MEMORANDUM OF LAW

DATE: October 1, 1996

TO: Bill Lopez, Labor Relations Assistant

FROM: City Attorney

SUBJECT:Leave Bank for Union Officers' Use

QUESTION PRESENTED

May the City of San Diego establish a presidential leave bank from which union presidents may withdraw leave donated by other City employees in the same bargaining unit?

SHORT ANSWER

Possibly. No specific legal prohibitions were found. However, care must be taken to structure the leave program so that it comports with tax requirements and does not constitute a gift of public funds. Also, City benefits are not available to individuals on presidential leave.

BACKGROUND

During the meet and confer process in 1995 between the City and its recognized employee bargaining units, the City and three of the four bargaining units agreed to "mutually study approaches to phasing down employee accruals of annual leave which have exceeded designated limits." Memoranda of Understanding, Local 127, Article 33(12), Municipal Employees Association, Article 18(5), Local 145, Article 28(4). The City and the bargaining units are currently engaged in those discussions and hope to reach consensus on a method of reducing balances prior to meet and confer in 1997.

The unions have repeatedly suggested that the City create a leave bank for union presidents. In a memorandum dated October 27, 1995, you requested a legal opinion regarding the proposed leave bank. You have suggested that the City of San Diego allow employees to donate leave hours to a presidential leave bank. The officers would then be free to devote their full attention to their union duties during their presidential tenure without suffering a loss of compensation.

ANALYSIS

I. Tax Implications

The first issue that must be raised is how a leave bank would be treated for tax purposes. For catastrophic leave banks no tax consequences accrue to donors who contribute leave time. The donee receiving the donated leave time is responsible for paying the taxes. The Internal Revenue Service ("IRS") treats the leave time donated to the donee as "wages." The donee must report these "wages" as gross income subject to the usual withholding and employment taxes. IRS Ltr. Rul. 9051005 (Dec. 21, 1990).

The structure of the leave program appears to be an internal decision for the employer. For example, in IRS Ltr. Rul. 9051005, the IRS addressed several concerns of a

non-profit corporation that had established a flexible paid-leave program. The program enabled employees who had exhausted their accumulated leave time to receive more time from other employees. "Specifically, the Policy provides that employees who experience a major illness (and who are not covered by the Taxpayer's short- term disability program) or who have a death or major illness in their family are eligible to receive leave hours surrendered by other employees." Id. Citing Rev. Rul. 90-29, 1990-15 I.R.B. 5, the IRS held that the amounts donors transfer to a donee are included in the gross income of the donee and that the IRS considers the amounts as "wages." Under the proposed leave sharing program, the tax consequences are the same: only the donee accrues income from a leave donation.

II. Gift of Public Funds

The California Constitution and the San Diego City Charter prohibit gifts of public funds. Cal. Const. art. XVI, Sections 6; City Charter section 93. The primary inquiry in determining whether an appropriation of public funds constitutes a gift is whether the funds are to be used for a public or private purpose. Orange County Foundation v. Irvine Co., 139 Cal. App. 3d 195, 200 (1993). If the funds are for a public purpose, they are not gifts within the meaning of the constitutional and charter prohibitions. Id. However, because the leave in the proposed bank would be donated by employees, no public funds are involved. As discussed in detail below, we have determined that the actual leave donation is not a gift of public funds because the money is the employee's not the City's. However, unless the donee pays both portions of the retirement contributions, that is, the employee portion and the City's match, public funds will be used. Should this occur, the gift of public funds issue must be addressed in a more detailed analysis for compliance with constitutional requirements regarding such monies.

III. Public Funds or Not?

A. Annual Leave as a Vested Benefit

Absent the retirement issue, the City avoids having to determine if there is a public purpose because the money is not the City's to give. "It is established that vacation pay is not a gratuity or a gift ╒to employeesσ, but is, in effect, additional wages for services performed." Suastez v. Plastic Dress-Up Co., 31 Cal. 3d 774, 779 (1982)(emphasis added). Vacation pay, moreover, vests as the employee renders service; conditions precedent to vesting are generally void. Id. Further, under Labor Code section 227.3, an employer may not enforce forfeiture of vested vacation time upon an employee's termination. Finally, the IRS treats the donated vacation time as wages.

Because under Suastez vacation pay is a wage, it should be as alienable, assignable, and transferable as other wages. However, no case law explicitly addresses the alienation of vacation pay and either allows or prohibits employees from transferring vacation time the same way as they do other wages.

Currently, employees may request that the City deduct from their wages voluntary contributions to benefit programs, such as health care and insurance plans, and to pay union dues. Transfers of vacation time are similar to existing payroll deductions. Thus, if the transfers of accrued leave are voluntary, and employees can discontinue their participation at any time without penalty, the transfers or deductions for presidential leave banks would, like donations for catastrophic leave banks, most likely be lawful. Because vested vacation pay is a wage, employees impliedly have the power to request that the City deduct vested vacation time to contribute to leave banks.

