



Office of the City Manager

May 16, 2014

To: Mayor and City Councilmembers

From: Christine Daniel, City Manager 

Subject: Mason Tillman Associates Report

As you may recall, the City retained Mason Tillman Associates (MTA) last year to conduct interviews with twenty individuals who filed complaints with the Berkeley Branch of the NAACP, and to review current City policies and procedures related to workforce recruitment, retention and promotion. The resultant report has now been completed and a copy is attached for your review. The report presents MTA's analysis of the City's Personnel Rules and their application to the City's recruitment, hiring and promotion processes. The report spans events from the 1980's to as recent as 2013 and includes recommendations to enhance transparency, improve accountability of management personnel and develop processes to ensure equitable application of rules and regulations. City staff are now reviewing the report and will provide an analysis of its conclusions and identify improvements to the City's current processes and policies.

It should be noted that the MTA report includes specific statements reflecting the perspectives of the twenty individuals interviewed. The identity of these individuals will remain confidential and will be maintained by MTA. Given this, staff is unable to respond to specific circumstances described in these statements. However, the identification of themes as described by the twenty interviewees will assist the overall policy review that staff is currently undertaking. This review will involve discussion with the Personnel Board as the advisory body charged with oversight of these matters, and the various labor unions whose memoranda of agreements include numerous processes and procedures (e.g. grievance processes, notification of vacancies, layoff placement processes) that relate to the report's findings. Staff has also provided a copy of the report to the NAACP and looks forward to discussing it with them. Once all discussions and reviews have been completed, staff will provide a report to the City Council.

Enc.

cc: William Rogers, Deputy City Manager
Ann-Marie Hogan, City Auditor
Mark Numainville, City Clerk
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City of Berkeley

Top-Line Report of NAACP Complainant Interviews

MASON TILLMAN
ASSOCIATES, LTD

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I. INTRODUCTION

This report is a review of the City of Berkeley’s employment practices in light of complaints brought forth by 20 current and former City of Berkeley employees (hereafter “employees”). The report presents the analysis, assessment, and implications of the complainants’ interviews in light of the City of Berkeley’s Personnel Rules. Personnel policy modifications are also suggested as actions to be taken by the City of Berkeley. The personnel policy framework was provided by the City of Berkeley’s current Personnel Rules, Title 4 of the Berkeley Municipal Code (BMC), and Ordinance No. 2342 – N.S. codified in the BMC between 1940 and 1995.

II. METHODOLOGY

The complaints were filed with the Berkeley branch of the National Association for the Advancement of Colored People (NAACP). Mason Tillman interviewed 20 employees in person. The interviews were recorded, transcribed, and coded for analysis. The interviewees included employees from different departments. The interviewed employees had a wide variety of backgrounds, experience, educational qualifications, and years of service. They were all people of color and diverse in terms of ethnicity, gender, and age. To protect the anonymity of employees, the testimony will be discussed in terms of the patterns and themes that emerged from the accounts. The statements presented below illustrate the patterns and themes identified by the employees. Where necessary, statements cited have been edited to protect the anonymity of the employees. These decisions were made because the interviewees currently employed expressed fear of retaliation.

The dominant themes were the absence of transparency in the hiring and promotion process, failure to hold supervisors, managers, and directors accountable for their actions, and inconsistent application of rules and regulations in the hiring and promotion process. A number of the concerns discussed in the interviews occurred as recently as 2013 and spanned events that took place as early as the 1980s.

The interviews were analyzed in light of the application of the Personnel Rules by the City of Berkeley, directors, department managers, and supervisors. Thus, the Personnel Rules were reviewed to determine the standards that governed the recruitment, hiring, retention, and termination of City of Berkeley employees. The analysis of the City of Berkeley’s Personnel Rules also provided a basis for the recommendations to enhance transparency, improve accountability of management personnel, and provide processes to ensure equitable application of rules and regulations. The Cities of Hayward and



Fremont's personnel policies were also reviewed to identify best management practices of cities within the region of comparable size.

The following chapters of the Personnel Rules track the concerns articulated by the employees. Therefore, it is these chapters of the Rules which are discussed in this report:

- **Chapter 2.00 – General Provisions:** discussing policies related to fair employment
- **Chapter 3.00 – Classification:** discussing policies related to classification plans and revisions
- **Chapter 4.00 – Compensation:** discussing policies related to compensation plans and revisions
- **Chapter 5.00 – Applications and Applicants:** discussing policies related to announcements of vacancies, application processes, and notifications of application status
- **Chapter 6.00 – Examinations:** discussing policies related to examinations
- **Chapter 7.00 – Eligible Lists:** discussing policies related to establishment and expiration of eligible lists
- **Chapter 9.00 – Method of Filling Vacancies:** discussing policies related to promotions, certification of eligibles, and appointments, including provisional, temporary, and emergency appointments
- **Chapter 10.00 – Probationary Period:** discussing policies related to length of probationary periods and rejection of probationers
- **Chapter 11.00 – Employment Transactions:** discussing policies related to transfers, demotions, suspensions, reinstatements, discharges, and resignations

Title 4 of the BMC was also reviewed to obtain an overview of the personnel systems structure. An examination of Title 4 of the BMC prior to the last amendment in 1995 informed this analysis because it governed employees who have been employed with the City of Berkeley for over 20 years. Ordinance No. 2342 – N.S. was codified in Title 4 of the BMC and was approved in 1940. The ordinance included Section 6 entitled “Adoption Of Rules” which authorized the City Council to establish procedures to govern a variety of personnel matters.¹ In eliminating this section, the City Council's role in the current Title 4 was reduced to a passive participant that only reviews and adopts recommendations presented by the City Manager.

The following sections of the current Title 4 are discussed in the report:

- **Section 4.04.040 – Board – Affirmative action duties**

¹ Berkeley, Cal., Ordinance 2342 – N.S. (May 8, 1940). The City Council could establish procedures in order to prepare, install, revise, and maintain position classifications, formulate minimum standards and qualifications of each class, post *public* announcements of vacancies and examinations, conduct entrance and promotional examinations, evaluate employees during the probationary period, standardize hours of work, attendance and leave regulations, working conditions, and develop morale, welfare, and training etc.



- **Section 4.04.070 – Board – Organization, meetings and functions**
- **Section 4.04.100 – City Manager – Powers generally**
- **Section 4.04.110 – City Manager – Duties and responsibilities designated**

The statement in this report regarding the work conditions in the City of Berkeley are derived based solely on the employees’ interviews which are simply the perceptions of the employees. The scope of work for this report did not provide for an investigation or verification of the employees’ statements. Therefore, the complaints were neither investigated, nor verified.

III. FINDINGS

A. Complaints Regarding the Application of Personnel Rules

One of the major concerns expressed by the 20 interviewed employees was the need for transparency and consistent application of rules and regulations.

My primary concern ... there is a hiring process – and an interviewing process and they need to adhere to that process because when you step out of bounds with that process then you encounter problems. They’re dealing with the livelihood of, and the quality of life for employees. So, you [need to] follow the process. ... I can take being rejected. But if it’s not done properly then that’s an issue.

The lack of transparency in the hiring process affects employees’ quality of life and morale. The reported hiring practices reduce employee trust and confidence in the City of Berkeley.

1. Classification

Provision 3.05 states that new positions can be classified by the City Manager. This provision contradicts Title 4, Section 4.04.110 of the BMC requiring to the City Manager to submit class specifications and revisions to the Personnel Board and Section 4.04.070 B and E requiring the Personnel Board to review class plans and provide classifications for all employment.

In addition, the City Manager can reclassify a lower level class to a higher level class and promote all incumbent employees in the lower level class without competitive examination. However, provision 3.04 circumvents the approval process of the classification plan in the Personnel Rules. Provision 3.02 requires the Personnel Board to



review a classification plan recommended by the City Manager and the City Council to then adopt it. This provision also contradicts the review requirement in Sections 4.04.070 and 4.04.110 in Title 4 of the BMC which requires the Personnel Board to review position class plans, including class specifications and revisions to the plan, and make recommendations to the City Manager. The review, approval, and adoption process allows for a system of checks and balances in which changes and revisions to a classification plan are reviewed by an independent entity and recommendations on possible issues are provided to the City Manager. No major reclassification should be permitted without performing this process. In addition, provision 3.04 circumvents competitive examinations required to be provided by the Personnel Board in Title 4, Section 4.04.070 of the BMC.

Several employees identified disparate treatment with regard to classification of employment. It was noted by several employees that they were improperly classified, denied the appropriate classification, or forced to work outside of their classifications. In addition, they felt that policies and procedures were implemented based on a supervisor's decision to utilize a given rule or policy and procedure subjectively. Specific incidences of disparate treatment in connection with classifications are discussed below.

Interviewees expressed frustration that job descriptions and titles for positions in different classes have similar duties and responsibilities, but are compensated at different pay rates. In some cases, inequity in pay rates appeared to result from a wholesale reclassifications of all incumbent employees in a particular class.

Employees did not perceive that there was equity applied when classifying similar positions under similar working conditions.

