

MEMORANDUM OF LAW

DATE: April 15, 1992

TO: Hedy Griffiths, Employee Benefits Manager

FROM: City Attorney

SUBJECT: Extension of Benefits While on Extended Military Leave

It has recently come to the attention of Risk Management that an employee who was called to active duty during Operation Desert Storm is still on extended military leave due to an injury incurred while he was on active duty. The City has continued, through an oversight, to pay his benefits up to the current time. On February 11, 1991, Council adopted Resolution No. R-277351. The resolution provided an extension of paid flexible and management benefits up to 150 days beyond the usual 30-day military leave benefit. You have asked if any law requires the City to continue to pay his benefits beyond those 180 days. You have also asked if the City may seek reimbursement for any overpayments.

As a general rule, while reservist employees are on active duty, employers do not have an obligation to pay wages or continue benefits such as health insurance, unless the company has a policy or contractual provision on these issues which would apply for other employees on leave of absence. 38 U.S.C. Sections 2021(b)(1) and 2024(b)(1). However, if the Company does not generally provide health benefits for employee reservists called to active duty, the Internal Revenue Service has interpreted the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA") as requiring such employees and their dependents to be permitted to purchase group health coverage at their own expense. Thus, they must be given notice of their COBRA rights. (Internal Revenue Service Notice 90-58 issued 9-7-90.)

Under federal law, therefore, reservists would be entitled to maintain their benefits, beyond the one hundred eighty days (180), but only at their own expense.

Pursuant to California Military & Veterans Code Section 395.02, an employee of public agencies called to active duty is entitled to receive his or her salary for 30 days. The section reads as follows:

Section 395.02. Same: Absence on military leave other than temporary military leave:
Right to salary, etc., for first 30 days when in public service for not less than one year:
"Officer" and "employee" defined
Every officer and employee of a public agency who is on military leave other than temporary military leave of absence who

has been in the service of such public agency for a period of not less than one year immediately prior to the date on which the absence begins shall be entitled to receive his salary or compensation as such officer or employee for the first 30 calendar days while engaged in the performance or ordered military duty.

As used in this section only, the terms "officer" and "employee" mean an officer or employee who

(a) Is ordered into active military duty as a member of a reserve component of the armed forces of the United States;

(b) Is ordered into active federal military duty as a member of the National Guard or Naval Militia; or

(c) Is inducted, enlists, enters or is otherwise ordered or called into active duty as a member of the armed forces of the United States.

The City Council, by Resolution No. R-277351, adopted on February 11, 1991, approved supplemental benefits for an additional one hundred and fifty (150) days. No additional paid benefits are provided for employees.

Therefore, even though the individual may still be on active duty, due to an injury, he is not entitled to have paid benefits beyond those specifically provided by Council. To continue to pay benefits beyond that date would be a gift of public funds. It is, therefore, appropriate for the City to seek reimbursement of the overpayments. I have attached a Memorandum of Law by Deputy City Attorney Loraine L. Etherington, dated January 14, 1992, which discusses the general provisions under which the City may seek reimbursement to avoid the gift of public funds concern.

If I can be of further assistance, please feel free to contact me.

JOHN W. WITT, City Attorney

By

Sharon A. Marshall

Deputy City Attorney

SAM:mrh:314(x043.2)

Attachment

cc D. Cruz Gonzalez

ML-92-35