MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

GREGORY J. HALSEY
DEPUTY CITY ATTORNEY

OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

Jan I. Goldsmith

CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620

SAN DIEGO, CALIFORNIA 92101-4178

TELEPHONE (619) 236-6220

FAX (619) 236-7215

MEMORANDUM OF LAW

DATE: May 1, 2014

TO: Donna Wallace, Assistant Personnel Director

FROM: City Attorney

SUBJECT: The Status of Councilmember Ed Harris' Position as a Lifeguard Sergeant During His Tenure as a Councilmember

INTRODUCTION

You have asked this Office to analyze whether the San Diego Charter (Charter) places any conditions or restrictions on the transfer of Ed Harris, a classified hourly Lifeguard in the City of San Diego's Fire-Rescue Department, to the unclassified position of the San Diego City Councilmember (Councilmember) for District 2.

On April 8, 2014, Ed Harris was appointed as the Councilmember for District 2, temporarily filling the council position vacated by Kevin Faulconer until December 2014. Mr. Harris is a longtime employee in the Fire-Rescue Department and, at the time of his appointment, he was actively employed by the City in a permanent, classified position as a Lifeguard in the Fire-Rescue Department.

Charter section 12(k)[1], provides that Councilmembers "shall not be eligible during the term for which they were appointed or elected to hold any other office or employment with the City . . . ." San Diego Charter § 12(k). Mr. Harris[2] has applied for special leave without pay from his Lifeguard position during the months that he serves as a Councilmember.

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[1] This section is located in article III of the Charter.

[2] Throughout this memo we refer to Councilmember Harris as "Mr. Harris" to avoid confusion when discussing the status of Mr. Harris as a Councilmember and City employee.

Civil Service Rule X, section 9 authorizes the Civil Service Commission to grant employee requests for special leave without pay for any unpaid absence of more than 30 consecutive calendar days. Civil Service Rule X, § 9. Employees who transfer from a classified position to an unclassified position, without a break in employment, may apply for special leave without pay from the classified position for an indefinite period of time. San Diego Personnel Reg. I-7 § III. A. 5.

This Memorandum analyzes whether Charter section 12(k) prohibits Mr. Harris from applying for special leave without pay from his Lifeguard position during his tenure as a Councilmember.[3]

QUESTION PRESENTED

Does Charter section 12(k) prohibit Ed Harris from applying for a special leave without pay from his classified position with the City as a Lifeguard to serve as an appointed Councilmember for District 2 for a limited period of time?

SHORT ANSWER

Probably not. Mr. Harris may apply for special leave without pay from his classified position with the City as a Lifeguard, with job saved or on the eligible list. Although Charter section 12(k) prohibits Mr. Harris from "hold[ing] any other office or employment with the City" during his tenure as a Councilmember, a court would likely conclude that Mr. Harris does not "hold employment" in his Lifeguard position if he takes a special leave without pay, job saved or eligible list. When read with other Charter provisions, the purpose of Charter section 12(k) is to prevent a Councilmember from actively occupying and working in another City position during his or her tenure on the San Diego City Council (Council).

If Mr. Harris takes a special leave without pay, the purpose of Charter section 12(k) is still achieved, as he will not be working in another City position. Also, while on special leave without pay, Mr. Harris may retain his property interest in his classified position and exercise his federal and state constitutional right to hold public office without penalty. However, the Civil Service Commission retains the ultimate discretion to determine whether Mr. Harris may take special leave without pay, job saved or eligible list. We do note that there are no cases directly on point that address the unique facts present here; thus, it is possible a court could conclude that a special leave without pay, if granted, still constitutes employment within the meaning of Charter section 12(k).

[3] This Memorandum does not address any conflict of interest issues that could arise as a result of Mr. Harris taking a special leave without pay, with job saved from his classified Lifeguard position. Since this type of leave permits Mr. Harris to retain his property interest in his classified position, this Office recommends that he take extra precaution to navigate through potential conflict of interest issues.

