CCC
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CITY COUNCIL MEETING
DECEMBER 19, 1984

COMMENTS BY THE PUBLIC ON NON AGENDA ITEMS

APPEAL OF MICHAEL FAUGHT FOR AN EXCEPTION TO CITY POLICY PERTAINING TO THE HIRING OF RELATIVES IN ORDER TO ALLOW HIS EMPLOYMENT AS A FIREMAN WITH THE CITY OF LODI

Mr. J. Anthony Abbott, Attorney-at-law of the firm of Mayall Hurley, et al, addressed the Council advising that his firm represents Michael Faught in all matters arising out of his prospective employment as a fireman with the City of Lodi. Mr. Faught has been denied employment by the City of Lodi as a fireman on the sole basis that his father, Russell Faught, already works as a fire engineer in the department. The basis for the refusal of employment was Resolution No. 83-15, adopted by the City Council March 2, 1983. It is Mr. Faught's position that the denial of employment to him is a misapplication of the policy embodied in Resolution No. 83-15, and constitutes insivious discrimination under Federal and California law. Mr. Faught hereby petitions the City Council to reverse the decision of City Manager Henry Glaves, and ordering the hiring of Mr. Faught as a fireman in the Lodi Fire Department.

Mr. Abbott then addressed the Council in detail regarding the reasons he feels support for this request.

Mr. Al Haupt, 727 Grant Ave., Lodi, also addressed the Council speaking on behalf of Mr. Faught's appeal.

Following a brief discussion, Mayor Snider directed the City Clerk to place on the January 2, 1985 Regular Meeting Agenda, the appeal of Michael Faught for an exception to City policy pertaining to the hiring of relatives in order to allow his employment as a fireman with the City of Lodi.

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December 18, 1984

Members of the City Council
City of Lodi
221 West Pine Street
Lodi, CA 95240

Re: Michael Faught

Gentlemen:

This firm represents Michael Faught in all matters arising out of his prospective employment as a fireman with the City of Lodi. As you are probably aware, Mr. Faught has been denied employment by the City of Lodi as a fireman on the sole basis that his father, Russell Faught, already works as a fire engineer in the department. The basis for the refusal of employment was resolution No. 83-15, adopted by the City Council March 2, 1983. It is Mr. Faught's position that the denial of employment to him is a misapplication of the policy embodied in resolution No. 83-15, and constitutes invidious discrimination under Federal and California law. Mr. Faught hereby petitions the City Council to reverse the decision of City Manager Henry Glaves, and ordering the hiring of Mr. Faught as a fireman in the Lodi Fire Department. The reasons in support of this request are set forth in more detail as follows:

FACTS

Michael Faught is a 24 year old man who was born in Stockton and raised in Lodi. In November of 1979 he became employed as a beginning fireman at the Woodbridge Fire Department. Two years thereafter, he became a fire engineer. The next position to which he could hope to aspire in the Woodbridge Fire Department is Captain, and there are three young Captains still in those positions. Because of this, as well as a long standing desire to join his home town fire department, he began working toward obtaining a position with the Lodi Fire Department. He took the fire department test in 1980, and placed ninth on the list. Four years later, in 1984, he took the test again, and placed sixth. It is this placement on which Michael Faught bases his current application for employment. The five candidates ahead of Mr. Faught on the list have all been hired, and hence he presently stands number one. At no time during the testing or application procedure, prior to time at which Mr. Faught became the most eligible candidate for the next opening,

was there ever any mention that he would be denied employment by reason of the fact that his father was already employed by the City.

Michael Faught was confident, due to his high placement on the Lodi Fire Department list, that he would be hired in due course. Therefore, he did not avail himself of opportunities to apply at the Stockton Fire Department. He might well have taken advantage of such opportunities had he known that at the eleventh hour employment would be denied him on the basis of his familial relationship.

As we understand it, there is currently no question that Mr. Faught is the most qualified applicant, and that no reasons exist for the denial of his employment except the fact that his father is already employed by the City as a fire engineer.

