

COUNCIL AGENDA: 06-03-08
ITEM: 2.5

Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Lee Price, MMC
City Clerk

**SUBJECT: AMENDMENT TO CIVIL
SERVICE RULES (SJMC
3.04.1410 – DISCIPLINARY
HEARINGS)**

DATE: 05-22-08

RECOMMENDATION

As referred by the Rules and Open Government Committee of May 14, 2008 and outlined in the attached memo previously submitted to the Rules and Open Government Committee, consider approval of an ordinance amending Section 3.04.1410 of the Civil Service Rules to provide that disciplinary appeal hearings for Peace Officers be closed to the public unless requested to be a public session by the employee.





Memorandum

TO: Rules and Open Government
Committee

FROM: RICHARD DOYLE
City Attorney

SUBJECT: Amendment to Civil Service
Rules (SJMC 3.04.1410 –
Disciplinary Hearings)

DATE: May 6, 2008

RECOMMENDATION

Amend Section 3.04.1410 of the Civil Service Rules to provide that disciplinary appeal hearings for Peace Officers be closed to the public unless requested to be a public session by the employee.

BACKGROUND

City Charter Section 1103 addresses the procedures for adoption of Civil Service Rules in the San Jose Municipal Code. Section 1103 provides that the Council may adopt or amend any Civil Service Rule for the classified service provided it first receives a report or recommendation with respect to the proposed Rule from the Civil Service Commission.

On April 3, 2008, the Civil Service Commission reviewed a memorandum, draft ordinance and recommendation from the City Attorney which recommended that Section 3.04.1410 of the San Jose Municipal Code be amended to provide that disciplinary appeal hearings for peace officers be closed to the public unless requested to be a public session by the employee.

The Commission voted to recommend to the City Council that Section 3.04.1410 be amended in accordance with the City Attorney's memorandum and draft ordinance. The memorandum and draft ordinance provided to the Commission and also distributed to the City Council is attached for your review.

DISCUSSION

In 2006, the California Supreme Court issued a decision in Copley Press, Inc., v. Superior Court, 39 Cal.4th 1272, 141 P.3d 288 involving the San Diego County Civil Service Commission and the access by the public to peace officer discipline records. As explained in the attached memorandum, the Court's decision requires that the identity of a peace officer and the discipline records which are filed or created during the administrative appeals be kept confidential.

Because of the Supreme Court's decision, Civil Service Commission hearings involving peace officers have been closed to the public. Procedures have been implemented to maintain confidentiality of a peace officer's identity when an appeal is filed and a hearing is scheduled with the Commission. The recommended amendment to the Municipal Code will codify current procedures.

Richard Doyle
City Attorney

By: 
Norm Sato
Chief Deputy City Attorney

Attachment

cc: Debra Figone
Lee Price

TO: CIVIL SERVICE COMMISSION

FROM: RICHARD DOYLE
City Attorney

SUBJECT: Amendment to Civil Service Rule
(SJMC 3.04.1410) – Disciplinary
Hearings

DATE: March 27, 2008

Recommendation

That the Civil Service Commission recommend to the City Council that Section 3.04.1410 of Chapter 3.04 of Title 3 of the San Jose Municipal Code be amended to provide that disciplinary appeal hearings for peace officers be closed to the public unless requested to be a public session by the employee.

Background

In 2006, the California Supreme Court issued a decision involving the San Diego County Civil Service Commission and the access by the public to peace officer discipline records. The Court's decision required that the identity of a peace officer and the discipline records which are filed or created during the administrative appeals be kept confidential. An amendment to the Civil Service Rules is recommended to codify current procedures which were made necessary by the Court's decision. A draft amendment to the Municipal Code is attached to this memorandum.

Discussion

A. California Supreme Court Decision – Copley Press

On August 31, 2006, the California Supreme Court issued its decision in Copley Press, Inc., v. Superior Court, 39 Cal.4th 1272, 141 P.3 288 which concerned the right of a newspaper to obtain records of a peace officer's appeal of discipline to the San Diego County Civil Service Commission. The Supreme Court reversed the Court of Appeal and ruled that a peace officer's personnel information is confidential, even if an officer files an administrative appeal of discipline. The Court disagreed with Copley's argument that the confidentiality provisions of Penal Code section 832.7 apply only to a criminal or civil proceeding and concluded that section 832.7 established a general condition of confidentiality. The Court held that it was unreasonable to assume the Legislature intended to limit the discovery of police personnel records in the context of civil and criminal discovery, and then permit any member of the public easily to obtain those records through the California Public Records Act.

