



CITY OF SACRAMENTO  
CALIFORNIA

OFFICE OF THE  
CITY MANAGER

November 12, 1981

CITY HALL  
915 I STREET - 95814  
(916) 449-5704

City Council  
Sacramento, California

Honorable Members in Session:

SUBJECT: Case of Elbert V. Johnson vs. the City of Sacramento

Attached is a copy of the opinion of John L. Saltonstall, Jr.,  
factfinder in the case of Police Officer Elbert V. Johnson vs.  
the City of Sacramento.

The resolution authorizing payment of \$45,000 is intended to  
provide a final settlement of the issue.

Respectfully submitted,

Walter J. Slupe  
City Manager

**APPROVED**  
BY THE CITY COUNCIL

NOV 17 1981

OFFICE OF THE  
CITY CLERK

NONBINDING FACTFINDING

Between: )  
 )  
 ELBERT V. JOHNSON, )  
 )  
 Complainant, )  
 )  
 vs. )  
 )  
 CITY OF SACRAMENTO, )  
 )  
 Respondent. )

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OPINION OF FACTFINDER

I. BACKGROUND

On May 21, 1981 the City of Sacramento, California and Elbert V. Johnson, a member of the Sacramento Police force, entered into a Factfinding Submission Agreement (the Agreement). The Agreement recites that Officer Johnson has a legally unenforceable claim against the City based upon his discharge as a police officer by the City; that the parties have agreed to submit certain disputed factual issues with respect to such claim to "an independent non-binding advisory factfinding procedure," and that the Sacramento City Council "reserves the right to review Elbert Johnson's claim in light of the results of such non-binding advisory factfinding procedure."

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CITY CLERK

On or about May 22, 1981, the parties acting through counsel, selected the undersigned to serve as factfinder. I accepted the appointment and agreed to be bound by the terms of the Agreement. Such terms include certain stipulated facts plus joint exhibits of the parties, and specify the factual issues to be determined by the factfinder (set out hereinbelow) and the procedural steps to be followed during the factfinding.

Pursuant to the Agreement, evidentiary and argumentative hearings were held before me on July 16-17, 1981 in Sacramento. Exhibits in addition to the joint exhibits were received, a stenographic transcript of the proceedings was made, and the parties agreed on a briefing schedule to be triggered by the availability of the transcript or the submission to me of certain earnings data, whichever was to be later. The last of the briefs was submitted to me on October 2, 1981.

## II. ISSUES SUBMITTED

Under the Agreement, the sole issues to be determined by the factfinder are as follows:

A. Did Officer Johnson or his attorney request back pay or benefits from the Civil Service Board or the City Council at any time prior to his reinstatement in 1969? If so:

(i) When and how were such requests made, and

(ii) What was requested by Officer Johnson or his attorney from the Civil Service Board or the City Council in the way of back pay or benefits?

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B. Did Officer Johnson or his attorney at any time prior to his reinstatement in 1969 waive or say he was not requesting back pay or benefits from the City?

C. (i) Was Officer Johnson or his attorney aware of the fact that Civil Service Board Rule No. 10.5 prohibited payment of back pay to anyone reinstated under that rule?

(ii) If so, when did he or his attorney become aware of such fact?

(iii) Did either Officer Johnson or his attorney express any objection to the Civil Service Board or the City Council regarding such prohibition of back pay?

(iv) If so, when were such objections made?

D. (i) Was coercion used by either the City staff or the Civil Service Board to convince Officer Johnson or his attorney to refrain from requesting back pay prior to or at the time of Officer Johnson's reinstatement in 1969?

(ii) If so, what facts support a conclusion that coercion was used by the City Staff or Civil Service Board?

E. What amount is Officer Johnson requesting in back pay or benefits at this time?

F. (i) What is the total amount of back pay and benefits which were lost by Officer Johnson because of his dismissal from 1962 to 1969 as a City police officer.

(ii) How much did Officer Johnson earn from other sources during the period from 1962 to 1969?

G. What is the total amount of such back pay and benefits for the officer if annual interest at 7% compounded is added to the above figures?

These issues are dealt with seriatim:

### III. DETERMINATION OF ISSUES

#### A. Requests For Back Pay Or Benefits Prior To Reinstatement.

Officer Johnson's attempts to recover salary and fringe benefits\* lost during the period following his discharge from the Sacramento police force on June 22, 1962 until his reinstatement effective as of February 3, 1969 (hereinafter "the discharge period") began no later than November 14, 1966, when he filed suit against the City of Sacramento for breach of contract. (See Agreed Statement of Facts contained in the Agreement (hereinafter "Stip.") p. 3) The City demurred to the complaint on grounds, inter alia, that it was barred by the statute of limitations, laches and failure to comply with the claims statute. The demurrer was sustained and judgment for the City was entered on February 14, 1967. (Stip. p. 3)

On or about February 23, 1967, Johnson filed a so-called "claim for personal injuries" against the City for unjust discharge as a patrolman. Approximately \$25,500 was demanded as damages for lost wages plus additional amounts, designated as "unknown", to reflect salary increases and "monthly benefits" which Johnson would have received had he remained on the Sacramento payroll. (Ex. J-7) This claim was rejected by the City Council at its meeting of March 2, 1967. (See Ex. J-8)

On or about April 7, 1967, Johnson filed an amended claim against the City alleging substantially the same grounds and demanding the same amount of damages. The amended claim was rejected by the City Council on April 20, 1967. (See Exs. J-9 and J-10)

\*The parties have generally referred to such salary and benefits collectively as "back pay."

On November 26, 1968, Tony J. Stathos, Esq., then a member of the Sacramento City Council, and formerly an attorney for Officer Johnson, addressed a memorandum to his colleagues on the Council urging that the Council reinstate Officer Johnson. This memorandum was prepared by Councilman Stathos after a conversation with City Attorney Jackson in which Mr. Jackson advised Councilman Stathos concerning his views as to the guiding legal principles involved. (T. 91-92). In the memorandum, besides urging Officer Johnson's reinstatement, Councilman Stathos made the following comment regarding the matter of back pay:

"I am certain that all of you have been impressed with this man as we have been. You must have noted for yourselves that he has not concerned himself with back pay or other lost remuneration in the sense that "the City will be made to pay", but rather he has concerned himself with an honest, sincere and justified effort to have his position restored to him."

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"The Civil Service Board does have the power to enact a new rule under which Mr. Johnson could be reinstated subject to certain conditions; i.e., that he be reinstated in a position equivalent to one then held by him without benefit of any lost pay or other similar remunerations."

