



MEMORANDUM
HUMAN RESOURCES
COMPENSATION & POLICY ADMINISTRATION

DATE: May 11, 2016
FROM: Ken Factor, Manager of Compensation and Policy Administration *KF*
TO: Dewey Bartlett, Mayor
CC: Erica Felix-Warwick, Personnel Director
David O'Meilha, City Attorney
RE: Ethics Code and Police Promotions

Overview

This memo is being written in response to two ethics complaints; one from the Tulsa County Democratic Party and another from We The People Oklahoma. The complaint from the Tulsa County Democratic Party specifically referred to Tulsa Police officers paying "superior officers to retire early so they could secure promotion." It specifically listed Vic Regalado, then a Tulsa Police Sergeant and candidate for Tulsa County Sheriff, as having paid such compensation so he could be promoted to Sergeant.

The second complaint, from We The People Oklahoma, objected to officers "paying supervisors to retire early so they can be promoted." This practice is stated as a way for officers to avoid retaking the test when it is given.

In both cases, the practice of subordinate police officers paying superior officers to retire early in order to be promoted without having to retest is claimed by the complainants to be a clear violation of the City of Tulsa Ethics Code which is found in Title 12 Chapter 6 Sections 600-610 of the Code of Ordinances for the City of Tulsa. This review will also examine other City regulations including the City of Tulsa Charter and certain other City policies. No state or federal statutes are being examined.

Please note that this review incorporates and contains confidential legal advice received from the City Attorney.

Issue

The issue being reviewed is whether the City of Tulsa Ethics Code (the Code) prohibits a city employee from soliciting or accepting a significant amount of money, gift or anything of value from a subordinate as an enticement to retire. The specific practice being reviewed is the apparent procedure whereby a subordinate police officer will pay a superior officer to retire early. The retirement will allow the subordinate to be promoted to the rank vacated by the retiring superior officer.

Tulsa police officers who wish to promote must go through a process which includes a written exam and a group of oral assessment exercises. The candidates who complete testing are placed on an eligibility list for promotion in the order of their finish in the process. These rank order lists are public knowledge. The list for each rank is in effect for one year. At the end of the one year period the list expires and any officers who have not promoted must go through a new testing process for the rank in question.

Before the list expires, in some cases, a subordinate will provide some type of consideration (usually money) to a superior officer to cause him/her to retire. The subordinate will then promote to the higher rank not having to test again for that rank.

Ethics Code

Section 601 of the Code defines **City Official** to include "every City of Tulsa elected official, officer, or employee . . ." A **financial interest** is defined to exist "when the action may result directly or indirectly in a gain or loss accruing to the City official and/or his immediate family to a greater extent than could reasonably be expected to accrue to the general public." Finally, a **public interest** is defined as "a direct or indirect interest, matter or relationship not shared by the general public which could be reasonably expected to impair the City official's objectivity or independence of judgment." As employees of the City of Tulsa, it is clear that police officers are included in the definition of City Official.

As stated in **Section 600** of the Code, City employees "shall not use their public positions for personal gain nor should they act in such a way as to give an appearance of impropriety." Police superiors who take money from subordinate officers to make an official decision are receiving personal gain. That decision would also seem to create the appearance of impropriety. However, this violation does not only occur with the superior officer's receipt of money. The subordinate officer is also receiving personal gain. While they are paying out money for the immediate rank, in the long term they will receive a higher salary which could continue past the point of "breaking even". Additionally, the higher salary will also affect their pension and give them increased pay even after they are no longer employees of the City. These actions would create in reasonable minds a perception that the officer engaged in conduct that reflects unfavorably on the officer's honesty, impartiality, or fitness to serve as a public servant. Receiving or giving money in order to cause a superior police officer to retire so that a subordinate police officer can promote creates the appearance of impropriety by both and is a violation of Section 600 of the Code.

Section 603 of the Code states:

Except as permitted under applicable federal, state, and City laws and policies, no City Official shall participate in any City business in which they have a related personal, financial or organizational interest. Such City official shall not discuss the matter with a City official who is participating in the action other than to state his disqualification. The possibility, not the actuality, of a conflict shall govern.