So they refused to allow me to be compensated for all this [work] — that's why I said they manipulate the job classification process because they say this is your job classification, and yet, when you compare it to another job classification, well, if I'm doing all this City-wide policy development, reports with City Council, the other person is doing it, but they are getting paid more. Because of one or two words in a job classification title they get more pay? And so they've done that, not only to me, but to a few people.

Classifications are formal standards that justify pay differences for the work performed. As this interviewee showcases, the City of Berkeley's current use of classifications allows for employees to be assigned similar job responsibilities in different classifications with a different pay scale. The employee directly compares the job responsibilities assigned with pay, noting that City of Berkeley's use of classifications does not necessarily draw upon job responsibilities.



Employees also noted that job duties and responsibilities often did not change after a reclassification of their position, in the case of both demotions and promotions. This is a result of the lack of oversight of when reclassifying employees.

In addition, interviewees felt that there was a lack of transparency when changing job titles and descriptions. At least five interviewees felt that job titles and descriptions were changed to hire certain individuals or to prevent certain employees to from getting hired.

They changed the criteria on all the positions when certain people apply, whenever I applied for it, they've changed the criteria of the job position... They pick and they choose who they want to put in the position whether you had the experience or not.

The employee identified a mechanism through which nepotism takes form: hiring departments are able to manipulate job classifications, responsibilities, and eligibility criteria for a specific position. Such manipulation takes place not out of the workplace requirements or the City of Berkeley's need, but in order to select certain individuals while barring others from applying. Qualification criteria are used arbitrarily not to select the most qualified candidate under fair and equitable conditions, but to select specific individuals.

One employee retained the same job title over 25 years after the initial hire date. Accordingly, some employees are not able to advance in their chosen careers at the City of Berkeley after years of service. Instead, the selected individuals are groomed to become supervisors.

'Cause the person, who went for the position, they had already designated. They had training him for the position, and to be in the position. And he didn't have any supervisor experience or nothing.

There is supposed to [be] a procedure, but that procedure has been kicked out the door when it comes to certain individuals.

The perception of nepotism leads to low morale and a sense of inequity among affected employees. Nine out of the 20 interviewees felt that it was common practice for supervisors to hire friends or relatives. Oftentimes, interviewees felt particularly strong about the hiring decisions when qualified and tenured employees, in particular female and minority employees, were apparently entitled to the positions.

In comparison, the City of Hayward requires that all rules and regulation recommended by its Personnel Commission for adoption by the city council must undergo a public hearing.² A public hearing is also required for adoption of a classification plan by the

² HAYWARD, CAL. MUNICIPAL CODE, art. IV, § 2-4.12.



Hayward Personnel Commission.³ Changes to the classification plan must be recommended by the Human Resource Director and approved by the Personnel Commission.⁴ The City of Berkeley could increase transparency by offering public hearings prior to adoption of personnel rules and classification plans.

The City of Fremont also requires that the personnel rules are amended by the city council.⁵ Recommendations for amendments or revisions of the personnel rules are made by the city manager and reviewed by the civil service board before they are considered by the city council.⁶ This process was the rule in the City of Berkeley under the pre-1995 Title 4 of the BMC.

In addition, in the City of Fremont, classification plans must be formulated by the city manager or personnel officer in consultation with affected department heads and the civil service board.⁷ The City of Fremont's personnel rules provide parameters to determine a class, such as common education, experience, knowledge, and skill requirements, same descriptive title with "clarity to designate each position allocated to the class," and common tests of fitness.⁸ The personnel officer must determine and record the duties and responsibilities of all positions and establish a classification plan for the positions after consulting the department heads and civil service board.⁹ The classification plan should not only provide the title, description of duties and responsibilities, desired education, and experience, but also include all positions substantially similar with respect to duties, responsibilities, authority, and character of work.¹⁰ Therefore, similar positions will receive same pay to be applied "with equity under like working conditions to all positions in the same class."¹¹ In addition, reclassifications should be approved by the city manager if duties of a position have changed materially. The rules also expressly prohibit reclassification as a means to avoid restrictions surrounding demotions, dismissals, and promotions.¹² Although the City of Fremont's personnel rules also allow the city manager some discretion to amend and revise the classification plan, the city manager must follow the same procedures that established the original classification plan.¹³ Thus, all

³ HAYWARD, CAL. MUNICIPAL CODE, art. IV, § 2-4.21.

⁴ HAYWARD, CAL. MUNICIPAL CODE, art. IV, § 2-4.22.

⁵ FREMONT, PERSONNEL RULES, art. III, § 3.

⁶ *Id.*

⁷ FREMONT, PERSONNEL RULES, art. V, § 1; FREMONT, CAL. MUNICIPAL CODE, ch. 2.25, § 2.25.020.

⁸ FREMONT, PERSONNEL RULES, art. II, § 6.

⁹ FREMONT, PERSONNEL RULES, art. V, § 1.

¹⁰ *Id.*

¹¹ *Id.*

¹² FREMONT, PERSONNEL RULES, art. V, § 3.

¹³ FREMONT, PERSONNEL RULES, art. V, § 2.



amendments or revisions must be formulated in consultation with the department heads and civil service board.

2. Compensation

Section 4.04.070 also requires the Personnel Board to review the salary and wage plan as well as revisions and amendments to the plan. Provision 4.03 should also specify which Classification/Salary Resolution is referred to. This Resolution is not mentioned or defined anywhere else in the Personnel Rules. In addition, greater oversight is needed to monitor actual compensation of employees.

Four interviewees expressed one or more of the following concerns: they were not adequately compensated for the duties they perform; they received less pay than the white male predecessor or colleagues for the same duties and responsibilities; or they had to perform the same duties at a lower pay rate after their job title was eliminated.

I have been given numerous jobs to do that other people have been paid more to do, and I have been denied upward mobility, whereas other people have gotten promotions. The gentleman that is doing the job—my predecessor—he was promoted into [position] to do the job that I’m now doing, so he was promoted up to do the job... I’m not compensated for work that somebody else is paid more to do. And the fact of the matter is that I’m the only person that has had to do [multiple] jobs.

In making comparisons to the experiences and treatment of other employees, the interviewee identifies differences in job responsibilities, promotional opportunities, and pay. Job responsibilities and promotional opportunities relate to pay, as classification is seen as the City of Berkeley’s justification for differences in pay. Changes in classification and promotional opportunities with little transparency leave employees frustrated and concerned when other employees are treated differently or report having different experiences.

In contrast, the City of Fremont provides more transparency by enumerating in its personnel rules the five salary steps of each class and explaining the step increases and decreases as applied to promotions, reclassifications, and demotions.¹⁴ An eligible employee may be considered for the first salary step after six months of satisfactory service.¹⁵ The second step is available after an additional six months of satisfactory services.¹⁶ Each step thereafter may occur after one year of satisfactory service.¹⁷

¹⁴ FREMONT, PERSONNEL RULES, art. VI, §§ 3-6.

¹⁵ FREMONT, PERSONNEL RULES, art. VI, § 3.

¹⁶ *Id.*

¹⁷ *Id.*



3. Announcements

Provision 5.01 of the Personnel Rules requires the announcement of all examinations for career classifications. Six interviewed employees expressed the concern that this rule is not consistently enforced because some examinations or positions were not announced or posted. For example, one employee observed a supervisor sharing information related to a promotional examination with employees, excluding several employees of color.

In addition, the methods for posting these examinations are not clearly defined in the Personnel Rules. The provision requires a posting at the Human Resources Department. However, no specific location at the Human Resources Department is identified. This rule also gives discretion to the City Manager and Director of Human Resources to determine other posting methods.

Some interviewed employees expressed frustration about missing examinations because they were not aware of postings or even where they could be found. Many employees indicated that employment and promotional opportunities can be found in an internal newsletter, called *Berkeley Matters*. A few of them stated that the newsletter would be stapled to the paystubs while others indicated that they had to proactively request it.

I said [to my manager], “I never saw the position advertised.” He says, “Well, I talked to HR, and they told me that because they were on the list and working in the department, I didn’t have to do that.” And I said, “Well, [since I’ve been] here [numerous] years, that’s incorrect, and you as a Director and HR—I’m sure they are aware of that.” ... [W]e stayed on the list for a whole year, and I said, “I have been in the department forever ... and I was on the list, so what makes this any different than me? As a matter of fact, I have been there longer, so can you—how can you justify that?” ... And a lot of people did not have the opportunity to apply for those positions, because they were never notified.

Interviewees reported examples of when Provision 5.01, as it pertains to the advertisement of new positions and examination opportunities, was not followed. The lack of advertisement inhibits employee communication, prevents employees from accessing and applying for promotional opportunities, and decreases employee trust in the hiring process. An employee cited the length of employment with the City of Berkeley as justification for familiarity with existing policy and the right to a fair examination. The hiring manager’s practice prevented potential applicants from coming forward, and also set up an environment in which the interviewee lost trust and respect for the department.

The City of Fremont’s personnel rules provide guidance on examination posting. Examination announcements must be posted in the city’s government building on official bulletin boards. However, the personnel officer may also post announcements in additional places.



The City of Berkeley's announcements are also lacking some essential information, such as job status, and whether the position is a temporary or permanent assignment. At least one interviewee explained that there was some question about the temporary or permanent status of a new position.