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"I therefore move that this Council refer the case of Elbert Johnson to the Civil Service Board that Mr. Johnson be reinstated to the Sacramento Police Department in a position which would be equivalent to the one held at time of discharge without recompense for back pay or other similar fringe benefits save for current pay for such a position." [Italics supplied] (Ex. J-13)

There is no indication from the record that Mr. Stathos understood, much less represented to the Council, that Johnson had authorized him to disclaim any continuing interest in obtaining reimbursement from the City. Indeed, the italicized language in Councilman Stathos's statement may have been for the purpose of stressing that Officer Johnson was not a money-grubber who was more interested in back pay than in vindication and a return to the police force, rather than for the purpose of notifying the Council that Officer Johnson had abandoned his financial claim. In any case, I find that the inference of the Stathos memorandum -- particularly in the context of the fact that he sought legal advice from City Attorney Jackson and of the position of the City Department of Law that granting of back pay to Officer Johnson would be illegal\* -- was that Councilman Stathos believed that reinstatement of Officer Johnson would be lawful only if, as his memorandum stated, it was "without benefit of any lost pay or other similar remunerations."

Acting on Councilman Stathos's initiative, the City Council referred the matter to the Sacramento Civil Service Board recommending that a special rule be adopted by the Civil Service Board allowing for reinstatement of Johnson and others similarly situated. (Stip. p. 4) City Attorney Jackson appeared at the December 17, 1968 meeting of the Civil Service Board, explained the situation to the Board "advised the Board that the City Council does not have the power to take any remedial action regarding Mr. Johnson, and further advised that the only means left open to Mr. Johnson for reinstatement is through the Civil Service Board after an appropriate amendment to the Board's rules and regulations." (Ex. J-14)

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\*See Exs. J-37 and C-2A

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The Board voted to instruct Mr. Jackson to prepare and submit a proposed amendment to the Rules and Regulations which would permit the Board to consider the reinstatement of Officer Johnson (Stip. p. 5), and it placed the proposed amendment on the agenda for the next regular meeting (T. 96-97; Ex. J-14). During the time when Attorney Jackson was drafting the proposed new rule, he talked with Clarence S. Brown, Esq., Officer Johnson's then attorney, to discuss with him the wording of the proposed rule. Attorney Jackson testified before me as follows concerning this conversation with Attorney Brown:

"I called Mr. Brown prior to that meeting [of January 7, 1969] and prior to my letter of January 3rd [to the Civil Service Board (Ex. J-16)] to advise him of what I was putting into the rule, and he raised the question about the provision of the rule on back pay, and he was talking in terms of leaving the door open, somewhat for back pay; and my recollection is that he was talking about some money that had been used for attorneys' fees or for, at a maximum, no more than one year of back pay in salary. He didn't like the provision that said no back pay at all, and I told him that the rule contained that provision because of the Tony Stathos report and the Council's action that there be no back pay.

"Actually the Civil Service Commission had no authority to give back pay anyway. They had reinstatement authority, but no back pay authority. That was under the jurisdiction of the City Council, and the Council had already expressed its opinion in that area.

"As I recall, I'm the one that put in the back pay provision. I wrote the rule, but it was consistent with what the Council had said, and I was also concerned about the possibility of liability if nothing was said on that subject, and even though the City was under no legal obligation to reinstate Mr. Johnson, I felt that if they went ahead and reinstated him, that they might be opening the door somehow to some kind of admission that would result in some obligation, moral or otherwise, for back pay; and I wanted to put the provision on no back pay in the rule to pin that down and make it clear, that if there was reinstatement, it was with the condition that there be no back pay." (T. 97-98)



At the Civil Service Board's January 7, 1969 meeting the Board received the draft of a new Rule 10.5 drawn by Attorney Jackson, together with a legal opinion of Attorney Jackson dated January 3, 1969 (Ex. J-16) concerning the Board's powers in the premises. (Stip. p. 5; Ex. J-15) After considering the matter the Board voted to defer final action on the new rule until January 21, 1969. (Ex. J-15)

On January 21, Rule 10.5 was adopted substantially as drafted by Attorney Jackson, but with two modifications, one of which had the effect of giving "credit for sick leave accumulated by the former employee prior to discharge." (Ex. J-19) Attorney Brown, who was present at the January 21st meeting, evidently made no objection or reference to the fact that the new Rule was expressly "subject to the condition that no back pay or any other form of reimbursement will be paid to the former employee." (T. 102) Indeed, Attorney Brown "expressed his appreciation to the Board for the action taken in adopting the rule addition, and in scheduling an early hearing for his client." (Ex. J-19)

On January 28, 1969, the Civil Service Board held a hearing on reinstatement under Rule 10.5. Both Attorney Brown and Officer Johnson were in attendance but, according to Attorney Jackson (T. 110), no mention was made by anyone concerning the matter of reimbursement to Officer Johnson by the City except in the following two instances:

1. During the public part of the hearing, Attorney Brown called as a witness Mr. Howard Harris, Director of the Sacramento Chapter of the Urban League, and Mr. Harris testified in part as follows:

MR. BROWN: Now I'm going to bring up something that I possibly shouldn't bring up here, but I think it might sooth some nerves. I've had a lot of people say to me, "You should get Elbert Johnson back pay." And this is something that a lot of people have thought about. Of your knowledge, what's going on in this community right now?

MR. HARRIS: A lot of people feel this. Number one, I think it has to be realized that over a six year period and with several attorneys being involved, that he certainly must have been spending money.

MR. BROWN: Is there an answer to this?

MR. HARRIS: Well, the Council of Churches, having felt this from several persons, are now acting as trustees for an effort to structure that kind of a vehicle allowing the people who feel warmly toward him and his efforts to give, and I think that fund is operating now at the Council of Churches' office, so that this, this is a realization that there needs to be some sort of financial retribution, for lack of a better word, and I have been made aware that this is, in fact, working very well.

MR. BROWN: So to your knowledge right now, there is a trusteeship which has been set up by the Council of Churches for the specific purpose of compensating to the extent possible?

MR. HARRIS: Right. Or of using it in any manner that he might have to use, for attorney's fees or whatever. (Ex. C-3)

2. Following the public hearing, the Board retired into executive session, at the conclusion of which Chairman Diepenbrock stated as follows:

CHAIRMAN DIEPENBROCK: I want to let the record show that we have present in the room Mr. Johnson and his attorney. We note the absence of Mr. Jackson. We would like to have him present, but in the interest of time, we can't delay much further because this room will be occupied in 5 minutes by the Planning Commission and other citizens of this community.

Mr. Johnson, this Board has given considerable study to your problem, not only in this meeting but we had to become somewhat acquainted with the facts of your case before we even adopted the rule we did. We first had a review of the police report, studied our Rules and Regulations to determine whether there should be a rule adopted; and so we made some preliminary judgments and concluded, as you well know, that a rule should be adopted for the peculiar circumstance of an employee who has been discharged by a unanimous action of the City Council pursuant to a section of the Charter that has since been repealed. Since that adoption of that rule, we, of course, as you know, have given this matter further consideration and we have now had a hearing which, in the judgment of the Board, we would have liked to have seen you have many years ago.

