

MEMORANDUM OF LAW

DATE: March 18, 1993

TO: Jerry Fort, Deputy Director, Personnel Department

FROM: City Attorney

SUBJECT: Veterans Reemployment Rights

The rights and benefits due to returning veterans has recently been questioned by Fire Fighter Derrin Austin. The facts in his case are as follows:

Fire Fighter Austin was appointed as a Fire Recruit to the 48th Basic Fire Academy which began on October 22, 1990. On January 2, 1991, prior to completion of the Basic Fire Academy, Fire Fighter Austin was recalled to active military duty as part of the Desert Shield/Desert Storm deployment. He returned from active duty on July 30, 1991, and was immediately assigned to administrative duty pending the start of the next Basic Fire Academy. Fire Fighter Austin remained on administrative duty until January 27, 1992, when he entered the 50th Basic Fire Academy to complete the required training for assignment as Fire Fighter I.

Fire Fighter Austin contends that Federal and State law require that he be granted the same pay status as those individuals originally hired with him as part of the 48th Basic Fire Academy whose service was not interrupted by a call to active military duty. However, Fire Fighter Austin does not meet the minimum hands on experience requirement needed to promote to the classification of Fire Fighter II which is the classification occupied by the 48th Basic Fire Academy at the present time.

In response to Fire Fighter Austin's contentions, you have asked the following questions:

1. Should Fire Fighter Austin be promoted to the classification of Fire Fighter II and established at C step of the classification along with other individuals similarly situated in the 48th Basic Fire Academy?
2. If Fire Fighter Austin is to be advanced to C step of Fire Fighter II, should this increase be granted retroactively?
3. If Fire Fighter Austin is not immediately advanced

to Fire Fighter II but is required to meet the one year of active service requirement before being promoted to Fire Fighter II then at what pay step should he be placed once he is promoted?

4. Finally, how should Mr. Austin's seniority and employment status be determined for layoff purposes? Is there a legal requirement to waive the probationary period for Mr. Austin and what should be his seniority date as a Fire Fighter I and as a Fire Fighter II?

#### SHORT ANSWER

The courts have repeatedly distinguished between reemployment rights that accrue by the mere passage of time and those that accrue through experience and proficiency. Based upon this distinction, Fire Fighter Austin should not be promoted merely because his original academy class has been promoted. At this point, he lacks the necessary proficiency and experience for promotion. However, for purposes of layoffs and retirement benefits, his seniority date goes back to his original starting date at the 48th academy.

#### ANALYSIS

38 U.S.C. Section 4324(a) and 38 U.S.C. Section 4324(b)(1) extend to reservists the same rights granted to inductee's in 38 U.S.C. Section 4321. 38 U.S.C. Section 4321 (formerly 38 U.S.C. Section 2021) provides, in pertinent part:

Section 4321. Right to reemployment  
of inducted persons;  
benefits protected

- (a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such

training and service or from hospitalization continuing after discharge for a period of not more than one

year-. . . .

(B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person

shall-(i) if still

qualified to perform the duties of such position or able to become requalified with reasonable efforts by the employer, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay . . . .

(b)(1)(A) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

The United States Supreme Court established a two-prong test for determining whether a benefit is a perquisite of seniority under the Act.

If the benefit would have accrued, with reasonable certainty, had the veteran been continuously employed by the private employer, and if it is in

the nature of a reward for length of service, it is a "perquisite of seniority." If, on the other hand, the veteran's right to the benefit at the time he entered the military was subject to a significant contingency, or if the benefit is in the nature of short-term compensation for services rendered, it is not an aspect of seniority within the coverage of Section 9.

*Alabama Power Co. v. Davis*, 431 U.S. 581, 589 (1977).

