

OFFICE OF  
**THE CITY ATTORNEY**  
CITY OF SAN DIEGO

1200 THIRD AVENUE, SUITE 1620  
SAN DIEGO, CALIFORNIA 92101-4178  
TELEPHONE (619) 236-6220  
FAX (619) 236-7215

**Jan I. Goldsmith**  
CITY ATTORNEY

March 7, 2011

REPORT TO THE HONORABLE MAYOR AND CITY COUNCIL

DROP COST-NEUTRALITY

**1. The Judges' "Extended Service Incentive Program" vs. DROP**

Attached is a report from the Judicial Council of California addressing the effectiveness of the Extended Service Incentive Program (ESIP) available to judges covered by the Judges' Retirement System (JRS). As stated in the attached report, the ESIP program is an example of one that appears to be not just cost neutral but cost effective for the State of California. There is an annual savings of \$128,000 per judge.

The ESIP is similar to DROP, except that judges are required to continue making their normal retirement contributions of 8% during participation in the program and the amount judges receive is about 25% of their retirement allowance.

By comparison, under the DROP program a City of San Diego employee receives 100% of their retirement allowance (plus interest) and contributes only 3.05% during their DROP participation, far below their normal retirement contributions that range from 6.74% to 17.57% depending upon their age and classification.

**2. Salaries and/or contributions may be adjusted for DROP participants**

The City of San Diego can ensure DROP's cost neutrality by borrowing from some aspects of the Judge's Extended Service Incentive Program. The City could either adjust salaries so that

DROP participants receive the same net salaries they would have received as a non DROP participant or require their normal retirement contribution levels.<sup>1</sup>

---

<sup>1</sup> The City may be able to require an employee to continue to make contributions to the Retirement System while participating in DROP. If the Council is interested in this option, my office will need to do further research as to how and whether this could be accomplished.

In 2009, the City was successful in obtaining a court decision that salaries of DROP participants do not constitute a vested benefit. In *San Diego Police Officers' Ass'n v. San Diego City Employees' Retirement System*, 568 F.3d 725, 729 (9<sup>th</sup> Cir. 2009), the San Diego Police Officers Association (SDPOA) argued that the City violated SDPOA's constitutional rights following labor negotiations in 2005, by unilaterally imposing a reduction in salaries of employees who had entered DROP. The Ninth Circuit Court of Appeals held that employees have no vested contractual rights to a certain salary while participating in DROP. *Id.* at 736. The court relied on evidence that a DROP participant is considered an active employee, subject to all terms and conditions of employment. *Id.* at 737.

### **3. State labor laws must be followed**

The salaries and employment benefits of employees represented by one of the City's recognized employee organizations may be modified or eliminated, so long as the City complies with the requirements of the Meyers-Milias-Brown Act (MMBA), at California Government Code sections 3500 through 3511. *See, e.g., Hinchliffe v. City of San Diego*, 165 Cal. App. 3d 722, 725 (1985) ("The public employee, thus, can have no vested contractual right to the *terms* of his or her employment, such terms being subject to change by the proper statutory authority.") The MMBA requires that the City, as a public agency employer, provide each recognized employee organization representing employees affected by a modification or elimination of "wages, hours, and other terms and conditions of employment," with reasonable written notice and opportunity to meet and confer before a determination of policy or course of action. Cal. Gov't Code §§ 3504.5, 3505.

### **4. Current labor agreements must be followed**

Agreements reached as a result of "meet and confer" under the MMBA are binding upon the City and its employees, once the agreement has been approved by the legislative body. Cal. Gov't Code § 3505. *See also Glendale City Employees' Ass'n, Inc. v. City of Glendale*, 15 Cal. 3d 328, 334 (1975), *cert. denied*, 424 U.S. 943 (1976). The terms of agreements reached under collective bargaining statutes, such as the MMBA, bind individual unit members even though they are not formally parties to the collective bargaining agreement. *See San Lorenzo Education Ass'n v. Wilson*, 32 Cal. 3d 841, 846 (1982).

There are "reopener" provisions in the present agreements with the City's recognized employee organizations, relating to negotiations on "the impacts, if any, that result from the City's defining

DROP's 'cost neutrality.'"<sup>2</sup> These reopeners may be sufficient to allow the City to negotiate a decrease in salaries for DROP participants in response to the DROP Cost Neutrality Study.

