

CSC Agenda  
9/2/10  
#6



# Memorandum

**TO:** Civil Service Commission

**FROM:** Lee Price, MMC

**SUBJECT:** Appeal by Matthew Webster -  
Denial of Outside Work Permit

**DATE:** August 26, 2010

On September 2, the Commission will hear the Appeal of the Denial of an Outside Work Permit filed by Matthew Webster, an Electrician in the Department of Transportation. As background information for hearing this item, we have included an excerpt from San Jose Municipal Code Section 3.04.1710 and the relevant City Administrative Policy 1.2.3 (attachment 1). In addition, Mr. Webster has provided materials for the Commission's consideration (attachment 2).

**San Jose Municipal Code, Section 3.04.1710 Restriction on outside work.**

*A. No employee shall engage in any work, employment or occupation outside his city employment which is detrimental to the service, which prevents or impedes the efficient performance of his duties in his city employment, or which is in any way in conflict with his employment by the city. No employee shall engage in any work, employment or occupation outside his city employment unless and until he shall have notified the city manager of his intention to do so.*

*B. If the city manager determines that any work, employment or occupation outside his city position is detrimental to the service, or prevents the efficient performance by an employee of his duties in his city employment, or is in conflict with the city employment of any such employee, then the city manager may impose reasonable conditions or limitations upon any outside work, employment or occupation authorized hereunder, or may order an employee to terminate such outside work, employment or occupation at any time.*

*C. Any violation of any provision of this rule may be deemed grounds for discharge or other disciplinary action. Any employee affected by a denial of an outside work permit, or limitations or conditions upon any outside work imposed by the city manager, may appeal such action to the commission whose decision shall be binding. An appeal hereunder must be filed with the civil service commission within ten working days after notice to the employee of the denial of an outside work permit or limitations or conditions imposed on an outside work permit. The secretary of the civil service commission shall send a copy of the appeal to the city manager upon receipt of the appeal.*

*(Prior code § 2012.3.)*

  
LEE PRICE, MMC  
City Clerk

Attachments



# Outside Employment

**1.2.3**

## PURPOSE

This section provides information on the requirements for all City employees (including contract employees) who wish to engage in outside work activities.

## AUTHORITIES

### San Jose Municipal Code, §3.04.1710A

No employee shall engage in any work, employment or occupation outside his City employment which is detrimental to the service, which prevents or impedes the efficient performance of his duties in his City employment, or which is in any way in conflict with his employment by the City. No employee shall engage in any work, employment or occupation outside his City employment unless and until he shall have notified the City Manager of his intention to do so.

### San Jose Municipal Code, §3.04.1710B

The City Manager may impose reasonable conditions or limitations upon any outside work, employment or occupation or may order an employee to terminate such outside work.

### San Jose Municipal Code, §3.04.1710C

Any violation of any provision of this rule may be deemed grounds for discharge or other disciplinary action. Any employee affected by a denial of an outside work permit, or limitations or conditions upon any outside work may appeal such action to the [Civil Service] Commission within ten (10) working days after notice to the employee of the denial of an outside work permit or limitations or conditions imposed on an outside work permit.

## POLICY

### **1. Criteria for Approval**

Applications by City employees to engage in an outside work activity may be approved if the outside work activity (1) is not detrimental to the City (2) will not impede the efficient performance of the employee's assigned duties and (3) will not create a conflict of interest for the employee.

A conflict of interest occurs where an employee could make or participate in a decision that may foreseeably have a material effect on his or her personal financial interests. If an employee's outside work activity puts him or her in a position where his decisions as a City employee could foreseeably have a material effect on his personal financial interests, a conflict of interest is created, and the application for an outside work permit is to be denied.

If necessary, a supervisor may request that an employee provide a job description from the outside employer in order to determine if an outside work activity meets the above criteria for approval.

### **2. Prior Approval Required**

A City employee who wishes to engage in any outside work must first obtain approval from the appropriate Department, through an "Application for Outside Work Permit."

# Outside Employment

**1.2.3**

## **3. Reasons for Denial**

Where an application for an outside work permit is denied, the department should provide the employee with the reason why the permit was denied.

## **4. Restrictions**

Reasonable conditions or limitations may be imposed upon any outside work activity, and an employee may be directed to end the outside work at any time.

## **5. Appeals**

An employee who is affected by denial of an Outside Work Permit, or by limitations or conditions established for an Outside Work Permit, may appeal to the Civil Service Commission. An appeal to the Commission must be filed within ten (10) working days after notice of the denial or the limitations is given to the employee. The decision of the Commission is binding.

## **6. Annual Renewal**

Outside work permits must be approved every year. At the Department's discretion, the Outside Work Permit can be set to expire on December 31st of the current calendar year, or a maximum of one (1) year from the approval date. Upon expiration of the permit, it is the responsibility of the employee to re-apply for an Outside Work Permit. Employees may not continue the outside work beyond the expiration of the Outside Work Permit unless a new application is submitted and approved.

