MEMORANDUM OF LAW

DATE: January 26, 1989

TO: Jerry Fort, Deputy Personnel Director

FROM: City Attorney

SUBJECT: Residency Requirements for City Employees

In a memorandum dated November 25, 1988, you asked the following questions:

1. Is it still legally permissible for the City to require County residency immediately after appointment and throughout an individual's employment with The City of San Diego?
2. Is it legally permissible to prohibit residency in Mexico throughout an individual's employment with The City of San Diego?
3. If an employee violates the residency requirements outlined in Questions One (1) and Two (2) above, is it legally permissible to take the enforcement actions outlined in Personnel Manual Index Code C-5, II, B.

Personnel Manual Index Code C-5 has its genesis in Civil Service Rule II (Municipal Code section 23.0301) which states in part:

> SEC. 23.0301 GENERAL REQUIREMENTS
> Rule II, Section I of the Rules
> of the Civil Service Commission
>
> Unless waived, all applicants must: . . .
> (2) be actual residents of the County of San Diego immediately following appointment and throughout their employment. . . . emphasis added

The pertinent part of Index Code C-5 setting forth the Civil Service Commission policy on residence is as follows:

> A. It is the policy of the Civil Service Commission to waive the requirement that an applicant have been a resident of the County of San Diego for one year; however, this section allows the Commission to:
> 1. Restrict applicants to one-year residents of the County whenever economic or employment conditions make such restriction feasible and desirable.
> 2. Accept applications from all qualified applicants during periods of full employment and recruitment difficulty, with

the understanding that they must fulfill the requirements of Rule II, Section 2, immediately after appointment and in every case not later than the end of the probationary period, and

3. To prohibit residence in Mexico.

B. Nonresident eligibles are expected to fulfill the residence requirement immediately after appointment, and to maintain County residence as a condition of employment.

1. An employee appointed to a permanent, full-time position who fails to establish proper residence before the end of his probationary period (one year for all newly hired employees) shall be discharged, unless transfer to a budgeted part-time or limited position is approved by the department head and the Civil Service Commission.

2. A permanent full-time employee who violates the residence requirement shall forfeit his employment and shall not within three years be eligible for other City employment. (Charter Sections 131 and 136.)

3. For the maintenance of proper records, employees must report any change in residence and telephone number to the department payroll clerk on Form CS-804, Employee Address Card.

C. The Commission liberalized residence requirements not only for the purpose of improving recruitment, but also to remove an unnecessary restraint on the lives of City employees, and thus improve morale. It is assumed that employees will use good judgment in the location of their residences, realizing that distance from work cannot be accepted as an excuse for absenteeism, tardiness, or failure to respond to calls for emergency work.

In order to be valid, the City's residency requirement must conform to the provisions of article 11, section 10(b) of the California State Constitution, which states as follows:

A city or county, including any chartered city or chartered county, or public district, may not

> require that its employees be residents of such city, county, or district; except that such employees may be required to reside within a reasonable and specific distance of their place of employment or other designated location. emphasis added

In Lanam v. Civil Service Com., 80 Cal.App.3d 315 (1978), the court reviewed the residency requirement of the City of Ukiah requiring all new employees in certain job classifications to live within an area drawn by hand on a map attached to a resolution incorporating it by reference. The map was in the shape of an irregular oval surrounding the City and was designed to prohibit safety personnel from living in areas where they might be isolated from their duties by natural disasters, such as flooding. The court held that the city's residency area was not reasonable within the meaning of the permissive constitutional language because the purpose of its specifications in measurement of airline miles would not be reasonable if the distance is not traversable by road, and its measurement in road miles may not be reasonable if its travel time does not comport with the identical purpose. More recently, the court in International Ass'n of Firefighters v. City of San Leandro, 181 Cal.App.3d 179 (1986), upheld a regulation requiring San Leandro Fire Department personnel to reside within forty (40) road miles from a specified fire station. That court held that travel time may be a factor in measuring the constitutional reasonableness of residency restrictions, but that an ordinance that fails to address such a factor is not ipso jure invalid. The court emphasized that the test is one of reasonableness, and determined that the forty (40) mile limit at issue was reasonable and specific because it permitted appellants to live in nearly all the cities of the bay area's seven (7) counties. The court stated that no arbitrariness was shown by the regulation.

