MEMORANDUM OF LAW

DATE: December 21, 1988

TO: Robert Ferrier, Labor Relations Manager,
via Jack McGrory, Assistant City Manager

FROM: City Attorney

SUBJECT: Smoking Policy Proposed by Local 145,
International Association of Fire Fighters,
AFL-CIO

Liz Fort, the former Labor Relations Manager, indicated that during the course of negotiations with Local 145 regarding the two-year extension of the current Memorandum of Understanding (MOU) with the City, Local 145 proposed a revision to the smoking policy which is now incorporated as an addendum to the MOU. This proposal states that all fire fighters hired on or after July 1, 1989 be required to be nonsmokers and to remain nonsmokers during their employment with The City of San Diego. The specific proposed language is as follows:

> Employees hired as fire fighters from Civil Service eligible lists established following the effective date of this Memorandum of Understanding shall be required to remain nonsmokers throughout their employment as a member of the Fire Department.
>
> A nonsmoker shall not smoke or use any tobacco product either on or off-duty while employed.
>
> An affidavit signed on a periodic basis by the employee shall be used to verify continued nonsmoking status.

With respect to this proposal, the following questions were asked:

1. Is this proposal a legal employment standard for employees in the Fire Representation Unit?
2. If an employee violates this provisions once it is adopted, what enforcement or disciplinary actions are possible under the circumstances?
3. Are there any other legal issues which I should be aware of in evaluating the merits of this proposal?

ANSWER TO QUESTION NO. 1

At the present time, there is only one reported court decision that addresses the enforcement of a nonsmoking

regulation for firefighters. The court in Grusendorf v. City of Oklahoma City, 816 F.2d 539 (10th Cir. 1987) upheld the termination of a firefighter who violated the terms of a pre-employment agreement requiring that he would not smoke a cigarette either on or off duty for a period of one year from the day he began work. The sole issue addressed by the court in that case was whether or not such a policy violated the due process clause of the Fifth or Fourteenth Amendment of the United States Constitution. No other legal objections to the rule were made by the appellant. The court reasoned that there is a rational relationship between the regulation and the promotion of safety and property, and that even though there is some liberty or privacy interest within the Fourteenth Amendment that protects the right of a firefighter to smoke cigarettes when off duty, there is no fundamental right to smoke that overrides the rational basis for the regulation. The court had no difficulty in assuming that cigarette smoking is hazardous to one's health and that good health and physical conditioning are essential requirements for firefighters.

That decision, however, was a narrow one and did not address other constitutional issues. In order for the policy to be enforceable, it of course must be lawful under both the federal and state constitutions. International Assn. of Firefighters v. City of San Leandro, 181 Cal.App.3d 179 (1986). Although both the Fourteenth Amendment of the United States Constitution and Article I, section 7 of the California Constitution accord any person the equal protection of the laws, we will confine our discussion of equal protection to the California constitutional issue only. We do so because California courts have exercised independence in the application of the state equal protection clause, finding rights to be suspect where the United States Supreme Court has declined to do so. Lucchese v. City of San Jose, 104 Cal.App.3d 323 (1980).

Initially, we must state that the proposed policy in no way affects a smoker's right to apply for a position as a firefighter with The City of San Diego. This is an important distinction because the right to be considered for public employment without unreasonable or invidious distinction has been held to be a fundamental right involving the application by the California courts of the strict scrutiny test. Cooperrider v. Civil Service Com., 97 Cal.App.3d 495 (1979). However, once a person attains status as a public employee, he or she cannot be properly removed from such employment because of arbitrary discrimination or in disregard of a constitutional right. Fort v. Civil Service Com.,

61 Cal.2d 331 (1964). This protection extends to the hiring, firing and promotion of employees. Gay Law Students Association v. Pacific Tel & Tel Co., 24 Cal.3d 458 (1979). Simply stated, a public employee does not have a constitutional right to a governmental position, but such employee may not be removed arbitrarily or for an unlawful reason. Board of Trustees v. Stubblefield, 16 Cal.App.3d 820 (1971).

Local 145's proposed policy if implemented would establish separate qualifications for employees in the same job classification. The key question then is whether or not the equal protection clause of the California Constitution would prohibit the City from enacting such a policy. The court in Lucchese indicated clearly that a municipality has a right to prefer the best qualified persons in reaching its hiring or promotional decisions. The equal protection clause only guarantees protection against arbitrary discrimination. The court went on further to indicate that a reasonable basis is required for any sort of job-related classification that embraces and affects equally all persons similarly situated. A rule that discriminates against otherwise qualified firefighters may constitute a denial of equal protection.

There is no question that a rule prohibiting all firefighters from voluntarily inhaling smoke is reasonable because of the well known dangers from involuntary smoke inhalation that all firefighters face on a day to day basis. The question is whether or not a distinction based on the date of hire is a reasonable one under these circumstances. Initially, it may appear that the more one argues that such a prohibition is a reasonable regulation because of the impact on the health of firefighters, the more difficult it becomes for one to argue that the creation of two classes of firefighters, one who can smoke and one who cannot smoke, is a fair distinction. However, we believe the stronger view is that the classification is reasonable because the objective is to reduce the City's health care costs over the long term without interfering with the established rights of current employees. One can certainly argue that this distinction is a reasonable one.

Insofar as the regulation prohibits conduct which is generally agreed to be harmful, especially to one in the position of a firefighter, we do not believe that a challenge based on the right of privacy as contained in article I, section 1 of the California Constitution will be successful. Even though it may be argued that there is some privacy right infringed by the regulation, we do not believe that the courts would hold that

firefighters have a constitutional right to engage in harmful activity, even in the privacy of their homes. The courts in California have held consistently that the right of privacy, as expressed in the California Constitution, is not absolute and may in some cases be subordinate to the state's fundamental right to enact laws and regulations which promote public health, welfare and safety. Kathleen K. v. Robert B., 150 Cal.App.3d 992 (1984); National Organization for Reform of Marijuana Laws v. Gain, 100 Cal.App.3d 586 (1979).

In conclusion, we answer your first question by indicating that the no-smoking policy for firefighters might well withstand constitutional challenges based either on an equal protection or due process theory.

ANSWER TO QUESTION NO. 2

Local 145's proposal is an addendum to The City of San Diego's smoking policy. Violations of the current policy may result in discipline up to and including termination in accordance with the Civil Services Rules of The City of San Diego. The proposal as currently drafted is not very specific on the issue of enforcement. We suggest that it be revised to indicate clearly that any violations of this policy may result in discipline.

ANSWER TO QUESTION NO. 3

There are other legal issues which should be addressed prior to the policy being adopted. The policy is vague as to when an employee is required to sign the affidavit verifying continued nonsmoking status. The policy also does not indicate if the affidavit is to be signed under penalty of perjury. We would recommend clarifying these issues prior to adoption.

One final note: Other cities, such as Duluth and Boston, have initially encountered opposition to the enforcement of such policies because of a failure to negotiate properly with the unions. However, their policies have not been attacked on the basis of any constitutional issue.

The concept of a nonsmoking policy for firefighters is a new one. As a consequence, we will keep you informed of any changes in the law which may affect the enforcement of this policy.

JOHN W. WITT, City Attorney
By
John M. Kaheny
Deputy City Attorney

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