THE POLICY

As aforementioned, the current policy of the City of Lodi is set forth in resolution No. 83-15. This resolution initially states that no employee or prospective employee shall be discriminated against on the basis of his familial relationship. The policy, in pertinent part, reads as follows:

> "No employee, prospective employee, or applicant shall be improperly denied employment or benefits from employment on the basis of his or her familial or marital status.... Familial status is defined as the state of an individual specific relative working for the City of Lodi, and shall include child, brother sister, parent, or parent-in-law."

The resolution creates two exceptions to this policy, the first of which is where the employee or prospective employee in question would be under the direct supervision of the other spouse or relative. This does not apply to the situation of Michael Faught, because his father does not act in a supervisory capacity.

The second exception allows the City, in its discretion, to refuse to place both relatives

> "...in the same department, division, or facility where such has the potential for creating adverse impact on supervision, safety, security, or morale, or involves potential conflicts of interest."

It is this provision on which the City Manager relies in refusing to employ Michael Faught.

It is our understanding, pursuant to conversations with City Attorney Ronald Stein and City Manager Henry Glaves that this policy is to be applied on a case by case basis. That is, the city administration will use its discretion in evaluating each case on its merits, and not apply a blanket exclusion. Not withstanding assurance, it is our understanding that this blanket exclusion is just what has occurred in this case.

MEETING OF DECEMBER 4, 1984

On December 4, 1984, the undersigned and Michael Faught met with City Attorney Ronald Stein, and City Manager Henry Glaves, to discuss the reasons behind the City's position. Initially, it was explained that the City did in fact rely on subparagraph two of resolution No. 83-15, which allows the City to refuse to place one relative in a department in which the other relative already works. I then asked what specific facts in this situation led the City to believe that the hiring of Michael Faught would have an adverse impact on supervision, safety, security or morale.

Mr. Stein and Mr. Glaves assured me that there was nothing about this situation of Michael Faught which specifically made him a potential problem. His employers at Woodbridge Fire Department were unanimous in their praise of Mr. Faught's abilities, and his higher ranking on the fire department test was undeniable. In short, but for his relationship with his father, Russell Faught, he would certainly have been hired.

Mr. Glaves then explained that his interpretation of resolution No. 83-15 empowered him, and indeed directed him, to refuse to employ anyone in the police department or fire department where the prospective employee already had a relative in the department. At that point it became apparent that Mr. Faught was not being judged on a case by case basis, as had been previously indicated, but was being made the victim of a blanket exclusion which applied to police and fire departments only. In other words, where a prospective placement in the police department or fire department was concerned, no case by case analysis would occur; rather, the prospective employee would be declined employment simply on that basis. This is a clear contravention of the policy expressed in the opening paragraph of resolution No. 83-15, which prohibits discrimination based solely on familial status.

ARGUMENT

1. The city administration has misapplied the policy.

The city administration can cite no reason for its refusal to hire Michael Faught other than his familial relationship with his father. There are no facts which have been brought to our attention which would lead to the conclusion that Mr. Faught's employment has the potential for creating an adverse impact on morale, supervision, or safety. Mr. Glaves has indicated that some employees might complain that the hiring was the result of nepotism, but such complaining would certainly not be warranted in light of Michael Faught's high placement on the hiring list. Supervision should not be a problem, because Russell Faught does not act in a supervisory capacity. Regarding safety, the City has expressed concern that the Faughts, father and son, might be called on to fight the same fire, and that their close familial relationship might hinder their objective assigning of duties in such a situation. In the first instance, it would be an extremely rare instance were one would be supervising the other. In the second, it is obvious that many close relationships exist in the work environment, which might leave the supervisor to favor one employee over another. That such favoritism might conceivably occur in the absence of any facts to indicate that it will occur, is not a valid ground for denial of employment.

In short, all reasons advanced by the City for its refusal to hire Mr. Faught are reasons which allegedly apply to fathers and sons in general. It is admitted that there is nothing specific in the relationship between Russell Faught and Michael Faught w ich creates the forseeable potential for such problems. Under these circumstances, the refusal to hire Michael Faught is a clear violation of the City's policy against discriminating against persons simply by reason of their familial status.

