MEMORANDUM OF LAW

DATE: December 24, 1991
TO: Larry Gardner, Labor Relations Manager
FROM: City Attorney
SUBJECT: No Strike Clause

Recently Ed Lehman, legal representative for Local 127, wrote to you requesting that the City policy of presenting new employees with copies of San Diego City Charter ("Charter") section 129.1, the no-strike provision, be discontinued pursuant to the holding of County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn., 38 Cal. 3d 564 (1985). You have asked if it is proper for the City to present and have City employees acknowledge receipt of the no-strike provision in Charter section 129.1 as a condition of employment.

This precise question was asked of now Assistant City Attorney John M. Kaheny in 1989 and answered in a memorandum dated January 19, 1989. His opinion is attached for your review. Assistant City Attorney John M. Kaheny indicated acknowledgement of the receipt of the no strike agreement was lawful. We are not aware of any new cases which would cause us to change our opinion.

In County Sanitation Dist. No. 2 v. LA County Employees' Assn., 38 Cal. 3d 564, 572 (1985) the Supreme Court addressed the issue of a public employees right to strike when an impasse results after a failure to reach a binding MOU pursuant to the dictates of the Meyers-Milias-Brown Act ("MMBA"). In that case the Court said:

> On its face, the MMBA neither denies nor grants local employees the right to strike. This omission is noteworthy since the Legislature has not hesitated to expressly prohibit strikes for certain classes of public employees. For example, the above-noted prohibition against strikes by firefighters we enacted nine years before the passage of the MMBA and remains in effect today. Moreover, the MMBA includes firefighters within its provisions. Thus, the absence of any such limitation on other public employees covered by the MMBA at the very least implies a lack of legislative intent to use the MMBA to enact a general strike prohibition.

The Court went on to say the right to strike is a necessary and important component of effective collective bargaining. The case does not, however, give public employees an unqualified right to strike. For examples, firefighters are statutorily prohibited from striking and the clear implication of the Courts has been that police would similarly be barred from striking because of the concern for public safety. The Court

in County Sanitation specifically limits the right to strike to instances when concerns for the general public welfare are not at issue. The Court said:

> We believe the following standard may properly guide courts in the resolution of future disputes in this area: strikes by public employees are not unlawful at common law unless or until it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health or safety of the public. This standard allows exceptions in certain essential areas of public employment (e.g., the prohibition against firefighters and law enforcement personnel) and also requires the courts to determine on a case-by-case basis whether the public interest overrides the basic right to strike.

Id. at 586.

Although the Court has indicated that public employees may have a common law right to strike under certain circumstances, they have not gone so far as to say this right has a constitutional underpinning. In fact, in County Sanitation the Court stated that they were not addressing the constitutional issue, but deciding the case solely on common law principles. Since the constitutional validity of the right to strike was not addressed it is difficult to determine whether a court would find that the policy which the City now follows has a chilling effect on a fundamental right. This is especially true in light of the fact that the make up of the current court is decidedly different from that of the County Sanitation court.

Thus, the Court's ruling in County Sanitation and the MMBA's silence on the issue of strikes does not render Charter section 129.1 void. Rules of statutory construction indicate that statutes, or in this case Charter sections, must be read, whenever possible, to uphold the validity of the statute. As explained in Sutherland's Statutory Construction:

> Statutes are documents having practical effects. It is therefore improper to construe them in the abstract, without taking into consideration the historical framework in which they exist. Since legislation is addressed to the future, information about contemporaneous and post-enactment facts and developments is relevant to a determination of legislative intent because the legislature must have contemplated the interaction of the new law with such facts and developments even though it could not foresee their precise character.

Sutherland section 49.02.

At the time Charter section 129.1 was adopted, strikes were prohibited by public sector employees. In light of the Court's ruling in County Sanitation, Charter section 129.1 may be read to prohibit illegal

strikes. As the court said in People v. Madearos, 230 Cal. App. 2d 642, 644 (1964), "there is a uniformity of opinion among the authorities that a statute will not be held void for uncertainty if any reasonable and practicable construction can be given to its language."

Note too, that City procedures do not require an employee to sign a promise not to strike. Rather, an employee merely acknowledges receipt of the section. As explained by Assistant City Attorney John M. Kaheny in the 1989 memorandum on the same issue, "the form does not require employees to 'sign . . . adherence to City Charter Section 129.1.' It only indicates that the employee has been given a copy of the section and apprised of its contents."

No new case law has addressed the issue of public sector employees and the right to strike. Therefore, our advice is no different now than it was at the time of Mr. Kaheny's previous memorandum. Thus, in keeping with Mr. Kaheny's previous memorandum, we read Charter section 129.1 to prohibit only illegal strikes and the City's practice of requesting a signed receipt of the section to be a reasonable management practice.

If I can be of further assistance on this issue, please feel free to contact me.

JOHN W. WITT, City Attorney
By
Kenneth K. So
Chief Deputy City Attorney

KKS:SAM:mrh:360(x043.2)
Attachment
cc: Rich Snapper
ML-91-108