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RESOLUTION NUMBER R- 307149

DATE OF FINAL PASSAGE NOV 30 2011

A RESOLUTION OF THE COUNCIL OF THE CITY OF
SAN DIEGO APPROVING COMPENSATION FOR
UNREPRESENTED EMPLOYEES ADVERSELY AFFECTED
BY THE SPSP WAIVER ELECTION.

WHEREAS, in Fiscal Years 2010 and 2011, under agreement between the City of San Diego and the San Diego Municipal Employees' Association (MEA), MEA-represented employees who were eligible for Supplemental Pension Savings Plan (SPSP) were given an "election" between a 3% salary reduction and waiving their 3% SPSP employer matching contribution to SPSP, which was a match on the SPSP employee mandatory contribution; and

WHEREAS, in Fiscal Year 2012, under agreement between the City and MEA, MEA-represented employees who were eligible for SPSP were given an "election" between a waiving their 3% employer matching contribution to SPSP and a salary reduction in the form of 52 hours of unpaid furlough; and

WHEREAS, by adopting the Salary Ordinances for Fiscal Years 2010, 2011 and 2012, the election between a 3% salary reduction and waiving the 3% SPSP employer matching contribution was imposed upon the City's unrepresented non-safety employees in those years; and

WHEREAS, the election between the SPSP employer matching contribution and reduced pay is referred to throughout this Resolution as the "SPSP Waiver Election"; and

WHEREAS, the SPSP Waiver Election was first available to unrepresented non-safety employees effective the pay period ending October 2, 2009; and

WHEREAS, in March 2011, tax counsel advised the City that the SPSP Waiver Election constitutes a “cash or deferred arrangement” (CODA) under federal tax laws; and

WHEREAS, the SPSP Plan did not have the required 401(k) provisions and did not have provisions allowing employees to waive the employer matching contribution, the SPSP Waiver Election was a non-qualified CODA and also conflicted with the SPSP Plan document; and

WHEREAS, the affected unrepresented employees are not responsible for the creation of the non-qualified CODA and had no notice that their non-waived SPSP employer contributions would become taxable; and

WHEREAS, to preserve the SPSP Plan’s tax qualification, the San Diego City Council (City Council) adopted San Diego Resolution R-306805 (R-306805) on May 10, 2011, approving prospective and retroactive amendments to the SPSP Plan document allowing employees to waive the mandatory employee contribution and the matching employer contribution in compliance with Internal Revenue Code (IRC) section 401(k); and

WHEREAS, San Diego Resolution R-306805 also approved the filing of a Voluntary Correction Program (VCP) application with the Internal Revenue Service (IRS) Employee Plans Compliance Resolution System (EPCRS) to seek IRS approval for the retroactive plan amendments; and

WHEREAS, as a result of the SPSP Plan amendments, the employer matching contribution (made on behalf of employees who chose not to waive the contribution) is treated as an “elective deferral” in the same manner as an employee contribution to the City’s 401(k) Plan; and

WHEREAS, the employer matching contributions are therefore subject to the IRC section 402(g) annual dollar limit on elective deferrals; and

WHEREAS, in determining whether an employee exceeded the IRC section 402(g) limit in any year, the City must add the non-waived employer matching contributions to the elective deferrals the employee made to the City's 401(k) Plan in each year, and test the total against the annual limit; and

WHEREAS, the City must now issue corrected 2009 and 2010 W-2s to all of the unrepresented non-safety employees who chose not to waive the employer matching contributions in those years, except for employees who: (1) are not covered by Medicare, and also (2) did not exceed the IRC section 402(g) limit in either year; and

WHEREAS, unlike employer contributions to a qualified retirement plan, elective deferrals under IRC section 401(k) are subject to Medicare taxes; and

WHEREAS, therefore, the corrected 2009 and 2010 W-2s issued to unrepresented non-safety employees who chose not to waive the SPSP employer matching contribution will report additional wages subject to Medicare taxes; and

WHEREAS, the City wishes to compensate the affected unrepresented employees for the adverse effects caused by these unforeseeable Medicare taxes; and

WHEREAS, all of the unrepresented non-safety employees who exceeded the IRC section 402(g) limit in either 2009 or 2010 (Excess Deferral Employees) will receive corrected W-2s for the years in which they exceeded the limit, which will report additional wages subject to state and federal income taxes; and

