

OPINION NUMBER 90-1

DATE: January 19, 1990

SUBJECT: Removal of Port Commissioners,
San Diego Unified Port District

REQUESTED BY: Committee on Rules, Legislation and
Intergovernmental Relations

PREPARED BY: John W. Witt, City Attorney;
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QUESTION PRESENTED

On what basis may a San Diego Unified Port District
Commissioner, appointed by the City Council, be removed by the
City Council before the end of his or her term of office?

CONCLUSION

"Good cause" is required for removal of port commissioners.
Public policy favors an independent commission, with members
serving for a fixed term, not at the pleasure of the City
Council. They may be removed only for some substantial
misconduct in office. "Good cause" does not mean failure to vote
at port board meetings in the way the City Council directs.

BACKGROUND

In 1984, the Committee on Rules, Legislation and
Intergovernmental Relations ("Rules Committee") considered the
Council's ability to control the vote of persons appointed to
serve on boards and commissions. In response, City Attorney
Opinion No. 84-1, dated January 19, 1984 (attached), concluded
that the City Council cannot direct or control the vote of board
and commission members it has appointed. Opinion No. 84-1
remains correct and, to the extent applicable, is adopted here.

The 1984 Rules Committee also wanted to know if, with
commissioners having such discretion, the Council (as appointing
authority) can remove and replace one merely for failing to
comply with a Council request to vote in a certain way. That
issue was not discussed in Opinion No. 84-1. It is addressed
here.

ANALYSIS

I. Introduction

Our conclusion that "good cause" is required for removal is
based on the following factors and analysis.

The Port District Act does not explicitly address the "cause
vs. at-will" issue. Looking elsewhere then, we find that (1) a

fixed term indicates removal for "cause" only, (2) public policy favors removal for "cause" only and (3) there is no compelling evidence of legislative intent to rebuke this public policy preference.

II. The San Diego Unified Port District Act Does Not Clearly Indicate The Circumstances Under Which A Commissioner May Be Removed.

The San Diego Unified Port District, and its Commission, were formed and are governed by the provisions of the San Diego Unified Port District Act (the Act). Cal. Harb. & Nav. Code App. 1. As to port commissioners, the Act provides, in part:

Section 16. The district shall be governed by a board of commissioners who shall be known as "port commissioners." Each city council, respectively, of the cities which are included in the district pursuant to the provisions of this act shall appoint the commissioner or commissioners to which it is entitled, pursuant to this section, to represent that particular city on the board. .

..

Section 17. The term of each commissioner shall be for four years, except as provided in this section. . . . A commissioner may be removed from the board by a majority vote of the city council which appointed such commissioner. Amended Stats 1982 ch 171 Section 1.

At first blush, one could argue a commissioner is appointed for four years and, at any time during that four years, can be removed by the City Council, perhaps for failing to "represent" the City in a manner a Council majority approves. But, the cyclopedic literature suggests a different approach and rule. "However, appointments to continue . . . for a fixed term of years, cannot be terminated except for cause . . ." 52 CalJur3d Public Officers Section 123. See also, 63A AmJur2d Public Officers Sections 222, 223. Further, "where a statute is silent as to whether 'cause' is or is not required as a condition of removal, the question depends on the intent of the legislature to be gathered from the provisions of the statute dealing with the removal and all other related statutes which may throw light on the subject." 4 McQuillan, Municipal Corporations Section 12.230 (3d Ed.).

These cyclopedic citations only begin the analysis. They are based on cases which do not always explicitly stand for the

propositions asserted by the commentators. However, support for the rule may be found elsewhere. Since the Port District Act is silent on whether or not "cause" is required for removal of a commissioner, it is both logical and reasonable to view the Act in its entirety for its purpose and examine other relevant statutes as well.

III. The Supreme Court Has Impliedly Held That Where

A Term Of Office Is Fixed, Removal May Be For Cause Only.

