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MEMORANDUM OF LAW

DATE: September 10, 2008

TO: Scott Chadwick, Director of Labor Relations

FROM: City Attorney

SUBJECT: Presidential Leave – Overtime and Administrative Pay Issues regarding
Union president of International Association of Fire Fighters, Local 145

INTRODUCTION

The City Attorney has been asked to provide a legal opinion on two issues relating to “Presidential Leave” in Article 47 of the Collective Bargaining Agreement and Operating Procedures for Local 145 Firefighters.¹ The questions pertain to overtime and administrative assignment pay provisions of the Collective Bargaining Agreement and Operating Procedures for Local 145 Firefighters, which the union president claims he is entitled to while on “Presidential Leave”. This Memorandum reviews of the law related to “Presidential Leave”.

QUESTIONS PRESENTED

Below are the specific questions asked and answers, based upon the above analysis.

1. Is the union president of Fire Fighters Local 145, who is on Presidential Leave, pursuant to Article 47 of the Collective Bargaining Agreement (“CBA”), entitled to be paid overtime for working voluntary fire suppression shifts? You indicate that the union is relying on the language in Article 47, Section 2, which states that the

¹ The Collective Bargaining Agreement expired June 30, 2006. The Operating Procedures superseded it. The language of the presidential leave article in both is the same. A new Collective Bargaining Agreement between the City and Local 145 is near agreement, except for the Presidential Leave article. The City Council has indicated it is receptive to approving the terms of a new agreement, once the parties negotiate a new Presidential Leave article that conforms to the law.

President will maintain all the rights and benefits of a City employee.

2. The Local 145 President asserts that he has a right to Administrative Assignment Pay. The language of Article 17 provides that all employees in classes represented by Local 145 who are permanently assigned to straight-day administrative assignments shall receive an additional pay differential labeled Administrative Assignment Pay. The pay does not apply to personnel in temporary light-duty assignments. The union president is currently working Monday through Friday full time, on Presidential Leave. Is the Local 145 President entitled to Administrative Assignment Pay?²

SHORT ANSWERS

1. The union president on Presidential Leave is a full-time union representative, using his time exclusively for the union affairs. The president is not performing City-related services. Such time should not be counted as time worked as an employee of the City. Since "Presidential Leave" time by a union president can not be considered as time worked as a City employee, any fire suppression shift work by him will first count towards his the regular weekly work hours required prior to an employee being eligible for overtime. Only then is an employee entitled to overtime payment. In addition, the City has a past practice of not allowing employees on "Presidential Leave" to pick-up additional shifts.
2. The plain language of the provision "Administrative Assignment" covers only those situations. Barring some other understanding by the parties at the table regarding the meaning of this word, it would seem that no one should be granted this additional pay that does not have an administrative assignment.

In addition, as noted above under number one, since the time a union president spends on "Presidential Leave" is not time worked for the City, it follows that he can not be on a City "administrative assignment" during that time, and is not entitled to City pay. In addition, the City's past practice is not to provide this differential pay to an employee on so-called "Presidential Leave."

DISCUSSION

I. The Collective Bargaining Agreement Article granting Presidential Leave.

The current Presidential Leave article declares that the union president shall remain a full time City employee and draw a City salary while on Presidential Leave. The union president is granted forty (40) hours per week, every week, of Presidential Leave, the full time hours of the employee. The union president is a full-time union representative, using his or her time exclusively for union affairs. The president is not performing City-related services. The City

² The Operating Procedures grant a 10% added pay differential. The proposed new Agreement raises it to 15%.

does not direct the president's daily duties, nor does it manage or control his/her use of time.

Apart from a reference to the union president being subject to all policies and procedures of the City, which is true of all employees, the union president is not restricted as to what he/she can do while on Presidential Leave. References in the Presidential Leave article suggest the parties understood the union president on Presidential Leave was not a city employee.

Section 5 of the Article requires that the union hold the City harmless, and defend and indemnify it for any liability incurred by the City for the City **not** withholding employment taxes from the president's wages while on Presidential Leave. In the indemnification clause, the parties reference the Federal Insurance Contributions Act (FICA). That law requires employers to withhold employment taxes from its employees. (See detailed discussion, *infra*.) The union also guarantees to indemnify the City for any obligation by the City to pay those employment taxes determined to be due, to pay interest on late payments of taxes, and to pay penalties for failure to timely file, pay, withhold and remit taxes owed.

The Article acknowledges that the union president on Presidential Leave will engage in more than representational activities, and that special protection for the City is therefore necessary, not required of other city employees. The union specifically obligates itself to indemnify, defend, and hold the City harmless from the actions and conduct of its union president, while on Presidential Leave.

The union president is covered by the City's Workers' Compensation Plan for injuries while the president is performing merely representational functions, however, while on Presidential Leave he/she is specifically written out of coverage for injuries occurring to travel "to or from social activities from any location".

