

**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 its 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
President, Part-Time Unit

{A09-00229} - Mar01-Modernization

**CIVIL SERVICE BOARD
MEETING MINUTES**



DATE: March 1, 2010
5:00 pm – 6:17 pm

BOARD: Doug Coulter, Chairperson
Hugh Logan, Vice Chairperson
James "Mickey" Dunlap, Board Member
Debra Allen, Board Member
Maiqual "Mike" Talbot, Board Member

STAFF: Terri L Cassidy, Human Resources Director/Secretary to the Board
David Hunt, City Attorney
Jyll C Ramirez, Administrative Assistant to the HR Director

1. FLAG SALUTE

The Pledge of Allegiance was led by Vice Chairperson Logan.

2. ROLL CALL

All Board Members were present.

3. APPROVAL OF THE FEBRUARY 1, 2010 MINUTES

A Motion was made by Board Member Dunlap to approve the February 1, 2010 Minutes with a few grammatical changes. Board Member Talbot seconded the Motion. It was approved 4 Ayes, 0 No and 1 Abstain (Board Member Allen was absent for the February 1, 2010 CSB meeting).

4. MONTHLY REPORT FROM THE SECRETARY TO THE BOARD

HR Director Terri Cassidy reported to the Board:

- She was pleased to see the support of the Civil Service Board and Employee Association Members at the Mayor's State-of-the-City Address Dinner.
- As a follow-up to ERIP (Early Retirement Incentive Program), Human Resources has been organizing and coordinating a high-volume of recruitment activity requests and is playing a key role in the strategic planning of the City-wide restructuring progression.
- HR is preparing to open the Police Chief recruitment.
- The City and HR welcomed Interim Fire Chief Steve Parker.

- Deputy Fire Chief Dave Mais has been appointed as the Acting Fire Chief due to the retirement of Fire Chief Steve Lewis until Chief Parker begins his assignment on March 15, 2010.
- The City was shocked and saddened by the sudden passing of Recreation Leader Cara Lee, whose father, IT Specialist III Randy Lee, is a long-time employee of the City as well. City employees really pulled together in support of the Lee family and the Recreation & Senior Services Department.
- On March 4, HR will participate and help educate a local high school student on how a local government functions during the City's Youth in Government day.
- HR has been keeping up with training regarding pension reform and changes in the laws, such as Firefighters Bill of Rights and Peace Officer Bill of Rights.

5. CITY ATTORNEY ROLE AND "ETHICAL WALL"

Mr. Hunt informed the Board that the City Attorney's Office is now divided between two functions on the personnel level. Some of the staff members are assigned to give support to HR and other City departments in the context of discipline. He and the other staff members represent the Board in HR discipline issues to protect the due process procedural rights of an employee who comes before the Board. He is not involved in any recommendations to the Department Directors regarding discipline. He explained that there are now enough attorneys in his office to create Ethical Walls. He would only ask for outside help if he was directly involved in the discipline.

Vice Chairperson Logan expressed his concern to Mr. Hunt on being able to uphold ethical walls when all staff members in the City Attorney's Office report directly to him.

Mr. Hunt assured Vice Chairperson Logan that he was functioning within the case law.

Chairperson Coulter asked how many attorneys Mr. Hunt has in his office.

Mr. Hunt answered that he has 5.7 Full-Time Equivalent (FTE) employees.

Board Member Allen expressed that it is her understanding that the case law to which he is referring is meant for public offices with more than 5.7 staff members, and she is also concerned about the perception of ethical walls between a boss and subordinates in a litigation context.

Mr. Hunt understands their concerns and reassures the Board that he would not do anything to put the City at risk.

6. CONTINUED DISCUSSION OF THE CIVIL SERVICE SYSTEM – CHARTER UPDATE COMMISSION

Board Member Dunlap expressed his concern and questioned if there would be a conflict of interest for Mr. Hunt between his role in representing the CSB and providing his own professional recommendation to the Charter Update Commission (CUC), if the two recommendations were not the same or in agreement.

Mr. Hunt responded by letting the Board know that it will not be a conflict of interest. He continued to explain that his job is to do, or advise, what is in the best interest of the City. He assured the Board that he will actively submit the Board's recommendation in addition to providing the CUC with his own professional recommendation. He encouraged the Board Members to attend the March 16 Charter Update Commission meeting.

Chairperson Coulter asked Mr. Hunt if they were expected to take action on this item during this meeting.

