

October 16, 2012

LOS ANGELES FIRE DEPARTMENT




BRIAN L. CUMMINGS
FIRE CHIEF

October 4, 2012

BOARD OF FIRE COMMISSIONERS
FILE NO. 12-167

TO: Board of Fire Commissioners

FROM: Brian L. Cummings, Fire Chief 

SUBJECT: PROPOSED AMENDMENTS TO CITY CHARTER SECTION 1060
ENTITLED "DISCIPLINARY PROCEDURES FOR THE FIRE
DEPARTMENT"

FINAL ACTION:	<input type="checkbox"/> Approved	<input type="checkbox"/> Approved w/Corrections	<input type="checkbox"/> Withdrawn
	<input type="checkbox"/> Denied	<input type="checkbox"/> Received & Filed	<input type="checkbox"/> Other

Recommendations:

It is respectfully recommended that the Board of Fire Commissioners:

- (1) Review and approve the proposed amendments to City Charter Section 1060 entitled "Disciplinary Procedures for the Fire Department", listed for consideration in the following order of priority to the Department:
 - (a) Statute of Limitations.
Section 1060(a) as to the Statute of Limitations;
Section 1060(c) as to Satisfying the Statute of Limitations.
 - (b) Expanding Types of Punitive Actions (Temporary Salary Reduction, Demotion).
Section 1060(a) as to Types of Punitive Actions against Sworn Members;
Section 1060(n) as to Imposition of Penalty;
Section 1060(o) as to Effective Date of Penalty;
Section 1060(u) as to Restoration to Duty.

- (c) Authority of Fire Chief to Impose Discipline and Role of Board of Rights to Uphold Fire Chief's Decision.
Section 1060(b) as to Authority of Fire Chief to Impose Disciplinary Action;
Section 1060(m) as to Authority of the Board of Rights.
 - (d) Addition of Presiding Civilian Board of Rights Member.
Section 1060(g) as to Addition of Civilian Board of Rights Member;
Section 1060(f) as to Time and Place of Hearing.
 - (e) Separation of Guilt Phase and Penalty Phase.
Section 1060(m) as to Guilt Phase and Penalty Phase;
Section 1060(m) as to Use of Personnel Files to Determine Penalty.
 - (f) Subpoena Powers During Investigative Process.
Section 1060(i) as to Issuance of Subpoenas During the Investigative Process.
 - (g) Service.
Section 1060(d) as to Manner of Service of Notice, Order or Process.
 - (h) Pre-deprivation Due Process When Temporarily Relieving Member from Duty.
Section 1060(b) as to Temporary Relief from Duty.
 - (i) Provisions Mirroring Charter Section 1070 as to Police Officer Disciplinary Procedures.
Section 1060(b) as to Temporary Relief from Duty;
Section 1060(j) as to Ex Parte Communications;
Section 1060(k) as to Burden of Proof and Evidence;
Section 1060(r) as to Calendar Days;
Section 1060(s) as to Public Records.
 - (j) Employee Bearing Costs of Defense.
Section 1060(l) as to Cost of Accused's Representation;
Section 1060(l) as to Cost of Board of Rights Transcripts.
- (2) Request that the City Attorney's Office review the Board-approved amendments to City Charter Section 1060 entitled "Disciplinary Procedures for the Fire Department";
- (3) Request that the Council and Mayor authorize, by resolution, the Board-approved amendments to City Charter Section 1060 "Disciplinary Procedures for the Fire Department" to be placed on the March 2013 City of Los Angeles ballot.

Summary:

Fire Department Disciplinary Issues and Current Process

In the aftermath of high profile hazing incidents and the Los Angeles Fire Department's (LAFD) handling of disciplinary issues from those incidents, the City Controller and the Personnel Department conducted audits of the Department's management practices as to EEO and disciplinary investigations in 2006. Both reviews were highly critical of the LAFD's existing practices and recommended that the LAFD:

1. Reinstitute a separate EEO investigative function outside the LAFD chain of command to handle the investigating, tracking and reporting of EEO-related complaints;
2. Establish a centralized mandatory tracking and reporting system for disciplinary and corrective actions that includes all measures taken at each LAFD level;
3. Develop, with input from the firefighter and chief unions, a set of standard disciplinary penalty guidelines for sworn firefighters;
4. Once the disciplinary penalty guidelines were developed, assure that they are consistently applied and fairly administered;
5. Eliminate the practice of proposing greater disciplinary punishment simply to create a bargaining position for negotiating a lesser punishment with the accused member or the union by proposing penalties consistent with the disciplinary penalty guidelines;
6. Create a separate Internal Affairs Division within the LAFD with permanently assigned investigative staff who possess the necessary expertise, experience and training to conduct the wide range of investigations to ensure public accountability of the LAFD, as well as prepare and maintain professionally documented investigative files.
7. Require that the separate Internal Affairs Division report to both the Fire Chief and Fire Commission, but be otherwise removed from the chain of command.
8. Amend Charter Section 1060(g) of the Disciplinary Procedures for the LAFD to mirror the provisions of Charter Section 1070(f) for the Police Department to add a non-sworn, independent civilian member to the Board of Rights;
9. Revise its current investigation procedures to ensure that all pertinent witnesses are interviewed and that the interviews are thoroughly documented.

In response, the Mayor's Office convened the LAFD Professional Standards Division (PSD) Working Group to present a final plan that incorporated best practices, realistic timelines and resources necessary to implement the best model for the PSD. The product of these efforts resulted in the creation of the present structure and staffing of the PSD. Beginning in 2008, PSD implemented processes to strictly follow the Controller's and Personnel Department recommendations and the intent of the Stakeholders by:

1. Creating the Complaint Tracking System (CTS) to track all complaints received by the LAFD against its members;
2. Assessing incoming complaints to determine if they alleged misconduct against LAFD members and if so, assigning the complaint for investigation to either the chain of command or to PSD;
3. Providing an eight-hour training program to all 700 Officers and Chief Officers on basic administrative investigations skills;
4. Creating procedures for the handling of complaints of serious misconduct and EEO/Hazing by the PSD to ensure thorough, complete and well documented investigations;
5. Creating a review and adjudication process within the PSD to determine whether the investigation is complete and to adjudicate the complaint without involvement of the chain of command;
6. If one or more of the allegations were sustained, proposing discipline consistent with the Disciplinary Penalty Guidelines;
7. Utilizing an investigative team of a sworn Advocate and a civilian Investigator on all cases to marry LAFD knowledge with investigative expertise in all PSD cases;
8. Ensuring that all implemented practices not only satisfied the City Charter and existing MOUs, but complied with the newly enacted Firefighters Procedural Bill of Rights (FFBOR).

Almost immediately, PSD found that strictly adhering to these processes produced operational challenges. The number of complaints received in CTS in 2009 and 2010 exceeded the Audits' estimate of 100 complaints annual by ten fold. The caseload among three civilian Investigators, four sworn Captains and two contract, part-time Senior Personnel Analysts (for EEO cases) initially assigned to PSD, immediately became overwhelming. The need to thoroughly document interviews and investigative steps in the Advocate Report added to that burden.

Further, conflict between the statute of limitations provisions of the City Charter and the FFBOR required that the LAFD complete all investigations within one year, without the ability to extend that period as allowed under the FFBOR (see Government Code 3254d). Finally, the LAFD's strict adherence to the Disciplinary Penalty Guidelines in imposing punitive action, coupled with refusing to lower proposed penalties in informal "settlement" discussions, led to an increase in members requesting Boards of Rights to challenge their discipline. The lack of permanent PSD staffing to prepare for and present Boards of Rights added to the backlog of hearings.

On March 27, 2010, the Independent Assessor, Board of Fire Commissioners, issued his Assessment of the LAFD's Disciplinary Process and Professional Standards Division, concluding among his many findings that the increased number of complaints received by the LAFD "has severely impacted and will continue to severely impact its ability to effectively conduct investigations, prosecute disciplinary hearings, target issues of concern and appropriately manage the disciplinary system without additional and qualified resources being provided."

Despite City Council approval to hire eight Special Investigator IIs and one Management Analyst II in 2011 to implement the recommendation to permanently assign experienced civilian investigative staff, the demands on PSD in terms of Boards of Rights and complaint investigations have continued to grow. The number of complaints received by the LAFD has consistently gone down, in part, due to a reduction of internal complaints (from 803 in 2009 to 381 in 2011). However, in that same period, the number of EEO Unit investigations grew from 46 in 2009 to 63 in 2011. The number of sustained complaints resulting in punitive action also rose in that period. At the same time, the quality of field investigations conducted by the chain of command languished because of the inability of PSD to provide adequate support and training to the field. This led to PSD taking over a number of field investigations which appeared to have sustainable allegations, adding to its existing caseload. The number of pending Board of Rights Hearings currently stands at twenty-seven. Five are "LAFD directed" where the LAFD sends the member to a Board of Rights for egregious misconduct. The remaining 22 are "Member requested" where the member is challenging the proposed discipline (including suspensions as low as two days). The predominate reason given for "Member requested" Boards is not that they are not guilty of the alleged act, but that they believe the proposed penalty is unfair.

Since the beginning of 2012, two Special Investigator positions have become vacant. Further, the request to re-employ (under Charter Section 1164(b)) the two part-time Senior Personnel Analysts assigned to EEO cases were not rehired for 2012-2013. Finally, the number of Fire Captains detailed to PSD had been reduced from seven in 2010 to four in 2012.

Recommendations as to Traditional Discipline

Because of these factors, PSD has been unable to reduce its backlog of active investigations, leading to extraordinary delays in completing cases. It is not unusual for a member to be served with final papers on the eve of the running of the statute of limitations. Disagreement with the disciplinary penalty guidelines continues to result in members requesting Boards of Rights for low-level proposed discipline, adding to the backlog.

PSD has implemented a number of changes to its processes to address these issues. These include using single investigators (as opposed to the sworn/civilian team) whenever possible, utilizing a "short form" report to document investigations where no allegations are sustained and empowering civilian investigators with the ability to independently provide the admonition and interview sworn members alone (through the use of a Fire Chief letter presented to the member). However, the extent that PSD may modify its investigative practices is sometimes subject to "Meet and Confer" with the Unions, slowing its ability to make changes as needed.

Based on its four years of experiences since 2008, PSD has also recommended changes to the disciplinary penalty guidelines and the City Charter. Specifically, PSD has recommended that the Disciplinary Penalty Guidelines be modified to address problems with verbiage that could not have been foreseen by the Stakeholders in 2008 but which have created difficulties in proposing consistent and fair discipline to match the conduct. PSD has also recommended implementing base penalties, based on the Core Values, as the starting point for the Disciplinary Penalty Guidelines, instead of the arbitrary one-third for UFLAC and one-half for COA currently in use.

Finally, PSD is proposing these recommended amendments to the City Charter to address a number of issues, including the statute of limitations and the composition of the Board of Rights to include a civilian Hearing Officer. The LAFD was unsuccessful in its first attempt to amend the City Charter in 2010.

Alternative Discipline Resolution

Recognizing that the current approach to the disciplinary process was overloaded and may not be the most effective means to change members' behaviors, PSD proposed measures to strengthen the traditional means of discipline (punitive action and disciplinary hearings) while exploring alternative discipline philosophies involving education and training instead of punishment. A full presentation to the Board of Fire Commissioners on Alternative Discipline Resolution strategies will occur in late 2012.

The report specifically addresses limitations to the traditional discipline process imposed by City Charter Section 1060 in cases where punitive action is necessary to correct behavior.

