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In the Matter of Factfinding:

-between-

CITY OF ENCINITAS/SAN DIEGUITO
WATER DISTRICT

EMPLOYER

-and-

S. E. I. U LOCAL 221

UNION

CASE NO. LA-IM-3700-M

FINDINGS

CONCLUSIONS

RECOMMENDATIONS

DAVID B. HART
CHAIRMAN

HEARING HELD

June 1, 2012

Encinitas, California

REPRESENTING:

CITY OF ENCINITAS

Glenn Sabine, Esq.
Encinitas City Attorney

REPRESENTING:

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 221

Fern M. Steiner, Esq.
Tosdal, Smith, Steiner & Wax

1 **JURISDICTION**

2 This Fact Finding arises pursuant to Government Code Section 3505
3 concerning Impasse Procedures as administered by the Public Employment Relations
4 Board (hereinafter may be referred to as "PERB") between the City of Encinitas/San
5 Dieguito Water District (hereinafter may be referred to as the "City") and the Service
6 Employees International Union (SEIU) , Local 221 (hereinafter may be referred to
7 as the "Union").

8 Unable to reach a settlement, David B. Hart was selected by PERB to act as
9 an impartial Chairman and empowered him to render an advisory recommendation
10 in accordance with the PERB'S rules concerning Fact Finding. The panel met in
11 executive session within the times lines as set forth by the rules. The Hearing was
12 held within the aforementioned time lines. The parties agreed that the final report by
13 the panel would be delivered by June 30, 2012.

14 The Factfinding panel, in addition to the Chairman, included Steve Berliner,
15 Esq., appointed by the City, and Terry Brennand, Representative, appointed by SEIU,
16 Local 221.

17 The Hearing was held on the date set forth above and the parties had ample
18 time to present evidence including documents and witnesses.

19 **ISSUE**

20 **'WHAT TERMS SHALL BE INCLUDED IN THE**
21 **SUCCESSOR AGREEMENT BETWEEN THE CITY**
22 **OF ENCINITAS/SAN DIEGUITO WATER DISTRICT**
23 **AND SEIU, LOCAL 221**

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25 **BACKGROUND**

26 The recognized Bargaining Unit in the City of Encinitas, as represented by the
27 Union, is made up of the Miscellaneous Employees of both the City and the San
28 Dieguito Water District. Also a part of this unit are the lifeguards who are Safety

1 Employees. The term of the parties most recent MOU was from January 1, 2008
2 through December 31, 2011. It appears the parties commenced bargaining for a
3 successor agreement within the applicable time line.

4 The issues still outstanding at the time of the factfinding hearing were as
5 follows:

- 6 1. TERM
- 7 2. SALARY
- 8 3. RETIREMENT
- 9 4. HEALTH INSURANCE
- 10 5. SHIFT CHANGES
- 11 6. DISCIPLINARY ACTION/PERSONNEL BOARD
- 12 7. GRIEVANCE PROCEDURE
- 13 8. PAID TRAVEL TIME
- 14 9. MULTI LEVEL CLASSIFICATIONS
- 15 10. PAID LEAVE FOR FAMILY MEMBERS

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17 **ANALYSIS**

18 It is generally believed that the best labor-management contracts are those that
19 are negotiated through bargaining without outside assistance. There are instances
20 however, where the parties find it difficult or impossible to reach agreement by direct
21 negotiation.

22 In such situations the fact-finding process can often provide a mechanism for
23 resolution. It is certainly not the panel's intention to prolong the dispute or erect
24 obstacles that impede resolution. It is also not our intent to "split the baby" so to speak.

25 The Chairman is cognizant of the fact that the current dispute has roots in the
26 economic conditions of the times and the local political climate . The nature of the
27 issues and the current state of relations of the parties are of obvious significance.
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1 While it is generally prudent to try and achieve a long-term settlement, the
2 Chairman notes that both parties to these proceedings have indicated their desire for
3 a long term agreement. Accordingly, the recommendations set forth herein will not
4 contain any re-openers and it is hoped the parties will use these recommendations to
5 bring this dispute to an end.

