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against:

#### CITY AND COUNTY OF SAN FRANCISCO

#### ADMINISTRATIVE PROCEEDINGS FOR DEBARMENT

ORDER OF DEBARMENT

[Administrative Code Chapter 28]

Ed Harrington, Controller and the charging official in the debarment proceedings against San Francisco League of Urban Gardeners, consistent with the findings and recommendation of the hearing officer (attached), hereby issues an Order of Debarment against the San Francisco League of Urban Gardeners, its successors, assigns, and affiliates. The debarment period shall be two years from July 8, 2004.

In the matter of debarment proceedings

SAN FRANCISCO CONTROLLER Ed

SAN FRANCISCO LEAGUE OF

URBAN GARDENERS, by

Harrington, Charging Official.

Ed Harrington

Controller and Charging Official

## CITY AND COUNTY OF SAN FRANCISCO



DENNIS J. HERRERA City Attorney

## FILE COPY

## OFFICE OF THE CITY ATTORNEY

SHERYL L. BREGMAN Deputy City Attorney

DIRECT DIAL: (415) 554-4226

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January 13, 2005

Roger Gordon, President Board of Directors San Francisco League of Urban Gardeners 2088 Oakdale Avenue San Francisco, California 94124

Roger Gordon, Executive Director Urban Solutions 1083 Mission Street, 2<sup>nd</sup> Floor San Francisco, California 94103-2812

Re: Debarment of the San Francisco League of Urban Gardeners

Dear Mr. Gordon:

On behalf of the City and County of San Francisco Controller, I am enclosing a copy of the Order of Debarment in this matter.

Very truly yours,

DENNIS J. HERRERA City Attorney

SHERYL L. BREGMAN Deputy City Attorney

cc: Ed Harrington, Controller
Loretta M. Giorgi, Chief Attorney
Joan Lubamersky, Hearing Officer
c/o Marie Corlett Blits, DCA

# CITY AND COUNTY OF SAN FRANCISCO ADMINISTRATIVE PROCEEDINGS FOR DEBARMENT

In the matter of debarment proceedings

SAN FRANCISCO LEAGUE OF URBAN GARDENERS, by

SAN FRANCISCO CONTROLLER Ed Harrington, Charging Official.

ORDER OF DEBARMENT
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Ed Harrington

Controller and Charging Official

 against:

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Against

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## CITY AND COUNTY OF SAN FRANCISCO

## ADMINISTRATIVE PROCEEDINGS FOR DEBARMENT

## HEARING OFFICER JOAN LUBAMERSKY

In the Matter of Debarment Proceedings

SAN FRANCISCO LEAGUE OF URBAN GARDENERS, by

SAN FRANCISCO CONTROLLER, Ed Harrington, Charging Official.

FINDINGS AND RECOMMENDATION BY THE HEARING OFFICER

**ISAN FRANCISCO ADMINISTRATIVE** CODE CHAPTER 12G AND CHAPTER 28]

The Hearing Officer, having considered the evidence and legal arguments presented by the Controller, reaches the following Findings and Recommendation as to the Controller's proposed debarment of the San Francisco League of Urban Gardeners ("SLUG").

#### **FINDINGS**

- On July 8, 2004, the Controller issued Counts and Allegations against SLUG under 1. San Francisco Administrative Code Chapter 12G and Chapter 28 ("Counts and Allegations"), based on the Controller's determination that SLUG inappropriately used City resources and public funds to participate in an attempt to influence the December 2003 mayoral run-off election. [July 8, 2004 Controller letter to SLUG.]
  - 2. Following issuance of the Counts and Allegations:
    - SLUG requested an administrative hearing on the Counts and Allegations. [July 9, 2004 Roger Gordon letter to the Controller.]1
    - The Controller requested appointment of a Hearing Officer to conduct the

Administrative Code §28.6: "Within 15 days after receipt of the Counts and Allegations, the contractor may submit a written request for an administrative hearing. The contractor may make such request through counsel or other authorized representative. Any such request shall be filed with the Controller and copied to the charging official."

hearing, who was appointed July 22nd. [July 13, 2004 Controller letter to the Director of Administrative Services; July 22, 2004 letter from the Director of Administrative Services to the parties.]<sup>2</sup>

- The Hearing Officer wrote the parties in late July, requesting identification of any City contract(s) at issue. [July 28, 2004 Hearing Officer's letter to the parties.] The Hearing Officer wrote the parties on August 4, 2004, scheduling a pre-hearing conference for the third week of September, with specified pre-hearing filings due in advance from both parties, and scheduling hearing on the merits for mid-October 2004 (the parties were given a choice of four dates).