Mr. Hunt clarified to the Board that he was seeking their direction and comments to bring before the Charter Update Commission. He continued to explain that the goal is to seek policy direction for the CSB, not craft an ordinance at this time.

Chairperson Coulter proposed a study session.

Vice Chairperson Logan said he would like to talk to the other Board Members in closed session without violating the Brown Act.

Mr. Hunt responded that it needs to be discussed in an open setting.

Chairperson Coulter made a Motion to call a public study session at a date to be determined. The Motion was seconded by Board Member Dunlap.

Board Member Allen requested that we refer to the study session as a meeting, so that they Board may vote if they wish to do so.

Mr. Hunt replied that we will call it a Special Meeting, unless he determines that it needs to go into closed session following a conversation with Vice Chairperson Logan.

Board Member Dunlap stated for the record:

I have no concerns that the Charter Update Commission or the City Council will consider removing the Civil Service System completely. Article VIII, Section 803 requires a 2/3 vote of the people to remove or repeal the Civil Service System. With

expected strong opposition to this from the Safety Employee Associations, it would not likely pass and would doom to failure the positive changes that need to be made to the Charter and to the Civil Service rules.

With regard to Section 711 of the Charter, I believe that the provisions of 711, A through E, must be maintained as written.

With regard to Ordinance 866, I do not believe that it should be replaced, but that certain provisions of 866 must be changed. Specifically . . .

- *Anything not consistent with State and Federal law.*
- *Those notifications made redundant by "Skelly."*
- *Those sections that refer to "investigations" by the Civil Service Board in personnel appeals to be done prior to the start of a formal Board personnel hearing.*
- *Those sections that are too specific regarding what is involved in the testing process and who determines the content.*
- *And, if it is a fact that there is a strong exposure to liability existing, remove the requirement for Civil Service Board Members to sit in on interviews for Police And Fire Chiefs.*
- *I believe a strong argument can be made for each of the other functions of the Board, including those in which the Board routinely approves job descriptions and promotion lists, and I can explain that in detail at the proper time.*
- *I do not believe that it would be burdensome for City staff to draw the appropriate changes in a timely manner. Staff certainly has the talent to do that.*

Further, there have been numerous references to the City Employee Manual and to the supposed protections it offers to City employees. That manual, which was written with input from the Civil Service Board and approved by it as supplementary to the Civil Service Rules, was never designed to replace those rules. It can be changed at any time by a simple majority vote of the City Council and thus does not guarantee Civil Service protection of due process to City Safety Employees.

To answer Mr. Hunt's comment, I do not believe the City electorate will be concerned about complex issues involving personnel matters. They will approve with a majority vote if the initiative is unopposed and the System will be brought into compliance with current law and the protections inherent in the system will be preserved.

I do not favor replacing Ordinance 866 with one that can allow a future City Council, by majority vote, to alter employee protections and I do not believe that the Safety Associations will support an ordinance that could erode their present protections.

Vice Chairperson Logan expressed concern regarding Mr. Praet's recommendation that the Civil Service Board be disbanded. He feels Mr. Praet's approach to have only one level of documents may read better, but is unrealistic. Additionally, the role of the CSB is an independent body that is unbiased and is a way to solve problems without litigation.

Board Member Allen reminded all that the CSB provides an open, transparent forum and believes the PMA Investigation would have gone to litigation in the absence of a Civil Service Board. In regard to the Charter, she doesn't see any conflict with current laws for Sections 711, 800, 801, 802 and 803, and she did not see any details outlined in the staff report referring to staff's concerns and why staff feels that these provisions, which guarantee the continuance of the Civil Service System to protect the rights of the employees, should be abandoned.

Mr. Hunt said he hasn't made any recommendations, including abandoning Article VIII.

Vice Chairperson Logan expressed that he believes Mr. Hunt's views to be the same as Bruce Praet's, of Lexipol, since he was the person who hired Mr. Praet.

Ms. Cassidy reminded the Board that Mr. Praet was hired specifically for the PMA Investigation and because many of the City's governing documents are in contradiction with each other, difficult to work with and sometimes illegal. Mr. Praet's comments were his own recommendations, and she asked that the Board not focus on just Mr. Praet's recommendation, but the larger picture before them. Disbanding the Civil Service System was only one option of several, and she felt it would be more productive to address the other issues since staff was aware that the Board does not agree with Mr. Praet's recommendation.

