

MEMORANDUM OF LAW

DATE: November 9, 1992

TO: Ed Ryan, Auditor and Comptroller

FROM: City Attorney

SUBJECT: Furlough Program

You have asked a number of specific questions related to the voluntary and mandatory furlough program for City employees. The following responds to your questions.

1. Is it legal for the Auditor's Office to pay MEA represented employees for 1992 nonworking days under the mandatory furlough agreement and then deduct the advance over a number of subsequent pay periods beginning in calendar year 1993?

Yes. All appropriate procedures were followed in reaching the mandatory furlough agreement. Municipal Employees Association ("MEA") and management met and conferred on the issue pursuant to the dictates of the Memorandum of Understanding ("MOU"). The issue was then submitted to the union membership for a vote. Therefore, all legal hurdles have been overcome. There is no bar to deducting the pay-back over a period of time because the City's pay system is structured in such a way that employees have at least a two-week float period at all times. At any given point in time, when a paycheck is delivered, the City owes the employee an additional ten to twenty days wages. This means the City actually is in debt to the employee. During the furlough period, the City will be merely reducing the debt temporarily and replacing it at a later time. It is important that adequate records be kept which show the employee is being paid for hours previously worked. Adequate recordkeeping will preclude any intimation of negligence.

- a. If the answer is yes, what is the authority for the Auditor's Office taking those deductions since there will not be an employee signed Payroll Deduction Notice?

A signed Payroll Deduction Notice will not be necessary to permit the deductions. The written and signed agreement negotiated with MEA will provide the necessary authorization for the deductions.

- b. If non-MEA represented employees choose to voluntarily take time off during the same days as the "MEA Mandatory Furlough" what is the authority for spreading the pay back as done in the "mandatory" program?

A payroll deduction notice for the Limited Voluntary Furlough Program has been prepared. Each unclassified or classified/unrepresented employee participating in the program will complete the form prior to the first furlough day (November 27, 1992). These forms will provide the Auditor's office with adequate authority for spreading the pay-back over the thirteen pay periods.

2. After notifying employees of the mandatory furlough schedule, does the Auditor's Office have any liability for not allowing an employee in our Department to work, subject to this agreement, if they present themselves for working during those "mandatory" days off?

No. As noted above, all the proper steps have been executed prior to reaching this agreement. MEA is the recognized exclusive representative for the bargaining unit consisting of the classifications listed in Appendix A of the current MOU. The MEA represented employees of the Auditor's office, pursuant to the agreement, have not been scheduled for work on those days and thus have no rights to wages on those days.

- a. Does it matter whether they are MEA represented employees or not?

No. MEA is the exclusive bargaining representative for all employees in the specified classifications. Whether an employee is a dues paying member does not affect the agreement between the management and MEA represented classifications. Classified unrepresented employees will be participating in the Limited Voluntary Furlough Program.

- b. Would your answer be the same if the employee is an employee of another Department?

Yes. All MEA represented employees, regardless of department, are subject to the same mandated furlough days. Specific exemptions for purposes of preserving the public health or safety or for other reasons of necessity have been made. Only individuals in these classifications who have been exempted will be permitted to work on furlough days.

3. Do FLSA rules impact this mandatory furlough program, particularly with unclassified employees.

No. Unclassified employees will be participating in the Limited Voluntary Furlough Program, using the same days as the

Mandatory Furlough Program. Unclassified exempt employees will not be taking absences of less than a day. Thus, FLSA rules will not be impacted.

4. Am I personally liable for any legal action that could result from this furlough program? If the answer is yes, what would be the circumstances?

San Diego City Charter ("Charter") sections 82 and 126 address the issue of the Auditor's duty in issuing paychecks. Specifically, Charter section 82 reads in pertinent part:

The Auditor and Comptroller shall examine all payrolls, bills, and other claims and demands, except claims for damages against the City, and shall issue no warrant or check-warrant for payment unless he finds that the claim is in proper form, correctly computed, and duly approved; that it is legally due and payable; that an appropriation has been made therefor which has not been exhausted; and that there is money in the treasury to make payment.

Appropriations for payroll are made in the annual appropriation ordinance and the salary ordinance which ensures the claims are in proper form. The previously noted float system ensures that employees have actually performed work for the hours for which they are being paid, thus the claim is legally due and payable. Under these conditions, no liability can attach to the Auditor's performance of his legally mandated duty.

Additionally, Charter section 126 provides in pertinent part:

If the Auditor and Comptroller shall wilfully or negligently approve any payment or issue any warrant in violation of this section he and the sureties on his bond shall be liable to the City for the amount thereof and action may be brought therefor by the City or any taxpayer for the use of the City without making previous request to the City to sue.

Under this Charter section, the Auditor can only be found personally liable for willful or negligent acts. As previously noted, we believe all proper procedures have been adhered in reaching the furlough agreement. Thus, we do not believe there will be willful or negligent acts in the computation or

disbursement of paychecks if the proper documentation is kept.

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By

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cc Joe Lozano

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