MEMORANDUM OF LAW

DATE: November 18, 1986

TO: Kent Lewis, Assistant Personnel Director
FROM: City Attorney
SUBJECT: Military Leave

In a memorandum dated August 19, 1986, you requested that this office answer several questions concerning the military leave policy of The City of San Diego. Most of these questions concerned conflicts in the terminology used by the Municipal Code, the Personnel Manual and the Military and Veterans Code of the State of California. We will answer your questions seriatim.

QUESTION NO. 1

Your first question concerned the effect of a conflict in the terminology of the Municipal Code and the Personnel Manual in describing eligibility for military leave. Municipal Code section 23.1107 refers to one year of City employment as the minimum eligibility requirement and the Personnel Manual in Index Code I-10 refers to one year of "public service." Neither of these terms is found in section 395.01 of the Military and Veterans Code which sets forth the State of California's policy on paid military leave. That section reads in part:

> Sec. 395.01. Compensation of public employees on temporary military leave of absence; conflict of section with memorandum of understanding
>
> (a) Any public employee who is on temporary military leave of absence for military duty ordered for purposes of active military training, encampment, naval cruises, special exercises, or like activity as such member, provided that the period of ordered duty does not exceed 180 calendar days including time involved in going to and returning from the duty, but not for inactive duty such as scheduled reserve drill periods, and who
>
> has been in the service of the public agency from which the leave is taken for a period of not less than one year immediately prior to the day on which the absence begins shall be entitled to receive his salary or compensation as such public employee for the first 30 calendar days of any such absence. Pay for such purposes shall not exceed 30 days in any one fiscal year. For the purpose of this

section, in determining the one year of public agency service, all service of said public employee in the recognized military service shall be counted as public agency service.

. . . .

The terms in the Municipal Code and the Personnel Manual should therefore be changed to reflect the terminology of the Military and Veterans Code in order to avoid any confusion. In addition, you should be aware of the attached Memorandum of Law dated August 26, 1969 prepared by R. Thomas Harris, Deputy City Attorney to A.A. Bigge, Personnel Director which provides guidance in determining what periods of time qualify as "recognized military service." The analysis provided in that memorandum reflects the current state of the law except that section 53070 of the Military and Veterans Code was repealed by Stats. 1970c. 1513 p. 3014, Sec. 62.5 and the Vietnam Era has been defined in 38 USC 101(29) as that period of time beginning August 5, 1964 and ending May 7, 1975.

QUESTION NO. 2

Your second question concerned the apparent conflict between the Military and Veterans Code and the current practice of The City of San Diego whereby the City does not hold breaks in public service against the employee in calculating the one year of public service provided for in section 395.01 of the Military and Veterans Code. Under the City's policy, an individual who has not had one year of continuous service in the service of a public agency as defined in the code, but whose total time in public service exceeds one year, would qualify for military leave. This policy provides a benefit in excess of what is required by section 395.01 of the Military and Veterans Code. The City may change its policy to coincide with state law but because it has established this past practice, it must meet and confer with the recognized employee associations before changing this provision as it affects a matter within the scope of representation. Gov't Code Sec. 3500 et seq.

QUESTION NO. 3

Your third question concerned the computation of the amount of paid military leave available for each employee. You indicated that it is the current operational practice to charge an employee for thirty days military leave if the employee is absent on military leave for thirty continuous calendar days. However, if the employee takes two fourteen-calendar-day leaves then the employee is only charged for the working days absent and not the actual calendar days. This may result in two periods of

ten calendar days each, leaving the employee an additional ten days of military leave. This practice is not consistent with the previous advice of this office contained in the attached memorandum of law to Don Rae from Jack Katz, dated October 13, 1971 or the current policy statement contained in Personnel Manual Index Code I-10. The Personnel Manual specifically states that The City of San Diego has adopted the method of calculating military leave found in section 395.03 of the Military and Veterans Code. That section states that no more than the pay for thirty calendar days is allowed under the provisions of section 395.01 for any one military leave of absence or during any one fiscal year. Therefore, the practice of charging employees for working days absent while on military leave is inconsistent with both City policy and State law.

QUESTION NO. 4

Your last question concerns what type of leave should be utilized once an employee reaches the thirty-day per year maximum paid benefit for military leave. At that point, it is the employee's option to use either annual leave, military leave without pay or compensatory time off if the employee is eligible for compensatory time.

JOHN W. WITT, City Attorney
By
John M. Kaheny
Deputy City Attorney

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Attachment
ML-86-109