

MEMORANDUM OF LAW

DATE: May 29, 1997
NAME: Civil Service Commission
FROM: City Attorney
SUBJECT: The Effect of Proposition 209 on the City's Hiring Practices and Policies

QUESTION PRESENTED

Does the passage of Proposition 209, and the recent court decision lifting the injunction barring the implementation of Proposition 209, have any effect on the equal opportunity hiring policies of the City?

SHORT ANSWER

No. At this time, it appears that current City policies set forth in Council Policy 300-10 do not violate the provisions of Proposition 209 and may continue to form the basis of the City's equal opportunity policy.

BACKGROUND

At the April 1997 meeting of the Civil Service Commission ("Commission"), the most recent statistics showing the ethnic and gender makeup of the current City workforce were provided to the Commission for review and approval. Based on the reports presented by the Personnel Department, the Commission asked several questions regarding the City's equal opportunity policy as reflected in Council Policy 300-10 and how that policy would be affected by the passage of Proposition 209.

Proposition 209, an amendment to the California Constitution, article I, section 31(a) was passed by the voters in November 1996. The language pertinent to this discussion says: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." A lawsuit was filed challenging the constitutionality of the proposition and seeking an injunction barring its implementation. A preliminary injunction

was granted by Justice Thelton Henderson in Coalition for Economic Equity v. Pete Wilson, 946 F. Supp. 1480 (N.D. Cal. 1996). Subsequently, the Ninth Circuit Court of Appeals overturned Justice Henderson's ruling and lifted the injunction in Coalition for Economic Equity v. Pete Wilson, 110 F.3d 1431 (1997). The appeals court addressed two specific arguments raised by the Coalition for Economic Equity: first, that Proposition 209 violates the Equal Protection Clause of the United States Constitution "as a matter of 'conventional' equal protection analysis." Id. at 4556. And second, that Proposition 209 violates the Equal Protection Clause "as a matter of 'political structure' analysis." Id. at 4556. In overturning Justice Thelton's finding, the Ninth Circuit found Proposition 209, under either analysis, did not violate constitutional guarantees of equal protection. In light of the Ninth Circuit's ruling and its subsequent dissolution of the injunction which had previously barred implementation of Proposition 209, the Commission has asked whether the City may continue to use its existing policies as adopted in Council Policy 300-10 in its hiring and promotion process.

ANALYSIS

Council Policy 300-10 provides in pertinent part, that "The City Council, in this Policy, declares its commitment to provide Equal Opportunity in all activities of the City and its agencies, including employment of individuals and firms which contract with the City. This policy is intended to reinforce the merit principle in public employment." Nothing in this statement of purpose violates the principles of Proposition 209. In its Implementation Guide published in January 1997, the California League of Cities suggests that a solution for restructuring voluntary affirmative action plans is to restructure them "as 'equal employment opportunity' plans which merely establish goals and objectives to prevent discriminatory conduct in the application and selection process."

This is precisely what the current City policies seek to do. As the report to the Commission from the Personnel Director indicates, the City has a longstanding commitment to removing barriers that artificially prevent individuals from competing for City jobs based on nonessential criteria. The League's Implementation Guide indicates that where possible, it may be helpful to revise recruiting policies to emphasize economic background rather than race or gender. If the Commission recommends such a change to the Council Policy, this office can prepare a resolution for presentation to Council.

While Proposition 209 does not directly affect the Council Policy as it relates to hiring and promotion, it is less clear what effect, if any, Proposition 209 will have on outreach programs and job recruitment. To the extent the City can show its recruitment efforts are directed to attracting a more diverse applicant pool, rather than affecting selection criteria for a position, its outreach efforts would be consistent with the provisions of Proposition 209. City recruitment efforts do not need to be curtailed, if positions are offered to everyone who is qualified, without group identification criteria for acceptance.

As a public entity, the City is already required to meet advertising and notice requirements that reach City-wide. Such requirements ensure that City recruitment policies are not narrowly targeted for a specific group. San Diego Municipal Code ("SDMC") section 23.0401 provides that all examinations for City employment must be publicly noticed, and

SDMC section 23.0303 provides that applicants of either sex may be admitted to any examination, and that no questions regarding race, color, national origin or sex may be asked, except to the extent required by law. These provisions apply to new hire, promotional and training programs for all City employees and applicants. Thus, the City personnel policies as currently written, do not allow or prescribe any act forbidden by the provisions of Proposition 209.

CONCLUSION

Proposition 209 forbids the granting of preferential treatment to any employee or applicant for employment. Current City policies, both as codified in the San Diego Municipal Code and as adopted by Council resolution, prohibit preferential treatment based on race, ethnicity or gender. Thus, current policies comply with the provisions of Proposition 209.

The Commission may, if it chooses, take a step to further insulate City personnel practices from legal challenges. The Commission could amend language in outreach or recruitment programs that address race or gender to adopt more broadly based language. For example, rather than referring to outreach based on race or gender, the Commission could refer to economic disadvantage. However, such amendments are not necessary at this time.

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