2. The policy, as applied by the City administration, invidiously discriminates.

The equal protection clause of the United States and California Constitutions, and supporting statutory and case law, prohibits discrimination against persons based on characteristics which they cannot change. The most striking examples would be race and sex. It would seem evident that one of the other characteristics which a prospective employee cannot change is his familial relationship with others. Yet, it is on this basis, and solely on this basis, that the City denies Michael Faught employment.

Previous case law in the area of employment discrimination based on familial status has centered on the relationship of the husband and wife. Basically, the cases have come to the conclusion that the fundamental right to marry must be weighed against the employers interest in avoiding conflict of interest and favoritism. The cases have generally come down on the side of the prospective employee, except where the prospective employee would be supervised by his/her spouse. (See, e.g. Cutts vs. Fowler (1982) 692 Fed.2d 138).

A case which is instructive in the area of non-spousal relationships is Limongelli vs. Postmaster General of the U.S. (1983) 707 Fed.2d 368. In that case Limongelli was seeking employment with the Costa Mesa Post Office. The Postmaster V.P. was temporarily assigned out of the area, and during that time, a position opened up to which Limongelli was one of five applicants. The job went to the nephew of the Postmaster V.P., and Limongelli cited this as nepotism and invidious discrimination. The Court concluded that the Postmaster did not hire his nephew, rather others did. And, significantly, the nephew was selected on the basis of his qualifications, which were better than Limongelli's. The Court held there was no violation.

So too, in our situation, Michael Faught has qualified for the job of fireman based on merit not on the basis of his relationship with his father. Further, there is no current prospect that either Russell Faught or Michael Faught will come to supervise the other. Of course, this is always a bare possibility; however, it cannot be said at this time that such a development is probable.

The application of a policy such as the one embodied in resolution No. 83-15 must, at bottom, be a weighing process. The interest of the City in avoiding problems of favoritism, nepotism, and supervision must be weighed against the interest of the prospective employee who has earned the right to be selected. In the case of Michael Faught, the City can point to no specific evidence whatsoever which does no apply to any father and son situation. Hence, the circumstances do not support discrimination against Michael Faught based solely on his familial status.

3. The City is estopped to refuse employment.

Briefly, the doctrine of estoppel applies where one party misleads the other into acting to his detriment. Where this has occurred, the party who has done the misleading will not be allowed to maintain it's position to the detriment of the injured party.

In this case, Michael Faught has taken the Lodi Fire Department examination twice. He has placed very high on the examination on both occasions, which has given rise to the justifiable expectation that he would be hired as a fireman. Further, Lodi's policy against employment of relatives has been overlooked on several occasions, further giving rise to the impression that the policy would not be applied in Mr. Faught's case. Specifically, in 1976, Janet Curry was hired by the City, notwithstanding that her husband, Dave Curry, was Assistant Utilities Director. Again, on September 15, 1980, Virgil Monroe, the son of Animal Control Officer Earl Monroe, was hired by the Police Department. Finally, in September of 1974, Jane Randolph, the sister of Police Officer Dan Randolph, was hired as a Police Dispatcher. There have been no known problems arising out of these relationships which have been brought to our attention.

Because he had no idea that employment would be denied him on the basis of his relationship with his father, Michael Faught took the fireman's test twice, and declined opportunities to apply with the City of Stockton. We are now given to understand that it is the City policy that a person in the position of Michael Faught will not even be allowed to take the test. However, this does not change the fact that Mr. Faught has changed position in reliance on the City's perceived policy. Under the circumstances, the City is estopped to deny employment.

CONCLUSION

This not a situation where an attempt is being made to foist an unqualified, undesirable employee upon the City. Testimony from all quarters indicates that Mr. Faught is a quality applicant, well qualified for employment as a fireman. Mr. Faught evidences an exemplary desire to follow in his father's footsteps, serving the town in which he has spent virtually all of his life. In the absence of a demonstrable potential for problems arising out of the familial relationship, he should be hired forthwith.

Therefore, we ask that the City Council reconsider the decision of City Manager Henry Glaves, and offer employment to Michael Faught as a beginning fireman. Thank you for your anticipated cooperation.

Very truly yours,

MAYALL HURLEY KNUTSEN SMITH & GREEN

By _____
J. ANTHONY ABBOTT

JAA/rks/ct10