MEMORANDUM OF LAW

DATE: May 7, 2001

TO: Dan Kelley, Labor Relations Manager

FROM: City Attorney

SUBJECT: Reasonable Time Off for Union Activities

QUESTION PRESENTED

For City employees who hold union positions, how much time is considered "reasonable time off" to spend performing union activities?

SHORT ANSWER

Neither statute nor case law define "reasonable time off" for purposes of allowing representatives of recognized bargaining units to perform union activities. Rather, what is "reasonable" can only be determined through the meet and confer process. The final determination of what is "reasonable" must not only accommodate the employee, but must also allow the City to fulfill its responsibilities as a municipality in an efficient and effective manner.

BACKGROUND

Under the Meyers Milias Brown Act [MMBA], government agencies must allow reasonable time off, without loss of compensation or benefits, for employee representatives of recognized employee organizations to perform certain union activities. The City has four recognized bargaining units: the Municipal Employees Association [MEA]; the American Federation of State, County and Municipal Employees [Local 127]; the Police Officers Association [POA]; and the International Association of Firefighters [Local 145]. For MEA and Local 127, employee representatives include members of the Board of Directors and designated stewards. The POA maintains an Employee Representative Program staffed by POA members who provide assistance to other members for disciplinary issues. Both POA and Local 145 may designate any member of their respective Board of Directors as employee representatives.

Pursuant to the provisions of the Memoranda of Understanding [MOU] for the four recognized bargaining units, designated employee representatives may participate in formal meet and confer meetings. They may also attend the meetings of Council, Council Committees, Civil Service Commission or other designated meetings where matters within the jurisdiction of the recognized bargaining unit are under consideration. However, attendance at these meetings must be pre-approved by the employee's supervisor. Each MOU also includes specific rules regarding which meetings union representatives are permitted to attend in order to represent employees with grievances and disciplinary matters. These rules do not define how much time is reasonable for an employee representative to spend attending meetings and providing employee representation. However, each of the MOUs contain language limiting the time spent by union representatives on union business and allow management to deny requests for time off when the employee's presence at the work site is necessary for business reasons.

The MOUs include specific procedures that must be followed when an employee representative requests time to process a grievance or represent an employee in a disciplinary matter. All representatives must request permission of their supervisor before they may spend time engaged in these types of activities. Additionally, the employee with whom the representative is meeting must request the time off in advance of the meeting. Requested time off must be pre-approved by the appropriate employee's supervisor. The supervisor may not unreasonably deny requests by union representatives for time off to process grievances or disciplinary matters. A supervisor may, however, designate a more appropriate time if the presence of the employee is needed in the workplace at the requested time.

Time spent on union activities is reflected on employee time cards, but only in the general categories of grievance processing, industrial leave hearings, and labor relations meetings. As a practical matter employees use the category of "labor relations meetings" for almost all representation issues. This catch-all category does not reflect how the representative's time is actually spent. Consequently, it is very difficult for management to track a representative's time to determine if the time is spent efficiently processing necessary union business, so that he or she is not spending excessive periods away from his or her job duties.

A recent audit conducted by the Auditor's Office revealed that some union representatives spend as much as one hundred percent of their City paid time conducting union activities while being fully compensated by the City. Coinciding with the Auditor's report, some department heads have complained that the absence of employees who serve as union representatives and who spend significant amounts of time conducting union related activity impacts the department's ability to conduct its business in an efficient and effective manner. As a result, you have asked for guidance in interpreting and applying the requirement that employee representatives may spend only a "reasonable" amount of time away from their job duties to attend to union matters.

ANALYSIS

The MMBA, California Government Code sections 3500-3510, governs labor relations for public employers in California. Section 3505.3 provides: "public agencies shall allow a reasonable number of public agency employee representatives of recognized employee

organizations reasonable time off without loss of compensation or other benefits when formally meeting and conferring with representatives of the public agency on matters within the scope of representation." Although this section has been a part of the MMBA since 1968, no California cases have yet addressed the issue of what is "reasonable time off."

When the California courts are silent on an issue, we may refer to similar federal law for guidance. *Sullivan v. State Board of Control,* 176 Cal. App. 3d 1059 (1985). California courts have said "[f]ederal labor legislation has frequently been a prototype for California labor law, and the California courts look to federal law for guidance in interpreting parallel provisions of public employee labor law statutes." *Id.* at 1064. The National Labor Relations Act [NLRA] 29 U.S.C.S. 151-187, and the Federal Service Labor-Management Relations Act [FSLMR] 5 U.S.C.S. 7101-7135, each have a provision similar to the MMBA, which allows for reasonable time off for union activities (sometimes referred to as "official time"). Federal courts have interpreted the "reasonable time" language in these provisions. Although the courts have not defined what is reasonable time off, two principles can be derived from the cases. First, the determination of what is reasonable must be met and conferred on; it may not be unilaterally imposed by either party. Second, to ensure that the employer can effectively conduct its business, an employer may make reasonable rules limiting the amount of time an employee representative may spend on union activities during work hours.

