

MEMORANDUM OF LAW

DATE: October 5, 1994

TO: Rich Snapper, Personnel Director

FROM: City Attorney

SUBJECT: Promotional Eligibility

Question Presented

Two questions arose at the Civil Service Commission meeting of August 11, 1994. The first is whether an employee may apply and compete for promotion to Assistant Fire Marshal without first having been a Fire Prevention Inspector I, Fire Prevention Inspector II and Fire Prevention Supervisor. The second is whether the City is required, under the Meyers-Milias Brown Act (MMBA), to meet and confer on the issue of changes in applicant qualifications.

Short Answer

San Diego City Charter (Charter) Section 124 provides that an employee may be promoted from a lower grade to a higher grade whenever experience derived in the lower grade tends to qualify an employee for the higher grade. There are no provisions in the Charter, Civil Service rules or Personnel regulations that require a strict progression up a preordained ladder.

Additionally, the management rights clause of the Memorandum of Understanding (MOU) between the International Association of Firefighters, Local 145 (Local 145) and the City provides that management has the exclusive right to set standards of selection for employment and promotion. Thus it is not necessary for the City to meet and confer with the union on the issue.

BACKGROUND

At the August 11, 1994, Civil Service Commission meeting Local 145 raised the issue of which employees are eligible to compete for the position of Assistant Fire Marshal (Marshal). Local 145 contended that Article 10 of the current MOU, which lists all employees in the firefighter unit, precludes the Fire Protection Engineer (Fire Engineer), who is not in the firefighter unit, from competing for the Marshal position. Local 145 further argued that Article 10 indicates a clear "career path" and an employee may only compete for the Marshal position after having been a Fire Prevention Inspector I, Fire Prevention Inspector II and Fire Prevention Supervisor.

The Personnel Director contended that an employee may compete for

the position of Marshal if the employee meets the minimum qualifications for a given class. However, minimum qualifications are then evaluated in conjunction with the education and experience of an individual candidate which demonstrate that candidate's ability to perform the duties of the position. The Personnel Director also indicated that, at the time the last Marshal examination was announced, the position of Fire Engineer had just recently been created. The duties of the position had not yet been fully clarified. Since then, the duties of the Fire Engineer position have evolved to include duties identical to those of Fire Prevention Supervisor.

The Personnel Director stated that, if the announcement for the Marshal position was reissued today the minimum qualifications would be revised to allow an individual with Fire Engineer experience to compete for the position of Marshal. To disallow such experience would create artificial barriers for candidates who have demonstrated the same knowledge, skills and abilities as Fire Prevention Supervisors.

ANALYSIS

The first issue raised by Local 145 is whether an employee must progress up the "career ladder" from one step to the next to compete for a Fire Marshal position. Nothing in the Charter or Civil Service Rules indicates that such a "career ladder" exists. At the Civil Service Commission meeting, Local 145 stated that Article 10 of the MOU was evidence of the City's "career ladder" in the firefighter unit. However, Article 10 merely lists classes that are exclusively represented by Local 145 and indicates that such representation is recognized formally by the City. This article does not preclude an employee from transferring from one bargaining unit to another when a change in job classification makes the employee no longer eligible to remain in his or her current bargaining unit.

The Charter provides no language regarding "career ladders." Rather, Charter Section 124, dealing with promotions, provides in pertinent part:

Whenever practicable vacancies in the classified service shall be filled by promotion, and the Civil Service rules shall indicate the lines of promotion, from each lower to higher grade wherever experience derived in the lower grade tends to qualify for the higher. Any advancement in rank shall constitute promotion. Lists from which promotions are to be made shall be created as provided in the Civil Service rules.

(Emphasis added.)

Note that the language does not indicate specific career steps, but indicates that promotability flows from experience in a lower grade which would tend to qualify an employee for a higher classification.

