MEMORANDUM OF LAW

DATE: May 29, 1991

TO: Kent Lewis, Assistant Personnel Director

FROM: City Attorney

SUBJECT: Negligent Hiring

In a memorandum dated March 6, 1991, you expressed concern regarding the doctrine of negligent hiring and asked for an opinion as to how to minimize the City's potential liability in this regard. You asked a number of specific questions relating to the use of criminal history, drug testing, financial information and reference checks in the application process. No clear cut answers to your inquiry exist. However, substantial guidelines may be gleaned from the case and statutory law which will allow the City to develop a policy designed to protect against negligent hiring claims.

Background

Over the past decade there has been an expanding recognition of the tort of negligent hiring. Under the negligent hiring doctrine, an employer may be held directly liable for retaining an employee who is incompetent, dishonest, unsuitable, vicious or dangerous to others. Odewahn & Webb, Negligent Hiring and Discrimination: An Employer's Dilemma?, 40 Lab. L.J. 705 (1989).

The rule of negligent hiring is stated in Restatement Second of Agency, section 213. It reads in pertinent part: "A person conducting an activity through servants i.e., employees . . . is subject to liability for harm resulting from his conduct if he is negligent or reckless: . . . (b) in the employment of improper persons . . . involving the risk of harm to others . . . ." Comment (a) reads in part: "Liability results under the rule . . ., not because of the relation of the parties, but because the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment . . . ."

Under the doctrine of negligent hiring many inquiries will be acceptable if the City can show the inquiries are job-related. Demonstrating that a question is job related allows inquiries which might otherwise be prohibited by Title VII discrimination statutes. Whether a question is job related can be determined only from a thorough understanding of the particular job and its needs and requirements. An effective job analysis should consider such factors as the extent of employee contact with the public, normal access to private property, risk of harm to others, and so on. These and other potential problem areas

should become a standard part of the job related analysis of each position, keeping in mind the greater the risk of harm, the higher the degree of care necessary.

Employer Background Investigation

An integral part of an employer's responsibility is the duty to conduct a reasonable and adequate pre-employment investigation. The scope of the pre-employment investigation is related to the degree of risk a potential employee poses to a third party. While there is no uniform rule as to when an employer has fulfilled its duty, it is clear that the scope of investigation increases proportionately with the importance of the employment relationship to the accomplishment of a tortious or criminal act. Thus, the selection of a peace officer requires a greater duty of care than does the selection of a grounds maintenance worker. However, although the City has a duty to investigate an applicant's background to prevent possible future injury, the depth of the investigation is severely restricted by Title VII discrimination guidelines. With the above guidelines in mind, each of the areas you questioned will be addressed separately.

Pre-Employment Applications

Pre-employment questionnaires and interviews are an obvious and necessary part of any background investigation. The parameters of all employment questionnaires are limited by statutes that deal with discriminatory hiring practices. Employers must be extremely cautious in asking employment questions which elicit information that may be protected by any of the job discrimination statutes. The obvious areas to avoid are race, sex, age, physical disability and religion. However, the City should also avoid questions concerning height and weight, education, voluntary associations, foreign language ability or related areas unless the questions can be shown to be specifically job related. The cardinal rule is to limit inquiries to subjects necessary to evaluate the applicant's suitability for the particular job for which the applicant has applied.

Pursuant to San Diego City Charter section 131, it is appropriate for the application to indicate that responses must be complete and truthful and that false statements may result in a refusal to hire or in termination if the false information is discovered after hire.

In addition to the pre-employment application, all potential employees may be interviewed. The same restrictions and parameters apply to interviews as apply to questionnaires. Subjects and questions must be limited to issues which are specifically job related.

Employment Reference Checks

The City may legally request prior employment information and verify employment references. Reference checks may reveal known dangerous propensities which may assist in judging the applicant's suitability for the job, and confirm the veracity of the employee's responses on the employment application. However, such a thorough revelation of an

employee's past employment record is unlikely. Practically, a reference check is more likely to reveal only the dates of the employee's hire and separation. Past employers (including the City when it is in that position) must be extremely circumspect about information they release to potential employers. An employer who injures a former employee's opportunity for employment by releasing adverse information about the employee may be subject to liability for defamation. To maximize the amount of useful information obtained, the City should formulate questions specifically addressed to the character traits and attributes of the applicant that are required for the position for which the applicant has applied. Ideally, inquiries should be in writing, or at least well documented.