ANALYSIS

I. CIVIL SERVICE EMPLOYEES HAVE A RIGHT TO APPLY FOR SPECIAL LEAVE WITHOUT PAY

Classified employees may apply for two different categories of special leave without pay: "job saved" leave and "eligible list" leave. San Diego Personnel Regulation I-7, section III, A. 1. Under the "job saved" category, an employee may return from leave to the same classification in the same department, and at a salary step no lower than that held when the leave commenced. *Id.* at section III, C. 6. The "eligible list" category does not guarantee an employee a return to his or her former position – or any position with the City. Instead, this type of leave merely permits a returning employee to place his or her name on eligible certification lists that departments will consider when hiring for open positions. *Id.* at section III, C. 4. Additionally, if an employee is hired from an "eligible list" leave, his or her salary is not guaranteed at a certain rate but is determined as though that employee participated in a voluntary class transfer or demotion, in accordance with San Diego Personnel Regulation H-9.

Employees on the "job saved" leave also retain certain rights during their leave. *See* San Diego Civil Service Rule X, § 9. For example, if a department participates in a Reduction in Force (RIF), an employee on a "job saved" leave is treated the same as other incumbents in the impacted classification – meaning, his or her name is added to the seniority ranking to determine bumping rights. An employee on "eligible list" leave has no rights in a RIF process because he or she is not considered an incumbent in the impacted classification. *See* San Diego Personnel Regulation I-7, section III, C. 4.

Generally, an employee may only take special leave without pay for a period not exceeding one year. San Diego Civil Service Rule X, § 9. However, Personnel Regulation I-7, section III. A. 5, provides that employees who transfer from a classified position to an unclassified position without a break in City employment may take a special leave without pay from the classified position during the duration of their unbroken employment in the unclassified Service. While on a permitted special leave without pay, employees remain on City payroll and shall not be terminated, except for cause, in order to protect their continuity of service, retirement, and other job rights. San Diego Personnel Regulation I-7, section III, A. 6.

II. GRANTING MR. HARRIS SPECIAL LEAVE WITHOUT PAY LIKELY DOES NOT VIOLATE SAN DIEGO CHARTER SECTION 12(K)

San Diego Charter section 12(k) states:

> Council members shall not be eligible during the term for which they were appointed or elected to hold any other office or employment with the City, except as Mayor or City Attorney and as a member of any Board, Commission or Committee thereof, of which they are constituted such a member by general law or by this Charter.

San Diego Charter § 12(k).[4] Charter section 12(j) mandates that Councilmembers "devote full time to the duties of their office and not engage in any outside employment, trade, business or profession which interferes or conflicts with those duties." San Diego Charter § 12(j).

Although Mr. Harris will not perform any of his job duties as a Lifeguard while a Councilmember, if he receives special leave without pay he will still maintain a relationship with his Lifeguard position. San Diego Civil Service Rule X, § 9. This is a particularly strong relationship if he elects "job saved" special leave without pay because it will guarantee him the right to return to his Lifeguard classification at the conclusion of his term.

To determine whether Mr. Harris will "hold employment" during such a leave, we must analyze the meaning of Charter section 12(k)'s use of the term "hold employment."

A. Since Charter Section 12(k) Does Not Define What It Means To "Hold Employment," A Court Would Likely Apply The Common Law Test To Interpret That Phrase

The language of Charter section 12(k) prohibits Mr. Harris from "hold[ing] any other office or employment with the City" during his term as a Councilmember. However, the Charter does not define the term "hold employment" or the parameters of its application. As such, a court will use the rules of statutory construction to evaluate whether section 12(k) limits Mr. Harris' ability to apply for special leave without pay from his Lifeguard position.

The language of the Charter "must be interpreted in its ordinary meaning and in accordance with legislative intent." *Tripp v. Board of Fire and Police Pension Com'rs of City of Fresno*, 94 Cal. App. 720, 723 (1928). When terms of a charter remain undefined, courts will presume that they were used in a manner consistent with the way courts have traditionally defined those terms. *West v. City of Oakland*, 30 Cal. App. 556, 560 (1916). Additionally, courts construe charter language in favor of the exercise of the power over municipal affairs and against the existence of any limitation or restriction that is not expressly stated. *Michael Leslie Productions, Inc. v. City of Los Angeles*, 207 Cal. App. 4th 1011, 1021 (2012).

