MEMORANDUM OF LAW

DATE: August 18, 1995

TO: Bob Lawrence, Payroll Manager, Auditor's Office

FROM: City Attorney

SUBJECT: Garnishments

QUESTIONS PRESENTED

You have asked the City Attorney to answer two questions. They are:

1. May an employee's voluntary portion of his or her Supplemental Pension Savings Plan ("SPSP") be deducted from gross income when calculating "disposable income" for purposes of employee wage garnishment limits?

2. Garnishments other than Internal Revenue Service ("IRS") and support garnishments have a twenty-five percent (25%) cap on monies that may be deducted from an employee's disposable income. Given this restriction, if an employee is subject to an existing garnishment order, and a new order is received which causes the cumulative total to exceed the twenty-five (25%) cap, should the new order be rejected completely, or accepted and deductions made to the extent that the total amount garnished does not exceed the twenty-five percent (25%) cap?

SHORT ANSWERS

1. An employee's voluntary contribution to his or her SPSP account is not a deduction from an employee's paycheck that is required by law. Therefore, it is not deducted from gross income for purposes of calculating disposable income.

2. Garnishment orders which exceed the twenty-five (25%) cap should be returned to the issuer. The City should notify the creditor of its inability to fully comply with the order due to the existence of prior orders which, when added to the new order, would cause the amount deducted from the employee's disposable income to exceed the twenty-five percent (25%) cap. The issuer of the order may then seek an adjustment of the order.

BACKGROUND

The Auditor's office is currently in the process of automating its payroll system. The new computerized system, known as CAPS, will allow for program changes and refinements that were not technically possible with the former system. The extensive programming potential made possible by CAPS has prompted you to ask whether current payroll

procedures adequately meet the requirements imposed by law with regard to court ordered wage garnishments of an employee's salary.

The first issue presented concerns what monies in an employee's pay check may be deducted for purposes of calculating disposable income. Currently, the Auditor's office deducts both an employee's mandatory and voluntary SPSP contributions to arrive at an employee's "disposable income" as defined by the Consumer Credit Protection Act (the "Act"), 15 U.S.C. Sections 1671 through 1677. The combining of voluntary and mandatory contributions is mandated by the limitations of the Auditor's present system, which does not allow for a breakdown of employee's SPSP contributions. The CAPS system will, however, allow for a detailed breakdown of an employee's payroll deductions and will separate voluntary and mandatory SPSP contributions. You have asked if the limited breakdown currently employed by the Auditor's office meets the standards of the Act or if the system should be programmed to separate voluntary from mandatory contributions and deduct only the mandatory contribution for purposes of calculating disposable income.

The second issue involves receipt by the City of multiple garnishment orders for deductions from an employee's salary. The current City practice is to accept multiple orders for the entire amount of the order without reference to the mandatory twenty-five percent (25%) cap imposed by the Act. The Auditor's office has assumed that fixed amount garnishments were the result of a negotiated agreement between the employee and his or her creditor and, therefore, it has accepted the garnishment orders for the full amount. You further indicate that employees rarely, if ever, reach the twenty-five percent (25%) cap imposed by the Act. However, because the new system may be programmed for a wide variety of contingencies, you have asked for the appropriate procedure to follow in those instances when multiple orders will cause deductions from an employee's disposable income of more than twenty-five percent (25%).

ANALYSIS

The Act was adopted by Congress in response to a variety of unscrupulous credit practices which Congress believed severely impacted the ability of employees to maintain a wage adequate for their basic needs. At the time of the adoption of the Act, Congress articulated the finding that "the unrestricted garnishment of compensation due for personal services encourages the making of predatory extensions of credit." 15 U.S.C. Section 1671(a)(1). Congress indicated that such extensions of credit diverted money into excessive credit payments which ultimately disturbed the flow of interstate commerce through the disruption of employment, production and consumption. 15 U.S.C. Section 1671(a)(2). Disparities in the bankruptcy laws of the various states prompted Congress to enact uniform regulations regarding consumer credit protection, thereby strengthening the uniformity of the bankruptcy laws. 15 U.S.C. Section 1671(a)(3). The Act does not attempt to create or

establish garnishment proceedings but is meant only to preempt state laws which are less restrictive. Evans v. Evans, 429 F. Supp. 580 (1976). California has followed the Act for purposes of employee wage assignments and garnishments pursuant to California Labor Code section 2929(e) which states: "This section is intended to aid in the enforcement of the prohibition against discharge for garnishment of earnings provided in the Consumer Credit Protection Act of 1968 and shall be interpreted and applied in a manner which is consistent with the corresponding provisions of such act." Thus, for purposes of this memorandum, we will refer only to federal law.

The Act provides certain limitations on wage garnishments. The restrictions are designed to allow creditors to receive the monies due to them, while at the same time allowing the debtor to maintain an income adequate to meet his or her basic needs. Congressional intent was to maximize protection available to the debtor. Hodgson v. Christopher, 365 F. Supp. 583 (1973). This goal is achieved primarily through a cap placed on the amount of an employee's income which may be garnished. 15 U.S.C. Section 1673(a) provides in pertinent part: "the maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment may not exceed 25 per centum of his disposable earnings for that week." This maximum may be increased to 50 or 60 per centum, depending on the employee's current family status, if the order is for the support of any person as opposed to an order for the sale of goods. 15 U.S.C. Section 1673(b).

Disposable earnings are defined by the Act as "that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld." 15 U.S.C. Section 1672(b). The courts have interpreted the phrase "amount required by law to be withheld" to mean only those specific deductions mandated by law which are unilaterally imposed upon every wage earner and deducted from each paycheck. Thus, social security and mandatory tax withholding deductions are required by law. Only similar uniform mandatory deductions are required by law. A plethora of case law indicates that other deductions, representing a variety of different circumstances, are not required by law and may not be considered for purposes of calculating "disposable income."