Government Code section 1301 provides as follows:

Section 1301 Tenure where term not fixed

Every office, the term of which is not

fixed by law, is held at the pleasure of the

appointing power. (Emphasis supplied.)

In *Brown v. Superior Court*, 15 Cal.3d 52 (1975), the Supreme Court held that a regional coastal commissioner served "at the pleasure" of the governor because the term of office was not fixed by law, citing Government Code section 1301. The significance of the case is that the commissioner had contended his term of office was fixed by law and he could not be dismissed at will. The court rejected his argument. Thus, necessary to the court's ruling is the inherent recognition that had the term been fixed by law, as it is in the Port District Act, the commissioner would not have been serving "at the pleasure" of the governor and he could not have been summarily dismissed.

The Brown court, in rejecting the argument that the commissioner's term of office was fixed by the expiration of the commission itself, said the drafters and voters "could reasonably choose to establish a commission of limited duration, but one composed of politically responsive members subject to removal by elected officials." *Brown*, supra, 15 Cal.3d at 56. This language is quite similar to that found in the San Francisco Bay Conservation and Development Commission Act ("San Francisco Bay Act"), where it is expressly stated that the San Francisco Bay Act's purpose is to establish a "politically responsible" planning agency. Government Code section 66600. The San Francisco Bay Act explicitly states that members serve "at the pleasure" of the appointing authorities. Government Code section 66622. There is, in our view, a clear parallel between "politically responsive/responsible" and "serving at the pleasure" of the appointing authority.

Our Port District Act contains neither language about "political responsiveness" nor "service at the pleasure" of the appointing authorities. Instead, it fixes a term of office which, according to the Brown decision, means that the commissioners do not serve "at the pleasure" of the City Council.

It could be argued that our Port District Act, when calling for the commissioners to "represent" their respective appointing cities, creates the equivalent of a "politically responsive" agency. It could then be argued further that the four-year term is qualified by the removal clause. Finally, it could be argued that the four-year term was a term "of limited duration" as contemplated by Brown.

These arguments are not persuasive to us. First, the term of "limited duration" in Brown was established by the fixed longevity (five years) of the commission itself, not the term of office of commissioners. Second, while there is a removal clause, it is silent on the "cause" issue. Third, in view of this silence, the public policy considerations reflected in Brown and other cases in determining an appointee's removability are compelling.

IV. Public Policy Favors An Independent Commission To The Extent Members May Not Be Removed At Will.

While Brown arrived at its conclusion by necessarily recognizing that a fixed term would have meant removal for cause, it also reflected the pervasiveness of public policy on the issue of tenure of appointed officials. The Brown court, noting the

limited duration and purpose of the commission, said that state administrations elected during the commission's pendency should not be denied a role in the selection of the representatives. Brown, *supra*, 15 Cal.3d at 56.

Here, however, the Port District as an agency has no term and we see no compulsion to get every newly-elected administration represented as soon as it takes office. To the contrary, the Port Commission, especially as an independent government entity, requires the stability and independence which was one of the major reasons for its creation in the first place. The district was created to solve the "problem" of trying to coordinate action among separate municipalities. "Because of the several separate cities . . . only a specially-created district can operate effectively. . . ." City of Coronado v. San Diego Unified Port District, 227 Cal.App.2d 455, 462 (1964). If the commissioners were nothing more than removable conduits for municipal desires, no advantage would have been gained by creating the district as a separate governmental entity.

Delorey v. Bd. of Public Works, 110 Cal.App. 362 (1930), by way of contrast, also sheds some light on this prevailing public policy consideration. In Delorey, the court held that a commissioner could be removed despite having a fixed term. The Los Angeles City Charter provided for five-year terms "except as provided" in the charter. The Los Angeles Charter contained

another section which stated a commissioner might be removed by a majority vote of the City Council.