Here, the legislative history associated with Charter section 12(k) provides no insight into the meaning of the phrase, "to hold employment." The provision prohibiting Councilmembers from holding "any other office or employment with the City" was part of the language of the original Charter approved by voters on April 7, 1931. This language was amended in 1975 and 1990, but with no effect on the prohibition against a Councilmember holding employment with the City.[5] Therefore, without any guidance from legislative history, a court would likely interpret the meaning of "employment" consistent with the manner in which courts generally define this

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[4] A city charter is the city's constitution. *City and County of San Francisco v. Patterson*, 202 Cal. App. 3d 95, 102 (1988). "The charter represents the supreme law of the City, subject only to conflicting provisions in the federal and state Constitutions and to preemptive state law." *Woo v. Superior Court*, 83 Cal. App. 4th 967, 974 (2000) (citations omitted).

[5] In 1975, the language of this section was amended to add "City Attorney" to the list of officials who were exempt from this prohibition against holding any "other office or employment with the City." San Diego Charter Amendment, voted 11-04-1975. Also, in 1990, the language of the section was changed to its current form, but the substance remained the exact same. San Diego Charter Amendment, voted 11-06-1990.

term. *See Oneto v. City of Fresno*, 136 Cal. App. 3d 460, 465 (1982) ("Since there was no extrinsic evidence introduced as to the meaning of the language used, the proper interpretation of that language is a question of law for the court . . . .")

A court will likely find that the drafters of Charter section 12(k) understood the phrase "hold employment" to be interpreted consistent with common law. "[W]hen a statute refers to an 'employee' without defining the term, courts have generally applied the common law test of employment to that statute." *Arnold v. Mut. of Omaha Ins. Co.*, 202 Cal. App. 4th 580, 586 (2011); *see Metropolitan Water Dist. v. Superior Court*, 32 Cal. 4th 491, 500 (2004). The decision in *Board of Retirement of the Kern County Employees' Retirement Association v. Bellino*, 126 Cal. App. 4th 781 (2005) (*Bellino*), provides especially relevant insight because it analyzes the undefined use of the term "employee" in a statute with language that largely mirrors Charter section 12(k).

In *Bellino*, the Board of Retirement for Kern County filed a complaint for declaratory and injunctive relief challenging the election of a Kern County civil service employee to the Board. The Board argued that California Government Code section 53227 applied to the County and prohibited the employee from sitting on the Board. Government Code section 53227(a) provides, in part, that "an employee of a local agency may not be sworn into office as an elected or appointed member of the legislative body of that local agency unless he or she resigns as an employee."[6] The parties disputed whether the county employee constituted an "employee" as used in Government Code section 53227. The court held that since the statute did not define "employee," the common law definition of "employee" applied and, under that definition, the county employee was an employee of the local agency that the Board served. Accordingly, the court found that Government Code section 53227 prohibited the employee from serving on the Board, unless he immediately resigned. *Bellino*, 126 Cal. App. 4th at 795.

Here, since Charter section 12(k) does not define the term "hold employment" and the legislative history associated with this section is silent on this term, it is likely that a court will follow the analysis in *Bellino* and apply the common law test of "employment."

