

Side-by-Side Comparison of Successive Iterations of Proposed Whistleblower Protection Ordinance Amendments: Ethics Commission’s Recommendations March 28, 2016 vs. “Collaborative Input” From Four City Agencies January 17, 2017

Note: Underlined red revision marks show edits inserted by an agency. Black strikeouts represent material deleted by an agency. Yellow highlighting is to draw emphasis to key issues in the various source documents. Blue page numbers refer to pages in source document(s). Bold italic text added for emphasis.

Issues of Concern in Civil Grand Jury Report on “Whistleblower Protection Ordinance” May 2015 ¹	Ethics Commission Proposed Amendments Submitted to Clerk of the Board Angela Calvillo March 28, 2016 ²	Four-Agency * WPO † Proposed Amendments Collaborative Revisions January 17, 2017 ³	Discussion of DHR/Board of Supervisors/Ethics Commission/City Controller “Artful Dodger” Misdirection
<p>The Civil Grand Jury noted:</p> <ol style="list-style-type: none"> “Finally, some complainants are excluded from WPO protection because of their job status. As noted by our predecessor Civil Grand Jury, the ordinance covers only City officers and employees. It does not cover applicants for City employment, or employees or applicants for employment with City contractors — even those who work side-by-side with City employees.” [Page 12] “The chief reason why whistleblower retaliation complaints have fared so poorly before the Commission is the narrow scope of the current law, known as the Whistleblower Protection Ordinance (WPO). The WPO protects only those who make disclosures ‘in house.’ The whistleblower must make his or her report of government wrongdoing only to certain agencies within City government, in certain approved ways, or the WPO does not apply. It does not protect disclosures that are made by other means, or to persons or 	<p>§4.100 FINDINGS: This Chapter protects all City officers, and employees, <u>and contractors operating within the scope of a contract with the City and County of San Francisco</u>, from retaliation (1) for filing a complaint with, or providing information to, the Ethics Commission, Controller, District Attorney, City Attorney, or (2) for filing <u>a complaint with any supervisory employee at the complainant’s department or at another City, County, state or federal agency.</u> [Page 1]</p>	<p>§4.100 FINDINGS: This Chapter <u>sets forth the requirements for the City’s Whistleblower Program and</u> protects all City officers and employees, <u>City contractors, and employees of City contractors</u> from retaliation for <u>reporting filing a complaint with, or providing information to, the Ethics Commission, Controller, District Attorney, City Attorney or complainant’s department about</u> improper government activity by City officers and employees <u>or unlawful activity by City contractors and their employees in connection with a City contract.</u> [Pages 1–2]</p>	<ol style="list-style-type: none"> It is important to note that the version submitted to the Board in March 2016 indicated at the start of the Findings that the ordinance focuses on protecting whistleblowers from retaliation. But quietly, the January 2017 revised amendments redirected the focus saying the WPO sets forth requirements for the City’s whistleblower program, and only secondarily protects against retaliation. Misdirects “filing a complaint” and/or “providing information to other City agencies,” confounding it with merely “reporting improper government activity,” as if filing a formal complaint or providing information outside of a “report,” is somehow distinct from “reporting.” Does this portend that filing a formal complaint or providing information may not be covered by the new amendments to the WPO? In other words, is filing a report is OK, but filing a complaint may not be? Although the Ethics Commission had expressly included in its March 28, 2016 version allowing complainants

* It is thought the four-agency version of the proposed WPO amendments dated January 17, 2017 involved collaborative revisions by the Board of Supervisors, the City’s Department of Human Resources (DHR), the City Controller’s Office, and the Ethics Commission.

† WPO is the acronym for San Francisco’s “Whistleblower Protection Ordinance.”

