

**CITY OF NEWPORT BEACH
CIVIL SERVICE BOARD STAFF REPORT**

Agenda Item No. _____
March 1, 2010

TO: HONORABLE CHAIR AND MEMBERS OF THE CIVIL SERVICE BOARD

FROM: David R. Hunt, City Attorney
ext. 3131, dhunt@newportbeachca.gov

SUBJECT: Recommendation for Modernization of City Personnel System
Specifically Addressing Civil Service Modernization

ISSUE:

What, if any, recommendation does the Civil Service Board ("Board") have for modernization of the Civil Service System ("System") of the City of Newport Beach ("City")?

RECOMMENDATION:

Staff recommends the Board give its express recommendations on the issues that have been raised with respect to possible modernization of the System. In order to achieve this end, staff recommends the Board address by express motion the following issues specifically, and any other issues it believes are important.

1. Should the Charter be amended to eliminate the requirement there be a System within the City?

If the answer to question No. 1 is "no," proceed to question No. 2. If the answer is "yes" then no further questions need be addressed.

2. Should the System's ordinance enacted in 1958 be replaced with an ordinance enacted by the City Council thus allowing for updating the System on an ongoing basis without the need for a voter initiative?

If the answer to question No. 2 is "no," proceed to question No. 3. If the answer is "yes," proceed to question No. 4 skipping Question 2 entirely.

3. Should ordinance No. 866 be amended to modify any of the following?

- a. Bring it into consistency with the California and Federal Constitutions;

- b. Modify or eliminate any of the four functions performed by the Board in the context of the ordinance;
- (1) Overseeing the recruitment process for all civil service employees, as well as performing a role in the selection of the Police Chief and Fire Chief and acting as an appellate body on recruitment issues;¹
 - (2) Functioning as a discipline appeals board, reviewing any decision to discipline civil service employees, and also for non-civil service employees under the City's Employee Policy Manual ("EPM"), that are appealed to its level;
 - (3) Conducting investigations as requested by either by the City Council, the City Manager, or an organized employee's association within the System; and/or
 - (4) Overseeing the System as a whole and making recommendations to the City Council as to any changes the Board believes are appropriate.

Once Question No. 3 is answered, you may skip to Question No. 5.

4. *If the existing System ordinance should be replaced with a new ordinance, what role/functions do you recommend the Board continue to perform?*

You may recommend no change, modification of the roles, or elimination of any of the four roles played by Board:

- a. Overseeing the recruitment process for all civil service employees, as well as performing a role in the selection of the Police Chief and Fire Chief and acting as an appellate body on recruitment issues;
- b. The functioning as a discipline appeals board, reviewing any decision to discipline civil service employees and also for non-civil service employees under the City's EPM that are appealed to its level;
- c. Conducting investigations as requested by either by the City Council, the City Manager, or an organized employee's association within the System; and/or;

¹ You have recommended that the candidate appeals issue be modified and that recommendation has been accepted by the Council. That will be processed no matter of the outcome of the Charter update process.

- d, Overseeing the system as a whole and making recommendations to the City Council as to any changes the Board believes are appropriate.
5. Should the Charter be updated to create an Assistant/Deputy Chief position or positions for Police and the Fire Departments outside of the System and outside of organized bargaining units?

This ends the specific questions.

Whatever the Board's recommendations regarding the maintenance of the System or it's modification, staff recommends at least two changes for the purposes of modernization and efficiency;

1. Replacement of initiative passed Ordinance No. 866 with an ordinance passed by the City Council to allow for updates and modernization without having to go to a vote of the people as personnel procedures and laws change; and
2. Creation of a management buffer outside of the System to assist the chief officers in performing their duties and running their organizations.

DISCUSSION:

We are seeking your recommendations on the policy decisions dealing with the City's personnel system, specifically the review of the Civil Service System. We ask you to address the broad policy questions and give specific direction on those questions.

1. Ongoing Civil Service System.

Our System has been in place since 1958. As outlined in our staff report to you for your January 2010 meeting, many changes have developed in personnel law dealing with public employees in California since that time. Modern personnel practices must comply with all those changes in the law or subject the City to potential liability.