It is the unanimous opinion of this Board that you were entitled to discipline based upon the evidence that took place on the evening in question. It is also the unanimous opinion of this Board that the amount of discipline handed down to you was unduly severe. It is the unanimous opinion of this Board that you should be placed upon a reinstatement list to be available for the next vacancy that comes up as patrolman. We have imposed certain conditions upon this decision. One of them, and the first, is there shall be no reimbursement of any kind by way of back pay, salary, expenses or anything else that you have incurred financially. Secondly, it is our judgment that what we should try to do, as nearly as humanly possible, is make available to you a patrolman classification that is equivalent to that which you were occupying at the time of discharge. Specifically we have spelled out and we will have it typed up so that it will be in the minutes, that you will be available to be appointed to Step B of the current salary scale because you were in Step B at the time of discharge. You will be given credit for the 8 days of sick leave which you had accumulated at the time of discharge and, similarly, we have worked out a formula for vacation allowance which, as near as is humanly possible, gives you the benefit, actually gives you a little bit of the benefit of the doubt, as to handling of vacations, and it's too difficult really to explain, but we have instructed Mr. McWilliam to type these up in the minutes, and Mr. McWilliam if you will then give Mr. Johnson a copy of these minutes so that he fully knows what the conditions are. And as I say, that is the decision of the court.

MR. BROWN: May we ask one question of the court? You used some language in the very beginning relating to reimbursement. I take it that relates to reimbursement from the City and does not preclude Mr. Johnson from accepting reimbursement, as an example, from the Council of Churches?

CHAIRMAN DIEPENBROCK: We are only dealing with an employer-employee relationship and, incidentally, [sic] that does bring to mind one other point. The Board was quite satisfied and concluded that the charge made against you of immoral conduct with the woman in that house was unsupported by the evidence." (Ex. C-4)

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On the basis of all of the foregoing, I find that Attorney Stathos and Attorney Brown, acting on behalf of Officer Johnson, requested back pay or benefits from the Civil Service Board or the City Council prior to his reinstatement on February 3, 1969 on the following occasions and in the following amounts:

| <u>Person Making Request</u> | <u>To Whom</u>        | <u>How</u>           | <u>When</u> | <u>How Much</u>      | <u>Source of Evidence</u> |
|------------------------------|-----------------------|----------------------|-------------|----------------------|---------------------------|
| Attorney Stathos             | City Council          | Formal Claim         | 2/23/67     | \$25,500 Plus        | Stip. p.4; Ex. J-11       |
| Attorney Stathos             | City Council          | Amended Formal Claim | 7/17/67     | \$25,500 Plus        | Stip. p. 4; Ex. J-11      |
| Attorney Brown               | City Attorney Jackson | Oral Request         | 1/2/69      | One year in back pay | T. 97-98                  |

B. Waiver Of Request For Reimbursement.

There is no evidence in the record that Officer Johnson, or any authorized attorney, ever expressly waived Officer Johnson's claim for back pay or benefits prior to Officer Johnson's reinstatement.

ment in 1969. Moreover, even if Issue B is to be interpreted as including waiver by implication, the definition of waiver by the California Supreme Court as "the intentional relinquishment of a known right after knowledge of the facts," Roesch v. DeMota, 24 Cal. 2d 563, 572, appears to exclude the possibility even of implied waiver on these facts. (See also 7 Witkin, Summary of California Law at p. 5353; DeCruz v. Reid, 258 Cal. App. 367, 65 Cal. Rptr. 698; City of Ukiah v. Fones, 64 Cal. 2d 104, 48 Cal. Rptr. 865).

In the Fones case the plaintiff had been dismissed from his job as janitor for the City of Ukiah's Municipal Library, and he brought suit for reinstatement and back pay. The trial court found that Fones was not entitled to reinstatement because he had reached the mandatory retirement age of 70 during the course of the litigation. On the salary issue, Fones argued that he was entitled to some \$12,000 arrearage for the three-and-one-half year period from his wrongful dismissal until his attainment of retirement age. The trial court found, however, that Fones had entered into a stipulation during the course of the litigation providing in part that if it should be determined that Fones had been wrongfully dismissed he would be entitled to salary "from the date of dismissal to the date of the filing of this complaint minus what he earned or might reasonable [sic] have earned during said period." The trial court found that this stipulation constituted a waiver by Fones of any back pay for the period from the time of filing his complaint to the mandatory retirement age of 70. In holding that the trial court erred in determining that there had been a waiver, the California Supreme Court stated as follows:

"It is a well-settled rule that a Civil Service employee who has been unlawfully deprived of his position is entitled to recover the full amount of the salary which accrued to him from the date of his unlawful discharge to the date of his reinstatement, less any amounts he earned or might reasonably have earned from other employment during that period. [Citations omitted] The trial court held this rule inapplicable on its implied finding that by stipulating that he was entitled to back salary 'to the date of the filing of this Compliant,' Fones must be deemed to have waived all wages to which he would have been entitled thereafter.

"Waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts.' [Citations omitted] The burden, moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be decided against a waiver.' [Citations omitted] This is particularly appropos in cases in which the right in question is one that is 'favored' in the law; and it is hardly necessary to cite more than a few relevant statutes [citations omitted] to show the established policy of our Legislature of protecting and promoting the right of a wage earner to all wages lawfully accrued to him."

With the foregoing definitions and guidelines in mind, I find that there was no waiver of back pay by or on behalf of Officer Johnson and that the most that can be said is that when Attorney Brown asked at the reinstatement hearing before the Civil Service Board on January 28, 1969, whether Rule 10.5 precluded Officer Johnson's acceptance of the charitable fund supposedly being raised for him,\* he was implying (although he did not say) that Officer Johnson had abandoned his request for back pay or benefits from the City. I find, however, that Officer Johnson never authorized such a change of posture by Attorney Brown -- as he himself clearly testified. (T. 21)

\*Actually, the total amount collected was less than \$50. (T. 79)

True enough, Officer Johnson did go before the City Council at least twice in 1968 to plead his case and, so far as appears from the minutes, asked only that he be given a "hearing." (Ex. J-11) No doubt some of the City officials may have concluded from this that Officer Johnson had waived his claims for back pay and benefits. However Officer Johnson testified several times that to him a "hearing" was synonymous with vindication, reinstatement and full reimbursement for all back pay and benefits. As he put it:

"I thought that a hearing would be a complete hearing, everything that would go along with it. If I got a hearing, and if I was found to be not guilty of what I was accused of, that I would get everything that I've lost, such as back pay, sick leave, vacation, holidays and opportunities to compete with the guys that came on the Police Department with me." (T. 19)

I therefore find that Officer Johnson never intended to waive his back pay and benefits claim and that the City cannot meet the burden of proof standard required by Fones to establish that he waived.

C. Awareness Of Condition In Rule 10.5.

The first question posed to the factfinder under this heading is whether either Officer Johnson or his attorney were aware of the "no back pay or any other form of reimbursement" condition contained in Rule 10.5. Since no cut-off date is suggested by the stipulated formulation of this issue, (unlike in Issues A, B and D), my report will deal with this question both for the period before and the period after Officer Johnson's reinstatement.