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<p>entities that are not listed in the ordinance: for example, to news media, to outside law enforcement agencies, or to elected officials outside City government. Thus, a City employee who discloses government wrongdoing or corruption to the San Francisco Chronicle, or to the California Attorney General, or to the F.B.I., or to Congress, is not a 'whistleblower' entitled to protection under the WPO. If retaliation ensues and the employee complains to the [Ethics] Commission, his/her complaint will be dismissed.”</p> <p>[Pages 5–6]</p>			<p>to file complaints with other County, State or federal agencies, that provision suddenly vanished from the January 17, 2017 four-agency collaborative review.</p> <p>4. Although the March 2016 version Ethics forwarded to the Clerk of the Board had added that complaints could be submitted to supervisory employees, the January 2017 version deleted the supervisory provision in §4.100 and §4.105(a), but then added it in §4.115(a)(1). See discussion of significance of "supervisory employees" in §4.115(a)(1) below.</p> <p>5. Of note, the March 2016 Ethics Commission's final version and the four-agency collaborative version in January 2017 failed to provide that complaints could be filed with the Mayor or Board of Supervisors, although they are considered "City agencies," but weren't specifically named.</p> <p>Neither the March 2016 or January 2017 versions provide anti-retaliation protections if a whistleblower complaint is submitted to private lawyers involved with litigation against the City, to media outlets, other law enforcement agencies, or to watchdog and whistleblower third-party private-sector agencies.</p> <p>6. While the March 2016 version added coverage for City contractors, the Ethics Commission did not address the Grand Jury's concern about providing whistleblower protection for City job applicants.</p>

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			<p>7. Finally the Ethics Commission's March 2016 version is to be commended for including that complaints meriting retaliation protection could be made to County, State or federal agencies to address the Grand Jury's concern about only "in-house" complaints, but the January 2017 version returned anti-retaliation protections only to "in-house" complaints.</p> <p>Although "in-house" initially meant just to a City employee's own department, but was broadened to include other City departments, it still means "in-house" to the extent filing complaints is still restricted to only with City agencies.</p>
<p>Again, the Grand Jury was concerned that the WPO covered only complaints made "in-house" to a narrow set of City agencies: "whistleblower must make his or her report of government wrongdoing only to certain agencies within City government ..." [Page 5]</p>	<p>§4.105(a) COMPLAINTS: Any person may file a complaint with the Ethics Commission, Controller, District Attorney <u>or City Attorney, or with any supervisory employee</u> at the complainant's department or <u>at another City, County, state or federal agency, alleging that a City officer, employee or contractor operating pursuant to a contract with the City and County of San Francisco has engaged in improper government activity.</u> [Page 2]</p>	<p>§4.105(a) COMPLAINTS: Any person may file a complaint with the Ethics Commission, Controller, District Attorney or City Attorney, or a written complaint with the complainant's department alleging that a City officer or employee has engaged in improper government activity, <u>or that a City contractor or employee of a City contractor has engaged in unlawful activity in connection with a City contract.</u> [Page 2]</p>	<p>Again, although the Ethics Commission had expressly included in its March 28, 2016 version allowing complainants to file complaints with other County, State or federal agencies, that provision suddenly vanished from the January 17, 2017 four-agency collaborative proposed revisions to the WPO.</p>
<p>The Civil Grand Jury noted "To qualify for protection, the whistleblower's disclosure must also concern a topic that is among those listed in the ordinance. The list is limited: disclosures of waste, fraud or abuse in general are not included, nor are those concerning violations of general law. Whistleblowers who disclose such information are not</p>	<p>§4.105(a) COMPLAINTS: ... Subparagraph (a) continued with:</p> <p><u>"Improper government activity means</u> violating local campaign finance, lobbying, conflicts of interest or governmental ethics laws, regulations or rules; violating the California Penal Code by misusing <u>gross waste, fraud and</u></p>	<p>§4.105(a) COMPLAINTS: ... Subparagraph (a) continued with:</p> <p>... by: violating local campaign finance, lobbying, conflicts of interest or governmental ethics laws, regulations or rules; violating the California Penal Code by misusing City resources; creating a specified and substantial</p>	<p>1. The March 2016 version Ethics submitted to the Clerk of the Board had, to its credit, specifically incorporated the Grand Jury's concern that gross waste, fraud and abuse of City resources be added to definitions of improper government activity, but gross waste, fraud and abuse was suddenly eliminated in</p>