Similarly, San Diego Municipal Code Section 23.0903 (Civil Service Rule VIII) at subsection 2 provides:

Section 2. ELIGIBILITY FOR PROMOTIONAL EXAMINATIONS: Promotional examinations shall be open to any qualified employee who has completed at least six months of City service immediately preceding the final date for filing applications or who has returned to City employment from a re-employment list, and any qualified prior employee whose name is currently on a re-employment eligible list.

Note again, that the rule does not refer to a specific career path, but rather, leaves promotional eligibility open to any qualified employee.

Finally, Personnel Regulation D-4 II. B. provides, in pertinent part, "In order to be eligible for a promotional examination, an applicant must meet the minimum qualifications for the class as indicated in the job announcement." Pursuant to the language of the City's class specifications, employment standards are a guide for determining the education, training, experience and skills required for employment in a particular class. The specifications go on to explain that the standards will be reevaluated each time a job announcement is distributed and an examination is opened.

Personnel Regulation D-3 does provide for career advancement in certain positions. In essence, Personnel Regulation D-3 provides that an employee may enter City service at a trainee level and automatically promote to a higher level without the necessity for competition upon reaching a certain level of proficiency. For example, a Clerical Assistant I may promote to a Clerical Assistant II, an Account Clerk or a Benefits Representative I without taking a promotion examination. This is true also of a Fire Inspector I, who may promote automatically to a Fire Inspector II. It does not however, hold true in relation to a Fire Inspection Supervisor because supervisors must compete in eligibility examinations. Despite the career advancements noted in Personnel Regulation D-3, this regulation has never been intended or used to limit competition for a class to lower level classes in the same series. An employee may compete for any job for which he or she is qualified.

Support for the establishment of a "career ladder" is recognized for Fire Recruits who automatically promote to Firefighter I and then Firefighter II. This "career ladder" is memorialized in the MOU in Article 54 but there is no evidence that the "career ladder" has ever been formally adopted by the City. Note, also that Article 54 does not memorialize a "career ladder" for Fire Prevention Inspectors, only for Fire Recruits. Rules of statutory construction indicate that when a specific form of conduct or manner of performance or operation is

designated, there is an inference that all omissions should be understood as exclusions. Sutherland Statutory Construction, Vol. 2A Section 47.23, 216 (5th ed. 1992). As the court stated in *In Re Fain*, 145 Cal. App. 3rd 540, 550 (1983), "the expression of things in a statute necessarily involves exclusion of other things not expressed."

Local 145 also contends that if the City was to amend the minimum qualifications to allow the Fire Engineer to compete for Marshal, the City must first meet and confer with Local 145 prior to implementation of the competitive process. However, Article 16 of the MOU, entitled Management Rights provides in pertinent part:

The rights of the City include but are not limited to the exclusive right to determine the mission of its constituent departments, commissions, and boards; set standards of service; determine the procedures and standards of selection for employment and promotion; . . . determine the methods, means and personnel by which government operations are to be conducted; determine the content of the classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work.

The exercise of such right shall not preclude Local 145 from meeting and consulting or meeting and conferring with management representatives as required by law about the practical consequences that decisions on these matters may have on wages, hours, and other terms and conditions of employment, and shall supersede the provisions of this agreement.

The management rights clause is very broad and permits the Personnel Director, under supervision of the Civil Service Commission, to set standards for promotion. Since the management rights clause permits the Personnel Director to set standards for promotability, revisions in the experience requirements of a promotional announcement do not rise to the level of a meet and confer issue. It is an established past practice within the City that the personnel staff reviews and evaluates the experience requirements of a promotion announcement each time a new announcement is issued.

CONCLUSION

Nothing in the MOU with Local 145 indicates an employee may apply for the Assistant Fire Marshal position only after completing a rigid line of progression through the fire prevention ranks. Additionally,

the Charter, Municipal Code and Personnel Regulations all indicate that only the stated minimum qualifications must be met before an individual is eligible to compete for a promotional examination. No "career ladder" may be read into an otherwise clear job announcement.

Finally, no meet and confer process with Local 145 is necessary because the management rights article of the MOU reserves to management the power to set standards of selection for employment and promotion.

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