  [August 4, 2004 Hearing Officer's letter to the parties.]
- SLUG informed the Hearing Officer in early September that it had decided not to
  proceed with the requested administrative appeal hearing. [September 8, 2004
  Roger Gordon letter to the Hearing Officer, "The San Francisco League of Urban
  Gardeners has decided not to pursue its appeal of the City Controller's July 8,
  2004 decision barring it from receiving City contracts for two years... we make
  no admissions of any kind."]
- The Controller submitted a Brief of Points and Authorities Supporting

  Debarment with a cover letter, asking the Hearing Officer to make Findings and

  Recommendation of debarment pursuant to Administrative Code §§12G.4 and

  28.7 ("we consider [SLUG's] withdrawal to be a failure to respond under

  Administrative Code §28.7<sup>3</sup> and request that you proceed under that section").

Administrative Code §28.8: "A charging official shall request either the Controller or the Director of Administrative Services to appoint a hearing officer for any debarment proceeding. If either the Controller or the Director of Administrative Services is the charging official then he or she shall request the other to appoint the hearing officer. Within 15 days of the request, the Controller or the Director of Administrative Services shall appoint a hearing officer and notify the contractor and the charging official of the appointment. The notice of appointment shall include the name of the hearing officer. The contractor or the charging official may object to the appointed hearing officer within five business days of the notification."

<sup>&</sup>lt;sup>3</sup> Administrative Code §28.7: "Failure of the contractor to submit to the City a written request to be heard within the time required by this Chapter, or failure of the contractor or the contractor's representative to appear for a requested hearing that has been duly noticed, shall be deemed admission by the contractor to (continued on next page)

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[Controller's September 9, 2004 letter to	the Hearing Officer, an	d Brief of Points
and Authorities Supporting Debarment.]		

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- The Hearing Officer responded to the parties, stating in part: "This is written to confirm my understanding that by withdrawing the previously submitted request for hearing SLUG has chosen not to appear or participate in a hearing, and that I (as the Hearing Officer) should proceed to make a determination on evidence submitted by the Charging Official as provided by Section 28.7. If Mr. Gordon/SLUG disagree with this understanding, they should notify me in writing immediately and no later than noon on Tuesday October 12, 2004. In the absence of SLUG's participation, the Controller shall present evidence in writing in support of the Charges and Allegations, together with proposed Findings and Recommendation, no later than noon on Wednesday October 20, 2004." (The evidentiary documents that were referenced in the Controller's July 8th Counts and Allegations and the Controller's September 9th Brief of Points and Authorities were not attached to either of those documents and had not been otherwise submitted to the Hearing Officer.) [October 7, 2004 Hearing Officer's letter to the parties.
- SLUG did not respond to the Hearing Officer's October 7th letter.
- On October 20, 2004 the Controller submitted a Revised Brief of Points and Authorities Supporting Debarment with attached evidentiary Exhibits A through H, a Declaration of Timothy Armistead in Support of Debarment with attached evidentiary Exhibits 1 through 14, and Proposed Findings and Recommendation by the Hearing Officer. [October 20, 2004 Controller's submittals.]
- The Hearing Officer scheduled further submittals, regarding redactions in the

## (footnote continued from previous page)

the Counts and Allegations. In accordance with the procedures set forth below, the charging official shall present evidence in support of the debarment to the appointed hearing officer and the hearing officer shall make a determination on such evidence."

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evidentiary documents received October 20th. [October 27, 2004 Hearing Officer's letter.]

