

DATE: December 29, 1987

TO: Brene Patrick, San Diego RETC  
FROM: City Attorney  
SUBJECT: RETC Personnel Policy Manual

You requested review of portions of a new RETC personnel policy manual and had several specific questions. You asked me if RETC was required to comply with the Hatch Act. 5 U.S.C. section 1501, et seq. ("The Hatch Act") deals with political activities of government employees. The constitutionality of the Hatch Act was upheld by the U.S. Supreme Court in *CSC v. Letter Carriers*, 413 U.S. 548, 37 L.Ed.2d 796 (1973). Similar restrictions as to state and local government agencies were upheld in *Broadrick v. Oklahoma*, 413 U.S. 601, 37 L.Ed.2d 830 (1973). 5 U.S.C. section 1501(4) defines officer or employee: "State or local officer or employee' means an individual employed by a state or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the U.S. or Federal Agency...." Since RETC is a joint powers agency formed and funded pursuant to 29 U.S.C. section 1501, et seq., its employees are required to conform to the provisions of 5 U.S.C. section 1502 (see attachment).

You also asked that if compliance with the Hatch Act were required, was RETC in compliance? The new personnel manual you have provided does not directly address these issues. I would suggest you include a section worded so that RETC complies with the above-mentioned statute.

The next question concerned personnel records. You asked whether RETC needed to notify an employee if a government agency had requested information on him or her. Though not required by statute, if an agency's policy manual states notification will be given, as RETC's new manual does, it is then required.

Your next question was whether RETC employees have vested employment rights such that "Skelly" requirements apply.

("Skelly" requirements are enumerated in California Supreme Court case, *Skelly v. State Personnel Board*, 15 Cal.3d 194 (1975). That case set minimum procedural safeguards for disciplinary actions against vested employees.) An employee's employment interest is said to be vested where there is a constitutionally protected property interest in the job such that due process rights would attach. A property interest attaches where grounds for retention and/or dismissal are enumerated in the contract or

personnel policy manual or where termination may be "for cause" rather than "at will." Unless the contract or personnel policy provides that an employee holds a position at the will and pleasure of the employer, a property interest usually will be said to have been created.

The old personnel policy manual is quite definitive as to causes for disciplinary action (. 14.3), thereby creating a due process interest. Further . 14.5 (b) provides that Skelly requirements be followed. An employee's "for cause" due process rights cannot be converted to "at will" employment by a mere change in an agency's personnel policy without the employee's knowledge and consent. Therefore, present employees, having been hired under the old manual, are vested employees with due process rights in their jobs. The Skelly requirements of notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action was based and the right to respond must be met.

The new personnel manual section entitled "Standards of Conduct" lists offenses for which an employee can be disciplined. The section "Disciplinary Procedures" outlines ". . . progressive disciplinary action from verbal warning to termination for cause." Such wording and procedure would seem to create "for cause" due process vested rights that would require Skelly procedures. If an agency preferred to have "at will" employees, the language of the personnel manual should be so worded. Although there appears to be no specific statutory restrictions on a service delivery agency creating "at will" employees, it is legally questionable whether RETC, as a public entity per Government Code section 6507, can create "at will" employees other than probationary employees. RETC can only do what its founding agencies can do. The agencies from which RETC is derived have charters which mandate civil service type protection to employees with a few very specific exceptions not applicable to RETC's situation. See San Diego City Charter section 117.

The law on Job Training Partnership Act (JTPA) funded projects is not specific as to rights and appeals processes of employees of the service delivery agency, as opposed to

participants. However, I would strongly advise that RETC as a public entity subscribe to a personnel policy in which vested employees have due process rights in their jobs and are accorded Skelly safeguards in regards to disciplinary action.

Your last question was whether there should be an appeal process regarding internal grievance procedures. Though not mandated explicitly by law for employees of the service delivery agency, the same recommendations hold true as to vested rights.

A grievance procedure is an integral part of a merit-based personnel system. As a public entity, RETC would be well advised to afford the same protections to its employees that are common to other governmental agencies.

JOHN W. WITT, City Attorney

By

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Deputy City Attorney

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Attachment

cc Aurelia Koby

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