

**Office of  
The City Attorney  
City of San Diego**

**MEMORANDUM  
MS 59**

**(619) 236-6220**

**DATE:** February 23, 2018  
**TO:** Honorable Councilmembers  
**FROM:** City Attorney  
**SUBJECT:** Chief of Police Confirmation

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This Memorandum is prepared to assist the San Diego City Council (Council) in its confirmation process for the City of San Diego (City)'s next Chief of Police (Chief). The confirmation of the Chief is governed by the San Diego Charter (Charter) and Council Policy 300-08 (Aug. 8, 1988).

**INTRODUCTION**

Chief Shelley Zimmerman is retiring, effective March 1, 2018. Under Charter section 57, the new Chief is to be appointed by the Mayor, and the appointment is confirmed by a majority of the Council.

Charter section 57 grants the Chief "all power and authority necessary for the operation and control of the Police Department." The Chief appoints, directs, and supervises San Diego Police Department personnel, in accordance with the City's Civil Service Rules and regulations and Council-approved memoranda of understanding between the City and its recognized employee organizations. San Diego Charter § 57. The Chief also has "charge of the property and equipment of the department and exercise[s] all powers and duties provided by general laws or by ordinance of the Council." *Id.*

The Mayor sets the salary of the Chief within the salary ranges adopted by the Council in the annual Salary Ordinance. San Diego Charter §§ 70, 290. *See also* 2006 City Att'y MOL 310 (2006-12; Jul. 14, 2006). The Mayor may remove the Chief from office at any time; however, the Chief has a right to appeal the Mayor's decision under specified procedures. San Diego Charter §§ 57, 265(b)(10).

On February 1, 2018, Mayor Kevin Faulconer announced his appointment of Assistant Chief David Nisleit to succeed Chief Zimmerman, effective March 2, 2018. On February 12, 2018, in accordance with Council Policy 300-08, the Council Committee of the Whole conducted a public hearing for the purpose of seeking community comments on the appointment. The Council is scheduled to conduct a confirmation hearing on February 26, 2018.

## DISCUSSION

### I. WHAT IS THE PURPOSE OF THE CONFIRMATION HEARING?

In accordance with Charter section 57, the appointment of Assistant Chief Nisleit to the position of Chief is not complete until the Council confirms it. “Confirmation” is the “act of giving formal approval; the ratification or strengthening of an earlier act.” *Black’s Law Dictionary* 362 (10th ed. 2014). The Council’s confirmation of the Chief is the formal approval of the Mayor’s appointment, giving it legal effect. *See, e.g., Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1212 (9th Cir. 2001). If the Council fails to confirm the appointment by a majority vote, then the Mayor must make a different appointment.<sup>1</sup>

### II. WHAT IS THE FORMAT OF THE CONFIRMATION HEARING?

The confirmation process has two steps: first, following notification by the Mayor of the Chief’s appointment, the Council Committee of the Whole conducts at least one public hearing for the purpose of seeking community comments on the appointee, and to address the appointee’s qualifications in terms of established criteria listed in Attachment A to the Council Policy. Council Policy 300-08 (Aug. 8, 1988).

The Council Committee of the Whole held its hearing on February 12, 2018, and moved the Mayoral appointment and staff report forward to a meeting of the Council, to be held on February 26, 2018.<sup>2</sup>

The Council must consider the confirmation of Assistant Chief Nisleit to the office of Chief of Police at a properly noticed, public meeting under the Ralph M. Brown Act (Brown Act). Cal. Gov’t Code §§ 54950-54963; *see* 2006 City Att’y MOL 310 (2006-12; Jul. 14, 2006). The Council may request the appearance of the appointee, who must comply with the Council’s request. It is our understanding that Assistant Chief Nisleit will be in attendance.

The Council’s established procedure for debate, as defined in Rule of Council 2.10, codified in the San Diego Municipal Code (SDMC), allows for public comments, following opening statements by City staff and any comments by the Independent Budget Analyst, City Attorney, or City Auditor. SDMC § 22.0101. Following public comment, the City Councilmembers may speak on the matter, ask questions, or make comments. The established procedure for debate may be modified at the discretion of the Council President or by a vote of the Council majority. *Id.* It would be outside of established procedure for a Councilmember to cede time to a member of the public to ask questions of the appointee because it is outside of the general practice set forth in the Council Rules and it is the duty of the Councilmembers to make a determination on

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<sup>1</sup> The Council’s failure to confirm a Mayoral appointment is not subject to Mayoral veto because failure of the Council to confirm is not an affirmative legislative action within the meaning of Rule of Council 2.8, at San Diego Municipal Code section 22.0101. If the Council fails to confirm, it may move to continue the matter or return the matter to the Mayor.

