

LESLIE E. DEVANEY  
ANITA M. NOONE  
LESLIE J. GIRARD  
SUSAN M. HEATH  
GAEL B. STRACK  
ASSISTANT CITY ATTORNEYS

LISA A. FOSTER  
DEPUTY CITY ATTORNEY

OFFICE OF  
**THE CITY ATTORNEY**  
CITY OF SAN DIEGO

**Casey Gwinn**  
CITY ATTORNEY

CIVIL DIVISION  
1200 THIRD AVENUE, SUITE 1620  
SAN DIEGO, CALIFORNIA 92101-4178  
TELEPHONE (619) 236-6220  
FAX (619) 236-7215

**MEMORANDUM OF LAW**

**DATE:** October 14, 2004

**TO:** City Clerk Charles Abdelnour

**FROM:** City Attorney

**SUBJECT:** Use of Title by City Employee, Officeholder, or Appointee in Election Related Activity

**INTRODUCTION**

A number of questions have arisen in the context of the November 2, 2004, election regarding the use of official title by City officials and appointees in election related activities. You have asked this Office to clarify whether City employees, officeholders, or appointees are legally permitted to use their official titles for election related purposes, such as endorsing a ballot measure or candidate, or signing a ballot argument.

**QUESTION PRESENTED**

Is a City employee, officeholder, or appointee legally permitted to use his or her official title in association with election activity, such as endorsing a candidate or ballot measure, or signing a ballot argument?

**SHORT ANSWER**

Yes. There is no legal prohibition on the use of official title by a City employee, officeholder, or appointee for election related purposes. However, the election activity must be conducted by the City official on his or her own time, without the use of public resources, and the use of title must be done so that it is clear the official is acting in an individual capacity. Certain employees or appointees may be subject to an internal policy that prohibits or restricts use of City title or affiliation in political activity, therefore, an employee or appointee should investigate whether such a policy exists prior to using a City title for election related purposes.

## ANALYSIS

### **I. Legal Authorities Governing Political Activity by City Officeholders, Employees, and Appointees.**

A review of the relevant legal authorities governing political activity of public employees reveals that there is currently no prohibition on the use of official title by a City employee, official, or appointee for election related purposes. The following is a summary of the relevant legal authorities governing political activity of City officials and employees.

#### **A. San Diego Charter section 31**

Charter section 31 provides:

- (a) No officer or employee of the City, except elected officers and unsalaried members of commissions, shall during regular hours of employment take an active part opposing or supporting any candidates in any City of San Diego political campaign or make contributions thereto in behalf of any candidates, nor shall such person seek signatures to any petition seeking to advance the candidacy of any person for any municipal office. Nothing in this section shall be construed to prevent any officer or employee, whether Classified or Unclassified, from seeking election or appointment to public office or from being active in State or Federal political campaigns, in any bond issue campaign including municipal bond issues, or from being active in local political campaigns.
- (b) Every municipal employee shall prohibit the entry into any place under his control occupied for any purpose of the municipal government, of any person for the purpose of therein making, collecting, receiving, or giving notice of any political assessment, subscription, or contribution.

Section 31 prohibits certain political activity by officers and employees during hours of regular employment, and in municipal government facilities, but contains no prohibition on the use of official title in election activity. This section exempts elected officers and unsalaried members of boards and commissions from its prohibitions, and clarifies that City officers and employees are otherwise permitted to be active in local political campaigns.

#### **B. California Government Code sections 3201 – 3209**

Prior to the 1960's, a number of local and state provisions existed which broadly prohibited political activity by public employees. For instance, prior to 1979, San Diego Charter section 31 prohibited City employees from taking part in a county or municipal political campaign, even on private time. Challenges to these types of laws in the 1960's resulted in court decisions which held that public employees have a fundamental right to engage in political

activity, and that restrictions placed on that right must be based on a showing of “compelling need”. *Kinnear v. City and County of San Francisco*, 61 Cal. 2d 341, 343 (1964). See also *Fort v. Civil Service Commission of the County of Alameda*, 61 Cal. 2d 331, 338 (1964) (restrictions on officers and employees cannot be “broader than required to preserve the efficiency and integrity of its public services”); *Bagley v. Washington Township Hospital District*, 65 Cal. 2d 499 (1966). The *Bagley* decision sets forth a three part test for determining the constitutionality of restraints on the political activity of public employees, as follows: (1) the restrictions must have a rational relationship to the enhancement of public service, (2) the benefits which the public gains by the restrictions must outweigh the impairment of constitutional rights, and (3) there are no alternatives less injurious of constitutional rights. *Bagley v. Washington Township Hospital Dist.*, 65 Cal. 2d 499, 501-502 (1966).

