

MEMORANDUM OF LAW

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DATE: November 29, 1989

TO: Doris Uzdavines, Employee Savings Plans
Administrator, via D.Cruz Gonzales, Risk
Management Director

FROM: City Attorney

SUBJECT: SPSP/401(k) Cost Recovery

In a memorandum dated November 3, 1989, you asked this office to review and comment on a proposal that The City of San Diego recover the expenses of administering the Supplemental Pension and Savings Plans (SPSP/SPSP-M) and the 401(k) Plan from the applicable trust fund. You indicated that the SPSP/SPSP-M Plan Documents, Article X Plan Administration, Section 10.06 Payment of Expenses; and, the 401(k) Plan Document, Article VIII Plan Administration, Section 8.06 Payment of Expenses appear to allow for such payment.

Section 10.06 of the SPSP/SPSP-M Plan Documents and Section 8.06 of the 401(k) Plan Document are similar but not identical. They state as follows:

SEC. 10.06 PAYMENT OF EXPENSES

The Plan Administrator shall serve without compensation for services as such. However, the Trust Fund may reimburse the Plan Administrator and other fiduciaries for all necessary and proper expenses incurred carrying out their duties under the Plan. The compensation or fees of accountants, counsel and other specialist, and any other cost of administering the Plan or Trust shall be paid directly by the Employer.

SEC. 8.06 PAYMENT OF EXPENSES

The Plan Administrator shall serve without compensation for services as such. However, the Trust Fund may reimburse the Plan Administrator for all necessary and proper expenses incurred carrying out his/her duties under the Plan. The compensation or fees of accountants, counsel and other specialist, and any other

cost of administering the Plan or Trust shall be paid directly by the Employer.

The above language gives the Plan Administrators the discretionary authority to seek reimbursement for authorized expenses from the appropriate trust fund within the expressed limitations of the Plan and the provisions of Section 401(a)(2) of the Internal Revenue Code. Section 401(a)(2) requires, as a basis for tax qualification, that reimbursement is permissible only when the expenses have been incurred for the exclusive

benefit of the employees and their beneficiaries under the trust. According to the supporting information accompanying your memorandum, the Plan Administrators have never exercised the authority to seek reimbursement for authorized expenses. Instead, The City of San Diego has assumed all costs of administering the SPSP/SPSP-M and 401(k) Plans since the Plans were adopted.

If in the future authorized expenses are paid from the trust funds, it must be assumed that they will be paid out of trust earnings. According to the supporting information, this procedure will cause an adverse affect upon the plan participants' average annual earnings. It is, therefore, reasonable to assume that if the Plan Administrators exercise the authority under the Plan Documents to seek reimbursement from the trust fund, there will be a direct adverse impact on wages, hours and other terms and conditions of employment within the meaning of Meyers-Milias-Brown Act (California Government Code section 3500 et seq.). *International Assn. of Fire Fighters Union v. City of Pleasanton*, 56 Cal. App. 3d 959 (1976). Such an adverse impact will make it necessary for The City of San Diego to meet and confer with the applicable recognized employee organizations prior to the Plan Administrators exercising the authority to recover authorized expenses from the appropriate trust funds. Once that is accomplished, there being no necessity to amend the Plans, the Plan Administrators may exercise the authority to recover authorized expenses in accordance with the provisions of the Plan Documents and Section 401(a)(2) of the Internal Revenue Code.

JOHN W. WITT, City Attorney

By

John M. Kaheny

Chief Deputy City Attorney

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