## **7. Suspension of Outside Work While on Disability Leave**

Outside work permit approvals are *automatically suspended* when an employee goes on disability leave status. This action is intended to ensure that the employee will not risk prolonging recuperation by working at another job. The employee may request authorization to continue the outside work while on disability status by sending a written request to his/her Department Director. If this application is denied, a new Application for Outside Work Permit must be submitted when the employee returns to regular duty, and approved before the employee resumes any outside work.

## **8. Medical Review**

The City Physician may provide a review of an employee's Outside Work Permit application in relation to the employee's medical history, upon request from the relevant Department Director, through the Director of Human Resources. The Physician will assess the employee's physical ability to safely and effectively perform his or her City work activities while doing the outside work.

## **9. Compliance with Business License Tax Requirements**

City employees should be aware that the business tax requirement affects them if they conduct certain outside business activities in the City of San Jose as independent contractors. Applying

## Outside Employment

## 1.2.3

for an outside work permit does not relieve an employee of the business tax requirement. Employees who are uncertain about whether their outside business requires a business license, or who have other questions regarding the business license tax, should check with the Business License Section of the Finance Department.

### 10. Violations

Violations of this policy may result in disciplinary action.

### PROCEDURES

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| Employee  | 1. Obtain an Application for Outside Work Permit form from the department timekeeper, Human Resources liaison, the Human Resources Department, or the City's intranet site. Complete, sign, and submit form to supervisor.   |
| Supervisor,<br>Intermediate<br>Supervisor, and<br>Department Director | 2. Review application and approve or disapprove based on impact of outside work on employee's City work. Add limitations or conditions, if needed, and specify expiration date to be December 31st of the current calendar year or no later than one year from the date of approval. If application is disapproved, notify employee. |
| Department  | 3. If approved, notify employee by providing him/her with a signed and dated copy of the application. Send the original signed application to Human Resources to be filed in the employee's City personnel file. File a copy of the signed application in the Department's personnel file.   |
| Human Resources   | 4. Place original signed application in the employee's City personnel file.  |
| Employee  | 5. Submit new application prior to expiration of Outside Work Permit or upon returning from disability leave.  |

Please note that the Police Department has additional specific procedures for approval of Outside Work Permits.

Attachment: Application for Outside Work Permit form

Approved:

/s/ Alex Gurza  
Director of Employee Relations

5/10/2005  
Date



**Dates and times of conversations regarding the denied work permit, to the best of my recollection.**

**Friday 7/23-** Called to Don Ernst in the morning before my shift to discuss the possibility of taking time off to work a side job. I requested as much time as the city was willing to give me. I estimated that I would be able to take up to two months off if all my comp-time and vacation were granted. I did not insist that it be two months, only that I would like as much as they could see fit to grant me, keeping in mind that 5-6 week vacations are not unheard of in this department. Mr. Ernst informed me that he would have to talk with Angel Alvarez before approving any extended time off. He gave me verbal authorization to take the following week off, and pointed out that I needed to fill out an application for outside work permit. That evening on shift I filled out the form and left it for Mr. Ernst.

**Tuesday 7/27-** I received a voicemail from Mr. Ernst, informing me that my work permit was denied, and I was expected to return to work on swing shift on Monday 8/2. I called back and left a voicemail confirming receipt of message.

**Wednesday 7/28-** I Spoke with Mr. Ernst by telephone. I explained that I did not understand how my work permit was denied based on my inability to fulfill my roll on swing shift. I explained that I would only be working if my time off was approved. He said he could not explain it to me, but if I spoke with Mr. Alvarez, or Ms. Milowicki I could get an explanation. I called and left a message with Mr. Alvarez who was leaving for vacation. He returned my call and left a voice message. I called Ms. Milowicki and left a message.

**Thursday 7/29** – Finally spoke with Ms. Milowicki and received the reasoning she outlines in the email dated August 2, 2010. I expressed that I felt that that was not an accurate or fair interpretation of the policy.

**Monday 8/2** – Spoke with Mr. Alvarez, who expressed the same logic as Ms. Milowicki. In our conversation he made it clear that they could not consider the fact that I would use vacation to do this work. He said they had to look at the situation isolated from the fact that I would use earned leave. This logic informed me that this department would not allow anyone to take time off work to do another job. I told him that I thought that they misinterpreted the city policy.



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**Webster, Matthew**

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**From:** Krantz, Ruth  
**Sent:** Monday, August 09, 2010 4:16 PM  
**To:** Hawkins, Dennis (Clerk)  
**Cc:** Webster, Matthew  
**Subject:** RE: denied outside work permit

Dennis,

Here's the information sent by Matthew Webster regarding denial of a work permit. Would he first need to contact OER?