6 The sworn testimony presented by witness Tom Beckord, Human Resources
7 Director for the City of Encinitas, was concise and to the point. Direct and cross
8 examination of the sole witness in the Hearing gave the panel a general historical
9 context in which to assess the differences which now predominate the situation
10 confronting the parties.

11 After careful consideration and examination of sworn testimony and documents,
12 the Chairman presents the following recommendations in the hope the parties can use
13 these recommendations to reach an agreement. Unilateral implementation of terms and
14 conditions by the Employer would tend to disrupt good labor relations. Good labor
15 relations are a desired goal.

16 The panel members have had an opportunity to concur or dissent on the issues
17 as put forth by the Chairman, and attached to these recommendations are those
18 notations.

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21 **RECOMMENDATIONS**

22 **TERM**

23 **JUNE 30, 2015** AMEND THE CURRENT LANGUAGE TO REFLECT THIS
24 CHANGE

25 **SALARY**

26 CITY PROPOSAL OF 3/26/2012 IS RECOMMENDED
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1 **RETIREMENT**

2 CITY PROPOSAL OF 3/26/2012 IS RECOMMENDED

3 **HEALTH INSURANCE**

4 1ST PAY PERIOD JANUARY 2013, \$500.00 ADDED, CASH OUT INCREASED
5 BY \$200.00

6 1ST PAY PERIOD JANUARY 2014, \$500.00 ADDED, CASH OUT INCREASED BY
7 \$200.00

8 1ST PAY PERIOD JANUARY 2015, \$500.00 ADDED, CASH OUT INCREASED
9 BY \$200.00

10 THE CHAIRMAN IS COGNIZANT THAT THE PENDING "HEALTH CARE LAW"
11 MAY AFFECT THE CASH OUT PROCEDURE

12 **SHIFT CHANGES**

13 CITY PROPOSAL OF 3/26/2012 IS RECOMMENDED

14 **DISCIPLINARY ACTION**

15 ANY DISCIPLINE THAT REQUIRES "SKELLY" RIGHTS SHALL BE SUBJECT
16 TO BINDING ARBITRATION AS OUTLINED BELOW IN THE SAMPLE
17 LANGUAGE.

18 THE CHAIR ASSERTS THAT "HE WHO MAKES THE RULES, SHOULD NOT BE
19 THE SOLE INTERPRETER OF ALLEGED VIOLATIONS OF THOSE RULES."

20 SAMPLE LANGUAGE IS AS FOLLOWS:

21 **The Arbitrator shall be selected by the mutual agreement of the parties.**

22 **If the parties cannot agree upon an arbitrator, a list of seven (7) Arbitrators shall be**
23 **obtained from the California State Conciliation Service, and each party shall alternately strike**
24 **one (1) name from the list until only one (1) name remains.**

25

26 **Findings of Facts and Remedies**

27 **An Arbitrator may sustain, modify or rescind an appealed disciplinary action as follows and**
28

1 subject to the following restrictions:

2 a. All disciplinary Actions

3 If the Arbitrator finds that the disciplinary action was taken for reasonable cause, he or she
4 shall sustain the action.

5 b. Suspensions/Reductions

6 If the action is modified or rescinded, the Appellant shall be entitled to restoration of pay
7 and/or fringe benefits in a manner consistent with the Arbitrator's decision.

8 c. Discharges

9 1. If the Arbitrator finds that the order of discharge should be modified, the Appellant
10 shall be restored to a position in his or her former class subject to forfeiture of pay and fringe
11 benefits for all or a portion of the period of time the appellant was removed from duty as
12 determined by the Arbitrator.

13 2. If the Arbitrator finds that the order of discharge should be rescinded, the Appellant
14 shall be reinstated in a position in his or her former class and shall receive fringe benefits and
15 pay (which shall not include overtime the employee could have worked) as determined
16 by the Arbitrator but not to exceed the level of fringe benefits and pay for all of the
17 period of time he or she was removed from pay status.

18 3. Restoration of pay and benefits shall be subject to reimbursement of all unemployment
19 insurance and additional outside earnings which the Appellant received since the date of
20 discharge.