B. Under The Common Law Test, A Court Will Likely Find That Mr. Harris Does Not Currently Hold Employment As A Lifeguard

The California Supreme Court has recognized that the principle test of an employment relationship under common law is "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired . . . ." *S.G. Borello & Sons,*

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[6] There are no cases that have analyzed whether California Government Code section 53227 applies to charter cities. However, it is this Office's opinion that it is unlikely a court would find that this statute applies to charter cities, such as the City. Government Code section 53227.2(a) provides that for purposes of this article, local agency means "a city, city and county, county, district, municipal or public corporation, political subdivision, or other public agency of the state." Cal. Gov't Code § 53227.2(a). Critically, unlike other Government Code statutes that apply to charter cities, this statute does not define "local agency" to include charter cities or counties. *See e.g.,* Cal. Gov't Code § 3501 (defining a "public agency" to include "every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not."). Moreover, there is no indication that this statute addresses a statewide concern strong enough to justify interference into a well-established municipal affair – i.e., councilmember eligibility. *See* Cal. Const. art. XI § 5(b).

Inc. v. Department of Industrial Relations, 48 Cal. 3d 341, 350 (1989). However, this "principal" factor of the common law test – control – is not exclusive, and courts will consider "additional factors."[7] *Id.* at 350-51; *Arnold v. Mut. of Omaha Ins. Co.*, 202 Cal. App. 4th 580, 584 (2011). Although courts will not apply these individual factors "mechanically as separate tests," they are "intertwined" and "are often given weight depending on the particular combination of factors." *Arnold*, 202 Cal. App. 4th at 584 (citations omitted). For example, the *Bellino* court summarized the common law definition of "employment" as "[t]he right to control and direct the activities of the alleged employee or the manner and method in which the work is performed . . . ." *Bellino*, 126 Cal. App. 4th at 790.

Some California courts have also held that "[w]here no financial benefit is obtained by the purported employee from the employer, no plausible employment relationship of any sort can be said to exist because although compensation by the putative employer to the putative employee in exchange for his services is not a sufficient condition . . . it is an essential condition to the existence of an employer-employee relationship." *Estrada v. City of Los Angeles*, 218 Cal. App. 4th 143, 151 (2013) (citations omitted) (internal quotations omitted); *Mendoza v. Town of Ross*, 128 Cal. App. 4th 625, 636 (2005).

A City Attorney Memorandum of Law from 1985 used a similar analysis to evaluate, for conflict of interest purposes, whether a member of the Board of Directors of the San Diego Neighborhood Improvement Council Inc. was an employee of a related nonprofit corporation. 1985 City Att'y MOL 496 (85-96; Dec. 13, 1985). The memorandum concluded that the Board member was not an employee of the nonprofit corporation because "he is not engaged in day to day management of the agency and he is not financially compensated for his services to the [nonprofit corporation]." *Id.*

Here, during his term, Mr. Harris will not perform any duties or work in any capacity that suggests he still occupies the position of a Lifeguard. Mr. Harris will not be engaged in the day to day management of a Lifeguard position, he will not perform any duties of a Lifeguard, he will not be financially compensated for any Lifeguard services, and he will not be under the control or work at the direction of the City Fire-Rescue Department. It is likely that a court will conclude, under the common law test of employment, that Mr. Harris does not "hold employment" with the City as a Lifeguard during his tenure as a Councilmember.

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[7] These additional factors include: "whether the principal has the right to discharge at will, without cause; whether the one performing services is engaged in a distinct occupation or business; the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; the skill required in the particular occupation; whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; the length of time for which the services are to be performed; the method of payment, whether by the time or by the job; whether or not the work is a part of the regular business of the principal; and, whether or not the parties believe they are creating the relationship of employer-employee." *Arnold v. Mut. of Omaha Ins. Co.*, 202 Cal. App. 4th 580, 584 (2011).

C. An Employee On Special Leave Without Pay Likely Does Not "Hold Employment" With The City, As The Term Is Used In Charter Section 12(k)

If the Civil Service Commission permits Mr. Harris to take a special leave without pay (job saved or eligible list) from his Lifeguard position, this leave will likely not create the type of employment relationship with the City prohibited under Charter section 12(k).

An argument could be made that if Mr. Harris receives special leave without pay, job saved, then he will still "hold employment" in his Lifeguard position because the position will not be permanently filled, and is guaranteed to be available for him when he finishes his tenure as a Councilmember and returns from leave. In this context, Mr. Harris maintains his Lifeguard position with the City. However, when read historically and in context with similar Charter language, it is unlikely that a court will interpret the availability of a position to be the same as holding employment.