This is quite similar to the provisions in our Port District Act. However, the Delorey holding was based heavily on the fact that the commissioner was an officer of the appointing authority's own government. In other words, he was a City officer, appointed by the City Council. The court said the "framers of the charter undoubtedly realized and intended . . . the mayor should have the right at all times to have heads of departments in sympathy with his policies of administration. . . ." Delorey, *supra*, 110 Cal.App. at 372.

The "loyal employee" rationale of Delorey does not apply in the Port District situation. Here, the appointed commissioners are not members of our City government, but rather are officers of the Port District. Port District Act section 18. The Port District is a separate government entity, having been established as a public corporation holding the port lands in trust for the entire state. The Port District can be a party to lawsuits, adopt its own seal, exercise eminent domain, and has the quasi-legislative power to enact ordinances.

Indeed, as a quasi-legislative body, the Port District Commission must necessarily be independent and free from coercion. That independence and freedom may only be protected by its members' fixed terms and immunity from termination at will. In *Humphrey's Executor v. United States*, 295 U.S. 602, 79 L.Ed. 1611 (1935), the court held that the President could not dismiss at will members of the Federal Trade Commission ("FTC") in light of their role, in part, as a quasi-legislative body. The court emphasized the importance of impartiality and responsiveness only to the "people of the United States." *Humphrey's Executor*, *supra*, at 79 L.Ed. 1617. Here the Port Commission administers the Port for the people of the entire State of California. Neither the FTC in *Humphrey's Executor* nor the Port Commission here could be responsible to the people of the larger governmental entity if they were expendable at the whim of political expedience.

The *Humphrey's Executor* court further said that the FTC commissioners were to be "charged with no policy except the policy of the law." Consequently, they were to be "free from political domination or control," and it was "manifestly desirable that the terms of the commissioners should be long enough to give them an opportunity to acquire the expertness (necessary)." *Humphrey's Executor*, *supra*, 79 L.Ed. at 1617. Similarly, the Port Commission is charged solely with the policy of developing the harbor in the interest of the entire state, as

opposed to a local political agenda. So, it must be politically unencumbered and of sufficient continuity to acquire expertise.

In addition to their quasi-legislative role, the commissioners are also trustees, by virtue of the public trust passed from the state to the cities to the District. City of Coronado, *supra*, 227 Cal.App.2d at 463, State of California ex rel State Lands Commission v. County of Orange, 134 Cal.App.3d 20, 23 (1982). As such, they ". . . assume() the same burdens and (are) subject to the same regulations that appertain to other trustees of such trusts." State ex rel State Lands Comm'n, *supra*, 134 Cal.App.3d at 27.

That a trustee has the highest duty to act only in the interest of the trust needs no citation. Indeed, it has been codified in the California Probate Code section 16002, Duty of Loyalty: "The trustee has a duty to administer the trust solely in the interest of the beneficiaries." (Emphasis added.) One cannot serve two masters. It is clear from a long line of cases that the public trust in favor of the entire state's interest in tidelands and harbors is inviolate. Illinois Central Railroad

Company v. Illinois, 146 U.S. 387, 36 L.Ed. 1018, 13 S.Ct. 110 (1892); City of Berkeley v. Superior Court, 26 Cal.3d 515 (1980); Mallon v. City of Long Beach, 44 Cal.2d 199 (1958); City of Long Beach v. Morse, 31 Cal.2d 254 (1947). In a variety of settings, these cases indicate the nearly sacrosanct quality of the tidelands trust. It is inconceivable that a trustee could be tolerated who was serving an interest other than that of the good of the harbor.

V. The San Diego City Charter, While Not Applicable To The Port District, Provides An Example Of The Relationship Between "Fixed Terms," "Discretion" and "Removal For Cause."

The San Diego City Charter itself provides examples of the concepts discussed above. There is a clear relationship between fixed terms, discretionary independence and removal for cause. Charter section 41 requires "cause" for removal of members of those commissions which exercise discretion, have decision-making authority and serve for fixed terms. Section 41 authorizes the Funds Commission for 4-year terms, the Civil Service Commission for 5-year terms and Planning Commission for 4-year terms, all of which exercise independent discretion and all of which require cause for removal.