Overview of City Charter Section 1060 - Disciplinary Procedures for the Fire Department

Because of the sworn status of its members and the unique nature of the fire service, the LAFD's disciplinary procedures are separate from those of civilian and sworn Police Department employees. City Charter Section 1060 entitled "Disciplinary Procedures for the Fire Department" sets forth the structure of the LAFD discipline process. In summary, Section 1060 allows the Fire Department to suspend or remove a member of the Fire Department from the service of the Fire Department only with "good and sufficient cause". (Section 1060(a)). After an investigation is completed and pre-deprivation Skelly due process is provided, the Department may impose punitive action by serving the accused member with a complaint stating the charges. In order to preserve the statute of limitations under Section 1060, the charges must be filed with the Board of Fire Commissioners within one year of the discovery of the misconduct and no later than two years from the date of the event. (Section 1060(a) and (c)). The Fire Chief has the power to temporarily relieve an accused member from duty or impose a suspension without pay not exceeding 30 calendar days. If the Fire Chief believes that punitive action exceeding a 30 calendar day suspension is warranted, he or she must direct the accused member to a "Board of Rights". (Section 1060(b)). An accused member receiving a suspension without pay of 30 calendar days or less can challenge his or her penalty by requesting a "Board of Rights". (Section 1060(e)). The accused member incurs no punitive action until the Board of Rights is convened and upon a finding of guilt, a penalty imposed.

The manner in which the three Board of Rights members (members of the rank of Battalion Chief or above) are selected, the time and place of the hearing once the Board of Rights is selected and the broad procedural structure of the Board process are contained in Section 1060(e) through (o). The Board of Rights has the authority to make a finding as to guilt or innocence and upon a finding of guilt, impose a penalty of suspension without pay not exceeding six months, reprimand or removal. (Section 1060(m)). Once the member selects a defense representative of his or her choice, the Fire Chief is required to detail the representative to the Board of Rights at the Department's expense. (Section 1060(l)). The Board of Rights proceedings are recorded and transcribed by a court reporter. The accused member is entitled, upon request, to a certified copy of the transcript at the Department's expense without charge or payment of fee. (Section 1060(l)). The decision and order of the Board of Rights is delivered to the Fire Chief who has the power to execute the order or reduce the penalty. The Fire Chief's Notice of Penalty must then be served on the accused and filed with the Board of Fire Commissioners within five days. (Section 1060(o)).

Under the Memorandums of Understanding with United Firefighters of Los Angeles City (UFLAC) and with the Chief Officers Association (COA), the union may submit the decision of a Board of Rights to arbitration to further challenge the Fire Department's disciplinary decision.

City Controller's Review of Los Angeles Fire Department Management Practices (January 2006)

In its January 2006 Review of Los Angeles Fire Department Management Practices, the City Controller identified among several issues that "the process to investigate and discipline persons who have violated Los Angeles Fire Department rules and policies... is poorly done". One of its recommendations was "to develop and consistently apply and fairly administer" a set of disciplinary penalty guidelines for sworn firefighters.

Personnel Department's Audit of Fire Department Selection and Employment Practices (January 30, 2006)

In its January 30, 2006 "Audit of Fire Department Selection and Employment Practices", the Personnel Department identified similar concerns about the Fire Department's disciplinary process. The Personnel Department concluded that the effect of improving who and how disciplinary investigations are conducted will be severely limited unless the disciplinary appeal process is also changed. The Personnel Department recommended that City Charter Section 1060(g) governing the composition and selection of the Board of Rights be amended to add a non-sworn independent civilian member, similar to that provided in the Disciplinary Procedures for the Police Department under City Charter Section 1070.

Board of Fire Commissioner, Independent Assessor's Assessment of the Department's Disciplinary Process and Professional Standards Division (March 27, 2010)

On March 27, 2010, the Independent Assessor for the Board of Fire Commissioners issued his "Assessment of the Department's Disciplinary Process and Professional Standards Division". The Independent Assessor made, among his many conclusions:

While Board of Rights members are capable of controlling the proceedings and deciding factual matters appropriately, they lack the training, expertise and experience to handle more complicated legal issues, objections and evidentiary issues.

The City Attorney's office does not have an attorney present to assist the Board of Rights with evidentiary and other legal issues. Delays result when a recess is taken and the Board of Rights has to locate a Deputy City Attorney to assist with advice.

The Department has engaged in inappropriate ex parte communications with Board of Rights members.

With increasing frequency, sworn members of the Department are represented by attorneys when preparing for or attending Board of Rights hearings.

The Independent Assessor's recommendations included that "the Department should take all necessary action to ensure the City Charter is amended as follows:"

Change the composition of the Board of Rights from three chief officers to one chief officer, one civilian, and one administrative law judge who shall preside at the hearing, ruling on the admission of evidence and providing advice to the Board on matters of law;

Add language similar to City Charter Section 1070 that would prohibit ex parte communications with the Board of Rights;

Add language similar to City Charter section 1070 that would provide the Fire Department with pre-hearing internal investigation subpoena power , and specifically the Board of Fire Commissioners have the power to compel compliance to a subpoena;

Add language similar to City Charter section 1070 requiring Board of Rights decisions be based solely on the evidence before the Board, including the Department's disciplinary penalty guidelines in effect at the time of the misconduct;

Section 1060(a) of the City Charter concerning the statute of limitations should "mirror" the statute of limitations language of the Firefighters Procedural Bill of Rights Act by eliminating the two year statute of limitations referred to in the City Charter, and add the tolling provisions of Government Code section 3254(d);

Section 1060(d) of the City Charter concerning service of disciplinary actions should reflect disciplinary action may be taken if the Department files the complaint with the Board of Fire Commissioners within one year of discovery;

Section 1060(n) of the City Charter should be amended to add limitations on the access to medical records and stress the confidentiality of personnel records used in the penalty phase of a Board of Rights hearing;

Add subsections to Section 1060 of the City Charter specifying the use of calendar days and specifying what are public records; and

Allow the Board of Rights to be adjourned without further hearing when the Board loses jurisdiction by resignation, retirement or death.

Professional Standards Division (2008-Present)

Since its inception in 2008, PSD has implemented the Audit and Stakeholder recommendations into its current disciplinary process. Its experiences follow the conclusions of the Personnel Department and the Independent Assessor as to the challenges raised by the current version of City Charter Section 1060.

Statute of Limitations

Note: The Board of Fire Commissioners approved a report regarding the proposed changes to the statute of limitations under Section 1060 on March 6, 2012. (See Board Report 12-040). On or about March 7, 2012, the report was referred to the City Council. (Refer to Council File Numbers 11-1699 and 12-0349).

City Charter Section 1060 requires the Fire Department to file charges against an accused member within one year of the discovery of the misconduct and no later than two years from the date of the event. The Charter does not allow for tolling or delaying the statute of limitations (such as related criminal or civil actions) nor for delayed discovery (such as the discovery of workers compensation fraud). As such, the Fire Department is often unable to impose punitive action for incidents where a supervisor knew about the misconduct over a year before or where the incident is over two years old. Although the Firefighters Procedural Bill of Rights (California Government Code Sections 3250 et seq.) only has the one-year limitation from date of discovery and allows for tolling or delayed discovery under specific conditions, the City Attorney has advised the Fire Department that it must follow the Charter's statute of limitations because its narrower limitations period provides added benefit to the members.

Board of Rights Issues

Since 2008, PSD has presented twenty (20) Boards of Rights. Nine of the Boards of Rights involved accused members directed to a Board of Rights by the Fire Chief. The remaining eleven were member requested Boards of Rights to challenge lesser suspensions imposed by the Fire Chief.

Department Directed		
Outcome	No.	Notes
Board Decision Guilty - Terminated	6	One case reversed at arbitration
Member Retired/Resigned prior to decision	2	
Settlement prior to Board decision	1	
Member Requested		
Outcome	No.	Notes
Board Decision Guilty – Penalty higher than proposed	3	
Board Decision Guilty – Penalty reduced from proposed	3	
Board Decision Guilty – Penalty same as proposed	1	Settled prior to arbitration
Board Decision Not Guilty	1	
Settled prior to Board decision with lower penalty	2	
Member rescinded request prior to Board decision	1	

The collective experiences of the PSD Advocates who have presented Boards of Rights are consistent with the conclusions of the Personnel Department and the Independent Assessor:

Chief Officers sitting on Board of Rights often lack the training, expertise and experience to handle more complicated legal issues, objections and evidentiary issues;

Chief Officers sitting on Board of Rights sometimes fail to consult with the City Attorney for advice prior to making decisions, either because they choose not to, because they believe the City Attorney is not immediately available or because they believe they are qualified to make those decisions;

Ex parte communications sometimes occur between the Board of Rights Chiefs and either the Department or representatives;

Chief Officers sitting on Board of Rights express a lack of confidence in their ability to make decisions on legal issues, objections and evidentiary issues during Boards of Rights;

Given the wide discretion that a Board of Rights has in deciding a penalty (no penalty, reprimand to 6 months suspension or removal) and the lack of a clear penalty phase where the Department can also present evidence regarding penalty, Chief Officers sitting on Board of Rights struggle when deciding the proper penalty after a guilty verdict, sometimes resulting in a lower penalty from what had been initially proposed.

The Board of Rights process is also expensive and time-consuming. The cost to the Fire Department for the three Chief Officers, Sergeant at Arms (Captain level), court reporter, transcription costs, expert witnesses and exhibit preparation costs the Fire Department between \$25,000 and \$50,000 per Board of Rights. This does not take into account the cost of the two PSD advocates and Department witnesses who may be called to testify or account for extensive preparation time the PSD Advocates require before the Board is convened.

Further, the City Charter requires the Fire Department to pay for the cost of the defense representative (who, after being selected by the accused member, is detailed to the Fire Chief's office and paid for utilizing hours) and to bear the costs of a certified copy of the Board of Rights transcripts for the accused member.

Analysis:

The following is a summary of the proposed amendments to City Charter Section 1060 entitled "Disciplinary Procedures for the Fire Department". The Department believes that these amendments to City Charter Section 1060 will correct many of the concerns raised by past audits and PSD in the current investigative and Board of Rights process. They would also bring specific portions of Section 1060 into alignment with verbiage in City Charter Section 1070 "Discipline Procedures of the Police Department" and the Firefighters' Procedural Bill of Rights. The proposed amendments to the City Charter Section 1060 are attached as Attachment Number One.

Section 1060 (a). Applicability; Rights

Types of Punitive Action against Sworn Members

Current: Currently limits the power of the Fire Department to impose punitive action against sworn members to either (1) a suspension without pay or (2) discharge.

Currently limits the Fire Department's authority to suspend a sworn member to a period not exceeding six months.

Proposed: Allow the Fire Department to impose punitive action against sworn members of (1) suspension with loss of pay; (2) a temporary reduction in salary in lieu of a suspension without pay; (3) demotion in rank; (4) a combination of suspension, temporary salary reduction or demotion; or (5) removal from service.

Defines "demotion in rank" as a reduction in civil service classification.

Defines "temporary salary reduction" as a reduction of a member's salary by a specific percentage for a period of time where the loss of pay is equivalent to that incurred by suspension.

Limits the Fire Department's authority to suspend a sworn member to a period not exceeding sixty (60) calendar days.

If the Fire Department imposed a "temporary salary reduction", limits the loss of pay to that equivalent had the member received a sixty (60) calendar day suspension without pay.

Rationale: Provides the Fire Department with additional means to impose punitive action. Demotion allowed for the Police Department. Temporary salary reduction would allow the member to remain working while serving punitive action.

Statute of Limitations

Note: The Board of Fire Commissioners approved a report regarding the proposed changes to the statute of limitations under Section 1060 on March 6, 2012. (See Board Report 12-040). On or about March 7, 2012, the report was referred to the City Council. (Refer to Council File Numbers 11-1699 and 12-0349). A true and correct copy of the Board Report 12-040 is attached as Attachment Number Two of this report.

Current: Currently requires the Fire Department to impose punitive action against sworn members within one year of the Department's discovery of the alleged misconduct and in no event, more than two years from the date of the alleged misconduct.

Currently requires the Fire Department to (1) serve the accused member with a verified copy of the complaint and (2) lodge a copy of the verified complaint and other specified documents with the Board of Fire Commissioners in order to satisfy the statute of limitations.

Proposed: Allows the Fire Department to impose punitive action against sworn members within one year of the Department's discovery of the alleged misconduct.

Allows tolling of the statute of limitations triggered by certain events (such as concurrent criminal prosecution or civil litigation, when the accused is unavailable, etc.) or "delayed discovery" provisions such as in cases of workers compensation fraud.