To construe a charter provision, a court first analyzes the words themselves and gives them the meaning they bear in "ordinary use." *Franchise Tax Bd. v. Superior Court*, 63 Cal. App. 4th 794, 798 (1998); *Killian v. City and County of San Francisco*, 77 Cal. App. 3d 1, 7 (1978). If the language is clear and unambiguous there is no need for construction. *Delaney v. Superior Court*, 50 Cal. 3d 785, 800 (1990) (citations omitted). "However, this plain meaning rule does not prohibit a court from determining whether the literal meaning of a charter provision comports with its purpose, or whether construction of one charter provision is consistent with the charter's other provisions." *Int'l Fed'n of Prof'l & Technical Engineers, AFL-CIO v. City of San Francisco*, 76 Cal. App. 4th 213, 224 (1999). As a last resort, a court will adopt the interpretation that leads to the more reasonable result. *Witt Home Ranch, Inc. v. County of Sonoma*, 165 Cal. App. 4th 543, 555 (2008).

Here, Charter section 12(k)'s use of the word "hold" is susceptible to numerous interpretations. The legislative history does not indicate what definition of "hold" the voters intended to adopt. Arguably, if the voters intended "hold" to mean "maintain without change," then Mr. Harris will "hold" employment in his Lifeguard position if he received special leave without pay, job saved. However, if the voters intended "hold" to mean something more active, then Mr. Harris will not "hold" employment in his Lifeguard position.

The definition of "hold" provides useful guidance. *See MacIsaac v. Waste Mgmt. Collection & Recycling, Inc.*, 134 Cal. App. 4th 1076, 1083 (2005) ("We do not view the language of the statute in isolation."). The Black's Law Dictionary edition that was in effect in 1931, when the language of Charter section 12(k) entered the Charter, provides eight definitions of the term "hold." *See* Black's Law Dictionary, 573-574 (2nd ed. 1910). The only definition fitting in this context defines "hold" as: "To possess, to occupy; to be in possession and administration of; as to *hold office*." *Id.* at 574 (emphasis added).[8] Since the plain language of

[8] A recent edition of Black's Law Dictionary added the following definition of "hold" that also works in this context: "To keep; to retain; to maintain possession of or authority over." Black's Law Dictionary 730-731 (6th ed. 1990). Pursuant to this definition, Mr. Harris would likely still "hold employment" if he received special leave without pay, job saved. However, since this definition was not in the Black's Law Dictionary at the time the "hold

Charter section 12(k) uses the verb "hold" in the context of "to hold any other office or employment," it is likely that the court will interpret "hold" consistent with this Black's Law Dictionary definition. *See* Charter § 12(k).

When interpreted in this context, Mr. Harris will not "hold" employment in his Lifeguard position when on a special leave without pay, job-saved, because he will not "occupy" or "be in possession and administration of" the position. Instead, Mr. Harris will solely occupy the position of a Councilmember and will only control the administration of affairs associated with his Council position.

Charter section 12(j) reinforces this interpretation of the term to "hold employment" because it requires Councilmembers to "devote full time to the duties of their office and not engage in any outside employment, trade, business or profession which interferes of conflicts with those duties." San Diego Charter § 12(j). The use of the term "engage in any outside employment" conveys the notion that Councilmembers should not be *actively working* in other employment fields. It does not suggest that Councilmembers should not "retain" or "maintain" an outside or inactive employment position.

The California Supreme Court's decision in *Whitehead v. Davie*, 189 Cal. 715 (1922), also provides relevant guidance. In *Whitehead*, the court analyzed whether a battalion chief might hold the position of fire chief without violating the Oakland City Charter, which provided that no person holding an office or position under the city government should be eligible to hold any other elective or appointive office under the city. *Id.* at 720-21. In that case, the battalion chief took a leave of absence, under the applicable civil service rules, during the time that he served as fire chief. The respondents contended that the battalion chief held two offices at this time in violation of the city's charter, but the court disagreed. Without much analysis, the court concluded that the fire chief "relinquished" his employment as a battalion chief when he elected to take a leave of absence during the time that he served as fire chief, and the Oakland charter "did not operate to prevent his returning to his civil service position [battalion chief] upon the termination of his incumbency as chief of the department." *Id.* at 722.