1. Prior To Reinstatement

Officer Johnson testified that he did not learn that his reinstatement was subject to the condition of no back pay or other benefits until shortly after the reinstatement hearing on January 28, 1969 (T. 29-30, 70). On the other hand, Rule 10.5 had been adopted by the Civil Service Board at its meeting of January 21, 1969. Officer Johnson could not recall whether he had been present at that meeting (T. 62), and he testified that he never had an opportunity to read Rule 10.5 prior to his reinstatement hearing (T. 25). Also the minutes of the meeting of the Civil Service Board on January 21, 1969 (J-19) reflect the presence of Clarence Brown (Mr. Johnson's attorney at the time), but not the presence of Mr. Johnson. Similarly, the minutes of the Civil Service Board's meeting of January 7, 1969 (J-15) failed to reflect Officer Johnson's presence at the meeting -- at which a draft version of Rule 10.5 was submitted.

At the hearing before me, Counsel for the City showed Officer Johnson a copy of the minutes of the Board meeting of January 7, 1969 and asked him to read a portion of those minutes, after which the following colloquy occurred:

"Q. Do you recall being present at the meeting of the Civil Service Board?

A. Some of this I remember. Most of if I've forgotten.

Q. Do you believe you were present at this meeting or not; or do you know?

A. Well, it appears to me that I was present at a point of it maybe; and maybe I wasn't sitting on all of it altogether. I don't know.

MR. SIMMONS: If you don't know, just indicate you don't know.

THE WITNESS: I don't know." (T. 59-60)



As indicated below, Officer Johnson's then attorney, Clarence Brown, became aware sometime between December 17 and January 3, according to the testimony of City Attorney Jackson (T. 96-97), that it was Mr. Jackson's intention to insert a provision against back pay in the amended Civil Service Board rule, and by the time that Mr. Brown received information concerning the action of the Board at its January 7, 1969 meeting it seems likely that Mr. Brown must have been fairly certain that Officer Johnson would be reinstated, but without back pay. On the other hand, we do not have clear information as to the extent to which Mr. Brown kept his client informed. (See e.g., T. 30; 67-70)

A possible, and perhaps an accurate, answer to the question of whether Officer Johnson was aware of the no-back-pay condition of Rule 10.5 prior to his reinstatement would be, "yes and no." That is, he might have possessed some information indicating that he was not going to get back pay, but at the same time he might not have believed it.

According to the Random House Dictionary of the English Language (1966), the word, "aware," is defined as:

1. Having knowledge; conscious; cognizant:  
aware of the danger.

2. Informed; alert; knowledgeable; sophisticated: He is one of the most politically aware young men around."

In addition, the principal synonym is given as "mindful" and the antonym as "oblivious."

I conclude that prior to his reinstatement, Officer Johnson was more "oblivious" than he was "mindful" of the probability that he

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was not going to get back pay -- as illustrated by the following account by Officer Johnson concerning his participation in the January 28 hearing before the Civil Service Board:

"Q. Okay. Let me ask you this: When you first got to the hearing in 1969, you and Mr. Brown were present in the room with the Civil Service Commission?

A. Yes sir.

Q. And there was a series of questions that went on?

A. Yes sir.

Q. Do you recall Mr. Jackson getting up and telling the facts of the case?

A. I know Mr. Jackson, but I can't recall.

Q. Do you recall this man, Mr. Harris, speaking on your behalf?

A. Mr. Howard Harris?

Q. Yes.

A. Yes, sir.

Q. And then what happened, you were asked to leave the room while the Commission made its decision?

A. I think that was it.

Q. And you and Mr. Brown stepped out of the room?

A. Yes sir.

Q. Now, up until that time did you still have a belief that you were going to be entitled to back pay?

A. I sure did.

Q. Now, why would that have been?

A. Because, as I said before, it was, I thought a complete package. I had no idea it was just to be reinstated, and I thought I was going to get the complete package.

Q. Okay. Now, were you subsequently called back into the room?

Q. Yes sir. Mr. Brown went back in first.

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Q. Okay. You say Mr. Brown went in first? Did he go in by himself?

A. Yes sir.

Q. And did you stay outside the room?

A. Yes sir.

Q. Do you know what he did while he was in there?

A. I have no idea.

Q. How long was he in there?

A. A short time. I don't remember the exact time, but it wasn't very long.

Q. And then did he call you in there?

A. Yes sir.

Q. And then what happened when you got into the room?

A. They stated that my name would be placed on the list to go back on the Police Department and at the next available position I would be reinstated.

Q. Okay. Were you told at the time that you weren't going to get any back pay?

A. No sir. I don't recall being told at that time.

Q. Do you remember, Mr. Johnson, after going back into the room, after you and Mr. Brown were asked to step out, a gentleman who is the Chairman of Commission by the name of Mr. Diepenbrock telling you that they had imposed certain conditions upon the decision, one of them, and the first being that there shall be no reimbursement of any kind by way of back pay, salary, expenses or anything else that you incurred financially? Do you remember Mr. Diepenbrock telling you that?

A. I remember Mr. Diepenbrock, but I don't remember this occurring. Maybe I was so up in the air or something I don't know. I don't remember that." (T. 27-29)

So far as concerns Mr. Brown, I find that he was "aware" that Rule 10.5 contained a condition against back pay at the time that the Civil Service Board passed it in that form on January 21, 1969.

2. Subsequent To Reinstatement.

As previously indicated, Officer Johnson became fully aware immediately following the reinstatement hearing on January 28, 1969, that Rule 10.5 contained a condition blocking his claim for back pay, as indicated by the following testimony (T. 29-30):

"Q. When is it that you first realized, Mr. Johnson, in your own mind that you were not going to get back pay and benefits?

A. It was after I was reinstated, that particular day that we had the hearing. The wife and I were on our way out of City Hall when a gentleman, and I don't know which one this was, came out and told me what date I was going to be reinstated, because there was, in fact, an opening; and would I be available. I said, yes, sir. I don't know if I received a paper inside of the hearing or got this sheet of paper outside. I'm not sure, but somewhere along the line I recall reading, and the wife and I discussing the fact of no back pay. We were both kind of unhappy with that.

Q. That was after you had walked out of the hearing?

A. Yes sir. I'm sure.

Q. So, did Mr. Brown ever tell you that you weren't going to get any back pay?

A. No sir. Not that I can recall."

C. (iii)-

(iv) Objections Regarding Prohibition Of Back Pay.