II. The City Charter.

Section 93 of the City Charter sets forth the limitation relating to expenditure of public funds. It provides, in pertinent part: "The credit of the City shall not be given or loaned to or in aid of any individual, association or corporation; except that suitable provision may be made for the aid and support of the poor."

The City Charter requires that the City of San Diego maintain accurate payroll records and compensate employees only for services rendered to the City in accordance with applicable laws and regulations. Charter section 126 authorizes the Personnel Director to certify payroll only if the employee is performing service under the provisions of the Charter. The City Charter establishes the rule that the City may not compensate individuals unless they render personal service to the City.

City Charter section 126 mandates that the Treasurer "shall not pay...any salary or compensation to any person holding, or claiming to hold, a position in the classified or unclassified service unless the payroll or account of such salary or compensation shall bear the

certificate of the Personnel Director that the persons named therein have been elected, appointed or employed and are performing service..." Charter section 135 requires the Personnel Director to compile and maintain a list of all persons in the service of the city. If the union president is not susceptible to orders to work from his superiors, the certification could not be made. "In the service of the City" means performing those duties prescribed for someone occupying a classified or unclassified position as specified in Charter section 117. Charter section 130 authorizes employees to perform duties within their classification for service to the City of San Diego. Union president" is not a classified or unclassified position. Because union presidents are not employees, they cannot receive any form of compensation directly from the City for work performed in the capacity of union president.

To be considered an employee, the individual must be available to work and subject to management orders to work. "The essential characteristic of employment relationship is the right to control and direct the activities of the person rendering service, or the manner and method in which the work is performed." *Villanazul v. City of Los Angeles* (1951) 37 Cal.2d 718, 721. Unless the City retains the right to control and direct the activities of the individual, the individual is not an employee of the City.

The CBA requires the City to directly fund 80 hours per pay period of Presidential Leave. The union president is not doing work for the city, but rather the union. During such time, the union directs the duties of its president, not the City. Under the law, during such times, the union president is not an employee of the City, and it is not proper, and a misappropriation of public funds, to pay the union president out of City funds.

III. The California Labor Code.

An employee is a person "rendering **actual** service in any business for an employer..." (Labor Code section 330, emphasis added.) By not working on City business in a recognized City position and not being directed in his or her daily duties by City management, a union president who is on "presidential leave" runs afoul of the definition of employee under the California Labor Code. Engagement in union business, other than time in collective bargaining with the employer, for which release time is authorized by a different statute as discussed below, is not being engaged in business of the employer. Labor Code cases define employee as "one who is subject to the absolute control and direction of his employer in regard to any act, labor or work to be done in the course and scope of his employment." *Crook v. Glens Falls Indem. Co.* (1954) 124 Cal App.2d 113, 121.

The City is not permitted to pay City funds to a union president on "Presidential Leave". During that leave, the union president is not working for the City and not directed in his/her daily duties by City management.

IV. The Meyers-Milias-Brown Act.

Pursuant to the Meyers-Milias-Brown Act [MMBA], a city may grant a reasonable amount of “release time to an exclusive representative, without loss of compensation or other benefits, when those union representatives are “formally meeting and conferring with representatives of the public agency on matters within the scope of representation.” Gov. Code § 3505.3. While the amount of “reasonable release time” is a negotiable subject of bargaining *Anaheim Union High School District* (1981) PERB Decision No. 177, it can only be granted by a City to a union official for “meeting and conferring with representatives of the agency”, and for no other purpose.

The release time contemplated under MMBA by the legislature is more restrictive than other public entities. For instance, while Government Code provisions applying to school districts and state universities under the Educational Employment Relations Act (EERA) and the Higher Education Employment Relations Act (HERRA) provide that release time may also be used for grievance handling, the labor relations section of the Government Code applicable to cities, the MMBA, does not. The difference in language evidences a difference in legislative intent. *Peasquitos, Inc. v. Superior Court* (1991) 53 Cal.3d 1180, 118801189; *Cumero v. Public Employment Relations Board* (1989) 49 Cal.3d 575, 596.

Importantly, released time is considered time when an employee is excused temporarily from his/her normal work duties for reasonable periods to participate in negotiations (or grievance handling under EERA). In defining release time under EERA section 3543.1(c) PERB stated:

Released time, though not specifically defined in EERA, refers to *time during an employee’s day during which the employee is excused from work.* In the context of section 3543.1(c), it is *time during the workday during which an employee is excused from work to participate in negotiations and grievance processing.* Further, pursuant to the Act’s requirement, the employee is to continue to receive full compensation during reasonable periods of time excused from work for these purposes. *Anaheim Union High School District* (1981) PERB Decision No. 177, p.2, emphasis added.

To receive release time under the MMBA, the individual must be under the control of the City and the City must direct the work of the individual. The core of managerial control is the right of the City to direct its work force and determine what work is to be performed by employees. This control is not subject to alteration in bargaining. *Davis Joint Unified School District* (1984) PERB Decision No. 393.

