

MEMORANDUM OF LAW

DATE: December 30, 1994

TO: Charles G. Abdelnour, City Clerk

FROM: City Attorney

SUBJECT: Effect of Military Active Reserve Status on Eligibility to Hold Council Office

Question Presented

This is in response to your memorandum of December 16, 1994, to the City Attorney in which you ask about the effect of military active reserve status on a person's eligibility to hold a Council office. Specifically, you ask whether San Diego City Charter section 12(j), requiring a Council member to devote full time to Council duties, would preclude a person's eligibility to hold Council office if that person were on active military reserve duty. The question arises because an applicant for the vacant Second District Council seat is currently in an active military reserve status, which requires him to spend one weekend per month and two weeks per year performing his military responsibilities.

Short Answer

San Diego City Charter language requiring Council members to devote full time to their Council duties does not preclude a person's eligibility for appointment to a vacant Council seat, merely because that person is in an active military reserve status and would be required to spend one weekend per month and two weeks per year fulfilling military responsibilities.

Analysis

As you point out, San Diego City Charter ("Charter") section 12(j) requires that "Council members . . . devote full time to the duties of their office and not engage in any outside employment, trade, business or profession which interferes or conflicts with those duties." The Charter further requires that Council members attend all Council meetings. Charter Section 12(i). The Council is required to vacate the seat of a Council member who fails to attend a certain number or percentage of Council meetings per month, unless those absences are excused by Council resolution. Charter Section 12(i).

The above-cited Charter provisions do not address the issue of eligibility to hold an elective City office. Eligibility requirements are set forth in several other Charter provisions. In particular,

Charter section 7 requires that a candidate or appointee be a resident and elector of this City to be eligible to hold a City elective office. This Charter section further delegates authority to Council to establish by ordinance the minimum residency requirements of an elected or appointed City officeholder. Charter section 12(h)(1)(A) provides in relevant part that "any person appointed by the Council to fill a vacant Council District seat . . . is not . . . eligible to run for that office for the next succeeding term. . . ." (Emphasis added.) Another eligibility requirement is found in Charter section 12(f). That section prohibits a person from holding a particular Council office more than two consecutive terms. In other words, that person would not be eligible to run for a third term for the same Council seat. There is nothing in the Charter or San Diego Municipal Code that denies eligibility to hold elective City office merely because the candidate or applicant is on active military reserve. Furthermore, merely being absent from the City for two weeks per year and one weekend per month for military reserve duties does not deprive a person of his or her residency, or his or her status as an elector of the City.

Assuming an applicant who is in the military reserve is appointed to the vacant Council seat, the question arises as to whether the appointed Councilmember's absence from the City for military reasons two weeks per year (and one weekend per month) would either:

- (1) constitute a failure to devote full time to Council duties, contrary to Charter section 12(j), or
- (2) cause the person to miss an excessive number or percentage of Council meetings, contrary to Charter section 12(i), thereby triggering a vacancy in office.

The City Attorney has previously construed a Council member's duty to devote full time to the elective office as permitting activities that would not interfere with a Council member's elective duties. For example, a person could continue a part time legal practice, as long as that practice did not interfere with the Council member's duties. See Memorandum of Law dated May 17, 1993 (copy attached).

More serious is the question of whether a mandatory vacancy is created by a Council member's missing several Council meetings in a month because of active military service two weeks per year. First, we point out that not all Council meetings count for purposes of determining whether a vacancy may or should be declared under Charter section 12(i). Only "regular" meetings of the Council count for this purpose, as opposed to "special" Council meetings, standing Council Committee meetings, or meetings of related agencies such as the Redevelopment Agency or the Housing Authority. See City Attorney Memorandum of Law, March 3, 1993 (copy attached).

Second, and perhaps more important, Charter section 12(i) requires that a member's absence be unexcused in order to trigger a vacancy. If the absence is excused, the Council may not declare a vacancy. As a

practical matter, the Council generally and regularly adopts resolutions excusing members for absences for such reasons as vacation, out-of-town trips, and illness. Although not technically required to do so, the Council may be reasonably expected to adopt a resolution excusing another Council member's absence by reason of military service. To do otherwise would probably constitute an unlawful discriminatory practice contrary to California Military and Veterans Code section 394(b). This Code section reads in relevant part:

No member of the military forces shall be prejudiced or injured by any officer . . . of any . . . city with respect to that member's employment, appointment, position or status or be denied or disqualified for or discharged from that employment or position by virtue of membership or service in the military forces of this state or of the United States.

Although this Military and Veterans Code section has not been tested in courts, it and related sections of the Military and Veterans Code

See, for example, California Military and Veterans Code ' 395.3, which provides the right of reentry into public office or employment after resignation to serve in the armed forces.

would probably be held to preempt any Charter provision that on its face or as applied would allow discriminatory conduct against a person in an active military reserve status. In light of the Council's record of excusing Council absences for arguably less meritorious reasons, this Code section could possibly operate to deny the Council discretion to refuse to excuse a Council member's absence for military reasons.

JOHN W. WITT, City Attorney

By

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Attachments

ML-94-101