

1 **ADMINISTRATIVE APPEAL HEARING**

2 **OFFICE OF THE CONTROLLER**

3 **CITY AND COUNTY OF SAN FRANCISCO**

4 IN THE MATTER OF:

5 GMG JANITORIAL, INC.

6
7 and

8 CITY AND COUNTY OF SAN FRANCISCO
9 OFFICE OF LABOR STANDARDS
10 ENFORCEMENT (OLSE).

CASE NO. HCSO-359

DECISION OF HEARING OFFICER

HEARINGS: MARCH 22, 2012 &
APRIL 16, 2012

11 **INTRODUCTION**

12
13 The San Francisco Health Care Security Ordinance (HCSO) was enacted in 2006 to
14 improve health care access for individuals living and working in San Francisco. There are two
15 major components of the HCSO: (1) a health access program for otherwise uninsured
16 individuals (now called "Healthy San Francisco"), which is administered by the San Francisco
17 Department of Public Health; and (2) an employer spending requirement for the purpose of
18 funding health care benefits to San Francisco employees, which is enforced by the Office of
19 Labor Standards Enforcement (OLSE).

20 This case involves the employer spending requirement under the HCSO, which went into
21 effect beginning in 2008 and requires employers to "make required health care expenditures to
22 or on behalf of their covered employees each quarter." The minimum required health care
23 expenditure is calculated by multiplying the total number of hours paid for each covered
24 employee during the quarter by the applicable health care expenditure rate.

25 On December 7, 2011, the OLSE issued a Determination of Violation (DOV) in Case No.
26 HCSO-359 stating that employer GMG Janitorial, Inc. (GMG) failed to make required health
27 care expenditures of \$1,339,028.39 for 275 current and former employees during the audit
28 period January 2008 through December 2010. The DOV sets forth specific corrective action and
penalties requiring GMG to: (1) pay unpaid health care expenditures in the sum of

1 \$1,339,028.39 directly to 275 current and former employees; (2) establish compliance with the
2 employer spending requirement for 2011; and (3) pay an administrative penalty of \$66,900.08.

3 On December 22, 2011, GMG filed a timely appeal of the December 7, 2011
4 Determination of Violation. GMG specifically appeals the amount of unpaid health care
5 expenditures stated in the DOV, and the employer also appeals the corrective action requiring
6 payment of any unpaid health care expenditures directly to its employees. GMG established its
7 compliance with the employer spending requirement for 2011, and the employer does not
8 appeal that aspect of the corrective action. The employer also paid the penalty of \$66,900.08,
9 and it does not appeal the penalty assessment.

10 On January 5, 2012, San Francisco Controller Ben Rosenfeld appointed the
11 undersigned San Francisco Administrative Law Judge as the Hearing Officer to conduct the
12 administrative appeal hearing under HCSO Regulation 10. The Hearing Officer thereupon
13 scheduled an administrative appeal hearing for February 13, 2012.

14 The administrative appeal hearing scheduled for February 13, 2012 was postponed at
15 the request of the OLSE for good cause shown, and the hearing was rescheduled for March 22,
16 2012 pursuant to a stipulation of the parties.

17 GMG and the OLSE both submitted timely Pre-hearing Statements on March 16, 2012,
18 and the hearing on GMG's appeal commenced on March 22, 2012 in City Hall, Room 479. The
19 appeal hearing was not finished on March 22, 2012, and the hearing was completed on April 16,
20 2012 pursuant to a party stipulation. The record closed at the adjournment of the April 16, 2012
21 hearing.

22 At both hearings, attorney representatives John Kevlin of Rueben & Junius LLP and
23 Douglas Robbins of O'Leary Wood & Robbins appeared on behalf of GMG. Deputy City
24 Attorney Jill Figg Dayal appeared on behalf of the Office of Labor Standards Enforcement. The
25 employer retained court reporter Judith A. DeAlba to transcribe the hearings.

26 The parties had full opportunity to present relevant evidence and argument at the
27 hearings, and those who testified did so under oath. GMG Exhibits A through E were entered
28 into the record, as were OLSE Exhibits 1 through 15.

1 The employer did not call any witnesses. The OLSE called 14 witnesses including 2
3 OLSE staff members, and 12 former janitor employees of GMG. Carl Telson was sworn under
4 oath as the interpreter (Spanish/English) for the former employees of GMG. Mr. Telson
5 interpreted for all former employees except Franklin Mejia, who testified in English. Table 1
6 ("Witness List – GMG Janitorial, Inc. and OLSE"), attached and incorporated, sets forth the
7 date, name, and identity of each of the witnesses who testified under oath. GMG had the
8 opportunity to cross-examine all of the witnesses.

8 **FINDINGS OF FACT**

9 1. GMG Janitorial, Inc. is a business that provides commercial janitorial services to
10 clients in San Francisco. Gina Gregori is the owner, and the business has its headquarters at
11 2237 Palou Street, San Francisco, California 94124.

12 **HCSO Employer Spending Requirement**

13 2. The audit period in this case is January 1, 2008 through December 31, 2010, and
14 it is undisputed that GMG had over 300 San Francisco employees during the audit period. The
15 minimum health care expenditure requirement for large businesses with 100 or more workers
16 went into effect January 1, 2008.

17 3. Pursuant to HCSO Section 14.3(a), the required health care expenditure is
18 calculated by multiplying the total number of hours paid for each of its covered employees
19 during the quarter by the applicable health care expenditure rate.

20 4. Under HCSO Section 14.1(b)(8), the health care expenditure rate for large
21 businesses was \$1.76 per hour in 2008; \$1.85 per hour in 2009; and \$1.96 in 2010.

22 5. Matthew Goldberg is an OLSE Supervising Compliance Officer. Mr. Goldberg is
23 responsible for supervising OLSE investigations regarding the employer spending requirement
24 of the HCSO. Mr. Goldberg testified that although large employers like GMG predominately
25 satisfy the HCSO's health care expenditure requirement by paying for employees' health
26 insurance, there are a variety of ways that employers can fulfill the spending requirement.

27 6. Under HCSO Section 14.1(b)(7) and HCSO Regulation 4.2, examples of
28 qualifying health care expenditures include, but are not limited to:

1 (1) Payments to a third party to provide health care services for a covered employee,
2 e.g., health insurance premiums;

3 (2) Expenditures made by self-insured and/or self-funded insurance programs;

4 (3) Contributions on behalf of a covered employee to a health benefit flexible spending
5 account, a health savings account, a health reimbursement account, a medical spending
6 account (as defined under sections 125, 223 of the federal Internal Revenue Code and
7 Publication 969 of the Internal Revenue Service), or to any other account having
8 substantially the same purpose or effect without regard to whether such contributions
9 qualify for a tax deduction or are excludable from employee income;

10 (4) Reimbursement to a covered employee for expenses incurred in the purchase of
11 health care services;

12 (5) Costs incurred in the direct delivery of health care services for a covered employee;
13 and,

14 (6) Payments on behalf of a covered employee to the City of San Francisco:

- 15 (a) to fund membership in the Health Access Program/Healthy San Francisco; or
16 (b) to establish and maintain medical reimbursement accounts for covered
17 employees.

18 7. Matthew Goldberg testified that he assisted in the drafting of the OLSE's 2010
19 Analysis of the Health Care Security Ordinance, a copy of which was submitted into evidence by
20 GMG. (GMG Exhibit A) Mr. Goldberg testified that in 2010, 90% of the required health care
21 expenditures made by large employers were payments for health insurance premiums to cover
22 employee health care costs. Of the remaining 10% of health care dollars spent, 7% was spent
23 on health reimbursement accounts, and 3% was spent on the "City Option," also known as
24 Healthy San Francisco.

25 8. On appeal, GMG argues that it established an account for the purpose of
26 reimbursing incurred health care costs for the vast majority of its workforce. Although GMG
27 interchangeably uses the terms "health savings account" and "health reimbursement account"
28 on appeal, the two types of accounts are completely different and unrelated. Notwithstanding
the employer's inconsistent use of terminology, it is undisputed that GMG is arguing that during
the audit period it utilized a health reimbursement account or an account having substantially
the same purpose or effect as a health reimbursement account.

9. Under federal law, employers utilizing health reimbursement accounts are

1 required to provide employees with precise notice of how the reimbursement account works
2 through a summary plan under 29 CFR §§ 2520.102-2 & 2520.102-3, and employers must also
3 provide employees with an annual report regarding reimbursement plan access under 29 CFR §
4 2520.104b-3. Matthew Goldberg testified that in a case where the employer claims to be
5 utilizing an account "with substantially the same purpose and effect" as a health reimbursement
6 account, the OLSE does not require all of the technical notice and reporting requirements under
7 federal law, but the department does require an employer to establish that its employees have
8 been provided with notice of the reimbursement account and how to access the account.

