

MEMORANDUM OF LAW

DATE: January 25, 1993

TO: Rich Snapper, Personnel Director

FROM: City Attorney

SUBJECT: Probationary Appeals

It has come to my attention that the Civil Service Commission ("Commission"), at the meeting of December 3, 1992, granted an evidentiary appeal hearing before the Commission to a probationary employee. In reviewing the Commission's action, I have determined that the Commission was without the authority to grant a hearing to a probationary employee.

San Diego City Charter ("Charter") section 129 provides in pertinent part:

Upon attaining permanent status pursuant to the Rules of the Civil Service Commission, any officer or employee of the City in the classified service may be removed from office or employment for cause by the appointing authority. Written notice of removal given to any officer or employee, or written notice left at or mailed to his or her usual place of residence, shall be sufficient to put any such removal into effect. The person so notified may, within five days after such notice, demand a written statement of the reasons therefor and the right to be heard before the Civil Service Commission.

The underlined section denotes the language added to the Charter section by a vote of the people of the City in 1980. Prior to the 1980 amendment, the section indicated any officer or employee, regardless of probationary status, in the classified service had the right to a hearing. However, the ballot language makes it clear that the intent of the Charter provision, even prior to the amendment, was to restrict removal appeal hearings

to permanent employees.

The ballot language in favor of the proposed 1980 amendment is as follows:

Proposition E will clarify the existing language of Charter Section 129 concerning probationary appeal rights. The current policy of the Civil Service Commission does not provide for an appeal hearing by a probationary employee who is terminated. The proposed language will make the Charter language clear in regards to this policy and practice. Probationary employees currently have rights to an administrative hearing and a Civil Service Commission hearing for termination is not necessary or conducive to efficient management.

The proposed change will not increase or decrease employee rights, but will clarify the language of Charter Section 129. (Emphasis added.)

It is clear from the ballot language that the sole purpose of the proposed amendment was to clarify that upon removal, probationary employees are not entitled to a Commission hearing. Additional language added by the 1980 amendment provides that the Commission may promulgate rules and conditions for the termination of probationary employees. The rules promulgated by the Commission may not, however, contradict or contravene the Charter provisions. The Charter prevails over both the San Diego Municipal Code and the Personnel Regulations, therefore, any rules proposed by the Commission which are inconsistent with the Charter will be preempted by the Charter.

Since this is a Charter provision, it cannot be waived or amended by the Commission. Amendment may be had only through the ballot process. The action of the Commission was an ultra vires act, that is, an act which is in excess of the powers granted to the Commission, and is void. If, however, the facts before the Commission indicate that the employee's probation was improperly extended thus making him a permanent employee, a hearing is a matter of right.

JOHN W. WITT, City Attorney

By

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