

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: March 17, 2015

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Tentative Agreement between the City of San Diego and the San Diego Police Officers Association

INTRODUCTION

The City of San Diego (City) labor negotiators and the San Diego Police Officers Association (POA) have reached a tentative agreement on modifications to POA members' pay and benefits for Fiscal Years 2016 through 2020, in an effort to improve recruitment and retention of City police officers.

The tentative agreement, which is being presented to the San Diego City Council (Council) for final determination, includes increases to flexible benefit credits, uniform and tool allowances, and tuition reimbursement. As negotiated, any excess flexible benefit credits that are not used for health care expenses may be directly contributed to POA members' 401(k) accounts, or flexible spending accounts for child care reimbursement or dental, medical, and vision reimbursement. Any amounts remaining will be paid out in cash twice a year. The City and the POA have agreed that the increased benefits for Fiscal Years 2016 through 2018 are not pensionable. The City and the POA have also agreed to pensionable pay increases, in the form of a general salary increase of 3.3%, in Fiscal Years 2019 and 2020.

This memorandum discusses the legal issues related to this tentative agreement. Specifically, this memorandum addresses whether the increased flexible benefit credits may be excluded from pensionable compensation, and the legal requirements of San Diego Charter (Charter) section 70.2.

DISCUSSION

I. FLEXIBLE BENEFIT CREDITS AND PENSIONABLE COMPENSATION

In this Office's Legal Opinion 2011-1 (2011 Op. City Att'y 2 (2011-1; Jan. 10, 2011)), the Office advised that certain items of compensation are expressly excluded from the definition of "Base Compensation" in the City's defined benefit retirement plan, and therefore are not pensionable. "Base Compensation" does not include "the Flexible Benefits Plan dollar value available to an employee each fiscal year . . . payments made by the City to an employee as a Uniform Allowance or Uniform Reimbursement, or the monetary value of employer-provided uniforms; payments made by the City to an employee as a Tool Allowance. . . ." SDMC § 24.0103.

City employees agreed to this definition, as part of the settlement of a class action lawsuit filed by active and retired City employees against the City and the San Diego City Employees' Retirement System (SDCERS). In the lawsuit, captioned *Corbett v. City Employees' Retirement System, City of San Diego, Real Party in Interest*, San Diego County Superior Court Case No. 722449 (*Corbett*), City employees and retirees alleged that retirement benefits were being calculated incorrectly in light of the California Supreme Court's decision in *Ventura County Deputy Sheriff's Association v. Board of Retirement of Ventura County Employees' Retirement Association*, 16 Cal. 4th 483 (1997). In the *Ventura County* decision, the California Supreme Court held that the retirement board was required to classify certain payments made by the County of Ventura to its employees, over and above their basic salaries, as "compensation earnable" and to include those payments in the "final compensation" used to calculate the amount of monthly pension benefits payable to retired employees. *Id.* at 505. The plaintiffs in the *Corbett* case alleged that the same rationale applied to certain categories of compensation paid by the City. The POA intervened in the litigation.¹

The *Corbett* settlement agreement increased retirement benefits for retired employees and retirement factors for active employees in exchange for clarification of the types of compensation that would be included in retirement calculations going forward.² On August 7, 2000, the Council adopted San Diego Ordinance O-18835, amending the San Diego Municipal Code (Municipal Code) to reflect the terms of the *Corbett* settlement. Among other things, the ordinance added the current definition of "Base Compensation" to Municipal Code section 24.0103. Before Council adopted the ordinance, it was approved by a majority vote of active and retired members of SDCERS, pursuant to Charter section 143.1.³ Attached to this memorandum is a letter, dated January 30, 2015, from attorney Michael Conger, who litigated the *Corbett* case, which the POA provided to the City's negotiators. Mr. Conger concludes that

¹ The San Diego Municipal Employees' Association; San Diego City Firefighters, International Association of Fire Fighters Local 145; and Local 127, American Federation of State, County, and Municipal Employees, AFL-CIO also intervened.

² See Notice of Proposed Settlement of Class Action, *Corbett*, filed April 4, 2000, at 2 (*Corbett* Order and Judgment Approving Settlement of Class Action, filed May 17, 2000).

³ San Diego City Employees' Retirement System Certification of the IVR Ballot Count for the *Corbett* Settlement Benefits Election, dated June 14, 2000.

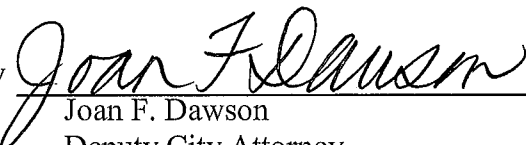
there is no basis under the *Corbett* settlement agreement to include the increased flexible benefit credits in police officers' pensionable compensation. As further protection for the City, the agreement requires all POA members to acknowledge that no amount of flexible benefits credits are included in "Base Compensation" under the SDCERS plan.