This [position] was supposed to be [a] full time permanent...and so a couple of months after that, I was told by the [supervisor] in the [unit] that my position was only a temporary position, so now they were going to cut me back to part time. I said, "Oh, no no no, that's not what I was told."

As noted, the City of Berkeley's hiring managers and departments lack transparency about decision making, and communicate ineffectively. Specific written communication is an inexpensive way for the City of Berkeley to provide more structure and transparency in the hiring process. The same information should be included on application forms. Doing so would allow the employee to hold the hiring managers and departments accountable for its practices.

It is also noteworthy that Ordinance No. 2342 – N.S. required *public* announcements of vacancies, examinations, and acceptance of applications of employment.¹⁸ The City of Berkeley should consider returning to this standard of transparency in the hiring process.

4. Applications

Provision 5.03 of the City of Berkeley's Personnel Rules requires the Director of Human Resources to reject any application that was not filed within the period prescribed in the public notice.

Interviewees expressed confusion about the length of the application period or noted that the period was very short. Nearly half of the interviewees felt that the application period was short in order to allow pre-selected individuals to apply and prevent others from applying. Employees described several instances when new applications were considered after the posting period, which is clearly prohibited by the Personnel Rules.

I did hear of the list opening and closing within a short period of time for people that were interested and want[ed] to go full time. That the list had been opened and then closed so that people get on the list and then it would close to prevent other people from getting on the list.

Setting a short application period can limit the number of people who apply. When selected individuals are encouraged to apply, the shortened application period can reduce

¹⁸ Berkeley, Cal., Ordinance 2342 – N.S. (May 8, 1940).



competition. This is another example of a mechanism that supports nepotism. Even beyond keeping the application period open for only a short amount of time, this practice also left employees discouraged from applying and pursuing promotional opportunities.

Ten out of the 20 interviewees felt discouraged from applying for promotions or lateral positions. Manipulation of the job opening period was cited by some as deterrent to applying for promotions.

[The job openings] would be listed in the Berkeley Matters and they'd have to be listed by law or the law within the City, but they already know who they [are] giving the position to. So, it was just a formality when they listed. So, I could put in an application, which meant nothing 'cause that job was already given to somebody ahead of time. A lot of [the employees] said that they felt that [specific person] was going to get it automatically no matter what. [M]ost of them that I spoke to just felt discouraged from even applying because they felt like [person] was going to get the job no matter what.

Provision 5.04 requires applicants to be notified of the outcome of their application. The provision does not specify who would be responsible for this notification. The provision should be amended to clearly state who is responsible for notifying applicants in order to increase accountability. In addition, the failure to notify applicants of the review outcome was a prevalent complaint among interviewed employees. Almost half of the interviewees did not receive any communication regarding their application.

Just did not get that job. I am not even sure I heard from them. I did not hear from them, as a matter of fact... No, we have a publication called Berkeley Matters, which comes on payday. That's how you find out who's hired, who's resigned, and so it's not until I saw that [unit] had hired a new [person] that I knew it wasn't me.

Yeah, [Berkeley Matters] was in our pay envelope. But, now it's not. You almost have to [find out yourself. It seems like] they're trying to save paper or something.

They post information on Berkeley Matters, which is a—like a leaflet that we get on paydays. Now that information is not given to us. You have to ask for it, but it is available.

As emerged in the interviews, the City of Berkeley has a history of not providing communication regarding the success of applications and interviews during the hiring process. One interviewee mentioned learning about the application outcome only by seeing the announcement in *Berkeley Matters*, which welcomed the new employee. However, other interviewees identified that *Berkeley Matters* is no longer provided



directly to each employee. To rectify this issue, City of Berkeley should consider reaching to each applicant directly to communicate the outcome of the application.

A few employees reported that the Human Resources Department had erroneously rejected their applications. One of them had to initiate contact with the Human Resources Department to discover this error.

And I said, well, how is that possible when I have passed that exam and been on the list for several years. And they said, oh, really? Well, okay, let us go back and check. So, an HR analyst went back and pulled my application and said, oh, we, we made a mistake. Yes, we're going – go ahead and place your name on the eligible list. However, there were several other [employees of color] who had more education and background than I had. They didn't accept theirs[.]

Such errors prevent qualified, eligible employees from being considered for promotional opportunities. Provision 5.04 also states that defective applications may be returned to applicants with notice to amend and refile. This provision should clearly state which defects are subject to amendment. In addition, it is necessary to identify who will make this determination and the criteria for an application to be eligible for amendment.

5. Examination

Provision 6.01 of the Personnel Rules provides that “[e]xaminations may consist of any method of evaluation to measure the capacities of the persons examined to execute the duties and responsibilities of the career class to which they seek to be appointed.” Provision 6.02 adds that the examinations are conducted or arranged by the Director of Human Resources under the direction of the City Manager. However, these provisions do not specify who determines the format and criteria of the examinations.

In contrast, the City of Fremont provides three types of examinations: 1) assembled examinations, 2) unassembled examinations, and 3) continuous examinations.¹⁹ Assembled examinations are competitive tests conducted at specific times and places.²⁰ Unassembled examinations are relative appraisals of applicants’ qualifications.²¹ Continuous examinations are competitive tests at irregular times and places.²² All examinations are conducted or arranged by the personnel officer.²³ In addition, all

¹⁹ FREMONT, PERSONNEL RULES, art. II, § 13.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ FREMONT, PERSONNEL RULES, art. VIII, § 3.



examinations must be graded based on competitive factors of the examination.²⁴ Each portion of the examination must be graded separately, and the sum of the portions makes up the final score which determines the applicant's place on the employment list.²⁵

a. Promotional Examinations

Provision 9.01 of the Personnel Rules requires that all vacancies must be filled through transfers, demotions, re-employments, reinstatements, or eligible lists. Otherwise, a temporary appointment may be made. However, the rules do not specify how department heads or directors report vacancies, or who is responsible for verifying that eligible employees are considered for these vacancies.

Provision 6.03 grants the City Manager unlimited discretion to waive minimum qualifications or substitute experience and education in case of staffing reductions. Instead, the City Manager may consider development potential. This provision seems overbroad and superfluous. Permanent staffing needs should be filled using the prescribed hiring methods. Any temporary staffing are governed by provision 9.07 regarding temporary appointments and provision 9.09 regarding emergency appointments. The temporary and emergency appointments allow the City to hire staff for a limited period until the emergency conditions or urgent staffing needs have ended or been resolved by hiring through the prescribed formal hiring process. In addition, Title 4, Section 4.04.070 E prescribes "promotion on the basis of merit, experience, and record[.]" "Development potential" is not a listed criteria. It would be difficult to develop an objective metric to measure development potential. Accordingly, it is not advisable to make development potential the deciding factor in considering candidates for promotions and allow minimum qualifications to be waived based on development potential, even in the event of staffing reductions.

While the City Manager has appointing authority and "shall make transfers, promotions, demotions, reinstatements, layoffs . . . subject to the personnel rules and applicable memorandum agreements" according to Title 4, Sections 4.04.100 and 4.04.110, the authority to administer all provisions of the personnel ordinance and Personnel Rules is limited to duties "not specifically reserved to the Personnel Board." Section 4.04.070 lists the duties and functions reserved for the Personnel Board which include providing for promotions based on merit, experience, and record as well as open examinations. It is also noteworthy that Ordinance No. 2342 – N.S. provided for establishment of procedures for entrance and promotional examinations by the City Council.

Provision 6.03 allows the Director of Human Resources to include selection techniques in promotional examinations as deemed appropriate. This seems to encroach on the duties of the Personnel Board. According to Title 4, Section 4.04.070 E, the Personnel Board shall provide for "open, competitive and free examinations as to fitness[.]" This

²⁴ FREMONT, PERSONNEL RULES, art. VIII, § 4.

²⁵ *Id.*



overbroad grant of discretion to the Director of Human Resources may be the cause of the complaints by interviewed employees about the lack of transparency regarding the selection technique and criteria.

A supervisor, regardless of what someone's ranking is, a supervisor can pull anyone off the list... they're going to rank them. But, they don't have to go in any particular order... all personnel did was make sure there was, that all the paperwork was in.

This interviewee noted that a high degree of discretion is granted to the supervisor which allows for decisions to be made without justification. This authority can lead to unfair hiring practices, especially if there is no formal communication about the hiring process. The formulation of selection criteria should be more transparent. In addition, selection criteria should be clearly stated on both the examination announcements and application forms.

The one incident that I talked about, about how [the director] hires friends—one of his oldest friends was hired, and the opening we had was as [Position 1], so that was how she had to be hired. Then we all got an email a week later saying “I’m going to make her an [Position 2],” even though the list isn’t open right now, I’m going to make her this because I want her to do these kinds of functions. So it was like, overnight, he did this, but the fact is there was an open list, and one of those [tenured employees] that I talked about happened to be on the list at that time.

Unchecked discretion also creates an environment conducive to nepotism when promotional positions are filled.