B. Union Presidents as City Employees

As a general rule, full time union presidents, as is currently the case with the Municipal Employees' Association and Police Officers' Association are not City employees, but rather, are union employees. If they are employees, such classification would eliminate any question regarding a gift of

public funds. As City employees, union presidents would clearly be entitled to compensation from the City. If employees devoting all their working hours to union business are, nevertheless, City employees, the City could operate the union leave bank much as it does the catastrophic leave bank. However, for the reasons set forth below, we think union presidents cannot lawfully be classified as City employees.

1. Labor Code and Case Law Definition of Employee

Neither the San Diego Municipal Code, nor the San Diego City Charter, defines "employee," although the City Charter does describe the characteristics of an employee. For compensation purposes, California Labor Code section 350 defines an "employee" as

> every person . . . rendering actual service in any business for an employer, whether gratuitously or for wages or pay and whether such wages or pay are measured by the standard of time, piece, task, commission, or other method of calculation and whether such service is rendered on a commission, concessionaire or other basis.

Cal. Labor Code Sections 350 (Deering 1991)(emphasis added).

C. Analysis under "Control" Model

The California Labor Code and case law fail to elaborate on the meaning of actual service. There are, notwithstanding the failure to define "actual service," cases that define "employee." There are two categories of definitions. The first category is further divided into two variations. The first variation defines an employee as "one who is subject to the absolute control and direction of his employer in regard to any act, labor or work to be done in the course and scope of his employment." Crooks v. Glens Falls Indem. Co., 124 Cal. App. 2d 113, 121 (1954)(emphasis added). The second variation

defines an employee as "an individual who performs services subject to the right of the employer to control both what shall be done and how it shall be done. . . . " Weisman v. Blue Shield of California, 163 Cal. App. 3d 61, 68 (1984). This first category is the "control" model.

Neither of the "control" model variations presents an exact standard or complete checklist of characteristics which identify an "employee," yet each indicates that an employee is one who is under the employer's control. "Control" is thus the key word. Union presidents are not employees under either variation. The City does not control union presidents, nor does it dictate to union presidents what union business shall be done or how it shall be done. Union presidents function as advocates for City employees, not as conduits for City objectives. In fact, union presidents frequently oppose, as is their function, the City's aims. Union opposition to City proposals demonstrates a profound lack of City control over unions and their presidents.

D. Analysis under "Context" Model

The other definition of "employee" stems from the earlier California Supreme Court case of Knight v. Board of Administration, 32 Cal. 2d 400, 402 (1948). In Knight, the Court held that the term "employee" has no fixed meaning that must govern in every instance. The Court was asked to construe a constitutional provision authorizing the Legislature to provide for a retirement system for state employees. The Court determined that the definition of "employee" must be defined in context. Id. This is the "context" model.

The Knight court's primary purpose was to decide if state legislators could receive pension compensation as "employees of the State" under a state constitutional provision authorizing retirement pensions. The court held that " ┌tσhe flexibility of the term 'employee' is of special significance when considered in connection with the rule that statutory provisions for pensions must be liberally construed to the end that their beneficial purposes are broadened rather than narrowed." Id. In its holding the court emphasized its special sensitivity

toward retirement pensions. No retirement issues are present in the current proposal, thus eliminating the special sensitivity or circumstance the court faced in Knight. Also, in Knight, the state legislators were actually rendering service to the state. The union presidents do not render service to the City. Thus, even within the present "context," union presidents are not employees, and as argued above, they are not under the City's control.

E. Summary Analysis under "Control and "Context" Models

In conclusion, case law provides two definitions of "employee." On the one hand, "employee" signifies an individual whom an employer controls within the scope of employment. On the other, the term "employee" must be defined in the context of applicable facts. The better and more internally consistent view from a legal standpoint is the control model, which holds an "employee" to be one who is subject to employer's control. It establishes a clear causal connection between work performed and compensation. The "context" model lacks such a connection. Despite their differences, both the "control" and "context" models yield the same result: union presidents are not City employees.

1. City Charter's Definition of Employee

Buttressing the conclusion that union presidents on leave are not City employees are certain sections of the City's Charter. The Charter establishes the rule that the City may not compensate individuals unless they render personal service to the City. The Charter authorizes the Personnel Director to certify payroll only if the employee is providing service under the provisions of the Charter. Charter Sections 126. Charter section 135 requires the Personnel Director to compile and maintain a list of all persons in the service of the City. Read together, these provisions indicate that only those employees in personal service are entitled to compensation. "In the service of the City" means performing those duties prescribed for someone occupying a classified or unclassified position as specified in Charter section 117. "Union president" is not a classified or unclassified position.

Because union presidents are not employees, they cannot receive any form of compensation directly from the City. Compensation includes not only vacation time, but retirement matching funds, medical, dental, vision, and life insurance as well. Thus, to give union presidents any compensation directly from City funds raises the gift of public funds issue, which the City Charter and the state Constitution expressly prohibit.

As argued above, however, if vacation time is vested with the employee once accrued, transfer from an employee to a presidential leave bank would not be a transfer of public funds and does not, therefore, violate the prohibition against gifts of public funds. Other types of compensation (e.g., the City's match for retirement funds), however, which accrue with annual leave would come directly from the City Treasury and would constitute gifts of public funds if paid to union presidents.