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<p>protected from retaliation under the WPO; again, the Commission will dismiss their complaints." [Emphasis added.] [Page 6]</p>	<p>abuse of City resources; creating a specified and substantial danger to public health or safety by failing to perform duties required by the officer or employee's City position; or abusing his or her City position to advance a private interest." [Page 2]</p>	<p><i>danger to public health or safety by failing to perform duties required by the officer or employee's City position; or abusing his or her City position to advance a private interest.</i> [Page 2]</p>	<p>the January 2017 written by four-agency collaborative team.</p> <p>It is not known who at, or which of, the four-agency team eliminated the gross waste and fraud category and why it was eliminated.</p> <ol style="list-style-type: none"> The January 2017 version misdirected issues when it bifurcated allowing City employees to report improper government activity, but for City contractors dumbed down "improper government activity" to only "unlawful activity," such that if a whistleblower were to complain of "improper" but not clearly "unlawful" activity by a City contractor, they may not receive anti-retaliation protections, as if City contractors don't engage in improper activities. The January 2017 version moved most of those specifically-named categories struck out to a new definition in the list of definitions in §4.110, but specifically excluded (did not move or re-instate) the prohibition against "abusing her or her City position to advance a private interest."
		<p>§4.110 DEFINITIONS: The January 2017 revisions added several other Definitions, including (among others):</p> <ul style="list-style-type: none"> "Misuse of City funds shall mean any use of City funds for purposes outside of those directed by the City, or local, state and federal law." "Wasteful and inefficient City government practices shall mean the expenditure of City funds that could 	<ol style="list-style-type: none"> To be fair, the January 2017 version does re-insert the language struck out in §4.105(a) into §4.110, Definitions on page 6 and 7, and added definitions for "misuse of City funds" and "Wasteful and inefficient City practices," with the latter restricted to wasteful expenditure of City funds not other wasteful practices. But definitions added to §4.110 did not keep the "gross waste,

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		<p><i>be eliminated without harming public health or safety, or reducing the quality of government services."</i></p> <p>[Pages 6–7]</p>	<p>fraud, and abuse of City resources" included in §4.105(a) in the Ethics Commission's version submitted to the Clerk of the Board, suggesting waste, fraud and abuse are still not covered by the proposed anti-retaliation protection amendments, because deleted in January 2017.</p>
<p>The Grand Jury was very concerned that anti-retaliation provisions in §4.115 of the WPO were overly narrow.</p> <p>"As currently written, the ordinance is very narrow. It prohibits City officers or employees from retaliating against a whistleblower only in certain specified ways: by termination, demotion, suspension, or 'other similar adverse employment action.' Lesser forms of retaliation such as non-promotion, or a reassignment without loss of grade or pay are not prohibited. Moreover, it applies only if the whistleblower has made a certain type of report alleging violation of certain laws. If a report is not one of those listed in the WPO, or if it concerns a violation that is not listed, then retaliation can occur and the victim will have no recourse under the WPO."</p> <p>[Page 7]</p>	<p>§4.115(a) PROTECTION OF WHISTLEBLOWERS — RETALIATION PROHIBITED:</p> <p>The March 2016 Ethics version reads:</p> <p>No City officer or employee may terminate, demote, suspend or take other similar adverse employment action against any City officer, or employee, or contractor operating within the scope of a contract with the City and County of San Francisco because the officer, or employee, or contractor has in good faith:</p> <p>(i) filed a complaint with the Ethics Commission, Controller, District Attorney or City Attorney, or a written complaint with any supervisory employee at the complainant's department or at another City, County, state or federal agency, alleging that a City officer or employee engaged in improper government activity by or contractor operating pursuant to a contract with the City and County of San Francisco, by: violating local campaign finance, lobbying, conflicts of interest or governmental ethics laws, regulations or rules; violating the California Penal Code by misusing gross waste, fraud or</p>	<p>§4.115(a) PROTECTION OF WHISTLEBLOWERS – CITY EMPLOYEES — RETALIATION PROHIBITED:</p> <p>The January 2017 version reads:</p> <p>No City officer or employee may terminate, demote, suspend or take other similar adverse employment action against any City officer or employee because the officer or employee has in good faith:</p> <p>(i) filed a complaint with any supervisory employee within a City agency alleging that a City officer or employee engaged in improper government activity, misused City funds, caused deficiencies in the quality or delivery of government services or engaged in wasteful and inefficient government practices; the Ethics Commission, Controller, District Attorney or City Attorney, or a written complaint with the complainant's department, alleging that a City officer or employee engaged in improper government activity by: violating local campaign finance, lobbying, conflicts of interest or governmental</p>	<p>1. Lesser Types of Retaliation Not Addressed: Neither the March 2016 nor January 2017 proposed amendments addresses the lesser forms of retaliation such as non-promotion and re-assignment, and is still restricted to termination, demotion, or suspension.</p> <p>2. Anti-Retaliation Protections for City Contractors Moved: The Ethics Commission's March 2016 proposed amendments to the WPO specifically included in §4.115(a) retaliation against both City employees and City contractors would be prohibited.</p> <p>Along came the collaboration between DHR/Board of Supervisors/Ethics Commission and it is thought with the City Controller's Office (which administers the main portion of the Whistleblower Program) in January 2017, and smack dab in the title of §4.115 the scope was narrowed to prohibit retaliation only against City employees, not City contractors. Specifically, the January 2017 version excluded from §4.115(a) that City contractors were to be protected from retaliation.</p>