The City of Fremont appears to rely on numeric or quantifiable scores. Each portion of the examination is graded separately and the sum of the portions makes up the final score.²⁶ In some cases, exam takers are permitted to review the answer key that will be used to grade the exams at the personnel office during regular business hours within five days of the exam.²⁷ The exam taker may also submit a written objection to the appropriateness of any questions or the correctness of any answers within that five-day period.²⁸ If the question is improperly keyed or misleading, the personnel officer may eliminate the question or modify the answer key.²⁹ The requests to eliminate or alter the answer key must be filed to with the personnel office prior to the end of the review

²⁶ FREMONT, PERSONNEL RULES, art. VIII, § 4.

²⁷ FREMONT, PERSONNEL RULES, art. VIII, § 5(a).

²⁸ *Id.*

²⁹ *Id.*



period.³⁰ This provision increases the transparency of the examination scoring process and strengthens the perceived legitimacy of the scoring criteria.

Provision 6.04 of the Personnel Rules requires the City of Berkeley to give the scores of all written examinations to each candidate. This provision lacks clear designation of the staff member within the City of Berkeley responsible for this notification. The provision should be amended to include a designated City of Berkeley staff member which will increase accountability. As with the application review, a number of interviewed employees did not receive communications from the City of Berkeley regarding their scores, and therefore, were never notified of their scores.

The City of Fremont not only notifies exam takers of their exam scores, but also allows them to review their exam papers at the personnel office during normal business hours.³¹ Any scoring errors can be brought before the personnel officer to determine if rescoring is required.³² This section also expressly authorizes employees to bring any complaint of unfairness or prejudice of oral examination to the attention of the personnel officer within three business days of the oral examination.³³

6. Eligible List

Provision 7.01, 7.02, and 7.03 provides that the eligible list is established and effective upon announcement by the Director of Human Resources and remains in effect for one year unless City Manager abolishes it early or extends it within his or her discretion. The Director of Human Resources is required to prepare an eligible list from the candidates who qualified during the examination.

Due to the lack of communication to candidates regarding their examination scores, several candidates could not verify whether they should have been included in the eligible list. Interviewed employees also complained about inadequate communication, or the lack thereof, in regard to eligible lists.

I didn't know there was a list... and how to get on the list or how to try to get on the list. Those things weren't clear to me at the time when I first started.

These employees often were unaware or unsure of the effective date or duration of the eligible list. This lack of communication contributes to employees' lack of understanding of the hiring process as well as the perceived lack of transparency and accountability.

³⁰ FREMONT, PERSONNEL RULES, art. VIII, § 5(a).

³¹ FREMONT, PERSONNEL RULES, art. VIII, §§ 5(b), 6.

³² FREMONT, PERSONNEL RULES, art. VIII, § 5(b).

³³ FREMONT, PERSONNEL RULES, art. VIII, § 5(c).



The City of Berkeley places employees in three categories with category one containing the best performing candidates during the examinations. However, these categories are not mentioned in the Personnel Rules. In order to increase transparency, an explanation of these categories and the selection criteria for each of the three categories should be contained in the Personnel Rules. In this regard, the City of Berkeley inconsistently informed interviewed employees about their category placing.

Two interviewed employees also questioned the relevance of those three categories because their supervisors had discretion to pick a candidate out of any of those three categories. The use of those categories and selection criteria for the final candidate in the categories should be explained in the Personnel Rules.

Nobody in the world knew [the application process] because remember they keep changing the game. Nobody, we had the game last year, we all went through interview processes. This year they, there was no interview, the interview process was only if they chose you.

[W]ell, they do a ranking now. They changed their whole thing. It used to be like, top ten; now they do it where they create the job for the person they want, so they have three rankings and then they will—the person they want—that person will be—I think it highly, where like you're highly—I can't use the right terminology, but number one, number two and number three. So—and these are categories, so your rank number three means like, you have the less qualifications; number two, good; and number one is excellent, and it's always the person that they created the job for that's "one."

Ranking applicants may do little to ensure fair and equitable hiring conditions, especially if positions are being created for specific individuals. This suggests that the City of Berkeley's hiring practices do not reflect the needs and requirements of the City of Berkeley, but are based on some other factor. A ranking system may provide a mechanism to ensure fairness for employee access, but only if new positions are also created under fair and equitable conditions.

The City of Hayward provides a specific order of priority in filling vacancies. Employees on re-employment lists receive first priority, employees on promotional lists receive second priority, and persons placed on the original employment list receive third priority.³⁴ The re-employment list contains regular employees and probationary employees who were laid off due to lack of funds or work.³⁵ The promotional list contains regular and probationary employees with passing scores.³⁶

³⁴ HAYWARD, CAL. MUNICIPAL CODE, art. IV, § 2-4.51.

³⁵ *Id.*

³⁶ *Id.*



The City of Fremont also provides a specific order of ranking applicants. The City's personnel rules provide that each applicant on the eligible list pass an open and competitive examination.³⁷ The applicants on the list must be ranked in the order of their scores earned in the examination.³⁸

In addition, employees on a promotional list must have passed a promotional examination for a class and ranked in the order of their scores earned.³⁹

Provision 7.04 of the Personnel Rules requires the City Manager to remove qualified candidates from the eligible list if they do not respond to a notice of certification from the Director of Human Resources. Certification is a requirement under provision 9.04 also for appointments. Therefore, communication from either the Director of Human Resources or the City Manager is essential to maintain qualified candidates in the eligible list.

Several employees stated that they did not receive any communication regarding the eligible list and never received a certification notification or removal notice. Accordingly, these qualified employees were removed from the eligible list without their knowledge.

No, they didn't tell me. 'Cause the person they, who went for the position, they already, they had, they was training him for the position anyway to be in the position. And he didn't have no supervisor experience or nothing. The process is you become a [position 1], then after [working] you apply for [position 2]. But, you know, then they'll train you for the position. So, that's they process of selecting who they want to select. You know? Regardless of your education or how many years you've been on the job.

An improved notification system needs to be established. Notices can be distributed using online application portals that allow applicants to log in and receive communications from the City regarding their application status. A web-based portal can also serve as reminder system for employees to update their application in order to maintain continuous eligibility as outlined in provision 7.05 (waiving additional examination if an employee is included in the previous eligibility list).

The City of Fremont removes names of an eligible or promotional list only if the candidate requests removal in writing, or if the candidate does not pass a subsequent character investigation.⁴⁰ Candidates on an eligible list of a temporary appointment may

³⁷ FREMONT, PERSONNEL RULES, art. II, § 10.

³⁸ FREMONT, PERSONNEL RULES, art. II, § 10, art. IX, § 1.

³⁹ FREMONT, PERSONNEL RULES, art. II, § 20.

⁴⁰ FREMONT, PERSONNEL RULES, art. IX, § 3.



be removed if the personnel officer deems them unsuitable, disqualified, or unavailable for future employment.⁴¹ In either case, affected candidates are notified of their removal in writing.⁴²

Provision 7.04 also indicates that employees who have resigned or are discharged are automatically dropped from the list. In order to safeguard against errors, such employees should also receive a removal notice.

The eligible lists are also crucial in determining the selection of candidates for promotional opportunities. Provision 9.02 of the Personnel Rules states that the appointing authority may open up promotions to the general public in an open and competitive examination if no promotional list for that position exists. Accordingly, the lack of understanding and clarity of the hiring process as well as the ambiguity of the duration of the lists does not allow for accountability by employees to ensure that there is no existing list.

7. Promotions

a. Qualifications for Promotions

As in provision 6.03 of the Personnel Rules, provision 9.03 allows the City Manager unchecked discretion to waive qualification requirements. This provision allows the City Manager or her designated representative to “consider an employee for promotion to a higher class through a non-competitive personnel action” if the employee acquired the required professional license for the promotion. Therefore, employees without a professional license may be hired and entitled to a promotion without a competitive process if they obtain the necessary skills, qualifications, and professional license for the promotion at the journey level. However, this provision lacks any structure on the process on how to fulfill these requirements, including a fixed time period to acquire the qualifications and professional license. These requirements should be published and uniformly enforced in all departments. In addition, consequences for failure to fulfill these requirements should be clearly disclosed and communicated to employees.

b. Addition of Responsibilities

Seven interviewees explained that they were asked to perform additional duties and take on additional responsibilities without a reclassification, promotion, or additional pay.

An employee described how employees can be placed in a position for a few months and moved to the next position while being asked to perform duties of multiple positions at the same time.

⁴¹ FREMONT, PERSONNEL RULES, art. IX, § 3.

⁴² *Id.*



I was then required to be the [Position 1] and [Position 2]. Then, let's see, did that for about, I guess maybe six months or something. And then for the last two years—no, the last year and a half, I was just the [Position 2 and 3], and then six months ago I had to take on the responsibility of being the [Position 2 and 4] also... Different titles, but basically the [same] deal... My predecessor was a male who was in a different classification at a higher level, making more money, and when they gave me the job, they said "No, you don't get more money because your job classification allows you to do this job." I said, "Well, no, why was he paid more money to do the same job? Isn't that equal work for equal pay?" So they're saying, "No, that is not equal work for equal pay," and they went to pretend like I don't do the same job that he does, whatever the case may be, which is _____, of course.

