 395, City Hall
200 N. Spring Street
Los Angeles, CA 90012

Council File No. 11-0452

Honorable Members:

The implementation of Charter Amendment I was the subject of a motion (March 18, 2011: Perry-Garcetti-Smith-Rosendahl) introduced in Council that would instruct the Chief Legislative Analyst (CLA) and the City Administrative Officer (CAO), and request the City Attorney to report to the Council on the listing of actions and ordinances required for implementing the measure. At its meeting on April 25, 2011, your Committee received a report on implementation from the Chief Legislative Analyst, the City Administrative Officer, and the City Attorney.

Interest was expressed by the Committee in the phased implementation of Charter Amendment I. As we understand the approach, in the initial phase, under authority established by an initial implementing ordinance codified in the Administrative Code and an initial budgetary ordinance, the citizens committee would be formed, an Executive Director appointed and confirmed, and limited initial staff and resources provided as operations commenced. Appointment of the Ratepayer Advocate and

adoption of procedures on reporting and consumer protection and complaints would be deferred until the second phase. In the second phase, the Executive Director, who would then be onboard, would be consulted about: (a) reporting requirements and schedules; (b) consumer protection and complaint procedures, (c) other duties to be performed; (d) the number, nature, qualifications, and compensation of additional positions to be established (including the Ratepayer Advocate); and (e) other resources required. These deliberations would yield a supplementary implementing ordinance on these subjects amending the Administrative Code and would be accompanied by a supplementary budgetary action to authorize the additional resources required. This secondary phase could itself be implemented in stages if it were so desired.

This Office was asked to report on related legal questions and the steps required for initial implementation. Accordingly, this report consists of two parts: a response to the legal questions and a listing of the instructions required of the Council for the initial implementation.

LEGAL ISSUES

A number of legal questions have arisen in connection with implementation:

Question no. 1

May implementation of Charter § 683 be effected in phases so as to allow for consultation about it with the newly appointed Executive Director?

Answer

Yes.

Discussion

Charter Amendment I provides that Charter § 683 is to become operative on July 1, 2011. Charter § 683(I). The measure did not prescribe that Office of Public Accountability (OPA) operations were to begin by that date. A phased in implementation is inherent and unavoidable to some extent anyway, since the citizens committee could not be formed before that date, the Executive Director could not be appointed for lack of the citizens committee, and the other OPA staff could not be appointed for lack of their appointing authority, the Executive Director. Charter § 683(c)(4). The phases described earlier in this report represent one possible approach to phased implementation.

Question no. 2

Can the citizens committee be made permanent so as to oversee the Office of Public Accountability (OPA)?

Answer

No.

Discussion

Charter Amendment "I" authorized creation of a "citizens committee" for the appointment of the OPA's Executive Director. The "composition and manner of selection" of the citizens committee was to be prescribed by ordinance. Charter § 683(b). No other role for the citizens committee is provided in the amendment, nor is another role even suggested. An oversight role for the committee would encroach upon the authority of the Executive Director. The Executive Director is to "report directly to, but not be instructed by, the board [Board of Water and Power Commissioners]." Charter § 683(c)(1). Had it been intended that the citizens committee perform some managerial or oversight role, that intention would have been reflected in language to that effect at this point in the Charter provision. There is none. Therefore, to place the citizens committee in a governance role would introduce a governmental design not contemplated by the amendment and contrary to the provisions of the Charter as adopted.

Question no. 3

Must the citizens committee be dissolved upon confirmation of the Executive Director?

Answer

No. The implementing ordinance may permit the committee to continue in existence for a limited period of time after appointment of the Executive Director to be available should another appointment be required during that time.

Discussion

As noted above, the citizens committee's exclusive function is to appoint the Executive Director. After the initial appointment, another appointment could be required not long thereafter. The possibilities are endless (e.g., the initial appointee may not be confirmed, after confirmation the Executive Director resigns within a month thereafter). The implementing ordinance could provide that the committee remain in existence for a limited period of time after appointment of the Executive Director (e.g., six months).

Thereafter, a vacancy in the position of Executive Director would be filled through appointment by a newly formed citizens committee.

Question no. 4

May the CAO propose the initial budget for the OPA?