9 10. Mr. Goldberg testified that based on information gathered from San Francisco
10 employers between 2008 and 2010, health reimbursement accounts have a very low utilization
11 rate. The OLSE 2010 Annual Report states that in 2010, only 20% of the funds allocated to
12 reimbursement plans were reimbursed to employees, which low utilization rate is consistent with
13 2008 and 2009. Mr. Goldberg testified that from the OLSE's perspective, the reporting of low
14 utilization rates raises public interest concerns, including whether employers are properly
15 notifying workers about the existence and utilization of health reimbursement accounts. Mr.
16 Goldberg testified that employee notice was of particular concern during the audit period (2008-
17 2010) because the HCSO in effect at that time authorized employers to recover or retain any
18 funds remaining in a health reimbursement account at the end of the year. Effective January 1,
19 2012, HCSO Section 14.1.5 no longer allows employers to retain funds from reimbursement
20 accounts at the end of the year.

21 OLSE Investigation of GMG

22 11. Donna Mandel is an OLSE Compliance Officer. Ms. Mandel testified that in early
23 February 2011, the OLSE began receiving complaints from GMG employees and/or former
24 employees that GMG was not providing minimum health care coverage for some of its workers.
25 After receiving those complaints, the OLSE initiated an investigation to determine whether GMG
26 was in compliance with the health care expenditure requirements under the HCSO.

27 12. On February 10, 2011, Donna Mandel sent a letter to Gina Gregori of GMG,
28 which states in relevant part:

1 "The Office of Labor Standards Enforcement (OLSE) is investigating
2 GMG Janitorial's compliance with the San Francisco Health Care
3 Security Ordinance (HCSO) from January 2008 to the present.

4 Under the HCSO, GMG Janitorial is required to make health care
5 expenditures for all covered employees – those who have been
6 employed at least 90 calendar days for your company and who work at
7 least 8 hours per week in San Francisco. These health care
8 expenditures must meet or exceed the minimum expenditures required
9 under the HCSO.

10 As of January 1, 2011, for businesses with over 100 employees overall
11 (located anywhere), the minimum health care expenditure for each
12 covered employee is calculated by multiplying \$2.06 by the hours paid
13 (which includes both hours worked and any paid time off) to the
14 employee for work performed in San Francisco. The rate was \$1.96 in
15 2010, \$1.85 in 2009, and \$1.76 in 2008.

16 ***

17 Pursuant to Section 14.2(b) of the HCSO, covered employers must not
18 only maintain accurate records of health care expenditures, but also
19 allow the OLSE reasonable access to such records. Please forward to
20 me the following information related to your obligations under this
21 Ordinance:

22 (1) a list of names, addresses and telephone numbers for all persons
23 performing work for compensation for GMG Janitorial or its owners, in
24 San Francisco, at any time from January 2008 through December 2010;

25 (2) for each employee listed indicate:

- 26 (a) the total hours paid in each year;
- 27 (b) the health care expenditures earned under the HCSO in each
28 year (per the formula described above);
- 29 (c) the type of health care expenditures you made for them;
- 30 (d) for any employee who had a reimbursement arrangement
31 (whether administered by you or a third party), the total amount
32 of money deposited or allocated to their reimbursement account
33 each year, and the date of each deposit or allocation;
- 34 (e) the amount and date of any employee claims made against
35 those funds; and,
- 36 (f) the result of those claims, including, as applicable, the date
37 and amount of any reimbursement and/or the date and reason
38 for the rejection of any claim;

39 (3) for each of these employees, provide a copy of all communications
40 (in any language) provided by GMG Janitorial (or its agent) regarding
41 reimbursement arrangements, including the date on which they were
42 provided and how they were delivered. This should include, but not be
43 limited to, information about how to access funds, covered or uncovered
44 expenses, deadlines for submissions of claims, who to contact for

1 assistance, and statements of funds available, and

2 (4) documents verifying exception from the HCSO for any employee for
3 whom you claim exemption, as defined in Section 14.1(b)(2) of the
4 HCSO (e.g. voluntary waiver forms, job descriptions for any employees
5 you contend are supervisory or managerial, etc.).

6 OLSE may require additional documentation as the investigation
7 proceeds.

8 **This is a formal notice that GMG Janitorial must produce the
9 documents and information described above to OLSE by no later
10 than 5 p.m. on Monday, February 21, 2011.**

11 Please be advised that your business may be subject to penalties listed
12 in Regulation 9 for each day that it is out of compliance with the HCSO,
13 including a penalty of up to one-and-one-half times the total
14 expenditures that a covered employer failed to make, plus interest of up
15 to ten (10) percent on all due and unpaid health care expenditures, from
16 the date the payment should have been made (not to exceed \$1,000 per
17 employee, per week). The penalty for failure to cooperate with the
18 OLSE, or to otherwise impeding the OLSE's ability to conduct an audit
19 or investigation, is \$25 per day, and the penalty for failure to allow
20 reasonable access to records is \$25 per worker per day."

21 (OLSE Exhibit 3)

22 13. On March 7, 2011, former counsel for GMG sent a letter to the OLSE, which
23 states in pertinent part:

24 "This letter responds to your letter request dated February 10, 2011 for
25 GMG Janitorial, Inc. ('GMG') to provide information regarding its
26 compliance with the San Francisco Health Care Security Ordinance
27 ('HSCO'). Pursuant to the parties' agreement to extend the deadline for
28 response to March 7, 2011, GMG has enclosed the following
information:

1. **Excel Spreadsheets for 2008, 2009 and 2010:** These spreadsheets
provide:

- the names, addresses and telephone numbers of all persons performing work for compensation for GMG in San Francisco from January 2008 through December 2010;
- total hours paid in each year, by employee;
- health care expenditures earned under the HCSO in each year, by employee;
- type of health expenditures made; amount of reimbursement deposited or allocated to reimbursement accounts each year and date of deposits or allocations;
- amount and date employees made claims against those funds; and
- date and amount of reimbursement and/or date and reason for rejections, if any, of claims.

1 **2. Copies of Communications to Employees regarding HCSO and**
2 **Reimbursements:** Communications to GMG employees regarding the
3 HCSO are provided to employees in writing (in English and Spanish) at
4 the time they begin employment with GMG as part of their "New
5 Employee Orientation Documents." Enclosed please find:

- 6 • English and Spanish versions for 2008;
- 7 • English and Spanish versions for 2009;
- 8 • English and Spanish versions for 2010; and
- 9 • English and Spanish versions currently being used in 2011.

10 **3. Documents Verifying Exemption from HCSO:** GMG has only two
11 employees that it deems exempt from participation in HCSO, Gina
12 Gregori (President) and Linda Harrison (Controller/Treasurer). Forms
13 showing Ms. Gregori's and Ms. Harrison's exemption from participation
14 are also enclosed.

15 GMG believes the enclosed information satisfies your request for
16 information to conduct the necessary audit. Should you have questions
17 regarding the information provided, please do not hesitate to contact
18 me."

19 (OLSE Exhibit 4)

20 14. Based on the information received from GMG on March 7, 2011, the OLSE made
21 additional requests for information and documentation from the employer. Donna Mandel
22 testified that the OLSE was particularly concerned with whether GMG had provided adequate
23 notice of any health reimbursement account to its employees, and Ms. Mandel therefore
24 requested additional information about the employer's efforts to notify its employees of any
25 existing health reimbursement account.

26 15. On April 20, 2011, GMG's former attorney sent an email to the OLSE, which
27 email addresses five separate points over which GMG had made inquiries. The last three points
28 addressed in the email are set forth below beginning with the third point pertaining to GMG's
29 assertion that it gave its employees adequate notice of its health reimbursement program:

30 "Third, you have requested a copy of the notice that is posted in a work
31 area that all employees have access to and a description of that
32 location. The copy of the notice will be provided to you later today under
33 separate cover, as that has not yet been transmitted to me. Please note
34 that there are actually three (3) areas where the notice is posted. The
35 notice is posted in an area where employees go to pick up their
36 paychecks. This notice is posted on a bulletin board right near paycheck
37 pick up area. This bulletin board contains multiple notices related to
38 laws affecting GMG and its employees. In addition, the notice is also
39 posted on a bulletin board similar to the paycheck pick up area bulletin

1 board in an area where employees go to pick up supplies to do their
2 jobs. Finally, the notice is posted on a similar bulletin board in the
3 upstairs area of GMG's main office. Employees have access to and can
4 easily view the notices in these three areas.

