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February 21, 2008

Assistant Sheriff Jack Anderson
Orange County Sheriff's Department
550 North Flower Street
Santa Ana, California 92703

RE: Appearance and Remarks Before the San Clemente City Council on November 20, 2007

Assistant Sheriff Anderson:

On January 17, 2008, the Attorney General received a complaint requesting an investigation into your appearance in uniform at a meeting of the San Clemente City Council on November 20, 2007. At this meeting you addressed the Council in opposition to a resolution or motion before it. This resolution proposed sending a letter from the Council to the Orange County Board of Supervisors, the purpose of which was to urge the Supervisors to appoint former Sheriff's Lieutenant Bill Hunt to the office of Sheriff, in the event that then Sheriff Carona were to vacate his office.

The complaint asserted that your actions violated two separate statutes: 1) Government Code section 3206, in that your appearance and remarks to the Council, while in uniform, constituted participating "in political activities of any kind while in uniform," and 2) Penal Code section 424, misuse of public monies, in that your activities in connection with your appearance were facilitated by the use of county property, staff or resources to prepare your remarks or a county car to drive to and from the council meeting. (See, *People v. Battin* (1978) 77 Cal.App.3d 635; *People v. Sperl* (1976) 54 Cal.App.3d 640.)

Upon receipt of this letter, the Attorney General's Office shared it, supporting documents and a video of the November 20 council meeting with the Orange County District Attorney's Office, as the District Attorney has primary responsibility for the investigation and prosecution of public offenses within his county (Gov. Code, § 26500). Our two offices have since coordinated a review of this matter based on the District Attorney's role as the public prosecutor and the Attorney General's supervisory role over both the District Attorney and the Sheriff (Cal. Const., art. V, § 13; Gov. Code, §§ 12550, 12560).

The facts underlying the complaint are not subject to dispute.

At the time of your appearance before the Council, the Sheriff of Orange County was on a self-imposed leave in the wake of his October 30 indictment by a federal grand jury. Day-to-day operations of the Sheriff's Department were under the direction of Undersheriff Jo Ann Galisky. You held the rank, as you now do, of Assistant Sheriff. Accordingly, you were then subordinate to Sheriff Carona and Undersheriff Galisky.

On November 20, 2007, the San Clemente City Council was considering the afore described resolution which proposed the sending of a letter to the Orange County Board of Supervisors recommending that the Board appoint Lieutenant Bill Hunt as Sheriff in event that then Sheriff Michael Carona were to resign from office. A review of the video of the Council meeting establishes that you appeared in full Sheriff's Department uniform, including your sidearm, and spoke in opposition to the resolution. In your prepared remarks you initially stated that you were there to urge the Council not to endorse any particular person to fill the potential unexpired term of the office of Sheriff and disclaimed any aim to cast aspersions on Mr. Hunt or any other person.

After pointing out the contractual relationship between the Sheriff's Department and the City of San Clemente since 1993, under which that department provided law enforcement services to the City, you mentioned the history of low crime rates in South Orange County, which includes San Clemente. You reminded the Council that they "lived in one of the safest communities in the nation," and that your department's annual surveys for that area indicated that 96% of the respondents felt safe in their communities. You then asked, "What law enforcement services is the Council not receiving that warrants this letter?" You then asked, "If you're pleased with the law enforcement services provided to the City, it is inappropriate to undermine the men and women of the Orange County Sheriff's Department in furthering a political agenda that does not in any way directly benefit the City."

You repeated and reiterated these warnings that approval of the proposal before the Council threatened the delivery of law enforcement services to the Council's constituents, more than once in the following statements:

- "It is my belief that this proposed letter serves to undermine the men and women of the Sheriff's Department, your law enforcement contract partner, and the very deputies protecting your community tonight, and the Department's ability to effectively and efficiently deliver the quality service that your constituents have come to expect."