IV. Leave Programs In Other Jurisdictions

Following requests for examples of leave programs in other jurisdictions that are similar to the one proposed, Local 145 provided several bargaining unit contracts. Unfortunately, most of the contracts were from jurisdictions outside California; however, there was one contract from Sacramento. We look to it for example and guidance. We also examine contracts from other jurisdictions.

A. Sacramento

The City of Sacramento and the Sacramento Area Fire Fighters Local 522 contracted to have a time pool for the period beginning February 23, 1991, to June 25, 1993. Article 7, entitled Employee Organization Business, allowed Local 522 members to receive other members' accumulated leave to attend either union related functions or to augment personal leave under Sacramento's Long Term Disability Policy. Attending

union functions and augmenting time for disability leave under the Sacramento plan are different from granting union officers access to other members' donated leave, albeit to perform union business, under the proposed leave bank.

Nevertheless, the Sacramento provisions are distinguishable from the current proposal. Attending union events is an occasional occurrence, and disability leave is unforeseeable. In contrast, under the proposed leave bank, when union officers exhaust their own accrued time, they would receive the donated leave of other employees and continue to receive pay as though fully employed. There is a substantial difference between receiving an occasional donation to conduct union business and receiving a continual stream of donations as income. Further, the cycle would repeat itself, differentiating it from the unforeseen disability leave under the Sacramento plan. Moreover, the Sacramento plan was open to all members, whereas the proposed bank would discriminate in favor of union officers only. Thus, the Sacramento example helps only minimally, as it does not implicate the same legal issues, such as the gift of public funds problem.

B. Montgomery

The contract between the Montgomery County Career Fire Fighters Association's of Montgomery County, Maryland, and the its county government most resembles the program Local 145 proposes. The Montgomery County contract reads in part:

A. The President of the Union shall be granted administrative leave up to 1248 hours per year for the purpose of discharging his official representational duties as Union President.

. . . .

C. ╒Mσembers of the bargaining unit shall

> be assessed three (3)hours compensatory leave or annual leave per year (at the option of the employer) which shall be contributed to an administrative leave bank for the purpose of additional administrative leave to the President and/or other officers and officials of the Union. Administrative leave identified in this Subsection and Subsection A shall be the sole source of leave for the Union President and shall result in the President being placed on administrative leave full-time, except that the President shall continue to use annual and sick leave pursuant to applicable regulations and the provisions of this Agreement. Any residue in this leave bank at the end of any leave year shall not carry over to the next year. (Italics added).

The Montgomery contract raises the same gift of public funds issue as the unions' proposal. In a phone conversation, an attorney in the contract section of the Montgomery County City Attorney's Office stated informally that the county negotiated the Firefighters' presidential leave under its collective bargaining agreement law. He stated also that the county pays for half the year's leave under subsection A, and the union members pay the other half under subsection C. Although the attorney did not discuss directly the gift of public funds issue, he implied the county felt the greater harmony between management and unions to be a sufficient "public" purpose to justify the expenditure. This does not, of course, resolve the public funds issue, but implies only that the legislative body has determined the benefit is worth the risk.

V. Conflict of Interests

If the program is feasible, there could possibly be irreconcilable conflicts of interest. The City would essentially be funding the party of opposition. The City Council may, however, decide that the perceived conflicts of interest are not weighty enough to preclude the establishment of the proposed leave bank.

The Council policy regarding conflicts concerns only personal conflicts. Council Policy 000-4(1) mandates that

> No elected official, officer, appointee or employee of the City of San Diego shall engage in any business or transaction or shall have a financial or other personal interest, direct or indirect, which is incompatible with the proper discharge of his official duties or would tend to impair his independence or judgment or action in the performance of such duties.

The express policy does not address conflicts of interest for the Council as a body. Only individual members' business and transactions must be void of conflicts. Possible conflicts of interest with the union presidents surrounding the proposed leave bank are not personal, and the Council policy may be inapplicable.

VI. Retirement

Employees accumulate retirement benefits as they serve the City. Union presidents under the proposed leave bank would not serve the City, and thus would not be eligible for retirement benefits. Under San Diego Municipal Code (hereinafter, "SDMC") section 24.1307, an employee who has taken a leave of absence may repurchase, or buy back, service credits. A member employee who has taken an unpaid leave of absence and returns to service within one (1) year can repurchase only their employee portion for the leave period; if the employee is on leave for more than one (1) year, the employee can buy back both the employee portion and employer portion. There are no employer matching

funds for these buy backs.

CONCLUSION

The tax implications of the proposed leave bank are identical to those surrounding catastrophic leave banks. The gift of public funds issue may be a problem, unless harmonious labor relations represent a sufficient "public purpose" to justify the leave bank. This, however, is still an untested legal theory. Even assuming that the bank is legal, there might still be a conflict of interest problem. However, the City Council may decide such conflict issues are not sufficiently problematic to prohibit the leave bank. Union presidents, because they will not be in paid status on the active payroll, may not receive retirement benefits. They may, however, upon return to City service, repurchase portions of the forfeited benefits, the amount of which depends on the length of the presidential leave.

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