5 Fourth, as discussed and provided previously, GMG supplied all current
6 employees in January 2008 with a handout regarding the Health Care
7 Security Ordinance. In addition, at the same time, GMG began providing
8 the notice to all new employees in a packet of 'new hire orientation'
9 materials. GMG did not, however, require that any employees sign for or
10 acknowledge their receipt of the notice. As discussed previously, there
11 is no requirement under the Ordinance or its implementing regulations
12 that GMG notify employees of the availability of health care
13 expenditures that it holds for employees who wish to submit requests for
14 health care reimbursements to GMG. In fact, notice is only required to
15 employees when the employer chooses to satisfy its obligation under
16 the Ordinance by contributing to the City's Healthy San Francisco fund.
17 See Regulation 7.1 and 7.2(A). Moreover, there is no such requirement
18 that employees sign for any notices they receive or that they have seen
19 postings in the workplace. As you may recall, you expressed concern
20 that the notice being provided to GMG employees referenced 'Healthy
21 San Francisco,' which is not the Ordinance itself, but a fund established
22 as one of the means of compliance with the Ordinance. You specifically
23 stated that you believed this might be confusing to employees. Despite
24 the fact that the Ordinance and its regulations do not require GMG to
25 take steps to provide any notices to employees, GMG intends to update
26 and change the notice provided to new employees to reflect its choice to
27 reimburse employees directly for health care expenditures.

28 Fifth, you have requested that GMG provide statements from its bank
account(s) going back to January 2008 indicating an account was
established to meet the HCSO's requirements and the amounts of the
deposits. As discussed previously, GMG does deposit monies that
comply with the Ordinance into the bank. GMG is working to obtain
documentation to demonstrate the existence of any such account. Such
documentation will be provided under separate cover. However, it is
important to note that under the Ordinance and its regulations, there is
no obligation that all health care expenditure monies be kept by an
employer in a bank account at all, nor is there a requirement that the
employer demonstrate that any bank account was established for that
purpose. As such, it is GMG's position that demonstrating that it does
maintain a bank account, that it has been reimbursing employees for
health care expenditures, and that it is maintaining the records required
under the Ordinance and its regulations, should be ample evidence to
demonstrate GMG's compliance with the law."

(OLSE Exhibit 5)

16. On April 20, 2011, the former attorney for GMG sent a second email message to
the OLSE, which email states in relevant part:

"[Y]ou have asked for examples/copies of the notices posted in areas
that employees have access to and can see. The attached notices are

1 in Spanish and English and are the ones that are posted in the three
2 areas referenced below.

3 As also discussed in my email from earlier today, I am attaching some
4 documents that evidence two accounts GMG uses for holding HCSO
5 health care expenditure amounts for employees and for providing
6 reimbursement either directly to employees or to health care
7 providers/institutions, such as Kaiser or SF General. Both accounts—the
8 Citibank and Wells Fargo accounts—hold monies that are designated
9 for GMG's compliance with the HCSO. However, both accounts also
10 hold other monies that are that are not for HCSO compliance purposes.
11 The reason for using these accounts for multiple purposes is because
12 the accounts are in essence 'money market' accounts that are used for
13 maximizing an account holder's money by applying higher rates of
14 interest maintaining a certain threshold balance in the accounts for a
15 specified period of time. Money is typically transferred between these
16 and other accounts for the purpose of engaging in responsible financial
17 planning purposes and to maximize the tax benefits associated with
18 these monies. While money may be transferred at different times of the
19 year, etc. in order to maximize tax benefits, GMG also maintains an
20 adequate amount of monies to pay out health care expenditures as
21 required by the HCSO and, as evidenced by the other information
22 provided in this audit, is paying monies out to health care institutions, as
23 well as the employees directly.”

24 (OLSE Exhibit 5) Donna Mandel testified that the employee notices attached to the email raised
25 concerns for the OLSE during the investigation because: (1) the notices reference “Healthy San
26 Francisco” in the title, which is a separate aspect of the HCSO from the employer spending
27 requirement; (2) the notices are not specifically addressed to GMG employees; and (3) the
28 notices do not include any reference whatsoever to GMG or its responsibilities as a large
employer under the HCSO. Ms. Mandel further testified that the 2008 notice states that an
employee is covered under the HCSO if he or she works at least 8 hours in a week. However,
the 8-hour workweek rule went into effect in 2009 – in 2008 employees had to work 10 hours in
a week to be covered. The employer offered no explanation for that discrepancy. OLSE
contends that the error in the notice indicates that the notice is a “post hoc creation” that GMG
manufactured during the investigation.

17. The second attachment to the April 20, 2011 email includes portions of bank
statements from 2 different GMG business bank accounts. The first bank statement is from a
Wells Fargo business savings account for the period December 1, 2010 through December 31,
2010. The December 2010 Wells Fargo statement is heavily redacted and almost completely

1 illegible due to the poor quality of the copy. Also attached to the email are two pages from a
2 Citibank statement for another GMG business account, which statement is even less legible
3 than the Wells Fargo statement – and it is therefore of little, if any, evidentiary value. (OLSE
4 Exhibit 5)

5 18. Donna Mandel testified that the redacted and illegible bank statements made it
6 impossible to determine whether the accounts were established as health reimbursement
7 accounts as claimed by GMG. She further testified that GMG never provided any additional
8 requested documentation to show whether the accounts were established for the purpose of
9 reimbursing employees' health care costs.

10 19. Ms. Mandel credibly testified that during the early phase of the investigation,
11 OLSE staff made direct telephone contact with approximately 17 former GMG employees, none
12 of whom had any notice or knowledge of any employee health reimbursement account.

13 20. Ms. Mandel testified that based on the documentation provided by GMG and
14 OLSE's own investigation of the facts, the OLSE was able to verify that the employer paid for
15 health insurance for 45 employees during the audit period, and the employer also reimbursed
16 some of that same group of 45 employees for out-of-pocket medical costs. Ms. Mandel further
17 testified that the OLSE determined that no health care expenditures were made during the
18 three-year audit period on behalf of the vast majority of the company's workforce.

19 Notice of Violation

20 21. On August 11, 2011, after determining that GMG was not in compliance with the
21 HCSO, the OLSE issued a Notice of Violation to GMG for failing to make \$1,368,935.04 in
22 required health care expenditures between January 2008 and December 2010 for 296 current
23 and former employees. (OLSE Exhibit 6) The August 11, 2011 NOV required GMG to take
24 corrective action by making the required expenditures for the first and second quarters of 2011,
25 and by submitting a check to the OLSE in the amount of \$1,368,935.04 within 10 days for
26 distribution to the affected workers. Ms. Mandel testified that it is standard practice for the OLSE
27 to order employers in violation of the HCSO to not only make the required expenditures for the
28 calendar year when the violation is issued, but to also pay its employees dollar-for-dollar any

1 unpaid but required expenditures that pre-date the calendar year when the NOV was issued.

2 22. On August 31, 2011, after receiving additional information from GMG, OLSE
3 issued an Amended Notice of Violation requiring payment of \$1,300,002.86 to 275 current and
4 former employees, instead of \$1,368,935 to 296 current and former employees. (OLSE Exhibit
5 7) Donna Mandel credibly testified that the corrective action was modified after GMG informed
6 the OLSE that its employee list included several duplicate names and/or more than one name
7 for the same employee. The OLSE also credited GMG with additional health care expenditures
8 based on new information provided by the employer after the NOV was issued. The Notice of
9 Violation and Amended Notice of Violation both include spreadsheets showing the amount of
10 unpaid health care expenditures for each affected employee. (OLSE Exhibits 6 & 7) Donna
11 Mandel testified that the calculations are based on GMG's representation of the number of
12 hours paid for each employee during the audit period.

13 23. Donna Mandel testified that despite months of discussions between the parties,
14 GMG failed to comply with the August 11, 2011 Notice of Violation and the August 31, 2011
15 Amended NOV. The OLSE therefore issued the Determination of Violation at issue.

16 Determination of Violation

17 24. On December 7, 2011, the OLSE issued the Determination of Violation in Case
18 No. HCSO-359. The DOV states that GMG failed to make health care expenditures in the
19 amount of \$1,339,028.39 on behalf of 275 employees between 2008 and 2010.