The Supreme Court held that neither the news media nor members of the public may have access to peace officer discipline records which are filed or created during administrative

appeals. Further, the Court ruled that the identity of the officer must be kept confidential unless the officer waives his or her privacy rights.

B. San Jose Municipal Code (Civil Service Rules)

San Jose Municipal Code Section 3.04.1410 Hearing – Procedures and Requirements Generally sets out procedures for Civil Service Commission disciplinary appeal hearings. These procedures are applicable to all classified Civil Service employees, including peace officers, who appeal disciplinary actions to the Commission. Section 3.04.1410 provides that appeal hearings “shall be open to the public.”

When employees, including City employees who have peace officer status,¹ appeal disciplinary action to the Civil Service Commission, Commission procedures provide that documents and information which are submitted as evidence in the public hearing are available for review as a public record. The California Supreme Court’s decision in Copley Press, Inc., supra, necessitates an amendment to Section 3.04.1410 to provide that appeals of disciplinary actions by peace officers to the Commission and disciplinary appeal hearings be confidential and closed to the public unless the peace officer employee requests a public hearing.

Because of the Supreme Court’s decision, hearings involving peace officers have been closed to the public. Additionally, procedures have been implemented to maintain the confidentiality of a peace officer’s identity when an appeal is filed and a hearing is scheduled with the Commission. An amendment to the Municipal Code will codify current procedures.

The attached draft amendment to San Jose Municipal Code Section 3.04.1410 provides that discipline hearings for City employees in peace officer classifications shall be closed to the public. The amendment also provides that representatives designated by the City Manager’s Office and the employee’s Department or Office shall not be considered members of the public and shall not be excluded from the hearing. This provision is necessary because certain members of the City Manager’s Office and certain designated members of the employee’s Department who have investigated and who have made disciplinary recommendations should be present at the hearing as representatives of the appointing authority.

C. City Charter - Civil Service Rule Amendment Process

City Charter Section 1103 addresses the procedures for adoption of Civil Service Rules. Section 1103 provides that the Council may adopt or amend any Civil Service Rule for the classified service provided it first receives a report or recommendation with respect to the

¹ Peace officers under the Public Safety Officers Procedural Bill of Rights Act (Gov. Code Section 3300-3312) includes all peace officers specified in the California Penal Code Sections cited in Section 3301 of the Act. City of San Jose peace officer classifications include sworn police classifications, arson investigators, full-time park ranger classifications and airport police officers.

proposed Rule or amendment of a Rule from the Civil Service Commission. If the Commission refuses or fails to submit a report or recommendation to the Council within 90 days from the date the Council requests such a report or recommendation, the Council may then adopt or amend an existing Rule without first receiving a report or recommendation from the Commission. Therefore, if the Commission concludes that Municipal Code Section 3.04.1410 should be amended to comply with the Copley decision, it would be appropriate for the Commission to forward a recommendation to the City Council.

D. Labor Relations – Notice to City Labor Organizations

The Office of Employee Relations has provided notice to affected City labor organizations of the proposed Municipal Code amendment and change in procedures for appeals of disciplinary actions by City peace officers. These organizations include the San Jose Police Officers' Association, International Association of Firefighters (IAFF) Local 230, and the International Union of Operating Engineers, Local 3. Employee Relations has informed us that there were no objections raised by these organizations with respect to the recommendation.

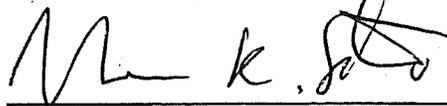
E. Technical Amendments

The proposed ordinance contains technical and grammatical corrections to Section 3.04.1410. Additionally, Government Code Section 11513 referenced in Section 3.04.1410 regarding hearing procedures and the standard of admissible evidence was amended in 1995. The proposed ordinance reflects this amendment to the Government Code Section.