Allows the Fire Department to satisfy the statute of limitations by notifying the accused member of the Fire Department's intent to impose disciplinary action.

Rationale: Proposed amendments mirrors the statute of limitations contained in the Firefighters' Procedural Bill of Rights (Government Code Section 3254). Proposed amendment would satisfy the statute of limitations as required under the California law (See Mays v. City of Los Angeles (2008) 43 Cal.4th 313).

Section 1060 (b). Temporary Relief From Duty; Suspension

Temporary Relief From Duty

Current: Currently allows the Fire Chief to temporarily relieve a member from duty pending a Board of Rights.

Proposed: Requires that the member does not incur a loss of pay until 30 days after the member was served with charges.

Gives calendar priority to a Board of Rights where a member has been relieved from duty.

Rationale: Allows the Fire Department time to provide member with pre-deprivation due process prior to imposing a loss of pay. Mirrors City Charter Section 1070(b)(1) as it applies to police officer disciplinary actions in this area.

Authority of Fire Chief to Impose Disciplinary Action

Current: Currently allows the Fire Chief to suspend a member for a period not to exceed thirty (30) calendar days with loss of pay, subject to the member's right to a hearing before a Board of Rights.

Currently requires that the Fire Department direct a member to a hearing before a Board of Rights when the Fire Chief believes that the proposed disciplinary action should exceed a thirty (30) calendar day suspension without pay.

Fire Chief does not have the authority to terminate a member but must instead refer the member to a Board of Rights.

Proposed: Empowers the Fire Chief to (1) suspend a member for up to sixty (60) calendar days without pay; (2) reduce the member's salary for a specified period of time in lieu of suspension; (3) demote a member in rank; (4) a combination thereof; (5) remove a member from service.

Rationale: Authority to demote and discharge consistent with other General Managers under City Charter Section 509.

Empowers the Fire Chief to relieve a member from duty where the Fire Chief intends to demote or remove member.

Section 1060(c). Complaint.

Satisfying the Statute of Limitations

Current: Currently requires the Fire Department in matters of suspension or where a member is relieved from duty, to file, within five days of service, a copy of the verified complaint and a statement that the member has been served with copies of specific disciplinary documents, with the Board of Fire Commissioners.

Filing of the documents with the Board of Fire Commissioners satisfies the statute of limitations under Section 1060.

Proposed: Requires that where a member is relieved from duty, is suspended, demoted, incurs a temporary salary reduction, a combination thereof or discharged, the Fire Department must file, within five days of service, a copy of the verified complaint and a statement that the member has been served with copies of specific disciplinary documents, with the Board of Fire Commissioners.

This would not be used to determine when the statute of limitations under Section 1060 is satisfied.

Rationale: Incorporates the additional modes of punitive action where documents must be filed with the Board of Fire Commissioners.

By making the act of notifying the Member of the proposed disciplinary action as satisfying the statute of limitations, Charter is consistent with California law (See *Mays v. City of Los Angeles* (2008) 43 Cal.4th 313).

Section 1060(d). Service

Manner of Service of Notice, Order or Process

Current: Currently requires that any notice, order or process identified in Section 1060 must initially be served personally.

Currently requires that the Department must demonstrate due diligence as to attempted personal service, before allowing service via certified mail at the member's last known address of record on file with the Fire Department.

Proposed: Would allow the Fire Department, at its discretion, to serve a member with any notice, order or process identified in Section 1060 either personally or by certified mail to the member's last known address of record on file with the Fire Department.

Rationale: Provides the Fire Department with the same discretion allowed in civil litigation regarding service (See California Code of Civil Procedure Sections 1010, et seq.)

Section 1060(e). Application for Hearing; Failure to Respond to Hearing.

Current: Currently requires that a member must file a written application to the Fire Chief requesting a hearing before a Board of Rights within specific time periods, depending on the manner of service.

Proposed: Adds that if the member fails to request a hearing before a Board of Rights in the manner prescribed, that failure would be deemed a waiver of the member's right to a hearing and requires the Fire Chief to proceed with the imposition of the penalty.

Rationale: Current City Charter Section 1060(h) allows the Fire Chief to convene a Board of Rights after the member has failed to request a hearing. Amendment clarifies that the member's failure to request a hearing only results in the imposition of the proposed discipline.

Section 1060(f). Time and Place of Hearing.

Current: Requires that once a Board of Rights is selected, the Fire Chief shall set a time within five to ten days in which the Board of Rights must convene.

Proposed: Would extend the period of time that a Board of Rights must convene to no less than ten days and no more than thirty days after the Board members are selected.

Rationale: Extension of time period to convene a Board of Rights contemplates the amendment adding a civilian Board member (hearing officer) to the Board of Rights. Mirrors City Charter Section 1070(g) as it applies to police officer disciplinary actions in this area.

Section 1060(g). Composition of Board of Rights.

Addition of Presiding Civilian Board of Rights Member

Current: Requires that a Board of Rights is comprised of three officers of the rank of Battalion Chief and above.

To select the three officers, the member picks six names at random from a box containing the names of eligible chief officers.

Mandates the member to strike three names at his or her choice, leaving the remaining three to hear the Board of Rights.

Proposed: Board of Rights would be comprised of one civilian member and two officers of the rank of Battalion Chief and above.

Requires that the civilian member's qualifications and pay would be set by ordinance.

Mandates that the civilian member would be the chairperson of the Board of Rights.

Requires that the two chief officers be selected from six names picked by the accused from a box containing the names of eligible chief officers at random, with the member and the Department each striking two names.

Rationale: Verbiage referring to "Civilian Member" same as used in Charter Section 1070 as it applies to police officer disciplinary action and contemplates that the ordinance would specify that the civilian member be a hearing officer. Would add a legally trained person to deal with evidentiary and procedural issues. Give the Department the opportunity to strike prospective members similar to that used when selecting arbitrators and administrative law judges.

Section 1060(h). Failure to Appear

Ability of Fire Chief to Proceed with Board of Rights Where Member Has Not Applied for Hearing

Current: Allows the Fire Chief to convene a Board of Rights and require that a hearing begin within five days after the period to apply for the hearing has lapsed even when the member has not requested a Board of Rights.

Where a member fails to or refuses to appear for a Board of Rights, allows the Fire Chief to (1) direct that a Board of Rights proceed in the member's absence or (2) impose a fit and proper penalty.

Proposed: Eliminates the power of the Fire Chief to convene a Board of Rights when the Member has not requested one.

Rationale: Allowing the Fire Chief the power to convene a Board of Rights after a member has been served with disciplinary papers and decides to accept the punishment without a hearing contravenes the intent of the disciplinary penalty guidelines.

Section 1060(i). Oaths, Affirmation and Subpoenas.

Issuance of Subpoenas During the Investigative Process

Current: Currently grants members of a Board of Rights the power to administer oaths and affirmations and demand the issuance of a subpoena for the attendance of witnesses and/or the production of evidence, provided that the matter is already pending before a Board of Rights.

No power to issue subpoenas during the investigative process prior to a Board of Rights.

Proposed: Would allow the Fire Department to request that the City Clerk issue a subpoena during the investigative process.

Identifies the Board of Fire Commissioners as the appropriate entity to hear a request to quash the subpoena.

Continues to authorize members of a Board of Rights the power to administer oaths and affirmations and demand the issuance of a subpoena for the attendance of witnesses and/or the production of evidence, provided that the matter is already pending before a Board of Rights.

Rationale: Provides investigative subpoena powers in Fire Department disciplinary cases Mirrors Charter Section 1070(j) as it applies to police officer disciplinary actions in this area.

Section 1060(j). Legal Advice.

Current: Allows a majority of the Board of Rights to request a Deputy City Attorney to advise on legal matters during any session of a hearing.

Allows the advice to be provided by other means without physical presence of the Deputy City Attorney.

Requires that the Deputy City Attorney advising the Board of Rights not be the same attorney advising the Department's Advocates.

Proposed: Adds that the Deputy City Attorney can advise the Board of Rights during or between sessions.

Prohibits communications outside of the Board of Rights with Board members regarding the subject matter of the hearing.

Rationale: Prohibition against ex parte communications necessary given informal conversations with the Board that have previously occurred. Mirrors Charter Section 1070(k) as it applies to police officer disciplinary actions in this area.

Section 1060(k). Burden of Proof; Evidence.

Evidence of Actions Consistent with Pattern of Conduct

Current: Requires that the Department has the burden of proving each charge against the member by preponderance of evidence.

Proposed: Retains verbiage as to burden of proof.

Allows the introduction of evidence of acts which tend to prove that the conduct charged is consistent with a pattern of conduct, similar to that allowed under Penal Code Section 1101(b).

Rationale: Mirrors Charter Section 1070(m) as it applies to police officer disciplinary actions in this area.

New Section 1060(l). Representation; Transcript.

Cost of Accused's Defense

Current: Currently requires that the Fire Department pay for the cost of the accused member's representative by requiring the Fire Chief to assign the selected representative to the defense.

Proposed: Places the cost of the accused member's appeal, including the cost of the representative, on the accused.

Rationale: Requires the Member to pay for costs of his or her defense. Mirrors Charter Section 1070(m) as it applies to police officer disciplinary actions in this area.

Cost of Board of Rights Transcripts

Current: Currently requires that the Fire Department pay and provide a certified copy of the Board of Rights hearing transcripts to the accused.

Proposed: Would require that the accused bear the costs of obtaining a certified copy of the Board of Rights hearing transcript.

Rationale: Requires the Member to pay for costs of his or her defense. Mirrors Charter Section 1070(m) as it applies to police officer disciplinary actions in this area.

Section 1060(m). Findings and Decision; Use of Personnel History and Records.

Separation of Guilt Phase and Penalty Phase Upon a Finding of Guilt

Current: Currently requires that the Board of Rights make a finding of guilt. If no finding of guilt is made, the Board must order the Member's restoration to duty.

Currently empowers the Board of Rights, upon a finding of guilt, to prescribe a penalty of (1) suspension without pay not exceeding six months with a reprimand; (2) reprimand; or (3) removal from office.

Proposed: Retains the requirement that the Board of Rights must make a finding of guilt. If no finding of guilt is made, the Board must order the Member's restoration to duty.

Requires that upon a finding of guilt, the Board of Rights must convene a separate penalty phase.

Both the accused and the Department may bring evidence that may assist the Board of Rights in determining the proper penalty.

Rationale: The current Board of Rights process limits post-guilt proceedings to a review of the member's personnel record and allowing character witnesses. Allowing a clear penalty phase where both parties are allowed to present evidence as to the appropriate penalty provides the Board with the tools to determine harm to the public service, likelihood of recurrence and the value of the member's job history to the Department.

Use of Personnel Files to Determine Penalty

Current: Board of Rights currently may review Department personnel history and records for the purpose of determining a proper penalty.

Must conduct its review of the personnel history and records in the presence of the member and can use the information only after the member has been given a reasonable opportunity to explain the information.

Proposed: Retains current requirement that the review of the personnel history and records must be done in the presence of the member after they have had an opportunity to explain the information.

Allows use of Department records and history during the penalty phase to the extent allowed by applicable law.

Rationale: Protects the use of personnel history and records in accordance with existing laws. Mirrors Charter Section 1070(o) as it applies to police officer disciplinary actions in this area.

Authority of the Board of Rights

Current: Because the Fire Chief currently has the authority to direct a matter to a Board of Rights without imposing a penalty, the Board of Rights has the power to decide the appropriate penalty upon a finding of guilt.

Proposed: Role of the Board of Rights changes from deciding the appropriate penalty to upholding the Fire Chief's discipline. Board would have the authority to reinstate member with no discipline or reduce the discipline based on a written rationale.

Rationale: Because the Fire Chief would have more authority to impose discipline up to and including discharge, the role of the Board of Rights mirrors that of the Civil Service hearing officer to provide a post-Skelly evidentiary hearing. The ability of the Board to modify the Fire Chief's discipline mirrors language in City Charter Section 1016(d) as it applies to civilian discipline in the Civil Service process. (Police Department's disciplinary process inapplicable because their current Board of Rights process mirrors the current Fire Department model).

