DATE: September 21, 1989

TO: Civil Service Commission
FROM: City Attorney
SUBJECT: Defendant's Assertion of the Defense of Laches

You advised us that Attorney Everett Bobbitt intends to raise the defense of laches on the upcoming appeal of Officer John Doulette and in other police officer appeals now awaiting a hearing before the Civil Service Commission. It is his contention that a delay of six months to a year between the notice of termination and the appeal prejudices his clients because they are unable to adequately preserve and protect favorable evidence that may be based upon testimony. He fears that witnesses will be unable to recall details and will not be able to refresh their recollections. We disagree with his contention. Our analysis follows.

Laches is an equitable defense designed to relieve defendants of the burden of having to defend against stale claims. However, laches was not intended to be asserted in situations such as the present case, where the only delay involves getting the case before the administrative tribunal.

In order to establish the affirmative defense of laches, the defendant must demonstrate an unreasonable delay on the part of the plaintiff as well as prejudice resulting from the delay. Conti v. Board of Civil Service Commissioners, 1 Cal. 3d 351 (1969). In the present action, the officer contends that the length of time between the Skelly hearing and the scheduled Civil Service Commission hearing constitutes an unreasonable delay and that he has been prejudiced by the delay.

The officer has the burden of showing the delay is unreasonable. Id. at 351. The issue of unreasonable delay was raised in Steen v. City of Los Angeles, 31 Cal. 2d 542 (1948). In Steen, the plaintiff requested that his discharge as a civil service employee be dismissed since the prosecution of the charge against him had been delayed for two and one-half years. The

plaintiff argued that the board was required, under the city charter, to hold a hearing within fifteen days of the charges being filed. The California Supreme Court held that the board was only required to decide whether or not to grant a hearing within fifteen days. The hearing itself need only be held within a reasonable time.

In determining what a "reasonable time" might be, the Steen court stressed that the initiator of the proceedings must

diligently prosecute the charges. In the instant case, the Police Department has been diligent in the pursuit of this action. The officer was notified of pending adverse action shortly after the occurrence of the event that precipitated the dismissal. A short time later, the Skelly hearing was held. At the hearing, the officer received the documentation upon which the Police Department based its decision to terminate the officer and the final notice of termination was provided shortly thereafter. Each side of the controversy has the same information and both are aware of the pending action. Written documentation, such as that provided at the Skelly hearing, ensures the preservation of evidence necessary for the Civil Service hearing, and the appellant is charged with the duty of preservation of evidence. The only delay comes into being between the termination and the hearing before the Civil Service Commission. The hearing date was set at the earliest date available to a quorum of the Commission. Any delay between the Skelly hearing and the Civil Service hearing is not due to a lack of diligence on the part of the Police Department, but rather due to a crowded Civil Service Commission calendar.

The San Diego City Charter has no set time limit during which a Civil Service hearing must be commenced. There is, however, a somewhat relevant California statute. Section 19635 of the California Government Code applies to commencement of personnel actions involving state civil service employees and reads that: "No punitive action shall be valid against any state employee for any cause for discipline based on any civil service law of this State, unless notice of such punitive action is served within three years after the cause . . . first arose" (emphasis added).

In Brown v. State Personnel Bd., 166 Cal. App. 3d 1151 (1985), the Court of Appeal held that Section 19635 "reflects a legislative policy judgment that a delay of three years is inherently unreasonable . . ." Brown, supra, at 1160. The court stated that "unless excused, a delay in the initiation of disciplinary proceedings for more than three years is unreasonable as a matter of law." Brown, supra, at 1160 (emphasis added).

The Brown case concerned a university professor who was disciplined four years after the occurrence of the incidents giving rise to the discipline. The Brown court held that a delay of such length was too prejudicial to Mr. Brown.

Additionally, in the Brown case, the court considered the delay between when the incident occasioning the discipline occurred and when the complaint was filed to be the critical time frame. Prejudice to an appellant, if it occurs, occurs between

these two junctures. Prejudice is shown when unreasonable delays between the precipitating incident and the hearing causes memories to fade and evidence to vanish. E.E.O.C. v. Indiana Bell Telephone Co., Inc., 641 F. Supp. 115 (S.D. Ind. 1986).

> After suit is filed, the defendant is put on notice that it needs to preserve evidence necessary for its defense. If the defendant fails to preserve testimony after the complaint is filed, then the prejudice caused thereby is the result of the defendant's action and the pendency of the suit rather than a result of the delay in filing the complaint. Therefore, such prejudice will not be considered by the Court.

E.E.O.C. at 124.

In earlier cases, prejudice was presumed if the defendant pleaded laches and established undue delay. Wolstenholme v. City of Oakland, 54 Cal. 2d 48 (1960). However, in Conti v. Board of Civil Service Commissioners, 1 Cal. 3d 351 (1969), the Supreme Court overruled Wolstenholme, and stated prejudice is no longer to be presumed, but must be shown, and as stated earlier, commencement of the personnel action is not at issue herein.

The officer in this case has shown no lack of diligence on the part of the appointing authority, nor has he shown an unreasonable delay. Additionally, the officer has shown no prejudice by the minimal delay. Therefore, laches may not be asserted as an equitable defense.

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By
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JS:SAM:mrh:920.11(x043.2)
cc Rich Snapper
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