

October 22, 1991

REPORT TO THE CHAIR AND
MEMBERS OF THE HOUSING AUTHORITY

THE MATTER OF THE EMPLOYMENT CONTRACT WITH THE EXECUTIVE
DIRECTOR

In connection with a performance review of the Executive Director, the Housing Authority requested that we review the employment contract with the Executive Director and provide you with the legal alternatives available in the event it is determined to terminate the employment of the Executive Director.

BACKGROUND INFORMATION

The Executive Director is employed on a year-to-year basis under the terms and conditions set forth in the employment agreement attached hereto as Attachment 1. Under paragraph 2 of the employment agreement, the Housing Authority and Housing Commission may terminate the employment contract at the end of any contract year by giving 60 days' prior notice of intent not to extend the contract. No cause is required for such termination. Under paragraph 5, either party to the contract is allowed to terminate the agreement at any time for cause as described in paragraph 5.

The annual contract was entered into with the initial term beginning August 1, 1988 and terminating July 31, 1989, with automatic annual renewals subject to the above rights of termination.

In May 1991, the Housing Authority determined to conduct a performance review of the Executive Director and it was noted that any decision to not extend the contract for an additional year would have to be made by May 31 in order to provide the required 60-day notice.

The Housing Authority first proposed an extension of time to provide the 60-day notice to August 31, 1991. The Executive Director did not initially consent to such an extension and on May 28, 1991, the Housing Authority adopted a resolution of intent not to extend the employment contract, with the understanding that a performance review would take place within the 60-day notice period.

The Housing Commission, which met jointly with the Housing Authority on May 28, expressed an unwillingness to similarly give notice of intent not to extend the annual contract. The joint meeting was thereupon continued to May 31 to devise a reasonable solution.

On May 31, the Executive Director consented to an extension to September 30, 1991, to allow for a performance review. A copy of the Executive Director's memorandum is attached as Attachment 2.

During the discussion on May 31, the Executive Director indicated the conditions which he felt were appropriate for the extension, including a provision that, if the Housing Authority and Housing Commission determined to extend his employment agreement, the employment agreement would have a term commencing October 1, 1991, and ending September 30, 1992, and he explained that a contract year commencing October 1 would better relate to the Housing Commission's fiscal year. There was no discussion regarding the Executive Director's statements regarding the extended term and the Housing Authority approved the contract amendment extending the review period to September 30, 1991. The Housing Commission likewise unanimously approved the extension as proposed.

For a variety of reasons the Housing Authority and the Housing Commission were unable to make a final determination on whether or not to extend or terminate the Executive Director's contract in the 120-day period ending September 30.

The questions posed by the Housing Authority to this office are:

1. What are the Housing Authority's options with regard to terminating the employment agreement as of this date?
2. Does the existing employment agreement terminate as of July 31, 1992, or as of September 30, 1992?
3. What options are available to the Housing Authority if the Housing Commission disagrees with a Housing Authority determination to not extend the employment agreement?

With regard to the first question, since no notice not to extend the contract was given by September 30, no right to terminate the present annual contract remains except for cause. "Cause" as specified in the employment agreement includes:

- a) breach of contract terms;
- b) incapacity to perform the assigned duties of the position for a period in excess of three months;
- c) negligence;
- d) malfeasance;
- e) nonfeasance;
- f) conviction of a felony or any crime of moral turpitude.

This office is not aware of any situation at present which would allow the Authority and Commission to terminate the employment agreement for cause pursuant to paragraph 5. Options available to the Authority and Commission are, therefore, somewhat limited and include the following:

1. Notify the Executive Director now or at any time prior to May 31, 1992, that it is the intent of the Housing Authority and Housing Commission to not extend the 1991-92 employment term. If such action is taken, the Housing Authority should also commence the process for appointment of a new Executive Director.
2. Negotiate with the Executive Director for the immediate termination of the agreement.
3. Negotiate with the Executive Director for an early termination of the agreement effective upon appointment of a new Executive Director.
4. Await the results of the performance audit for the Housing Commission and then make determinations regarding potential early

termination in view of the audit findings.

5. Allow the Executive Director to continue his employment through the end of the present contract year but negotiate a situation where a proposed new director gradually assumes the duties of the Executive Director during the present contract term.

6. Wait until early-'92 and then determine whether or not to extend the contract or give 60 days' notice of intent not to extend.

With regard to the second question, attached as Attachment 3 is a copy of the resolution and second amendment to employment agreement which was prepared for the Housing Authority meeting of May 28 and carried over to the May 31 meeting. You will note that the proposed amendment extended the time period to provide notice of nonextension for the employment period "ending July 31, 1992." At the actual meeting on May 31, Mr. Becker indicated in response to a question from Commissioner Behr: "Another point about the September 30 date . . . if that does end up being in effect a new anniversary date, September 30 or October 1 will . . . correct a difficulty in the contract" by helping "synchronize the employment contract anniversary date" with the fiscal year of the Housing Commission which runs from July 1 to June 30. There was no decision extending the anniversary date to October 1.

It appeared to us at the time that the Housing Authority and Housing Commission were intent upon concluding whether or not to extend the contract within the 120-day period ending September 30 and that if it was determined to renew the contract, the one-year extension suggested by Mr. Becker was logical.

A review of the tape of the meeting, however, leaves some question as to whether it was the intent of the Authority and the Commission to go along with Mr. Becker's proposed extension of the new anniversary date from July 31, 1992, to September 30, 1992. Since the proposed contract extension was not in Mr. Becker's memo to the Authority relating to the 120-day extension (Attachment 2), and because there was no Authority discussion of the extension of the contract from July 31, 1992, to September 30, 1992, this office has some doubt that the "gratuitous" proposal that the anniversary date of the contract be extended to September 30, 1992, was in fact approved by the Housing Authority.

Mr. Becker may, however, claim that since he made such a proposal at the meeting, and since there was no indication of disapproval of his proposal, and because the Housing Authority has already received the benefit of the 120-day review period, that, as an "equitable" matter, he is entitled to the anniversary date extension to September 30, 1992.

No final agreement with regard to the contract amendment was executed. If, therefore, the Housing Authority feels strongly that the existing contract should expire as of July 31, 1992, rather than September 30, 1992, this office will, of course, support such determination, even though such a position will likely result in litigation.

The third issue is: "How can the Housing Authority assure that its

decision with regard to the employment of the Executive Director can overrule any contrary determination by the Housing Commission?" As was noted by this office at the May 28 and 31 meetings, the employment contract is a three party contract between the Housing Authority and the Housing Commission as employers and the Executive Director. At present, the Housing Commission is charged with administration of the basic functions of the Housing Authority.

As Larry Marshall pointed out at the May 31 Housing Authority meeting, Section 98.0301 of the Municipal Code, which constitutes the ordinance creating the San Diego Housing Commission, specifies that all actions of the Commission are subject to referral to the Housing Authority for final action in which case "the action taken by the Commission shall be advisory." Therefore, in the event the Housing Authority determines to not extend the Executive Director's employment contract, it would be appropriate to cause the Housing Commission to take an action on whether or not to extend the contract. If the Housing Commission decided to not give notice upon extension, that decision could be brought to the Housing Authority for final action.

To avoid any similar problems in the future, in the event a new contract is entered into with an executive director, the contract should specify that the executive director serves at the will of the Housing Authority and can provide that the duties of the executive director include administering the activities of the Housing Commission.

Respectfully submitted,
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City Attorney

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Attachments 3
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