Former Section 1060(n). Personnel History and Records.

Incorporated into proposed Section 1060(n).

Section 1060(n). Imposition and Reduction of Penalty. (Formerly Section 1060(o)).

Current: Currently grants the Fire Chief to lower, but not raise the penalty prescribed by the Board of Rights.

Requires the Fire Chief to serve the member with notice of the penalty and to file a concurrent statement with the Board of Fire Commissioners within five days.

Proposed: Retains the same power for the Fire Chief to lower the penalty but adds "temporary salary reduction" and "demotion in rank" to those options.

Retains the requirement to notify the member of the notice of penalty and file statement with the Board of Fire Commissioners.

Rationale: Modification to provide the Fire Chief with additional modes of punitive action ("temporary salary reduction" and "demotion in rank") in the event the penalty should be lowered.

Section 1060(o). Effective Date of Penalty. (Formerly Section 1060(p)).

Current: Currently requires that a suspension or removal ordered by the Board of Rights relates back to the first date that a member was temporarily relieved from duty pending a Board of Rights.

Proposed: Retains current wording that a suspension or removal ordered by the Board of Rights relates back to the first date that a member was temporarily relieved from duty pending a Board of Rights.

Incorporates verbiage encompassing the 30 day provision in the proposed Section 1060(b)(1), allowing for temporary relief from duty after pre-deprivation due process is afforded.

Would allow the Fire Chief, at his or her discretion the power to convert a suspension without pay to a "temporary salary reduction" equaling the loss of pay from the suspension imposed by the Board of Rights.

Rationale: Brings this section into harmony with amendments in prior sections.

Section 1060(p). Double Jeopardy; Exoneration. (Formerly Section 1060(q)).

Current: Currently states that a member cannot be tried twice for the same offense.

Currently states that exoneration after a Board of Rights hearing is without prejudice to the member.

Proposed: Retains current provision regarding exoneration.

Clarifies that double jeopardy attaches only if the member is tried twice for the same offense by a Board of Rights.

Rationale: Codifies the definition because of continued claims by members that exposure to concurrent civil litigation, licensing or criminal prosecution stemming from the same underlying incident bars the Fire Department from proceeding with disciplinary action.

Section 1060(q). Rehearing. (Formerly Section 1060(r)).

No changes proposed.

New Section 1060(r). Calendar Days.

Current: None existing.

Proposed : Proposed Section 1060(s) defines the manner in which time periods are calculated for the purposes of Section 1060.

Rationale: Clarify for calculating time within Section 1060. Mirrors Charter Section 1070(r) as it applies to police officer disciplinary actions in this area.

New Section 1060(s). Public Records.

Current: None existing.

Proposed: Clarifies that the order filed with the Board of Fire Commissioners under Section 1060(c) and the notice of penalty filed with the Board of Fire Commissioners under Section 1060(o) are "public records".

Rationale: Clarifies what documents in the disciplinary process are public record. Mirrors Charter Section 1070(y) as it applies to police officer disciplinary actions in this area.

Section 1060(t). Other Legal Rights. (Formerly Section 1060(s)).

No changes proposed except for changing the Section number.

Section 1060(u). Restoration to duty. (Formerly Section 1060(t)).

Current: States that a member restored to duty or reinstated after challenging a suspension without pay or removal at a Board of Rights is entitled to full compensation as if the disciplinary action had not occurred. Limits the total compensation to one year of salary unless otherwise provided by law.

Proposed: States that a member restored to duty or reinstated after challenging a suspension without pay, demotion in rank, temporary salary reduction, a combination thereof, or removal at a Board of Rights is entitled to full compensation as if the disciplinary action had not occurred. The Section limits the total compensation to one year of salary unless otherwise provided by law.

Rationale: Add "demotion in rank, temporary salary reduction or a combination thereof" to scenarios where member is restored and owed compensation.

New Section 1060(v). Effects of New Charter.

No changes proposed except for changing the Section number.

Fiscal Impact:

As of September 26, 2012, the Fire Department had one Board of Rights in progress, twenty-three (23) pending (of which 18 were member-requested to challenge lesser discipline) and three cases involving potential discharges at the Pre-Deprivation Skelly hearing phase. If the misconduct is egregious requiring the Fire Chief to direct the member to a Board of Rights or if the accused member elects to exercise his or her right to a post-Skelly evidentiary hearing, the Department must convene a Board of Rights. It is hoped that the Alternative Discipline Resolution strategies to be presented to the Board later this year will alleviate the need for the majority of Member-Requested boards currently pending or that will be requested in the future.

As to the Boards of Rights that must occur, the addition of a Civilian Hearing Officer will likely be less than the cost of a Battalion Chief or Assistant Chief that the civilian is replacing. If the Charter amendments as to expanding the Fire Chief's authority to impose punitive action are approved and he is given tools beyond suspension (which takes the member out of the workplace) and removal, to include temporary salary reduction and demotion (which may keep the member at the workplace), cost savings may be realized.

If the Charter amendments as to shifting of the defense costs to the accused member are adopted, there may be additional savings. However, a true assessment of the fiscal impact of these proposed amendments depends on which are approved by the voters.

Conclusion:

The Fire Department requests that the Board of Fire Commissioners review and adopt the proposed amendments to City Charter Section 1060 "Disciplinary Procedures for the Fire Department", requests that the City Attorney's Office review the Board-approved amendments and requests that the Council and Mayor authorize, by resolution, the Board-approved amendments to City Charter Section 1060 "Disciplinary Procedures for the Fire Department" to be placed on the March 2013 City of Los Angeles ballot.

Attachments:

- Attachment 1: Proposed Amendments to Charter Section 1060
- Attachment 2: Board of Fire Commissioners transmittal letter dated March 7, 2012 and Board of Fire Commissioners Report BFC 12-040 dated February 24, 2012 entitled "Proposed City Charter Amendments – Charter Section 1060 – Sworn Fire Disciplinary Statute of Limitations"

Board report prepared by Assistant Chief Dean Ulrich, Professional Standards Division and Chief Special Investigator Paul Hayashida, Professional Standards Division.

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DISCIPLINARY PROCEDURES FOR THE FIRE DEPARTMENT**Sec. 1060. Rights and Due Process Procedures.**

- (a) **Applicability; Rights.** For purposes of this section, the term “member” refers to all officers and firefighters of the Fire Department. This section shall not apply to any member of the department who has not completed the period of probation in his or her entry position as provided in Section 1011(a). Members not covered by this section who are otherwise entitled by law to a hearing or appeal with regard to proposed or imposed discipline shall be provided a hearing or appeal under rules promulgated by the Fire Chief.

The right of a member of the Fire Department, except the Fire Chief and any other member in a position exempt from civil service, to hold his or her office or position and to receive compensation attached to the office or position is hereby declared to be a substantial property right of which the holder shall not be deprived arbitrarily or summarily, nor other than as provided in this section. ~~No member of the Fire Department shall be suspended, removed, or otherwise separated from the service of the Fire Department (other than by resignation), except for good and sufficient cause shown upon a finding of guilty of the specific charge or charges assigned as cause or causes after a full, fair and impartial hearing before a Board of Rights except as provided in subsection (b) and (h) of this section.~~

~~No member of the Fire Department shall be suspended, removed, or otherwise separated from the service of the Fire Department (other than by resignation), except for good and sufficient cause shown upon a finding of guilty of the specific charge or charges assigned as cause or causes after a full, fair and impartial hearing before a Board of Rights except as provided in subsection (b) and (h) of this section.~~

No member of the Fire Department shall be

- (1) suspended with loss of pay; or***
- (2) have their salary temporarily reduced; or***
- (3) demoted in rank; or***
- (4) any combination of suspension, salary reduction and/or demotion; or***

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- (5) *removed or otherwise separated from the service of the Fire Department (other than by resignation),*

except for good and sufficient cause shown upon a finding of guilty of the specific charge or charges assigned as cause or causes after a full, fair and impartial hearing before a Board of Rights except as provided in subsection (b) and (h) of this section.

For purposes of this section, demotion in rank shall mean reduction in civil service classification. The provisions of this section shall not apply to reductions in pay grade or similar personnel actions caused by reassignment, deselection from bonused positions, punitive transfers and the like. Such personnel actions shall be administered under policies adopted by the department.

For purposes of this section, a temporary salary reduction shall mean that in lieu of being suspended without pay for a specified number of days, the member's salary will be reduced by a specific percentage for a period of time where the loss of pay is equivalent to that incurred by suspension.

~~The charges must be filed within one year of the department's discovery of the act committed or omitted by a member and in no event later than two years from the date of the act or omission. No case of suspension with loss of pay shall be for a period exceeding six months.~~

For a suspension, demotion, temporary salary reduction (or combination thereof), removal or separation to be taken, the department shall complete its investigation and notify the member of its proposed disciplinary action within one year of the department's discovery of the act committed or omitted by a member, except in any of the following circumstances:

- (1) *If the member voluntarily waives the one-year time period in writing, the time period shall be tolled for the period of time specified in the written waiver.*
- (2) *If the act, omission, or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution, the time during which the criminal investigation or criminal prosecution is pending shall toll the one-year time period.*
- (3) *If the investigation is a multijurisdictional investigation that requires a reasonable extension for coordination of the involved agencies.*

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- (4) *If the investigation involves an employee who is incapacitated or otherwise unavailable.*
- (5) *If the investigation involves a matter in civil litigation where the member is named as a party defendant, the one-year time period shall be tolled while that civil action is pending.*
- (6) *If the investigation involves a matter in criminal litigation in which the complainant is a criminal defendant, the one-year time period shall be tolled during the period of that defendant's criminal investigation and prosecution.*
- (7) *If the investigation involves an allegation of workers' compensation fraud on the part of the member.*

No case of suspension with loss of pay shall be for a period exceeding ~~six months~~ *sixty calendar days. If a temporary salary reduction is ordered, the amount of the loss of pay from the temporary salary reduction shall not exceed the amount that would be lost had the member been suspended without pay for sixty calendar days.*

Notwithstanding the one-year time period specified above, an investigation may be reopened against a firefighter if both of the following circumstances exist:

- (1) *Significant new evidence has been discovered that is likely to affect the outcome of the investigation.*
 - (2) *One of the following conditions exists:*
 - (A) *The evidence could not reasonably have been discovered in the normal course of investigation without resorting to extraordinary measures by the agency.*
 - (B) *The evidence resulted from the firefighter's predisciplinary response or procedure.*
- (b) **Temporary Relief from Duty; Suspension.** After following predisciplinary procedures otherwise required by law, the Fire Chief may:

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- (1) ~~temporarily relieve from duty any member pending a hearing before and decision by a Board of Rights on any charge or charges pending against the member; or~~

temporarily relieve from duty any member pending a hearing before and decision by a Board of Rights on any charge or charges pending against the member, except that a member so relieved shall not suffer a loss of compensation until 30 days after the date on which the member was served with the charge or charges, except as provided for in subsection (q) or whenever the employee is temporarily relieved of duty on a new charge or charges while relieved of duty or serving a suspension based on a prior charge or charges. There shall be a calendar priority for Board of Rights hearings when a member is subject to relief from duty pending a hearing. The Fire Chief in his or her sole discretion shall have the power to cancel temporary relief from duty, or following relief from duty, to restore the member to duty with or without restrictions pending hearing; or

- (2) ~~suspend the member for a total period not to exceed 30 days with loss of pay and with or without reprimand, subject to the right of the member to a hearing before a Board of Rights. In the event the member files an application for a hearing before a Board of Rights as provided in this section, the suspension shall automatically become a temporary relief from duty pending hearing and decision by the Board of Rights. In the event that the member fails to apply for a hearing within the period prescribed, he or she shall be deemed to have waived the hearing and the suspension shall remain effective, unless the Fire Chief requires that a hearing be held.~~

suspend the member for a total period not to exceed sixty (60) calendar days with loss of pay, subject to the right of the member to a hearing before a Board of Rights as provided in this section; or,

- (3) *temporarily reduce the member's salary for a specified period of time, subject to the right of the member to a hearing before a Board of Rights as provided in this section. The loss of pay from the temporary salary reduction shall not exceed an amount equal to a loss of pay incurred by the member for a sixty (60) calendar day suspension; or*
- (4) *demote the member in rank, with or without suspension or temporary salary reduction, subject to the right of the member to a hearing before a Board of Rights as provided in this section; or*

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- (5) *demote the member in rank, with or without temporary relief from duty or cancellation of such relief from duty, subject to the right of the member to a hearing before a Board of Rights as provided in this section;*
- ~~(5)~~ (6) *remove the member from the service of the Fire Department, with or without temporary relief from duty or cancellation of such relief from duty, subject to the right of the member to a hearing before a Board of Rights as provided in this section;*
- (7) cancel such temporary relief from duty, or following such relief from duty, restore the member to duty with or without restrictions pending a hearing before a Board of Rights.

