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### REPORT TO CITY COUNCIL

### ANNUAL LEAVE CAPS FOR SAN DIEGO CITY FIREFIGHTERS

#### INTRODUCTION

This Report is in response to a request from the Audit Committee on September 15, 2014, to review the history of the cap on annual leave, which has been implemented by the City of San Diego (City) as part of its Memorandum of Understanding (MOU) with San Diego City Firefighters, International Association of Firefighters Local 145 (Local 145) (*see* San Diego Resolution R-308478 (Oct. 15, 2013) (approving the MOU)).

A cap on accrual of annual leave hours by City firefighters has been in effect in the MOU since July 1, 1990. *See* MOU, 1986-1991, art. 28. However, a review of the MOU language from 1990 to the present shows that the cap has never been absolute, and it may be lifted by the City's Fire Chief under certain circumstances.

In its August 2014 Performance Audit of the San Diego Fire-Rescue Department (Department)'s overtime costs, the Office of the City Auditor (Auditor) found that the City's liability related to annual leave is growing because firefighters are allowed to accrue annual leave in excess of the caps set forth in the MOU.

The Audit Committee, chaired by Councilmember Scott Sherman, requested that this Office respond to specific questions related to the cap. We answer those questions here and discuss the City's legal obligations in modifying its current practice related to annual leave accrual and use.

#### BACKGROUND

Eligible City employees, including City firefighters represented by Local 145, receive annual leave under the provisions of collective bargaining agreements, as well as the City's Civil Service Rules and Personnel Regulations. The Civil Service Rules and Personnel Regulations are expressly incorporated into the MOU. MOU, arts. 5, 29.

The MOU is approved by the San Diego City Council (Council), pursuant to the Meyers-Milias-Brown Act (MMBA), at California Government Code sections 3500 through 3511, the state collective bargaining law applicable to the City; the San Diego Charter (Charter); and City Council Policy 300-06. The Council also approves the City's Civil Service Rules, pursuant to Charter section 118. The City's Civil Service Commission approves the Personnel Regulations, following Council approval of the Civil Service Rules.

Civil Service Rule X, Section 3, which is codified in the San Diego Municipal Code (SDMC), authorizes annual leave "to provide compensation to employees who are absent from duty because of illness, injury, death in the family, medical or dental care appointments, or personal business, or who utilize the time off as personal vacation." SDMC § 23.1103 (Rule X, § 3). Eligible employees earn annual leave based on the number of years of active service. *Id.*

Article 28 of the MOU sets forth the maximum accumulation of annual leave for Local 145-represented employees hired before July 1, 1994, with 15 or more years of service, at 700 hours for employees working 40 hours a week (fire administration) and 980 hours for employees working a 56-hour schedule (fire suppression). MOU, art. 28, ¶ B. *See also* MOU, art. 20 (related to hours).

Annual leave for firefighters hired on or after July 1, 1994 is capped at 350 hours for 40-hour-a-week employees, and this cap is "adjusted appropriately" for 56-hour employees. MOU, art. 28, ¶ B.

In the 1995-1997 MOU, the City and Local 145 agreed to mutually study approaches to phase down annual leave accruals "that have exceeded designated caps for implementation by January 1, 1996." MOU, 1995-1997, art. 28.

Effective July 1, 1998, the City and Local 145 implemented a "cease-to-accrue" provision for annual leave; however, it was not absolute:

Effective July 1, 1998, employees who reach their maximum permitted accumulation of annual leave on their anniversary date shall cease to accrue additional annual leave. Employees who expect to be in this situation may submit a written plan by which to reduce excess leave which will include time off and pay-in-lieu up to 125 hours per fiscal year as necessary. If the Appointing Authority denies the specific time off requested and provides no alternative time off which is acceptable to the employee, this cease-to-accrue provision shall not apply until such time as the

employee is granted and takes the time off. It is the City's intent to accommodate employee's requests to use annual leave and avoid any loss of this benefit.

MOU, 1995-1998, art. 28, ¶ 4.<sup>1</sup>

The "cease-to-accrue" rules, as established in 1998, remain in the current MOU approved by the Council. In 2002, the City, through meet and confer, limited the ability of firefighters to reduce leave balances through annual cash-outs of leave (known as "pay-in-lieu"). See MOU, art. 28, ¶ D.<sup>2</sup>

The Appointing Authority for City firefighters, as described in the "cease-to-accrue" provisions, is the Fire Chief. San Diego Charter § 58. The Fire Chief and his designees are responsible for arranging time off for firefighters so that adequate personnel are available to carry on necessary City work, and annual leave is to be granted when requested, subject to the operating needs of the Department. Personnel Regulation I-2, §§ III.A.8.a, III.B.1. The MOU also sets forth rules related to vacation selection for fire suppression personnel. MOU, art. 34.