I. Reasonable Time Off is a Meet and Confer Issue.

The first principle is illustrated in *American Federation of Government Employees v. Federal Labor Relations Authority,* 798 F.2d 1525 (D.C. Cir. 1986). In *American Federation*, the union wanted to negotiate regarding the number of employees who would be allowed official time off for union activities and the percentage of work time they would be allowed to perform union activities. The union originally proposed sixty employees be granted 100 percent official time off. This proposal was later modified to twelve employees. The employer refused to bargain on the issue saying the proposal had the "direct effect" of requiring management to add positions or reallocate work and was therefore, a management prerogative. The Federal Labor Relations Authority [FLRA] agreed with the employer and determined that the decision to add positions or reallocate work was a matter of management discretion and could not be dictated by union proposals.

The Court of Appeal disagreed. In overturning the findings of the FLRA, the court focused not only on the employer's interests, but on the union's interests as well.

> The FLRA's generalized concern to protect the ability of agencies to carry out their mission cannot displace a specific congressional provision providing for the negotiability of official time proposals. Although the FLRA presents its "direct effects" approach as a means of determining on a case-by-case basis whether an official time proposal will interfere with the accomplishment of the agency's work, the "direct effects test" in fact isolates only those official time proposals that will require an agency to hire or transfer an employee.

Id. at 1530.

> While decisions to reallocate work or add positions may be considered a management prerogative, the court said such decisions could not be the sole factor in determining whether a union proposal was reasonable. "Congress has provided that the agency and the union together should determine the amount of official time 'reasonable, necessary and *in the public interest.*'" *Id*. at 1530 (emphasis in original). By including a specific provision for time off without loss of compensation in the MMBA, and by requiring that management and labor meet and confer on all matters relating to employment conditions, we may infer the state legislature also indicated a desire to have public entities meet and confer with their labor organizations over "reasonable time off."

The language of the MMBA refers only to time off for "formally meeting and conferring." It does not include time off for conducting other union activities such as preparing grievances, preparing for disciplinary proceedings, or taking care of other union business. Nevertheless, the common understanding of the MMBA language by public sector employers in California has included time off for these types of activities. Similarly, while the NLRA also refers only to time off for meet and confer, federal courts have interpreted that language to include more than formal negotiations.

This liberal interpretation is illustrated in *BASF Wyandotte Corp. v. Local 227,* 791 F.2d 1046 (2d Cir. 1986). In that case, the collective bargaining agreement authorized four hours each day to conduct union business during normal work hours. The union representatives said that for every twenty hours spent on union activities, they spent approximately one to two hours meeting with management, and the remaining eighteen hours were spent:

> (1) preparing for Union activities by, for example, reading labor periodicals and investigating employee grievances, (2) conducting such intra-Union business as writing Union reports, preparing notices of Union meetings, and preparing for lawsuits against BASF, and (3) engaging in non-Union-related social activities such as making personal telephone calls and reading newspapers.

Id. at 1047.

> After receiving this information, BASF reduced the number of activities it included within the definition of union activity that would be compensated, and said in the future it would only compensate union representatives for time spent actually meeting with management as required by the NLRA. The union filed an unfair labor practice charge. It maintained the unilateral changes imposed by management limiting the time allowed for union activities violated the provisions of the negotiated agreement. *BASF Wyandotte*, 791 F.2d at 1047.

BASF argued that paying employees for performing union activity other than formal meetings with management violated the NLRA. The court disagreed and said there was "no meaningful distinction between time spent in meetings with management and time spent in

preparing for those meetings" and included in its discussion the types of duties the union had listed. *BASF Wyandotte*, 227, 791 F.2d at 1049. This broad interpretation is similarly applied to the reasonable time provision of the MMBA. Thus, while the statute specifically refers only to time off for formal meet and confer sessions, the courts have interpreted this liberally to include preparation for meetings, grievances, and disciplinary actions.

II. Determining What is "Reasonable Time Off" Requires Balancing the Needs of Both Parties

In determining what is "reasonable time off," the courts have attempted to balance the needs of the respective parties. The courts have stated that an employer has a right to maintain an efficient and effective workforce. This includes the right of the employer to refuse to authorize time off for union activities and to discipline employees for violating the employer's decision.

For example, in *Vokas Provision Co. v. National Labor Relations Board*, 796 F.2d 864 (6th Cir. 1986), the court overturned the finding by the National Labor Relations Board [NLRB] that the employer had committed an unfair labor practice when it fired six employees who left the plant to testify at a union meeting. The employer had specifically warned the employees they would be terminated if they left work without having been served with subpoenas. As a compromise, the employer said one employee could go to the meeting as a representative of the work group even without a subpeona. The employees were told by the union that subpeonas would be served at the hearing, but they did not have the subpeonas in hand when they left the workplace.

