January 8, 1991

REPORT TO THE COMMITTEE ON PUBLIC SERVICES AND SAFETY
APPEAL OF MASSAGE TECHNICIAN

BACKGROUND

On May 16, 1990 an appeal from the denial of a massage technician's permit was heard by the Committee on Public Services and Safety. A majority of the Committee voted to overturn the decision of the hearing officer, finding that San Diego Municipal Code section 33.3531(d)(2) was vague and overly broad as applied in that case. The City Attorney was directed to review and revise, if necessary, pertinent ordinances in order to grant the hearing officer the authority to consider mitigating circumstances at the hearing.

An additional question involving revocation of a massage establishment permit was raised by the Committee on November 7, 1990. On that date, the Committee denied a request for an appeal from a hearing officer's decision to uphold a permit revocation. Counsel for appellants raised the question of at what point applicants may no longer file additional written documents for Committee consideration of appeals.

The City Attorney has been further directed to review and clarify, if necessary, Council Policy 000-11 as regards these hearings.

ANALYSIS

1. Hearing officer's authority to hear matters in mitigation.

It is our opinion that the hearing officer presently has the authority to consider matters in mitigation when deciding whether to uphold or overturn the action of the Chief of Police. San Diego Municipal Code section 33.3531 is restricted by its terms to the police department. "The Chief of Police shall have a reasonable time, not to exceed sixty (60) days, in which to investigate the application . . . . ┌emphasis added┘." San Diego Municipal Code section 33.3531(c). Immediately thereafter, that section continues: "A permit shall be issued within sixty (60) days . . . provided: . . . (2) The applicant has not within five (5) years immediately preceding the date of the filing of the application been convicted of any of the following offenses . . . ." San Diego Municipal Code section 33.3531(d). Under this Code section, the absence of authorization to consider

matters in mitigation is applicable only to the police department.

The first paragraph of San Diego Municipal Code section 33.0501 contains information regarding the right to appeal the action taken by the Chief of Police: "The applicant, licensee, or permittee may have the assistance of counsel or may appear by counsel and shall have the right to present evidence." The hearing officer's authority is contained within the second paragraph of that section -- he or she may take any action indicated by the evidence presented at the hearing:

> The hearing officer may uphold the denial, sus- pension, revocation or other decision of the Chief of Police or may allow that which has been denied, reinstate that which has been suspended or revoked, or reverse any other decision of the Chief of Police which is the subject of the appeal.

Inherent within the above language is the authorization to consider all relevant evidence, including matters in mitigation and extenuation.

We presume that these key provisions had not been brought to the Committee's attention at the time of the hearing in May 1990. Committee Chair Pratt recognized the need for such authorization, not having been made aware that it was already in existence. As the authority to consider matters in mitigation presently exists, we trust this explanation complies with the Chair's direction.

2. Council Policy 000-11.

The second issue concerns the possible ambiguity of Council Policy 000-11, entitled APPEALS FROM DECISIONS OF THE POLICE CHIEF RELATIVE TO POLICE-REGULATED BUSINESSES. According to that Council Policy, it is unclear at what point applicants may file additional written documents for appeal: either when a hearing date is first set for Committee to decide whether or not to hear the appeal; or when Committee grants a request to set the appeal for hearing.

In order to clarify Council Policy 000-11, section 5 on page 3 of 4, under PROCEDURE SUBSEQUENT TO HEARING OFFICER HEARING, should be deleted. By deleting this supplemental submission, the Council Policy would then be in conformity with San Diego Municipal Code section 33.0502, second to last paragraph, which states that " ┌tσhe PS&S Committee shall rely upon the record of the proceedings before the hearing officer and the written appeal. No oral presentation shall be made to the Public

Services and Safety Committee by proponents or opponents of the appeal." There should be nothing else before the Committee, written or oral, at that time.

CONCLUSION

The authority for a hearing officer to consider matters in mitigation is currently contained in the Municipal Code. The revision to Council Policy 000-11 suggested here would eliminate any ambiguity or discrepancy between that Council Policy and the San Diego Municipal Code in the area of appeals in police-regulated businesses.

Respectfully submitted,
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RC-91-03