20 25. The August 31, 2011 NOV required payment of \$1,300,002.86 instead of
21 \$1,339,028.39 as stated in the DOV. Donna Mandel testified that the discrepancy results from a
22 recalculation that excludes medical costs paid to reimburse employees for workplace injuries,
23 which costs are not health care expenditures under the HCSO.

24 26. The December 7, 2011 DOV states, in relevant part:

25 "OLSE has the authority to conduct investigations and shall enforce the
26 obligation of covered employers to satisfy the HCSO's health
27 expenditure requirements. All covered employers shall cooperate fully
28 with OLSE in connection with any investigation of an alleged violation of
this Ordinance or with any audit or inspection conducted by the OLSE.

In February 2011, OLSE initiated an investigation of GMG's compliance

1 with the HCSO for the period January 2008 to December 2010. Michelle
2 Barrett, counsel for GMG, provided information to my office on March 7,
3 2011 and April 20, 2011, and met with representatives from my office
4 and the Office of the City Attorney on August 19, 2011.

5 On August 31, 2011, OLSE sent a Notice of Violation, which required,
6 among other things, that GMG pay \$1,330,002.86 to 275 current and
7 former employees by September 10, 2011. Ms. Barrett submitted a
8 written response to this Notice on September 9, 2011. You provided
9 information regarding 'the financial hardship for GMG Janitorial, Inc.' on
10 October 3, 2011 and additional documentation regarding medical
11 reimbursements on November 4, 2011, November 7, 2011, and
12 December 5, 2011. Based on those documents and inquiries made to
13 verify them, I modified the assessment of overdue health care
14 expenditures.

15 Michelle Barrett reported to me that an HRA with Flex-Plan has been set
16 up for 2011 expenditures.

17 As of the date of this Determination, GMG has not taken the corrective
18 actions established in OLSE's August 31, 2011 Notice of Violation.

19 III. OLSE Findings

20 OLSE makes the following findings with respect to the period January
21 2008 to December 2010:

22 1. An average of 100 or more persons per week performed work for
23 compensation for GMG for each of the twelve (12) calendar
24 quarters within the period.

25 2. GMG engaged in business within the City of San Francisco and
26 was required to obtain a valid San Francisco business registration
27 certificate. As such, GMG was 'covered' as a 'large business' under
28 the HCSO.

3. As a large, covered employer, GMG has been subject to the
following hourly Health Care Expenditure rates: \$1.76 in 2008,
\$1.85 in 2009, \$1.96 in 2010, and \$2.06 in 2011.

4. GMG employed over three hundred people during the period.
Based on the hours they worked in San Francisco, two hundred
and eighty-nine (289) of these employees were entitled to
\$1,585,775.82 in required health care expenditures by GMG.

5. GMG made an offer of health benefits to certain employees
(hereafter referred to as 'benefited employees'), including office
staff, managers, and some janitors. GMG made \$315,180.88 in
health care expenditures – in the form of health or dental insurance
premiums – on behalf of forty-five (45) of the aforementioned
benefited employees. Notwithstanding the fact that some of these
expenditures were in excess of the quarterly requirements for
individual employees, these insurance premium payments

1 constituted qualifying health care expenditures under the HCSO
2 and are, therefore, credited against GMG's mandatory
3 expenditures.

4 6. GMG reimbursed \$7,081.16 for out-of-pocket medical, dental and
5 vision expenses to benefited employees. These direct
6 reimbursements constituted qualifying health care expenditures
7 under the HCSO and are, therefore, credited against GMG's
8 mandatory expenditures.

9 7. GMG purportedly set-aside additional funds for the purpose of
10 reimbursing additional out-of-pocket medical expenses incurred by
11 GMG employees. This purported set-aside did not constitute a
12 contribution to a 'health savings account... or to any other account
13 having substantially the same purpose or effect' and is, therefore,
14 not credited against GMG's mandatory expenditures.

15 8. GMG made some reimbursements to employees for medical
16 expenses resulting from workplace injuries. These reimbursements
17 did not constitute qualifying health care expenditures under the
18 HCSO and are, therefore, not credited against GMG's mandatory
19 expenditures. Payments for long term disability insurance are
20 likewise not credited.

21 9. GMG made no other health care expenditures to or on behalf of
22 its covered employees.

23 10. Accounting for the qualifying expenditures made, GMG failed to
24 make \$1,339,028.39 in health care expenditures to or on behalf of
25 two hundred seventy-five (275) employees.

26 IV. Corrective Action

27 OLSE may order employers who violate this Ordinance to take any
28 actions it deems necessary to correct the violation(s) committed. In
order to remedy the aforementioned failure to make the required health
care expenditures, OLSE hereby mandates that GMG take the following
corrective actions:

1. **By January 26, 2012**, make **\$1,339,028.39** in payments to the
two hundred and seventy-five (275) current and former employees
listed in the enclosed Exhibit A. Make these payments by check to
the individuals in the amounts listed in the 'TOTAL DUE' column of
Exhibit A.

2. Along with each payment, provide a copy, in both Spanish and
English, of the enclosed 'Notice to Current or Former Employee.'

3. GMG may deliver the checks and notices to current employees in
the same manner that GMG currently issues itemized pay
statements. Otherwise, GMG shall mail the checks and notices to
each individual via first-class mail to the most recent address GMG
has maintained in its records. In either case, GMG shall make a good

1 faith effort to deliver the checks to the intended recipients (including,
2 but not limited to, re-sending any checks upon GMG's receipt of
3 updated address information).

4 4. Within five (5) days of issuing the checks, mail (via first class mail)
5 or email copies of the checks and addresses to my attention.

6 5. GMG shall afford the individuals at least sixty (60) days to cash
7 the checks. After this sixty (60) day period, GMG may issue a stop-
8 payment order for any un-cashed checks.

9 6. Within fifteen (15) days following the sixty (60) day period, mail
10 (via first class mail) to my attention:

- 11 a. An accounting, with supporting evidence, of the checks that were
12 cashed and un-cashed. Absent clear evidence that the checks
13 were cashed, OLSE will presume the checks were not cashed.
14 b. A check, made payable to 'The City and County of San
15 Francisco' in the amount of the un-cashed checks. OLSE shall
16 hold the money in escrow for claimants whom the Labor
17 Standards Enforcement Officer, despite his/her best efforts,
18 including any required public notice, cannot locate. Funds so
19 held for three years or more shall be dedicated to the
20 enforcement of the Health Care Security Ordinance.

21 7. Furthermore, GMG must establish that it has satisfied the health
22 care expenditure requirement for the first three quarters of 2011
23 (January 1, 2011 through September 30, 2011), which are the
24 quarters immediately following the investigation period. Please mail
25 (via first class mail) or email, to my attention, 'records sufficient to
26 establish compliance' with the health care expenditure requirement
27 for these quarters. These should include the complete rosters
28 submitted to Flex-Plan showing the amount of the health care
expenditure made for each employee for each quarter, one copy of
any documents sent to employees in connection with this benefit,
and, a final summary plan description and adoption agreement for
the HRA.

29 **V. Administrative Penalties and Interest**

30 The City may impose administrative penalties and interest upon
31 employers who fail to make required health care expenditures on behalf
32 of their covered employees. The amount of the penalty may be up to
33 one-and-one-half times the total expenditures that an employer failed to
34 make, plus simple annual interest of up to ten percent, from the date
35 payment should have been made, not to exceed \$1,000 per employee
36 per week.

37 **OLSE hereby imposes an administrative penalty upon GMG in the**
38 **amount of \$66,900.08 for the foregoing violations.** Payment of this
administrative penalty shall be made payable to the 'City and County of
San Francisco' and is due by January 6, 2012. Please mail the check to
the Office of Labor Standards Enforcement, attn.: Donna Mandel, City

1 Hall, Room 430, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA
2 94102.”

3 (OLSE Exhibit 8) The DOV includes a spreadsheet showing unpaid health care expenditures in
4 the amount of \$1,339,028.39 for 275 employees. (OLSE Exhibit 8) The OLSE also submitted
5 into the record a spreadsheet detailing the calculation of unpaid health care expenditures for
6 each employee. (OLSE Exhibit 10) The amounts range from \$200.64 to \$11,400.34 per
7 employee, and the average amount to be paid to each employee is less than \$5,000.00.

8 27. When the DOV was issued on December 7, 2011, HCSO Section 14.4(e)(1)
9 allowed for a penalty of up to one-and-one-half times the total expenditures the employer failed
10 to make. However, effective January 1, 2012, HCSO Section 14.4(e)(1) was amended to reduce
11 the cap on penalties to “\$100 for each employee for each quarter that the required expenditures
12 were not made within five business days of the quarterly due date.” Matthew Goldberg testified
13 that the penalties in this case were calculated using the reduced cap on penalties under the
14 amended Ordinance because the amendment was soon to be effective.

