

2012 Council Study Issue

OCA-12-02 Consideration of Whistleblower Ordinance For Board and Commission Members

Lead Department Office of the City Attorney

History **1 year ago** None **2 years ago** None

1. What are the key elements of the issue? What precipitated it?

Current California state law provides protection against retaliation for "whistleblowers" who disclose violations of a state or federal statute or regulation to a government or law enforcement agency and is applicable to Sunnyvale employees and officers. Current Sunnyvale Administrative Policy VI, Section 6, prohibits any retaliation against employees who complain about or oppose discrimination based on race, color, religion, national origin, ancestry, disability, medical condition, marital status, sex, sexual orientation, or age.

As Board and Commission members are not subject to any employment action such as termination, demotion, or changes to work environment, they are not considered "employees" for purposes of these statutes.

This study issue would research whether a separate City "whistleblower" ordinance that would apply only to City Board and Commission members should be adopted.

This study issue paper was requested by Vice Mayor Whittum and seconded by Councilmember Meyering.

2. How does this relate to the General Plan or existing City Policy?

Charter Section 1002

Section 1002. Appointments. Qualifications.

Except as otherwise provided in this Article:

The members of each board or commission shall be appointed, and shall be subject to removal, by motion of the City Council adopted by at least four affirmative votes.

Council Policy Manual Policy 7.3.1 Legislative Management - Goals, Policies, and Action Statements

POLICY 7.3B.3 Prepare and update ordinances to reflect current community issues and concerns in compliance with state and federal laws.

Administrative Policy Chapter 3, Article 6, Section 6. Policy Against Harassment, Discrimination and Retaliation

Subd. 1. Purpose

It is the City's intent and the purpose of this Policy to provide all employees, applicants, and contractors with an environment that is free from any form of harassment, discrimination or retaliation as defined in this Policy. This Policy prohibits harassment or discrimination on the basis of any of the following protected classifications: an individual's race, religion, color, sex, gender identity, sexual orientation (including heterosexuality, homosexuality and bisexuality), ethnic or national origin, ancestry, citizenship status, uniformed service member status, marital status, family relationship, pregnancy, age, cancer or HIV/AIDS related medical condition, genetic characteristics,

and physical or mental disability (whether perceived or actual). It is also the policy of the City to provide a procedure for investigating alleged harassment, discrimination and retaliation in violation of this Policy. The protection from discrimination includes the protection from retaliation on any of the above identified protected classifications against an employee for his or her having taken action either as a complainant or griever, or for assisting a complainant or griever in taking action, or for acting as a witness or advocate on behalf of an employee in a legal or other proceeding to obtain a remedy for a breach of this policy.

Subd. 2. Policy

The City has zero tolerance for any conduct that violates this Policy. Conduct need not rise to the level of a violation of law in order to violate this Policy. Instead, a single act can violate this Policy and provide grounds for discipline or other appropriate sanctions. If you are in doubt as to whether or not any particular conduct may violate this Policy, do not engage in the conduct, and seek guidance from a supervisor or the Director of Human Resources.

3. Origin of issue

Council Member(s) Whittum and Meyering

4. Staff effort required to conduct study Moderate

Briefly explain the level of staff effort required

This study issue would require research into whether any other jurisdiction has a whistleblower ordinance for board and commission members, a review and analysis of the pros and cons of such an ordinance, and the legal and policy considerations for a whistleblower ordinance for board and commission members.

5. Multiple Year Project? No **Planned Completion Year** 2012

6. Expected participation involved in the study issue process?

Does Council need to approve a work plan? No

Does this issue require review by a Board/Commission? No

If so, which?

Is a Council Study Session anticipated? No

7. Briefly explain if a budget modification will be required to study this issue

Amount of budget modification required 0

Explanation

The study issue work would be absorbed within the existing OCA budget.

8. Briefly explain potential costs of implementing study results, note estimated capital and operating costs, as well as estimated revenue/savings, include dollar amounts

Are there costs of implementation? Yes

Explanation

If the City adopted a "whistleblower" ordinance for Board and Commission members, it would need to establish a procedure for investigation and enforcement. If an outside investigator is retained to investigate and make recommendations, there would be costs for the investigation. There would need to be a due process procedure for an appeal of any adverse finding involving a City employee and the City would have costs to retain a hearing examiner.

9. Staff Recommendation

Staff Recommendation Drop**If 'Support', 'Drop' or 'Defer', explain**

"Whistleblower" laws and policies are drafted to prohibit employment retaliation against employees for reporting violations of state or federal law or for participating as a witness. Existing laws and regulations protect City employees from retaliation resulting from a "whistleblower" complaint.

City Board and Commission members are not city employees and are not subject to any City actions that would affect their salary, job position, or other employment matters. To the extent that a Board or Commission member has a complaint against City staff, the City Manager already has the authority to investigate and take disciplinary action as a result of any inappropriate staff action or comments.

Board and Commission members are appointed by, and serve at the pleasure of, the City Council. A Board or Commission member can be removed by motion of the City Council with 4 affirmative votes. Adopting a "whistleblower" ordinance that applies to Board and Commission members would require amendment of this Charter provision and could limit the Council's ability to remove a Board or Commission member for cause.

This study issue is similar to OCA-08-03 and OCA-09-02, which were both dropped. The difference is that the prior study issues were for both City employees and Board and Commission members, and this study issue would be only for Board and Commission members. As the purpose of a "whistleblower" ordinance is to protect against adverse employment actions, the drop recommendation is substantially stronger when the study issue would apply only to non-employee Board and Commission members.

Reviewed by



Department Director

1/18/12

Date

Approved by



City Manager

1/18/12

Date