

MEMORANDUM OF LAW

DATE: September 22, 1987

TO: D. Cruz Gonzalez, Risk Management Director
FROM: City Attorney
SUBJECT: Supplemental Savings and Pension Plan - Vesting Rules

You indicated in a recent memorandum that you have several questions concerning a letter from the Wyatt Company written in response to your questions concerning the vesting rules contained in the Supplemental Savings and Pension Plan documents (SPSP and SPSP M). The contents of that letter reflect some confusion stemming from the adoption, in January 1985, of amendments regarding vesting rights of reemployed former participants in SPSP and SPSP M. Those amendments to the original plan document were adopted in order for the plan to remain consistent with recent changes in federal law providing retirement security for individuals who frequently change employment status. Your questions and our answers are as follows:

QUESTION NO. 1: Is there an agreement that, if an employee has been terminated from City employment for more than five years, there is no recapture of the City's forfeited match?

ANSWER TO QUESTION NO. 1: Yes. This question concerns the effect of the January 1, 1985 amendment to SPSP and SPSP M which brought the plan documents into compliance with certain provisions of the Retirement Equity Act of 1984 (REACT), Public Law 98-397, 98 Stats. 1426 (1984) and the Deficit Reduction Act of 1984 (DEFRA), Public Law 98-369, 98 Stats. 497 (1984). Section 8.03 entitled "Forfeitures" of both amended plans, clearly states, in part, that:

The nonvested portion of the Participant's Employer Matching Mandatory Contribution Account and Employer Matching Voluntary Contribution Account will be forfeited as of the date on which he or she incurs five consecutive One-Year Breaks in Service. The nonvested portion of such accounts, which has not yet been forfeited, shall be transferred to the Forfeiture Suspense Account. Emphasis added.

The plan document is very clear on this point. When an employee returns to City employment after five consecutive one-year breaks in service, there is no recapture of the previously forfeited

employer matching contributions. If, on the other hand, the employee returns to City employment prior to five consecutive one-year breaks, the employee recaptures the City's matching contributions in accordance with the detailed provisions of sections 8.02(b) of SPSP and 8.03 of SPSP M.

QUESTION NO. 2: Do you concur that if an employee was 100% vested on January 8, 1982, he or she is "always" 100% vested regardless of terminations or when rehiring occur?

ANSWER TO QUESTION NO. 2: Yes, the plan document is very explicit on this point. Section 8.02(a) of the plan, as amended and restated effective January 1, 1985, specifically states that an employee eligible to participate in the plan on its effective date is 100% vested at all times in his or her accounts held under the plan. The effective date of the plan is defined in Section 1.07 as January 8, 1982. A similar provision existed in Section 4.4 of the original plan which went into effect on January 8, 1982. Therefore, any employee who was eligible to participate in SPSP when the plan went into effect on January 8, 1982 is always 100% vested regardless of any break in service or the length of the break in service.

QUESTION NO. 3: Do you have any knowledge of previous discussions regarding the "intent" of the plan not to aggregate all service?

ANSWER TO QUESTION NO. 3: We are not aware of any previous discussion regarding the "intent" of the plan not to aggregate all service. On the contrary, information accompanying your memorandum indicates that, in regard to vesting percentage, the plan documents have always been interpreted to provide that a rehired employee will never be less vested than previously vested. This interpretation follows the general rule that the provisions of a pension plan document should always be liberally construed in favor of the applicant. *Terry v. City of Berkeley*, 41 Cal.2d 698 (1953). We believe, therefore, that the plan documents should continue to be interpreted in a manner which provides that when an employee who has left City service returns, the employee's vested percentage in SPSP or SPSP M employer's matching contributions will not have diminished in any way because of the absence.

QUESTION NO. 4: Please review and comment on the recommendations listed in Item No. 3 of the Wyatt letter.

ANSWER TO QUESTION NO. 4: The Wyatt letter describes the following options:

- (1) If you wish to continue the practice that a person with a 1-year (or 5-year) break in service loses all prior Service, add a

provision to the end of Section 1.23 (the "Service" definition) which states that prior Service will not be considered if a person incurs 5 one-year breaks in service. Because the plan has been operated (from what you have told me) in a manner which supported this provision, it could be argued that this amendment brings the revised plan into conformance with its original intent.

(2) If you wish to apply the "always start over" rule stated in the first document, restate the "Service" definition to match the original definition and delete all reference to the "formula" in Section 8.02.

(3) If you wish to aggregate all Service, even for those who have 5 one-year breaks in service, the plan need not be amended. As the situation involving the return of an employee after 5 one-year breaks in service is sufficiently rare, the amount the City gains in forfeitures by applying this provision may well be lost in extra administrative costs.

The recommendations by the Wyatt Company were drafted in an attempt to resolve what they believed to be conflicts in the interpretation of the above-described plan provisions. However, because it appears that it was always the intent of The City of San Diego to aggregate all service for the limited purpose of calculating the vesting percentage for rehired individuals so that they would never be less vested than previously vested, we do not believe that changes must be made to the plan documents at the present time. However, if, in the future, other amendments to the plan document are proposed, we would recommend clarifying the vesting provisions of both plan documents to avoid any future confusion.

JOHN W. WITT, City Attorney

By

John M. Kaheny

Deputy City Attorney

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