Personnel Regulation I-2, which is incorporated into the MOU, provides further guidance on the accrual and use of annual leave. The Personnel Regulations authorize accrual of annual leave credits above the maximum limits in certain circumstances, and the Personnel Regulations refer to the applicable ratified and approved MOUs. The Personnel Regulations state:

Maximum accumulation: . . . For employees who go beyond the maximum accrual limit, refer to the provisions of current management policies or ratified memorandum of understanding for each employee representation unit.

Personnel Regulation I-2, § III.A.8.

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<sup>1</sup> According to City staff, the Department does not currently require Local 145 members to submit a plan to reduce annual leave balances. This Office does not know why this process is not being followed; however, the MOU says employees who are reaching their leave caps "may submit a written plan." "May" is generally permissive, meaning it is optional or discretionary, not mandatory or required. *Black's Law Dictionary* 1127 (10th ed. 2014) ("may" means to be permitted to or to be a possibility). See also *Santa Clara County Correctional Peace Officers Ass'n, Inc. v. County of Santa Clara*, 224 Cal. App. 4th 1016, 1036 (2014). "May" can be read to mean "is required to" or "must." *Black's Law Dictionary* 1127 (10th ed. 2014). However, the MOU does not create consequences for failure to submit a plan. By not enforcing this requirement, the City has likely created an established practice under the MMBA, as discussed below.

<sup>2</sup> In 2002, the City and Local 145 agreed that annual leave earned on or after July 1, 2002 could only be reduced four ways: (1) taking the leave time as vacation time or sick leave, (2) taking it as time off at the end of City service for any type of separation, which was called "terminal leave," (3) using it to purchase additional service credit under the City's retirement system, or (4) using it to extend a firefighter's Deferred Retirement Option Plan (DROP) period beyond five years by the amount of accumulated annual leave. MOU, art. 23, ¶ C.9.c. See also MOU, art. 28, ¶ G. Terminal leave was eliminated in 2011. MOU, art. 61. In 2008, in conjunction with the Voluntary Correction Program with the Internal Revenue Service, the City eliminated the ability of firefighters to purchase additional service credit with accumulated annual leave because it violated federal tax laws applicable to the City's defined benefit plan. MOU, art. 23, ¶ C.9.c (2).

The Personnel Regulation states that appointing authorities “are responsible for arranging leave schedules so that adequate personnel are available to carry on necessary City work.” Personnel Regulation I-2. In addition, the Personnel Regulations authorize reinstatement of leave credits for certain employees in limited circumstances when a department approves a scheduled leave request and subsequently denies it, resulting in the employee losing leave credits because of going beyond the accrual limit. *Id.*

## **QUESTIONS PRESENTED AND RESPONSES**

### **1. Where did this practice of non-enforcement of the agreed upon annual leave caps begin and who made the decision to begin this practice?**

The agreed upon leave caps, set forth in the MOU, are not absolute. The City’s Fire Chief has had the authority to lift the leave caps, under specified circumstances, since 1998.

The MOU is approved by the Council, and administered by the Mayor for those Departments under his authority. San Diego Charter §§ 28, 265 (b)(8). The Fire Chief, with approval of the Mayor, directs and supervises the Department personnel. San Diego Charter § 58. The Fire Chief has “all power and authority necessary for the operation and control of the Fire Department and the protection of the lives and property of the people of the City from fire.” *Id.*

### **2. What are the City’s legal obligations in regards to enforcing the agreed upon annual leave caps and ending this practice? Specifically:**

#### **a. Did the person or department who made the decision to not enforce the agreed upon annual leave caps have the legal authority to do so?**

Yes. The practice is supported by language in the MOU, which allows the Fire Chief to lift the leave caps, under certain circumstances, to ensure that firefighters are able to use accrued annual leave, without loss of the benefit.

The Fire Chief has authority to make staffing decisions, including the authority to deny an employee’s request to use annual leave. MOU, art. 16 (the City’s management rights include the right to determine the methods, means and personnel by which government operations are to be conducted). If an employee is unable to reduce accrued annual leave by taking time off for cashing it out, the leave caps are lifted.

#### **b. Is annual leave accrued beyond the agreed upon cap now a vested benefit?**

Yes. Annual leave that Local 145 members have already earned beyond the agreed upon caps is vested and cannot be eliminated, unless the City erred in crediting leave to a firefighter, in which case the City can rely on article 62 of the MOU to correct the error.

The City can negotiate prospective modifications to the annual leave policy, in compliance with the MMBA.