- “Your constituents reside in one of the safest communities in the nation, 96% feel safe. . .”
- “Again I ask the Council—what benefit are your constituents to receive that warrants this letter that injures your partner in public service?”
- “I ask that the Council carefully reflect if this letter is intended to serve its constituents. In any form, this letter serves to undermine your law enforcement contract partner who has so faithfully provided quality law enforcement services for the past fourteen years.”

These comments, made while in uniform, could reasonably be interpreted (and have been by some observers) as being made on behalf of the Sheriff’s Department and implying that the law enforcement services supplied to the City by the department would be in jeopardy should the Council not agree to your suggestion to not send the letter endorsing Lt. Hunt as a replacement for the then sitting Sheriff, should he vacate office.

You also argued that a vote to send the letter would undermine the County’s defense of a lawsuit brought by Mr. Hunt challenging his demotion by Sheriff Carona after he unsuccessfully campaigned for the office of Sheriff in 2006. In addition despite your earlier stated intention to not cast aspersions on anyone, you essentially argued that Mr. Hunt was not qualified to hold the position of either Undersheriff or Assistant Sheriff under the recently re-instated County regulations and suggested that the Board of Supervisors would not promote him to Sheriff since he was not qualified to hold these lesser offices.

Given the undisputed facts, the Attorney General has concluded, with the concurrence of the District Attorney, that your appearance before the San Clemente City Council on November 20, 2007, in conjunction with your remarks in opposition to the resolution before the Council constitutes “political activity” within the meaning of Government Code section 3206. Having done so in full Sheriff’s Department uniform therefore constitutes a violation of that section. Court cases that discuss political activity as well as the plain meaning of the words “political activity of any kind” support a broad interpretation of this language and the conclusion we have jointly reached.

In *California Common Cause v. Duffy* (1987) 200 Cal.App.3d 730, the Court of Appeals dealt with the very events that prompted the enactment of Government Code section 3206. **Quoting the Supreme Court, the opinion stated that, “a public agency pursues a proper 'informational' role when it simply gives a 'fair presentation of the facts' in response to a citizen's request for information . . . [A] fair presentation of the facts will necessarily include all consequences, good and bad.”** (*Duffy, supra*, 200 Cal.App.3d at p. 747, quoting *Stanton v. Mott* (1976) 17 Cal.3d 206, 220-221 (emphasis added).) In that case a County Sheriff authorized his deputies to pass out, while in uniform, post cards advocating the resignation of the Chief Justice of the California Supreme Court, and failing that, to defeat her reelection. At the time

there was no election pending. The court found this to be “clearly partisan political activity, not informational activity.” (*Ibid.*)

The court pointed out that in the case before it, “The postcards did not merely present the facts both good and bad as to the Chief Justice's tenure or her judicial opinions but rather argued only one side. Distribution of these postcards was therefore not ‘informational’ activity; it was political.” (*Duffy, supra*, 200 Cal.App.3d at p. 748). Furthermore, the court ruled that the lack of political party involvement did not render the practice non political or “non-partisan.” “In the context of use of public office and funds to advance a position, “partisan” means favoring one side or the other, not the presence of political parties.” (*Ibid.*)

Noting that the Legislature has declared “that political activities of public employees are of significant statewide concern,” the court stated that:

The importance of governmental impartiality in electoral matters finds explicit expression in a number of recent decisions '[A] fundamental goal of a democratic society is to attain the free and pure expression of the voters' choice of candidates,' . . . [and] 'our state and federal Constitutions mandate that the government must, if possible, avoid any feature that might adulterate or, indeed, frustrate, that free and pure choice....
(*Duffy, supra*, 200 Cal.App.3d at p. at 746.)