In the event the member who has been suspended, had their salary temporarily reduced and/or is demoted in rank under this subsection files an application for a hearing by a Board of Rights as provided in this section, the suspension, temporary salary reduction and/or demotion shall automatically be stayed pending hearing and decision by the Board of Rights.

- (c) **Complaint.** In the event any order of relief from duty or suspension *with loss of pay, temporary salary reduction, demotion, a combination of suspension, temporary salary reduction and/or demotion, or removal from service* is made, the order shall contain a statement of the charges assigned as causes. The Fire Chief shall, within five days after the order is served as provided in subsection (d), file with the Board of Fire Commissioners, a copy of a verified written complaint upon which the order is based, with a statement that a copy of the order and verified complaint was served upon the accused. The complaint shall be verified by the oath of the Fire Chief and shall contain a statement in clear and concise language of all the facts constituting the charge or charges. If the complaint and proof of service are not filed within the five day period prescribed, the order of temporary relief from duty or suspension shall be void and of no effect and shall be automatically revoked, and the accused member restored to duty with the department without loss of pay and without prejudice, as if no order of relief from duty or suspension had been made.
- (d) **Service.** The service of any notice, order or process mentioned in this section, other than service of subpoena, may be made either by handing the member a copy personally or by sending a copy by certified mail to his or her last known address of record with the Fire Department ~~if, after due diligence, the member cannot be found~~ *at the discretion of the department.*

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- (e) **Application for Hearing.** Within five days after personal service upon the accused of a copy of the verified complaint or within ten days after service by certified mail, the accused member may file with the Fire Chief a written application for a hearing before and decision by a Board of Rights.

In the event the accused fails to request a hearing before a Board of Rights within the period prescribed, the accused will have been deemed to have waived his/her right to a Board of Rights hearing. The Fire Chief shall then proceed with imposing the penalty without further delay.

- (f) **Time and Place of Hearing.** Upon the selection of a Board of Rights, the Fire Chief shall set the time (not less than ~~five~~ ***ten*** nor more than ~~ten~~ ***thirty*** days thereafter) and designate a place where the hearing is to be held, and shall cause notice thereof to be served upon the accused. After the Board of Rights has first convened, the board may continue the hearing of the matter to a specific date, and no other notice need be given, except as required by order of the board.

- (g) **Composition of Board of Rights.** ~~The Board of Rights shall be composed of three officers of the rank of battalion chief or higher. Upon the filing of the request for hearing before a Board of Rights, the accused shall draw six cards from a box containing the names of all officers who are qualified to be members of the board (except the names of the accused, the accuser, the Fire Chief, Deputy Chiefs, and other officers who may be prejudiced or disqualified by reason of being a material witness to the facts constituting the charges made), and shall select any three of the six names drawn to be members of the Board of Rights, rejecting the three names not selected by replacing them in the box.~~

The three-person Board of Rights shall be composed of two officers of the rank of battalion chief or higher and an individual who is not a member of the department (the civilian member). The qualifications of, selection procedures for, and compensation of the civilian member shall be established by ordinance.

The civilian member shall preside over the hearing, rule on the admission and exclusion of evidence, and advise the agency on matters of law. The Chief Officer members shall exercise all other powers relating to the conduct of the hearing but may delegate any or all of them to the civilian member.

Upon the filing of the request for hearing before a Board of Rights, the accused shall draw six names at random from the names of the chief officers qualified to sit as Board members. The names of the accused, the accuser, the Fire Chief, any staff or command officer specifically exempted by the Fire Chief in accordance with the provisions of the Board of Rights Manual or successor

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document, any other chief officer who may be prejudiced or disqualified by reason of being a material witness to the facts constituting the charges made, otherwise disqualified for cause as determined by the Fire Chief who has a conflict of interest, or any chief officer who has already been selected for a pending or convened Board of Rights, shall not be included the name selection process. From the six chief officers selected and beginning with the department Advocates, the department and the accused shall alternatively strike one chief officer until two names remain. Those chief officers shall sit on the Board of Rights.

- (h) ~~Failure to Request a Hearing; Failure to Appear. In the event the accused fails to request a hearing before a Board of Rights within the period prescribed, the Fire Chief may require a hearing to be held before a Board of Rights and may for that purpose, within five days after the expiration of such period, draw three names from a box to constitute the board.~~

If a Board of Rights has been constituted for the purpose of hearing and the accused, without reasonable excuse, fails, or refuses to appear before the Board of Rights at the time and place designated, the Fire Chief may, at his or her discretion, either direct the Board of Rights to proceed with the hearing in the absence of the accused, or the Fire Chief may, without a hearing, impose the penalty of suspension, ***temporary salary reduction, demotion, any combination thereof***, or removal ***from service*** as he or she deems fit and proper. The Fire Chief shall cause notice of the action to be served upon the accused and shall file a statement of the action with the Board of Fire Commissioners within five days.

If the accused and the Fire Chief both fail to draw and create a Board of Rights within the period prescribed in any case of temporary relief from duty pending hearing, the temporary relief from duty shall be null and void.

- (i) ***Oaths, Affirmations and Subpoenas. During an internal investigation, prior to a Board of Rights hearing, or prior to or during other administrative proceedings, the Fire Commission may compel the attendance of witnesses and the production of evidence by subpoena. Upon demand of the Fire Commission, the City Clerk shall issue a subpoena in the name of the city and attest the same with the corporate seal. The subpoena shall direct and required the attendance of the witnesses or the production of evidence, at the time and place specified. A request to quash a subpoena may be filed with the Fire Commission who shall decide the matter.***

Each member of the Board of Rights shall have the power to administer oaths and affirmations, in any investigation or proceeding pending before the board,

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examine witnesses under oath, and compel the attendance of witnesses and the production of evidence.

Upon demand of any member of the Board of Rights, the City Clerk shall issue a subpoena in the name of the City, and attest the same with the corporate seal. The subpoena shall direct and require the attendance of the witnesses or the production of evidence at the time and place specified. It shall be the duty of the Chief of Police to cause all such subpoenas to be served upon the person or persons required to attend or produce evidence. It shall be the duty of the Council to provide suitable penalties for disobedience of such subpoenas, and the refusal of witnesses to testify or produce evidence.

- (j) **Legal Advice; Ex Parte Communication.** Upon the request of any two Board members, the Board's chairperson shall request an attorney from the City Attorney's office who shall advise the Board on legal matters during *or between* any session of the hearing. The attorney need not be physically present at the hearing, but may advise the Board telephonically or through other means of communication. The attorney who advises the Board may not advise the department's advocate in the same matter.

Ex Parte communication with members of a Board of Rights regarding the subject matter of the hearing while proceedings are pending is prohibited. No person shall attempt to influence the decision of a Board of Rights except during the hearing and on the record.

- (k) **Burden of Proof, Evidence.** In Board of Rights proceedings, the ~~department~~ **Fire Department** shall have the burden of proving each charge, including those based on conduct punishable in whole or in part as a crime, by a preponderance of the evidence. *Members of a Board of Rights are to make decisions based solely on the evidence before them.*

Evidence of acts, irrespective of whether they were associated with a personnel complaint against the accused and irrespective of the resolution of the complaint, may be considered in the discretion of a Board of Rights if relevant to the charges, such as, if the acts tend to prove that the conduct charged is consistent with a pattern of conduct. The acts may have occurred either before or after the conduct concerning which the member is presently charged. Members of a Board of Rights are to make decisions based solely on the evidence before them.

- (l) **Representation; Transcript.** At the hearing, the accused shall have the right to appear in person and by counsel or representative, or both, *(at his or her expense)*

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~~and make defense to the charges and may produce witnesses and cross-examine witnesses. The accused shall have the right and privilege to select and name any other member of the department of any rank not higher than the rank of captain (who is not otherwise disqualified by reason of prejudice or being a party to the action in any capacity) to act as his or her defense representative at the hearing. The Fire Chief must immediately assign the member selected to act as defense representative, and it is hereby made the duty of such member to use every legal means available and exercise the best efforts of which he or she is capable to defend the accused at the hearing.~~

~~All testimony at the hearing shall be given under oath, reported by a stenographer and transcribed and the member shall be entitled, upon request, to a certified copy of the transcript without charge or payment of fee.~~

All testimony at the hearing shall be given under oath and shall be reported by a stenographer for possible transcription. Upon prepayment of the fee for the preparation thereof, the accused shall be entitled to a certified copy of the transcript; provided, however, when the department has previously had all or a portion of the report transcribed, a copy of the previously prepared report(s) shall be given to the member without charge. When the report is transcribed, the original transcript shall be placed on file in the department.

- (m) **Findings and Decision.** The Board of Rights shall, at the conclusion of the guilt phase of the hearing, make its findings of guilty or not guilty on each charge which must be based only upon the evidence presented at the hearing. If the accused is found not guilty, the Board shall order his or her restoration to duty without loss of pay and without prejudice, and the order shall be self-executing and immediately effective. ~~If the accused is found guilty, the Board of Rights shall, by order, prescribe its penalty of:~~

- ~~(1) suspension for a definite period not exceeding six months with total loss of pay, and with or without reprimand; or~~
- ~~(2) reprimand without further penalty; or~~
- ~~(3) removal from office or position.~~

~~The decision and order must be certified in writing and a copy immediately delivered to the Fire Chief.~~

If the accused is found guilty, the Board of Rights shall commence the penalty phase of the hearing. During the penalty phase, the department and the

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accused may bring forth evidence testimony and evidence witnesses for the purpose of assisting the Board of Rights in determining a just and proper penalty.

The departmental personnel history and records of the accused shall be available to the Board of Rights only if the accused has been found guilty of any charge upon which the member was heard or tried by the Board of Rights, and then only for the purpose of determining a just and proper penalty. In the penalty phase, the Board may consider the entire departmental personnel history and record of the accused which shall include, among other things, information concerning personnel complaints against the accused that were sustained to the extent and in the manner allowed by department policy except that the medical package of the accused shall not be considered by the Board with regard to penalty unless such information is relevant to a charge as to which there was a finding of guilty.

In prescribing the penalty, the Board shall look to the nature and gravity of the offense of which the member has been found guilty and may at its discretion review the departmental personnel history and record of the member. No item or entry in the record may be considered by the Board except in the presence of the member and only where the member has been given a fair and reasonable opportunity to explain any item or entry unless the member has failed or refused to be present. Personnel records introduced at or considered by the Board are confidential except for any document or information from a document that was publicly disclosed during the hearing.

If, upon completing of the presentation of evidence in the penalty phase and argument, the Board of Rights finds, in writing, that the grounds stated for the suspension, temporary salary reduction, demotion, any combination thereof, or removal from service were insufficient or were not sustained, the Board shall order the person to be reinstated or restored to duty. With the consent of the Fire Chief, the Board may also reduce the length of the suspension or temporary salary reduction or combination thereof, or may substitute suspension, temporary salary reduction, demotion or any combination thereof for discharge, if the board makes a written finding that such action is warranted. The decision of the Board must be certified in writing and a copy delivered to the Fire Chief as soon as practicable, but in no event later than five days after the decision of the Board of Rights. Whenever a Board of Rights prescribes a penalty of suspension or removal and the member is not currently relieved from duty, the Fire Chief may temporarily relieve the member from duty pending execution of the order.