15 GMG Appeal

16 28. On December 22, 2011, GMG filed a timely written appeal of the December 7,
17 2012 Determination of Violation, and the employer also submitted the \$66,900.08 penalty to
18 OLSE. (OLSE Exhibit 9) GMG does not contest the penalty, and the penalty assessment is not
19 at issue on appeal.

20 29. In its appeal, GMG declined to challenge OLSE Findings 1, 2, 3, 5, 6, and 8.
21 GMG denies and disagrees only with Findings 4 (in part), 7, 9, and 10. GMG also appeals some
22 of the Corrective Action mandated in the DOV, specifically Corrective Action items 1 through 6,
23 requiring payment of unpaid health care expenditures in the sum of \$1,339,028.39 directly to
24 275 current and former employees. GMG complied with the HCSO for all employees beginning
25 in 2011 by establishing an administered health reimbursement account in September 2011, and
26 GMG does not appeal Corrective Action item 7 requiring the company’s compliance with the
27 HCSO spending requirement for 2011.

28 Issues on Appeal

30. GMG and the OLSE agree that the following two issues must be decided on

1 appeal:

2 **(1) What contributions did GMG make that qualified as health care**
3 **expenditures under the HCSO during the period January 2008 to December**
4 **2010?** GMG does not refute the total amount of required expenditures set forth in
5 OLSE Exhibit 10. Instead, GMG asserts that the OLSE should have given the
6 employer credit for establishing an account in 2008 that had the same purpose
7 and effect as a health reimbursement account.

8 **(2) What corrective action is appropriate for any health care expenditures**
9 **that GMG failed to make during the period January 2008 to December**
10 **2010?** GMG argues on appeal that GMG has complied with authorized corrective
11 and punitive mandates under the HCSO and HCSO Regulations by establishing
12 compliance with the Ordinance beginning in 2011, and also paying the penalty of
13 \$66,900.08. GMG further argues that the HCSO and HCSO Regulations do not
14 provide any authority for the OLSE to require GMG to make payments in the
15 amount of the unpaid health care expenditures directly to GMG employees.

16 GMG's Health Care Expenditures

17 31. The only health care expenditures that GMG claims to have made that OLSE has
18 not credited as qualifying health care expenditures under the HCSO are deposits that the
19 employer purportedly made to the Citibank business account for the purpose of reimbursing
20 employees' out-of-pocket health care costs. Prior to filing its appeal, GMG asserted that it had
21 established two health reimbursement accounts, one with Citibank and one with Wells Fargo.
22 Since filing the appeal, the employer has abandoned – without any explanation – the claim that
23 the Wells Fargo account was established as a health reimbursement account.

24 32. GMG argues that since San Francisco employers were entitled to retain any
25 funds remaining in a health reimbursement account at the end of each year throughout the audit
26 period, GMG should get credit for making adequate health care expenditures for its employees
27 between 2008 and 2010 because GMG could have used funds in the Citibank account to cover
28 health care reimbursement costs for its employees. GMG claims that the Citibank account had

1 average balances in the following amounts during the audit period: \$82,223.52 in 2008,
2 \$105,449.93 in 2009, and \$120,034.93 in 2010. The OLSE argued that even if GMG had
3 adequate proof to establish that the Citibank account constitutes a legitimate health
4 reimbursement account, the account was woefully underfunded by hundreds of thousands of
5 dollars each year during the audit period.

6 33. To support the claim that GMG should be credited for deposits to the Citibank
7 account, GMG submitted declarations from Gina Gregori, President of GMG, and Linda
8 Harrison, the treasurer of GMG, as well as copies of notices that were purportedly distributed
9 and posted to inform employees about the health reimbursement account. (GMG Exhibits B&C)

10 34. Gina Gregori's declaration states, in relevant part:

11 "1. GMG became subject to the San Francisco Health Care Security
12 Ordinance ('HCSO') on January 1, 2008.

13 2. Upon enactment of the HCSO, I consulted legal counsel at Littler
14 Mendelson, P.C. ('Littler') in order to obtain legal advice regarding how
15 GMG could comply with the HCSO.

16 3. GMG sought to comply with the HCSO through the payment of health
17 care premiums for certain employees, and through the establishment of
18 and deposits of health care expenditures into a Citibank bank account
19 having substantially the same purpose or effect as a health savings
20 account, as defined under section 223 of the United States Internal
21 Revenue Code.

22 4. Littler advised me that the aforementioned HCSO compliance method
23 of establishing and depositing required health care expenditures into a
24 private bank account having substantially the same purpose or effect as
25 a health savings account was adequate to comply with the health care
26 expenditure requirement of the HCSO.

27 5. GMG also made health care expenditures pursuant to the HCSO by
28 paying health care insurance monthly premiums for 45 covered
employees.

6. The aforementioned Citibank account was opened on or around April
24, 2008.

7. The Citibank account was established for the specific purpose of
paying out reimbursements to covered employees for qualified health
care services.

8. The average balance of the Citibank account was \$82,223.52 in
2008, \$105,449.93 in 2009, and \$120,034.93 in 2010.

1 9. At no point during the period January 1, 2008 through December 31,
2 2010 did the Citibank account drop below \$0, and at no point were there
3 insufficient funds in the account to pay for a requested reimbursement of
4 an employee's covered health care service, as required by the HCSO.

5 10. At no point during the period January 1, 2008 through December 31,
6 2010 did the GMG fail to pay for a requested reimbursement of an
7 employee's covered health care services, as required by the HCSO. No
8 employee of GMG has ever filed an internal company complaint, a legal
9 claim against the GMG, or a complaint in any administrative tribunal for
10 any reason related to GMG's alleged failure to make required health
11 care expenditures pursuant to the HCSO. To my knowledge, no
12 employee who needed health care expenses reimbursed or paid for per
13 the HCSO failed to have their health care expenses reimbursed or paid
14 for by GMG.

15 11. All reimbursements made to employees pursuant to the HCSO were
16 paid out of the Citibank account to GMG's operating account, and then
17 reimbursement checks were drawn from the operating account.

18 12. GMG notified its employees of their eligibility to be reimbursed by
19 the GMG for health care services, as required by the HCSO, by the
20 following methods: (1) a stack of notices of the reimbursement accounts
21 were left for employees on a table located adjacent to where employees
22 pick up their paychecks and where administrative forms and notices are
23 typically placed; these notices were updated on an annual basis to
24 reflect the updated reimbursement rate; the stack was replenished after
25 the last notice was taken; (2) notices of the reimbursement accounts are
26 posted conspicuously on a bulletin board in the area employees pick up
27 their paychecks, on a second bulletin board in an area where
28 employees go to pick up supplies for their jobs, and on a third bulletin
board in an area on the second floor of Appellant's offices. Employees
have access to all three areas where the notice is posted. All notices
were provided in English and Spanish, due to the large number of
Spanish-speaking employees."

(GMG Exhibit B) The referenced notices are attached to Gina Gregori's declaration, and they
are the same notices produced during the investigation. (GMG Exhibit D)

35. The declaration of Linda Harrison, Controller of GMG, includes the following
additional information:

"On February 11, 2008, I consulted Human Resource Advisors ('HRA'),
a human resources consulting firm located in Lafayette, California, in
order to obtain professional advice regarding how GMG could comply
with the HCSO. During my conversation with an advisor we outlined the
five different types of health care expenditures expressly recognized by
the HCSO. The advisor confirmed that the payment of premiums for
health care insurance on behalf of employees would count as health
care expenditures under the HCSO. The advisor also told me that
establishing private bank accounts into which contributions would be

1 deposited to be used for reimbursements to employees for health care
2 services would also be counted a health expenditure so long as the
3 United States Internal Revenue Code regulations applicable to health
4 savings account were followed.”

5 (GMG Exhibit C) Linda Harrison's declaration also states that the average balance of the
6 Citibank account was \$82,223.52 in 2008, \$105,449.93 in 2009, and \$120,034.93 in 2010.

7 36. Aside from the illegible Citibank statement and the declarations of GMG's owner
8 and its treasurer, no other evidence was offered regarding the Citibank account. GMG
9 submitted no documentation to establish whether quarterly deposits were made into the
10 Citibank account on behalf of specific individual employees as required under the HCSO. The
11 OLSE therefore argues that the Citibank account is nothing more than a generic business
12 account used for a variety of business purposes, and not specifically designated for employee
13 health care reimbursements.