However, in negotiating prospective modifications to the annual leave policy, the City must ensure it does not infringe on the vested benefits of individual firefighters. While annual leave is a mandatory subject of bargaining under the state collective bargaining laws, the City and its recognized employee organizations cannot bargain away an individual employee's vested benefits. *See California Teachers' Assn. v. Parlier Unified School Dist.*, 157 Cal. App. 3d 174, 183 (1984) (holding that a collective bargaining agreement could not waive benefits to which employees were statutorily entitled); *Phillips v. State Personnel Bd.*, 184 Cal. App. 3d 651, 660 (1986), disapproved on another ground in *Coleman v. Department of Personnel Administration*, 52 Cal. 3d 1102, 1123, fn. 8 (1991) (holding that a collective bargaining agreement could not waive an employee's right to due process).

A vested benefit is one that is protected by the federal and state constitutional provisions prohibiting impairment of contracts. *See* U.S. Const., art. I, § 10; Cal. Const., art. I, § 9. The California Supreme Court has explained that "public employment gives rise to certain obligations which are protected by the contract clause of the Constitution, including the right to the payment of salary which has been earned." *Kern v. City of Long Beach*, 29 Cal. 2d 848, 853 (1947).

Contractual rights may be expressly set forth in a contract or they may be implied from an ordinance or resolution "when the language or circumstances accompanying its passage clearly evince a legislative intent to create private rights of a contractual nature enforceable against the [governmental entity]." *Retired Employees Ass'n v. County of Orange*, 52 Cal. 4th 1171, 1177 (2011). "Whether an implied term creates vested rights . . . is a matter of the parties' intent." *Id.*

Annual leave is a form of compensation. Under the City's Civil Service Rules, adopted by the Council and under the City's approved MOU with Local 145, annual leave is time off with full pay that is earned in increments based on a schedule. *See* SDMC § 23.1103. The Civil Service Rules also provide that "an eligible employee is entitled to pay in lieu for the number of accumulated annual leave days credited to his or her account." SDMC § 23.1103(c).

The California Supreme Court has held that, under an employment policy providing for annual paid vacations, the right to a vacation vests as it is earned. *Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 774, 779 (1982). "Vacation pay is not a gratuity or a gift, but is, in effect, additional wages for services performed." *Id.* (citations omitted). Vacation pay is "a form of deferred compensation." *Id.* at 780. "Vacation pay is similar to pension or retirement benefits, another form of deferred compensation." *Id.* "The right to a paid vacation, when offered in an employer's policy or contract of employment, constitutes deferred wages for services rendered. . . . a proportionate right to a paid vacation 'vests' as the labor is rendered." *Id.* at 784. On termination of employment, an employee must be paid accrued, unused vacation time. *Id.* Therefore, Local 145 members must be permitted to use any earned, accrued, unused annual leave above the cap or be paid for the accrued leave time upon separation from City service.

The Civil Service Rules, which are adopted by the Council, state that employees "shall accrue and may use annual leave as earned if approved by the employee's appointing authority." SDMC § 23.1103(a)(5). "Eligible employees may be granted pay in lieu of annual leave," and "may accumulate annual leave credits up to the maximum determined by the Civil Service

Commission.” SDMC §§ 23.1103(a)(6), 23.1103(a)(7). Upon separation from City service, “an eligible employee shall be entitled to pay in lieu for the number of accumulated annual leave days credited to his or her account.” SDMC § 23.1103(c).

Annual leave that has already been earned cannot be eliminated.

**c. Is annual leave accrued beyond the agreed upon cap now subject to meet and confer or “me-too” provisions?**

There are no “me-too” provisions in any of the current memoranda of understanding with the City’s recognized employee organizations, including the MOU with Local 145.<sup>3</sup>

Prospective modifications to the City’s annual leave policy will require meet and confer under the MMBA.

Personal leave, including annual leave, is a mandatory subject of bargaining. *Bernardino Public Employees Ass’n v. City of Fontana*, 67 Cal. App. 4th 1215 (1998). Under the MMBA, local governments must meet and confer with their employees’ authorized bargaining representatives regarding mandatory subjects of bargaining, defined as wages, hours, and other terms and conditions of employment. Cal. Gov’t Code §§ 3504, 3504.5, 3505. The City must meet and confer with its recognized employee organizations prior to modifying its written leave policies. Cal. Gov’t Code §§ 3504.5, 3505, 3505.1.

The MMBA authorizes local governments to enter into written memoranda of understanding to memorialize the agreements reached through the meet and confer process. Cal. Gov’t Code §§ 3505, 3505.1. Once the legislative body has approved a memorandum of understanding, it is binding on the local government. *Glendale City Employees Ass’n, Inc. v. City of Glendale*, 15 Cal. 3d 328, 335 (1975).