In an instructive case, PERB has recently distinguished between release time granted to union officials for meet and confer duties, and a leave of absence taken by a union president to work on union activities. *Berkeley Unified School District* (2008) PERB Decision No. 1954. As

noted above, similar but slightly different release time is granted by the Government Code to cities under MMBA and school districts under EERA. In addition, school districts, per the Education Code are permitted to grant a union president up to one year leave of absence to work on union business, with full salary and benefits, including retirement fund contributions paid for by the employer, provided the union agrees to reimburse the school district for all salary and benefits paid on behalf of the union president.³

In *Berkeley Unified School District*, after describing the two separate statutory sections, PERB distinguished the purposes of union presidential leave under Education Code versus release time which is authorized for cities under MMBA and schools under EERA.

As outlined above, the leave of absence allowed by the Education Code and the released time required under EERA have different purposes. The Education Code's provision allows an employee to carry out his or her duties as union officer, while on leave from their normal work duties. In essence, during the time that the employee is on leave, it is the union that directs their duties.

In contrast, released time under EERA is for employees who continue to carry out their normal work duties for the school district, but who are afforded reasonable paid time off to participate in negotiations and grievance processing. *Id. at 8, emphasis added.*

An employee must be subject to the absolute control and direction of his work by his employer to be eligible for release time. *Service Employees International Union v. Superior Court* (1982) 137 Cal.App.3d 320, 325-326; *Service Employees International Union, Local 434 v. County of Los Angeles* (1990) 225 Cal.App.3d 761, 769.

The Meyers-Milias-Brown Act is the only authority upon which the City can grant a union president some time away from his/her normal duties and still be paid by the City. MMBA only permits payment of a "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." Cal. Gov't. Code § 3505.3. Presidential Leave, Article 65, goes well beyond this legal mandate by providing that a union president can use his City funded presidency for virtually any purpose. Under the Article, the union president, who is a paid City employee, is permitted to spend 100% of his time exclusively acting in the capacity of union president, on any business he or his the union wishes for its president. This is neither permitted nor condoned by the Myers-Milias-Brown Act or the California Public Employment Relations Board that interprets and enforces that law.

³ Education Code section 45210. The legislature has not granted cities this same option.

V. Federal Tax law .

The Presidential Leave article, at section 5 clearly states that the City will be held harmless, defended and indemnified by the union for any liabilities for the City **not** withholding employment taxes from the president's wages, pursuant to the Federal Insurance Contributions Act (FICA). The Agreement further provides that this guarantee by the union includes any obligation by the City to pay those employment taxes determined to be due, to pay interest on late payments of taxes, to pay penalties for failure to timely file, pay, withhold and remit taxes owed. Section 5 states:

Local 145 will indemnify, defend, and hold harmless the City, and its employees and agents, for any liabilities resulting from the City's **not** withholding employment taxes pursuant to the Federal Insurance Contributions Act (FICA) from the President's wages, including but not limited to the obligation to pay those employment taxes determined to be due (both the employee and City portions), interest on the late payment of those taxes, penalties for failure to timely file, pay, withhold and remit the taxes, plus costs and attorneys' fees. (Emphasis added.)

The Internal Revenue Code and FICA require a city to withhold Federal taxes from its "employees". (Internal Revenue Code Sections 3101 and 3111. See also Internal Revenue Publication 15, IRS Form 941.)

The contract language appears to indicate that the parties contemplated that City employees, during the time they were performing as union presidents on "Presidential Leave", were not to be considered City employees.

The IRS has ruled that "In determining who is the employer...the governing factor is not who furnishes the funds to pay the worker, but who actually has the right to supervise and control the individual in the performance of his services and whether that right is being exercised as principal". (Rev.Rul. 56-605, 1956-2 C.B.696). Based on the fact that union presidents on Presidential Leave are working as full time union representatives, and are not performing City-related services, it is reasonable to assume the Internal Revenue Service would conclude that, for Federal income tax purposes, during the time that City employees who are union presidents are on Presidential Leave, they are "employees" of the union, not of the City.

CONCLUSION

The union president on Presidential Leave, although drawing a City salary, is working as a full time union representative, and is not performing City-related services. The union president is not directed in his/her daily duties by City management. The conclusion is that a union president is not working as an employee of the City of San Diego while on Presidential Leave. Hence, the City is not permitted to pay City funds to a union president on "Presidential Leave".⁴

Based upon the president's non-employee status while taking Presidential Leave, as well as the plain language of the CBA on administrative assignments, and the past practice of the City of not granting overtime or administrative assignment pay to union presidents on Presidential Leave, it is our opinion that the union president of Local 145 is not entitled to overtime or administrative assignment pay while on Presidential Leave, under the facts presented.

MICHAEL J. AGUIRRE, City Attorney

By

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City Attorney

MJA:jdf

ML-2008-15

cc: The Honorable Jerry Sanders
City Councilmembers
Andrea Tevlin, Independent Budget Analyst

⁴ The City Attorney on previous occasions has reached the same conclusions expressed herein, i.e. Memoranda dated October 1, 1996, April 10, 2008 and May 23, 2008.