



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: RICHARD DOYLE
City Attorney

SUBJECT: Military Leave

DATE: December 1, 2006

BACKGROUND

On November 14, 2006, the City Council approved the staff recommendation to continue to provide supplemental pay and benefits to employees who are military reservists and who are called to active duty. Additionally, the Council directed the Administration to report back on issues related to the Military Leave and Supplemental Pay Program and also directed the City Attorney to review and report on options regarding overpayment of employee pay.

DISCUSSION

On October 26, 2006, this Office issued a memorandum (attached) which concluded that the City is required under the California Constitution to seek payments of overpaid salary or compensation to City employees even if the City is responsible for errors over an extended period of time.

Amending the current City Military Leave and Supplemental Pay Program to exclude allowances such as housing from military pay is not an option under the California Constitution (Article XI, Section 10(a)). Such an action would retroactively increase City compensation to an individual after service has been rendered under an approved program and therefore, is not legally permissible.

There are, however, options which may be considered by the City to facilitate the repayment of wages or salary by employees who have been overpaid.

A. Repayment –Use of Earned Paid Leave

The City may consider allowing employees to repay overpayments through the use of their earned paid leave such as accrued vacation leave and earned compensatory leave time. However, different repayment options may be subject to meet and confer with the appropriate bargaining unit to allow for uses of earned paid leave time which are not specified in agreements with bargaining units.

Use of accumulated sick leave could not be used to repay overpayments of compensation. Sick leave, unlike vacation leave or compensatory time, is not earned compensation nor a benefit which an employee may use at his or her discretion.

B. Repayment Schedule

The City may provide employees with a repayment schedule which would allow repayment over an extended period of time without interest. A repayment schedule may be subject to meet and confer if a payback process is addressed in a Memorandum of Agreement (MOA) or if a process is different from any existing provision in an MOA.

For example, the MOA with the San Jose Police Officers Association (SJPOA) provides that the payback process from an employee must be in the same amount and at the same rate in which the overpayment to the employee occurred. Therefore, any repayment schedule which does not conform to the MOA with the SJPOA is subject to the meet and confer obligation under state law.

RICHARD DOYLE
City Attorney

By 
NORMAN SATO
Chief Deputy City Attorney

Attachment

cc: Les White

For questions please contact NORM SATO, Chief Deputy City Attorney at 535-1925.



COPY

Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: RICHARD DOYLE
City Attorney

SUBJECT: Recovery of Overpayment of
Employee Pay – Legal Issues

DATE: October 26, 2006

BACKGROUND

On October 18, 2006, at the request of Vice Mayor Chavez and Councilmember Campos, the Rules Committee referred the discussion of issues related to the City's Military Leave Program to the October 31, 2006 City Council Agenda. One of the issues concerned an overpayment of salary to a military reservist over a period of 34 months. The City Attorney was requested to address whether the City can assume responsibility for long-term payment errors and overpayments of wages or salary to employees covered by the Program.

ANALYSIS

The City is required to seek payments of overpaid salary or wages to City employees. The fact that the City is responsible for errors, even over an extended period of time, does not diminish the obligation to seek repayment of extra unearned compensation.

Article XI, Section 10(a) of the California Constitution provides as follows:

A local government body may not grant extra compensation or extra allowance to a public officer, public employee, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part, or pay a claim under an agreement made without authority of law.

By not requiring repayment of unearned compensation by an employee, a public employer is, in effect, granting additional compensation after services have been rendered by the employee and would be making a gift of public funds. For example, where a specified salary or wage is fixed for a public employee, retroactive application of a salary increase to address a misunderstanding cannot be implemented by a legislative body under Article XI, Section 10(a) of the California Constitution. 65 Ops.Cal.Atty.Gen 66 (1982).

October 26, 2006

Subject: Overpayment of Salary

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Further, in reviewing an overpayment of wages to a state National Guard officer who was employed by the United States Armed Forces, the California Attorney General concluded that a waiver of collection cannot be done without the express authority to refrain from recovery of salary overpayments. 64 Ops.Cal.Atty.Gen.750 (1981).

There may be limited circumstances where collection of a claim based on a salary or wage overpayment may be waived. The Director of Finance is authorized to write off as uncollectible any account or claim not exceeding five thousand dollars which the City may have against any person when the Director determines that the claim is (1) uncollectible (2) possibly collectible but collection is not cost effective or (3) the claim is not a valid, enforceable claim of the City. (SJMC 4.24.030).

CONCLUSION

The City is required to seek payments of overpaid salary or wages to City employees. The fact that the City is responsible for errors, even over an extended period of time, does not diminish the City's obligation to seek repayment of overpayments of salary or extra unearned compensation. There is no requirement that an employee is required to make a repayment at once and the City may provide an employee with a repayment schedule.

RICHARD DOYLE
City Attorney

By / S /
Norman Sato
Chief Deputy City Attorney

cc: Les White
Alex Gurza

For questions please contact Norm Sato, Chief Deputy City Attorney at (409) 535-1900