14 37. The OLSE argues that in addition to the fact that there is no evidence that GMG
15 made quarterly expenditures on behalf of each covered employee, there is also no evidence
16 that GMG ever informed its employees about the existence of any reimbursement account, or
17 how to access such an account.

18 38. Some of GMG's former employees testified that they had no notice or knowledge
19 of any employee health reimbursement account. Of the 11 former GMG employees who testified
20 at the hearings, none of them recalled ever receiving informational material or seeing any
21 posting regarding an employee health care reimbursement account or any other kind of health
22 care benefit. Each former employee very specifically and credibly testified that they never once
23 saw the health care posting that GMG claims to have conspicuously posted and/or left in stacks
24 on the employee pay table. Moreover, the following former employees credibly testified that
25 GMG supervisors specifically informed them during the audit period that they did not have any
26 medical coverage: Giselda Suzuki, Jose Louis Contreras, and Ibis Maria Iglesias.

27 39. None of the 275 employees who were supposedly covered by the health
28 reimbursement account between 2008 and 2010 ever used the account, and the account
therefore had a 0% utilization rate during the three-year audit period.

1 Corrective Action Under the DOV

2 40. GMG argues on appeal that the corrective action in the DOV requiring the
3 employer to pay 100% of required expenditures to its current and former employees is not
4 authorized under the HCSO or the HCSO Regulations. GMG's pre-hearing brief states:

5 "Neither the HCSO nor its Implementing Regulations provide OLSE any
6 authority to require that GMG make direct payments to individual
7 employees of required funds not contributed to the account, as is
8 demanded by the corrective actions in the DOV."

8 (GMG Pre-hearing Statement, received March 16, 2012, page 4)

9 41. Under the HCSO, the OLSE may order employers who violate the spending
10 requirement to take appropriate corrective action to address violations. If an employer is found
11 in violation, then the employer:

12 "[S]hall be ordered to make the required health care expenditure on
13 behalf of each employee or person whose rights under this Ordinance
14 was violated, and/or to reimburse the individual for any and all out-of-
15 pocket medical expenses incurred by that individual for the period
16 during which the employer was in violation of this Ordinance, up to the
17 amount of the required health care expenditure. This payment shall be
18 made retroactively, from the date the expenditure was due, and
19 continuing until the case is resolved to the satisfaction of the OLSE."

17 [HCSO Regulation 9.2(A)]

18 42. HCSO Regulation 9.1 states that the OLSE is not limited to ordering the actions
19 under Regulation 9.2, and "may order any other actions it deems necessary to correct the
20 violation(s) committed."

21 43. In September 2011, GMG complied with the corrective action requiring the
22 company to establish and fund a legitimate health reimbursement account for calendar year
23 2011. GMG argues that the only other corrective action specifically authorized under the HCSO
24 regulations is to require the employer to reimburse employees for any and all out-of-pocket
25 medical expenses (up to the amount of the required expenditure) incurred during the audit
26 period, and the OLSE has not established what specific health care costs were incurred by
27 GMG employees during the audit period.

28 44. GMG also argues that OLSE's order requiring payment of 100% of required

1 expenditures to its current and former employees is based on speculation without any factual
2 basis. GMG contends, without citing any supporting authority, that any corrective action must be
3 based on actual losses and not speculative damages, otherwise the corrective action
4 constitutes a punitive penalty.

5 45. GMG additionally argues that low utilization rates for health reimbursement
6 accounts undercut the OLSE's position that the corrective action is reasonable. GMG
7 specifically argues that because health reimbursement accounts have an average utilization
8 rate of about 20%, there is absolutely no basis for the OLSE to order the employer to pay 100%
9 of required expenditures to its current and former employees unless the OLSE establishes that
10 each employee had out-of-pocket expenses equal to the required expenditure. The OLSE
11 argues that because GMG failed to establish a legitimate health reimbursement plan for its
12 employees until more than six month after the end of the 3-year audit period, it would be a
13 complete fiction to now credit the employer for establishing and maintaining an account with
14 substantially the same purpose and effect as a health reimbursement account for any part of the
15 audit period.

16 46. GMG contends that the health reimbursement account which it established in
17 September 2011 has an even lower utilization rate than 20%, and GMG argues that the low
18 utilization rate of its current reimbursement account further undercuts the OLSE's position that
19 the employer should pay 100% of required expenditures to its employees. GMG submitted a
20 declaration from its Chief Technical Officer and custodian of records, Martin McGinn, which
21 states the following facts regarding GMG's health reimbursement account established in
22 September 2011: (1) employees have been provided with specific notice of the health
23 reimbursement account, including notice provided with a paycheck and notice mailed to the
24 employees home addresses; (2) GMG has funded the account with \$552,779.23 for the period
25 January 1, 2011 through April 12, 2012; and (3) since establishing the health reimbursement
26 account, GMG employees have requested reimbursements and have actually been reimbursed
27 for a total of \$19,735.98. (GMG Exhibit E) Based on those figures, GMG contends that its health
28 reimbursement account thus far has a utilization rate of 3.47%, and a projected utilization rate of

1 approximately 7.2% by October 1, 2012. The OLSE argues that utilization rates increase over
2 time because most employees "save up" health care funds before incurring medical costs and
3 requesting reimbursement. In addition, the actual and projected utilization rates claimed by
4 GMG may be skewed because the employer did not begin funding the reimbursement account
5 until September 2011, and funds were not available for reimbursement until then.

6 47. GMG further argues that if there is a finding that it violated the HCSO, any such
7 violation resulted in no harm to its employees, and the order requiring payments directly to the
8 employees creates a "windfall." GMG's pre-hearing brief states, in relevant part:

9 "[E]ven assuming GMG was non-compliant in any significant way with
10 the HCSO, there is no evidence in the DOV of any employee having
11 suffered any harm of any kind as a consequence of GMG's non-
12 compliance. To the contrary, the evidence is that no employee at GMG
suffered actual harm. Absent actual harm, no 'corrective action' can be
justified."

13 (GMG Pre-hearing Statement, received March 16, 2012, page 5) The brief further states that
14 GMG is now in full compliance with the HCSO, and "the rights of GMG's employees under the
15 HCSO were never violated."

16 48. The OLSE argues that although GMG established a legitimate health
17 reimbursement account in 2011, the establishment of that account only cures GMG's non-
18 compliance for 2011 and it does not cure or correct the fact that the employer failed to comply
19 with employer spending requirements for 275 employees between 2008 and 2010. The OLSE
20 contends that payment of the full amount of required expenditures directly to the employees is
21 the only reasonable means of correcting GMG's past violations because deprivation of health
22 care results in substantial, but not always calculable, damages. Moreover, the OLSE argues
23 that the corrective action only requires the employer to do now what it should have been doing
24 during the audit period, which is to make minimum required expenditures to or for its
25 employees.

26 49. The OLSE further argues that payment of the full amount of required
27 expenditures to GMG employees and former employees is proper because there is no way to
28 undo the damage caused by not providing required health benefits. None of the employees who

1 testified at the hearings received any preventative care or any regular medical or dental
2 checkups during the audit period, and several employees testified that they had significant
3 medical issues that went undiagnosed and/or untreated while they worked at GMG because
4 they had absolutely no knowledge of any employee health care plan.

5 50. Each of the former janitor employees testified that they would have had routine
6 medical exams during the audit period if incurred costs would have been reimbursed to them.
7 Ten of the eleven former employees testified that they would have sought routine dental
8 cleanings and checkups, and several testified that they have serious dental issues that they
9 would have attended to if they had been notified of a health plan.

10 51. Former employee Maria Jesus Dominguez testified that she worked for GMG in
11 2008 and 2009. Ms. Dominguez testified that she has a lump under her arm near her breast
12 which has been there since she worked for GMG, and which she would have had treated if she
13 had known of any health care benefit while working for the company.

14 52. Former employee Jose Luis Contreras testified that he discovered he had a
15 hernia in 2009 while working at GMG, but GMG supervisors specifically told him he had no
16 employee health coverage. Mr. Contreras therefore put off having surgery and continued to work
17 as a janitor with a hernia. He eventually had the surgery after leaving GMG.

18 53. Former employee Alcides Caballero testified that he incurred dental expenses to
19 have a tooth removed while working at GMG, and he would have utilized a reimbursement
20 account if he knew one existed. He further testified that he went to a doctor at St. Luke's
21 hospital for a back injury he had while he worked at GMG, and he never paid the bill because he
22 could not afford to make the payment even though the bill was only for \$300.00.

