MEMORANDUM OF LAW

DATE: August 31, 1993

TO: Larry Gardner, Labor Relations Manager

FROM: City Attorney

SUBJECT: Favored Nations Clause

Background

On July 26, 1993, Ann Smith, attorney for the San Diego Municipal Employees Association ("MEA") sent you a letter invoking Article 66 of the Memorandum of Understanding ("MOU") entered into between the City and MEA for fiscal year 1994. Article 66 is the "most favored nations" clause of the MOU. During the course of negotiations, management and MEA reached agreement on, among other issues, a two hundred fifty (250) hour limit on the accrual of annual leave for new employees. Additionally, the City and MEA met and conferred on the impact on employees of a change in the merit increase system that provides that merit increases will be given only to employees who have achieved an above standard or outstanding performance evaluation.

A preexisting two (2) year agreement with the Police Officers' Association ("POA") and Local 145 allows new employees of those bargaining units to continue to accrue seven hundred (700) hours of annual leave. Merit increases are permitted on the basis of a satisfactory or above performance evaluation pursuant to Personnel Regulation H-8.

You have asked if the City must grant the more favorable provisions of the preexisting agreement with POA and Local 145 MOU's to MEA, despite the terms specifically agreed upon by MEA during this year's meet and confer process.

Analysis

The Meyers-Milias-Brown Act ("MMBA"), Government Code section 3500 et seq., was adopted by the state legislature to improve employer-employee relations in public agencies. Specifically, Government Code section 3500 provides in pertinent part: "It is the purpose of this chapter to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations."

Pursuant to the dictates of the MMBA, the City and its labor organizations meet and confer on issues concerning wages, hours and working conditions. The agreements reached during this process are subsequently put in written form as an MOU. The MOU between the City and MEA is in the nature of a contract. As in contract law, both parties to the agreement participate in the drafting of provisions that are mutually acceptable. Contract law teaches that the courts will look to the intent of the parties at the time the contract was entered into to determine what was meant by the contract provisions. As the courts have frequently noted:

> The fundamental canon of interpreting written instruments is the ascertainment of the intent of the parties. As a rule, the language of an instrument must govern its interpretation if the language is clear and explicit. A court must view the language in light of the instrument as a whole and not use a "disjointed, single-paragraph, strict construction approach."
>
> When an instrument is susceptible to two interpretations, the court should give the construction that will make the instrument lawful, operative, definite, reasonable and capable of being carried into effect and avoid an interpretation which will make the instrument extraordinary, harsh, unjust, inequitable or which would result in absurdity. If a general and a specific provision are inconsistent, the specific provision controls.

Ticor Title Ins. Co. v. Rancho Santa Fe Assn., 177 Cal. App. 3d 726, 730 (1986) (citations omitted).

Here, it is clear what the parties intended. MEA agreed to specific changes in the articles governing annual leave and merit increases. The meet and confer process allowed adequate time for full discussion of the impact of the proposed changes on MEA membership. MEA knew that the existing articles concerning annual leave and merit increases would not be changed in the POA and Local 145 MOU's for fiscal year 1994. After agreement was reached on these articles between the City and MEA, the

provisions were set forth in writing and ratified by a vote of the membership and finally approved by the City Council. Therefore, based upon the intent of the City and MEA at time the agreement was entered into, the "favored nations clause" is not applicable.

The term "most favored nations" does not contemplate the interpretation MEA has adopted. Rather, it is designed to protect covered entities against prospective erosion of their rights. As the court clearly and succinctly stated in Central States Pension Fund v. Reebie Storage, 815 F. Supp. 1131, 1135 (1993):

> Whenever parties enter into an agreement with a most-favored-nation clause, the normal reading of that understanding is to look only to the possibility of a future racheting upward in favor of the clause's beneficiary, essentially in these terms:
>
> > Here's our current deal. But if I give somebody else a better deal at any point during the life of our contract, I promise to give you the benefit of that better deal too.
>
> But there is no basis for treating a prior understanding with some other party as triggering the most-favored-nation clause - at most the contracting party (the putative beneficiary) might complain that the other side should have disclosed the third-party arrangement up front, to enable the putative party to strike a better deal from the outset.

The court's language indicates nothing more than plain common sense. The courts will not assume that two parties to an agreement would seriously negotiate on an issue knowing it would later have no force or effect because a preexisting clause with a third party supersedes the agreement currently being negotiated. Such an interpretation of a "most favored nations" would reduce the concept of good faith bargaining to a meaningless phrase.

At the very heart of the MMBA is the duty to meet and confer in good faith. Government Code section 3505 provides in pertinent part:

> "Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.

This process was adhered to by the City throughout the meet and confer process. The City met and conferred on the issues of annual leave and merit increases in an open and honest manner. During negotiations, MEA was aware of the merit increase and annual leave provisions of the MOU's currently in effect between the City and POA and Local 145. Additionally, MEA was aware those MOU's were two year agreements with provisions for salary reopeners only for fiscal year 1994. Nevertheless, MEA agreed to changes on both the annual leave and merit increase issues that are different from, and less favorable than, the provisions of the POA and Local 145 MOU's.

At no time during the course of the meet and confer process or in the public hearing before Council did MEA raise the issue of the "most favored nations" clause. To raise this issue now, after the meet and confer process has been concluded and an agreement entered into, and after Council has ratified the MOU by resolution, raises the inference that MEA bargained in bad faith during the meet and confer process. Specifically, it appears that MEA agreed to provisions in writing that it now chooses not to honor. Such actions may severely undercut the open and honest discussion between management and employees that the MMBA was enacted to foster and protect.

Conclusion

Basic contract law and the MMBA require both parties to an agreement to bargain openly and in good faith about the terms and conditions of an MOU or contract. The courts will look to the intent of the parties at the time of agreement to interpret provisions of an agreement. MEA may not, therefore, now invoke the protections of Article 66, the "most favored nations" clause, to overcome a specifically agreed upon provision of the MOU.

If you have further questions, please contact me.

JOHN W. WITT, City Attorney
By
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Deputy City Attorney

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