The formulation of Issue C. (iii) likewise fails to supply any time reference. In any case, I find that objections regarding the proposed limitation were voiced, as above set out, by Attorney Brown in his conversation with City Attorney Jackson (whom I find was acting both for the Civil Service Board and for the City Council) in late December 1968 or early January 1969 (T. 97-98). Following Officer Johnson's reinstatement, objections were voiced by Attorney Phillip Isenberg on February 13, 1970 (see Ex. J-26), and again on June 9, 1970, when he filed an action for a declaratory judgment against the City of Sacramento on behalf of Officer Johnson. (Stip. p. 7) Officer Johnson voiced still further objections to the denial of back pay and benefits on July 26, 1971, November 9, 1971, November 15, 1971, September 8, 1972 and April 17, 1979. (Stip. pp. 7-8) There may also have been other initiatives taken by Officer Johnson or his counsel to voice objection to the no-pay decision and to attempt to have it reversed (see T. 31) and clearly, as Officer Johnson himself testified, he never abandoned his effort to receive these benefits (T. 31).

D. Coercion

The meanings of "coercion" are many. The Oxford English Dictionary (1971) gives as its primary meaning:

"Constraint, restraint, compulsion; the application of force to control the action of a voluntary agent."

The following examples are given, inter alia:

Shakespeare, Henry VII, Act II: "Such releases were made by compulsion, coercion and imprisonment;" Hobbes, Leviathan: "Winning men to obedience, not by coercion and punishing; but by persuasion." Mill, Liberty: "The moral coercion of public opinion."

"Coercion," like "waiver," is a difficult word to define accurately in the context of this case. If it means heavy economic pressure, then there is some evidence that coercion was used by the City on Officer Johnson to "convince" him and his attorney, Clarence Brown, that Johnson would end his era of relative starvation wages\* by accepting reinstatement without back pay. If, on the other hand, coercion should be deemed to carry a connotation of illegal or improper pressure, as in, e.t., Leeper v. Beltrami, 53 Cal. 2d 195 (1959), or Greenberg v. Equitable Life Assurance Soc., 34 Cal. App. 2d 994 (1973), then I find that there is no evidence of any such "coercion."

In any case, I find that Officer Johnson never was convinced to refrain from requesting back pay, either before or after his reinstatement. He was dedicated to the proposition that he was not going to relax until he had obtained a "hearing," and to him a "hearing" meant "the complete package." (T. 28) In other words,

\*During calendar years 1963-1968 Johnson earned a total of \$31,269.90, or an average of \$5,211.65 per year.

he was convinced, perhaps beyond anything that anyone could tell him, that if he were to receive a hearing he would be found not guilty of any offense against the City, his name would be cleared, he would be reinstated, and he would get all of the back financial and status benefits which he would have received had he not been discharged. Accordingly, on the basis of these conclusions of fact, it would appear that the question of whether coercion in the form of economic pressure was used against Officer Johnson is almost beside the point.

So far as concerns Officer Johnson's attorney at the time, Clarence S. Brown Esq., the term "coercion" may again miss the mark. The facts are that Attorney Brown hoped that Officer Johnson would receive back pay, and prior to the City Council meeting of November 6, 1968, he may even have expected that his client would receive back pay. However, when it became clear at the November 26th meeting that Councilman Stathos (one of Officer Johnson's most enthusiastic supporters on the City Council (T. 112) and a former Johnson attorney) was recommending only that Officer Johnson be reinstated and not that he should receive back pay -- influenced, apparently, by an opinion which he had received from City Attorney Jackson that it would be unlawful for the City to award back pay to Officer Johnson\* -- and when he saw that a majority of the Councilors were ready to adopt the Stathos formula, Attorney Brown began to get the idea that his client would not receive back pay. Nevertheless, he did not give up on the matter and continued to press for back pay for his client until he had a conversation with Attorney Jackson on or about January 2, 1969 in which Attorney Jackson told Attorney Brown flat

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\*See T. 91-92 and Exs. J-37 and C-2A

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out that the decision had been made without recourse that no back pay would be given. (T. 135) So far as appears from the record before me, this ended Attorney Brown's efforts to obtain back pay for his client -- although not, of course, Officer Johnson's own efforts.

The difficulty with the use of the word, "coercion," in the formulation of Issue D is that it may presume that, but for the possible intervention of coercion, the City and Officer Johnson (individually or through his counsel) were engaged in an equal, arms-length negotiation over whether Officer Johnson should be reinstated, and if so, on what terms. But this was not the situation. The City Council, with the aid of Attorney Jackson, and the ratifying aid of the Civil Service Board, made the decision as to what would be done. The Council's decision did not emerge from a negotiated process. Officer Johnson and his counsel were simply told the decision. (See, e.g., T. 135, 137) In that sense they were "coerced."

E.-G. Amount Of Back Pay And Benefits

There is little, if any, disagreement between the parties in regard to the back pay and benefits issues. Exhibit C-2 B is a memorandum prepared in November of 1972 by William Woska, Sacramento's Supervising Personnel Analyst, for John Liebert, Labor Relations Council for the City, calculating what Officer Johnson would have received in back pay and benefits had he been employed by the City during the period from his discharge in June of 1962 until his reinstatement in February of 1971. These calculations, which are



accepted by both parties, show that the total amount of pay which Officer Johnson would have earned during the period in question, was \$55,278 and that the total amount of "supplemental benefits" would carry a valuation of \$16,584.

Although during the course of the testimony of City Attorney Jackson before me, it at first seemed that there was some disagreement between the parties as to how the matter of supplemental benefits should be treated for reimbursement purposes (if it should be determined that Officer Johnson is to be reimbursed), it later developed, and I find, that it is the intention of both parties that, in the event of a decision to reimburse, Officer Johnson's account is to be credited with those supplemental benefits as to which, had he been on the job, he would have received no cash. On the other hand, as to such items of supplemental benefits that he might have been able to "cash out", such as accumulated leave balances, (See T. 127) it is the intention of the parties that reimbursement should take the form of cash payment.\* Since the parties did not submit any hard evidence as to the existence or extent of any such "cash out" benefits, I am unable to make any findings as to them, and the matter must be remitted to the parties for negotiations by them or for resubmission to me in the event that agreement is not possible. However, unless counsel for Officer Brown makes an offer of proof to me by October 30, 1981 that Officer Johnson would have been the recipient of one or more "cash out" benefits had he not been discharged, the matter will be closed.

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\*City Attorney Jackson testified that his recollection was that such benefits were not available to City of Sacramento employees until 1969. (T. 127)

From the total salary which Officer Johnson would have received had his tenure with the City been uninterrupted, there must be deducted, of course, the amount of his earnings from other sources during the discharge period. Exhibit J-26, a claim made on Officer Johnson's behalf by his then attorney, Phillip L. Isenberg, states that the wages earned by Officer Johnson on the outside during this period, totalled \$32,101.05. The City has accepted this figure, but counsel for Officer Johnson sought leave to furnish income tax returns for the period in question in order to make sure of the accuracy of the data contained in the Isenberg claim. Close examination of these income tax returns, which were furnished some time after the hearing, indicates that they are incomplete and therefore cannot be used as an independent basis for calculation. However, it is noted that the figures contained in these returns correspond closely with those in Exhibit J-26. I therefore find that the total outside earnings figure set out in Exhibit J-26 is accurate and that the amount of back pay lost by Officer Johnson as a result of his dismissal was \$23,176.95. In addition, the total amount of back benefits lost by Officer Johnson because of his dismissal, (without attempting to distinguish between credit and cash-out items) would be \$16,582.00, or a grand total of \$39,760.95.

