MEMORANDUM OF LAW

DATE: August 11, 1995

TO: Rich Snapper, Personnel Director

FROM: City Attorney

SUBJECT: Liberty Interest Hearings

QUESTION PRESENTED

Does an employee who does not have a property interest in his or her job, and therefore no right to a Civil Service Commission appeal following his or her termination, nevertheless have a right to a liberty interest hearing?

SHORT ANSWER

Yes. Liberty interest hearings provide an employee only with an opportunity to clear his or her name if some stigma may attach to the employee's reputation as a result of the termination. This right of employees is protected even when there is no vested property interest in their job.

BACKGROUND

Recently, a probationary City employee was terminated from his job for actions on the job that resulted in his arrest for a misdemeanor offense. As a probationary employee, he was not entitled to an appeal before the Civil Service Commission. The employee instead requested a liberty interest hearing to allow him an opportunity to clear his name.

ANALYSIS

Although your question concerns only probationary employees, this opinion applies equally to all at-will employees. The term "at-will employees" includes both probationary and unclassified employees. Therefore, for purposes of this memorandum, we will refer to at-will employees as including probationary and unclassified employees.

Public employment generally involves a property interest entitled to due process protection. American Federation of State Etc. Employees v. County of Los Angeles, 146 Cal. App. 3d 879 (1983). A permanent employee is thus entitled to a pre-termination right to be apprised of the charges against him or her, and an opportunity to refute those charges. This property interest in public employment has not, however, been extended to at-will employees. The law concerning the termination of at-will employees has been discussed by the courts on many occasions. They have iterated the following principles:

It is settled law that a probationary

> (or nontenured) civil service employee, at least ordinarily, may be dismissed without a hearing or judicially cognizable good cause. Such a dismissal does not deprive the employee of a vested, or property, right. A public agency may constitutionally "employ persons subject to removal at its pleasure" for "unquestionably, a broad discretion reposes in governmental agencies to determine which probationary employees they will retain."

Lubey v. City and County of San Francisco, 98 Cal. App. 3d 340, 345-346 (1979) (emphasis in original) (citations omitted).

There is, however, an exception to the "no hearing" rule in those cases where the employee is deprived of a liberty interest guaranteed under the due process clause of the Fourteenth Amendment to the United States Constitution. The deprivation of a liberty interest arises when the at-will employee's job termination is based on "charges of misconduct which 'stigmatize' his reputation, or 'seriously impair' his opportunity to earn a living, or which 'might seriously damage his standing or associations in his community.'" Id. at 346.

Under this standard, the need for a liberty interest hearing does not arise if an employee is terminated for reasons unrelated to misconduct, such as poor performance, or poor attendance, or in those instances when an at-will employee is terminated without a specific reason. If, however, the termination is based on allegations of misconduct, it is reasonable to assume that some stigma may attach to the employee's reputation. Such stigma may hinder the employee's ability to obtain future employment. In these cases, the courts have determined that there is a need for a liberty interest hearing. When a hearing is required, the scope of the hearing must also be determined.

The scope of liberty interest hearings has been narrowly defined by the courts. They note that due process does not require a full evidentiary type of hearing at all times. In fact, the term hearing is a misnomer where liberty interests are at issue. The recent case of Binkley v. City of Long Beach, 16 Cal. App. 4th 1795 (1993), clearly outlines the parameters of a liberty interest hearing. Binkley involved the chief of police of Long Beach. The chief, an at-will employee, was terminated for misconduct, mismanagement and misjudgment. Subsequent to his termination, the chief demanded an opportunity to clear his name and when a hearing was granted, the chief challenged the adequacy of the hearing. In the Binkley case, the court pointed out that:

> 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. Three distinct factors must be considered: the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional procedural safeguards; and the government's interest, including the function involved and the fiscal and administrative burdens entailed by imposing additional procedural requirements.

Id. at 1807 (citation omitted).

In most instances, when a liberty interest hearing is at issue, no property interest is involved. If a classified employee is terminated for misconduct that may affect his or her reputation, the employee may clear his or her name in the context of a Civil Service appeal while defending against the termination. However, since an at-will employee may be terminated with or without just cause, the sole purpose of the hearing is not to regain one's job, but to clear one's name. The due process requirements are, therefore, less stringent than when an employee's job is at stake. However, because a protected "liberty" interest is implicated, due process requires, at a minimum, that the employee be given an opportunity to refute the charges and clear his name. Binkley at 1807. The limited right of a public employee serving in an at-will capacity is that he or she be given an opportunity to "establish a formal record of the circumstances surrounding his termination and to attempt to convince the employing agency to reverse its decision, either by demonstrating the falsity of the charges which led to the punitive action, or through proof of mitigating circumstances." Id. at 1809. Thus, although hearing is the title given to the procedure, it is really little more than an opportunity for the terminated employee to present his or her version of the facts. Ultimately, in a liberty interest hearing, even if the employee proves the allegations against him or her are false, the employer is not bound to reinstate the employee to his or her former position.

Although the Lubey case indicated that the hearing in that case should have been held prior to the termination, the Lubey case was not decided on the narrow issue of what is required for an adequate hearing under due process principles. Its holding that a pre-termination hearing was required was predicated on the specific rules of the City and County of San Francisco. However, when the sole purpose of an administrative appeal procedure is to afford a discharged government employee "'an opportunity to clear his name,' and no charter provisions or local regulation require a different procedure, a hearing . . . after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause." Arnett v. Kennedy, 416 U.S.

134, 157 (1974).

It should be noted that the City's Personnel Regulations provide that a probationary employee who is being failed on probation will receive five (5) days written notice of the failure of termination. Personnel Regulation G-2(II)(A). Similarly, Administrative Regulation 96.00 provides that an unclassified employee shall be given advance notice of his or her termination and an opportunity for review before the City Manager or other nonmanagerial authority. However, these are City mandated procedures and, like the procedures in the Lubey case, go beyond what is required by due process.

Similarly, pre-termination Skelly procedural rights are inapplicable to government employees holding at-will positions as they have no constitutionally protected property interest in continued employment. Binkley at 1808, citing Skelly v. State Personnel Bd., 15 Cal. 3d 194 (1975).

Finally, the narrow focus of a liberty interest hearing allows the administrative agency to preclude the calling or cross-examination of witnesses. Such limitations do not violate due process requirements. Binkley at 1809. The narrow scope also allows the hearing to be conducted by the individual who made the initial decision to terminate, absent a showing of actual bias on the part of that individual. Id. at 1810.

CONCLUSION

At-will employees who have been terminated for misconduct should be given the opportunity to refute the allegations through liberty interest hearings. However, case law indicates the scope of such a hearing is very narrow. The employee must only be granted an opportunity to clear his or her name. The hearing may occur either before or after the termination, and no witnesses need be called and no cross-examination allowed. Finally, liberty interest hearings may be held before the individual who made the final decision to terminate the employee unless there is a showing of actual bias by the hearing officer.

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cc Cathy Lexin, Labor Relations Manager
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