Following these court decisions, the state legislature enacted California Government Code sections 3201-3209, entitled “Political Activities of Public Employees.” The primary purpose of this legislation was to set forth the general rule that state and local agencies cannot place restraints on the political activity of their employees. Cal. Gov’t Code § 3203. The legislation then sets out some narrowly tailored exceptions to that rule, including:

- Section 3205, regulating the solicitation of political campaign contributions by public officers and employees
- Section 3206, prohibiting officers or employees of a local agency from participating in political activities of any kind while in uniform
- Section 3207, which authorizes local agencies to enact prohibitions on political activity during working hours and on the premises of the local agency

None of the exceptions to California Government Code section 3203 addresses the use of official title by state or local employees in election materials.

### **C. San Diego Municipal Code section 27.3564 (Ethics Ordinance)**

The City of San Diego Ethics Ordinance contains a provision entitled “Misuse of City Position or Resources,” however that provision does not address the use of official title in election materials. SDMC § 27.3564. Subsection (a) of section 27.3564 provides, “It is unlawful for any City Official to use his or her position or prospective position, or the power or authority of his or her office or position, in any manner intended to induce or coerce any person to provide, directly or indirectly, anything of value which shall accrue to the private advantage, benefit, or economic gain, of the City Official or his or her immediate family.” Subsection (b) prohibits a City Official from engaging in campaign related activities “using City facilities, equipment, supplies, or other City resources.” Neither of these provisions contains any prohibition on the use of official title in campaign activity, as long as no benefit or advantage accrues to the official or his or her immediate family as a result of the activity, and no City resources are involved.

The only other provisions of the Ethics Ordinance relevant to the political activity of City officials are provisions related to the use of influence or official authority to secure a City position for someone as a reward for political service, and solicitation of political campaign contributions from City employees. SDMC §§ 27.3570; 27.3571.

#### **D. Prohibition on the Use Of Public Funds to Support or Oppose a Candidate or Ballot Measure**

The prohibition on the use of public funds for political advocacy is set forth both in statutory and case law. California Government Code section 54964(a) states “An officer, employee, or consultant of a local agency may not expend or authorize the expenditure of any of the funds of the local agency to support or oppose the approval or rejection of a ballot measure, or the election or defeat of a candidate, by the voters.” San Diego Administrative Regulations 45.50 and 95.60 both prohibit the use of City labor, facilities, equipment, or supplies for private purposes.

The California Supreme Court has held: “A fundamental precept of this nation’s democratic electoral process is that the government may not “take sides” in election contests or bestow an unfair advantage on one of several competing factions.” *Stanson v. Mott*, 17 Cal. 3d 206, 217 (1970). Based on that reasoning, it is unlawful for City officers or employees to use public resources or personnel to engage in political activity. *Id.*; *Mines v. Del Valle*, 201 Cal. 273 (1927); *People v. Battin*, 77 Cal. App. 3d 635 (1978). In the case of a local ballot measure, a distinction is made between advocacy and informational purposes. Although public funds may not be used for ballot measure advocacy directed at voters, they may be used to provide neutral, factual information to the public about a ballot measure. Cal. Gov’t Code § 54964(c); *Stanson*, 17 Cal. 3d at 220.

These rules on the use of public funds for political advocacy do not resolve the question of whether an officer, employee, or appointee can use his or her official title for political activity. While these rules make it clear that public facilities and resources cannot be used to support or oppose a ballot measure or candidate, they do not address whether an official title can be used in political activity by an officer, employee, or appointee, if that activity takes place during private time and without using public resources.

