

MEMORANDUM OF LAW

DATE: May 21, 1991
TO: Bob Filner, Deputy Mayor
FROM: City Attorney
SUBJECT: Graffiti Removal Program

We have been asked to respond to questions you had regarding the establishment of the District 8 Graffiti Removal Program. You requested that we review the legality of a proposal in which volunteers would enter onto private property and remove graffiti from that property.

We see no legal prohibition against volunteers assisting in removing graffiti from certain areas of the City unless they are specifically requested not to do so by the property owner. For example, at the February 1, 1991 meeting you called, representatives of the San Diego Unified School District and San Diego Gas & Electric Company stated that they preferred to be responsible for their own graffiti removal and that no else become involved.

You subsequently sent us a memorandum requesting that we review for legality and potential City liability a consent form intended to provide written consent of a responsible party (owner, tenant or agent for property owner) to allow volunteers to enter upon private property and remove graffiti from that property. However, we received two different consent forms. One is on your Deputy Mayor, City of San Diego letterhead, and the other is on plain paper with no letterhead. The letterhead of the City, the City seal, and your name and title as Deputy Mayor should not be utilized on a volunteer consent form, since it would give the appearance of City sponsorship. The wording "DISTRICT 8 GRAFFITI PATROL CONSENT FORM" is acceptable since The City of San Diego is not specifically mentioned, thereby dispelling any notion or implication that the volunteers are performing at the behest of The City of San Diego. Otherwise, the form is not objectionable since the City would have no involvement in the event of a private dispute between any volunteers and owners, tenants or agents who may be affected.

In order to absolutely protect the City from any potential liability, each volunteer should sign a hold harmless agreement promising to defend and indemnify the City in case of any injury, harm or damage suffered or caused by a volunteer in the course of his or her volunteer graffiti removal work. Requiring such hold harmless agreements by volunteers, however, may possibly inhibit the use of volunteers for this clean-up effort.

There was also a question as to whether these volunteers would be eligible for workers' compensation coverage. California Labor Code section 3352 excludes certain persons from the definition of employee. Subsection (i) specifically excludes "any person performing voluntary service for a public agency or a private, nonprofit organization who receives no remuneration for the services other than meals, transportation, lodging, or reimbursement for incidental expenses." As a general rule of law, "a person providing purely gratuitous voluntary service is not an employee and has not entered into an employment relationship with the person receiving the services for purposes of the Workers' Compensation Act." *Barragan v. Workers' Compensation Appeals Board*, 195 Cal.App.3d 637, 646 (1987); *Edwards v. Hollywood Canteen*, 27 Cal.2d 802 (1946) (where a volunteer dancer was injured while dancing with a boisterous soldier!). Therefore volunteers would not be City employees entitled to benefits, remuneration or workers' compensation.

CONCLUSION

The volunteer program itself appears to have no legal impediment, and the consent form is acceptable if printed without the City name, City seal, or name and title of the Deputy Mayor. Volunteers under this program are not employees of The City of San Diego under any circumstance and are not entitled to workers' compensation. The City would not be liable for damage or injury to or by volunteers unless such damage or injury were caused by the City's negligence.

JOHN W. WITT, City Attorney

By

Mary Kay Jackson

Deputy City Attorney

MKJ:mb:210(x043.2)

ML-91-38