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CITY ATTORNEY

MEMORANDUM OF LAW

DATE: July 9, 2014
TO: Judy von Kalinowski, Human Resources Director
FROM: City Attorney
SUBJECT: Administrative Regulations – Authority and Signature

INTRODUCTION

The Human Resources Department is updating the City of San Diego's administrative regulations, some of which date back to the 1960's and 1970's. In the course of updating the regulations, you asked our Office to advise on the applicability of administrative regulations to non-mayoral departments (departments not under the direct supervision of the Mayor) and whose signatures are required to indicate applicability and final approval, including the City Attorney.

QUESTIONS PRESENTED

1. Does the Mayor have the authority to issue administrative regulations applicable to non-Mayoral departments?
2. Is a non-mayoral department signature required on administrative regulations in order for those regulations to apply to that department?
3. Is the City Attorney required to sign administrative regulations as to form and correctness per the City Charter (Charter)?

SHORT ANSWERS

1. Yes. The Mayor has the authority to issue administrative regulations applicable to all City departments, including non-mayoral departments, provided the issue is within the

Mayor's purview and the regulation does not contradict or interfere with a non-mayoral department's Charter or San Diego Municipal Code (Municipal Code) mandated authority or responsibilities, or with any applicable State or federal mandates.

2. No. Signature by non-mayoral department heads is not legally required in order for a properly issued administrative regulation to apply, though the Mayor may choose to request and include those signatures for practical reasons.

3. No. Charter section 40 does not require the City Attorney to prepare and sign administrative regulations, but we strongly recommend City Attorney legal review to ensure compliance with applicable law.

DISCUSSION

I. THE MAYOR HAS THE AUTHORITY TO ISSUE ADMINISTRATIVE REGULATIONS GIVING CONTROLLING DIRECTION THAT DOES NOT INTERFERE WITH INDEPENDENT DEPARTMENT AUTHORITY.

Charter section 265(b) grants the Mayor¹ the power to issue administrative regulations to give "controlling direction" to the administrative service of the City. It provides:

In addition to exercising the authority, power, and responsibilities formally conferred upon the City Manager as described in section 260, the Mayor shall have the following additional rights, powers, and duties:

...

(2) To execute and enforce all laws, ordinances, and policies of the City, including the right to promulgate and issue administrative regulations that give controlling direction to the *administrative service* of the City. Nothing in this section shall be interpreted or applied to add or subtract from powers conferred upon the City Attorney in Charter sections 40 and 40.1;

...

¹ Administrative regulations have been in place in the City dating back long before the City's adoption of the Charter provisions for the current mayor-council form of government (some current regulations date to the 1960's). Under the new mayor-council form of government, all power vested in the City Manager has been transferred to the Mayor. The City Manager had authority under Charter section 28 to prescribe "general rules and regulations . . . for the general conduct of the administrative Departments." In addition, an explicit grant of authority to promulgate administrative regulations as is now enumerated in Charter section 265(b)(2) as an additional power. Subsection (b) confers powers upon the Mayor that exceed the combined powers of the former City Manager and Mayor. (*See* 2008 City Att'y MOL 2 (08-1; Feb. 11 2008) regarding requirements for legally executed contracts.)

Charter § 265(b)(2) (emphasis added).

Although “administrative service” is not specifically defined, a review of Charter history reveals that administrative service has been used broadly to include not just managerial staff, but also elective and other independent offices. Charter section 117 in the original Charter provided:

Section 117. CLASSIFICATION. The administrative service of the City is hereby divided into the unclassified and classified service, as follows:

THE UNCLASSIFIED SERVICE shall include all elective positions and the following administrative offices:

A confidential Secretary to the Mayor. . . .

Original Charter section 117, approved by voters April 7, 1931.²

Other provisions of the Charter addressing administrative departments have also been interpreted to include independent departments.³ For example, Charter section 26 provides for the Council’s establishment of an “administrative code providing for the detailed powers and duties of the administrative offices and departments of the City Government, based upon the provisions of this Charter.” San Diego Charter § 26. The Council implemented this provision with the adoption of Municipal Code, Chapter 2, Article 2, of the City’s “Administrative Code,” which includes provisions for the non-mayoral departments. Therefore, the Charter reference in section 265(b)(2) authorizing “controlling direction” to the “administrative service” of the City may be reasonably interpreted to include all City departments, including those not directly under the Mayor’s supervisory authority.

However, this mayoral authority must be interpreted to be consistent with the City functions properly under the authority of the Mayor, as provided in the Charter. For example, the Mayor is authorized to prepare and submit budgets on behalf of all City departments. San Diego Charter § 28. The Mayor does not, nor would he, through the issuance of an administrative regulation, gain any supervisory authority over the independent departments. The lines of supervisory authority are established by the Charter. For example, Charter section 40 gives the City Attorney supervisory authority over deputies in the Office and Charter section 39.2 gives the Audit Committee supervisory authority over the City Auditor.

Just as the Council may not, by ordinance, impinge upon the Charter-established City departments’ authority or Charter-established duties of City officials, the Mayor’s authority to issue administrative regulations is necessarily limited by Charter and Municipal Code provisions (or other applicable State or federal law) delegating authority or responsibilities to independent

² The Charter section has been amended multiples times, while retaining the independent departments as part of the administrative service. In 1963, the section was amended to change the reference from administrative service to “employment.”