Answer

Yes.

Discussion

One of the Executive Director's duties is to propose the OPA's annual budget to the CAO. Charter § 683(c)(6). Inasmuch as the activities of the OPA would begin before the Executive Director had been appointed and confirmed -- namely, when the citizens committee charged with appointing the Executive Director was first being formed -- some other means must be found for proposing the initial budget for the OPA. We believe that from the structure of governance set out in § 683, the logical choice is the CAO, who normally would receive a proposed budget from the Executive Director as a preliminary step to enactment of a budgetary ordinance.

Question no. 5

May the initial OPA budget include funds for the costs associated with selecting the Executive Director?

Answer

Yes.

Discussion

Costs incurred in selecting the Executive Director would represent a necessary expense of the OPA and would be properly viewed as within the budgetary authority conferred by Charter § 683(g). The Charter authorizes the OPA's Executive Director to expend its funds. Charter § 683(c)(7). Since the Executive Director would naturally have yet to be appointed at the time of these expenditures, some means for making such expenditures must be inherent in the authority provided.

Under one possible approach, the initial implementing ordinance could authorize the CAO to expend funds from the initial budget to cover costs associated with selection of the Executive Director that may be incurred in various offices or departments of City government. Some such costs could be incurred, for example, by the City Clerk's

Office, if that office were charged with administrative support for the citizens committee. Other such costs could be incurred by the Personnel Department if it were charged with providing support to the committee on recruitment and selection. That support might or might not include a contract with an executive search firm. The CAO would be charged by the implementing ordinance to authorize such expenditures from the initial budget. But other approaches could be taken to covering such costs consistent with effectuating Charter § 683.

Question no. 6

May the Executive Director and Ratepayer Advocate be the same person?

Answer

No.

Discussion

The text of Charter § 683 does not allow for that interpretation. That provision focuses on the Executive Director in subsections (b) and (c), only mentioning in subsection (f) that "a Ratepayer Advocate" shall be included among the OPA employees. The Executive Director's authority over OPA "employees" is set out in subsection (c). The CLA's impartial summary states that the measure would "require a Ratepayer Advocate in the OPA." Impartial Summary ¶ 1, *Voter Information Pamphlet 75* (March 8, 2011 Primary Nominating and Consolidated Election). In the next sentence it is stated that the OPA "would be overseen" by the Executive Director. *Id.* at ¶ 2. True, the argument in favor of the measure states that the "Ratepayer Advocate will be an independent watchdog...." That assertion, however, is compatible with the OPA overall being "independent." Charter § 683(a). Had it been intended that the Executive Director and Ratepayer Advocate could be the same person, Charter Amendment I would have been written much differently.

Question no. 7

Pending appointment of the Ratepayer Advocate, may those duties be performed by the Executive Director?

Answer

Yes.

Discussion

The Charter requires that there be a Ratepayer Advocate as one of the "employees of the OPA." Charter § 683(f). The Executive Director appoints the Ratepayer Advocate, § 683(c)(4), issues instructions to him or her, § 683(c)(5), and bears overall responsibility for the OPA. Charter § 683(c)(2),(3). The managerial role of the Executive Director would permit him or her to perform any duty assigned to the OPA, including advocacy. Charter Amendment I requires that there be both an Executive Director and a Ratepayer Advocate, but it does not make ratepayer advocacy the province of the Ratepayer Advocate to the exclusion of the Executive Director, who is to supervise him or her in the performance of that very function.

Question no. 8

Who is to serve as the Acting Executive Director in the event of a vacancy, incapacity, or unavailability?

Answer

The implementing ordinance should so provide.

Discussion

This contingency should be addressed in the implementing ordinance. One possibility: During the initial operational phase, an Acting Executive Director could be appointed by the Mayor or Council President, perhaps from the staff of the Chief Legislative Analyst's Office, the City Administrative Officer's Office, or the Controller's Office. The longer term solution could entail having the Ratepayer Advocate fill in for the Executive Director. These are but among the options. In any event, the initial implementing ordinance need only deal with the contingency occurring during the initial implementation phase. The issue can be addressed on a long-term basis in the subsequent ordinance.

Question no. 9

Who can suspend the Executive Director temporarily pending an investigation of allegations of misconduct or incapacity?

