

November 30, 2004

SDEC Formal Advice Letter No. FA04-09

Advice Provided to:

Bruce Herring
Deputy City Manager
202 "C" Street, 9th Floor
San Diego, CA 92101

Re: Evaluation of Post-Employment Restrictions with Respect to Terminal Leave and
Negotiating Future Employment with Another Public Agency

Dear Mr. Herring:

This advice letter has been prepared in response to your e-mails to the City of San Diego Ethics Commission dated November 12 and 22, 2004. You are seeking advice from the Ethics Commission interpreting the provisions of the City's Ethics Ordinance, which is contained in the San Diego Municipal Code [SDMC]. Your letter seeks advice concerning the application of post-employment restrictions to "terminal" employees as authorized by City Personnel Regulation Index Code I-2, Section III F, as well as advice concerning whether or not the restrictions regarding negotiating future employment are applicable to public agencies.

QUESTIONS

1. Does the twelve-month period referenced in SDMC section 27.3550 concerning post-employment restrictions begin to run when an employee elects to take terminal annual leave as described in City Personnel Regulation Index Code I-2, Section III F?
2. Does the prohibition concerning City Officials influencing a municipal decision involving the interests of a person with whom he/she is negotiating future employment apply if the prospective employer is another public agency?

SHORT ANSWERS

1. Yes. If a City Official becomes a "Terminal Employee" after electing to take annual terminal leave, the prohibitions of SDMC section 27.3550 apply and the twelve-month time period associated with post-employment activities begins to run.
2. No. This prohibition was not intended to apply to employment negotiations with other public agencies.

BACKGROUND AND ANALYSIS

A. Twelve-Month Time Period

SDMC section 27.3550 addresses the restrictions and prohibitions applicable to City Officials after they leave the employ of the City of San Diego. (These restrictions only apply to City Officials who received compensation from the City.) According to section 27.3550, the restrictions are only applicable to former City Officials' activities for twelve months after they leave the City. In particular, the relevant provisions include the following:

(a) It is unlawful for any former City Official who received compensation from the City to work on a particular project during his or her City service to engage in direct communication with the City, for compensation, with regard to any pending application for discretionary funding or discretionary entitlements before the City relating to that particular project on behalf of any person other than a Public Agency for a one year period immediately following termination of service with the City.

...

(b) It is unlawful for any former City Official, for compensation, to knowingly counsel or assist any person other than a Public Agency in connection with an appearance or communication in which the former City Official is prohibited from engaging pursuant to subsection (a) for a one year period immediately following termination of service with the City.

...

(d) It is unlawful for any former City Official to engage in direct communication for the purpose of lobbying the City if all of the following circumstances apply:

(1) the former City Official served as a City Official within the previous twelve months; and

(2) the former City Official received compensation from the City for his or her services as a City Official; and

(3) the former City Official is receiving compensation from a private business to engage in the direct communication with the City.

SDMC § 27.3550.

As you have indicated in your e-mails, City employees may elect to take terminal annual leave pursuant to the provisions set forth in Personnel Regulation Index Code I-2, Section III F. According to this regulation, this option is available to retiring terminal employees, as well as other terminal employees and employees who are on terminal sick leave. In each case, the Regulation permits the employee to use accrued annual leave after they are transferred to the class of "Terminal Employee." In addition, the regulation appears to allow for the possibility that the terminal employee might return to active duty.

You have asked whether the twelve-month time period cited in SDMC section 27.3550 begins to run if and when an employee is transferred to the "Terminal Employee" class. Although the Ethics Ordinance does not specifically address this class of employee, it is clear that the post-employment restrictions were intended to apply to City Officials who have left the day-to-day employ of the City and necessarily includes those persons electing to take terminal annual leave. Although the Personnel regulation allows for the possibility that a "Terminal Employee" may return to active duty, this does not appear to be one of the regulation's main underlying purposes. To the contrary, it appears that this regulation was primarily designed to provide a procedure for departing employees to use their accrued annual leave after leaving active City service.

Regardless of the intent behind the regulation, the post-employment restrictions codified in the Ethics Ordinance were designed to prevent former City Officials from "switching sides" after they leave the City and working against the City's interests for a private company concerning a pending municipal decision. Because employees who take terminal annual leave are entitled to accept new employment while they are on terminal leave, it follows that the post-employment restrictions must apply. To conclude otherwise would result in a situation in which former City Officials on terminal leave would not be subject to any of the Ethics Ordinance's post-employment regulations, and would be permitted to use their former positions to enhance the interests of their new employers. Even if an employee on terminal leave elected to return to active duty, the public's interests would be best served if the employee abided by the restrictions in SDMC section 27.3550 while he or she was on terminal leave.

B. Future Employment and Public Agencies

The Ethics Ordinance sets forth the following prohibitions concerning the future employment of City Officials:

- (a) It is unlawful for any City Official to make, participate in making, or use his or her official position to influence a decision involving the interests of a person with whom he or she is seeking, negotiating, or securing an agreement concerning future employment.

(b) It is unlawful for any person who has a matter pending before the City to negotiate, directly or indirectly, knowingly or willfully, the possibility of future employment of a City Official who is making, participating in making, or using his or her official position to influence, a decision concerning that matter.

SDMC § 27.3551.

This provision in local law is substantially similar to a provision in state law, which provides as follows:

No public official shall make, participate in making, or use his or her official position to influence, any governmental decision directly relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment.

Cal. Gov't Code § 87407.

Because the Ethics Ordinance provision is modeled on the corresponding provision in state law, it is appropriate to look to the regulations promulgated by the state for direction. FPPC Regulation 18747 provides additional guidance in determining whether or not a public official is influencing a governmental decision involving a prospective employer. This regulation explicitly states that the prohibitions of Government Code section 87407 do not apply if the prospective employer is a state, local, or federal government agency.

Although the provision in the Ethics Ordinance does not contain the same explicit exclusion, the legislative intent behind the comparable laws is the same: to prohibit a government official from negotiating future employment with a private business while the official is involved in influencing a decision that involves the interests of that private business. This interpretation is consistent with the exclusions for public agencies that are present in the provisions discussed above regarding post employment activities. Moreover, the alternative construction would result in absurd scenarios. For example, the City of San Diego would be precluded from negotiating a consulting agreement with a City Official unless the City Official refrained from influencing any decisions involving the interests of the City of San Diego. In light of the foregoing, it is clear that the underlying purpose of SDMC section 27.3551 is not applicable to employment negotiations involving other public agencies.

I hope the foregoing sufficiently responds to the questions you have raised. If you have any additional concerns, please contact me at your convenience.

Sincerely,

Stacey Fulhorst
Executive Director