



City Employees Associates

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February 12, 2007

Civil Service Commission
City of Torrance
3031 Torrance Blvd.
Torrance, CA 90503-5059

RE: Examination for Deputy Public Works Director/City Engineer

2007 FEB 22 AM 8:31
CITY OF TORRANCE
HUMAN RESOURCES DEPT.

Honorable Commissioners:

On July 25, 2005 and again on September 12, 2005 your honorable body voted to support of the integrity of the Torrance Civil Service System by deciding to allow the exam for Deputy Public Works Director/City Engineer to be promotional. Despite your direction, the City has not tested for, nor filled this position. Instead, the City has now solicited a third legal opinion in its attempt to convince you that the exam should be open for this position.

The City's newest argument appears to be that Your Honorable Body does not have the right to order promotional examinations at all. As the authority to decide whether an exam will be "open and competitive" or "promotional" is clearly established in the Civil Service Rules (Section 14.1.29), and since your honorable body has most certainly approved hundreds, if not thousands, of promotional exams (including several which are pending) and since one of the primary functions of ALL Civil Service Systems is to make such determinations, we are amazed at the lengths to which the Public Works Department will go, in order to be able to get its way.

Before we go on to explain that the City's latest argument lacks cogency, we would like to ask a more fundamental question: **Why has the City not acted on your directive of September 12, 2005?** Why are you once again considering this matter, when it was thoroughly debated and decided upon twice within the last year-and-a-half? We respectfully request that you review your minutes from that meeting and vote, once again, to order the City to conduct a promotional exam.

Second, we have a question about the Commission's process. We do not find any authority in your rules providing for the setting aside of an eligibility exam on the basis of an "opinion letter" after the Your Honorably Body has already made your decision. **We do not understand why this matter is on your Agenda, nor why you are considering this "opinion" at all.**

The "opinion" (which if taken to its conclusion would eliminate the need for your Commission, because it eliminates the distinction between Civil Service and non-Civil Service employees) is

specious. Very simply, the City's argument is that since the Torrance Charter is similar to the San Jose Charter which says that "all appointments shall be made on the basis of merit and fitness" and since a lawsuit against the City of San Jose struck down the right of city employees with no experience to have priority for firefighters jobs over experienced firefighters from other jurisdictions, *you* must not have the right to establish an eligibility list composed of current employees only.

The lack of applicability of the San Jose (*Luchisi*) decision to the current City of Torrance decision is glaring for three reasons. First, the current civil service employees who are interested in composing the pool for a promotional exam (Engineers) are fully experienced and eligible to fill the higher position (City Engineer.) They are not clerical employees applying to be firemen. As a matter of fact, several of the employees have filled the job for extended periods in acting capacities.

Second, there are *many* current employees who are both experienced and who meet the eligibility requirements of the job. If there were not a reasonable pool of applicants, the Commission would not consider a promotional-only exam.

Third, the Commission has authority to decide when it will, or will not, limit the pool of applicants to current employees. When, for any reason, it decides that a particular job is so challenging that the current employees lack the skills necessary, calling an open-and-competitive exam is within the Commission's prerogative. (Please be reminded, that for the Deputy Public Works/City Engineer's position you have already made this decision.)

All employers must have mechanisms for screening and limiting the number of experienced, eligible people who may be considered for a job. The most time-honored method for accomplishing this in public employment involves the use of promotional exams whenever there are large numbers of current employees who meet the requirements of the position. This is not simply to reward long-term employees for their efforts, but an understanding that *experience with the same employer is a great predictor of success in another position with the same employer*. It is obvious that an Engineer who is not only certified and experienced, but who is also experienced with operations of the Public Works Department, may have greater ability to function within the Department than someone who has never worked in for City of Torrance. Experience with the same employer is unquestionably a legitimate criterion for screening applicants.

Municipal Code Provisions

The City's "opinion letter" states that "in California a city charter represents the supreme law of {a city...}." We concur, and also want you to know that the Meyers-Milias-Brown Act, the state collective bargaining law, similarly supports the notion that cities have "local control" over the establishment of rules affecting "wages, hours and conditions of employment." Promotional ladders are frequently a subject of bargaining in cities and, because the Torrance Civil Service System has excellent language on this subject, the Engineers (and other bargaining units) have had no need to address this matter in their individual negotiations. You should know that if the Commission should decide to take direction from the City's "opinion letter" to eliminate this language, this would trigger an obligation on the City's part to negotiate with all bargaining units. The loss of promotional language in the Civil Service Rules would be a serious loss to the employees in Torrance.

We do not understand the attorney's statement that there is no language regarding preference for existing employees in the Civil Service Rules. Here are the salient sections:

SECTION 14.12.7. TYPES OF PROMOTIONAL EXAMINATIONS.

Examinations for the creation of eligible lists for the higher positions in the competitive service of the City shall be ordered as often as may be necessary to meet or anticipate the needs of the higher class. Such examinations shall be known as:

- a) Departmental Promotional. Limited to eligible employees of the department embracing the position for which the examination shall be given unless there are four (4) employees filed and accepted except when specifically approved by the Civil Service Commission.
- b) Interdepartmental Promotional. Open to eligible employees in the classified service.