³ The term “independent department” is used in this memorandum to refer to those departments that are not under the Mayor’s authority, including Council District Offices, the City Attorney’s Office, Personnel, Retirement, the Ethics Commission, the City Clerk’s Office, the Office of the City Auditor and Independent Budget Analyst.

departments. (See City Att’y RC-2006-25, discussing limitations on Council’s ability to change Charter mandated department responsibilities.) The Mayor cannot divest a department of its Charter or Municipal Code mandated responsibility by way of an administrative regulation because any such regulation would be void as an attempt to amend the Charter or Municipal Code in an unauthorized way. *Montgomery v. Board of Administration*, 34 Cal. App. 2d 514, 520 (1939). Therefore, to the extent any proposed administrative regulation contradicted or interfered with the Charter or Municipal Code authority granted or duties assigned to an independent department, the administrative regulation would not apply.

Because of the number of independent departments with myriad responsibilities, the question of applicability of any proposed administrative regulation to independent departments must be determined on a case by case basis. The analysis would include determining first whether the administrative regulation is properly within the Mayor’s purview, as provided in the Charter, and second whether the proposed regulation contradicts or interferes with the authority or responsibility of an independent department.

II. SIGNATURES ON ADMINISTRATIVE REGULATIONS

A. Independent Department Heads

There is no legal requirement that an independent department head sign an administrative regulation in order for it to be applicable to the department. The legal authority to issue the regulations is provided in the City Charter, the supreme law of the City. “Any act that is violative of or not in compliance with the Charter is void.” *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171 (1994). As stated earlier, administrative regulations apply to all departments in the administrative service of the City, unless the regulation would contradict or interfere with the department’s ability to fulfill a Charter or Municipal Code delegation of authority or assignment of responsibility. Although the independent department head signatures are not legally necessary, the Mayor may wish to consider, as a practical matter, including signature lines for independent department heads to indicate acknowledgment the administrative regulation applies.

B. City Attorney Approval

Charter section 40 requires the City Attorney “to prepare in writing all ordinances, resolutions, contracts, bonds, or *other instruments* in which the City is concerned, and to endorse on each approval of the form or correctness thereof.” (Emphasis added.) This provision has not changed since the Charter’s adoption in 1931. The City Attorney does sign “as to form and legality” on City ordinances, resolutions and contracts,⁴ but has not provided this formal signature on administrative regulations.

⁴ A written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory note, or share certificate. - Also termed *legal instrument*.

The term “other instruments” is not defined in the Charter or its legislative history. Black’s Law Dictionary provides multiple definitions. In its broadest sense, “instrument” means:

“An ‘instrument’ seems to embrace contracts, deeds, statutes, wills, Orders in Council, orders, warrants, schemes, letters, patent, rules, regulations, by-laws, whether in writing or in print, or partly in both; in fact, any written or printed document that may have to be interpreted by the Courts.” Edward Beal, *Cardinal Rules of Legal Interpretation* 55 (A.E. Randall ed., 3d ed. 1924).

Black’s Law Dictionary 869 (9th ed. 2009).

However, the term is also defined in much more limited terms, such as in commercial law:

Commercial law. An unconditional promise or order to pay a fixed amount of money, with or without interest or other fixed charges described in the promise or order. Under the UCC, a promise or order must meet several other specifically listed requirements to qualify as an instrument. [UCC § 3-104\(a\)](#).

Id.

As indicated, the City Attorney signs resolutions, ordinances and contracts, but has not provided a formal approval “as to form and legality” on other City documents, including administrative regulations. This 80-year history of consistent application indicates that the City has not considered administrative regulations to be “instruments” as provided in Charter section 40. For documents approved by City Council, the City Attorney generally provides legal review of the underlying documents in preparing the approving ordinance or resolution for Council action. Likewise, although administrative regulations are not submitted to the City Council for approval, the Office does provide legal review of proposed administrative regulations upon request, fulfilling the City Attorney’s role as chief legal advisor for the City. San Diego Charter § 40.

Most administrative regulations state in the signature area, “authorized,” and then provide signature lines for the City Attorney, City Manager, and other independent department heads. There is no signature “as to form and legality” as is provided on other documents the City Attorney signs under Charter section 40. Given the 80-year history of using “approval as to form and legality” for those documents requiring City Attorney preparation and approval under the Charter, it appears the “authorized” signature line for the City Attorney was originally more likely intended to indicate the City Attorney’s acceptance of the application of the regulation to the City Attorney’s Office as an independent department.

Given this long history of consistent application of Charter section 40, we believe the appropriate interpretation is that administrative regulations are not deemed “other instruments”

as provided in Charter section 40. Therefore, City Attorney approval as to “form or correctness” is not mandated by the Charter. However, regardless of whether there is a signature by the City Attorney’s Office, we do recommend that any proposed administrative regulation be provided to the City Attorney’s Office for review for consistency with applicable law. Likewise, including a signature “as to form and legality” is permissible if that is something the Mayor and City Attorney wish to include.

CONCLUSION

The Mayor has authority under the Charter to issue administrative regulations applicable to all departments of the City, including the independent departments, for matters properly within the Mayor’s purview. Administrative regulations that interfere with the authority or duties of an independent department as provided in the Charter or Municipal Code would not apply to that department. Independent department heads do not have to sign in order for administrative regulations to apply, although the Mayor may wish to consider including the signature lines as a practical matter. The Charter does not require the City Attorney prepare and sign administrative regulations as to “form or correctness.” However, we strongly recommend City Attorney legal review to ensure consistency with applicable law.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Prescilla Dugard
Prescilla Dugard
Chief Deputy City Attorney

PMD:hm

cc: Hon. Mayor Kevin L. Faulconer
Hon. City Council Members
Scott Chadwick, Chief Operating Officer
Andrea Tevlin, Independent Budget Analyst
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Stacey Fulhorst, Ethics Commission Executive Director
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