SH CITY ATTORNEY'S OFFICE

- The Controller submitted Charging Official's Supplemental Brief of Points and Authorities Concerning Redactions, a Redaction Log, Supplemental Declaration of Timothy Armistead, and Declaration of Sheryl L. Bregman with attached additional material (including some but not all of the redacted material) for the interview transcripts that constituted Exhibits 5, 7, and 13. [November 10, 2004 Controller's submittals.]
- The Hearing Officer scheduled further submittals, regarding authentication of certain evidentiary documents and the correlation between various evidentiary documents. [November 23, 2004 Hearing Officer's letter.]
- The Controller responded by explaining the correlation, but declining further submittals and offering an *in camera* review of documents that had been redacted. [December 7, 2004 Controller's letter to the Hearing Officer.]
- The Hearing Officer scheduled submittal of points and authorities on in camera issues. [December 15, 2004 Hearing Officer's letter.]
- The Controller responded with a letter and a Second Supplemental Declaration of Timothy Armistead, which provided additional authentication of evidence previously submitted, and which withdrew the interview transcripts and a newspaper article that had been previously submitted: Exhibits 4, 5, 7, 9, 10, 11, 13, and 14, and Exhibit G, were withdrawn. Exhibits A through F and H, and witness declarations comprising Exhibits 1, 2, 3, 6, 8, and 12, remain in evidence. [December 27, 2004 Controller's letter and Second Supplemental Declaration of Timothy Armistead.]
- 3. The Counts and Allegations are based on activities performed by SLUG while under contract with the City. The City, by its Department of Public Works ("DPW"), awarded a Contract to SLUG on August 12, 1998, by Order No. 171,190 (the "SLUG Contract"). [Controller's Exh. A.] Under the SLUG Contract, SLUG agreed to operate a Temporary Employment Program ("TEP"), a

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- 4. The Controller has provided credible evidence, in the form of witness declarations and supporting payroll and controller's office records, that in November and December 2003, SLUG deployed its TEP workers in political activity while seeking reimbursement from the City as if the workers were properly engaged in street cleaning.
- 5. The Controller has provided credible evidence that on Sunday, November 23, 2003, a day off for many SLUG workers, SLUG management directed certain workers to attend a debate among the candidates for Mayor. SLUG management told the workers that they would be paid overtime for attending the event on their day off. SLUG Executive Director Jonathon Gomwalk and SLUG supervisors directed the workers that they were there to support a particular candidate. At the direction of their supervisors, the workers voiced support for a particular candidate and opposition to the opposing candidate. The workers' time sheets indicate that workers involved in the November 23 event were paid overtime for that week, but that the overtime was allocated to days other than November 23. The City paid SLUG for this time. [Exhibit 1; Exhibits B, H.]
- 6. The Controller has provided credible evidence that on or about December 2, 2003, SLUG engaged in the following political activities:
  - SLUG management re-directed workers from their regular work assignments to attend a "garage meeting" at SLUG headquarters;
  - At the garage meeting, Jonathon Gomwalk, executive director of SLUG, talked about the upcoming runoff election and directed and/or urged the workers to vote for a particular candidate for Mayor and a particular candidate for District Attorney.

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- Gomwalk conveyed to the group that if the workers failed to vote for SLUG's chosen candidates, the workers would not be paid and/or that SLUG would lose its funding.
- SLUG supervisors further directed workers in private conversations that failure to vote according to Gomwalk's instructions would result in loss of pay, loss of a day's work, or termination.
- Following the garage meeting, workers were driven in SLUG vans to the election headquarters of a candidate for District Attorney to attend a campaign speech by that candidate.
- After the campaign speech, SLUG workers were taken in non-SLUG vans to City Hall where SLUG management directed the workers to vote by absentee ballot for a particular candidate.

[Exhibits 1, 3, 6, 8.]

- The Controller has provided credible evidence that SLUG paid its workers for the above-described political activities on December 2, 2003; SLUG invoiced the City as if the workers had been performing their regular street-cleaning duties; and the City approved and paid SLUG's invoices for the pay period that included December 2, 2003. [Exhibits 1, 2, 3, 6, 8; Exhibits B, D.]
- The Controller has provided credible evidence that on December 5, 2003, a SLUG 8. supervisor took an additional worker, who did not work on December 2, to vote by absentee ballot at City Hall; the SLUG supervisor, indicating orders from the "front office," directed the worker to vote for a particular candidate; and a SLUG supervisor threatened a loss of pay for failure to vote. [Exhibit 2; Exhibits B, D.]
- 9. The Controller has provided credible evidence that SLUG paid the worker described in Paragraph 8, above, his/her full wages for December 5, 2003; SLUG invoiced the City as if the workers had been performing their regular street-cleaning duties; and the City approved and paid SLUG's invoices for the pay period that included December 5, 2003. [Exhibits C, H.]
- The Controller has provided credible evidence that on December 9, 2003, the date of 10. the run-off election, SLUG management deployed at least six workers in political activity. Such

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political activity included canvassing neighborhoods with door hangers, knocking on doors to encourage voters who had not yet come to the polls, and carrying signs supporting a particular candidate. [Exhibits 1, 3, 6, 8; Exhibit E.]