Thanks,

RUTH KRANTZ / DEPUTY CITY CLERK  
CITY OF SAN JOSÉ | OFFICE OF THE CITY CLERK  
200 EAST SANTA CLARA ST | SAN JOSÉ, CA 95113  
PHONE 408.535.1274 | FAX 408.292.6207  
[RUTH.KRANTZ@SANJOSECA.GOV](mailto:RUTH.KRANTZ@SANJOSECA.GOV)

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**From:** Webster, Matthew  
**Sent:** Monday, August 09, 2010 3:53 PM  
**To:** Krantz, Ruth  
**Subject:** FW: denied outside work permit

Ruth,  
I have included the Application for outside work permit. Please keep in mind that I made this request as my best case scenario, I was willing to work with what ever period of time they where willing to give me. Of course I would have to rewrite the work permit with the agreed upon time period. The ultimate result of this denial is that they feel that it is never acceptable to take time off work to do another temporary job. I strongly disagree with that interpretation, and I would like this issue cleared up for future situations.  
Matthew Webster

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**From:** Webster, Matthew  
**Sent:** Wednesday, August 04, 2010 10:37 PM  
**To:** CivilServComm  
**Cc:** Milowicki, Diane; Alvarez, Angel; Ernst, Don (DOT)  
**Subject:** FW: denied outside work permit

Ladies and Gentlemen of the Civil Service Commission,

I recently had the opportunity to work as an independent contractor on a high paying construction job in Southern California. I intended to take some of the vacation and comp time I have accrued to do this temporary job to make up for the 14% compensation reduction I am facing. I requested that I be granted as much time off as the department could afford to give me (1-7 weeks). At the time I had nearly enough time to take two months off. I was granted one week and during that week management would review my vacation request and review my outside work permit request. The following Tuesday I was informed over the phone that my work request was denied. I requested the reasoning in the attached emails. Management tells me that they must look at my request with out taking in to consideration the fact that I would be doing this work while on leave. To me this seems like they are going above and beyond the language and spirit of the municipal code. For example; I have a business in my home town in Wisconsin. Every year I fly back to WI to take care of business on my rental properties. I sign contracts; I make repairs and perform annual cleanups etc. By applying the city code in the

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manner DOT management did, I would be in violation, because I am involved in work, employment or occupation outside of city employment, and I am taking time off from the city to do so, therefore "outside employment that you have requested is in a location that is too far away from San Jose to enable you to perform both jobs. Working the outside employment means that you can not be here to perform your City job, which does not meet the second criteria for approval, and it also creates a burden on the employees who would have to be called in to cover for you in your absence. Additionally, the first criteria is also not met, as your absence for nearly two months (my leave was never approved for 2 months, I requested they do what they could) would mean that the maintenance activities that you regularly perform during your shift would fall behind." I never thought to get an outside work permit for these trips, but since I am working in my own business, and it is taking me away from my city duties I believe it is a strong analog to the situation in Southern California. In my opinion this is an unreasonable interpretation of municipal code. In the year and a half I have been here, I have seen at least three vacations of 4-5 weeks approved. I don't understand why I could not have been approved for at least two weeks. Unfortunately I will most likely miss the chance to work on this project even if this denial is overturned, but I want to lay the groundwork for future opportunities. I hope that you will be able to see illogical manner in this denial.

Best Regards,

Matthew Webster

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**From:** Milowicki, Diane  
**Sent:** Monday, August 02, 2010 6:54 PM  
**To:** Webster, Matthew; Alvarez, Angel; Ernst, Don (DOT)  
**Subject:** RE: denied outside work permit

Hello, Matthew –

The decision to deny your Outside Work Permit was made in accordance with the City's Outside Employment Policy found in the City Administrative Policy Manual Section 1.2.3, which states:

**Criteria for Approval**

Applications by City employees to engage in an outside work activity may be approved if the outside work activity (1) is not detrimental to the City (2) will not impede the efficient performance of the employee's assigned duties and (3) will not create a conflict of interest for the employee.

The authority for this policy is Section 3.04.1710A of the San Jose Municipal Code:

**San Jose Municipal Code, §3.04.1710A**

No employee shall engage in any work, employment or occupation outside his City employment which is detrimental to the service, which prevents or impedes the efficient performance of his duties in his City employment, or which is in any way in conflict with his employment by the City. No employee shall engage in any work, employment or occupation outside his City employment unless and until he shall have notified the City Manager of his intention to do so.

In your case, the outside employment that you have requested is in a location that is too far away from San Jose to enable you to perform both jobs. Working the outside employment means that you can not be here to perform your City job, which does not meet the second criteria for approval, and it also creates a burden on the employees who would have to be called in to cover for you in your absence. Additionally, the first criteria is also not met, as your absence for nearly two months would mean that the maintenance activities that you regularly perform during your shift would fall behind.

I am sorry that we are not able to approve your request.

*Diane Milowicki*  
 Division Manager, Infrastructure Maintenance Division  
 1404 Mabury Road, San Jose CA 95133  
 (408) 277-5496

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**From:** Webster, Matthew  
**Sent:** Monday, August 02, 2010 6:37 PM  
**To:** Alvarez, Angel; Ernst, Don (DOT); Milowicki, Diane  
**Subject:** denied outside work permit

Please send me a detailed written reason for my work permit denial. I would like to keep it for my records,

Thanks,

Matthew Webster