DATE: December 2, 1987

TO: Rich Snapper, Personnel Director
FROM: City Attorney
SUBJECT: Inappropriate Appointments

In a memorandum dated October 13, 1987, you indicated that due to administrative errors, two individuals currently employed by The City of San Diego were inappropriately appointed to their present job classifications. You asked for our legal opinion concerning any options you might have in this matter because of the unusual nature of the administrative errors.

The first individual was employed as a permanent Lifeguard II until August 24, 1987 when he transferred to the class of Zoning Investigator I in the Planning Department. Prior to July 1, 1987 the class of Lifeguard II was paid at a higher rate than Zoning Investigator I, and therefore, at that time, a Lifeguard II was eligible to voluntarily demote to Zoning Investigator via the transfer process. However, on July 1, 1987, Zoning Investigator I received a special salary adjustment which raised it above that of Lifeguard II. As a result, a transfer from Lifeguard II to Zoning Investigator I became a promotion requiring the employee to successfully complete an examination. On July 10, 1987, this employee requested a demotion to a number of classes including Zoning Investigator I. Unaware of the recent change in the salary ordinance, the Personnel staff, having previously approved Lifeguards to demote to the Zoning Investigator I class, did not notice that this transfer was in fact a promotion and inappropriately approved this individual's transfer. As a result, he was certified to the Planning Department, interviewed on July 16, 1987 and selected with a start date of August 24, 1987. Prior to his interview and selection by the Planning Department, the employee applied for the Zoning Investigator I promotional exam during the open period of June 12, 1987 through July 15, 1987. He did not take the written examination held on August 12, 1987 because he had already been offered and accepted the position of Zoning

Investigator I via the transfer process on July 16, 1987. As a result, the employee missed out on the opportunity to compete in the examination process. He is currently serving in the Zoning Investigator I classification.

The second situation concerns an individual who submitted an application for Sanitation Driver I. The minimum requirements included possession of a California Class II unrestricted driver's license. At the time of application, his license was

physically checked at the employment information counter and verified as being a valid Class II license with no apparent restrictions. After the individual's application was approved, he took and passed the qualifying written test and was then placed in Category I on the eligible list on April 2, 1987. His name was certified to the General Services Department - Refuse Collection Division on April 21, 1987. At the time his name was certified, the Personnel Department received his driver's record information from the Department of Motor Vehicles indicating that he had a restriction on the Class II license which, although not listed on the license itself, disqualified him from this appointment. The individual was notified by certified letter that his name was being removed from the eligible list on May 22, 1987. However, a notice was not sent to the Refuse Collection Division. This employee was then hired on June 1, 1987. According to the Refuse Collection Division, his work is highly satisfactory and he evidently quit another job to secure employment with The City of San Diego. You have also advised us that the restriction on this individual's license has been cleared by the Department of Motor Vehicles and he is now qualified for appointment.

Generally speaking, when a vacancy in a public office occurs, it can only be legally filled by the authority designated by law to fill it in accordance with the established statutory procedures. This principle applies to both promotion and new hires. When a public employee is appointed by mistake or error, he or she is referred to as a "de facto employee." The term "de jure employee" is used in reference to an employee whose appointment is valid. Smith v. County Engineer, 266 Cal.App.2d 645 (1968). The general rule is that a technically illegal appointment can be ratified by the municipal body or officer who has power to make the initial appointment once the defect is cured. State v. Basile, 174 Conn. 36 (1977). Therefore, the employee who did not possess the proper qualifications on the date of hire but who now possesses those qualifications may now be validly appointed. In regard to his past service to The City of San Diego, the general rule is that one who becomes a public

employee de facto, without bad faith, dishonesty, or fraud on his part and who renders the required services should be permitted to recover the normal compensation provided by law for such services during the period of their rendition. O'Connor v. Calandrillo, 117 N.J. Super 586, 285 App.2d 275, aff'd 121 N.J. Super 135, 296 A.2d 326, cert. denied 412 U.S. 940, 37 L.Ed.2d 399, 93 S.Ct. 2775 (1971).

The more difficult case to resolve, however, concerns the

employee who was not properly promoted. The employee has clearly served as a "de facto" Zoning Investigator I since the invalid appointment but is technically a "de jure" Lifeguard II. A simple solution to this problem is to transfer the employee back to his position of Lifeguard II. This of course would work a hardship on this employee who was inappropriately transferred through no fault of his own. There is some authority in other jurisdictions that supports the argument that the principles of equitable estoppel prevent a municipality from asserting that an appointment is invalid where exceptional circumstances exist and where the interest of justice, morality and common fairness require that course. Juliano v. Ocean Gate Bor., 520 A.2d 418 (N.J. Super L 1986). For example, a municipality was barred from enforcing an ordinance requiring employees to be city residents against certain employees who had changed their residence in justifiable reliance on the express written permission of the police commissioner. Police Lieutenants v. Detroit, 56 Mich.App. 617 (1974).

California courts, however, have never ruled on the legality of applying the rules of equitable estoppel in an action challenging the appointment process. However, the California courts have recognized other equitable defenses in disputes over appointment to public office. For example, in Newberry v. Civil Service Commission, 42 Cal.App.2d 258 (1940), the court upheld a trial court's conclusion that an employee's claim for an office currently filled by an unqualified employee was barred by latches.

We cannot be certain how a court of law would rule if faced with this particular issue under the present extraordinary circumstances. However, we believe that there is some authority for the argument that common fairness in the present case would be best served by permitting this individual to continue to serve as a "de facto" Zoning Investigator I until the next examination which should be scheduled as soon as possible. In the meantime, his status must be considered as similar to that of a limited appointee under Civil Service Rule VII, . 3 San Diego Municipal

Code . 23.0803 in that he has no permanent right to this position. If the employee successfully completes the examination, his appointment to Zoning Investigator I can be ratified at that time. If, on the other hand, he is not successful, he should then be immediately returned to the Lifeguard II classification. Your only other option is to notify this employee of the error and return him to Lifeguard II status.

JOHN W. WITT, City Attorney
By

John M. Kaheny
Deputy City Attorney

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