SECTION 14.12.8. ELIGIBILITY FOR PROMOTIONAL EXAMINATIONS.

No person shall be eligible to take either of said promotional examinations unless actually in the City employ at the time of examination or on leave of absence and the employee has completed six (6) months of actual service after permanent appointment.

The City's legal opinions also point to *Personnel Board vs. SEIU*, a seminal decision on the subject of merit verses seniority in the filling of Civil Service positions. In this case, the court held that seniority was not a distinguishing characteristic for purposes of obtaining a promotion. It did not in any way address the question of whether promotional testing interfered with merit-based hiring. There are no rules in Torrance pertaining to the use of seniority lists for hiring criteria. *This is a false issue*, intended, we believe, to distract you from the real matter: Torrance's rules for promotional testing are completely reasonable, normal and common. There are no legal precedents challenging such rules because they are used successfully in most large and medium-sized cities in California.

The Torrance Engineers Association is before you *for the third time on the same subject* not only because it objects to the City's repeated efforts to hire non-Civil Service employees for this position, but because it objects to the City's efforts to undermine the entire Civil Service System to accomplish this goal. It would like to remind the Commission that the concept of promotionalism is rooted in the State Constitution precisely to protect the concept of merit. To quote the Supreme Court's decision in *State Personnel Board*

"In 1913, the California Legislature enacted a statute creating California's first civil service system in an attempt to combat the 'spoils' system of political patronage in state. By the early 1930's, however, that statutory system was failing due to abuse in the creation of exemptions and authorizations for temporary employment that were not subject to the civil service statutes. In response to the perceived statutory failures, the people of California, in 1934, adopted article XXIV of the State Constitution 'to establish, as a constitutional mandate, the principle that appointments and promotions in state service be made solely on the basis of merit.' (emphasis added.)"

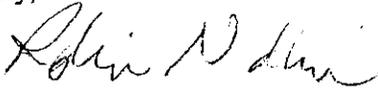
The system in Torrance devised by the Civil Service Commission is not arbitrary. It is a traditional exam process designed to create promotional ladders from among experienced and qualified employees who obtained their original positions as civil service employees. The City's attempts first in 2004 and 2005, to define at will employees as permanent employees so they may participate in promotional exams and -- when that didn't work -- to challenge the Commission's

right to conduct promotional exams at all (!) not only flies in the face of all legal precedent but is an insult to the intelligence of the Commission and to all practitioners of public sector employment law.

Finally, the TEA is concerned about the content of the materials that the City's staff have provided you in its report, and about the lack of objectivity which this selection of materials belies. **The Association has responded to every document that the City's attorneys have generated in their "opinion letters," but none of these materials have been included in your packet.** We will include them with this most recent communication. In recent years, there have been numerous legal actions brought by employees and their organizations reinforcing the need for neutrality in hearing officers and hearing bodies, such as Civil Service Commissions. Most pointedly, the Courts have said that hearing bodies must retain independence from the employers over which they adjudicate. We believe we are raising reasonable concerns about the independence of your staff and your attorneys and would like you to consider these biases in their context on the matter before you.

The Torrance Engineers Association thanks you for your time and hopes you will understand the City's effort to do away with promotional ladders in Torrance as a very serious attack on the integrity of our shared System. We hope you will take no action in response to the newest "opinion letters" and direct staff to comply with the orders you gave in September, 2005.

Respectfully,



Robin Nahin, Association Staff

c: Engineers Association Board
M. Koskie, Esq.

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September 12, 2005

Honorable Chairperson and Members
of the Civil Service Commission
City of Torrance
3031 Torrance Boulevard
Torrance, California 90503

Re: Promotional Examination for Deputy
Public Works Director/City Engineer

Dear Honorable Chairperson and Members of the Commission:

This law firm represents AFSCME Local 1117. This letter is in response to the legal opinion issued on August 15, 2005, by Michael H. Miller, legal counsel to the Civil Service Commission. Contrary to Mr. Miller's conclusion, it is my legal opinion that this Commission's decision to order the examination for the above-referenced position on a promotional basis does not conflict with the provision in section 1300 of the City Charter that "[a]ll appointments and promotions in the classified service of the City shall be made according to merit and fitness, to be ascertained, so far as practicable, by competitive examination."

Most importantly, the plain language of section 1300 itself, by referring to "promotions in the classified service" (emphasis supplied), allows for examinations on a promotional basis. Notably, the section does **not** refer to "promotions to the classified service." Promotions in the classified service are, by definition, promotions of employees who are already employed in the classified service. This should be distinguished from promotions to the classified service, which are, also by definition, promotions of employees in the unclassified service. Note also that "promotions" necessarily refer to the advancement of current City employees, not to the hiring of new City employees. Thus, the plain language of section 1300, by referring not only to "appointments," but also to "promotions," does not compel all examinations to be open, as Human Resources Manager Melody Lawrence recommends in her memorandum August 22, 2005, but also allows for examinations on a promotional basis, as this Commission decided on July 25, 2005. A contrary conclusion, such as the one advocated by Mr. Miller and Ms. Lawrence, renders the plain language of section 1300 nugatory.