After the terminations, the union filed an unfair labor practice charge. The NLRB agreed with the union and found the employer had committed an unfair labor practice by terminating the employees. The court refused to enforce the NLRB finding. It pointed to a long line of cases upholding the right of an employer to take disciplinary action in cases and said the NLRB failed to follow its own rules. In reaching its decision the court said "[t]he Supreme Court has also recognized that because 'working time is for work' the Act 'does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time,' . . . so long as such rule is not adopted for a discriminatory purpose." *Id.* at 870. The court thus upheld the right of the employer to maintain a productive workforce by refusing to allow union employees time off when it interfered with business needs.

In a similar case, *National Association of Government Employees, Local R7-23 v. Federal Labor Relationships Authority*, 770 F.2d 1223 (D.C. Cir. 1985), an employee at Scott Air Force Base, who was also the union president, was spending one hundred percent of his time engaged in union activities. The employee was threatened with disciplinary action if he did not start performing his duties as a systems analyst. Subsequent to this discussion, the employee received a performance evaluation that was lower than the one he received the previous year. Again, an unfair labor practice was charged. The administrative law judge [ALJ] determined the poor performance evaluation was based on the employee's sub-standard work performance, not his lack of performance due to the time he spent engaged in union activities. The ALJ also concluded that the threat of disciplinary action was based on poor work performance rather than the amount of time the employee spent on union activities. Thus, the ALJ did not find either

action by the employer resulted in an unfair labor practice.

The court agreed the performance evaluation was based on the actual work performed by the employee and not on the fact that he missed excessive amounts of work due to his union activities. However, the court disagreed with the ALJ's findings that the threat of disciplinary action was not based on the amount of time the employee spent on union activities. The court said the ALJ's findings on this issue were "incredible," based on the facts cited by the ALJ. The court did note however, that the second finding might have been upheld on another basis. *Id.* at 1226. In explaining its reasoning, the court said: "While the base could not lawfully threaten disciplinary action against an employee for spending authorized time--even if an unreasonable amount of time had been authorized--on union activities, it assuredly *could* refuse to authorize an unreasonable amount of time." *Id.* at 1226 (emphasis in original).

The court then explained that the ALJ could have determined that the threat of disciplinary action was the equivalent of notice that future requests for authorization of unreasonable amounts of time would be denied and "that the expenditure of unauthorized time would be punished." *Id.* at 1226. This case makes it clear that the City is not required to authorize release time for union activities every time it is requested. The City may determine that the union representative has already spent a reasonable amount of time in a given period (i.e., a pay period or a month) and refuse to authorize more time until a new period commences.

The City has met and conferred with each of the employee bargaining units, balancing the needs of both parties in deciding on the "reasonable time off" provisions. Each MOU provides for time off, with specific policies for each union for the approval of the time off. The Auditor's report shows that the terms of the MOU are not being followed by either the employee representatives or appointing authorities. Therefore, we recommend that union representatives, stewards, and appointing authorities be required to adhere to the requirements set forth in the various MOUs. The requirement is contained in each ratified MOU and is, therefore, enforceable. All representatives should be required to seek advance approval from supervisors prior to leaving a worksite to conduct union activities. All requests should follow the procedures of the relevant MOU. Representatives should also be required to keep detailed logs of their activities. The logs should include the name of any person a steward is representing, how much time was spent meeting with the employee, travel time, and any other information determined by labor and management to be pertinent. Supervisors should be advised they may refuse to authorize release time if the work load does not permit release at the requested time or if the union representative has already taken a reasonable amount of authorized release time. Union representatives may be disciplined for failure to comply with the provisions of the MOU. Based on the information contained in the logs, the City can determine what it believes is reasonable time and discontinue authorization of time beyond that amount, or decline to authorize time that interferes with the department's ability to get its work done in an efficient and effective manner.

CONCLUSION

Reasonable time off for conducting union activities must be met and conferred on in an

effort to balance the needs of both the City and the union. If the parties cannot agree on specific time limits, limits may be unilaterally imposed through an impasse proceeding. Courts will look to the interests of both parties in determining whether an allotted period of time is reasonable. The City is not required to authorize time off that will unduly impinge on its ability to conduct its business.

Presently, the City has existing MOUs with provisions for time off and has complied with the meet and confer requirement. These provisions have been met and conferred on and agreed to by labor and management. The City may, therefore, properly require employee representatives and stewards to strictly adhere to the requirements of the MOUs. Information received from union representatives and appointing authorities will be thoroughly evaluated. Based on the evaluation, the City can determine when and how much time requested by representatives and appointing authorities should be authorized and when it is acceptable to refuse to authorize time.

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