

DATE: September 3, 1987

SUBJECT: Appointments to the Civilian Advisory  
Panel on Police Practices

REQUESTED BY: John Lockwood, City Manager

PREPARED BY: John M. Kaheny, Deputy City Attorney

#### QUESTION PRESENTED

May the City Manager and the Chief of Police jointly make appointments to a Civilian Advisory Panel on Police Practices which will be constituted and act in accordance with the provisions set forth in Enclosure (1) to this opinion?

#### CONCLUSION

A review of the Charter of The City of San Diego, its legislative history and the applicable case law, leads us to the conclusion that the procedure, whereby the City Manager and the Chief of Police jointly select individuals to serve on a Civilian Advisory Panel on Police Practices constituted and acting in accordance with the provisions set forth in Enclosure (1), is appropriate under the Charter of The City of San Diego. This procedure is consistent with the requirements of Charter section 57 providing that the Police Chief may, with the approval of the City Manager, appoint personnel to serve in the Police Department and Charter section 28 providing that the City Manager may employ consultants to give advice connected with the departments of the City when necessary. We therefore believe that the specific procedure presented to us by Enclosure (1) is neither in derogation of the Charter nor prohibited by the Charter; nor does it result in an unlawful delegation of power by either the City Manager or the Chief of Police.

#### BACKGROUND

Over the past several months the City Manager's office, based upon a recommendation from the Citizens Advisory Board on Police Community Relations, reviewed numerous concepts in search of an appropriate method of permitting citizen involvement in the

citizen's complaint procedures of the San Diego Police Department. You believed it necessary to develop such a procedure in order to instill in the citizens of San Diego confidence in the department's ability and willingness to fairly investigate citizen complaints of police misconduct. On August 26, 1987 you forwarded to this office, for review, a specific procedural outline of your proposal. Your plan, a copy of which is attached as Enclosure (1), indicates that twelve civilian consultants, selected jointly by the City Manager and the Chief of Police from a pool of former members of the San Diego grand

jury, former or retired judges of the municipal and superior courts, former members of the San Diego Civil Service Commission, and persons recommended by community based agencies with a history of involvement in police community relations will serve as panel members. Individuals selected from this pool are to enter into consultant contracts with The City of San Diego and provide the Chief of Police with advice on these sensitive matters. They will agree, in writing, to maintain the security and the confidentiality of any internal affairs documents or other privileged law enforcement records for which they are provided access by the Police Department in the performance of their duties.

### ANALYSIS

In order to fully understand the special relationship that exists between the City Manager and the Chief of Police of The City of San Diego, it is necessary to review not only Charter sections 28 and 57 but also the legislative history of these sections. It is, of course, well established that a city charter is a municipal constitution and the organic law of the City. In *re Pfahler*, 150 Cal. 71 (1906); *Hubbard v. City of San Diego*, 55 Cal.App.3d 380 (1976); *Brown v. City of Berkeley*, 57 Cal.App.3d 223 (1976). The City's charter does not operate as a grant of power, but as an instrument of limitation and restriction upon the exercise of power over all municipal affairs of which a city is assumed to possess. Rules of statutory construction are applied to charter provisions in a manner that favors the exercise of power as opposed to the existence of any limitation or restriction that is not expressly stated in the charter. Restrictions on the exercise of municipal power may therefore not be implied. *City of Grass Valley v. Walkinshaw*, 34 Cal.2d 595 (1949). The rules of statutory interpretation also require that different sections of a charter dealing with the same subject be read together so that the entire statutory system may be harmonized. In addition, while it may be helpful to look at a charter section's legislative history to resolve questions of interpretation, it is more important to look to the words

themselves. *People ex rel. Younger v. Superior Court*, 16 Cal.3d 30 (1976). However, we will first address the interesting historical background of the current Charter of The City of San Diego.

#### The 1931 Charter - Its History

The City of San Diego has been governed by its current charter since 1931. It has been amended numerous items over the years, but no major revision has occurred in the last 56 years. As we shall indicate, it was the product of an intense public

debate over the very structure of municipal government in the City of San Diego.

Our historical research tells us that in 1929 a proposed Charter was presented by the newly elected fifteen-member Board of Freeholders to the voters of The City of San Diego in an attempt to establish a city manager form of government and abolish the "mayor/council" form of government then in existence. The proposed 1929 Charter was overwhelmingly rejected by the voters. It should be noted that the Fire Department had objected strongly to the provisions granting control over the Fire Department to the City Manager. The Police Department had joined in this objection to the proposed charter on similar grounds and both the Police and Fire Departments had actively opposed its passage.

However, in 1931, the Board of Freeholders tried again and this time the voters approved the original version of our current charter. It contained the original Charter section 28 setting forth the duties of the Manager and Charter section 57 setting forth both the structure of the Police Department and the duties of the Police Chief. A more detailed description of the political struggle concerning the scope of the City Manager's authority over the Police and Fire Departments during the 1929 to 1931 period can be found in the City Manager Government in San Diego; Public Administrative Service, 1939. We need only state here that, at the time of adoption of the 1931 Charter, the citizens of The City of San Diego were very concerned about the extent of the City Manager's power over the Police and Fire Departments and approved a structure based upon a separation of power that is rarely found in other municipal charters.