23 54. Former employee Ibis Maria Iglesias testified that she has a kidney condition for
24 which she sought no preventative medical care while working at GMG in 2009 and 2010
25 because GMG supervisors specifically informed her that she had no health care coverage. She
26 further testified that instead of seeking preventative care, she went to the emergency room
27 when the kidney condition flared up. Ms. Iglesias testified that she has not paid any of her
28 medical bills for emergency room visits (which she estimates to be in excess of \$30,000.00)

1 because she can't afford to make the payments and also take care of her family. Ms. Iglesias
2 also testified that she incurred a \$3,000.00 medical bill while employed at GMG because she
3 injured her eye at work, and GMG did not provide her with any medical care under worker's
4 compensation for the injury. She further testified that she tried to enroll in Healthy San Francisco
5 as an uninsured person while working at GMG, but she was ineligible because she did not
6 reside in San Francisco.

7 55. In addition to OLSE arguments that the corrective action is proper based on the
8 impact that the lack of health care had on GMG employees, the OLSE also argues that GMG's
9 assertion that the corrective action should be based on the utilization rates for health
10 reimbursement accounts is without merit since GMG failed to prove the existence of a legitimate
11 health reimbursement account during the audit period. The OLSE argues that even the
12 purported 7% utilization rate for GMG's currently existing health reimbursement account
13 supports the OLSE finding that there was no reimbursement account during the audit period –
14 when there was a 0% utilization rate.

15 56. Finally, the OLSE argues that the corrective action ordered in the DOV effectively
16 removes any competitive advantage that GMG might have over other companies that complied
17 with the minimum spending requirements.

18 CONCLUSIONS OF LAW

19 1. It has been established and is undisputed that during the audit period from
20 January 1, 2008 through December 31, 2010, GMG Janitorial, Inc. was a large business as
21 defined under the HCSO that was required to make health care expenditures to or on behalf of
22 its covered employees. [HCSO Section 14.1]

23 2. A "covered employee" is a person who works a minimum number of hours in the
24 City and County of San Francisco, is entitled to payment of the San Francisco minimum wage,
25 and has performed work for compensation for his or her employer for 90 days. The minimum
26 threshold was 10 hours per week in 2008 and 8 hours per week thereafter. [HCSO Section
27 14.1(b)(2)]

28 3. The required health care expenditure is calculated by multiplying the total

1 number of hours paid for each of its covered employees during the quarter (including only hours
2 starting on the first day of the calendar month following 90 calendar days after a covered
3 employee's date of hire) by the applicable health care expenditure rate. [HCSO Section 14.3(a);
4 HCSO Regulations 1.1 & 4.1(A)] Employers shall make required health care expenditures to or
5 on behalf of their covered employees each quarter. [HCSO Section 14.3(a)]

6 4. The health care expenditure rate for large businesses was \$1.76 per hour in
7 2008; \$1.85 per hour in 2009; and \$1.96 in 2010. [HCSO Section 14.1(b)(8)]

8 5. Under the HCSO, "health care expenditure" means any amount paid by a
9 covered employer to its covered employees or to a third party on behalf of its covered
10 employees for the purpose of providing health care services for covered employees or
11 reimbursing the cost of such services for its covered employees. [HCSO Section 14.1(b)(7)]

12 6. The HCSO and the HCSO Regulations set forth examples of qualifying health
13 care expenditures, which include but are not limited to:

14 (1) Payments to a third party to provide health care services for a covered employee,
15 e.g., health insurance premiums;

16 (2) Expenditures made by self-insured and/or self-funded insurance programs;

17 (3) Contributions on behalf of a covered employee to a health benefit flexible spending
18 account, a health savings account, a health reimbursement account, a medical spending
19 account (as defined under sections 125, 223 of the federal Internal Revenue Code and
20 Publication 969 of the Internal Revenue Service), or to any other account having
substantially the same purpose or effect without regard to whether such contributions
qualify for a tax deduction or are excludable from employee income;

21 (4) Reimbursement to a covered employee for expenses incurred in the purchase of
health care services;

22 (5) Costs incurred in the direct delivery of health care services for a covered employee;
23 and,

24 (6) Payments on behalf of a covered employee to the City of San Francisco:

- 25 (a) to fund membership in the Health Access Program/Healthy *San Francisco*; or
26 (b) to establish and maintain medical reimbursement accounts for covered
employees.

27 [HCSO Section 14.1(b)(7); HCSO Regulation 4.2]

28 7. The City's Office of Labor Standards Enforcement (OLSE) has the authority to

1 enforce the employer spending requirement under the HCSO, and it also has the authority to
2 commence an investigation after receiving a complaint alleging a violation of the HCSO. [HCSO
3 Section 14.3(a); HCSO Regulations 8.1 & 8.1] In this case, the OLSE properly commenced an
4 investigation in February 2011 after receiving complaints from employees and/or former
5 employees alleging that GMG was not providing any health care coverage to some of its
6 workers.

7 8. If the OLSE determines that an employer may have violated or is not in
8 compliance with the HCSO, the OLSE shall issue written notification or Notice of Violation to the
9 employer mandating compliance within no fewer than 10 calendar days from the date of the
10 notification. [HCSO Regulation Section 8.3(A)] The OLSE properly issued a Notice of Violation
11 on August 11, 2011, which NOV was properly amended on August 31, 2011.

12 9. If, after 10 days of the Notice of Violation to the employer by the OLSE, the
13 violation or failure to comply continues and no resolution is imminent, the OLSE may issue a
14 Determination of Violation (DOV). [HCSO Regulation Section 8.3(C)] The DOV in this case was
15 issued on December 7, 2011, more than 3 months after the August 31, 2011 amended NOV
16 was issued.

17 10. An employer must file an appeal seeking a hearing within 15 days from the date
18 a Determination of Violation is served. [HCSO Regulation 10.1(A)] In this case, GMG filed a
19 timely and proper appeal of the December 7, 2011 DOV on December 22, 2011.

20 11. On appeal, the employer has the burden of proving that the basis for the
21 Determination of Violation is incorrect. [HCSO Regulation 10.2]

22 12. Following a hearing on the employer's appeal, the hearing officer shall make
23 findings based on the record of the hearing and issue a written decision based on such findings
24 within 15 days of conclusion of the hearing. The hearing officer's decision may: (1) uphold the
25 issuance of the DOV and penalties stated therein; (2) dismiss the DOV; or (3) uphold the
26 issuance of the DOV but reduce, waive or conditionally reduce or waive the penalties stated in
27 the DOV or any late fees assessed if mitigating circumstances are shown and the hearing
28 officer finds specific grounds for reduction or waiver in the evidence presented at the hearing.

1 [HCSO Regulation 10.3(B)] The hearing officer may impose conditions and deadlines for the
2 correction of violations or the payment of outstanding civil penalties. [HCSO Regulation 10.3(B)]

3 Issues on Appeal

4 13. The following two issues must be decided on appeal: (1) what contributions did
5 GMG make that qualified as health care expenditures under the HCSO during the period
6 January 2008 to December 2010; and (2) what corrective action is appropriate for any health
7 care expenditures that GMG failed to make during the period January 2008 to December 2010.

8 GMG's Qualified Health Care Expenditures

9 14. Based on all of the evidence, the undersigned Hearing Officer finds that GMG's
10 Citibank account does not qualify as a health reimbursement account or as an account with
11 substantially the same purpose or effect as a health reimbursement account during the audit
12 period January 2008 through December 2010. This determination is supported by the following:
13 (1) GMG failed to show that any quarterly or regular payments were made to the Citibank
14 account on behalf of individual employees as required under HCSO Section 14.3(a); (2) GMG
15 failed to prove that it provided notice to its employees about the existence of a health
16 reimbursement account or how to access any such account; and (3) none of the 275 employees
17 who were purportedly covered by the reimbursement account between 2008 and 2010 ever
18 used the account, and the account therefore had a 0% utilization rate during the three-year audit
19 period. Additionally, GMG undermined its credibility on the existence of a health reimbursement
20 account by first informing the OLSE there were two separate health reimbursement accounts,
21 and then abandoning that assertion without explanation and instead arguing there is a single
22 reimbursement account. GMG also undermined any argument that it provided notice to its
23 employees with annually-updated office postings since the 2008 posting stated that employees
24 had to work for 8 hours to be eligible for coverage, and the 8 hour rule did not go into effect until
25 2009. In 2008 employees had to work 10 hours in a week to be covered. Moreover, 17
26 employees contacted during the investigation had no knowledge of a health reimbursement
27 program and eleven former employees credibly testified at the hearings that they never directly
28 received notice of any health reimbursement account, and they never saw any posting or any

1 other notice at GMG offices providing information about a reimbursement account.