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<p>The Civil Grand Jury had noted in its footnote #18:</p> <p>“¹⁸ In 2008 the Board of Supervisors passed an ordinance expanding the list of complaints covered under the anti-retaliation provision to include those complaints filed with the Controller's Whistleblower Program. Otherwise, it made no substantive changes to the anti-retaliation provisions. See Ordinance No. 205-08, approved 9/19/08; WPO, Subsection 4.115(b) (2008).” [Page 42]</p>	<p><u>abuse of</u> City resources; creating a specified and substantial danger to public health or safety by failing to perform duties required by the officer or employee's City position; or abusing his or her City position to advance a private interest,</p> <p>(ii) filed a complaint with the Controller's Whistleblower Program, or</p> <p>(iii) provided any information or otherwise cooperated with any investigation conducted under this Chapter. [Pages 4–5]</p>	<p>ethics laws, regulations or rules; violating the California Penal Code by misusing City resources; creating a specified and substantial danger to public health or safety by failing to perform duties required by the officer or employee's City position; or abusing his or her City position to advance a private interest,</p> <p>(ii)</p> <p>(2) filed a complaint with <u>any supervisory employee within a City agency alleging that a City contractor, or employee of a City contractor, engaged in unlawful activity, misused City funds, caused deficiencies in the quality and delivery of government services or engaged in wasteful and inefficient government practices</u>; the Controller's Whistleblower Program, or</p> <p>(iii)</p> <p>(3) provided any information <u>in connection with</u> or otherwise cooperated with any investigation conducted under this Chapter. [Pages 7–8]</p>	<p>Instead, the January 2017 version moved anti-retaliation protections for City contractors and their employees into a new section, §4.117 Protection of Whistleblowers – City Contractors.</p> <p>3. Waste, Fraud, Abuse Vanishes The March 2016 version specifically included in §4.115(a)(1) the “gross waste, fraud and abuse” clause that had been of concern to the Civil Grand Jury, but the January 20017 version omitted the Ethics Commission’s addition of that clause in the March 2016 version.</p> <p>4. Restricted to Supervisory Employees Throughout the March 2016 version the concept that complaints have to be filed with City government supervisory employees is troubling, and seems to create a loophole you could drive an 18-wheeler through.</p> <p>Why the Ethics Commission had added that caveat in March 2016 is not known.</p> <p>There are thousands of high-level City managers who don't have direct-reports, having a “span of control” of zero employees that they “supervise.” They’re managers, having nobody they supervise directly. If a whistleblower files a complaint against one of these managers who are not supervising anyone, will the complainants still face the prospect of retaliation?</p> <p>5. Although the Grand Jury had noted in footnote 18 that the Board of Supervisors had amended the WPO</p>