- 11. The Controller has provided credible evidence that SLUG paid workers who engaged in the December 9 electioneering activities for the day as if the workers had performed their normal street-cleaning duties under the Contract. In February 2004 SLUG withdrew its payroll for December 9 from its payment request that had been submitted to the City. SLUG's withdrawal of the December 9 billing does not excuse its improper deployment of SLUG workers who, under the City Contract, should have been cleaning the streets. SLUG also did not withdraw its payment request for the hours for any other day SLUG workers performed political activity rather than cleaning the streets. [Exhibits 1, 3, 6, 7; Exhibits B, D.]
- 12. San Francisco Administrative Code Chapter 12G, Prohibition On Use Of Public Funds For Political Activity By Recipients Of City Contracts, Grants, And Loans, provides in part as follows:

#### SEC. 12G.1. PROHIBITION.

No funds appropriated by the City and County of San Francisco for any contract, grant agreement, or loan agreement may be expended for participating in, supporting, or attempting to influence a political campaign for any candidate or ballot measure.

#### SEC. 12G.4. PENALTIES.

If the Controller determines that any recipient of a contract, grant agreement, or loan agreement has violated this Chapter, the violation shall be deemed a material breach of the contract, grant agreement, or loan agreement and the recipient of the contract, grant agreement, or loan agreement shall be barred for two years from receiving any City contract, grant agreement, or loan agreement.

13. San Francisco Administrative Code Chapter 28, Administrative Debarment Procedure, provides that any contractor found to have engaged in any willful misconduct with respect to the City contract shall be debarred from contracting with the City. [Administrative Code §28.3.] Such willful misconduct may include, but need not be limited to, failure to comply with the terms of a contract or with provisions of this Administrative Code. [Id.]

14. SLUG violated Administrative Code §12G.1. It expended City funds in campaign
activities. In November and December 2003, SLUG directed and required its workers to participat
in, support, and attempt to influence political campaigns. SLUG then sought and received
reimbursement from the City for at least a portion of the salaries paid for the political activity

15. The Hearing Officer observes that although these Findings and Recommendation are issued several months after the Counts and Allegations were originally issued in July 2004, the time lag was necessitated by SLUG's initial request for a hearing, that was later withdrawn; the Charging Official's delayed transmittal of evidence to the Hearing Officer; and due process and other concerns raised by some of that evidence. Even though the contractor here chose not to participate in the administrative hearing, the Charging Official was still required to "present evidence in support of the debarment to the appointed hearing officer," and "the hearing officer shall make a determination on such evidence." [Administrative Code §28.7; see also Section 28.3, requiring that the hearing officer's findings warranting debarment be based on evidence presented.]

The Hearing Officer did not receive any evidence from the Charging Official until late October, and that evidence included eight redacted transcripts of interviews with witnesses who did not submit authenticating declarations. Those interview transcripts were later withdrawn by the Charging Official, on December 27, 2004, following the Hearing Officer's inquiries regarding authentication and related issues. In providing evidence to the Hearing Officer, the Charging Official also included an internal SLUG investigative report that concluded any violations were minimal and attributable to well-intentioned but inappropriate judgment on the part of a few individuals for a brief time, and further concluded that serious City sanctions would not be justified. The Hearing Officer has fully considered this SLUG report, along with the other evidence submitted by the Charging Official that remains in the record.

Although as the Charging Official points out in his December 27th letter, Chapter 28 states that "proceeding as expeditiously as possible is in the public's best interests" [citing Administrative Code §28.9], the Hearing Officer notes that Chapter 28 also recognizes that the City "must afford contractors due process in any determination that precludes any individual or business entity from

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participating in the contracting process." [Administrative Code §28.0.] Further, Chapter 28 recognizes the power of the Hearing Officer to set dates any written presentations are due, and the very provision cited by the Charging Official favoring expeditious proceedings also states that the Hearing Officer may extend time for good cause, which has occurred in this case in the interest of providing full and fair due process and compliance with Chapter 28. Even in a case such as this, where a contractor decides not to formally contest the basis for debarment at a hearing, the Hearing Officer must make an independent judgment that the evidence warrants debarment.

