

## MEMORANDUM OF LAW

DATE: September 1, 1994

TO: Rich Snapper, Personnel Director

FROM: City Attorney

SUBJECT: Civil Service Appeals for Loss of Overtime Pay

### Question Presented

As a result of several citizen complaints, a night duty fire inspector was prohibited from conducting certain inspections for a period of six (6) months. This prohibition has resulted in a loss of overtime and a consequent reduction of overtime compensation to the employee. The employee has requested an evidentiary appeal hearing before the Civil Service Commission ("CSC"). You have asked if an employee may go before the CSC in an appeal process for a loss of overtime pay.

### Short Answer

San Diego City Charter ("Charter") section 129 provides that an appeal to the CSC may be made in cases of termination of a permanent employee or suspension of any employee. Additionally, San Diego Municipal Code ("SDMC") sections 23.1209 and 23.1211 provide for CSC appeals and the appropriate procedures for those appeals for reductions in compensation and demotions. No other provisions for CSC appeals are found. The basis for the inspector's request for a CSC appeal is that the loss of overtime pay is a taking of property in a legal sense, akin to the taking of property courts have found to exist in a termination or suspension of a government employee. Although this theory has initial appeal, because of the admitted reduction of overall compensation, courts have repeatedly stated that due process procedures apply only to vested property interests, and overtime pay is not a vested right.

### Analysis

A City employee has a vested right to his or her base salary. Salary rates are fixed each year, pursuant to Charter section 70, by the City Council through the salary ordinance. Employees, therefore, have a vested interest in their base salaries. However, "although a permanent employee's right to continued employment is generally regarded as fundamental and vested, an employee enjoys no similar right to continuation in a particular job assignment." *Howell v. County of San Bernardino*, 149 Cal. App. 3d 200, 205 (1983). The courts have held that to establish a property interest, there must be more than a mere

expectation of continued employment (or salary). An employee must show a legitimate claim of entitlement to it. "A mere revocable assignment to special duties in a position designated by a special title and carrying added compensation does not necessarily constitute a promotion to another rank or grade." *Sojka v. City of Pasadena*, 15 Cal. App. 3d 965, 972 (1971). Special assignments are thus management prerogatives that inure to employees for a variety of reasons such as seniority, skill or competence.

Unlike the vested property interest or right that courts have found in the base salary fixed by City Council, the "right to receive shift differential pay is not a right to future benefits based on past or current employment, as, for example, are retirement rights, but merely a form of compensation which accrues concurrently with appellant's salary." *Andrews v. Board of Supervisors*, 134 Cal. App. 3d 274, 282 (1982). Similarly, overtime pay is a form of compensation which accrues concurrently with an employee's salary, thus the right to receive such pay arises only when an employee works a particular shift.

Additionally, due process is not a static or rigid concept. "Decisions of the United States Supreme Court underscore the fact that due process is flexible and calls for such procedural protections as a particular situation demands." *Binkley v. City of Long Beach*, 16 Cal. App. 4th 1795, 1807 (1993). In a case such as this where no vested property interest is involved, no due process requirements are invoked even though there is a loss of some compensation.

#### Conclusion

CSC appeals are provided by the Charter and SDMC in instances where vested property rights are involved. No vested interest attaches to a special assignment. Such assignments are purely matters of management prerogatives. Therefore, the Fire Inspector is not entitled to a CSC appeal.

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By

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cc Bill Lopez

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