Issue G asks me to find "the total amount of such back pay and benefits for the officer if annual interest at 7% compounded is added to the above figures." Assuming that the intent of this question is that I should find what the total figure at interest of 7% compounded annually amounts to for the period from

the effective date of re-employment on February 3, 1969, to the present, I find that the total is \$94,250.61.\* However, I find that since it is not the intention of the parties that Officer Johnson is to be paid in cash for any of the supplemental benefits, except in the case of any "cash-out" items, adding compound interest to the supplemental benefit figure would appear inappropriate. Assuming, therefore, that the intention of the parties is that the factfinder calculate the amount of back pay compounded annually at 7% for 12-3/4 years, that figure is \$54,939.37.

October 16, 1981  
Sacramento, California

*John L. Saltonstall, Jr.*  
\_\_\_\_\_  
John L. Saltonstall, Jr.

\*This represents a 7% annual compounding of \$39,760.95 for 12-3/4 years.

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# RESOLUTION NO.

ADOPTED BY THE SACRAMENTO CITY COUNCIL ON DATE OF

RESOLUTION AUTHORIZING PAYMENT OF \$45,000 TO  
POLICE OFFICER ELBERT JOHNSON

WHEREAS the City Council has considered the request of Police Officer Elbert Johnson for lost compensation resulting during the period between his dismissal in June, 1962, and his reinstatement in February, 1969, and

WHEREAS the City Council has received and considered the opinion dated October 16, 1981, of its factfinder on this issue, and

WHEREAS although the City is under no legal obligation to pay Elbert Johnson any sum of money resulting from or arising out of his dismissal as a patrolman in June, 1962, nonetheless the City Council finds that payment of the sum provided for in this resolution serves a public purpose and a public benefit because it enhances racial harmony in the community and morale among employees by demonstrating that the City will do justice to its employees and others in the community;

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SACRAMENTO that the City Manager is authorized and directed to pay Police Officer Elbert Johnson the sum of Forty-five Thousand Dollars (\$45,000) as reimbursement for lost compensation during the period between his 1962 dismissal and 1969 reinstatement, subject to the condition that Elbert Johnson and his attorney first execute the attached "Release and Acknowledgment."

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MAYOR

ATTEST:

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CITY CLERK

RELEASE AND ACKNOWLEDGMENT

In consideration of the payment of Forty-five Thousand Dollars (\$ 45,000.00) in full satisfaction of any claims he may have against the City of Sacramento, its employees or agents, receipt of which is hereby acknowledged, the undersigned ELBERT JOHNSON does hereby declare and acknowledge that he shall have, and make, no additional claim against the City of Sacramento, its officers, employees or agents, arising directly or indirectly out of any acts or omissions resulting from, arising out of or relating to his dismissal as a patrolman in June, 1962, by the City of Sacramento, its officers, employees or agents. Declarant understands that this acknowledgment constitutes a waiver of any pre-existing claims, specifically intends hereby to waive the protections of Section 1542 of the California Civil Code, and agrees that he will in the future refrain from any action designed to enforce or obtain redress as to such claims.

Declarant also acknowledges that he has no legally enforceable claim against the City, its officers, agents or employees to recover the sum paid hereunder or any other sum.

Declarant acknowledges he has read and understands the foregoing provisions, and has had the opportunity to discuss them fully with legal counsel of his choice.

DATED: 11-16-81

*Elbert Johnson*  
 \_\_\_\_\_  
 ELBERT JOHNSON, Declarant

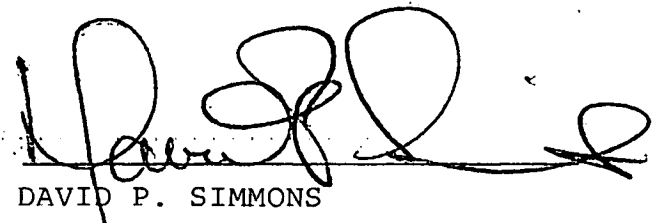
**APPROVED**  
 BY THE CITY COUNCIL  
 NOV 17 1981  
 OFFICE OF THE  
 CITY CLERK

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ATTORNEY'S DECLARATION

I have read the foregoing document and have explained its meaning to the declarant. I am satisfied that he understands its meaning and effect.

Dated: 11-16-81



DAVID P. SIMMONS

Attorney for ELBERT JOHNSON,  
Declarant

**APPROVED**  
BY THE CITY COUNCIL

NOV 17 1981

OFFICE OF THE  
CITY CLERK

81-855 30

# RESOLUTION NO.

ADOPTED BY THE SACRAMENTO CITY COUNCIL ON DATE OF

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POLICE OFFICER ELBERT JOHNSON

WHEREAS the City Council has considered the request of Police Officer Elbert Johnson for lost compensation resulting during the period of his dismissal in June, 1962, and his reinstatement in February, 1969, and

WHEREAS the City Council has received and considered the opinion dated October 16, 1981, of its factfinder on this issue, and

WHEREAS although the City is under no legal obligation to pay Elbert Johnson any sum of money resulting from or arising out of his dismissal as a patrolman in June, 1962, nonetheless the City Council finds that payment of the sum provided for in this resolution serves a public purpose and a public benefit because it enhances racial harmony and employee morale, particularly among minorities, by demonstrating that the City will do justice to its employees and others in the community;

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SACRAMENTO that the City Manager is authorized and directed to pay Police Officer Elbert Johnson the sum of Forty-five Thousand Dollars (\$45,000) as reimbursement for lost compensation between the period of his 1962 dismissal and 1969 reinstatement, subject to the condition that Elbert Johnson and his attorney first execute the attached "Release and Acknowledgment."

\_\_\_\_\_  
MAYOR

ATTEST:

**APPROVED**  
BY THE CITY COUNCIL

NOV 17 1981

OFFICE OF THE  
CITY CLERK

\_\_\_\_\_  
CITY CLERK

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RELEASE AND ACKNOWLEDGMENT

In consideration of the payment of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) in full satisfaction of any claims he may have against the City of Sacramento, its employees or agents, receipt of which is hereby acknowledged, the undersigned ELBERT JOHNSON does hereby declare and acknowledge that he shall have, and make, no additional claim against the City of Sacramento, its officers, employees or agents, arising directly or indirectly out of any acts or omissions resulting from, arising out of or relating to his dismissal as a patrolman in June, 1962, by the City of Sacramento, its officers, employees or agents. Declarant understands that this acknowledgment constitutes a waiver of any pre-existing claims, specifically intends hereby to waive the protections of Section 1542 of the California Civil Code, and agrees that he will in the future refrain from any action designed to enforce or obtain redress as to such claims.