Conclusion

The California Supreme Court's decision in Copley Press requires that the identity of a peace officer and the discipline records which are filed or created during disciplinary appeals be kept confidential. An amendment to the Civil Service Rules is recommended to codify current procedures which were made necessary by the Court's decision.

RICHARD DOYLE
City Attorney

By 

Norm Sato
Chief Deputy City Attorney

Attachment

cc: Mayor and City Council
Debra Figone
Lee Price

DRAFT

ORDINANCE NO.

AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING SECTION 3.04.1410 OF CHAPTER 3.04 OF TITLE 3 OF THE SAN JOSE MUNICIPAL CODE TO PROVIDE THAT A DISCIPLINARY HEARING FOR AN EMPLOYEE IN A CITY OF SAN JOSE PEACE OFFICER CLASSIFICATION SHALL BE CLOSED TO THE PUBLIC UNLESS THE EMPLOYEE REQUESTS THAT THE HEARING BE OPEN TO THE PUBLIC

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

Section 3.04.1410 of Part 11 of Chapter 3.04 of Title 3 of the San Jose Municipal Code is hereby amended to read as follows:

3.04.1410 Hearing - Procedures and requirements generally.

- A. Whenever an answer is filed to a disciplinary action, the Commission shall hold a hearing within forty-five days from and after the date on which said answer is filed, or at such other time as may be agreed to by the officer or employee filing the answer and the Commission. The Commission shall notify the parties in writing of the time and place of the hearing, ~~which~~ Except as provided in subsection D below, the hearing shall be open to the public and held in the Council chambers or other regular meeting place of the Commission. The hearing shall be presided over by a member of the Civil Service Commission who is admitted to practice law in the Supreme Court of the State of California, and he or ~~she~~ shall rule on all questions of the sufficiency of the charges, procedures, and the admission and exclusion of evidence. Such

hearing shall be conducted in accordance with the provisions of Section 11513 of the California Government Code, which reads as follows:

1. Oral evidence shall be taken only on oath or affirmation.
2. Each party shall have these rights: to call and examine witnesses; to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called the witness~~him~~ to testify; and to rebut the evidence against the party~~him/her~~. If the respondent does not testify in his or ~~her~~ own behalf, the respondent~~he/she~~ may be called and examined as if under cross-examination.
3. The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.
4. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be ~~admissible~~ admissible over objection in a civil action.

5. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing, ~~and irrelevant and unduly repetitious evidence shall be excluded.~~

6. The presiding officer shall ~~have~~has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.

B. Either by deposition or at the hearing, the employee may be examined and may examine or cause any person to be examined under Section 776 of the Evidence Code. The employee shall be allowed to appear personally at the hearing, and he/she shall have the right to legal counsel or lay representation of the employee's his/her choice at all times throughout the proceeding, and shall be allowed to produce such competent evidence in his or /her own defense and in rebuttal of the charges as the employee he/she or the employee's his/her counsel may wish to offer.

C. The Commission shall supply a phonographic or stenographic reporter to record all testimony adduced at the hearing. Either the Commission or the employee may order a transcript of the hearing to be prepared, and, except as provided in subsection E below, such transcript shall be filed with the Commission as a public record. If such transcript is ordered by the employee or the employee's representative, the employee shall pay the cost thereof. If such transcript is ordered by the Commission, the cost thereof shall be paid from money appropriated therefor by the City Council.

- D. The hearing for an employee in a City of San Jose peace officer classification shall be closed to the public unless the employee requests a hearing which is open to the public. For purposes of this Section, "peace officer" shall mean peace officers covered by Public Safety Officers Procedural Bill of Rights Act (Gov. Code Sections 3300 -3312). Representatives designated by the City Manager's Office and the employee's Department or Office shall not be considered members of the public and shall not be excluded from the hearing.
- E. The transcript of a hearing for an employee in a City of San Jose peace officer classification shall be sealed unless the employee requests the transcript be made public or unless ordered open by a court of competent jurisdiction.

(Prior code § 2016.8; Ords. 18347, 18394.)

RD:SJD:NKS
6/8/2007

PASSED FOR PUBLICATION of title this _____ day of _____, 2007, by the

following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

CHUCK REED

Mayor

ATTEST:

LEE PRICE, MMC

City Clerk