Additionally, the City has adopted a City Manager/Council form of government. In effect, this form of government puts the personnel decisions of the City under the direct responsibility of the City Manager and not the City Council. Thus, City personnel, with the exception of the City Manager, City Clerk, and City Attorney, are buffered from the political process and can be selected and promoted on the basis of merit. The System adds to this protection by giving an overlay of further process on top of this fundamental protection in the division of authority.

The most fundamental change in the law dealing with public personnel issues in California rests in the conclusion by the California Supreme Court in *Skelly vs. State Personnel Board*, (1975) 15 Cal. 3d 194, that public employees have a property interest in their employment. As such, a public employee must be provided due process of law before that property interest can be changed or taken. As a result, whether or not there is a System in place, no public employee may be substantially disciplined or discharged without being provided procedural due process recognized under the California and United States Constitutions. Civil Service Systems such as ours provide an added layer of process and protection to public employees on top of the already substantial protection afforded public employees by the California Supreme Court in its decision.

Additionally, the City has its own EPM, which was approved by the Council through adoption of a resolution on December 11, 2001. The EPM also provides protection to all City personnel, and it specifically provides procedural protections to non-Civil Service employees of the City, thus carrying out the dictates of the Supreme Court under the *Skelly* decision.

Additional protection is also provided by labor agreements. All city Civil Service employees have representation through their labor organizations. All organizations have Memorandums of Understanding ("MOU")² with the City. These MOUs have protections built into them, including grievance procedures for addressing issues arising out of the agreement.

Further, employees' are also protected by anti-discrimination laws enacted by the State of California and the United States. Thus, there is a complex web of laws providing protections for City employees with at least four separate elements.

In light of the substantial protection either instituted by the courts or enacted by the legislature, the trend in California is for either the elimination of the civil service systems or modifications of the system so they do not duplicate in overly complicated and already complex area of the law.

Staff recommends the Board finalize this issue by asking itself the question as to whether or not it feels the System provides a substantial benefit to the City. If it does, the System should remain in effect and it would be your recommendation to not repeal Article VIII of the Charter. If the System does not provide a substantial benefit to the City, then Article VIII of the Charter should be placed before the voters for possible repeal.³

² This term is simply a "term of art" in the area of employment law that is used to describe a contract between a labor organization and an employer.

³ As we have reported in the past the Civil Service System is enabled and based upon Article VIII of the Charter. It is then given substance by Ordinance 866 (Newport Beach Municipal Code ("NBMC") Chapter 2.24).

2. Modification of System.

Assuming the answer to the question of whether or not the System should be eliminated is "no," the Board then needs to face the question of whether or not the System should be modified in order to modernize it for efficient government purposes. If modernization is appropriate, staff recommends the consideration should focus on retaining the core protections the Board feels are important while making the System easier to administer. Thus, the Board should address the question of whether each of the functions performed by the System provides substantial benefit to the City. The Board can recommend keeping all roles that provide a substantial benefit and recommend eliminating those roles that do not provide such a benefit.

As discussed, there are four roles to consider.

a. Recruitment Oversight.

Civil Service System provides rules for recruitment and promotion within the City. The Board oversees every recruitment process and promotional process provided to Civil Service departments. It performs this function by approving testing procedures and advertisement prior to the process beginning. The Board then certifies any employment list created by the process and hears any appeals from the process. It is noted that the City's EPM also provides for recruitment, appointment and promotion with substantial protection for the employees in the process and protections of the merit based nature of the personnel system. (EPM sections 5 and 6.)

Review of the Board's records over the last five years reveals that it has not modified substantially any recommendation regarding any recruitment process presented by staff. It has not ever refused to certify an employment list.

b. Discipline Appeals Board Function.

The Board is charged with hearing appeals from disciplinary decisions within the System, and also has a role outside of the System pursuant to the EPM to hear such appeals. In this capacity the Board serves as an objective fact finding body determining contested issues and appropriateness of discipline in the System's setting. The Board's decisions on appeals from discipline in the System are final. It has performed role of a discipline appeals board up to six times over the course of the fifteen years.