PROPOSED REVISIONS TO CHARTER SECTION 1060

Normal: Existing Text of Charter Section 1060
~~Strikethrough:~~ Existing Text of Charter Section 1060 To Be Deleted
Bold Italics: Suggested New Text for Charter Section 1060 Revision

~~(n) **Personnel History and Records.** The departmental personnel history and records of the accused shall be available to the Board of Rights only if the accused has been found guilty of any charge upon which he or she was heard by the Board of Rights, and then only for the purpose of determining a proper penalty, except that the medical package of the accused shall not be considered by the board with regard to penalty unless such information is relevant to a charge as to which there was a finding of guilty. At the penalty stage, the board must look to the nature and gravity of the offense of which the accused has been found guilty and may at its discretion review the departmental personnel history and record of the accused, provided that no item or entry in the record may be considered by the board except in the presence of the accused, unless the member has failed or refused to be present, and then only if the accused has been given a fair and reasonable opportunity to explain the item or entry.~~

~~(e)~~ **(n) Imposition; Reduction of Penalty.** Within five days of delivery to the Fire Chief of a certified copy of the decision and order of the Board of Rights, the Fire Chief shall either execute the order, or the Fire Chief may, at his or her discretion and in lieu of the order, impose a penalty less severe than that ordered by the Board of Rights, but may not impose a greater penalty, including but not limited to *suspension without pay, temporary salary reduction, demotion, any combination thereof, or removal from service.* In the case of a suspension *without pay, temporary salary reduction, demotion, any combination thereof,* or removal *from service,* the Fire Chief shall cause a copy of the notice of the penalty to be served upon the accused and shall file a statement of such action with the Board of Fire Commissioners within five days thereafter.

~~(p)~~ **(o) Effective Date of Penalty.** ~~In any case of suspension or removal prescribed by the Board of Rights, or by the Fire Chief if no hearing is held before a Board of Rights, the time of the suspension shall be computed from the first day the member was suspended or relieved from duty pending hearing before and decision by the Board of Rights and the removal shall relate back to and be effective as of the date of the relief from duty pending hearing before and decision by the Board of Rights.~~

A removal prescribed by the Board of Rights, or by the Fire Chief if no hearing is had before a Board of Rights, shall relate back to and be effective as of the date of the relief from duty without pay pending hearing before and decision by the Board; however, where a final decision has been made by the Fire Chief prior to the end of the 30 day period referred to in subsection (b)(1), the removal shall be effective immediately.

PROPOSED REVISIONS TO CHARTER SECTION 1060

Normal:	Existing Text of Charter Section 1060
Strikethrough:	Existing Text of Charter Section 1060 To Be Deleted
Bold Italics:	Suggested New Text for Charter Section 1060 Revision

When there has been no relief from duty, the removal shall be effective upon service of the order. The effective date of any suspension, temporary salary reduction and/or demotion prescribed by the Board of Rights, or by the Fire Chief if no hearing is had before a Board of Rights, shall be determined by policies adopted by the department; provided.

In case of suspension where there has been a temporary relief from duty, the 30 day period referred to in subsection (b)(1) or any portion thereof in which the member received compensation shall not be counted as part of the suspension. Nothing in this section shall preclude the imposition of a suspension without pay when a final decision is made prior to the end of the 30 day period. Practices in effect on the effective date of the most recent amendment to this section shall remain in effect until the adoption of any modification to the policies.

Notwithstanding the above, the Fire Chief and the member may agree to an alternative date for the commencement of the period of suspension and/or may agree to non-consecutive dates for the term of the suspension.

Notwithstanding the above, where the Board has ordered a suspension without pay, the Fire Chief, with or without concurrence of the member, may instead impose a temporary salary reduction equaling the loss of pay that the member would have received by serving the suspension.

(p) Double Jeopardy; Exoneration. No member shall be twice tried for the same offense *by a Board of Rights*, except upon his or her request. In any case of exoneration of the accused after a hearing before a Board of Rights, exoneration shall be without prejudice to the member.

(q) Rehearing. At any time within three years after the effective date of removal, the removed member may file a request with the Fire Chief to be reheard or to be heard on the cause of his or her removal, together with a supporting affidavit setting forth in clear and concise language the reasons or grounds for a hearing or rehearing. The Fire Chief shall consider and make a decision upon the request within 30 days after filing. If the Fire Chief determines that good reason or cause exists for a hearing or rehearing, the Fire Chief shall without unnecessary delay, cause a Board of Rights to be constituted for the purpose of hearing and deciding upon the matter. The Board of Rights shall, at the conclusion of the hearing, render and certify its findings (independent of any previous findings by any other Board of Rights, or any other court, board or other tribunal, or any investigation or report of or discretion exercised by the Fire Chief in cases where no hearing was had before a Board of Rights), based only upon the evidence presented at

PROPOSED REVISIONS TO CHARTER SECTION 1060

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Bold Italics:	Suggested New Text for Charter Section 1060 Revision

such hearing. The board shall make and certify its decision and order in writing, and deliver a copy to the Fire Chief. The Fire Chief shall proceed in the same manner as provided for above after decision by a Board of Rights.

- (r) *Calendar Days. Except as otherwise provided in this section, all time periods, including those related to the statute of limitations, shall be calculated in calendar days. When the last day of any such period falls on a weekend or City holiday, the period shall extend to the next business day.*
- (s) *Public Records. The order referred to in subsection (c) and the notice of the penalty referred to in subsection (n) are considered to be a public record at the time of filing of such documents with the Board of Fire Commissioners. The Fire Chief or his or her designee shall be the custodian of public records referred to in this section.*
- ~~(t)~~ (t) Other Legal Rights. This section shall not be construed to affect any rights a member may have to assert other legal rights or remedies in relation to his or her office or position or to the compensation attached thereto, or to appeal to or be heard or tried by any court or other tribunal of competent jurisdiction.
- ~~(u)~~ (u) Restoration to Duty. Any person restored to duty or reinstated in his or her office or position after suspension, *temporary salary reduction, demotion in rank, a combination thereof* or removal, shall be entitled to receive full compensation from the City as if the suspension or removal had not been made, except that such compensation shall not be for more than one year's salary unless otherwise provided by law.
- ~~(v)~~ (v) Effects of New Charter. This section shall not apply to the discipline of any member who was relieved from duty or who appealed a suspension to a Board of Rights prior to its effective date. Matters arising out of such relief from duty or suspension shall be adjudicated in accordance with applicable prior Charter provisions.

BOARD OF FIRE COMMISSIONERS

GENETHIA HUDLEY-HAYES
PRESIDENT

CASIMIRO U. TOLENTINO
VICE PRESIDENT

ANDREW FRIEDMAN
JILL FURILLO

LETICIA GOMEZ
EXECUTIVE ASSISTANT I

CITY OF LOS ANGELES CALIFORNIA



ANTONIO R. VILLARAIGOSA
MAYOR

FIRE DEPARTMENT

BRIAN L. CUMMINGS
FIRE CHIEF

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March 7, 2012

Honorable Members of the City Council
City of Los Angeles
City Hall, Room 395
Attention: City Clerk

Honorable Antonio R. Villaraigosa
Mayor, City of Los Angeles
Room 303, City Hall
Attention: Mandy Morales, Legislative Coordinator

[BFC 12-040] – PROPOSED CITY CHARTER AMENDMENTS – CHARTER SECTION 1060 – SWORN FIRE DISCIPLINARY STATUTE OF LIMITATIONS

At its meeting of March 6, 2012, the Board of Fire Commissioners approved the Fire Department's report dated February 24, 2012, requesting that the City Council and Mayor authorize by resolution proposed rights and due process changes amending the statute of limitations under City Charter Section 1060 "Disciplinary Procedures for the Fire Department" to (1) eliminate the limitation of "and in no event later than two years from the date of the act or omission"; (2) to satisfy the Charter limitations requirement by notifying the accused of the proposed disciplinary action and (3) to add seven exceptions (commonly referred to as "tolling" provisions) which either "tolls" or allows for a reasonable extension of the one-year statute of limitations under the City Charter.

The report is herewith transmitted concurrently to the City Council and the Mayor for review and approval. Should you need additional information, please contact the Board of Fire Commission Office at 213-978-3838.

Sincerely,

Leticia Gómez
Commission Executive Assistant I

Attachment

cc: Miguel A. Santana, City Administrative Officer
Gerry F. Miller, Chief Legislative Analyst
Board of Fire Commissioners
Brian L. Cummings, Fire Chief

March 6, 2012



BRIAN L. CUMMINGS
FIRE CHIEF

February 24, 2012

BOARD OF FIRE COMMISSIONERS
FILE NO. 12-040

To: Board of Fire Commissioners

From: Brian L. Cummings, Fire Chief

Subject: PROPOSED CITY CHARTER AMENDMENTS - CHARTER SECTION
1060 - SWORN FIRE DISCIPLINARY STATUTE OF LIMITATIONS

FINAL ACTION:	<input checked="" type="checkbox"/> Approved	<input type="checkbox"/> Approved w/Corrections	<input type="checkbox"/> Withdrawn
	<input type="checkbox"/> Denied	<input type="checkbox"/> Received & Filed	<input type="checkbox"/> Other

RECOMMENDATION

That the Board recommends that the Council and Mayor authorize by resolution proposed rights and due process changes amending the statute of limitations under City Charter Section 1060 "Disciplinary Procedures for the Fire Department" to (1) eliminate the limitation of "and in no event later than two years from the date of the act or omission"; (2) to satisfy the Charter limitations requirement by notifying the accused of the proposed disciplinary action and (3) to add seven exceptions (commonly referred to as "tolling" provisions) which either "tolls" or allows for a reasonable extension of the one-year statute of limitations under the City Charter.

SUMMARY

Pursuant to City Charter Section 1060's statute of limitations, the Fire Department cannot suspend, remove or separate a sworn firefighter from employment unless charges are filed with the Board of Fire Commissioners "within one year of the department's discovery of the act committed or omitted by a member and in no event later than two years from the date of the act or omission." The statute of limitations under the 2008 California Firefighters Procedural Bill of Rights requires that punitive action against a firefighter must occur "within one year of discovery by the employing fire department." Because the Charter provides for a more limited period for discipline than the Firefighters Procedural Bill of Rights does, the Fire Department must abide by both limitations periods.

The two-year statute of limitations under Charter Section 1060 precludes suspension, removal or separation if the underlying event occurred more than two years before. This is true even if the event could not have been reasonably discovered by the Fire

Department or conduct had been concealed through the fraud or misrepresentation of or by the firefighter.

Amending City Charter Section 1060 "Disciplinary Procedures for the Fire Department" to mirror the statute of limitations in Government Code § 3254 (the Firefighters Procedural Bill of Rights) would resolve the inherent conflict between the two limitations periods and ensure the Fire Department can enforce and maintain the high standard of conduct expected of sworn firefighters while respecting their due process right to a fair and impartial disciplinary process.

A table comparing the current Charter Section 1060, the Firefighters Procedural Bill of Rights, Charter Section 1070 governing disciplinary procedures for sworn police officers, Charter Section 1016 governing disciplinary procedures for civilian employees and listing the impact and advantage of the proposed Charter Section 1060 amendment is attached as Attachment Number One of this report.

ANALYSIS

Statute of Limitations

In *Jackson v. City of Los Angeles* (2003) 111 Cal. App. 4th 899 (a case discussing the tension between the Peace Officers Procedural Bill of Rights and City Charter Section 1070 as it applied to the Los Angeles Police Department), the California Court of Appeals discussed the necessity that the statute of limitations balance the public and the employer's interest in maintaining standards and efficiency of the work place and ensuring that the employee is treated fairly and accorded due process:

When a law enforcement agency investigates alleged misconduct by an officer employee, the procedural protections in *The Bill of Rights Act* balance the public interest in maintaining the efficiency and integrity of the police force with the police officer's interest in receiving fair treatment. The *section 3304, subdivision (d)* limitations provision promotes both policies. By encouraging prompt investigation of allegations of officer misconduct, it promotes the public interest in maintaining the efficiency and integrity of the police force. It promotes the police officer's interest in receiving fair treatment by requiring the diligent prosecution of known claims so that police officers receive prompt notice of claims against them, can prepare a fair defense on the merits, and can marshal the facts while memories and evidence are fresh.