Chairperson Coulter opened it to public comment.

There were none.

Chairperson Coulter brought it back to vote for a Special Meeting. 5 Ayes, 0 No.

7. REQUEST APPROVAL OF THE UPDATED POLICE CHIEF JOB SPECIFICATIONS

Ms. Cassidy announced that Chief Luman's contract will expire on June 30, 2010, and she explained that we are ready to start recruiting for a Police Chief. The updated Police Chief job specifications include the industry standard with emphasis on leadership traits. In addition, HR incorporated suggested statements from the Police Association(NBPA) and Police Management Association (PMA), and Eric

Middleton, Alliance Resource Consulting, will be the executive recruiter, if approved. Ms. Cassidy asked Chairperson Coulter to select a second Board Member to serve on the Appraisal Board with him. Chairperson Coulter selected Board Member Dunlap, and asked that Board Member Allen be selected as an alternate in the event that Board Member Dunlap was familiar with an applicant. In addition, Ms. Cassidy requested approval to authorize the City Manager to obtain outside Police Chiefs to also serve on the Appraisal Board.

A Motion was made by Board Member Allen to approve the updated Police Chief job specifications. Vice Chairperson Logan seconded the Motion. It was approved 5 Ayes, 0 No.

8. REQUEST APPROVAL TO OPEN THE POLICE CHIEF RECRUITMENT

A Motion was made by Board Member Dunlap to approve opening the Police Chief recruitment. Board Member Allen seconded the Motion. It was approved 5 ayes, 0 No.

9. REQUEST TO VACATE THE FIREFIGHTER ELIGIBILITY LIST

Ms. Cassidy explained to the Board that the current eligibility list is two years old, and updated testing processes are being discussed. In addition, the Fire Department is working more closely now with HR and together are coming up with a more viable and appropriate testing process.

Chairperson Coulter opened the discussion to the public.

There were no comments.

A Motion was made by Board Member Dunlap. Vice Chairperson Logan seconded the Motion. It was approved 5 Ayes. 0 No.

10. REQUEST TO APPROVE SENIOR ANIMAL CONTROL OFFICER ELIGIBILITY LIST

A Motion was made by Board Member Logan to approve the Senior Animal Control Officer eligibility list. Board Member Dunlap seconded the Motion. It was approved 5 Ayes, 0 No.

11. FIRE DEPARTMENT STATUS REPORT

Acting Fire Chief Dave Mais welcomed Fire Chief Steve Parker and recognized retired Fire Chief Steve Lewis for his three years of service. He continued and informed the Board that:

- The Junior Lifeguards have been testing for the last four weekends of February.
- This weekend, the Seasonal Lifeguard pre-certification training will start and pick-up again in June.
- Battalion Chief training was held in the Council Chambers for two Fire Engineers and one Fire Paramedic.

Fire Chief Parker introduced himself to the Board and expressed his excitement for the opportunity to serve Newport Beach as the interim Fire Chief.

12. POLICE DEPARTMENT STATUS REPORT

Captain Gazsi addressed the Board:

- On February 20, approximately 400 candidates participated in the Police Lateral recruitment testing process.
- Written tests for the Animal Control Officer, Police Dispatcher and Crime Scene Investigator positions occurred on February 27.
- There were three graduates for the Orange County Sheriff's Academy on February 22.
- A Police Recruit Officer is anticipated to graduate on May 19 from the Police Academy.
- Police Officer Dave Moon is expected to retire this year.
- Police Officer Glen Garrity, assigned to the Detective Division, retired on February 22.
- Two Police Recruit Officers are anticipated to start the Academy on March 22.
- Currently in the background process is one Lateral Police Officer and four Police Recruit Officers.

13. BOARD MEMBER COMMENTS

Vice Chairperson Logan thanked staff for their good work and welcomed Chief Parker.

Board Member Dunlap recognized and thanked City Manager Dave Kiff and Police Chief Bob Luman for their presence.

14. ITEMS FOR FUTURE AGENDAS

Mr. Hunt will work with the Board Members to set up a Special Meeting, which was later determined to be Monday, March 8, 2010 at 8:00 a.m. in the City Council Chambers.

15. PUBLIC COMMENTS

None

16. ADJOURNMENT

The Civil Service Board meeting adjourned at 6:17 PM.

Terri L Cassidy, HR Director
Secretary to the Board