San Diego Fire Fighters are promoted through a step-rate system. That is, promotion is not based on length of service of time, but rather, on the basis of each Fire Fighter attaining a degree of proficiency through hands on work, classroom participation and the passing of a series of examinations. A copy of the Fire Fighter step system is attached for your review. The significant contingency noted in *Alabama Power* that is applicable to the Fire Fighter step system is the successful completion of each of the steps. The mere passage of time will not insure that a Fire Fighter will complete the classroom and experience portions or pass the examinations. "The Step-Rate system, as will be clearly observed, is something entirely separate and distinct from seniority." *Huffman v. Norfolk & Western Ry. Co.*, 71 F. Supp. 564, 566 (1947). The *Huffman* case involved a veteran returning to his job as a railway employee. The railway had a step-rate system similar to the City's which provided increased pay at each increased step. The court in explaining the system, and differentiating it from automatic increases accrued through the passage of time, stated: "the Step-Rate system does not depend upon the mere lapse of time or upon time spent in the employ of the Railway, but it depends upon actual experience obtained in clerical employment." *Id.* In *Hatton v. Tabard Press Corporation*, 406 F.2d 593, 596 (1969), the court said: "a crucial issue in this type of case is whether 'advancement depends essentially upon continuing employment' or whether 'the exercise of management discretion (is) a prerequisite to promotion.'"

The court went on to say "Where pay increases or promotions are awarded on the basis of skill or merit, and not on the basis of the mere passage of time, they cannot be regarded as the fruits of seniority . . ." *Hatton*, 406 F.2d at 598.

The merit cases are distinguishable from those cases where the benefit is indeed a reward for length of service. For example, in *Alabama Power Co. v. Davis*, 431 U.S. 581 at 594, a

case dealing with the retirement benefits of returning veterans, the court said: "pension payments are predominately rewards for continuous employment with the same employer. Protecting veterans from the loss of such rewards when the break in their employment resulted from their response to the country's military needs is the purpose of Section 9." (Now 38 U.S.C. Section 4321 (1977).) Promotions that accrue simply through length of time in service are similarly "perquisites of seniority." The factor that determined that a promotion was based upon seniority rather than merit in the United States Supreme Court decision of *Tilton v. Missouri Pacific Railroad Company*, 376 U.S. 169, 177 (1964), another railroad case, was that "the railroad under the collective bargaining agreement had no discretion to refuse journeyman's status to a helper who had successfully completed the work period.

Such is not the case with the City's step-rate system. The City's system relies upon more than mere length of service. As the attachments show step increases require proficiency and testing before progression to the next level. A returning Fire Fighter "is not entitled to demand that he be assigned a position higher than that he formerly held when promotion to such a position depends, not simply on seniority or some other form of automatic progression, but on the exercise of discretion on the part of the employer." *McKinney v. Missouri-Kansas-Texas R. Co.*, 357 U.S. 272 (1958). Promotion in the Fire Service is analogous to promotion in the railway service where the Court noted: "Promotion to a group 1 position from group 2, in which petitioner had formerly been employed, is not dependent simply on seniority. Under Rule 1(3)(A) of the collective bargaining agreement it is dependent on fitness and ability and the exercise of a discriminating managerial choice." *Id.* at 272. The *McKinney* Court in further explanation of the Veterans Reemployment Act said "nor does it sanction interfering with and disrupting the usual, carefully adjusted relations among the employees themselves regarding opportunities for advancement." *Id.* at 273. These carefully crafted relations are laid out in the City's Civil Service Rules, Personnel Regulations and the Memorandum of Understanding ("MOU") and provide specific steps that must be scaled before the next step is reached.

#### CONCLUSION

Based upon the distinctions made by the courts between seniority and step rate increases, Fire Fighter Austin is not entitled to promotion to Fire Fighter II until he has acquired the requisite training and experience embodied in the City's step-rate system. Similarly, he is not entitled to retroactive pay raises because he has not met the mandatory requirements for

promotion and pay increases. He is, however, entitled to seniority back to his original hire date for purposes of layoff, recalls and retirement benefits.

JOHN W. WITT, City Attorney

By

Sharon A. Marshall

Deputy City Attorney

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Attachment

cc Rich Snapper

Larry Gardner

ML-93-36

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