Criminal Records Check

The City may also conduct a limited inquiry into an applicant's criminal history. It may, on the employment application, ask for records of criminal convictions. It may not, however, predicate City employment on an absence of criminal history. Use of convictions as the sole basis for disqualification was determined to be unlawful in Green v. Missouri Pacific R.R. Co., 523 F.2d 1290 (8th Cir. (1975). Only if a job-related necessity is shown may employment be denied on the basis of criminal history alone. In addition to constitutional and California statutory restrictions, employers must consider Title VII Equal Employment Opportunity Commission (EEOC) restrictions when using criminal records in the selection process. The EEOC has held that use of arrest records has a disproportionate impact on minorities and may not be used as a basis for refusal to employ. In determining the relevance of criminal background, the EEOC requires employers to consider the nature and gravity of the offense or offenses, the time that has elapsed since the conviction and/or completion of the sentence,
and the nature of the job sought. In essence, the City must establish the relationship between specific criminal activity and specific important elements of the job to be performed.

As a general rule, criminal conviction records are not accessible to an employer. Under the United States Constitution, dissemination of conviction records is not a protected right of privacy. People v. Ryser, 40 Cal. App. 3d 1 (1974) citing Griswold v. Connecticut, 381 U.S. 479 (1965). However, the right of privacy, as guaranteed under article I, section 1 of the California Constitution is broader than the federal right of privacy. The courts have said any intervention into privacy must be justified by a compelling interest. American G.I. Forum v. Miller, 218 Cal. App. 3d 859, 864 (1990). One court of appeal has held that the right to privacy under the California Constitution, article I, section 1, imposes its own limitations on the Department of Justice's (DOJ) dissemination of criminal history summaries to employers. In Central Valley Ch. 7th Step Foundation, Inc. v. Younger, 214 Cal. App. 3d 145 (1989), the court held that the right to privacy prohibits the DOJ

from disseminating arrest information for employment to nonexempt employers under Labor Code section 432.7. Labor Code section 432.7(e) exempts from its coverage persons employed or seeking employment as a peace officer or in positions in the DOJ or other criminal justice agencies. The following are specific applications of the general rule.

I. Arrest Records

Labor Code section 432.7 prohibits employers from asking applicants for employment to disclose information concerning arrests or detentions which did not result in a conviction and from using such information as a factor in determining any condition of employment, including hiring, promotion, or termination. The section does permit the employer to inquire about arrests where the individual is released on bail or awaiting trial.

II. Conviction Records

The Fair Employment and Housing Commission (FEHC) and the EEOC take the position that certain conviction records are irrelevant to some jobs and believe that the use of conviction records as an absolute bar to employment may be unlawful if it has a discriminatory effect on minorities. Simmons, Employment Discrimination and EEO Practice Manual for California Employers, section 3.3(d) (3d ed. (1987)). However, employers have a right to exclude individuals convicted of certain crimes from employment in positions in which the crime bears a direct relationship with the job function.

State and local government units may receive and use conviction data but only under certain limited circumstances. Penal Code section 11105(b)(9-10) provides that a city, county or other non-law enforcement agency may, in fulfilling its employment duties, require criminal history information if access to such information is specifically authorized by the City Council or governing board of the county or city, and the regulation expressly refers to the specific criminal conduct contemplated by the regulation.

However, Penal Code section 11105(b) states that: "Section 432.7 of the Labor Code shall apply." Therefore, a city could not require by ordinance or regulation, arrest information not resulting in a conviction, but could require relevant conviction data or arrest information while the prospective employee is released on bail or on his own recognizance. Also, the City could only inquire into those convictions spelled out in the ordinance.

Thus, to obtain conviction records from the state agency, the City Council must pass a regulation or ordinance which:

1) Refers to specific criminal convictions;
2) Spells out job requirements or exclusions based on specified convictions;
3) Expresses a rational relationship between the job duties, requirements, or exclusions and the specified convictions.

Braconi and Kopke, California Worker's Rights, p. 63 (1986).