The California Attorney General has also opined that to be valid, a city's residency requirement, in addition to being reasonable, must be stated in terms of miles and not places. 59 Ops. Cal.Atty.Gen. 136, 140 (1976).

Civil Service Rule II's prohibition against City employees residing outside San Diego County is very specific and sets forth the residency requirement in clear and concise terms. The argument can certainly be made that, generally speaking, it is reasonable on its face because the commute to any community in Orange, Riverside or Imperial County is far too great to be a reasonable distance from almost any work station within the City of San Diego. In addition, the regulation permits a waiver for

the unique employee who works, for example, in Rancho Bernardo and desires to reside in Temecula. However, it does lack the "specific distance" requirement of the California Constitution, and to that extent it may be subject to constitutional challenge.

The prohibition against residency in Mexico presents a different issue. While this prohibition also lacks a "specific distance" requirement, a strong argument can be made that the restriction is a valid one because the provisions of article 11, section 10(b) were never intended to authorize local government employees to reside in a foreign jurisdiction under any circumstances. The issue of a public employee's residency in a foreign jurisdiction where the right to travel freely is subject to the laws and authority of a different sovereign is far different from the issue of a local employee's right to commute a reasonable and specific distance to work. Crossing the international border presents unique commuting problems not easily described in terms of mileage or normal commuting time. On an average day, for example, the delays usually encountered at the border by an individual noncritical City employee may only create a minor inconvenience for The City of San Diego. However, the City's ability to function could be severely impacted if a large number of noncritical employees or any number of safety personnel were affected by those delays.

Notwithstanding the provisions of article 11, section 10(b), local governmental employees do not have a fundamental constitutional right under the federal or state constitutions to reside outside the territorial jurisdiction of the employing state or of the United States. McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645, 98 S.Ct. 1154, 47 L.Ed 2d 366 (1976); Haig v. Agee, 453 U.S. 280, 101 S.Ct. 2766, 69 L.Ed 2d 640 (1981); Ector v. City of Torrance, 10 Cal.3d 129 (1973); Winkler v. Spinnato, 534 N.Y.S. 2d 128 (1988).

The courts must give the provisions of the California Constitution a practical, common sense construction. Los Angeles Met. Transit Authority v. Public Util. Com, 59 Cal.2d 863 (1963). The courts also have the power to disregard the literal language of enactment to avoid absurd results and to fulfill the apparent intent of the framers. Cooperrider v. Civil Service Com., 97 Cal. App.3d 495 (1979).

We therefore believe that the courts will hold that the reasonable and specific distance requirement of article 11, section 10(b) of the California Constitution applies only to those geographical areas within the sovereign jurisdiction of

the United States of America. This does not mean, however, that The City of San Diego must require that all of its employees reside in the United States. The Commission may authorize residency in Mexico for certain employees under conditions it deems appropriate.

We do believe, however, that The City of San Diego's residency requirement, as currently drafted, is subject to constitutional challenge because it lacks the specific distance requirement of article 11, section 10(b) of the California State Constitution. As a consequence we recommend that the Civil Service Commission amend its residency policy for current employees setting forth a specific mileage requirement. It is also arguable that a regulation applying different residency requirements for different employees or job classifications within city departments may be reasonable under certain circumstances. Finally, we also believe that such a regulation may prohibit employees from residing in Mexico.

You have asked us to review those provisions of Personnel Regulation Index Code C-5 which state that a full-time employee who violates the residency requirement shall forfeit his employment and shall not within three years be eligible for other City employment. (San Diego City Charter sections 131 and 136). You specifically ask if such enforcement action is legal.

Valid residency requirements may be enforced against employees pursuant to Charter sections 131 or 136. Of course, all employees must be afforded all the procedural due process rights they may possess under the California and United States Constitutions, in addition to those rights set forth in the Civil Service Rules, Personnel Manual, and the various memoranda of understanding. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 106 S.Ct. 1487, 84 L.Ed 2d 494 (1985); Skelly v. Personnel Bd., 15 Cal.3d 194 (1975); Lubey v. City and County of San Francisco, 98 Cal. App.3d 340 (1979).

In summary, we believe that it would be prudent to revise Civil Service Rule II to provide for the specific distance requirement of article 11, section 10(b) of the California Constitution. We are further persuaded that foreign residency may be legally prohibited. In the meantime, those employees currently residing outside the County of San Diego should be granted waivers as appropriate.

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By
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