Although not directly on point, the reasoning in *Whitehead* strongly suggests that a court would find that a City employee "relinquishes" his classified position while on a special leave without pay, and that Charter section 12(k) does not operate to prevent an employee on such leave from serving as a Councilmember. *See Id.* at 720-22.

Therefore, when read in context and consistent with analogous case law, the plain language of Charter section 12(k) likely does not restrict Mr. Harris from applying for special leave without pay, job saved, from his Lifeguard position.

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employment" language entered the Charter, it is unlikely that the drafters intended "hold" to be interpreted in this manner.

III. A COURT WILL LIKELY INTERPRET CHARTER SECTION 12(K) IN FAVOR OF PROMOTING MR. HARRIS' RIGHT TO HOLD OFFICE AND HIS PROPERTY INTEREST IN HIS CLASSIFIED POSITION

Charter cities, like this City, "can make and enforce all ordinances and regulations regarding municipal affairs subject only to the restrictions and limitations imposed by the city charter, as well as conflicting provisions in the United States and California Constitutions and preemptive state law." *Grimm v. City of San Diego*, 94 Cal. App. 3d 33, 37 (1979); Cal. Const. art. XI, § 5(a); San Diego Charter § 2. Article XI, section 5 of the California Constitution grants charter cities the right to "conduct" city elections. Cal. Const. art. XI, § 5(b). This section expressly recognizes that the "manner in which, the method by which, the times at which, and the terms for which" municipal officers are elected or appointed are within the plenary authority of charter cities. *Id.* As such, the City likely has the plenary authority to establish the restrictions set forth in Charter section 12(k).

Courts have also recognized that both the California Constitution and the federal Constitution protect an individual's right to seek and hold public office. The federal Constitution's First Amendment protection of freedom of association affords public employees "the right to run for office and to hold office once elected." *Flinn v. Gordon*, 775 F.2d 1551, 1554 (11th Cir. 1985); *Elrod v. Burns*, 427 U.S. 347, 356 (1976); *United States v. Tonry*, 605 F.2d 144, 150 (5th Cir. 1979) ("There is no question that candidacy for office and participating in political activities are forms of expression protected by the First Amendment.") If a government employer attempts to impede this right, courts conduct a balancing test between the employee's First Amendment right and the government employer's interest. *Randall v. Scott*, 610 F. 3d 701, 713 (11th Cir. 2010).[9]

Similarly, the California Supreme Court has held that "[t]he right to seek public office and the right to unrestricted exercise of the franchise are fundamental . . . protected by the First Amendment and article I, section 2 of the California Constitution." *Canaan v. Abdelnour*, 40 Cal. 3d 703, 727 (1985); *see also Helena Rubenstein Internat v. Younger*, 71 Cal. App. 3d 406, 418 (1977) ("In California, the right to hold public office has long been recognized as a valuable right of citizenship.") The California Legislature has codified this right, in part, in Government Code section 3203, which prohibits a local agency from placing any restriction on the political activities of any employee.[10]

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[9] However, the degree of First Amendment protection for the right to run for and hold public office is not entirely clear or well defined in case law. *Randall*, 610 F. 3d at 713. The *Bellino* court held that Government Code section 53227's restrictions on candidacy for public office "need not only be drawn in such a manner as to bear some rational relationship to a legitimate state end. Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them." *Bellino*, 126 Cal. App. 4th at 794 (citation omitted).

[10] California Government Code section 3203 reads: "Except as otherwise provided in this chapter, or as necessary to meet requirements of federal law as it pertains to a particular employee or employees, no restriction shall be placed on the political activities of any officer or employee of a state or local agency." Section 3201 in the same chapter declares, "The Legislature finds that political activities of public employees are of significant statewide concern." Cal. Gov't Code § 3201. However, no cases have held that these statutes apply to charter cities.