While "the phrase 'misconduct in office' (in defining 'cause') is broad enough to include any willful malfeasance, misfeasance, or nonfeasance in office," People v. Hale, 232 Cal.App.2d 112, 119 (1965), it is misconduct that is to be

distinguished from mere displeasure with an official's voting record. *Good v. Common Council of The City of San Diego*, 5 Cal.App 265 (1907).

VI. There Is No Evidence That The Legislature Intended To Rebuke Both The Law And The Public Policy Preference For Removal For "Cause."

On January 11, the San Diego Tribune reported that a letter on the subject of port commissioner removal had been written by former Assemblyman, now Superior Court Judge, Larry Kapiloff to Councilmember Bob Filner. Judge Kapiloff authored the 1982 amendment to the Port District Act which provided for simple majority removal of a port commissioner rather than an extraordinary Council majority (4/5ths). Judge Kapiloff's letter asserts that (1) he believes "a fair reading of the statute compels the conclusion that a commissioner . . . serves at the pleasure of his or her appointing authority" and (2) his intent

was to eliminate the 4/5ths vote requirement. He does not, however, say that it was either his or the legislature's express intent to make at-will removal a provision of the statute. Such provision certainly did not make it into the statute.

Judge Kapiloff's "fair reading" serves as no more than his expression of personal opinion. Unfortunately, for the reasons we have discussed, his interpretation is supported by neither law nor public policy. Even if he had asserted that it was his and the legislature's intent to make port commissioner removal at the will of the City Council, such assertion would not be helpful.

As the Supreme Court noted in California Teachers Assoc. v. San Diego Community College Dist., 28 Cal.3d 692 (1981) . . . , a declaration by the author of legislation . . . was "not a proper subject for consideration in determining the legislature's intent" (Id., at p. 701). The court held that the statement revealed only the author's personal opinion and understanding of the legislation. (Ibid.)

"In construing a statute we do not consider the motives or understandings of individual legislators who cast their votes in favor of it. (Citations.) Nor do we carve an exception to this principle simply because the legislator whose motives are proffered actually authored the bill in controversy (citation); no guarantee can issue that those who supported his proposal shared his view of

its compass.'" (Citations.)
Armstrong v. County of San Mateo, 146 Cal.App.3d 597, 618 (1983).
citing California Teachers Assn., supra, and In re Marriage of
Bouquet, 16 Cal.3d 583, 589 (1976). See also Lundgren v.
Deukmejian, 45 Cal.3d 727, 742 (1988).

Our review of the legislative record of Assembly Bill 1384,
which proposed the amendment, reveals that the legislature
intended (1) to merely provide some symmetry to the
appointment/removal voting scheme and (2) address the
"ineffectiveness" of certain port commissioners. First,
providing for simple majority appointment and removal hardly
translates into a similar symmetry of at-will appointment/at-will
removal. It is obvious from cases cited earlier that appointees

were naturally put in office by personal preference. But once
appointed, the removal criterium depends on the public's interest
in an independent appointee. Second, the "effectiveness" of a
port commissioner, without more, addresses issues of nonfeasance.
Nonfeasance is a form of "cause." People v. Hale, supra,
Cal.App.2d at 119 (1965).

Thus, there is no evidence that at-will removal was either
the intent of the original Port District Act or the amendment.
If former Assemblyman Kapiloff intended to grant the City Council
authority to remove a port commissioner at will, his bill should
have said so.

SUMMARY

It may be argued that the Port District commissioners are
supposed to represent their respective appointing authorities and
that the provision for removal by vote of the respective City
Council without any substantive cause is the remedy for a
"wayward" commissioner. However, the weight of law and public
policy favors an interpretation that the commissioners may only
be removed for good "cause" amounting to more than independence
from the appointing authority.

Respectfully submitted,

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Attachment

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