

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

**MEMORANDUM**

**DATE:** January 14, 2008  
**TO:** Honorable Mayor Jerry Sanders and Council Members  
**FROM:** City Attorney  
**SUBJECT:** Presidential Leave Program

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**Introduction**

Since 1989, the Presidential Leave Program provided credit in SDCERS for the time that City employees served as union presidents. Beginning in or around July 1, 2002, the Incumbent President Program permitted the union presidents compensation to be added to their City compensation for purposes of determining a union president's one year high salary for retirement purposes.

**Internal Revenue Service Determination**

The IRS has found the City's Presidential Leave Program and Incumbent Present Program to be in violation of the Internal Revenue Code. The IRS states:

During the plan years that ended in 1989 through 2008, the terms of the Plan provided special retirement benefits to past and current union presidents of the San Diego Municipal Employees' Association, Police Officers' Association, and Local 145, the International Association of Fire Fighters AFL-CIO ("Union") that were not permitted by the [Internal Revenue] Code. Under Code section 401(a), retirement benefits in a qualified plan can only be provided to employees of an employer and such benefits are generally based solely on service with and compensation paid by such employer. Specifically, the following problems were noted:

- (a) The Presidential Leave Program allowed former city employees who were no longer paid employees of the Plan Sponsor to continue to participate in the Plan as active participants and have their service as union presidents counted as credited service in determining retirement benefits under the Plan.

- (b) From 1989 through February 2004, the Plan accepted employee and employer contributions (based upon compensation paid by the Unions) that were paid by the Unions even though they had no adopted the Plan as participating employers.
- (c) Starting in 2002, the Incumbent President Program allowed compensation that was paid to the union presidents by the Unions to be counted in the determination of retirement benefits under the Plan, and such amounts would be combined with any other compensation paid by the Plan Sponsor subject to a specified dollar cap.

### **City's Voluntary Correction Program Compliance Agreement**

The City has agreed to remedy the violations of law with regard to the Presidential Leave Program and the Incumbent Presidents Program as follows:

The Plan Sponsor will amend the Plan retroactively to remove any provisions relating to Presidential Leave, including the Incumbent President Program. The resulting changes to the Plan will indicate that benefits and participation under the Plan are limited to employees of the Plan Sponsor and any other participating employers that have adopted the Plan and that retirement benefits would be based solely on paid compensation and service associated with the Plan Sponsor or other participating employers.

In regard to any employee contributions that were either paid to the Plan directly by the Unions or derived from compensation paid by the Unions such funds will be returned to the affected plan participants along with accumulated interest. The distribution of these monies will be a taxable distribution to each affected participant and such distribution will not be subject [to] any favorable tax treatment under the Code. The Applicant will send a letter to each participant informing the participant that the corrective distribution is taxable, not eligible for favorable tax treatment and cannot be rolled over as normally allowed under Code section 402(c). The Applicant also agrees that the distribution will be reported on Form 1099-R for the calendar year in which the distribution is made to the affected participants. The Applicant will return to the Unions the employer contributions that were paid to the Plan to [sic] by the Unions.

For all impacted participants, the Applicant will recalculate their benefits under the Plan and the Plan's records will be updated to reflect reduced benefits and service credits. Retirement benefits under the Plan, including the Deferred Retirement Option Plan ("DROP"), will be determined without using any compensation paid by the Unions and any union service will also be disregarded in any computations unless such service has

already been purchased by the participants under the Plan's regular service purchasing provisions. For those impacted participants who are in retirement status, the monthly annuity that is currently being paid by the Plan will be reduced to the recalculated amount. The Applicant will recover any overpayments that have been paid to affected participants via an offset against the return of employee contributions mentioned in the preceding paragraph, by direct repayment to the Plan by the affected participants or by a special actuarial reduction to the corrected monthly pension benefit on a going forward basis.

### **City Agreements, Resolutions and Ordinances Affected by the Voluntary Correction Program Compliance Agreement**

The City enacted the Presidential Leave Program and the Incumbent Presidents Program through various agreements, resolutions and ordinances. In order to comply with the terms of the Voluntary Correction Program Compliance Statement executed by the Jay Goldstone on behalf of the City and Thomas Hebrank on behalf of SDCERS, the following agreements, resolutions and ordinances need to be rescinded and/or repealed retroactive to the date of their enactment as if they never were enacted in the first place. Below is a summary of the agreements, resolutions and ordinances that involve the Presidential Leave Program and the Incumbent Presidents Program:

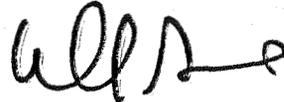
- (1) The agreement contained in the memorandum from Lawrence Grissom to Ed Ryan dated February 17, 1989 which states, "We have agreed that employees on presidential leave would be allowed to pay their contributions on a pay-period-by-pay-period basis, prospectively."
- (2) Ordinance No. O-18383 dated February 25, 1997 which added Municipal Code Sections 24.0201(3) and 24.0301(3), which allowed for employee contributions during presidential leave.
- (3) Ordinance No. O-18392 dated March 31, 1997 which made technical corrections to Municipal Code Sections 24.0201(3) and 24.0301(3).
- (4) Ordinance No. O-19121 dated November 18, 2002 which provides that, "WHEREAS, sections 24.0201 and 24.0301 must now be amended to provide that a Member serving as the duly elected president of a recognized employee labor organization may continue participating in the Retirement System consistent with the governing Memorandum of Understanding between the City and his or her employee organization."
- (5) Resolution No. R-29712 dated October 21, 2002 authorizing retirement benefits and retirement contributions for incumbent union presidents.

## Conclusion

The Presidential Leave Program and Incumbent Presidents Program are plan failures that potential jeopardize the qualification of the plan under Internal Revenue Code section 401(a). In the compliance statement, the Internal Revenue Service has agreed not to pursue the sanction of plan disqualification on account of these and other identified plan failures. However, the Internal Revenue Service agreement to not proceed with any action regarding plan disqualification and/or other remedies available to the Internal Revenue Service is conditioned upon the City completing all the corrections it agreed to implement within 150 days of December 21, 2007. Therefore, the City Attorney will be preparing a 1472 repealing to the date of enactment those portions of the San Diego Municipal Code that provides for this impermissible benefit. Once prepared, the action needs to be taken by the City Council immediately.

MICHAEL J. AGUIRRE, City Attorney

By



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