Whether an officer is accepting or giving money so that the promotion of the subordinate officer will occur, both are participating in City business in which they have a related personal or financial interest. By continuing through with this arrangement, both the superior and subordinate officer are creating and participating in a conflict of interest and this is a violation of Section 603 of the Code.

Section 604 of the Code requires City officials to make disclosures on items of personal, financial, or organizational interest. Paragraph A of Section 604, in fact, requires any City official who "may receive some benefit . . . to personal, financial . . . interest as a result of an item before the individual in their capacity as a City official" to reveal that interest "to their supervisor . . ." The Code goes on to say that "the reasonable possibility, not the actuality, of a conflict shall govern." If either the retiring superior or promotion eligible subordinate does not reveal the financial transaction, then a violation of Section 604 of the Code would occur.

Section 605 of the Code states that City officials "shall not directly or indirectly solicit or receive gifts, entertainment or other favors which may influence or be reasonably perceived as influencing a City official in the performance of their official duties." By receiving money from a subordinate, in any time remaining before a superior officer's retirement took effect, it would be reasonable to believe that the superior office might not take necessary disciplinary action against the subordinate or, if the lower ranking officer is not in the superior officer's chain of command, it would be reasonable to believe the superior officer might attempt to influence other ranking officers on behalf of the subordinate officer. Furthermore, by taking money from a subordinate to retire, the superior officer has violated Section 605 by accepting an incentive not to perform their public duties by discontinuing their public employment and relinquishing their official duties.

The practice of subordinate police officers paying a superior officer to retire early so the subordinate will be promoted to the rank vacated by the retiring superior officer violates several parts of the Code. **Section 609** states that violating the Code is "grounds for disciplinary action up to and including dismissal or removal from office as may be provided by law." It is unclear whether any action could be taken against superior officers who have retired and left City employment. However, superior officers who violated the Code and are now employed in non-sworn positions with the City and subordinate officers who violated the Code would be subject to discipline.

City Charter

The Tulsa City Charter (Charter) provides the bases on which all appointments and promotions within the classified service of the City are made. While some sections, or parts of sections, apply differently to police positions (i.e., only police officers can take promotional exams for police officer positions), there is no restriction on Section 1.1 of Article X of the Charter, ". . . Appointments and promotions in the classified service of the city shall be made solely on the basis of merit and fitness, determined by competitive procedures."

The current promotional procedures for sworn police officers are a competitive process based on merit and fitness. Officers take a written exam and go through oral assessment exercises and are then placed on a one year eligibility list based on the results of the testing process. Any vacancies that occur due to retirements during the one year period of the list would seem to be legitimate results of the promotional process and therefore satisfy Charter requirements. However, the word "solely" in Section 1.1 is a very important qualifier. "Solely" means "without anything or anyone else involved". If a superior officer retires because s/he is paid to do so by a subordinate then the meaning of "solely" is not met and the Charter is violated.

City Personnel Policies and Procedures Manual

City of Tulsa Personnel Policies and Procedures Manual (PPPM), is separated into separate chapters. Chapter one of the PPPM covers "Employment". Section 101, reflects the City Charter when it states that "employment shall be based upon merit and fitness as determined by competitive procedures." There are several parts of chapter one that applies specifically to police promotional exams. PPPM Section 119 covers eligibility for police promotional exams, including educational requirements, rank and time-in-grade requirements, exam schedules and eligibility cutoff dates and eligibility lists promotional exams. Section 120 discusses the different elements of police promotional exams such as the weighing of factors and statistical procedures. Section 121 covers the written and oral exams in police promotional procedures such aspects as administrative procedures, and the written exam study materials for the Corporal and Sergeant process. Finally, Section 122 discusses procedures for candidate review of the promotional exams. None of the police promotional sections in PPPM are in question in this review.

Conflict of interest is covered in Section 419 of the PPPM. The language of this section is very similar to Section 604 of the Code. This section states that City employees should "maintain high standards of honesty, integrity, impartiality and conduct in the performance of their jobs to ensure the trust and confidence of citizens in their government." This section goes on to describe that a "conflict of interest could arise when financial or personal interests of an employee could be affected by an official act or lack of action . . ."