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<p>Again, the Grand Jury had been concerned that:</p> <p>“...City employees who disclose government wrongdoing or corruption to the San Francisco Chronicle, or to the California Attorney General, or to the F.B.I., or to Congress, [are] not ‘whistleblowers’ entitled to protection under the WPO.” [Page 5]</p>			<p>in 2008 to provide anti-retaliation protections for people who had filed complaints with the City Controller’s Whistleblower Program, and although the March 2016 retained existing language (had not added new language) providing anti-retaliation protections to complaints submitted to the Whistleblower Program, the January 27 proposed amendments deliberately removed — by striking out — complaints filed with the Controller’s Whistleblower Program from §4.115(a)(2).</p> <p>It is not known who at, or which of, the four-agency team eliminated complaints filed with the Controller’s Whistleblower Program, and why it was eliminated nor is it known whether the four-agency team was even aware of Ordinance #205-08, approved by the Board of Supervisors on 9/19/08, and whether WPO amendments can now simply negate extant Ordinance #205-08.</p> <p>6. Still No Protections for Filing Complaints with State and Federal Authorities, the Media, and Lawyers Although the March 2016 Ethics version had included filing complaints with other County, state, or federal agencies, the January 2017 collaborative version obliterated that provision by removing it.</p> <p>And there’s still no explicitly-stated anti-retaliation projections anywhere in §4.115(a) “Retaliation Prohibited” for whistleblower complaints</p>

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			<p>submitted to private lawyers, media outlets, law enforcement agencies, or to watchdog and whistleblower third-party private-sector agencies.</p> <p>7. First Amendment Anti-Retaliation Protections Still Missing in Action §4.115(a) still provides no retaliation protections for City employees who exercise First Amendment free speech, despite repeated prodding to include them in the WPO.</p> <p><i>The U.S. Supreme Court has consistently upheld that federal, state, and municipal employees absolutely have First Amendment rights when it comes to speaking out on issues and matters of public concern.</i></p> <p>But there’s no protections in WPO §4.115(a) to prevent retaliation against City employees for exercising First Amendment free speech.</p> <p>Sunshine Ordinance §67.22(d) currently provides that City employees shall not be <i>disciplined</i> for expressing their <i>personal opinions on any matter of public concern while not on duty.</i></p> <p><i>Doesn’t the definition of “discipline” extend to prohibiting “retaliation”?</i></p> <p>Sunshine Ordinance §67.22(e) goes further saying “public employees shall not be discouraged from or disciplined for disclosing any information that is public information</p>