Answer

The implementing ordinance should so provide.

Discussion

Charter § 683(b) places the authority to remove the Executive Director in the City Council, since the provision calls for emulation of the authority by which the Council may remove the Chief of Police. On this basis, attention properly may turn to the removing authority, the City Council, for this purpose. Since a decision to suspend an employee temporarily pending investigation into allegations of misconduct or incapacity (often called "administrative leave") may require an expeditious decision and action, it would be impracticable to vest such authority in the Council as a whole or even one of its committees. One possible solution – the Council President would be assigned this responsibility, perhaps with confirmation by the Council after suspension as soon as reasonably practicable. Under another approach, that authority could be vested in the Mayor, who typically would make such decisions in matters involving the City's general managers and who is the City's Chief Executive. These are but two possible approaches.

INSTRUCTIONS NEEDED FOR IMPLEMENTING ORDINANCES

Instructions from the Council are required for the initial implementing ordinances on the following subjects:

Initial Administrative Code provision

The implementing ordinance for the OPA could logically be placed in the Administrative Code at Division 23 (Departments Having Control of Their Own Funds), Chapter 7 (Department of Water and Power), Article (2) (currently "Reserved") (Office of Public Accountability) as new § 23.123. The subjects for the initial provision should include:

1. The citizens committee.

The instructions should address the composition and the manner of appointment of members of the citizens committee. See Charter § 683(b). The CLA and CAO are submitting a joint report on options relating to these matters. In addition, the instructions should address the possibility that commissioners may need to be removed. One possibility in this regard is to vest the appointing authority with that power. The instructions should specify the staff support for the citizens committee and authority to expend budgeted funds for costs incurred in the selection effort.

2. The "reasons" and "procedure" for removal of the Executive Director.

a. Reasons.

We recommend that the Personnel Department be brought into deliberations on this subject. It should be noted that Charter § 683(b) provides that the Executive Director may be removed "*only* for the reasons provided by ordinance." (Emphasis added.) Hence, those "reasons" must be comprehensive.

b. Procedure

Charter § 683(b) requires that the procedure established by the ordinance be "similar" to that set forth in Charter § 575(e) for the removal of the Chief of Police by the City Council. That procedure entails initiation of removal proceedings by the Council by a two-thirds vote, a hearing before the Council, and removal by a two-thirds vote. Charter § 575(e) also permits adoption by ordinance of an appellate procedure if an appeal is "required by law." To deal with the possibility that due process could require an appellate remedy for the Executive Director beyond that offered in the Council, the implementing ordinance could do much the same thing, except that we would recommend that if adoption of the appellate procedure is to be deferred to the future, that adoption be by Council resolution rather than ordinance (to save time). Included, as well, should be provision for any pre-disciplinary procedure that may be required in addition to an appeal.

3. The procedure for designating someone to serve as Acting Executive Director in the event of vacancy, incapacity, or unavailability.

4. The official with authority to place the Executive Director on administrative leave.

5. Initial budget.

The CAO should be given authority to propose the initial OPA budget.

Initial budgetary ordinance

As noted above, the initial OPA budget should be proposed by the CAO. The initial budgetary ordinance should cover initial position authority and funding (Executive Director and other initial staff) and other initial financial resources required to commence operations. The Council should instruct the CAO, with the assistance of the City Attorney, to prepare such an ordinance.

If you have any questions regarding this matter, please contact Frederick N. Merkin, Outside Counsel Assisting the City Attorney at (213) 213-367-4620, or by email Frederick.Merkin@ladwp.com. He or another member of this Office will be present when you consider this matter to answer any questions you may have.

Very truly yours,

CARMEN A. TRUTANICH, City Attorney

By 

PEDRO B. ECHEVERRIA
Chief Assistant City Attorney

PBE:FNM:lee

cc: The Honorable Antonio R. Villaraigosa, Mayor
The Honorable Wendy Greuel, Controller
The Board of Water and Power Commissioners
Ronald O. Nichols, General Manager, Department of Water and Power
Maggie Whelan, General Manager, Personnel Department
Gerry F. Miller, Chief Legislative Analyst
Miguel A. Santana, City Administrative Officer