We will now trace the pertinent parts of Charter sections 28 and 57 as originally adopted, and subsequently amended, describing the relationship between the City Manager and the Chief of Police. The original Charter section 28 read, in pertinent part, as follows:

#### SECTION 28. DUTIES OF THE MANAGER.

It shall be the duty of the Manger to supervise the administration of the affairs of the City except as otherwise specifically provided in this Charter; emphasis added to make such recommendation to the Council concerning the affairs of the City as may seem to him desirable; to keep the Council advised of the financial condition and future needs of the City; to prepare and submit to the Council the annual budget estimate and such reports as

may be required by that body, including an annual report of all the Departments of the City; to see that the ordinances of the City and the laws of the State are enforced; and to perform such other duties as may be prescribed by this Charter or required of him by ordinance or resolution of the Council.

Except as otherwise provided in this Charter, emphasis added all other administrative powers conferred by the laws of the State upon any municipal official shall be exercised by the Manager or person designated by him. He shall assume the position of Director of any Department under this control for which a Director has not been appointed. The Directors, or heads of the administrative Departments under the Manager shall be immediately responsible to him for the efficient administration of their respective Departments. The Manager may set aside any action taken by a Director or Department subordinate responsible to him and may supersede him in authority in the functions of his office or employment. Where no provision has been made by ordinance authorizing a subordinate official to act as departmental head in case of a vacancy, the Manager may designate an interim acting head or perform personally the functions of the office. . . . He shall have the power, to employ experts or consultants to perform work or give advice connected with the Departments of the City when such work or advice is necessary in connection therewith. Emphasis added.

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In order to expedite the work of any department or to adequately administer an increase in the duties which may devolve on any Department or to cope with periodic or seasonal changes, the Manager, subject to Civil Service regulations, is empowered to transfer employees temporarily from one Department to perform similar duties in another Department. Likewise each Department head shall have power

to transfer employees from one Division to another within his Department.

The Manager may direct any Department or Division to perform work for any other Department or Division. Such powers to transfer employees or to direct the performance of work shall not apply to the Police or Fire Departments. Emphasis added.

Section 57 of the Charter of The City of San Diego, as originally approved by the voters in 1931, stated, in pertinent part, as follows:

SECTION 57. POLICE DEPARTMENT. The Police Department shall consist of a Chief of Police and such other officers, members and employees as the Council may from time to time by ordinance prescribe.

All members of the Police Department at the time this Charter takes effect shall be retained and shall only be removed for cause as provided in Section 129 of Article VIII of this Charter.

The Chief of Police shall be appointed by the Manager and the appointment shall be confirmed by a majority of the Council, provided, however, that the Chief of Police may be removed by the Manager at any time in the manner provided for in Section 30 of Article V of this Charter.

The Chief of Police, with the approval of the City Manger, shall direct and supervise the personnel, subject to Civil Service

regulations, have charge of the property of the Department and exercise all powers and duties provided by general laws or by ordinance of the Council. Emphasis added.

The Chief of Police may appoint, subject to the approval of the Manager, an Assistant Chief of Police, a Chief of Detectives, and all members, officers and employees of the Police Department, subject to the Civil Service requirements of this Charter. During the absence or inability of the Chief of Police to perform the duties of his office the Assistant Chief of Police shall perform all the duties of the office of Chief of Police.

Emphasis added.

....

The remainder of this section describing the relationship between the Merit System and the Civil Service Commission has been deleted as it is not at issue in this opinion.

In 1957, this section was amended to read in part as follows:

Section 57. POLICE DEPARTMENT. (As amended November 6, 1956. Effective January 10, 1957.) The Police Department shall consist of a Chief of Police and such other officers, members and employees as the Council may from time to time prescribe by ordinance. All members of the Police Department at the time this Charter takes effect shall be retained and shall only be removed for cause, as provided in Section 129 of Article VIII of this Charter, or as otherwise provided herein.

The Chief of Police shall be appointed by the Manager and the appointment shall be confirmed by a majority of the Council, provided, however, that the Chief of Police may be removed by the City Manager at any time in the manner provided for in Section 30 of Article V of this Charter.

The Chief, with the approval of the City Manager, shall appoint, direct and supervise the personnel, subject to Civil Service

regulations, have charge of the property and equipment of the department, and exercise all powers and duties provided by general laws or by ordinance of the Council. The Chief of Police shall have all power and authority necessary for the operation and control of the Police Department. Emphasis added.

In 1964, the last two paragraphs of Charter section 57 dealing with the Merit System and the Police Surgeon were repealed. This section has remained unchanged since that time. The provisions and the legislative history of Charter section 58 relating to the Fire Department are similar to that of Charter section 57. It is apparent therefore from the plain language of these sections that the City Manager's power under the Charter is somewhat less than plenary in regard to the operation of the Police and Fire Departments as opposed to his more extensive authority over the other administrative departments. However, it is also clear that the City Manager has the sole authority under

the charter to "employ consultants" to work for a department when necessary.