California State Pers. Bd. v. California State Employees Ass'n, 36 Cal.4th 758 (2005), and *Lucchesi v. City of San Jose*, 104 Cal.App.3d 323 (1980), relied upon by Mr. Miller, are both distinguishable and, therefore, do not support a contrary conclusion.



September 12, 2005

Page 2

At issue in *California State Personnel Board* was article VII of the California Constitution, which provides in pertinent part that, regarding state employees, "permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination." 36 Cal.4th at 770. Collective bargaining agreements between the parties contained "post and bid" programs under which permanent appointment and promotion of certain state employees was to be based on seniority. *Id.* at 763. The California Supreme Court held that basing the permanent appointment and promotion of state employees on seniority violated the requirement in article VII of the constitution that such appointment and promotion be based on merit ascertained by competitive examination.

California State Personnel Board is distinguishable first because it, like the article of the constitution which it interprets, applies only to **state** employees, but **not** also to **city** employees. Moreover, article VII of the California Constitution differs in important ways from section 1300 of the City Charter: Whereas the former demands, without qualification, the "merit" be "ascertained by competitive examination," the latter qualifies that "merit and fitness" be "ascertained, so far as practicable, by competitive examination."

Most importantly, however, is that *California State Personnel Board* involved seniority, whereas as seniority is not involved in any way, shape, or form here. This difference is crucial: Basing promotion and hiring decisions on seniority straightforwardly contradicted the requirement in article VII that such decisions be based on merit. Restricting the applicant pool to current City employees does not similarly contradict the requirement in section 1300 that promotion and hiring decisions be based on merit and fitness. On the contrary: From that vast applicant pool, the successful applicant will be chosen on the basis of merit and fitness alone, with no regard to seniority. Such procedure is clearly in keeping with section 1300, contrary to the conclusion by Mr. Miller and Ms. Lawrence. As discussed above, section 1300 otherwise would not allow any "promotions in the classified system," in direct contradiction to the plain language of that section.

Lucchesi involved a city charter section that provided that "[a]ll appointments and promotions to positions in the Classified Services shall be made on the basis of merit and fitness, demonstrated by examination and other evidence of competence." 104 Cal.App.3d at 326 (italics omitted). A city ordinance provided that openings for entry level firefighter positions be filled first from a "promotional eligible" list consisting of current city employees who scored 80 percent or higher on a written test, and only if they could not be filled from that list from an "open competitive" list consisting of current city employees who scored between 70 and 80 percent on the test and non-employees. *Id.* at 327. The Court of Appeal held that the ordinance was inconsistent with the charter.

September 12, 2005
Page 3

Please contact me with any questions you might have in this matter.

Very truly yours,

A handwritten signature in black ink, consisting of a stylized initial 'B' followed by a series of connected loops and a long horizontal tail.

Bernhard Rohrbacher

BR/dm

cc: AFSCME Local 117
James A. Murphy



City Employees Associates

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Via e-mail and U.S. Mail

September, 2005

Stacy Lewis, Civil Service Director
3031 Torrance Blvd
Torrance, CA 90503

Dear Ms. Lewis,

The purpose of this letter is to initiate a grievance on behalf of the Torrance Engineers Association over the Civil Service Department's failure to conduct an exam for the position of Public Works Deputy Director/ City Engineer. The Commission ordered the exam at its meeting of July 25th, but to this date, five weeks later, no exam has been scheduled.

We understand that the Commission's attorney, without request from the Commission, has issued an "opinion letter," suggesting that that the Commission reconsider its authority to conduct promotional exams. We have read the opinion letter and find the argument specious. The intent is clearly to dissuade the Commission from conducting this particular exam, not to cancel all other scheduled exams, nor disqualify all other applicants hired under the authority of promotional exams.

More significantly, we do not find any authority in the Commission's rules, which provides for an exam to be set aside based on an opinion letter, particularly an unsolicited one.

The Public Works Deputy Director/ City Engineer position has been vacant for many months. There are eleven current, eligible applicants for the position. The Engineers Association has taken all necessary steps to insure that the position be included as a "rung" in the negotiated career ladder for its members and to encourage its members to apply. We do not believe it is within the Commission staff's authority to contravene or "reconsider" this agreement.

The remedy we seek is that staff immediately conduct the exam ordered by the Commission. If the City does not comply, we are prepared to file a complaint with the Public Employment Relations Board.

Yours truly,


Kathleen Sage,
Attorney for the Torrance Engineers Association

c: Engineers Board of Directors

2005 SEP -7 AM 7:37
CITY OF TORRANCE
HUMAN RESOURCES DEPT.