Meet and confer may also be required prior to modification of an established or binding past practice that is outside of the MOU. For a past practice to be binding, it must be: “(1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.” *Riverside Sheriff’s Assn. v. County of Riverside*, 106 Cal. App. 4th 1285, 1291 (2003). *See also County of Sonoma*, PERB Dec. No. 2242-M (2012); *Desert Sands Unified School District*, PERB Decision No. 2092 (2010). The California Public Employment Relations Board, the state administrative agency that enforces the MMBA, has described an enforceable past practice as one that is “regular and consistent” or “historic and accepted.” *Hacienda La Puente Unified School District*, PERB Decision No. 1186 (1997); *County of Placer*, PERB Decision No. 1630-M (2004). *See also County of Sacramento*, PERB Decision No. 2043-M (2009) (County of Sacramento I); *County of Sacramento*, PERB Decision No. 2044-M (2009) (County of

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<sup>3</sup> A “me-too” clause, which is also known as a parity provision, establishes that whatever provisions are negotiated by another recognized employee organization, the organization with the “me-too” clause will receive the same negotiated benefit. *Banning Unified School District*, PERB Decision No. 536 (1985).

Sacramento II); *County of Sacramento*, PERB Decision No. 2045-M (2009) (County of Sacramento III) (finding 20-year practice of providing retiree dental and medical insurance to constitute a binding past practice).

To prove a breach of an established past practice, a recognized employee organizations must plead and prove facts demonstrating the unequivocal, fixed, and longstanding past practice. *Regents of the University of California*, PERB Decision No. 2109-H (2010). *See also San Francisco Unified School District* PERB Decision No. 2057 (2009); *City of Commerce*, PERB Decision No. 1937-M (2008) (stating the burden is on the charging party to prove a breach of an established past practice).

Here, the City's practice related to accrual and use of annual leave is memorialized in the City's MOU with Local 145, as well as in the City's Civil Service Rules and Personnel Regulations. Further, the Department has permitted firefighters to go above the leave caps, in a regular, consistent, and accepted manner. It is for this reason that, if the City intends to modify its current policy related to accrual and use of annual leave, it must meet and confer with Local 145 prior to any decisions on modifying the policy.

Further, in 2013, the Council approved the City's MOU with Local 145 for a five-year term from July 1, 2013 through June 30, 2018. *See San Diego Resolution R-308478* (Oct. 15, 2013). The annual leave provisions are set forth in the MOU. Because the MOU is binding on the City and Local 145 for its term, its provisions may only be modified through mutual agreement.

**d. Does the City have the authority to immediately begin enforcing the agreed upon cap based on the MOU?**

No. The MOU must be interpreted with any established practices, as defined by the MMBA. The MOU sets forth agreed upon terms and conditions of employment. The "cease-to-accrue" provisions in the MOU are not absolute. Further, the City may not unilaterally change a term in the MOU or an established practice without meeting and conferring. To do so, would be a violation of the MMBA.

**e. Does the City have the ability to recoup any of the benefits that were conferred outside of the agreed upon MOU?**

Yes, if a firefighter has been credited with annual leave in error. *See San Diego Charter § 126* (certification of payroll includes that the salary or compensation earned is at the established rate). However, this Office has been presented with no specific facts that any firefighters have accrued annual leave outside of the MOU.

The City's MOU with Local 145 contains provisions authorizing repayment by City employees to the City of any overpayments or unauthorized payments. MOU, art. 62. If annual leave is awarded in error, then the City may rely on these provisions to recoup the leave prior to payment or use. It is the responsibility of the employee's department to notify the employee in writing and supply the employee with the documentation used to determine the overpayment. *Id.*

**3. Are other bargaining units not having their annual leave capped in accordance with their respective MOUs?**

No. According to the Human Resources Department, Office of Labor Relations, this is an issue unique to the Department and Local 145-represented employees because of the constant staffing model used to staff fire stations.

**CONCLUSION**

Enforcement of the annual leave caps is governed by the provisions in the ratified MOU, which was approved by the Council pursuant to the MMBA, the Charter, and Council Policy 300-06.

The annual leave cap in the MOU is not absolute. MOU, art. 28, ¶ D. The City's Fire Chief, as the Appointing Authority for firefighters, may lift the leave caps under specified circumstances. If the Department does not allow time off to firefighters due to the constant staffing model, Local 145-represented employees may continue to accrue annual leave under the terms of the current, ratified MOU. Any prospective changes to the current annual leave policy for Local 145-represented employees will require meet and confer.

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