2 15. Since it is found that the Citibank account does not qualify as a health
3 reimbursement account or an account with the same purpose and effect, the Determination of
4 Violation correctly states that no credit for health care expenditures shall be attributed to
5 deposits made to the Citibank account.

6 16. GMG does not dispute the calculations for the amount that the employer was
7 required to pay on behalf of the 275 employees at issue. Therefore, the total amount of
8 required, but unpaid, health care expenditures is correctly stated in the DOV as \$1,339,028.39.
9 This amount properly credits GMG for the following qualified health care expenditures:

10 (1) \$315,180.88 paid for health and/or dental insurance for 45 employees; and (2) \$7,081.16
11 paid directly to members of that same group of 45 employees to reimburse them for out-of-
12 pocket medical expenses. No other qualified health care expenditures were made during the
13 audit period.

14 Corrective Action under the DOV

15 17. The OLSE may order employers who violate the HCSO to take appropriate
16 corrective action to address violations. [HCSO Regulation 9.1] If an employer is found in
17 violation of the spending requirement, then the employer:

18 "[S]hall be ordered to make the required health care expenditures on
19 behalf of each employee or person whose rights under this Ordinance
20 was violated, and/or to reimburse the individual for any and all out-of-
21 pocket medical expenses incurred by that individual for the period
22 during which the employer was in violation of this Ordinance, up to the
amount of the required health care expenditure. This payment shall be
made retroactively, from the date the expenditure was due, and
continuing until the case is resolved to the satisfaction of the OLSE."

23 [HCSO Regulation 9.2(A)] The OLSE is not limited to ordering the above-stated corrective
24 actions, and the OLSE "may order any other actions it deems necessary to correct the
25 violation(s) committed." [HCSO Regulation 9.1]

26 18. Based on all of the evidence, the undersigned Hearing Officer finds that the
27 corrective actions requiring GMG to pay \$1,339,028.39 in unmade health care expenditures to
28 the impacted employees is properly authorized under the law and appropriate under the facts of

1 this case. This determination is supported by all of the following: (1) the employer spending
2 requirement under the HCSO requires employers to make health care expenditures to or on
3 behalf of each covered employee, and the facts show that GMG failed to do so on behalf of 275
4 of its employees between 2008 and 2010; (2) HCSO Regulation 9.1 specifically authorizes the
5 OLSE to order any action it deems necessary to correct the violation; (3) of the former
6 employees who appeared at the appeal hearings, some paid for health care services out-of-
7 pocket, some relied on public hospitals at taxpayer expense, and others had to forego health
8 care services altogether because they didn't have the resources to pay for medical or dental
9 care without any reimbursement; and (4) the corrective action effectively removes any
10 competitive advantage that GMG might have over other companies that were in compliance with
11 the HCSO during the audit period.

12 19. Although GMG argues that the corrective action is "punitive" against the
13 employer and a "windfall" for its employees, such is not the case. The corrective action in the
14 DOV is not punitive, nor is it a windfall. GMG wrongly asserts that no employee has been
15 harmed in this case. Lack of access to health care poses serious health risks and can result in
16 substantial harm. Health care cannot be provided retroactively, and GMG failed to make legally
17 mandated health care expenditures for 275 employees over a three-year period. During that
18 period, most of GMG's employees were provided with absolutely no health care benefits, and
19 former employees testified that the lack of health benefits had a real impact on them. As such,
20 one-time payments averaging less than \$5,000.00 per employee for violation of the HCSO
21 during the 3-year audit period do not constitute a windfall.

22 20. Additionally, under the facts of this case, there is no basis to order payment of
23 only a portion of the required expenditures based on average utilization rates for health
24 reimbursement accounts because GMG was in complete violation of the HCSO for the 3-year
25 audit period. GMG did not establish a legitimate health reimbursement account until September
26 2011, more than 6 months after the end of the audit period, and there is no way to know what
27 the actual utilization rate would have been if the account had been properly established in 2008.
28 To permit payment of only a portion of the required expenditures would be a windfall for GMG,

1 and it would put the company at a substantial advantage over other San Francisco companies
2 that have consistently complied with the spending requirement.

3 21. Finally, there are no mitigating circumstances in this case to warrant any
4 reduction in the amount the employer has been ordered to pay its employees. [HCSO
5 Regulation 10.3(B)]


6 22. Based on all of the foregoing, the undersigned Hearing Officer finds that GMG
7 has failed to meet its burden of proving that the December 7, 2011 Determination of Violation
8 was issued in error.

9 **ORDER**

10 1. The appeal of GMG Janitorial, Inc. is denied, and the December 7, 2011
11 Determination of Violation is upheld. GMG is hereby ordered to comply with all corrective
12 actions in the December 7, 2011 DOV, which ordered the employer to make the required
13 payments to its current and former employees within 50 days of the issuance of the DOV.
14 Accordingly, GMG shall have until June 20, 2012 to make the required payments, and the
15 employer shall abide by the other timelines set forth in the DOV.

16 2. This Decision is final, and the sole means of review of this Decision shall be
17 made by filing a petition for a writ of mandate under California Code of Civil Procedure §1094.5
18 in the San Francisco Superior Court. [HCSO Section 14.4(a); HCSO Regulation 10.3(D)] A party
19 aggrieved by this Decision must seek judicial review within 90 calendar days of the date of
20 mailing of this Decision pursuant to Code of Civil Procedure §1094.6. [Code of Civil Procedure
21 §1094.6(b)]

22
23 Dated: May 1, 2012

24 
Peter Kearns
Hearing Officer

3 **TABLE 1**
4 **WITNESS LIST – GMG JANITORIAL, INC. AND OLSE**

5 HEARING DATE	NAME OF WITNESS	IDENTITY OF WITNESS
6 March 22, 2012	Matthew Goldberg	OLSE Supervising Compliance Officer
7 March 22, 2012	Donna Mandel	OLSE Compliance Officer
8 March 22, 2012	Franklin Mejia	Former GMG Employee
9 March 22, 2012	Griselda Suzuki	Former GMG Employee
10 March 22, 2012	Maria Jesus Dominguez	Former GMG Employee
11 March 22, 2012	Jose Luis Contreras	Former GMG Employee
12 March 22, 2012	Alcides Caballero	Former GMG Employee
13 March 22, 2012	Javier Abea	Former GMG Employee
14 March 22, 2012	Ibis Maria Iglesias	Former GMG Employee
15 April 16, 2012	Jose Garcia	Former GMG Employee
16 April 16, 2012	Jose Alfaro	Former GMG Employee
17 April 16, 2012	Jaime Reyes	Former GMG Employee
18 April 16, 2012	Maria Alvarenga	Former GMG Employee

1 **PROOF OF SERVICE**

2 I, Elvira James, declare as follows:

3 I am a citizen of the United States, over the age of eighteen years and not a party to the within
4 entitled action. I am employed by the City and County of San Francisco, 25 Van Ness Avenue, Suite 320,
5 San Francisco, CA 94102.

6 On May 1, 2012, I served the attached:

7 **DECISION OF HEARING OFFICER**

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

10 John Kevlin, Esq.
11 Reuben & Junius LLP
12 One Bush Street, Suite 600
13 San Francisco, CA 94104

Jill Figg Dayal, Deputy City Attorney
San Francisco City Attorney's Office, Labor
Team
1390 Market Street, 5th Floor
San Francisco, CA 94102

14 E. Douglas Robbins, Esq.
15 One Bush Street, Suite 800
16 San Francisco, CA 94104


Donna Levitt, OLSE Division Manager
City Hall, Room 430
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

17 Gina Gregori, President
18 GMG Janitorial
19 2237 Palou Avenue
20 San Francisco, CA 94124

21 and served the named document in the manner indicated below:

22 **BY FIRST CLASS MAIL AND CERTIFIED MAIL:** I caused true and correct copies of the
23 above document, by following ordinary business practices, to be placed and sealed in envelope(s)
24 addressed to the addressee(s), at 25 Van Ness Avenue, Suite 320, City and County of San
25 Francisco, California, 94102, for collection and mailing with the United States Postal Service, and
26 in the ordinary course of business, correspondence placed for collection on a particular day is
27 deposited with the United States Postal Service that same day.
28

Executed May 1, 2012, at San Francisco, California.


Elvira James