

# SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

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## MEMORANDUM

**TO:** Deputy General Manager

**DATE:** July 10, 2009

**FROM:** General Counsel

**SUBJECT:** Draft Citizen Oversight Model

As I have previously advised the Board of Directors, several legislative and structural changes of the District will be required in order to facilitate implementation of the developing citizen oversight model. With the diligent work of the committee now moving towards a solid and substantial framework I am able to identify what will need to be accomplished in order to implement the committee's plan.

1. General Legislative Changes Required.
  - A. Independent Auditor Position. Although the Board currently has the authority to create such staff positions, to the extent that any such new position would report directly to the Board, as opposed to reporting to the General Manager, new legislation would be required. The current law provides that all positions other than the General Manager, General Counsel, Controller, Treasurer and District Secretary ("Board appointed officers") report to the General Manager. The duties of the Independent Auditor as described in the Draft Model would need to be described in the new legislation and removed from the current statutory authority of the General Manager.
  - B. The role of the BART Board itself would also need legislative change. The current law states that the BART Board is the legislative body of the district and, consistent with the provisions of this part, shall determine all questions of policy. It does not provide for any role in discipline of any employees other than the Board appointed officers. The role the BART Board plays in the interplay between the Independent Auditor and the Citizen Review Board in the draft model is one of a potential decision-maker in discipline of non Board appointed officers. This carries with it several complications that I will discuss below in the general comment section, but also would require a legislative change in that the General Manager is currently the one with the statutory authority to discipline members of the police department.
2. Other General Comments.
  - A. The Draft Model does not, on its face, take into account the Skelly rights of public employees facing discipline. As a general matter, public employees, when facing discipline, have a constitutional right to due process prior to that discipline being issued. That due process includes a right to a statement of charges against them, a copy of all documents upon which that discipline may be based and an

opportunity to appeal to an independent decision-maker prior to the discipline being finalized (a "pre-disciplinary hearing.") The Draft Model does not expressly recognize this right, although it may intend to take it into account. It could arguably be solved by noting that all discipline, wherever issued in this Model, will be subject to the predisciplinary hearing process prior to its implementation. The point here being that the decision would not be final, as the Model says, but would be final subject to compliance with applicable constitutional due process rights.

Additionally, this Model contemplates that disagreements among parties to the process be documented. All this documentation would arguably be due the subject employee prior to any disciplinary decision being finalized.

Finally, to the extent the Board of Directors is taking action on employee discipline, the Brown Act must be complied with. Requirements in this regard include the posting of a notice of a Board meeting identifying the subject and an opportunity for the employee to address the Board in public if that employee so desires. In addition, the action may need to be announced in public and this would need to comport with the Police Officer Bill of Rights and prohibitions against making discipline of police officers public. This aspect of the plan could be very complicated and may not be workable. If unworkable, new legislation would be required.

B. The Model does make ample reference to compliance with the Peace Officers Bill of Rights as well as other confidentiality laws, but I would suggest that these aspects be highlighted. Many references are made to reports being made to the public, and I would add "to the extent permitted by law" to each such instance. The intricacies of navigating these rules will require that the Independent Auditor be someone well versed in these subjects.

C. All aspects of this Model, to the extent they conflict with the applicable labor contracts and are mandatory subjects of bargaining, may need to be negotiated with the police associations. Bargaining is currently ongoing and it is my understanding that at least some of these issues are being discussed.

3. Other suggestions to clear up what may be ambiguities.

A. 1-04.D. It is unclear when this Mediation is intended to occur. I assume it is after an investigation is completed, but this does not say.

July 10, 2009

Page 3

- B. 1-04.E.iii. I would add that updates will be given to the complainant "to the extent permitted by law." The confidentiality and bill of rights requirements will influence what information may be released.
- C. 1-04.G. This provision indicates that the policy recommendations will be approved by the Citizen Board. The BART Board, by statute, is the policy setting entity for the District. If the approval of these policy recommendations by the Citizen Board is just a step towards approval of them by the BART Board then this would not be a problem.
- D. 2-02. As the compensation has yet to be determined, when it has been decided this section should make it clear that service on the Citizen Board is voluntary and comes with some sort of stipend or reimbursement for expenses.
- E. Running a background check, depending on the circumstances, may require compliance with the Fair Credit Reporting Act.
- F. 2-04. Removal of members by a vote of the Board of Directors brings with it the issues discussed above of possible hearings and other due process rights. Removal by a vote, whether majority or supermajority, of the Citizen Board is likely to not have those issues. Separately, this section does not address how members are removed if the reason is other than those 3 listed in the section (i.e. it doesn't say how a member who misses 4 meetings is removed.)

As you requested, I will attend the July 13<sup>th</sup> meeting of the committee in the BART Board Room.



Matt Burrows

cc: General Manager  
Associate General Counsel