The interviewee compares job responsibilities, formal classification, and pay. Assigning additional job responsibilities without reclassification allows the City to justify the lower payment made to the employee than they may be entitled to. To rectify this widespread concern, employee responsibilities should be routinely assessed and compared to the given classification and adjustments should be made to either the job responsibilities or classification, when appropriate.

A couple of interviewees indicated that employees of color received a lower pay rate for similar work performed by non-minority employees in a higher classification. At times, interviewees were also asked to perform duties not listed on their job description. One employee stated that a supervisor added duties not found on the job description after the employee accepted the job offer on three different occasions.

c. Glass Ceiling

A major theme in the interviews was the perception that there were significant barriers to promotions for employees of color. The two identified barriers were racial bias and nepotism. Sixteen out of the 20 interviewees perceived the view that these barriers prevented them from obtaining promotions and even seeking promotions. Many of these interviewees expressed that employees of color were especially discouraged from applying for promotions. Employees reported six incidents where an experienced employee who was a person of color was not considered for a promotion, but was asked to train the new hire who filled the position.

When the [employee] was supposed to be promoted, he trained people and then they made another tier for the manager. [T]he people [the employee] trained was put over him.

And so this is a tradition and a culture... that all of a sudden they become a boss. Then they get [Person] in. They hire [Person] from [outside] or somewhere to come [in] as a coordinator and next thing you



know, she's a boss. Then they move her to the level of [the] only black guy in management. Then they raise her above him ... You got, [someone who] just came in and got above him... how do we get promoted?

These newly trained hires purportedly had little to no experience or less education and would become the supervisor of the experienced employees. Accordingly, these employees felt that they not only had the experience, but also the skills to perform the duties of the promotional position, but were passed over due to bias or nepotism.

I believe that, I sincerely believe that people of color, most of my colleagues who have been treated poorly, just leave ... There have been colleagues that have been very good, qualified [employees] that have better options to leave...

I walked in the door with a master's degree ... and I was hired as a temp. I was an Office Assistant for [several] years? And nobody was in any kind of a hurry to move me up.

The thing that I focused on the harassment that's been going on since 2011, but I really didn't talk about—probably the worst thing that's happened since I have been with the City of Berkeley was a program called The Leadership Development Program, that they have two open now, so they call them the LDP I and the LDP II ... but [the director] sent ... a Caucasian guy[.]...it sounds like they have no intention of bringing that program back, for anybody. It's like, they have all the leaders they want now.

These employees touch on a significant concern that persons of color are not encouraged to pursue promotional opportunities even if they appear to be qualified while Caucasians are encouraged to assume leadership positions. Five employees emphasized that upper management or leadership positions in their departments were held by predominantly Caucasian males. In addition, persons of color leave employment of the City of Berkeley due to poor treatment and lack of upward mobility.

8. Appointments

a. Permanent Appointments

Provision 9.05 of the Personnel Rules states that appointments are made from those certified on the eligibility list. Accordingly, it is crucial that the Director of Human Resources ensures adequate communication with qualified employees regarding their certification, as discussed on page 16. The Personnel Rules currently lack an explanation



of the criteria for the appointed employee. The current rules do not provide an order of priority for employees eligible for reinstatement or transfers.

Some interviewed employees would have benefited from a review of reinstatement or transfer eligibilities. A few of them have lost full-time status and other privileges due to budgetary restraints or department needs. Instead of having these privileges reinstated for tenured employees, the relevant departments hired new employees.

Prior to 1995, the BMC provided that employees should be selected for appointments in the order that they appear on the employment or promotional lists.⁴³ In addition, the number of candidate names should exceed the number of vacancies by two with persons eligible for reappointment receiving preference.⁴⁴ The BMC prior to 1995 provided a specific process for selecting candidates for permanent appointments which ensured transparency in the selection process.

The City of Hayward also provides that all appointments must be made from the eligible list.⁴⁵ The candidates for appointments should be submitted to the department head in the order in which they appear on the list.⁴⁶ The department head then makes recommendations to the city manager.⁴⁷

Similarly, the City of Fremont requires that all vacancies are filled by transfers or candidates from an eligible list.⁴⁸ If no lists or transfers are available, provisional appointments may be made.⁴⁹ In addition, the department heads must report any vacancies to the personnel officer.⁵⁰ The personnel officer is then able to advise the department head on the availability of employees eligible for reemployment, transfers, demotions, or promotions and candidates on an eligible list.⁵¹

b. Provisional Appointments

Provision 9.06 authorizes provisional appointments pending establishment of an eligible list. However, no other parameters are provided in this provision.

⁴³ Berkeley, Cal., Ordinance 2342 – N.S. (May 8, 1940).

⁴⁴ *Id.*

⁴⁵ HAYWARD, CAL. MUNICIPAL CODE, art. IV, § 2-4.53.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ FREMONT, PERSONNEL RULES, art. X, § 1.

⁴⁹ *Id.*

⁵⁰ FREMONT, PERSONNEL RULES, art. X, § 2.

⁵¹ *Id.*



According to employees, several provisional appointments would last up to two to three years without any attempts to fill the vacancy through an examination process and establishment of an eligible list. These long-term provisional appointments would provide non-permanent employees with opportunities to work full-time while some permanent employees were restricted to part-time schedules based on their job description. This would create inequities in the amount of working hours, pay, and benefits between provisional and permanent employees that could last longer than one year. Specific limitations on scope and duration of provisional appointments can avoid further inequities due to lack of oversight.

The pre-1995 BMC also provided a process for selecting candidates in the event that there was no employment list for the position. In absence of a list, a qualified person could be appointed in a provisional position for no longer than four months.⁵² During the four months, the City of Berkeley had to establish an employment list.⁵³ That section also prohibited any provisional appointments over four months in any fiscal year.⁵⁴

Other cities also limit the duration of provisional appointments. The City of Hayward limits provisional appointments to classified positions to six months or two pay periods after the establishment to an eligible list, referred to as employment register.⁵⁵ The City of Hayward also limits temporary appointments to unclassified positions to six months.⁵⁶

Similarly, the City of Fremont also limits the appointment of a qualified provisional employee to six months while no eligible list for a permanent position is available.⁵⁷ During the six-month period, an employment list for the permanent position must be established.⁵⁸ No person is permitted to be employed in a provisional appointment and no position is allowed to be filled by a provisional employee for more than six months.⁵⁹

c. Temporary Appointments

Provision 9.07 limits temporary appointments to six months with possible extension up to 25 months total. In addition, no career position should be filled by any temporary employee for longer than one year. A 19-month extension seems excessively long because it would allow an employee to be temporary in one position for over two years.

⁵² Berkeley, Cal., Ordinance 2342 – N.S. (May 8, 1940).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ HAYWARD, CAL. MUNICIPAL CODE, art. IV, § 2-4.42.

⁵⁶ HAYWARD, CAL. MUNICIPAL CODE, art. IV, § 2-4.43.

⁵⁷ FREMONT, PERSONNEL RULES, art. II, § 21; FREMONT, CAL. MUNICIPAL CODE, ch. 2.25, § 2.25.070.

⁵⁸ FREMONT, PERSONNEL RULES, art. X, § 5.

⁵⁹ FREMONT, CAL. MUNICIPAL CODE, ch. 2.25, § 2.25.070.



The provision limits temporary appointment of one employee in more than one position to 36 months. This also is an excessively long period for temporary appointments. In addition, the Personnel Rules should explicitly lay out a hiring procedure to convert temporary to permanent career employees. Although interviewees are aware of or have identified instances when an eligibility list existed enabling temporary employees to apply for permanent positions, the process employed was not clear or transparent resulting in some employees working several years to decades as temporary employees.

I was a temporary employee... I think maybe five years or more. I stayed temp for a very long time.

These interviewees expressed concern that their job status could remain temporary despite working well beyond the time limit set forth in the Personnel Rules. It is in the interest of the City of Berkeley to hire employees who are already trained and experienced in working for the City of Berkeley. However, a defined process will allow fair opportunity for all temporary employees to apply to permanent positions. After a given time period, temporary employees should be offered the opportunity to apply for permanent positions, or should be given a reclassification that reflects a change in job status.

The City of Fremont limits temporary appointments to circumstances when provisional appointments are not appropriate.⁶⁰ The following circumstances were listed: a permanent employee is temporarily absent, but has a right to return; a permanent employee was dismissed or terminated, but his or her reinstatement or the review proceedings are pending; or the city council has expressly authorized certain temporary appointments.⁶¹ However, even temporary appointments should be made from eligible lists whenever possible.⁶² The city manager can establish the terms, conditions, and duration of the temporary appointment as long as they do not deviate from the personnel rules, provisions set by the city council, or the law.⁶³ These rules clearly define the role and duration of temporary appointments, as well as the distinction between temporary and provisional employees.

d. Emergency Appointments

Although employees did not discuss emergency appointments, additional guidance regarding emergency appointments may be necessary. Provision 9.09 authorizes the City Manager to make emergency appointments in the event of emergency conditions that threaten life, property, or the general welfare of the City of Berkeley. The person should

⁶⁰ FREMONT, PERSONNEL RULES, art. X, § 7.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*



only be employed during the duration of the emergency without regard to the regulations as to appointments in the Personnel Rules.