### **5. City Charter provisions must be followed**

If the City Council were to seek modification of employees' salaries in DROP as a means to ensure DROP's cost neutrality, the City must comply with the provisions of San Diego Charter section 70, specifically that "increases and decreases of salary or wages of officers and employees shall be determined at the time of preparation and adoption of the budget." San Diego Charter §70. The salary ordinance must be introduced no later than April 15 of each year. San Diego Charter §290. Further, the City Council must ensure that a proposal to reduce salaries of employees in DROP is consistent with the provisions of San Diego Charter §130, which provides that the schedule of compensation for officers and employees in the City's classified

---

<sup>2</sup> Each current Memorandum of Understanding (MOU) between the City and its recognized employee organizations has "reopener" language regarding DROP cost neutrality. The language in each MOU differs slightly. However, each MOU provides for the parties to reopen negotiations under specified circumstances. As an example, the language in the MOU with Teamsters, Local 911 is as follows:

"Reopening of Negotiations Related to DROP.

During the term of this MOU, if any aspect of the DROP is found to be a mandatory subject of meet and confer by a final determination of a court of competent jurisdiction or by a PERB decision that has become final, the parties will reopen negotiations on those aspect(s) designated as mandatory subjects.

The City has also indicated its intention to conduct a "cost neutrality" study related to DROP and has stated that it will negotiate with Union on the impacts, if any, that result from the City's defining DROP's "cost neutrality." In the event the City proposes to change DROP during the term of this MOU as a result of defining DROP's "cost neutrality," Union reserves its right to meet and confer over any proposed change, and further, Union reserves its right to challenge any proposed change as an unlawful impairment of a vested, Constitutionally-protected benefit, or any other ground."

MOU with Teamsters Local 911, at art. 4, §6. *See also* MOU with the San Diego Municipal Employees' Association, at art. 4, §7; MOU with the Deputy City Attorneys Association, art. 7, §4.A.

The language in the MOU with the San Diego Police Officers Association (SDPOA) is as follows:

"The City will negotiate the impact, if any, resulting from the city's definition of the Deferred Retirement Option Plan's (DROP) cost neutrality. The City will also negotiate over the elimination of any element of DROP to the extent that any court of competent jurisdiction or Public Employ[ment] Relations Board (PERB) decides or has determined that DROP is a mandatory subject of bargaining."

MOU with SDPOA, at art. 5, §4. *See also* MOU with San Diego City Fire Fighters, I.A.F.F. Local 145, at art. 23, §B; MOU with American Federation of State, County, and Municipal Employees, Local 127, at art. 29, §IV, C.

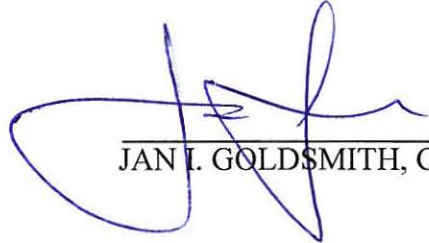
REPORT TO THE  
HONORABLE MAYOR AND  
CITY COUNCIL

-4-

March 7, 2011

service established before the beginning of each fiscal year must “provide uniform compensation for like service.” San Diego Charter §130.

Respectfully submitted,



JAN I. GOLDSMITH, City Attorney

JIG:cs

RC-2011-16

Attachment: Judicial Council of California dated April 9, 2007



**Judicial Council of California**  
ADMINISTRATIVE OFFICE OF THE COURTS

455 Golden Gate Avenue • San Francisco, California 94102-3688  
Telephone 415-865-4200 • Fax 415-865-4205 • TDD 415-865-4272

RONALD M. GEORGE  
*Chief Justice of California*  
*Chair of the Judicial Council*

RECEIVED  
APR 17 2007

ADMINISTRATIVE OFFICE  
OF THE COURTS (SAC)

WILLIAM C. VICKREY  
*Administrative Director of the Courts*

RONALD G. OVERHOLT  
*Chief Deputy Director*

April 9, 2007

Ms. Diane F. Boyer-Vine  
Legislative Counsel  
State of California  
State Capitol, Room 3021  
Sacramento, California 95814

Mr. Gregory P. Schmidt  
Secretary of the Senate  
State Capitol, Room 400  
Sacramento, California 95814

Mr. E. Dotson Wilson  
Chief Clerk of the Assembly  
State Capitol, Room 3196  
Sacramento, California 95814

Re: Effectiveness of the Extended Service Incentive Program, G.C. Section 75089.1

Dear Ms. Boyer-Vine, Mr. Schmidt, and Mr. Wilson:

Attached is the Judicial Council report required under Government Code section 75089.1 on the

If you have any questions related to this report, please contact Ernest Fuentes, Director, Human Resources Division at 415-865-4262.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. Vickrey', with a long horizontal flourish extending to the right.