Declarant also acknowledges that he has no legally enforceable claim against the City, its officers, agents or employees to recover the sum paid hereunder or any other sum.

Declarant acknowledges he has read and understands the foregoing provisions, and has had the opportunity to discuss them fully with legal counsel of his choice.

DATED: \_\_\_\_\_

ELBERT JOHNSON, Declarant



ATTORNEY'S DECLARATION

I have read the foregoing document and have explained its meaning to the declarant. I am satisfied that he understands its meaning and effect.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Attorney for ELBERT JOHNSON,  
Declarant

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November 13, 1981

The Honorable Mayor Phillip Isenberg  
and Members of the Council  
City of Sacramento  
City Hall  
Sacramento, CA 95814

The purpose of this letter is to express my thoughts and feelings regarding the way the issues of my employment, termination and reinstatement has been handled by the city administration. In particular, I am here to publicly express my deep appreciation for the hours of effort by Councilman Dan Thompson.

My thoughts and feelings are best described as being relieved that it is finally resolved. This process, which began in 1966 with an indepth conversation with Howard L. Harris, has involved many persons who have encouraged and demonstrated a faith in me. The many associations and individuals are too numerous to list here; however, I feel obligated to mention the following:

Sacramento Police Officers Association  
Sacramento Human Relations Committee  
Sacramento NAACP  
Sacramento Urban League  
Oak Park Action and Service (OPAS)  
Sacramento "Ten Plus"  
Shiloh Baptist Church

The resolution of this issue and the way it has been managed makes me proud to be a Sacramentean.

Sincerely,



Elbert V. Johnson  
Sacramento City Police Department

EVJ:pi



CITY OF SACRAMENTO

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JAMES P. JACKSON  
CITY ATTORNEY

THEODORE H. KOBEY, JR.  
ASSISTANT CITY ATTORNEY

LELIAND J. SAVAGE  
SAMUEL L. JACKSON  
WILLIAM P. CARNAZZO  
SABINA ANN GILBERT  
STEPHEN B. NOCITA  
CHRISTINA PRIM  
DEPUTY CITY ATTORNEYS

DEPARTMENT OF LAW

812 TENTH ST. SACRAMENTO, CALIF. 95814  
SUITE 201 TELEPHONE (916) 449-5346

November 13, 1981

RECEIVED  
OFFICE OF THE MAYOR

NOV 13 1981  
AM PM  
7 8 9 10 11 12 1 2 3 4 5 6

Hon. City Council  
Council Chamber  
Sacramento, California

Re: ELBERT JOHNSON

Dear Council Members:

I enclose a copy of the "Release and Acknowledgment" which has been given to David Simmons for execution prior to the Council meeting on November 17, 1981.

I also enclose a copy of the resolution to be considered by the Council at that meeting. I wish to call special attention to the findings of public purpose and benefit contained in the third paragraph of said resolution. It is essential that the City Council make findings of public purpose and benefit at the time of approving any payment to Officer Johnson. (See enclosed legal opinion prepared by Deputy City Attorney Diane Balter.) The Council should be in complete agreement with the findings, and I recommend that the Council discuss them during the Council meeting on November 17 prior to acting on the resolution. If you wish to modify the present findings in the resolution, or wish to add findings, please be prepared to do so at the Council meeting. Also, please give me a call if you have any questions or suggestions.

Very truly yours,

*James P. Jackson*  
JAMES P. JACKSON  
City Attorney

JPJ/p

Enclosures

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RELEASE AND ACKNOWLEDGMENT

In consideration of the payment of Forty-five Thousand Dollars (\$45,000) in full satisfaction of any claims he may have against the City of Sacramento, its employees or agents, receipt of which is hereby acknowledged, the undersigned ELBERT JOHNSON does hereby declare and acknowledge that he shall have, and make, no additional claim against the City of Sacramento, its officers, employees or agents, arising directly or indirectly out of any acts or omissions resulting from, arising out of or relating to his dismissal as a patrolman in June, 1962, by the City of Sacramento, its officers, employees or agents. Declarant understands that this acknowledgment constitutes a waiver of any pre-existing claims, specifically intends hereby to waive the protections of Section 1542 of the California Civil Code, and agrees that he will in the future refrain from any action designed to enforce or obtain redress as to such claims.

Declarant also acknowledges that he has no legally enforceable claim against the City, its officers, agents or employees to recover the sum paid hereunder or any other sum.

Declarant acknowledges he has read and understands the foregoing provisions, and has had the opportunity to discuss them fully with legal counsel of his choice.

DATED: \_\_\_\_\_

ELBERT JOHNSON, Declarant

ATTORNEY'S DECLARATION

I have read the foregoing document and have explained its meaning to the declarant. I am satisfied that he understands its meaning and effect.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Attorney for ELBERT JOHNSON,  
Declarant

30

# RESOLUTION NO.

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RESOLUTION AUTHORIZING PAYMENT OF \$45,000 TO  
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NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SACRAMENTO that the City Manager is authorized and directed to pay Police Officer Elbert Johnson the sum of Forty-five Thousand Dollars (\$45,000) as reimbursement for lost compensation during the period between his 1962 dismissal and 1969 reinstatement, subject to the condition that Elbert Johnson and his attorney first execute the attached "Release and Acknowledgment."

\_\_\_\_\_  
MAYOR

ATTEST:

\_\_\_\_\_  
CITY CLERK



# CITY OF SACRAMENTO

W

JAMES P. JACKSON  
CITY ATTORNEY

THEODORE H. KOBEY, JR.  
ASSISTANT CITY ATTORNEY

LELIAND J. SAVAGE  
SAMUEL L. JACKSON  
WILLIAM P. CARNAZZO  
SABINA ANN GILBERT  
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CHRISTINA PRIM  
DEPUTY CITY ATTORNEYS

## DEPARTMENT OF LAW

812 TENTH ST  
SUITE 201

SACRAMENTO, CALIF. 95814  
TELEPHONE (916) 449-5346

October 30, 1981

### MEMORANDUM

TO: JAMES P. JACKSON, City Attorney

FROM: DIANE B. BALTER, Deputy City Attorney

RE: UPDATE: REQUEST OF PATROLMAN ELBERT JOHNSON FOR BACK PAY

You have asked for an updating of David Benjamin's memorandum of June 1, 1978, relating to Patrolman Elbert Johnson's request for back pay. The issue presented was whether payment of the back pay could be (successfully) challenged in a CCP §526a taxpayer suit.

David's conclusion was that payment to Johnson could result in a successful taxpayer suit under CCP §526a. His conclusion that the expenditure could constitute waste under CCP §526a resulted from an assumption that no "demonstrable benefit to the public" would result from the payment.