The pre-1995 BMC allowed emergency appointments up to 15 working days.⁶⁴ Due to the broad latitude concerning emergency appointments in the Personnel Rules, specific limits on duration are advisable. If 15 working days are not sufficient, 20 or 25 working days should be sufficient to deal with acute emergency conditions.

9. Rejection of Probationers

Provision 10.03 of the Personnel Rules allows the City Manager to reject any employee without cause and without right to appeal.

I was given one [performance review]. We are supposed to be given three. I mean, every three months ... [they gave me] one at the start. And then I got the last two when the supervisor notified me that I didn't get the position.

In this case, the interviewee was given insufficient performance reviews in a timely manner. Had these performance reviews been given at regular intervals, the employee could have identified performance issues and other concerns that were later cited for the employee's rejection.

[The supervisor's] attitude is kind of like I'm just being lazy. And in one of the evaluations, you will see that. That's what, [the supervisor is] indicating that I was being lazy.

This employee indicated that racial bias influenced the outcome of the evaluation. That employee also found the environment very stressful due to being overly scrutinized by the supervisor.

In an effort to increase transparency, the employees on probation should have a set number of performance evaluations at regular intervals before a final decision is made in order to receive adequate opportunity for corrective actions. In addition, the performance evaluation should be administered by immediate supervisors who are familiar with the work and performance of the employee. These performance evaluations and the recommendations of immediate supervisors should be a decisive factor in making a decision to reject an employee because the City Manager is not likely to be familiar with the individual employee's work and performance.



⁶⁴ Berkeley, Cal., Ordinance 2342 – N.S. (May 8, 1940).

10. Transfer Between City of Berkeley, Library, and Rent Board

Provision 11.02 of the Personnel Rules allows for permanent employees to transfer to the Library without loss of benefits. Provision 11.03 allows for a permanent employee to transfer to the Rent Board without loss of benefits. However, the Personnel Rules do not explain the relationship between the Rent Board, the Library, and the City of Berkeley. In addition, the rules should explicitly state the rights and obligations the employees at the Library and Rent Board have to the City of Berkeley and whether they differ from the rights and obligations of other City of Berkeley employees. In particular, the employees' ability to utilize City of Berkeley grievance processes should be addressed.

[The director of the Rent Board] reports to the Rent Board. The elected Rent Board. He's under contract to them... [But] I don't know how much—maybe the City Council has some control, but I don't even know how much control they have in the hiring of the Board.

Employees seemed to be unsure to which extent the Rent Board is accountable to the City of Berkeley. This lack of transparency can also lead to uncertainty whether Rent Board or Library employees are able to use the City of Berkeley's grievance process. If Library and Rent Board employees are not able to use the City of Berkeley's grievance process, including filing a claim in the City of Berkeley's Equal Employment Opportunity (EEO) and Diversity Office and other available venues, the Personnel Rules should identify alternate avenues to pursue a complaint.

11. Demotions, Suspensions, and Discharge

Provisions 11.04, 11.05, and 11.07 of the Personnel Rules outline demotions for poor performance, suspensions for cause, and discharge for cause by the City Manager. These provisions lack specific procedures leading up to demotion or suspension of an employee. The immediate supervisor or a supervisor who is familiar with the employee's work or performance should be required to give the employee a set number of verbal and/or written warnings as well as written reprimands before an employee is eligible for demotion or suspension. The warnings and reprimands should be accompanied with specific recommendations to the employee on how to improve performance. The immediate supervisor's assessment of the employee's performance or improvement should be a decisive factor in the final decision to demote or suspend an employee. In addition, the provisions do not explicitly provide an opportunity to due process, such as a hearing, after a demotion, suspension, or discharge notice.

[The manager] fired at least seven or eight black people in, at one time.

He was going through women like it wasn't, you know...

[W]ell, that's one of the discriminatory actions that I felt, my age.



Several employees expressed concern that a disproportionate number of employees of color, female employees, and older employees were terminated or “pushed out” due to biases based on race, ethnicity, gender, and age. Some described working for the City of Berkeley as “painful” or “traumatic” experiences.

In comparison, the City of Fremont guarantees the right to appeal to the civil service board in connection with any employment-related matter, except where the right of appeal is explicitly prohibited in the rules.⁶⁵ The employee to be demoted, suspended, dismissed, or transferred must receive a notice with the reasons for such an action and initially has 10 days to answer these reasons in writing.⁶⁶ The employee can submit a written request for hearing to the chairman of the civil service board within 10 days of a demotion, dismissal, transfer, or reduction in pay.⁶⁷ For all other matters, the employee must submit a written complaint to the department head, and then the city manager.⁶⁸ If the city manager is unable to resolve the matter, the employee can file an appeal in writing with the personnel officer who brings the complaint to the attention of the civil service board at the next scheduled meeting.⁶⁹ The personnel officer is responsible to notify all relevant individuals, including the chairman and secretary of the board, relevant department heads, and other persons complained against, of the filed grievance and its contents.⁷⁰ An employee is entitled to a hearing if the employee as demoted or discharged.⁷¹ The hearing date must be set within seven calendar days after receiving notice of the appeal by the chairman of the board, and the hearing must take place within 20 working days of the filing date.⁷² The personnel officer is also responsible to notify all relevant individuals of the date, time, and location of the hearing, as well as publicly post this information.⁷³ The written findings and recommendation of the civil service board are then signed and filed with the personnel officer.⁷⁴ The employee receives a certified copy.⁷⁵ If there is a delay caused by the city or the civil service board in holding the hearing, any action, such as a demotion or discharge, is deferred, unless there is an emergency that justifies the suspension of the employee.⁷⁶

⁶⁵ FREMONT, PERSONNEL RULES, art. XIV, § 1.

⁶⁶ FREMONT, CAL. MUNICIPAL CODE, ch. 2.25, § 2.25.100.

⁶⁷ *Id.*

⁶⁸ FREMONT, PERSONNEL RULES, art. XIV, § 1.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ FREMONT, PERSONNEL RULES, art. XIV, § 2.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*



12. Seniority Rights and Benefits

Provision 11.07 of the Personnel Rules states that employees are entitled to seniority rights based on their length of service. However, the seniority rights and benefits are not defined in the Personnel Rules. Specific seniority rights and benefits, especially related to hiring and promotion decisions, should be added to the Personnel Rules.

Due to the lack of oversight regarding seniority rights and benefits, some interviewees complained that certain seniority rules were not observed. At least two interviewees indicated that they were forced to transfer to another department although less senior employees were available who should have been transferred instead. One employee found that the “bumping rights” of tenured employees to receive priority when a position in the same class is open were not granted. Another employee indicated that the seniority provisions in the union’s memoranda of understanding (MOUs) were being ignored by the supervisors in the department.

On several occasions, say, for instance, you have an individual that’s been there ten years and you have a person with less seniority, and you’re trying to promote this guy with less seniority over a guy that’s been there ten years, and how can you do that? I mean, it’s just blatant right-in-your-face that, hey, we don’t care if your MOU, your union protocol, we’re running this, we’re doing what we want to do because we’re the City of Berkeley. We do what we want to do. Because they know that the union is weak. The union isn’t going to do nothing, so, you know, they notice.

Employees express concern that City of Berkeley is uncooperative with the union and its protocols, particularly as it pertains to seniority. Accordingly, the City of Berkeley is encouraged to determine a transparent and uniform definition of seniority and application of these privileges in order to avoid inconsistent applications of the seniority rules.

One specific example of how seniority rights and benefits are applied is contained in the City of Hayward’s layoff policy. In the event that the City of Hayward faces lack of work or funds requiring staffing reductions, the department head may designate the job classes affected by the reductions.⁷⁷ Within each class, employees must be laid off in inverse order of their relative length and quality of services governed by the City’s evaluation rules.⁷⁸ In addition, all provisional employees must be laid off before probationary employees within each class, and all probationary employees must be laid off before regular employees within each class.

⁷⁷ HAYWARD, CAL. MUNICIPAL CODE, art. IV, § 2-4.90.

⁷⁸ *Id.*



The City of Fremont established three tenure groups. Group one includes employees who have completed their probation, group two includes employees who are still in their probation period, and group three includes employees who are not part of the classified service, such as temporary, seasonal, or provisional appointments.⁷⁹ An employee subject to layoffs has assignment rights to a vacant position as long as the employee meets the educational and special skills requirements and has the capacity to fulfill the duties of the position.⁸⁰ An employee may also displace an employee in the same tenure group that has less service or an employee in a lower tenure group.⁸¹ The city manager has the authority to deviate from seniority rules or approve a demotion in lieu of a layoff in unusual cases.⁸² It is also noteworthy that layoffs cannot be used to remove unsatisfactory employees instead of taking appropriate removal, demotions, transfer, or reassignment actions.⁸³ The city's personnel rules also provide a detailed process for layoff notifications and callbacks to return to an offered position.⁸⁴ Employees who were laid off or demoted in lieu of a layoff must be placed on a reemployment list for two years.⁸⁵

B. Additional Personnel Provisions

1. Training

While the City of Berkeley's Personnel Rules do not address training, the City of Fremont offers some guidance. The city manager and department heads are responsible for developing training programs, including lectures, demonstrations, and reading assignments, to broaden the knowledge of employees in the performance of their duties.⁸⁶ In addition, employees may receive credit for participating in and successfully completing special courses in advancements and promotions.⁸⁷

Seven interviewees have complained about not receiving adequate training to perform their duties efficiently and effectively. Some employees were denied requests for training.