A limitations period also promotes repose by giving security and stability to human affairs. Although a statute of limitations may purchase such repose at the price of procedurally barring a meritorious cause of action, the public policies favoring repose and disposition on the merits are equally strong, substantial, and important. It is for the Legislature to establish a period that strikes a balance between the two.

Jackson, 111 Cal. App. 4th at 909 (citations omitted).

Statute of Limitations Affecting Disciplinary Actions against Sworn Firefighters

Until 2008, City Charter Section 1060 set forth the sole statute of limitations in which the Fire Department could bring punitive action against a sworn firefighter. Under Charter Section 1060(a), the Fire Department may suspend, remove, or separate a sworn firefighter from employment if it files charges with the Board of Fire Commissioners within "one year of the department's discovery of the act committed or omitted by a member and in no event later than two years from the date of the act or omission".

In 2008, the Firefighters Procedural Bill of Rights set forth a limitations requirement statewide for firefighters of "within one year of discovery by the employing fire department." The City Attorney advised the Fire Department that Charter Section 1060 provides the member with additional protection from those under the Firefighters Procedural Bill of Rights, in that it narrows the timeframe in which the Fire Department can discipline a sworn firefighter. The City Attorney advised that because the existing limitations period under Charter Section 1060 expands on those provided under the Firefighters Procedural Bill of Rights, the Fire Department should consider both limitations statutes when suspending, removing, or separating a firefighter from employment.

Los Angeles City Charter Section 1060 (Disciplinary Procedures for the Fire Department)

This proposed Charter amendment would make changes to the Los Angeles Fire Department's disciplinary procedures applicable to firefighters who have passed the civil service probationary period.

Voters of the City of Los Angeles approved Charter changes in 1934 (effective in 1935) that created virtually identical systems of discipline for police officers in the Police Department and firefighters in the Fire Department under Section 135.

Prior to 1999, former Charter Section 135 required that disciplinary charges supporting punitive action "must be based upon some act committed or omitted by such officer or employee within one (1) year prior to the filing of the complaint referred to herein."

Based on a hostile work environment case in which disciplinary action could not be pursued because of Charter Section 135's limitations period, the Fire Department sought to amend the statute of limitations beginning in 1996. The amendment proposed by the Fire Department mirrored the existing statutory scheme of Charter Section 202 for the Police Department, which consisted of (1) one year from the date of discovery and brought to the attention of the Chief Engineer and (2) either two years from date of event if the event was not criminal, three years from date of event if the conduct were a

misdemeanor crime or no limit if the conduct were a felony crime. This proposed version did not move forward.

When approved by the voters on June 8, 1999, the revised City Charter moved the Disciplinary Procedures for the Fire Department from Charter Section 135 to Charter Section 1060. Contained in the 1999 revision was the current statute of limitations that exists today.

The current statute of limitations set forth in Charter Section 1060 requires that the Fire Chief file charges with the Board of Fire Commissioners (1) "within one year of the department's discovery of the act committed or omitted by a member" and (2) "in no event later than two years from the date of the act or omission." (Charter Section 1060(a)).

The statute of limitations under Charter Section 1060 is satisfied by filing with the Board of Fire Commissioners, a copy of a verified written complaint and a statement that specific documents were served upon the accused firefighter. (Charter Section 1060(c)).

Firefighters Procedural Bill of Rights (Government Code Section 3250, et seq).

The Legislature's enactment of the Firefighters Procedural Bill of Rights in 2008 included its own statute of limitations intended to be the minimum state guideline to ensure the "maintenance of reasonable and consistent procedural protections applicable to all employers with respect to the disciplinary process." (See Legislative History, *Firefighters Procedural Bill of Rights Act*, Assembly Bill 220, (Cal. 2007)).

Under California Government Code Section 3254(d), the Firefighters Procedural Bill of Rights mandates that "[p]unitive action or denial of promotion on grounds other than merit shall not be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of discovery by the employing fire department or licensing or certifying agency." The Firefighters Procedural Bill of Rights does not contain a statutory limitation from the time of the act itself.

The statute of limitations under the Firefighters Procedural Bill of Rights is satisfied when the employer notifies the firefighter of its proposed disciplinary action. (See *Mays v. City of Los Angeles* (2008) 43 Cal. 4th 343)).

Government Code Section 3254(d) contains seven exceptions (commonly referred to as "tolling" provisions) which either "tolls" or allows for a reasonable extension of the one-year statute of limitations. The seven exceptions are

- (1) If the firefighter voluntarily waives the one-year time period in writing, the time period shall be tolled for the period of time specified in the written waiver.
- (2) If the act, omission, or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution, the time during which the criminal investigation or criminal prosecution is pending shall toll the one-year time period.
- (3) If the investigation is a multijurisdictional investigation that requires a reasonable extension for coordination of the involved agencies.
- (4) If the investigation involves an employee who is incapacitated or otherwise unavailable.
- (5) If the investigation involves a matter in civil litigation where the firefighter is named as a party defendant, the one-year time period shall be tolled while that civil action is pending.
- (6) If the investigation involves a matter in criminal litigation in which the complainant is a criminal defendant, the one-year time period shall be tolled during the period of that defendant's criminal investigation and prosecution.
- (7) If the investigation involves an allegation of workers' compensation fraud on the part of the firefighter.

Challenges in Complying with Both the Statute of Limitations in Charter Section 1060 and the Firefighters Procedural Bill of Rights

The City Attorney has advised the Fire Department that because the City Charter's statute of limitations provides the member with protections which expand on those provided under the Firefighters Procedural Bill of Rights, the Fire Department abide by both provisions when disciplining its firefighters.

According to the City Attorney, Charter Section 1060's limitation that disciplinary action must occur "within a period of two years from the date of the act" is definite and absolute. The two-year limitation even applies even if the misconduct is egregious or criminal. If the act has been concealed from discovery by the intentional or fraudulent acts of the involved firefighter, the two-year limitation period still applies, barring the Fire Department from suspending, removing, or separating a firefighter from employment.

Based on the statutory language and the advice of the City Attorney, the Fire Department may suspend, remove, or separate a firefighter from service only if it has:

- (1) Filed charges against the firefighter with the Board of Fire Commissioners;
- (2) Filed charges against the firefighter within one year of the department's discovery of the act, and;
- (3) Filed charges against the firefighter within two years from the date of the act.

Concurrent Investigations/Inquiries Regarding the Same Event

Following both the statute of limitations in both City Charter Section 1060 and the Firefighters Procedural Bill of Rights (1) creates tension when the Fire Department has only one year to proceed with its discipline while inquiries or investigations by outside agencies or litigants are not so bound and (2) presents impediments to the Fire Department's ability to deal with misconduct issues because they are over two years old.

In the event that there are extraordinary circumstances connected to the underlying incident (such as concurrent criminal prosecution or civil litigation), the Fire Department is unable to "toll" the statute of limitations because unlike the Firefighters Procedural Bill of Rights, the City Charter does not contain "tolling" provisions. This means that the Fire Department must proceed with its disciplinary action despite the fact that simultaneous investigations and/or proceedings regarding the same event have not been completed.

When it is forced to complete its disciplinary action within one-year, the Fire Department must conduct its administrative investigation while other entities, including law enforcement, civil litigants, and licensing agencies, are conducting their own parallel investigations. Simultaneous investigations always create the potential that statements made by witnesses and parties may differ ever so slightly when recounted to different agencies. Further, evidence that may be discovered in one inquiry may not be shared with other simultaneous investigations, including the Fire Department's disciplinary case.

Further complicating the issue is the fact that as the employer, the Fire Department will generally compel a statement from the accused firefighter. When a statement from the accused firefighter is compelled by the employer, it is obtained with the employer's promise that it will not be given to criminal investigators and prosecutors. Should law enforcement or prosecutors be exposed to a compelled interview, the criminal case against the accused could be jeopardized. (See *Kastigar v. United States*, 406 U.S. 441, 448 (1972)).

Preclusion from Imposing Punitive Action for Events Over Two Years Old

The Fire Department has encountered several instances where it was unable to pursue punitive action against an accused firefighter despite having evidence beyond preponderance because of Charter Section 1060's two-year limitation. A recent

publicized example occurred in May 2011, when the Fire Department learned of a video on a commercial pornographic website depicting inappropriate acts occurring on an unmanned Fire Department apparatus. The investigation proved that the incident itself occurred in 2008. Because the incident itself occurred over two years prior, the Fire Department was precluded by Charter Section 1060 from suspending, removing or separating any of the involved firefighters.

This incident exemplifies the dispositive nature of the two-year prong of Charter Section 1060's statute of limitations. Even where the Fire Department could not have reasonably discovered the misconduct, such as when the accused concealed the conduct through his or her own fraud or misrepresentation, the Fire Department is barred from imposing disciplinary action if the act occurred over two years prior, regardless of egregious or significant the misconduct is.

Protection against Prosecuting Discipline for Where the Department Failed to Exercise Due Diligence

This proposed Charter amendment eliminates the requirement that the event upon which discipline is imposed is not over two years old. One of the concerns of eliminating a limitation based on the date of the event itself is safeguarding against the Department pursuing discipline where it had failed to exercise due diligence after becoming aware of the alleged misconduct.

Consistent Review and Adjudication by the Professional Standards Division

Within the creation of the Professional Standards Division (PSD) in 2008 was a fair and consistent evaluation of the propriety of disciplinary decisions within the Fire Department. When a completed administrative investigation is reviewed and adjudicated, two of the key components that are considered are: (1) Whether the Fire Department can present admissible evidence by preponderance to prove the charges at a Board of Rights and (2) whether proceeding with disciplinary action is fair, given the intrinsic and extrinsic factors of the event and investigation.

In that evaluation, PSD considers whether the Department has upheld the firefighter's interest in being treated fairly and due process accorded during that process. This is done by reviewing whether the Department acted diligently in investigating allegations of misconduct and whether the accused firefighter received timely notice of the charges against them so that they can prepare a fair defense on the merits by obtaining the facts while memories and evidence are fresh. If PSD believes that it cannot meet this burden, it will not proceed with recommending disciplinary action.

Laches

Where the Department believes that it should proceed with disciplinary action and the firefighter believes that it is untimely, the firefighter may allege the affirmative defense of *laches* to bar the punitive action from occurring.

Statutes of limitations and the doctrine of *laches* share a common policy: Both are designed to promote justice by preventing surprise through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared. (See *Brown v. State Personnel Bd.* (1985) 166 Cal. App.3d 1151, 1161. Under appropriate circumstances, the defense of *laches* may operate as a bar to the Department's disciplinary decision if the requirements of unreasonable delay and resulting prejudice are met. (See *Fountain Valley Regional Hospital & Medical Ctr v. Bonta* (1999) 75 Cal. App. 4th 316, 323-324). Merely facing disciplinary charges does not constitute prejudice. Instead, the firefighter has the burden of proof of establishing both that the Department's actions created an unreasonable delay and that delay resulted in prejudice to the firefighter.

Independent Assessor's Recommendation to Amend Charter Limitations

On March 27, 2010, the Independent Assessor, Board of Fire Commissioners, issued his "Assessment of the Department's Disciplinary Process and Professional Standards Division". Among his recommendations to enhance the Department's disciplinary process was that the Fire Department "seriously consider" amending the "City Charter to mirror the Firefighter Procedural Bill of Rights on the one year statute of limitations and its tolling provisions".

Statute of Limitations for Police Disciplinary Cases – Charter Section 1070

Prior to 2001, City Charter Section 1070 (Disciplinary Procedures for the Police Department) required that the Police Department had to satisfy two limitations standards in order to discipline an officer (that charges be filed (1) within one year after the misconduct was discovered and (2) an extension of either one year or two years if the charge was substantially based on conduct that would be a misdemeanor or a felony crime.)