Braconi and Kopke provide the following example:

> A government unit can legislate that its school bus drivers must not have been convicted of child molesting. It has to pass a statute or ordinance specifying that criminal record information, containing any convictions for molesting, can be sought by the unit. After this law is passed, the government unit can ask driver applicants about such convictions and can obtain data about molesting convictions. The agency has to specify what kind of convictions it is interested in, and what will happen if an applicant has that kind of conviction. There must be a reasonable connection between the type of conviction and the job sought. For example, the agency cannot lawfully refuse to hire a gardener because of a draft refusal conviction.

Id. at 63.

Penal Code section 11105.3 provides that an employer may obtain the conviction records, or arrests records of a person released on bail or on their own recognizance, involving any sex or drug crimes, or crimes of violence, of a person who would have supervisory or disciplinary control over a minor. The state may send the employer records of convictions and of commitments as a mentally disordered sex offender but cannot send any records which did not lead to a conviction.

Pursuant to Labor Code section 432.8, a marijuana conviction which is two years or older is treated like an arrest without a conviction. Therefore, the employer may not inquire about it.

Financial Information and Credit Checks

Questions about an applicant's personal finances are also troublesome. Again, this is due to the potential discriminatory effect against women or minorities and the slim relationship to job qualifications. For example, in United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977), the Chicago Police Department used a general background investigation which included inquiries into the applicant's financial history. The 7th Cir. court of appeals held the Police Department's investigation violated Title VII because it resulted in disqualification of a disproportionate number of minority applicants and was not shown to be job related.

The City, in rare instances, may require a good credit record of an applicant and do a routine check of an applicant's financial history if justified by business necessity. As always, in order to successfully invoke the business necessity defense, an employer must show that there is a legitimate job related business purpose. Few City positions would meet such a standard, although job relatedness might be shown for positions in the auditors or treasurer's department.

Drug Testing

Pre-employment drug screening raises a privacy issue under both the

California Constitution and the United States Constitution. It also raises fourth amendment search and seizure issues. The issue was specifically addressed in National Treasury Employers Union v. Von Raab, 109 S.Ct. 1384 (1989), where the U. S. Supreme Court upheld a Customs Service Program making mandatory drug testing a condition of placement or employment in three job categories: 1) employees directly involved in intercepting drugs; 2) employees carrying firearms; and 3) employees handling classified material. The Von Raab Court did not give approval for universal mandatory pre-employment drug testing, but it did articulate specific recommendations for determining when a drug test is appropriate. The court indicated the fourth amendment does not proscribe all searches and seizures, only those that are unreasonable. The reasonableness of a particular search is judged by balancing its intrusion on the individuals fourth amendment interests against its promotion of a legitimate government interest. Thus, the courts have held that drug testing for a police officer is acceptable while testing for other non-safety employees may not be acceptable.

In Wilkinson v. Times Mirror Corp., 215 Cal. App. 3d 1034 (1989), the court upheld an applicant drug testing program in private industry. The court indicated that the intrusiveness of the drug screening program is diminished when the applicant has advance notice of the testing requirement. However, recent cases in the public sector have held that although there is a lesser degree of a privacy expectation in pre-employment testing, the same job relatedness as outlined in Von Raab must be shown. The courts have frequently said that the right to public employment may not be predicated on a waiver of constitutional rights (here the right to privacy). Bagley v. Washington Township Hospital Dist., 65 Cal. 2d 499 (1966). For example, in the case of American Postal Workers Union v. Frank, 725 F. Supp. 87 (1989), the court said: General pre-employment drug testing of applicants for postal service jobs was unconstitutional, since the industry was not highly regulated and there were no safety issues.

Recommendations

The City must carefully balance the competing interests arising from negligent hiring and/or charges of discriminatory practices when evaluating an applicant's background. There are several actions the City should take that will insulate its hiring practices to avoid challenges either for negligent hiring or employment discrimination related to applicant background checks.

First, the City should have an established policy to determine dangerous proclivities of its potential employees. The policy should be established within California Department of Fair Employment and Housing Commission Pre-Employment Guidelines, and the Uniform Guidelines of Employee Selection Procedures, 29 C.F.R. 1607 (1978). (Attached as Appendix A.) The policy should be written, administered in a nondisparate fashion, and establish a clear cut job relatedness for each

use. Once established, the City should communicate the policy and its proper implementation through training of all persons involved in the hiring process. I will be happy to work with you to establish an acceptable policy.

Should you have further questions regarding this subject, please contact me.

JOHN W. WITT, City Attorney
By
Sharon A. Marshall
Deputy City Attorney

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Attachment
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