The election or appointment of a particular person to a public office, such as county sheriff, is a “political” matter within this context. Accordingly, any activity directed toward affecting that matter constitutes “political activity.” Thus, the issue before the Council that evening was a political one. The City Council did not solicit your input or that of the Sheriff's Department on the resolution before it. As noted above, the video recording confirms that you characterized the pending resolution and letter as involving a “political agenda.” Furthermore, while initially asserting that you wished the Council to endorse no one, clearly in the context of the meeting, your remarks amounted to an opposition to a Council endorsement of Mr. Hunt as a replacement for the then sitting Sheriff should he vacate the office. In addition while not actually stating so, your statement that Mr. Hunt did not meet the qualifications to be Undersheriff, in the context in which this statement was delivered, could reasonably have been interpreted (and has been by some observers) as averring that Mr. Hunt did not meet the legal qualifications of Sheriff. This is clearly erroneous. Given all of these factors, your remarks at that meeting do not appear to fall within the meaning of “informational,” but rather were “political” in nature.

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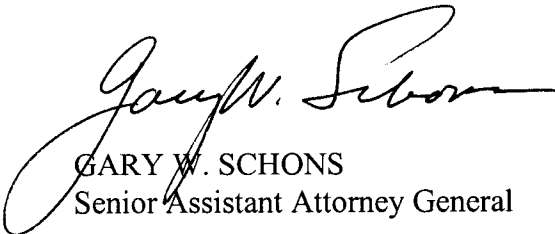
While as with any private citizen, you had every right to address the City Council and oppose the resolution (or any other political matter) on whatever grounds you saw fit, you did not have the right to do so in the uniform of a public law enforcement official. (*Monitor Patriot Co. v. Roy* (1971) 401 U.S. 265, 272; Govt. Code, § 3302(a).) While violation of Government Code section 3206 is not a crime, it is a violation of law that could be the subject of a civil suit or other proceeding against an office holder including and up to removal from office. (In addition, to the extent you may have used any county resources to facilitate your appearance and remarks, you could have committed a violation, albeit *de minimis*, of Pen. Code, § 424.)

In our joint review of this matter, we are mindful of your full cooperation with that review, and the sincerity of your belief that you were not in violation of the law but in good faith believed that you were engaging in appropriate Department business. We also take note that your decision to appear in uniform was made at the last minute, without consultation with legal advisors and after the then Undersheriff, your superior, suggested your appearance in uniform would be appropriate and in furtherance of the Departmental business. We also accept that your motivations were based on a concern for morale within your Department which had suffered and was only recently recovering from a recent fractious election contest between the then sitting Sheriff and other challengers including Mr. Hunt. Finally, this office shares the concern that the recent indictment of the former Sheriff, followed by his resignation and the resulting changes in leadership may have adversely impacted the operations and the morale of the men and women who serve the vital public safety responsibilities of the Sheriff's Department. For these reasons we have concluded that action beyond this advisement and warning is not warranted.

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With the concurrence of the District Attorney, the Attorney General has therefore decided to issue this letter as a warning and advisement that the conduct of speaking before the San Clemente City Council while in uniform on November 20, 2007, while done in good faith without the intent to break the law, was nevertheless in violation of Government Code section 3206 in that it constituted engaging in "political activity" while in uniform. Based upon the supervisory power granted Attorney General under the fore cited Constitutional and statutory authority, you are hereby advised and directed to avoid such practices in the future and as interim head of the Sheriff's Department to ensure that the members of your Department do so as well. In this regard you should remain mindful that the term "political activity of *any* kind" should be given the broadest possible interpretation to guarantee the effectuation of the intent behind the law, which is to avoid potential governmental interference in, or intimidation of, the democratic process.

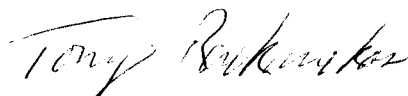
Sincerely,



GARY W. SCHONS
Senior Assistant Attorney General

For EDMUND G. BROWN JR.
Attorney General

I respectfully concur in the above findings and conclusions,



TONY RACKAUCKAS
District Attorney
County of Orange

GWS:clh

cc: Darryl R. Wold, Esq.
Counsel for Assistant Sheriff Anderson

Judith M. Fouladi, Esq.

Timothy Whitacre

Benjamin De Mayo, Esq.
County Counsel