The statute of limitations provisions for Charter Section 1070 were amended following voters approval on April 10, 2001 to eliminate the second prong, leaving only the one-year statute from the date of discovery. The impartial analysis of the Chief Legislative Analyst provides the rationale for the charter amendment:

The number of limitations periods applicable to police officer misconduct would be reduced, and certain time extensions and exceptions would be introduced. Currently, two limitations standards must be met for an officer to be charged with misconduct: charges must be filed within (a) one year after the misconduct was

discovered and (b) a criminal offense limitations period, where the charge is based substantially or entirely on conduct which may be punishable criminally. This proposed amendment eliminates the second of these time limitations, thereby leaving only one limitations period one year from discovery. This amendment would, however, allow for extension of or exceptions to the one-year period in certain circumstances in a manner similar to that provided by state law for many other police officers in the State of California. The extensions include delaying the one-year limitations standard if the alleged misconduct is also the subject of a criminal investigation or criminal prosecution, or if the alleged misconduct involves a matter in civil litigation where the member is named as a party defendant.

City of Los Angeles Civilian Employees – Charter Section 1016

According to City Personnel, the City Charter does not prescribe a statute of limitations for civilian employees. Instead, the disciplinary action must occur within a reasonable time after it has been discovered.

FISCAL IMPACT

Should the statute of limitations under Charter Section 1060 be amended to eliminate the limitation of “two years from the date of event” and incorporate the “tolling” provisions, the number of investigations and proposed disciplinary actions will increase. However, the Professional Standards Division believes that the number of additional cases would not be significant. PSD estimated that had the “two year from date of event” limitations period not existed, it would have pursued 10-15 additional cases over the past three years. However, those cases would have involved serious types of misconduct that would have been appropriate for investigation despite the passage of time.

CONCLUSION

The Fire Department requests that City Charter Section 1060 be amended to reduce the number of limitations periods applicable to firefighter misconduct and to align the City Charter provisions with those of the Firefighters Procedural Bill of Rights. The proposed amendment would eliminate the second of the two Charter time limitations (two years from the date of event), leaving only the one limitations period of one year from the discovery of the misconduct.

The proposed amendment would also incorporate seven “tolling” provisions which would allow for either a reasonable extension of or a “pausing” of the one-year period in certain circumstances provided for in the Firefighters Procedural Bill of Rights. The extensions include tolling the one-year limitations standard if the alleged misconduct is also the subject of a criminal investigation or criminal prosecution or if the alleged

misconduct involves a matter in civil litigation where the member is named as a party-defendant.

The Fire Department also requests Charter Section 1060 be amended so that the statute of limitations is satisfied when the Department notifies the firefighter of its proposed disciplinary action, provided that such notification occur within one year of the department's discovery of the act committed or omitted by a member. This is the manner of satisfying the statute of limitations under the Firefighters Procedural Bill of Rights. (See *Mays v. City of Los Angeles* (2008) 43 Cal. 4th 343).

Charter Section 1060 (Proposed Amendment)

- (a) **Applicability; Rights.** For purposes of this section, the term "member" refers to all officers and firefighters of the Fire Department. This section shall not apply to any member of the department who has not completed the period of probation in his or her entry position as provided in Section 1011(a). Members not covered by this section who are otherwise entitled by law to a hearing or appeal with regard to proposed or imposed discipline shall be provided a hearing or appeal under rules promulgated by the Fire Chief.

The right of a member of the Fire Department, except the Fire Chief and any other member in a position exempt from civil service, to hold his or her office or position and to receive compensation attached to the office or position is hereby declared to be a substantial property right of which the holder shall not be deprived arbitrarily or summarily, nor other than as provided in this section. No member of the Fire Department shall be suspended, removed, or otherwise separated from the service of the Fire Department (other than by resignation), except for good and sufficient cause shown upon a finding of guilty of the specific charge or charges assigned as cause or causes after a full, fair and impartial hearing before a Board of Rights except as provided in subsection (b) and (h) of this section. ~~The charges must be filed within one year of the department's discovery of the act committed or omitted by a member and in no event later than two years from the date of the act or omission.~~

For a suspension or removal to be taken, the Department shall complete its investigation and notify the member of its proposed disciplinary action within one year of the department's discovery of the act committed or omitted by a member, except in any of the following circumstances:

- (1) If the member voluntarily waives the one-year time period in writing, the time period shall be tolled for the period of time specified in the written waiver.
- (2) If the act, omission, or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution, the time

during which the criminal investigation or criminal prosecution is pending shall toll the one-year time period.

- (3) If the investigation is a multijurisdictional investigation that requires a reasonable extension for coordination of the involved agencies.
- (4) If the investigation involves an employee who is incapacitated or otherwise unavailable.
- (5) If the investigation involves a matter in civil litigation where the member is named as a party defendant, the one-year time period shall be tolled while that civil action is pending.
- (6) If the investigation involves a matter in criminal litigation in which the complainant is a criminal defendant, the one-year time period shall be tolled during the period of that defendant's criminal investigation and prosecution.
- (7) If the investigation involves an allegation of workers' compensation fraud on the part of the member.

No case of suspension with loss of pay shall be for a period exceeding six months.

This proposed amendment strengthens the Fire Department's ability to hold firefighters accountable for misconduct without diminishing the due process protections afforded to them. The amendment closes the loopholes that have allowed officers to escape accountability for their misconduct simply because the misconduct occurred over two years prior. The amendment brings the Charter into alignment with the protections provided for firefighters under California law.

Board report prepared by Graham Everett, Battalion Chief, Professional Standards Division, David Spence, Battalion Chief, Professional Standards Division and Paul Hayashida, Chief Special Investigator, Professional Standards Division.

Attachment

COMPARISON OF EXISTING AND PROPOSED DISCIPLINARY STATUTE OF LIMITATIONS

	City Charter §1060 (Sworn Fire)	Impact of Existing Charter §1060 Provision	Proposed City Charter §1060 (Sworn Fire)	Firefighters Procedural Bill of Rights (FFBOR) (Gov Code 3254)	City Charter §1070 (Sworn Police)	City Charter §1016 (Civilian)
Limitations From Discovery of Misconduct	One year from Department's discovery of the act committed or omitted by a member.	None	None	One year from discovery by the employing fire department.	One year from discovery by an uninvolved Department supervisor.	"Reasonable period".
Limitations From Event	Two years from the date of the act or omission.	LAFD unable to discipline firefighters for any act which occurs more than two years prior, even if it had no notice of misconduct and/or if it was concealed by firefighter. LAPD and civilian discipline have no limitation from date of act or event.	Delete limitation prohibiting discipline for acts or omissions occurring over two years prior.	None	None	None
Satisfying Limitations Period	Department files charges and statement of service with the Board of Fire Commissioners.	Prior to filing charges with Board of Fire Commissioners, the Department must (1) notify the employee of proposed disciplinary action; (2) provide the opportunity to respond (Skelly hearing), (3) receive the Skelly recommendation, (4) Fire Chief makes final decision and (5) employee is served. This takes 3-6 weeks from the one-year limitations period under the Charter.	Notification of proposed disciplinary action (standard required under the Firefighters Procedural Bill of Rights alone) satisfies the limitations period.	Department notifies firefighter of proposed disciplinary action.	Department files complaint with the Board of Police Commissioners.	Department files written statement of cause and certification of service with the Board of Civil Service Commissioners.

COMPARISON OF EXISTING AND PROPOSED DISCIPLINARY STATUTE OF LIMITATIONS

	City Charter §1060 (Sworn Fire)	Impact of Existing Charter §1060 Provision	Proposed City Charter §1060 (Sworn Fire)	Firefighters' Procedural Bill of Rights (FFBOR) (Gov Code 3254)	City Charter §1070 (Sworn Police)	City Charter §1016 (Civilian)
Tolling Voluntary Written Waiver by Accused	None	Firefighter cannot waive the statute of limitations under existing Charter. (City Attorney advice -- 2011)	Add tolling provision mirroring FFBOR (Government Code 3254(d)(1).	Firefighter voluntarily waives period in writing Limitations period tolled for the period of time specified in the written waiver.	Police officer voluntarily waives period in writing. Limitations period tolled for the period of time specified in the written waiver.	None
Tolling Related Criminal Investigator or Prosecution	None	High probability of concurrent investigations to meet one year statute. Potential for discrepancies in interviews; evidence in one case not made available to other; potential taint of criminal case because of compelled interview.	Add tolling provision mirroring FFBOR (Government Code 3254(d)(2).	Event is subject of a criminal investigation or criminal prosecution. Limitations period tolled during criminal investigation or criminal prosecution.	Underlying event is subject of a criminal investigation or criminal prosecution. Limitations period tolled during criminal investigation or criminal prosecution.	None
Reasonable Extension Multi- Jurisdictional Investigation	None	No reasonable extension of limitations period to allow for coordination with other agencies on multi- jurisdictional cases with differing policies, MOUs, etc.	Add tolling provision mirroring FFBOR (Government Code 3254(d)(3).	Multi-Jurisdictional investigation. Reasonable extension of limitations period to coordinate involved agencies.	Multi-Jurisdictional investigation. Reasonable extension of limitations period to coordinate involved agencies.	None

COMPARISON OF EXISTING AND PROPOSED DISCIPLINARY STATUTE OF LIMITATIONS

	City Charter §1060 (Sworn Fire)	Impact of Existing Charter §1060 Provision	Proposed City Charter §1060 (Sworn Fire)	Firefighters Procedural Bill of Rights (FFBOR) (Gov Code 3254)	City Charter §1070 (Sworn Police)	City Charter §1016 (Civilian)
Tolling Accused Unavailable	None	Current Charter does not take employee's unavailability into account. Department has had instances when employee takes sudden vacation or sick leave to make self "unavailable".	Add tolling provision mirroring FFBOR (Government Code 3254(d)(4)).	Employee is incapacitated or otherwise unavailable. Tolling for period of unavailability	Employee is incapacitated or otherwise unavailable. Tolling for period of unavailability	None
Tolling Related Civil Litigation Where Accused is Party- Defendant	None	Conducting administrative investigation during active litigation could result LAFD investigation being part of litigation discovery including compelled statement. Potential for discrepancies in statements; other party will have an advantage as to the Department's defense.	Add tolling provision mirroring FFBOR (Government Code 3254(d)(5)).	Underlying event is subject of civil litigation. Accused firefighter is a party-defendant. Limitations period tolled during civil litigation.	Underlying event is subject of civil litigation. Accused police officer is a party-defendant. Limitations period tolled during civil litigation.	None
Tolling Complainant Subject of Criminal Case From Underlying Event	None	High probability of concurrent investigations to meet one year statute. Potential for discrepancies in interviews; evidence in one case not made available to other; potential taint of criminal case because of compelled interview.	Add tolling provision mirroring FFBOR (Government Code 3254(d)(6)).	Underlying event in criminal litigation. Complainant is a criminal defendant. Limitations period tolled during criminal investigation or prosecution.	Underlying event in criminal litigation. Complainant is a criminal defendant. Limitations period tolled during criminal investigation or prosecution.	None

COMPARISON OF EXISTING AND PROPOSED DISCIPLINARY STATUTE OF LIMITATIONS

	City Charter §1060 (Sworn Fire)	Impact of Existing Charter §1060 Provision	Proposed City Charter §1060 (Sworn Fire)	Firefighters' Procedural Bill of Rights (FFBOR) (Gov. Code 3254)	City Charter §1070 (Sworn Police)	City Charter §1016 (Civilian)
Delayed Discovery	None	Current Charter does not allow for extension of limitations period, allowing employee to escape disciplinary action because of own fraud.	Add tolling provision mirroring FFBOR (Government Code 3254(d)(7)).	Allegation of workers' compensation fraud. Limitations period begins when fraud was discovered by Department.	Allegation of workers' compensation fraud. Limitations period begins when fraud was discovered by Department.	None
Workers Compensation fraud						
Reasonable Extension	None	Current Charter does not provide for extension when multiple employees are accused. Not requested in proposed Charter amendment because no analogous FFBOR provision.	Not requested in proposed Charter amendment because no analogous FFBOR provision.	None	Investigation involves more than one employee Reasonable extension of limitations period.	None
Multiple Accused Employees						