⁷⁹ FREMONT, PERSONNEL RULES, art. XVIII, § 1.

⁸⁰ FREMONT, PERSONNEL RULES, art. XVIII, § 3.

⁸¹ *Id.*

⁸² *Id.*

⁸³ FREMONT, PERSONNEL RULES, art. XVIII, § 2.

⁸⁴ FREMONT, PERSONNEL RULES, art. XVIII, § 4.

⁸⁵ FREMONT, PERSONNEL RULES, art. XVIII, § 5.

⁸⁶ FREMONT, PERSONNEL RULES, art. XV, § 1.

⁸⁷ *Id.*



The position was a learn-as-you-go... the work that I was doing, I was just actually thrown in there and had to, on my own, figure out... Even with the manager, I went to him a couple of times with questions about how to resolve an issue. He did not know the answer and referred me to someone else who was extremely busy. So this is the type of atmosphere...

This interviewee discusses the overall climate of the workspace due to the lack of training received. By not being properly trained, the employee was forced to seek assistance from the supervisor and other employees, who were unable to help. This not only leads to decreased productivity and quality of work, but also creates an environment in which employees are unable to demonstrate trust among one another or in their own abilities.

In addition, some noted that demonstrated initiative by employees to enroll in relevant training courses beneficial to the performance of their duties was not acknowledged by supervisors. Two interviewees felt that they were singled out and denied training opportunities by their supervisors while others were allowed or even encouraged to participate in training.

We had to do [courses] to keep up our licenses. And they provided training—up to 40 hours of training a year, but the last phrase in the MOU is “the discretion of the Program Supervisor.” So if he thought he could spare you, then you could go. If he couldn’t, then you couldn’t go. And I was the one that couldn’t go.

As identified in other cases, supervisor discretion may be used against specific employees to their detriment. In this case, the employee mentioned being routinely prevented from attending additional training opportunities. This has a negative effect on job performance and supervisor-employee relations. Accordingly, acknowledgments of and reward incentives for employees’ efforts to improve their performance and knowledge related to their duties should be included in the personnel system because it ultimately benefits the City of Berkeley and improves employee morale.

2. Hearings

The Personnel Rules do not contain any reference to when an employee has a right to appeal or hearing. Provision 1.18 concerning probationary periods and 9.06 concerning provisional appointments and provision are the only rules that address hearings in any way. These provisions state that in these instances, an employee has no right to appeal or hearing. The Personnel Rules should explain the rights and limitations of the right to appeal or hearing and the procedure to obtain a hearing. Title 4 also does not expressly provide for hearings in connection with complaints. In Sections 4.04.070 and 4.04.040 of Title 4, the Personnel Board is authorized to investigate and resolve non-EEO complaints



and EEO complaints, respectively. However, these sections do not require a hearing to resolve the complaints.

In order to provide adequate means to address complaints and provide due process for employees, hearings are recommended, especially in connection with denial of benefits, discrimination, harassment, and unfair employment practices by superiors. The City of Berkeley may consider making hearings and recommendations public as prescribed in Ordinance No. 2342 – N.S.

In contrast, the City of Fremont generally opens up hearings and meetings of its civil service board to the public.⁸⁸ The civil service board may have private hearings related to dismissal, discipline, appointment, or employment of an employee unless the employee requests that the hearing is made public.⁸⁹ The employee attending a hearing is entitled to have representation at his or her own choosing present.⁹⁰ The format of the hearing does not need to be formal as long as due process is observed.⁹¹ As discussed above, the City of Fremont guarantees the right to appeal to the civil service board in connection with any employment-related matter, except where the right of appeal is explicitly prohibited in the rules.⁹² These rules discuss procedures to file a complaint, obtain a prompt hearing within 20 working days of the filing date, and receive adequate notices of the hearing and the findings in detail.⁹³ Accordingly, each employee is guaranteed due process in all matters related to his or her employment.

3. Grievance Process

In Section 4.04.070 and 4.04.040 of Title 4, the Personnel Board is authorized to investigate and resolve non-EEO complaints and EEO complaints respectively. Section 4.04.070 provides that non-EEO complaints must be “processed according to the procedure established by the personnel rules adopted by resolution by the City Council[.]” Section 4.04.040 also requires that the Personnel Board appoint an affirmative action subcommittee and the committee chair participate in formal resolution processed of EEO complaints.

The Personnel Rules do not contain any reference to a grievance process available for employees, or the City’s EEO Officer. The Personnel Rules should clearly outline an accessible method to discuss concerns with the EEO Officer and submit written

⁸⁸ FREMONT, PERSONNEL RULES, art. IV, § 2.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² FREMONT, PERSONNEL RULES, art. XIV, § 1.

⁹³ FREMONT, PERSONNEL RULES, art. XIV, § 2.



grievances. Accordingly, the City Council must ensure adoption of a grievance process in the Personnel Rules as soon as possible.

The EEO/Affirmative Action Program provides that any written or oral complaint should be addressed in an informal resolution process in which the EEO Officer arranges a meeting with the complainant and the department head or other City official. The department head or City of Berkeley official must then write an investigative report and meet with the complainant and the EEO Officer again to discuss the complaint, investigation results, and resolution of the complaint. If the informal resolution process does not resolve the complaint, the complainant must submit a written complaint to the EEO Officer within 20 working days. The EEO Officer must then submit complaints to the City Manager who accepts or rejects complaints. The EEO Program provides guidelines for the formal written investigation report.

None of the interviewed employees found that they were able to resolve complaints through the EEO Office. The interviewed employees identified the following barriers in resolving matters through the existing grievance process.

- Many employees did not receive communication regarding the status of their complaints.
- Nine employees revealed that they filed complaints with the City of Berkeley or EEO Officer and did not reach a resolution. Some those complainants indicated that they had never reached a resolution or positive outcome in 10-15 years.
- Some of the employees described going to meetings with the EEO Officer and department heads and at times with the supervisor allegedly committing wrongdoing. However, the meetings do not result in any resolutions.
- An additional employee dropped the complaint due to stress.
- Due to the fact that complaints are not resolved, interviewed employees were often discouraged by other employees to file written complaints.
- At times, aggrieved employees were discouraged by the EEO Officer to pursue formal complaints.
- Some employees described difficulty making appointments with the EEO Officer.
- Some employees also were not aware of an EEO grievance process and procedures.
- A portion of the interviewed employees utilized the union grievance process instead although most did not find resolutions through that process either.



- In some instances, employees were told by the unions that certain complaints could not be pursued in the grievance process.

You know, it seems like every time I speak up, I'm put in a worse hole and just a little bit deeper, I'm digging myself a hole.

What I heard is that the system doesn't favor, you know, I hear that a lot from different staff, that, you know, that each time [the EEO Officer] tends to side with the City ... it's a no-win situation. There's no point wasting my time to go through that route.

The outcome with the City, it was overlooked. It was never [anything] done about it from Mr. Dennis Feggan.

Some interviewees suggested that the grievance process does little to ameliorate job difficulties. While some employees report concern over retaliation and subsequent worsening treatment after filing an official grievance, others show little faith in the grievance process itself. A repeated pattern of unresolved grievances may leave employees feeling distrustful toward the formal grievance process, especially if they risk experiencing additional disparate treatment as a result of the filing.

4. EEO/Affirmative Action Program

The EEO/Affirmative Action Program commits to ensuring fair opportunity in employment, promotion, compensation, and training and was last revised in 1989. The Program assigns roles to various city entities and officials:

- The City Council is responsible for the annual review of the EEO Program goal statuses.
- The City Manager oversees the implementation of the EEO Program, establishes a positive tone to encourage subordinates, and exercises final authority over hiring decisions impacting the EEO Program.
- The Director of Human Resources, referred to as the Director of Personnel in the EEO Program, is responsible for general administration of the EEO Program, including review of Personnel Rules, ordinances, resolutions, union agreements, and job classification in accordance with the 1978 Uniform Guideline on Employee Selection Procedures in order to remove barriers.
- The EEO Officer, referred to as the Affirmative Action Officer, oversees and coordinates the day-to-day administration of the EEO Program, including training



for all staff regarding EEO policies, monitoring of personnel transactions, and investigation and responses to complaints.

- The EEO Program also establishes an Affirmative Action Subcommittee that consists of members of the Personnel Board and is responsible for review and evaluation of the EEO Program and its effectiveness. In addition, the EEO Program requires involvement of directors, supervisors, and all other staff also in following the EEO policies in good faith which may include preventive, corrective, and disciplinary measures due to EEO violations.

