MEMORANDUM OF LAW

DATE: June 19, 1992

TO: Larry Gardner, Labor Relations Manager

FROM: City Attorney

SUBJECT: Fire Fighters Overtime Rate

At the budget hearing of June 18, 1992, Mr. Ron Saathoff, President of Fire Fighters Local 145, proposed to the Honorable Mayor and City Council that the fire fighters of the City of San Diego be paid overtime at the rate of 1.3 percent (1.3%) as opposed to the 1.5 percent (1.5%) rate currently paid. The proposal was put forth as a method of offsetting some of the City's budgetary shortfall. You have requested an opinion regarding the legality of accepting Mr. Saathoff's proposal.

Two factors prohibit the City from accepting Mr. Saathoff's proposal. The Supreme Court decision of Garcia v. San Antonio Metropolitan Transit Authority, 83 L. Ed. 2d 1016 (1985) subjected municipalities across the country to the provisions of the Fair Labor Standards Act ("FLSA"). Subsequent to the Court's decision, the City, through a negotiated agreement with Local 145 continued to pay Battalion Chiefs overtime pay at their regular rate of pay rather than the 1.5 percent (1.5%) rate specified in 29 U.S.C. section 207. This agreement with Local 145 has been adopted by Council by resolution each year since the Garcia decision. Nevertheless, in 1991, the Battalion Chiefs of Local 145 brought a suit against the City of San Diego for failure to pay the Battalion Chiefs overtime at the rate of one and one half the regular hourly rate pursuant to the dictates of the FLSA.

In granting the Battalion Chiefs' motion for summary judgment, the Honorable John S. Rhoades, Sr. said:

> Under the FLSA, the defendants the City are required to pay overtime at the rate of time and a half for hours worked in excess of the prescribed work period, unless they are exempted from these provisions by 29 U.S.C. Section 213(a)(1), which distinguishes those working in a "bona fide executive,

> administrative, or professional capacity." 29 U.S.C. Section207(k). Several other general principles control my evaluation of the plaintiffs' claims. First, the terms of coverage of the Act were designed to effectuate Congress' goal of expanding employment protection, and are to be liberally construed. Tony & Susan Alamo Foundation v. Sec'y of Labor, 471 U.S. 290, 296 n. 13 (1984), citing Powell v. U.S. Cartridge Co., 339 U.S. 497, 517 (1950) (exemptions from the Act are "narrow and specific," implying that "employees not thus exempted . . . remain within the Act.") Exemptions to the coverage provided by the Act are to be limited to those "plainly and unmistakably within their terms and spirit." Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960).

Therefore, pursuant to the specific language of the FLSA and the Court order of Judge Rhoades, the City is specifically precluded from negotiating an overtime rate less than that prescribed by law, even through agreement.

The second bar to accepting Mr. Saathoff's proposal is found in the City Charter. City Charter section 130 provides in pertinent part:

> The Council shall by ordinance, prior to the beginning of each fiscal year, establish a schedule of compensation for officers and employees in the Classified Service, which shall establish a minimum and maximum for any grade and provide uniform compensation for like service. It shall be the duty of the Civil Service Commission to prepare and furnish to the Council, prior to the adoption of said ordinance, a report identifying classifications of employees in the Classified Service which merit special salary consideration because of recruitment or retention problems, changes in

duties or responsibilities, or other
special factors the Commission deems
appropriate.

The plain language of this section requires that any changes to the salary ordinance for classified employees, such as fire fighters, go first to the Civil Service Commission for approval, be approved and adopted by Council and be effective prior to the beginning of the new fiscal year on July 1, 1992. Charter section 17 provides that no ordinance shall take effect at any time less than thirty days from the date of its passage. Thus, even if amendments to the salary ordinance were to be introduced at next Monday's Council session, the ordinance would not become effective until well after the July 1, 1992, deadline specified in Charter section 130 and a charter violation would result.

For the foregoing reasons, the proposal of Mr. Saathoff and Local 145 cannot be accepted. To do so would violate both federal law and the City Charter, thereby subjecting the City to potential serious and costly litigation.

JOHN W. WITT, City Attorney
By
Sharon A. Marshall
Deputy City Attorney

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cc Rich Snapper
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