<sup>2</sup> The Council Committee of the Whole voted to waive Council Policy 300-08, which calls for a special meeting of the Council to consider confirmation no later than seven days after the Council Committee of the Whole makes its findings and recommendations. The purpose of the waiver was to accommodate for the legislative recess the week of February 19, 2018, so the Council can consider the confirmation at a regularly scheduled meeting on February 26, 2018.

the confirmation and not delegate their authority to others (*see* San Diego Charter § 11.1). However, a Councilmember may follow up on public comments by addressing questions or issues raised, so long as the questions are within the permitted scope of questions, as discussed below.

### **III. ARE THERE QUESTIONS THAT THE COUNCIL MAY NOT ASK?**

Council questions about the proposed appointee's qualifications must focus on the criteria identified in Attachment A of Council Policy 300-08 as follows:

- A. Employment history, including, but not limited to, his responsibilities and accomplishments.
- B. Education qualifications.
- C. Affirmative action record.<sup>3</sup>
- D. Innovative operational programs.
- E. Community involvement.
- F. Administrative skills.
- G. Employee-employer relations, skills, and experience.
- H. Philosophical approach to law enforcement.
- I. Personal integrity.
- J. Experience in the development and administration of an effective police training program.
- K. Budgetary and financial experience.

When addressing the criteria for confirmation, the Council must be mindful of certain federal and state laws that limit the ability of employers, including the City as a public agency employer, to probe into personal matters. The Council should avoid discussion of the appointee's employment evaluations, salary history, citizen complaints against him, and private information, to comply with federal and state law.

Specifically, federal and state civil rights laws prohibit California employers, including the City, from discriminating against any applicants or employees based on certain characteristics, including race, color, national origin, religion, sex, disability, age, marital status, among others.

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<sup>3</sup> This factor must be read in conjunction with article I, section 31 of the California Constitution, added by Proposition 209, approved by California voters in November 1996, which provides that the City, in its employment practices, cannot discriminate against or give preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin. However, the Council may consider efforts to value diversity in the work place, including a blending of various cultures, backgrounds, and experiences.

Honorable Councilmembers

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*See* 42 U.S.C. §§ 2000e-2, 2000e-3 (Title VII, Civil Rights Act of 1964); 42 U.S.C. §§ 12101-12117 (Americans with Disabilities Act); 29 U.S.C. §§ 621-623 (Age Discrimination in Employment Act); Cal. Gov't Code §§ 12900-12996 (California Fair Employment and Housing Act). Therefore, the Council must not ask any questions that seek discussion of these characteristics.

Further, California employers are prohibited from relying on salary history information of applicants as a factor in determining whether to offer employment (Cal. Labor Code § 432.3) and from paying employees different wage rates based on sex, race, or ethnicity (Cal. Labor Code § 1197.5). Therefore, salary issues should not be raised. Further, the Council does not set the salary of the Chief; it is set by the Mayor at a rate consistent with the Council-approved Salary Ordinance.

Also, California peace officers have a right to privacy in their personnel records and personal information, including marital status; family members;<sup>4</sup> home addresses; medical history; employment advancement, appraisals, or discipline; and complaints. Cal. Const. art. I, § 1; Cal. Penal Code §§ 832.7, 832.8; *Commission on Peace Officer Standards & Training v. Superior Court*, 42 Cal. 4th 278, 296-99 (2007).

The Council should limit its questions to publicly known information about the proposed appointee and focus on the appointee's skills and abilities, and ideas and goals for the future of the Police Department.

This Office is available to respond to any further questions regarding the confirmation process.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Joan F. Dawson

Joan F. Dawson

Deputy City Attorney

JFD:cm

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cc: Mayor Kevin Faulconer

Kris Michell, Chief Operating Officer

Andrea Tevlin, Independent Budget Analyst

Judy von Kalinowski, Human Resources Director

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<sup>4</sup> "Family members" is not defined in California Penal Code section 832.8, but it reasonably includes any information about a peace officer's family to ensure their safety. *Commission on Peace Officer Standards & Training v. Superior Court*, 42 Cal. 4th 278, 296 (2007)).