#### **E. Opinions from Other Agencies**

An examination of the authorities discussed above reveals no clear prohibition in California law on the use of official title by a City employee, official, or appointee for political purposes. That conclusion is consistent with the opinions of other agencies in California. In a February 1, 2002, memorandum entitled “Political Activities by City Officers and Employees,” San Francisco City Attorney Dennis Herrera wrote:

City officers and employees may not use their official positions to influence elections. This prohibition, however, does not affect the ability of individual officers and employees to take a public position, as private

citizens, on an electoral race or a ballot measure. In addition, acting as private citizens, City officers and employees may endorse candidates or measures even where the commission as a group may not. For example, the members of a commission, acting as private citizens and not using City time or resources, may join in submitting a ballot argument in support of a measure and may even identify themselves by the City office they hold as long as the argument does not mislead the public into thinking that the commission itself is taking the position.<sup>1</sup>

Similarly, the City of Los Angeles Ethics Commission has written that City officers and employees may endorse candidates and take a position on a ballot measure, as long as these activities do not involve City resources. The Commission also noted: “With regard to candidate and ballot measure endorsements, City employees should make clear that they are acting as individuals and avoid giving the impression that the City supports the candidate.” *Political Participation: On Your Time, With Your Dime*, City of Los Angeles Ethics Commission (March 2000).

## **II. Restrictions Imposed by Policy**

Although there is no legal prohibition on the use of title in political activity by City officers, employees, and appointees, the use of title may violate a City or department policy applicable to a particular official or employee. City Council Policy 000-04 provides, “No elected official, officer, appointee or employee of The City of San Diego shall engage in any enterprise or activity which results in any of the following: (a) Using the prestige or influence of The City of San Diego office or employment for anyone’s private gain or advantage.” An argument can be made that this language prohibits the use of official title in the endorsement of a candidate, because such an endorsement would result in a private advantage for the candidate.

An example of a City departmental policy which prohibits the use of title in political activity is San Diego City Attorney Policy No. 1998-04, entitled “Political Activity by City Employees.” That policy states: “City employees may not use their offices, titles or positions to support or oppose a candidate for office. This includes the use of City title as identification in news releases, flyers or other campaign material.” The City Attorney’s Office policy is just one example of a department level policy prohibiting the use of an employee’s title in certain political activity. There may be other departments, programs, or appointed bodies that have similar policies prohibiting the use of official title in political activity.

Although these policies do not have the force and effect of law, violation of a policy could result

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<sup>1</sup> A use of title in ballot materials that is misleading, such as one that implies an entire agency or commission is taking a position, rather than an individual, is subject to legal challenge pursuant to San Diego Municipal Code section 27.0404. That section allows the City or any voter of the City to seek a writ of mandate or injunction to have ballot materials amended or deleted based on content that is false, misleading, or inconsistent with law.

in discipline of an employee, or could lead to other consequences, such as the failure of an appointing authority to reappoint a member of a board or commission. Therefore, any employee or appointee intending to use his or her title in political activity should become familiar with any relevant policies that may exist, and should seek the approval of the department head or appointing authority before proceeding with the activity.

### CONCLUSION

There are no legal authorities that expressly prohibit the use of title in ballot materials by a City employee, official, or appointee. In the absence of controlling authority and because public employees have a fundamental constitutional right to engage in political activity, the conclusion of this Office is that an employee, official, or appointee may use a City title in ballot materials, as long as the activity does not involve City time or resources, and as long as the wording in the ballot materials makes it clear that the action is being taken in an individual capacity.<sup>2</sup>

Because, in the absence of any clear City guidance, the use of official City titles in ballot materials has been controversial, there may be interest in having the City Council consider an ordinance, perhaps as a part of the Ethics Ordinance, to clarify the proper use of City titles in ballot materials. Any proposal to restrict the use of City title for political activity should take into consideration the constitutional limitations that would apply to such a restriction, as described in Section I(B) of this memorandum.

CASEY GWINN, City Attorney

By

Lisa A. Foster  
Deputy City Attorney

LAF:jab

cc: Joyce Lane  
Bonnie Stone  
Stacey Fulhorst

ML-2004-16

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<sup>2</sup>To the extent that prior memoranda issued by this office have concluded differently, they are superseded, including 1985 City Att’y MOL 56, 1975 City Att’y MOL 408, and 1967 City Att’y MOL 180.