If this negative assumption is removed from David's analysis, his conclusion can be restated in the following two ways:

1. Favorable action on Patrolman Johnson's request would not result in a successful taxpayer challenge if

(a) An enforceable obligation to Patrolman Johnson exists; or

(b) Payment would result in a demonstrable public benefit.

2. Favorable action on Patrolman Johnson's request could be successfully challenged by a taxpayer only if

(a) There is no enforceable obligation to Patrolman Johnson; and

(b) Payment results in no demonstrable public benefit.

It should be noted that in the case analyzed, in the 1978 memo, Los Altos Property Owners Assn. v. Hutcheon (1977) 69 Cal.App.3d 22, the school consolidation expenditure challenged came within the definition of §526a "waste" for pleading purposes because the complaint alleged there had been no "finding of additional public benefit" from selecting the more expensive plan instead of the less expensive one. It is my reading of the case that the 526a challenge would have failed if the school board had made findings, even informal ones, that the more expensive plan conferred "additional public benefits."

If the school board had made those findings, it is unlikely that a court would have interfered. A court will not disturb a legislative finding of public purpose - and, presumably, public benefit - so long as it has a reasonable basis. Jarvis v. Cory (1980) 28 Cal. 3d 562, 578 fn. 10. The rule has been applied in a case alleging waste under CCP §526a, City of Ceres v. City of Modesto (1969) 274 Cal.App.2d 545:

Admittedly, the term "waste" as used in Section 526a means something more than an alleged mistake by public officials in matters involving the exercise of judgment or wide discretion. To hold otherwise would invite constant harassment of city and county officers by disgruntled citizens and could seriously hamper our representative form of government at the local level. Thus, the courts should not take judicial cognizance of disputes which are primarily political in nature\*, nor should they attempt to enjoin every expenditure which does not meet with a taxpayer's approval. On the other hand, a court must not close its eyes to wasteful, improvident and completely unnecessary public spending, merely because it is done in the exercise of a lawful power." (224 C.A.2d at 555)

The 1978 memo emphasizes the last sentence of the foregoing passage from City of Ceres in reaching its conclusion; my view is that the emphasis properly rests on the earlier portions of the passage, leading to a different conclusion.

I believe that my view of the proper emphasis is reflected by the First District Court of Appeal, Division Three,\*\* paraphrase of the City of Ceres case in Trim, Inc. v. County of Monterey (1978) 86 Cal.App.3d 539, 543:

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\* Ironically, this is exactly what appears to have happened in the Los Altos case.

\*\* Los Altos v. Hutcheon was decided by Division Two of the same district the previous year.



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However, the term "waste" as used in section 526a means more than an alleged mistake by public officials in matters involving the exercise of judgment or discretion. Although the court must not close its eyes to wasteful, improvident and completely unnecessary spending, it should not attempt to enjoin every expenditure which does not meet with a taxpayer's approval. (City of Ceres v. City of Modesto (1969) 274 Cal. App. 2d 545, 555 [79 Cal.Rptr. 168].) A taxpayer complaining of government waste may state a cause of action under section 526a by alleging that funds are being expended for a project with no public benefit and no useful purpose (City of Ceres, supra, at p. 556), or for a plan costing much more than any alternative plans considered, without a finding of any additional public benefit (Los Altos Property Owners Assn. v. Hutcheon, supra, 69 Cal.App.3d 22).

Supreme Court decisions also emphasize legislative discretion. See Jarvis. V. Cory, supra and County of Alameda v. Carleson (1971) 5 C.3d 730, 745-746:

It is generally held that in determining whether an appropriation of public funds is to be considered a gift, the primary question is whether the funds are to be used for a "public" or "private" purpose; the benefit to the state from an expenditure for a public purpose is in the nature of consideration and the funds expended are therefore not a gift even though private persons are benefitted therefrom. [citations] The determination of what constitutes a public purpose is primarily a matter for the Legislature, and its discretion will not be disturbed by the courts so long as that determination has a reasonable basis." [citations]

In other words, if the legislature determines that an expenditure benefits the public, the fact that it also benefits private persons does not expose the expenditure to successful challenge.

See also Dittus v. Cranston (1959) 53 C.2d 284, 286: "The power to determine the facts upon which appropriations are based rests exclusively in the legislative and executive branches of the government and the function of the courts is to determine the issues of law presented by the face of the legislation and relevant facts of which they can take judicial notice." Dittus and cases cited therein confirm that a

legislature can choose to make payments to private parties for property robbed of value by government action or destroyed by government order, even though the parties would not have had an enforceable claim against the government if no payment had been made. Dittus is close in its analysis to the instant case, which can be described as a case where Johnson's job rights were destroyed by the government and although he has no enforceable claim against the government, the government is considering a voluntary payment to him anyway.

The rule that the legislative determination controls applies where the private persons benefitted are a big class of people, e.g., state employees (Jarvis v. Cory, supra) or the indigent (County of Alameda v. Carleson, supra) or just a few landowners who are benefitted by the construction of private roads. (Wine v. Boyar (1963) 220 Cal.App.2d 375.) Of course, if the group of persons privately benefitted is small (or just one person, as in our case), the impression of no public benefit is easier to create. However, if public benefit is found to exist by the legislative body, the fact that one (and only one) private individual is also benefitted should not, in itself, make the expenditure wasteful or illegal.

I would therefore elaborate on the 1978 memo by suggesting that the City Council be advised to determine whether there is a public purpose or demonstrable public benefit to be achieved by payment to Patrolman Johnson or whether it would be "completely unnecessary public spending."

Among the public purposes and benefits which the Council might perceive are promotion of racial harmony and justice in the community and enhancement of worker morale by reaffirming that the City gives its employees a "fair shake" and does not rely on technicalities to avoid doing so.\* It is possible that the Council, as the legislative body, will perceive other public benefits.

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\* In Jarvis v. Cory, supra, the Legislature had found the salary adjustments "necessary to ensure the continued recruitment and retention of qualified and competent employees." The Supreme Court also noted "at least three other public purposes served: (1) avoidance of legal disputes over colorable equal protection claims; (2) provision of funds to allow salary-setting bodies to fulfill their duties, and (3) resolution of continuing uncertainty about proper salary levels." (28 C.3d 562, 578-579, footnote 10)

October 30, 1981

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I wish to emphasize that the Council must do more than pay lip service to the notion of public benefit. There should be genuine discussion on the issue, and any motion supporting payment to Patrolman Johnson should articulate the public benefits the Council perceives will result from the expenditure.

If the Council finds a public benefit will be achieved and that the benefit justifies the expenditure, then a taxpayer challenge on the ground that a private person is also benefitted should fail (condition 1(b) above is fulfilled, and condition 2(b) is missing).

Incidentally, it is possible that the Council will perceive public benefits, but will also conclude that the benefits do not justify an expenditure in the amount found by the fact-finder to be the back pay requested. There is nothing to preclude payment of a lesser sum.

Finally, if the Council is not persuaded that a demonstrable public benefit justifies the expenditure, it can determine not to make the payment.



DB:mb