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			<p>or a public record to any journalist or any member of the public."</p> <p>Sunshine Ordinance extant language in §67.22(d) and §67.22(e) should be replicated as is into WPO §4.115(a).</p>
<p>The Grand Jury noted whistleblower complainants face a burden other types of complainants do not:</p> <p>"Whistleblower retaliation complaints face an additional obstacle before the Commission, in that the WPO imposes on the complainant an extra 'burden of proof' in such cases that does not apply to any other type of complaint." [Page 6]</p> <p>The Grand Jury further noted:</p> <p>"In whistleblower retaliation cases, however, the WPO imposes an additional burden of proof on the whistleblower to show by a 'preponderance of the evidence' that retaliation occurred." ... and also noted:</p> <p>"The Commission applies this additional burden during its investigatory process. Although not a party to the proceeding, the WPO complainant must show by a 'preponderance of the evidence' that retaliation occurred or the complaint will not go forward. The Commission's investigators require the complainant to meet this burden during preliminary review of retaliation complaints and also during formal investigation. If the complainant fails to do so, the complaint is dismissed without a public hearing."</p>	<p>§4.115(b)(iii) PROTECTION OF WHISTLEBLOWERS — BURDEN OF ESTABLISHING RETALIATION</p> <p>The March 28, 2016 version reads:</p> <p>"Burden of Establishing Retaliation. In order to establish <u>that</u> retaliation occurred under this Section, a complainant <u>in a civil action must demonstrate, or the Ethics Commission in an administrative proceeding must demonstrate determine,</u> by a preponderance of the evidence that the complainant's engagement in activity protected under Subsection (a) was a substantial motivating factor for the adverse employment action. The employer may rebut this claim if it demonstrates by a preponderance of the evidence that it would have taken the same employment action irrespective of the complainant's participation in protected activity." [Pages 5–6]</p>	<p>§4.115(b)(iii) PROTECTION OF WHISTLEBLOWERS — BURDEN OF ESTABLISHING RETALIATION</p> <p>The January 2017 version contains essentially the same proposed revisions, except near the end it changes the word "employer" to "respondent" who may rebut the claim:</p> <p>...</p> <p>"The <u>employer respondent</u> may rebut this claim if it demonstrates by a preponderance of the evidence that it would have taken the same employment action irrespective of the complainant's participation in protected activity." [Page 9]</p>	<p>1. It is not known why a municipal entity within San Francisco has introduced a burden-of-proof requirement that must be demonstrated during civil actions. To some, it seems to be "over-reach" for a municipality to set the legal bar in civil actions so high.</p> <p>2. Neither the March 2016 nor the January 2017 versions of the proposed WPO amendments note that the "burden of proof" shall not apply during preliminary review of whistleblower complaints submitted to the Ethics Commission. That distinction is not included in either of the proposed versions of proposed WPO amendments, but is instead only incorporated into "Regulations" adopted by the Ethics Commission on March 28, 2016 that the Board of Supervisors had not opposed, and became effective 60 days later.</p> <p>That burden of proof will only apply during the actual adjudication of a complaint of whistleblower complaints filed with the Ethics Commission if and when such complaints are eventually scheduled for an adjudication hearing. The Grand Jury's concern this burden-of-proof standard should not apply during eventual formal investigation</p>

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<p>[Page 13]</p> <p>The Grand Jury also reported:</p> <p>"Thus, a whistleblower who complains of retaliation must 'win' the case in the eyes of the [Ethics] Commission's staff, before [the Commission] will agree to prosecute the matter. This can be difficult, because complaints to the Commission are investigated in secret."</p> <p>The Grand Jury went on to say "Requiring [complainants] to prove their claims without fully participating in the procedure places a special burden on WPO complainants that contributes to their lack of success before the [Ethics] Commission."</p> <p>The Jury's discussion of this burden of proof is worth reading fully. [Pages 12–13]</p> <p>The Grand Jury's recommendations stated, in part:</p> <p>Recommendation 4: <i>"That amendments to the WPO include a revision of Subsection 4.115(b)(iii) providing that the burden of proof set forth therein does not apply during preliminary review and investigation of administrative complaints to the Commission."</i></p>			<p>hearings was not addressed.</p> <p>Whistleblower complainants who have read the WPO, but have not read the Ethics Commissions "Regulations," will not know that this "burden-of-proof" standard will not apply during preliminary review and formal investigation of their complaints.</p> <p>And there's no guarantee that other adjudicatory bodies — such as the City Controller's Whistleblower Program or other bodies — will honor the Ethics Commission's decision to not require this burden of proof during other bodies preliminary investigations.</p> <p>Both the March 2016 and January 2017 proposed WPO amendments failed to address Grand Jury Recommendation #4 that this "burden-of-proof" standard should not apply during preliminary review and formal investigation of complaints.</p>