William C. Vickrey  
Administrative Director of the Courts

WCV/JN

Enclosures

cc: Members of the Judicial Council  
Kathleen T. Howard, Director, AOC Office of Governmental Affairs  
Ernest V. Fuentes, Director, AOC Human Resources Division  
Judicial Administration Library (2 copies)

### How the Extended Service Incentive Program Works

Under ESIP, which became effective on January 1, 2001, a judge who is at least 60 years of age with 20 or more years of service is automatically enrolled in the program. During the ESIP period, the judge continues to receive his or her full salary and continues to contribute 8 percent to the retirement system. To receive the ESIP benefit, the judge is required to stay in service at least 36 months past the time he or she is eligible for retirement. The ESIP benefit is 20 percent of the judge's salary for the first 60 months of participation and 8 percent from the 61st through the 120th month. The maximum period a judge can participate is 10 years. ✖

When the judge retires after having served at least 36 additional months, the ESIP benefit is calculated based on the number of additional months multiplied by the appropriate percentage of salary, with interest indexed to 30-year U.S. Treasury Bonds. The most recent interest rate credited to judicial accounts was 5 percent. The ESIP benefit is payable to the judge as a lump sum, on the judge's retirement. Most often, the ESIP balance is rolled over to an Individual Retirement Account.

### Current Participation and Cost-Effectiveness of ESIP

As of the June 30, 1997, CalPERS JRS Actuarial Valuation, 1,338 judges were participating in JRS; 48 were at least age 60 with 20 or more years of service. Then, in 2001, ESIP was instituted. The CalPERS Actuarial Valuation of June 30, 2005, shows only 815 judges in JRS, but nearly 120 of these were still serving at 60 years of age or older with 20-plus years of service credit. According to CalPERS and the Judges' Retirement System, approximately 110 judges were participating in ESIP as of December 2006. While the empirical evidence is not conclusive, the ESIP incentive seems to have had a dramatic effect in encouraging longer service, demonstrating the program's effectiveness in rewarding and retaining our most experienced judges and justices.

Moreover, the program is cost effective. For each superior court judge eligible for full retirement who remains on the bench, there is a net annual savings of approximately \$128,475. The following scenarios demonstrate that cost savings. ✖

*Scenario 1:* A judge with an annual salary of \$171,648 receives an annual ESIP commitment of \$34,329, for a total cost of \$205,977.

*Scenario 2:* A retired judge receives 75 percent of pay, or \$128,736, and a new (replacement) judge is appointed at a salary of \$171,648, plus a JRS II employer rate of 19.848% or an additional \$34,068 for a total cost of \$334,452 for a single judicial position.

The difference between scenario 2 (\$334,452) and scenario 1 (\$205,977) is \$128,475 — the Extended Service Incentive Program.

## EFFECTIVENESS OF THE EXTENDED SERVICE INCENTIVE PROGRAM


Government Code section 75085 et seq. established the Extended Service Incentive Program (ESIP) to provide enhanced retirement benefits for judges who continue in service beyond retirement age. The statute directed the board of administration of the California Public Employees' Retirement System (CalPERS) to implement the program no later than July 1, 2001. (See Assem. Bill 1955 [Migden]; Stats. 2000, ch. 961.) CalPERS instituted the program on January 1, 2001. The bill also directed the Judicial Council to report to the Legislature, by January 1, 2006, regarding costs and effects of the program, including:

- A. An analysis of the effects, if any, of the program on judges' length of service; and
- B. Recommendations to ensure that the Judges' Retirement System (JRS) and the Judges' Retirement System II (JRS II) provide appropriate incentives to attract and retain judges of the highest quality from all areas of legal practice.

This report provides a detailed response to each of these items, as well as supporting data.

### **A. Analysis of Program's Effects on the Length of Service of JRS Judges and on Cost to State**

#### **Description of Issues and Program**

- Judges reach the maximum benefit payable under the JRS retirement formula after 20 years in service. Many judges choose not to stay on the bench after 20 years because they receive no additional benefit and because they are required to continue contributing 8 percent of their salaries into the retirement system. Under ESIP, JRS judges continue making the 8 percent contribution but will realize a benefit by continuing as active judges. (ESIP does not apply to JRS II members.) 
- ESIP addresses the need to retain the most experienced judges who are eligible for retirement. The people of California lose vital judicial resources and experience when long-serving and capable judges leave public service.
- ESIP provides an incentive for longer service to our most experienced judges, an alternative to private judging, and a creative financial reward that does not add to the state's costs. It also eliminates the financial penalty to continued service previously imposed on these judges.