Out of the eight entity and employee groups listed above, five (City Council, City Manager, Director of Human Resources, EEO Officer, and Affirmative Action Subcommittee) are responsible for either the review, evaluation, or monitoring of the EEO Program and its effectiveness. The City of Berkeley should consider centralizing the supervision of the EEO Program in order to create accountability for EEO policies and objectives.

The lack of accountability resulted in poor implementation of the EEO Program within the City of Berkeley. Several employees found that the EEO Program offered no protection against discrimination, harassment, or retaliation. Most employees felt that they were discriminated or retaliated against or treated unfairly. Eight of the 20 interviewees stated that they experienced retaliation as a result of complaining to superiors, filing a grievance with the City of Berkeley or the union, or refusing to “do whatever they were told.” Some employees felt that they were being “red-flagged,” “targeted,” or “punished.” As discussed above, no interviewed employee who sought assistance from the EEO Office found that the EEO grievance process produced positive results. None of these aggrieved employees perceived that discriminatory or harassing conduct by City of Berkeley employee resulted in discipline or that complaints were pursued generally. A significant portion of employees felt that their work environment was extremely hostile. Therefore, the City of Berkeley should review and update the policies and assess new strategies to properly implement the EEO policies and objectives.

5. Abolition of Position

There are no rules regarding discontinuation of a position in the Personnel Rules. Employees whose positions were discontinued stated the City of Berkeley was not able to offer them positions that matched their experience, education, or skill levels. These employees were often offered positions at a lower pay rate, positions that were unrelated to their previous positions, and part-time positions instead of full-time positions. However, these employees felt that they had no other choice than to accept the positions offered by the City of Berkeley if they wanted to continue employment at the City of Berkeley. In addition, several employees experienced rescission of multiple offers after acceptance of these offers during the transition process.



After I filed a complaint for harassment and discrimination, I was targeted and later on my position was eliminated for so called “budget cuts” and they offered me different positions. But finally they offered me different positions that had nothing to do with my skills or my training... there were a lot of jobs that I have the transferable skills... and I have lots of trainable supervisory skills... I said that I would accept the job as well because I didn’t have any other option. And they said that they were going to see... and then they rescinded that too.

Accordingly, the transition experience was traumatic for employees. In order to reduce trauma during the transition phase to another position within the City of Berkeley, Ordinance No. 2342 – N.S. provided a structured process to transition employees from discontinued positions.

They – when the positions were eliminated, usually, here’s how it goes. Usually the manager will pick up some of those responsibilities and designated others to the remaining staff. But in most cases, they left those positions vacant for like a year and then all of the sudden they discovered, oh, we cannot do without it. And then they would select their choices of – usually there was someone in mind that they wanted into it. ... Instead of nepotism, I call it friend-tism.

This employee’s statement emphasizes the need for a structured process to prioritize eligible employees for reinstatement in order to prevent nepotism. Section 16 of Ordinance No. 2342 – N.S. required that laid-off employees are placed on appropriate employment lists. Accordingly, employees could pursue positions that match their experience, education, and skills and proactively inquire about other open employment lists which may interest them. It is also important to note that only the City Council was permitted to discontinue or abolish of a position or employment in the competitive services by ordinance. This ensured that such drastic changes were pursued only when absolutely necessary.

The City of Fremont’s personnel rules provide that abolition of positions is permitted when the position is no longer necessary, or economic reasons necessitate abolition.⁹⁴ Similar to Berkeley’s Ordinance No. 2342 – N.S., abolition of a position must undergo the same procedure that used to create the position originally.⁹⁵ In addition, seniority rules must be observed.⁹⁶

⁹⁴ FREMONT, CAL. MUNICIPAL CODE, ch. 2.25, § 2.25.130.

⁹⁵ *Id.*

⁹⁶ *Id.*



IV. RECOMMENDATIONS

Although none of the statements were investigated or verified, the City of Berkeley is strongly encouraged to address the perceptions that there is an absence of transparency in the hiring and promotion process, a failure to hold supervisors, managers, and directors accountable for their actions, and inconsistent application of rules and regulations in the hiring and promotion process. Employees that articulated these concerns associate them with disparate treatment, discrimination, and retaliation. Furthermore, the perceived conditions negatively affect morale and trust between employees and the City of Berkeley. However, the City of Berkeley may instead chose to investigate the statements in order to verify and enumerate the incidences of the reported conditions.

Mason Tillman recommends that the City of Berkeley establish an immediate timeline to review and modify its hiring and promotion policies, train its managers, and make its personnel process transparent and its managers accountable for the implementation. The timeline and procedures for implementing a revised personnel policy and practices should be presented to the NAACP and the entire City of Berkeley workforce. Minimally, the following actions are suggested.

A. Department Audits

The City of Berkeley should address the major concern that interviewed employees fear retaliation for reporting their complaints to the Human Resources Department or the EEO officer. As a best practice, the Human Resources Department and the EEO Officer should be audited to evaluate their strict adherence to equal employment opportunity rules, protection from retaliation for complainants, as well as adherence to City of Berkeley's personnel policies and procedures. The interviewed employees also had no confidence in the practices of City of Berkeley's Human Resources Department and its staff.

One practice that can be readily implemented is more direct supervision by the Human Resources Department in the employment practices pertaining to hiring, promotion, and retention. The Human Resources Department, by working more closely with directors or managers as decisions are being made, can evaluate whether the practices result in disparate work assignments, disciplinary actions, termination of employment, and other adverse employment decisions made by management. These practices should then be reviewed in the Human Resources Department audits by an independent auditor. There should be a Human Resources Department representative assigned to each employment decision from hiring appointments to discipline, including termination. In some cases, a City Attorney from the Berkeley City Attorney's office could be assigned to ensure that employment decisions are made in conformance with state and federal law.



B. Reporting of Applicant Flow, Employee Turnover, Employee Training, and EEO Complaints

Proposition 209 eliminated affirmative action in California which has been taken by some as a ratification that equal employment opportunity practices no longer need to be enforced. Although the City of Berkeley is committed to remove inequities and further EEO objectives according to its EEO Policy Statement,⁹⁷ the City of Berkeley should consider reinstating the *reporting* requirements in its EEO/Affirmative Action Program (revised 1989). This may also provide the EEO Officer with the necessary tools to be more effective in enforcing EEO policies and addressing EEO complaints. The following reports enumerated in the City of Berkeley's EEO/Affirmative Action Program should be produced:

- Applicant Flow Report: To identify the number, sex, and race of applicants, test participants, and successful candidates in order to evaluate the extent to which underutilized classifications or job groups may be impacted by recruitment and selection procedures or practices.
- Quarterly and Year End Employee Turnover Report: To identify employment new hires, promotions, transfers, demotions, and terminations by job classification, race, sex, department, and division in order to identify and evaluate any indicators of disproportionate hiring, promotion, or retention practices.
- Quarterly and Year End EEO Complaint Report: To track EEO related complaints and grievances by issue, job classification, department, and resolution in order to identify and evaluate the need for review or revision of any policies, practices, procedures, or activities to enhance EEO effectiveness.
- Quarterly and Year End Training Report: To track training opportunities and participation in order to assure non-discrimination in training practices.

C. Survey and Focus Groups Addressing Grievance Process and Retaliation

One predominant complaint of the interviewed employees was the absence of a means to redress racial bias and harassment in hiring and promotions without concern for retaliation. This concern should be addressed immediately. In addition to the audits discussed in the Best Practices section above, a survey of all current employees and focus

⁹⁷ City of Berkeley Equal Employment Opportunity Policy Statement, available at https://www.cityofberkeley.info/Human_Resources/Home/EEO_Policy.aspx.



groups targeting the grievance procedure should be conducted in order to assess the magnitude of this problem.

In addition, an EEO consultant should be retained to investigate any backlog of complaints filed with the EEO office within the last five years. The consultant should also review the findings made the EEO office of cases closed within the last five years.

D. Revisions of Personnel Rules

The Personnel Rules should be amended to address the complaints regarding subjective and inequitable application. The revisions and additions must be formulated to provide fair and equitable work environment that is free of discrimination based on race, color, religion, sex, national origin, ancestry, age, political affiliation, medical condition, disability, veteran status, marital status, or sexual orientation.⁹⁸

The timeline to formulate, approve, and implement any revisions or additions should be published. The City of Berkeley should also look beyond San Francisco Bay Area jurisdictions to identify exemplary best practices employed by similarly situated cities.

E. Improvements to City of Berkeley's Communication Methods

The lack of communication regarding employment and promotion information is the root cause for a number of complaints. Establishing and outlining in the Personnel Rules specific methods of posting job openings, hiring, and promotions would make the examination process clearer and more transparent. A cost-effective means is to use a designated bulletin board to post vacancies and promotional opportunities. A designated Human Resources representative should be in charge of assuring that all vacancies are reported to the Human Resources Department and posted at least 10 business days prior to the date that the application period is open and applications are accepted. In addition, the application period should stay open for at least 10 business days. In short, timely and informative communication is critical to achieve transparency in the employment process.

⁹⁸ See FREMONT, PERSONNEL RULES, art. XVII, § 1, "Special rule must be in harmony with the general spirit of the personnel ordinance and the personnel rules."





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