II. COMPLIANCE WITH PROPOSITION B

This tentative agreement was negotiated in compliance with the provisions of Charter section 70.2, which was added by City voter approval of Proposition B in June 2012. Charter section 70.2 requires that the City, between July 20, 2012 and July 1, 2018, take certain procedural steps when negotiating increases to salaries and benefits for represented employees. Before it may establish a bargaining position for meet and confer with employee organizations that includes increases to salaries and benefits, the City must obtain from the SDCERS actuary a "study that identifies and discloses the impact on the City's Defined Benefit Pension Plan of any increases in proposed compensation or benefits contained in the initial Council proposal, and certifies whether the proposed action increases the average or mean Base Compensation, for any job classification." San Diego Charter § 70.2. The City must also obtain an updated actuarial study "to include any additional fiscal impacts of the tentative agreement," before the tentative agreement may be submitted to the Council for approval. *Id.* The actuarial analysis must be made readily available to the public ten days before the Council takes any final action. *Id.*

The actuarial analysis is presented as an information item, accompanying the proposed tentative agreement. City staff reports that the actuarial study and the updated report were posted on March 11, 2015, and will remain posted until April 14, 2015, outside the City Administration Building, in the display case where the Council dockets are posted.

JAN I. GOLDSMITH, CITY ATTORNEY

By 
Joan F. Dawson
Deputy City Attorney

JIG:JFD:ccm
Attachment
MS-2015-6
Doc. No.: 971180

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Michael A. Conger

Civil Litigation
Employment Law
Business Law
Governmental Law

January 30, 2015

Brian Marvel, President
Jeff Jordon, Vice President
San Diego Police Officers' Association
8388 Vickers Street
San Diego, CA 92111-2109

Re: Flex Benefits Issue

Dear Brian and Jeff:

You have asked for my opinion regarding whether a viable claim could be made by member of the San Diego Police Officers' Association that new amounts included in Flex Benefits paid by the City should be included in pensionable compensation (the technical term is "base compensation"). For reasons I will explain, the short answer is no—no viable claim exists or could be brought. Specifically, I have reviewed the SDPOA's proposals to the City of San Diego related to the extra flex dollar increases for those officers with 8 plus years of service and have determined such officers could not successfully claim against the City that those flex dollars should be included in pensionable compensation.

One reason no such viable claim could be brought is because the definition of "base compensation" in the San Diego Municipal Code (section 24.0103) expressly excludes flex benefits from Base compensation. This definition has remained consistent since January 1, 2000. Therefore, any SDPOA member who became a City employee *on or after* July 1, 2000, would be subject to the express exclusion provided by the municipal code. (See *Deputy Sheriffs' Association of San Diego County v. County of San Diego* (2015) 2015 WL 273138 (vested benefits do not accrue until employment begins).)

Regarding SDPOA members who were employed *before* July 1, 2000, no viable claim would exist because this claim was settled in the *Corbett* case. In *Corbett*, a case I brought in 1998, the plaintiffs contended that the City failed to include all items of "compensation earnable" (the predecessor to "base compensation") in pensionable pay. Among the items of pay at issue in the *Corbett* case were flex benefit pay for dental, medical, vision, dependent child care, and any amount left over from a flex benefit allowance paid to employees in cash.

Brian Marvel, President
Jeff Jordon, Vice President
January 30, 2015
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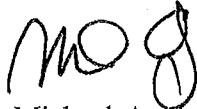
(See, e.g., the CAPPS Earning Code document dated July 8, 1998, Exhibit B, pp. 1-2.)

Corbett was settled in 2000. Because it was a class action, the settlement was reviewed and approved by the Court and entered as a judgment on May 17, 2000. In exchange for obtaining a higher retirement factor (3% at 50) and other consideration, all SDPOA members employed before July 1, 2000, expressly waived their claims that various categories of pay, including flex benefit pay for dental, medical, vision, dependent child care, and any amount left over from a flex benefit allowance paid to employees in cash, should be included in pensionable pay.

Therefore, any such claim brought by an SDPOA member employed *before* July 1, 2000, would be barred by the doctrines of settlement, release, merger and bar. (*Wade v. 20th Century Insurance Co.* (1988) 206 Cal.App.3d 32, 37 (compromise settlement operates as a merger and bar of all preexisting claims and causes of action).)

As always, should you have any questions or comments, please do not hesitate to contact me.

Very truly yours,



Michael A. Conger

MAC/pbm