WHEREAS, the Excess Deferral Employees will also receive distributions from their City 401(k) Plan accounts in the amount of their excess deferrals in 2009 and 2010, as adjusted by gains or losses in the year in which the excess deferral was made, and will receive Form 1099-Rs showing the excess deferral amounts as taxable distributions to them in the year of distribution; and

WHEREAS, absent action by the City Council, these employees would be penalized, through no fault of their own, by double taxation of their "excess deferrals" in 2009 and 2010; and

WHEREAS, the City Council wishes to compensate the Excess Deferral Employees for the adverse effects caused by the re-characterization of the SPSP employer matching contributions as elective deferrals by paying the federal and state income taxes on the excess deferral amounts in the year of deferral; and

WHEREAS, the City is taking steps to ensure that employees do not exceed the IRC section 402(g) limit in 2011 or 2012, thereby preventing double-taxation of employees in those years; and

WHEREAS, the City has entered into agreements with MEA and the International Brotherhood of Teamsters, Local 911 (Teamsters) to compensate employees represented by those labor organizations who are adversely affected by the SPSP Waiver Election; and

WHEREAS, the City wishes to compensate unrepresented employees in the same manner as employees represented by MEA and Teamsters, as outlined in the agreements between the City and those labor organizations; NOW, THEREFORE,

BE IT RESOLVED, that the City of San Diego (City) will pay, on behalf of the unrepresented non-safety employees who elected not to waive their SPSP employer matching contributions, the employee Medicare taxes owed on the non-waived SPSP employer matching contributions for the period beginning with the pay period ending October 2, 2009 and extending through June 30, 2012.

BE IT FURTHER RESOLVED, that the City will pay, on behalf of the unrepresented non-safety Excess Deferral Employees, the estimated state and federal income taxes owed on these employees' non-waived SPSP employer contributions that were in excess of the IRC section 402(g) limits in 2009 and 2010, calculated using the IRS withholding tables for supplemental wages and the California State Employment Development Department withholding tables for supplemental payments in effect on October 31, 2011.

BE IT FURTHER RESOLVED, that the City will pay the unrepresented non-safety Excess Deferral Employees an additional amount calculated to reimburse these employees for the income taxes they will owe on the income taxes the City pays on their behalf for 2009 and 2010.


BE IT FURTHER RESOLVED, that the City will also reimburse unrepresented non-safety Excess Deferral Employees for the reasonable expenses they incur to prepare and file their amended tax returns for 2009 and 2010, not to exceed \$250 per amended return, but only to the extent that these reasonable expenses exceed any tax refund the employee is entitled to based upon the City's overpayment of federal or state income taxes on the employee's behalf for those years. To receive this reimbursement, the employee must submit a copy of his or her amended tax return(s) and proof of tax preparation expenses incurred to the City's Risk Management Department before July 1, 2012. The City will not reimburse employees who do not submit their amended return(s) before July 1, 2012.

BE IT FURTHER RESOLVED, that the City will also reimburse the unrepresented non-safety Excess Deferral Employees for additional federal and state income taxes owed, above the estimated taxes paid on an employee's behalf, but only if the employee submits a copy of his or

her amended tax return(s) to the City's Risk Management Department before July 1, 2012. The City will not be required to reimburse employees for additional income taxes unless they submit their documentation to the Risk Management Department before July 1, 2012.

BE IT FURTHER RESOLVED, that the City Council authorizes expenditure of the necessary funds to implement this Resolution.

APPROVED: JAN I. GOLDSMITH, City Attorney

By  _____
Roxanne Story Parks
Deputy City Attorney

RSP:ccm
11/15/2011 REV.
11/8/2011
Or.Dept:Human Resources
Doc. #274646_2

I hereby certify that the foregoing Resolution was passed by the Council of the City of San Diego, at this meeting of **NOV 15 2011**.

ELIZABETH S. MALAND
City Clerk

By  _____
Deputy City Clerk

Approved: 11-30-11
(date)

 _____
JERRY SANDERS, Mayor

Vetoed: _____
(date)

JERRY SANDERS, Mayor