#### Other Charters - Their Relevance

Generally, cases interpreting other city charters provide little help in analyzing these provisions of the Charter of The City of San Diego because the specific language of the charter at issue may be different. For example, the charter provisions of the city of Berkeley analyzed in *Brown v. City of Berkeley*, 56 Cal.App.3d at 233 and *Parrot v. Rogers*, 103 Cal.App.3d 377 (1980) state that the city manager of Berkeley has the power and duty to "exercise control over all departments and bureaus of the city government and over all the appointed officers and employees thereof." As we have seen from a review of The City of San Diego's Charter, the City Manager's authority in San Diego is not as extensive as that of the authority of the City Manager of Berkeley, as contained in the Berkeley charter. Therefore, an analysis based upon interpretations of provisions in the Berkeley city charter will fall wide of the mark.

Unlike the Berkeley charter, the Charter of The City of San Diego establishes a distinction between the authority of the City Manager and the Chief of Police, especially in the area of appointments of personnel to the Police Department. That specific issue was addressed in an opinion issued by this office on November 24, 1970 in response to a question proposed by the Civil Service Commission concerning the definition of the term

"appointing authority" as it applies to the Police Department. At that time, then Deputy City Attorney Jack Katz, in analyzing the provisions of Charter section 28 and Charter section 57 stated that

The language of Charter . 57 is a most persuasive and effective modifier and is arguably one of those Charter sections contemplated by the phrase "except as otherwise provided herein." While the approval of the City Manager is called for within the appointing, directing and supervising grant to the Chief, the legal effect is not to displace the Chief as the appointing authority on the outset, but rather to approve or disapprove his actions therein. The effect of the action contemplated is one of confirmation....

The case of *Cassese v. Lindsay*, 272 NYS2d 324 (1966), is very helpful to our analysis. That case arose when a New York City Police Commissioner, pursuant to his authority under a charter

section similar to Charter section 57, established a civilian review board. Under the New York City charter, as it then existed, the Police Commissioner had "cognizance and control of the government, administration, disposition and discipline of the department" and he was "chargeable with and responsible for the execution of all laws and the rules and regulations of the department." When he established a police review committee of seven members (four of whom were to be appointed by the Mayor and three of whom were to be appointed by the Police Commissioner) several New York police officers filed a class action challenging the creation of the board alleging that it was an unlawful delegation of power by the Police Commissioner to the Mayor of the City of New York. In New York City the Mayor is the chief executive officer with duties and responsibilities similar to that of the City Manager of San Diego. The court, in upholding the establishment of the civilian complaint review board, stated as follows:

The unambiguous language contained in the above statutory provisions effectively rest broad administrative power in the Police Commissioner. In pursuit of the duties and obligations imposed upon him by statute, the Police Commissioner has apparently determined that the proper control and administration of the Police Department may best be effectuated by resort to a civilian advisory board. No

legal obstacle exists which may bar the exercise of the Police Commissioner's discretion. ... It is altogether clear, too, that the Police Commissioner should be permitted to operate this most critical City agency with sufficient aid, if required and requested. It is not the province of any individual, or organization, or, indeed, the court, to dictate to an appointed public official how he may best command his department.

Cassese v. Lindsay, *supra* at p. 331.

#### SUMMARY

Thus, we see that as in the above cited case, if the Chief of Police of The City of San Diego has decided that the joint appointment of a Civilian Advisory Panel is in the best interest of his department, and the Charter does not prohibit such an action, we are persuaded that such a procedure complies with the intent of those provisions of the Charter we have previously



discussed.

Consultant contracts must be executed under the authority of the City Manager in accordance with the provisions of Charter section 28; and Charter section 57 requires that appointments by the Chief of Police need the approval of the City Manager and must comply with the Civil Service regulations. The only Civil Service regulation concerning consultant's contracts is Civil Service Rule XVII (San Diego Municipal Code section 23.1801) which requires that expert and consultant contracts be reviewed by the Civil Service Commission prior to their execution to ensure compliance with the personnel related provisions of the Charter, the Municipal Code and the Civil Service Commission Rules and Regulations.

It is clear then that in the selection and appointment of consultants for the Police Department, the City Manager is the one who must "employ them" in accordance with Charter section 28 and the Chief of Police, with the approval of the City Manager, is the one who must appoint, direct and supervise them. We therefore believe that the proposed procedure is in accord with these requirements. The plan blends the procedures required by the Charter and we therefore opine that the proposed plan reflects a proper harmonizing of Charter sections 28 and 57 in order to establish a mutual goal. Such a procedure is consistent with the Charter of The City of San Diego.

Respectfully submitted,  
JOHN W. WITT, City Attorney

By  
John M. Kaheny  
Deputy City Attorney

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APPROVED:  
JOHN W. WITT  
City Attorney