Employee procedural due process rights are also protected under section 13 of the EPM. It is also noted that the Board acts as a recommending appeals board for all non-Civil Service employees in the City, making a recommendation to the City Manager in matters of contested discipline. (EPM section 13.4.) The final decision, however, rests with the City Manager in the context of non-civil service employees.

c. Investigative Function.

The Board performs its investigative function when requested by the City Manager, the City Council or a recognized labor organization. It looks into issues arising under the System to make recommendations, if any, for modification of the System or to address issues as needed to accomplish the purpose of the System.

Our review of City records indicates that that function has only been performed once in the Board's history. That one time arises from the Police Management Association's request for an investigation arising out of the promotional processes of the Police Department that went forward last year. The Board played an important role in assisting and addressing the issues raised in that investigation. To date, it appears that the resolution achieved has been accepted by all interested parties as at least appropriate.

d. System Oversight.

The Board oversees the implementation of the System in the City and makes recommendations to the City Council for its modification. Multiple recommendations have been made for modification arising from the business of the Board last year. One such modification is the Board's recommendation to eliminate a candidate's right to appeal a decision to not hire that individual. In addition, several recommendations were made in the context of the police promotional investigation.

3. Updating Existing Ordinance.

Staff recommends against updating the existing ordinance. To perform this task, we would need to go through and identify each individual problem area, draft appropriate language, and recommend an update of the ordinance be placed on the ballot of November 2010. The process of updating an initiative ordinance is time consuming and costly. It puts complex issues regarding personnel law of the City into the voting box. It would be difficult and unfair to ask the electorate to analyze all of the complex issues that would be raised with respect to updating the System.

Alternatively, staff recommends replacement of the ordinance, keeping the portions that provide substantial benefits to the City, with an ordinance adopted by the City Council. This approach would allow for the modification of the ordinance as the law changes and personnel practices develop.

Should the replacement ordinance option be chosen, staff will proceed to draft a replacement ordinance for consideration by the City Council that incorporates the functions of the System that benefit the City. The replacement of our ordinance will be presented to the Council prior to the election in November. If adopted by the Council, the replacement ordinance will take effect only if the former ordinance is repealed by the voters. In this manner, we could update and modify the System, bringing it current

with existing law and providing for efficient government, while allowing for subsequent modification as needed by the City Council action.

5. Assistant/Deputy Chief Level.

Staff recommends modification of the Charter to allow for creation for what in effect is an Assistant/Deputy Chief position or positions in each public safety department, regardless of the name assigned to it. The position or positions would not be in the System nor represented by organized labor. At present the two Chief Officers are the only persons in their departments not organized and not in the System. They have no backup at their executive management level that does not have any potentially competing interest to the interests of the departments who can act fully in their place.

Based upon the above, staff recommends modification of the Charter so that there can be an exemption from the System of an Assistant/Deputy Chief level of executive management officers between the two Chief Officers in fulfilling their roles as within their departments. This exemption would be consistent with the existing Charter provisions that exempt out Assistant City Managers and Assistant City Attorneys. (Charter section 802.)

CONCLUSION:

Staff seeks the recommendation of the Board with respect to the above complicated issues. We have tried to break them down into their component parts so you can address them one at a time. We ask that you take action on each specific question so we can give express recommendation as to the Charter Update Commission and to the City Council.

Prepared and submitted by:

Office of the City Attorney



David R. Hunt
City Attorney

cc: Dave Kiff, City Manager
Terri Cassidy, Human Resources Director
Teri Craig, President, City Employees Association
Chad Ponegalek, President, Firefighters Association

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Dave Mais, President, Fire Management Association
James Randal, President, League Employees Association
Brent Jacobsen, President, Lifeguard Management Association
David Syvock, President, Police Employees Association
Tom Gazsi, President, Police Management Association
Mel Fleener, President, Professional/Technical Association
Josh Yocam, President, Association of Newport Beach Ocean Lifeguards
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