As with Section 604 of the Code, if either the retiring superior or promotion eligible subordinate does not reveal the financial transaction when the subordinate pays the superior to retire, then a violation of PPPM 419 would occur. A violation of a section of the PPPM is grounds for disciplinary action.

Police Internal Policies

A review of police internal policies brought into question two items in the Rules & Regulations section. Rule 3 is the Duty to Know, Enforce, and Obey Laws and Ordinances. This rule requires that all police employees, which would include all sworn personnel, know and obey the ordinances of the City of Tulsa and the statutes of the State of Oklahoma. On-duty officers are also required to enforce state statutes and City ordinances. The Code, as part of the City ordinances, is included in the scope of this rule. Officers participating in the practice of accepting

or giving money in order for a retirement to occur so that a subordinate officer could promote violate Rule 3 of the City of Tulsa police Rules & Regulations.

Officers are also required to conduct themselves in an ethical manner. Rule 8 states that officers "shall not commit any act or indulge in any behavior, on or off duty, which tends to bring reproach or discredit upon the department." Employees are also prohibited from engaging in behavior that is "detrimental to the service." Clearly, by participating in the practice of exchanging money as an inducement for a superior officer to retire so that a subordinate could promote to a higher rank at a higher pay, both officers are violating the Code and are therefore also violating Rule 8 of the police Rules & Regulations.

Conclusion/Recommendations

This issue goes beyond mere speculation as evidenced by several media stories regarding the so called practice of "paying for stripes". In these stories a former Tulsa Police Sergeant, Vic Regalado, admitted he had paid a superior a sum of money to retire early so that he could be promoted. In these stories, various other current and former officers also stated they had heard of the practice although none of them admitted to participating. Since Regalado is no longer an employee of the City of Tulsa, it is unclear if there is any basis upon which the City might censure him or otherwise penalize him. There are no other current employees who admitted to participating in the practice of "paying for stripes."

An important matter present in the Code which has not been discussed up to this point is that, pursuant to Sections 609 B and C, the Code can only be violated by a City official or employee, and complaints for violation of the Code only trigger and initiate an investigation into the complaint if it is filed against a specific, named City official or employee. The only person named in the subject complaints is Vic Regalado, who was identified in only one of them as participating in a "buying stripes" transaction, and at the time the complaint was made was employed as a Sergeant in the Tulsa Police Department. Regalado resigned his City position upon being elected as Tulsa County Sheriff. Because he is no longer an official or employee of the City, likewise, Regalado can no longer be disciplined under the Code, and it is the City Attorney's opinion that any investigation into Regalado's specific actions in regard to buying rank was rendered moot by his resignation from employment with the City. Therefore, since there is no ethics complaint pending against a current City official or employee, the complaints regarding the alleged practice of "paying for stripes" do not trigger an ethics investigation into other police department personnel who may have been involved in or participated in the alleged practice.

The practice of paying superior officers to retire in order for subordinates to promote before the promotional list expires must be stopped. No matter whether any investigation goes forward, this practice exists to the detriment of the police department and the City of Tulsa. If nothing else comes out of this situation, the part of the promotional system which encourages this practice should be changed as soon as possible. It is strongly recommended that a new procedure be used to determine how long promotional lists exist. In the Tulsa Fire Department, a pre-determined

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- number of candidates are selected from each list and then those lists expire. This is only one example of alternate methods that can be used.

As discussed throughout this review, the practice of subordinate police officers paying a superior officer to retire early so the subordinate will be promoted to the rank vacated by the retiring superior officer violates several parts of the Code, the Charter, City PPPM and Police Department Rules & Regulations. This review does not imply an interpretation of any federal or state laws. It is enough that City rules and regulations are shown to be violated by this described practice. It is critical for efficient municipal government that there is a preservation of public trust. An important part of this public trust is the perceived integrity of police officers. The violations described in this report do not support a preservation of public trust and does not support the perception of integrity with all aspects of the promotional system of the Tulsa Police Department.