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<p>The Grand Jury noted:</p> <p>"Finally — and most seriously — even if a complaint clears all of these hurdles and results in a finding of retaliation, the [Ethics] Commission is unable to provide relief for the whistleblower. If a job is lost due to retaliation the [Ethics] Commission cannot restore it. All it can do is punish the guilty party." [Page 6]</p> <p>The Grand Jury further noted:</p> <p>"Another deterrent against filing a complaint for retaliation under the WPO is that while the Commission can prosecute the person who retaliates it cannot provide relief to the victim. Almost all complainants in whistleblower reprisal cases come to the Commission expecting to get their jobs back, or obtain some other form of relief, and are shocked to find that such relief is not available. Even if a job is lost due to retaliation, the Commission will not order reinstatement for the complainant or provide back pay or restoration of leave accruals, retirement credit, or other job benefits lost due to retaliation. All it can do is punish the retaliator. [Page 14]</p> <p>The Grand Jury's recommendations stated, in part:</p> <p>Recommendation 3: "That amendments to the WPO provide a meaningful remedy for the effects of retaliation, by authorizing the Ethics Commission to order cancellation of a retaliatory job action ..." [Page 20]</p>	<p>§4.115(c)(iv) PROTECTION OF WHISTLEBLOWERS — PENALTIES AND REMEDIES:</p> <p>This paragraph was misnumbered as Roman numeral "v" rather than "iv."</p> <p>The March 2016 Ethics Commission version reads in §4.115(c)(iv):</p> <p>(↔) (↔) (iv) Cancellation of Retaliatory Job Action. <u>Following an administrative hearing pursuant to Charter Section C3.699-13 and making a finding of a violation of Subsection (a), the Ethics Commission may issue an order calling for the cancellation of a retaliatory employment termination, demotion, suspension or other similar adverse employment action taken against any City officer or employee who exercised his or her right to protection under this Ordinance.</u> [Page 6]</p>	<p>§4.117(c)(2) PROTECTION OF WHISTLEBLOWERS – CITY CONTRACTORS PENALTIES AND REMEDIES — REDRESS FOR RETALIATORY ADVERSE ACTION</p> <p>Note the difference between §4.115(c)(iv) in the March 2016 version and §4.117(c)(2) in the January 2017 version.</p> <p>The January 2017 version reads in §4.117(c)(2), Redress for Retaliatory Adverse Action:</p> <p><u>"Following an administrative hearing and after making a finding that an adverse action has been taken for purposes of retaliation, the Ethics Commission may, subject to the Charter's budgetary and contracting provisions, order the cancellation of retaliatory adverse action taken against a City contractor or employee of a City contractor."</u> [Page 13]</p>	<ol style="list-style-type: none"> Amendments to §4.115(c)(3) of the WPO in both the March 2016 and January 2017 versions increase the amount of civil penalties that City employees who engage in retaliation against another City employee may personally be liable for from \$5,000 to \$10,000, which will increase with changes in the cost of inflation in the California Consumer Price Index annually. And although the March 2016 version had commendably attempted to introduce language to permit the Ethics Commission to cancel/reverse retaliatory employment actions — including wrongful termination and other adverse actions for City employees — that language was removed by the four-agency "collaborators" once they got their hands on it and issued the January 2017 updated proposed amendments. <p>And again, it is not known who at, or which of, the four-agency team eliminated the Ethics Commission's March 2016 proposed §4.115(c)(iv) amendment to have authority to consider cancelling retaliatory job actions, or why it was eliminated and vanished from the January 2017 proposed amendments.</p> <ol style="list-style-type: none"> Remarkably, the January 2017 version deliberately removed cancellation of retaliatory job actions for City employees, but retained cancellation of retaliatory job actions for employees of City contractors. How's that for a