For example, a wage earner's voluntary optional excessive withholding for taxes is not required by law. If the excess voluntary amounts withheld later result in a tax refund, the employee is said to have voluntarily changed his wages into savings. The savings, that is, the tax refund attributable to the excess contributions, are not earnings which are subject to protection by the Act. Gehrig v. Shreves, 491 F.2d 668, 673 (1974). Similarly, alimony or child support payments, even if deducted pursuant to a valid court order, are not "amounts required by law to be withheld" and therefore must be included in a

debtor's "disposable earnings" for purposes of the Act. First Nat. Bank v. Hasty, 415 F. Supp. 170 (1976). The essential factor that determines whether a deduction is required by law is, therefore, the employee's ability to control whether the deduction is made and the amount of the deduction. If the deduction is made for the employee's benefit, it is not required by law and not protected by the Act.

The City's SPSP is a hybrid pension plan. It is in part mandatory, and in part voluntary. Pursuant to the provisions of 42 U.S.C. Section 418(F) and the Internal Revenue Code, the City in 1982 opted out of the federal Social Security System. By law, such an action may be taken by a public entity only when an adequate retirement replacement plan for the Social Security System is in place for employees. 42 U.S.C. Section 418. IRC Section 3121 defines wages for tax and social security purposes. Federal Tax Regulations Section 31.3121(b)(7)-2(b) explains the social security requirements in the following way:

> Under section 3121(b)(7)(F), wages of an employee of a State or local government are generally subject to tax under FICA after July 1, 1991, unless the employee is a member of a retirement system maintained by the State or local government entity. This section 31.3121(b)(7)-2 provides rules for determining whether an employee is a "member of a retirement system." These rules generally treat an employee as a member of a retirement system if he or she participates in a system that provides retirement benefits, and has an accrued benefit or receives an allocation under the system that is comparable to the benefits he or she would have or receive under Social Security.

26 C.F.R. Section 31.3121(b)(7)-2 (1995).

To comply with this requirement, the City has two retirement plans; the San Diego City Employees' Retirement System ("SDCERS") and the SPSP Plan. The minimum amount mandated by Social Security must be equal to seven and one-half percent (7=%), of the employee's compensation for the plan year.

This required amount is achieved by the City through a mandatory 3.75% contribution by the employee to SPSP which is matched by an equal contribution by the City. However, those employees who also participate in SDCERS contribute only three percent (3%) mandatorily into SPSP. The balance of (0.75%) is contributed by SDCERS. Any amount contributed over the mandatory 3% or 3.75% contribution is made at the election of the employee. This voluntary contribution is, in essence, a kind of savings account to which both the employee and City contribute. The voluntary amounts are not required by law. Thus, under the provisions

of the Act, any voluntary contributions remain part of the employee's earnings and should be deemed disposable income in calculating amounts available for garnishments.

Question II

In some instances, an employee may have more than one valid wage garnishment attached to his or her salary. Whether an employee has one wage garnishment order or multiple garnishment orders, the twenty-five percent (25%) cap on the amount of disposable income that may be garnished pursuant to the Act remains stable. For example, in one case, an employee had an existing valid support order issued out of Family Court. Subsequently, a judgment creditor's wage garnishment was received by the employer which authorized a ten percent (10%) deduction of the employee's disposable income. The court said the second garnishment order could not be enforced unless, and except to the extent that, the existing support order did not absorb twenty-five percent (25%) of the employee's disposable income. General Motors Acceptance Corp. v. Metropolitan Opera Assoc., 413 N.Y.S.2d 818 (1978). Thus, the City may take no more than twenty-five percent (25%) of an employee's disposable income regardless of the number of orders involved.

Where more than one garnishment order exists, priority between or among garnishment orders is governed by state law. Marshall v. District Court for Forty-First-b Judicial Dist., 444 F. Supp. 1110 (1978). In California the rule is that, generally speaking, different liens upon the same property have priority according to the time of their creation. Pursuant to this rule, new orders will not supersede existing orders and may be executed only to the extent that monies withheld pursuant to later orders do not exceed the twenty-five percent (25%) limitations on deductions. Exceptions to the priority rule are made for support orders. California Family Code section 4011 provides: "Payment of child support ordered by the court shall be made by the person owing the support payment before payment of any debts owed to creditors."

Should a garnishment order be received by the City that will cause the amount to be deducted from the employee's disposable income to exceed the twenty-five percent (25%) cap, we recommend that the order be returned to the creditor with a letter of explanation citing the pre-existing order. The letter should also indicate the amount of disposable income available for garnishment, if any, after the original order has been satisfied. The creditor may then determine how he or she wants to proceed. The creditor may decide to accept the reduced amount, assuming some amount remains available, or he or she may seek a new order. This decision should be made by the creditor in light of all the available facts.

CONCLUSION

The Act exempts only those monies that are required by law to be deducted from inclusion in an employee's disposable income. This includes only mandatory tax withholding and Social Security

contributions. Voluntary contributions by an employee to SPSP are, therefore, included in the employee's disposable income for purposes of calculating the amount of money available for garnishment.

Garnishment orders must be executed in the order received by the employer, except when the order is for child support. If subsequent orders cause the amount ordered to be deducted from the employee's disposable income to exceed the twenty-five percent (25%) cap, the creditor should be notified. Based upon the facts presented, the creditor may select which course of action he or she chooses to pursue.

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By
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cc Cathy Lexin, Labor Relations Manager
ML-95-58