#### FINAL CONCLUSION AND RECOMMENDATION

Based on the foregoing, the Hearing Officer finds willful misconduct under Administrative Code §28.3 and hereby recommends to the Controller as Charging Official that the San Francisco League of Urban Gardeners be disqualified from participating in City contracts, grants, and loans for a period of two years.<sup>4</sup>

Dated: January 11, 2005

JOAN LUBAMERSKY Hearing Officer

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Administrative Code §28.10: "... The hearing officer shall serve the Findings and Recommendation on the charging official, the named contractor(s), and/or their respective counsels or authorized representatives, and shall submit the same to the Controller.

If the hearing officer finds that the named contractor has committed willful misconduct as described in the foregoing Section 28.3 and recommends a term of debarment, the charging official shall issue an Order of Debarment consistent with the hearing officer's recommendation. The charging official shall serve the Order on each named contractor, his/her/their counsel or authorized representative, if any, the City Attorney, and the Controller. An Order of Debarment under this Chapter shall be the final administrative determination by the City in the matter."

PROOF OF SERVICE

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#### I, VAN PITTSENBARGAR, declare as follows:

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I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, 1 Dr. Carlton B. Goodlett Place, Suite 325, San Francisco, CA 94102.

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On January 11, 2005, I served the attached:

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## Findings and Recommendations by the Hearing Officer

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on the interested parties in said action, by placing a true copy thereof in sealed envelope(s) addressed as follows:

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Roger Gordon, President Board of Directors San Francisco League of Urban Gardeners (SLUG) 2088 Oakdale Avenue

Sheryl Bregman, Deputy City Attorney

San Francisco City Attorney's Office. Construction Team Counsel to the Office of the Controller Fox Plaza, 1390 Market Street, 5th Floor San Francisco, California 94102-5408

Fax No.: (415) 255-0733

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San Francisco, CA 94124

Roger Gordon, Executive Director Urban Solutions 1083 Mission Street, 2nd Floor San Francisco, CA 94103-2812

Fax No.: (415) 553-4434

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and served the named document in the manner indicated below:

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 $\boxtimes$ BY MAIL: I caused true and correct copies of the above documents, by following ordinary business practices, to be placed and sealed in envelope(s) addressed to the addressee(s), at the City Attorney's Office of San Francisco, City Hall, 1 Dr. Carlton B. Goodlett Place, Suite 325, City and County of San Francisco. California, 94102, for collection and mailing with the United States Postal Service, and in the ordinary course of business, correspondence placed for collection on a particular day is deposited with the United States Postal Service that same day.

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X BY FACSIMILE: I caused a copy(ies) of cover letter without the enclosures to be transmitted via facsimile machine. The fax number of the machine from which the document was transmitted was (415) 554-4747. The fax number(s) of the machine(s) to which the document(s) were transmitted are listed above. The fax transmission was reported as complete and without error. I caused the transmitting facsimile machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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Executed January 11, 2005, at San Francisco, California.

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#### CITY AND COUNTY OF SAN FRANCISCO



DENNIS J. HERRERA City Attorney

## OFFICE OF THE CITY ATTORNEY

MARIE CORLETT BLITS Deputy City Attorney

DIRECT DIAL: (415) 554-4651

E-MAIL:

marie.blits@sfqov.ora

#### FACSIMILE MESSAGE January 11, 2005

TO:	PHONE:	FAX:
Roger Gordon, President San Francisco League of Urban Gardeners (SLUG)	(415) 285-7584	(415) 553-4434
Sheryl Bregman, Deputy City Attorney, Construction Team, Counsel to the Office of the Controller	(415) 554-4226	(415) 255-0733
cc:		
Loretta Giorgi Deputy City Attorney	(415) 554-3822	(415) 557-6939

FROM:	PHONE:	FAX:
By Marie Corlett Blits, Deputy City Attorney, Government Team, Counsel and Clerk to Hearing Officer Joan Lubamersky	(415) 554-4651	(415) 554-4747

#### **MESSAGE**

Re: In the Matter of the City and County of San Francisco Office of the Controller Debarment Proceeding Against San Francisco League of Urban Gardeners

Please see the attached Findings and Recommendations by the Hearing Officer

We are transmitting a total of 11 pages, including this cover sheet. If you did not receive all of the pages or if there is another problem, please call me or call Van Pittsenbargar at (415) 554-4687.

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