<p>Issues of Concern in Civil Grand Jury Report on “Whistleblower Protection Ordinance” May 2015 ¹</p>	<p>Ethics Commission Proposed Amendments Submitted to Clerk of the Board Angela Calvillo March 28, 2016 ²</p>	<p>Four-Agency * WPO † Proposed Amendments Collaborative Revisions January 17, 2017 ³</p>	<p>Discussion of DHR/Board of Supervisors/Ethics Commission/City Controller “Artful Dodger” Misdirection</p>
			<p><u>double-standard?</u></p> <p>The January 2017 proposed WPO amendments failed to address Grand Jury Recommendation #3 the Ethics Commission should be able to order cancellation of retaliatory job actions against City employees.</p> <p>Why do City contractor employees have a form of “redress” for job reinstatement that won’t be provided to actual City employees?</p> <p>It is worth repeating that the March 28 version Ethics submitted to the Clerk of the Board had included in:</p> <ul style="list-style-type: none"> a. §4.115(c)(iv) that the cancellation of retaliatory job actions would apply only to City employees, not to City contractors, but the January 2017 amendment changes created §4.117(c)(2), permitting cancellation of retaliatory job actions for City contractors, and removed that remedy for City employees in §4.115(c)(iv). b. §4.105(a) that a whistleblower could reports involving “<i>improper government activity</i>” by either City employees or City contractors, the January 2017 proposed changes in §4.105(a) allow complaints of improper activities by City employees, and only complaints involving contractors who engage in unlawful activity, as if contractors don’t also engage in improper activities.

Issues of Concern in Civil Grand Jury Report on “Whistleblower Protection Ordinance” May 2015 ¹	Ethics Commission Proposed Amendments ² Submitted to Clerk of the Board Angela Calvillo March 28, 2016	Four-Agency [*] WPO [†] Proposed Amendments ³ Collaborative Revisions January 17, 2017	Discussion of DHR/Board of Supervisors/Ethics Commission/City Controller “Artful Dodger” Misdirection
		<p><u>§4.115(f) WHISTLEBLOWER PROTECTION AWARENESS TRAINING</u></p> <p><i><u>(1) The Controller, in collaboration with the Ethics Commission, shall prepare, and all City departments shall distribute, materials to publicize and promote whistleblower protections as part of each department’s new hire training programs.</u></i></p> <p><i><u>(2) The Ethics Commission, Controller, and Department of Human Resources shall collaborate to ensure that whistleblower protection information and training is developed and implemented by January 1, 2018.</u></i></p> <p>[Page 11]</p>	<p>Neither the Grand Jury’s May 2015 report nor the proposed March 2016 amendments the Ethics Commission submitted to the Clerk of the Board in April 2016 had mentioned training of employees.</p> <p>The new §4.115(f), “<i>Whistleblower Protection Awareness Training</i>” In the January 2017 version obviously doesn’t go far enough, first because it doesn’t call for re-training of existing employees on changes to the WPO, just training new-hires.</p> <p>Second, providing “<i>awareness</i>” training isn’t the same as providing “<i>prevention</i>” training. The City’s Department of Human Resources requires — and has for a number of years — that every City employee who does, or could potentially, supervise other employees is required to take and complete an on-line sexual harassment prevention training module, and are required to sign a certificate submitted to departmental HR offices that they completed the mandatory on-line training.</p> <p>This new section should be revised to require on-line training annually for all employees, not just new hires.</p>

¹ City and County of San Francisco, Civil Grand Jury 2014–2015, report “*San Francisco’s Whistleblower Protection Ordinance Is in Need of Change*,” May 2015, posted on the Civil Grand Jury’s web site in early June 2015.

² San Francisco Ethics Commission, “*Proposed Whistleblower Ordinance Amendments*,” adopted at the Ethics Commission on March 28, 2016 and transmitted to the Board of Supervisors Clerk of the Board, Angela Calvillo on April 11, 2016, obtained on March 8, 2017 in response to a public records request to San Francisco’s Ethics Commission.

³ City and County of San Francisco, Campaign and Government Conduct Code, proposed ordinance “*Expanding Scope of Whistleblower Protection Ordinance*,” PDF file titled with date of January 17, 2017, obtained on March 2, 2017 in response to a public records request to San Francisco’s Department of Human Resources.