MEMORANDUM OF LAW

DATE: September 29, 1994

TO: Eugene Ruzzini, Audit Division Manager

FROM: City Attorney

SUBJECT: Overpayment of City Employees

QUESTION PRESENTED

The 1993 Fiscal Year citywide payroll audit revealed that some City employees received certain premium overtime pay as a result of an oral stopgap agreement between Local 127 and the City's Labor Relations Manager. You have asked the following question concerning that situation:

Does the Labor Relations Manager (or City Manager) have the authority to enter into agreements, either oral or written, affecting employee compensation without the approval of the City Council? If not, what action(s) should be taken . . . ?

SHORT ANSWER

The City Manager has certain authority to negotiate agreements with employee groups regarding wages, hours, and working conditions. However, the salaries of City employees are set by the City Council each year, pursuant to the mandate of San Diego City Charter ("Charter") section 70, and neither the City Manager nor his designee may unilaterally change the base salary of any employee. Changes in the base salary of an employee may only be effected through a change in the salary ordinance.

In this instance, the City Manager acted as the City's labor negotiator, in response to a specific problem presented by a grievance. No change in the base salary of the employees occurred as a result of the agreement. Therefore, no action in excess of managerial authority occurred.

BACKGROUND

During the fiscal year 1993 citywide payroll audit, the Auditor's office determined that eleven Water Utilities employees had received premium overtime pay for hours worked in excess of eight (8) per day up to the scheduled shift termination. That overtime was received even though the employees worked only forty (40) hours in the workweek. For example, the employees were scheduled for five (5) day forty (40) hour workweeks. After the shift change the employees worked weekends and their monthly weekend work schedule was thirteen and one-half (13=)

hours, thirteen and one-half (13=) hours and thirteen (13) hours. The employees thus received premium overtime for five and one-half (5=) hours, five and one-half (5=) hours, and five (5) hours, respectively. The Fair Labor Standards Act ("FLSA") requires that overtime be paid only when more than forty (40) hours have been worked in a single workweek. The shift change did not require the employees to work more than forty (40) hours in a workweek, it merely changed the timeframe within which the hours were worked.

The payment of premium overtime was the result of an oral "stop gap agreement" between the Labor Relations Manager and Local 127. The agreement was reached in response to a Local 127 grievance filed following the division's unilateral implementation of a shift change. This change, as implemented, may have impacted provisions of the Memorandum of Understanding ("MOU") which provide that changes in work hours would not occur without meeting and conferring with union representatives prior to any such changes being made. The change also implicates the Meyers-Milias-Brown Act ("MMBA") provisions which require management to meet and confer, in good faith, on issues concerning wages, hours and working conditions.

ANALYSIS

Managerial Authority

Charter section 28 grants to the City Manager broad powers to assume direction and control of the various departments of the City and to supervise the administration of the affairs of the City. Part of that administration necessarily involves the conduct of employer-employee relations. Labor relations in the City are governed by the MMBA, Government Code sections 3500 et seq., and Council Policy 300-6. The stated purpose of both the policy and the Act is to foster good employer-employee relations through the meet and confer process.

Article 28 of the MOU with Local 127 requires that employees receive five (5) working days notice prior to an extended or permanent shift change. Inadequate notice was given in this instance, and management failed to meet and confer with Local 127 prior to implementing the change. The agreement to pay overtime was reached because the inadequate notice of the proposed shift change meant that the employees affected by the shift change were not receiving the shift differential pay to which they were entitled.

The authority for the City Manager to reach a settlement of a grievance in this manner is found in Article 26 of the MOU with Local 127. MOUs with each of the employee organizations are approved by City Council after the contracts have been ratified by the unions. Article 26 incorporates by reference Personnel Regulation, Index Code H-4 III, which provides in pertinent part:

> A. Full-time employees in classifications in Group A . . . of which the affected employees are members:

1. Are eligible for premium rate overtime pay for all time worked:

. . . .

b. On days other than those designated in the employee's scheduled workweek.

In this instance, the employees were scheduled to work five (5) eight-hour shifts. The unilateral change to a three (3) day forty-hour shift was therefore outside the parameters of their scheduled workweek. Under the FLSA, only overtime for hours worked in excess of forty (40) hours per workweek must be paid premium overtime rate. However, nothing in the FLSA precludes the City from adopting overtime provisions which are more generous than those afforded by the FLSA. Therefore, the City Manager, pursuant to the MOU, was empowered to order the overtime payments authorized by the personnel regulations. No action in contravention of Charter section 70, which places the duty to set salaries with City Council occurred because no base salaries were changed. The City Manager settled the grievance by working within the confines of a previously adopted regulation. Based on the facts presented, the City Manager acted within his authority.

CONCLUSION

The premium overtime payments made to the Water Utilities employees were authorized by a legitimate managerial action based upon the MOU between Local 127 and the City. No action in excess of managerial authority occurred. Since we reach the conclusion the Manager acted properly in this instance, we do not address the secondary issue of recovery of overpayments.

Please let me know if you have any further questions.

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

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cc Cathy Lexin
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