It is likely that a court would interpret Charter section 12(k) in a manner that would avoid infringing on Mr. Harris' right to hold public office. When read in context and in harmony with section 12(j), the purpose of Charter section 12(k) is to prevent a Councilmember from actively working in and occupying another employment position with the City during his or her tenure as a Councilmember. As applied to Mr. Harris, this purpose can be achieved without forcing him to completely resign from his Lifeguard position. Special leave without pay allows for Mr. Harris to exercise his right to hold public office without suffering a loss of employment. *See Eldridge v. Sierra View Local hosp. Dist.*, 224 Cal. App. 3d 311, 319 (1990); *see also Woo v. Superior Court*, 83 Cal. App. 4th 967, 977 (2000) ("Any ambiguity in a law affecting [the right to hold public office] must be resolved in favor of eligibility to hold office.")

Moreover, a court will likely read Charter section 12(k) consistent with Mr. Harris' property interest in his classified Lifeguard position. California's statutory scheme governing civil service employment gives government employees who attain "permanent" status a property interest in continued employment that cannot be denied without due process. *Skelly v. State Personnel Bd.*, 15 Cal. 3d 194, 206–207 (1975); *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 541 (1985). Arguably, requiring Mr. Harris to immediately resign from his permanent, classified position as a Lifeguard, without any notice, appeal rights, or procedural hearings would likely violate his due process right. However, if Mr. Harris is allowed to apply for special leave without pay, job saved, he will be entitled to a procedural hearing in front the Civil Service Commission. This hearing will give Mr. Harris the opportunity to argue for special leave without pay, job saved, which would protect his continuity of service and allow him to return from leave to his same (or comparable) classified position.[11]

Therefore, it is likely that a court would interpret Charter section 12(k)'s "hold employment" language to permit Mr. Harris to apply for special leave without pay, job saved, from his City Lifeguard position because this interpretation achieves the purpose of Charter section 12(k) without infringing on Mr. Harris' constitutional rights.

We note that nothing in this Memorandum is intended to suggest that the Civil Service Commission is required to reach any particular result regarding Mr. Harris' application for special leave without pay. The Charter provides the Civil Service Commission with supervision over the selection, promotion, and removal of all classified employees. Charter § 115.

CONCLUSION

Charter section 12(k) does not prohibit Mr. Harris' ability to request special leave without pay, job saved or eligible list, from his classified position with the City as a Lifeguard. Although Charter section 12(k) prohibits Mr. Harris from "hold[ing] any other office or employment with the City" during his tenure as a Councilmember, a court will likely conclude that, under the

[11] San Diego Personnel Regulation I-7, section III. A. 6 states, "An employee granted special leave without pay shall not be terminated, except for cause. His/her name shall remain on the payroll so as to protect his/her continuity of service, retirement, and other job rights." However, special leave without pay is not permanent, an employee "must return to work prior to the expiration date of leave, unless the leave is extended by the Commission." San Diego Personnel Regulation I-7, section III, A. 7.

common law test for employment, Mr. Harris does not currently "hold employment" in his Lifeguard Sergeant position. Moreover, taking a special leave without pay, job saved or eligible list, will not trigger the type of employment relationship prohibited under Charter section 12(k). When read with other Charter provisions, the purpose of Charter section 12(k) is to prevent a Councilmember from actively occupying and working in another City position during his or her tenure on Council. However, the Civil Service Commission retains the ultimate discretion to grant or deny Mr. Harris' application for special leave without pay, job saved or eligible list. Again, we note that there are no cases addressing these unique circumstances and a court could conclude that holding employment within the meaning of Charter section 12(k) includes a special leave without pay.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Gregory J. Halsey
Gregory J. Halsey
Deputy City Attorney

GJH:sc
Doc. No. : 778685
ML-2014-3

cc: Judy von Kalinowski,
Human Resources Director