

DATE: March 30, 1989

TO: Doris Uzdavines, Employee Savings Plans  
Administrator

FROM: City Attorney

SUBJECT: SPSP/SPSP-M: Forfeitures/Vesting Requirements

In a memorandum dated December 21, 1988, you asked this office to review and comment on the current withdrawal and forfeiture procedures contained in the SPSP and SPSP-M Plans. The Plan requires that a forfeiture equal to the amount of the employee's withdrawal be taken from the employer's contribution. The forfeiture is a penalty for early withdrawals and, because of Plan procedures, frequently a portion of it is taken from the employee's vested benefits. You have asked if taking forfeitures from vested benefits is appropriate.

All the terms and conditions of the Plan are set forth in the Plan document. Section 6.03(a) through (d) of the Plan contains the conditions concerning forfeiture upon withdrawal. Under the plain language of the Plan formula, the amount taken from an employee's vested portion depends upon the extent to which the employer's contribution has become a vested benefit of the employee, but any forfeiture results in some diminution of the total vested amount. Though the forfeiture follows the Plan conditions, it appears to be contrary to case law which indicates that vested interests cannot be withheld once the employee has performed the required service. The service required by the Plan is one year of employment for each 20% increase in the employee's vested benefit.

In explaining the concept of vesting, the courts have said: "The right to retirement benefits vests when an employee acquires an irrevocable interest in a fund created by his own contributions, or the contributions of his employer, or both." In *In re Marriage of Fithian*, 10 Cal.3d 592, 596 (1974) "Irrevocable is defined as incapable of being recalled or revoked." *Commissioner of Internal Revenue v. Strong Mfg. Co.*, 124 F.2d 360, 363 (1941).

In interpreting provisions of pension plans, the courts have consistently sided with the employee stating: "It is a general and well recognized rule that pension provisions shall be liberally construed in favor of the applicant." *Terry v. City of Berkeley*, 41 Cal.2d 698, 702 (1953). The Plan can, and does, provide for when the employee's benefits vest. However, once vested, the money cannot be retrieved by the employer. "When the pension vests, the benefits of the pension system may not be

withdrawn arbitrarily by the employer." Williamson v. Williamson, 203 Cal.App.2d 8, 12 (1962).

We recommend that the Plan Document be amended to provide that amounts once vested cannot be forfeited. In the meantime, we recommend that the plain language of the Plan formula be interpreted in such away as to not forfeit any vested employee dollars.

JOHN W. WITT, City Attorney

By

Sharon A. Marshall

Deputy City Attorney

SAM:mrh:357(x043.2)

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