21 At the hearing, both the appealing Employee and the City shall have the right to be heard and
22 to present evidence. The following rules shall apply:

23 a. Oral evidence shall be taken only on oath or affirmation.

24 b. Each party shall have these rights: to call and examine witnesses, to introduce
25 exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though
26 that matter was not covered in the direct examination, to impeach any witness regardless of
27 which party first called the witness to testify and to rebut the evidence against the witness. If
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1 the Employee does not testify in his or her own behalf, the Employee may be called and
2 examined as if under cross-examination.

3 5. The hearing need not be conducted according to technical rules relating to evidence
4 and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which
5 responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the
6 existence of any common law or statutory rule which might have made improper the admission
7 of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose
8 of supplementing or explaining any direct evidence, but shall not be sufficient in itself to
9 support a finding unless it would be admissible over objection in civil actions.

10 6. The City shall be allowed to have one (1) employee, who may be called upon to testify as
11 a witness, present at the Arbitration hearing at all times.

12 7. The parties agree to forego the use of briefs and transcripts whenever practicable.

13 8. The decision of the Arbitrator shall be final and binding on all parties.

14 9. As an alternative to proceeding directly to arbitration after completion of Step 2, the parties
15 may mutually agree to submit a grievance/appeal to Mediation. A request for Mediation may
16 be presented in writing to the Human Resources Director within seven (7) calendar days from
17 the date a decision was rendered at Step 2. A request for mediation will automatically suspend
18 the normal processing of a Grievance until the Mediation process is completed or the request
19 is denied. The City shall respond to a request for Mediation within thirty (30) calendar
20 days. The Mediation process shall be optional, and any opinion expressed by the Mediator
21 shall be informal and shall be considered advisory.

22

23 **GRIEVANCE PROCEDURE OTHER THAN DISCIPLINE**

24 CURRENT LANGUAGE IS RECOMMENDED, AS AMENDED BY ABOVE

25 **PAID TRAVEL TIME**

26 IF A CITY VEHICLE IS USED AND ONE PERSON GETS TRAVEL TIME PAID,
27 ALL IN VEHICLE WILL GET TRAVEL TIME PAID.

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1 CITY PROPOSAL OF 3/26/2012 AS AMENDED BY THE ABOVE IS
2 RECOMMENDED

3 **MULTI LEVEL CLASSIFICATIONS**

4 CITY PROPOSAL OF 3/26/2012 IS RECOMMENDED

5 **THE CHAIRMAN REJECTS PROPOSAL FOR PERSONNEL BOARD**
6 **EXPANSION OF THE PAID LEAVE FOR FAMILY MEMBER ILLNESS**

7 THE CITY 3/26/2012 PROPOSAL IS RECOMMENDED

8 ALL TENTATIVE AGREEMENTS SHALL REMAIN

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14 Respectfully submitted;

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17 David B. Hart
18 Chairman

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21 Signed and dated this 25th day of June, 2012

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1 SERVICE EMPLOYEES . LOCAL 221
2 PANEL MEMBER TERRY BRENNAND
3 AS TO CHAIRMAN'S RECOMMENDATIONS

4 TERM

5 CONCUR

6 DISSENT ✓

7 SALARY

8 CONCUR

9 DISSENT ✓

10 RETIREMENT

11 CONCUR

12 DISSENT ✓

13 HEALTH INSURANCE

14 CONCUR ✓

15 DISSENT

16 SHIFT CHANGES

17 CONCUR

18 DISSENT ✓

19 DISCIPLINARY

20 CONCUR ✓

21 DISSENT

22 GRIEVANCE PROCEDURE

23 CONCUR ✓

24 DISSENT

25 PAID TRAVEL TIME

26 CONCUR ✓

27 DISSENT

28 MULTI LEVEL CLASSIFICATIONS

CONCUR

DISSENT ✓

1 **PERSONNEL BOARD**

2 **CONCUR** _____

DISSENT ✓ _____

3 **PAID LEAVE**

4 **CONCUR** _____

DISSENT ✓ _____

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8 Terry Brennand
9 Panel Member

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Signed and dated this 13th Day of June, 2012

CITY OF ENCINITAS
PANEL MEMBER STEVE BERLINER
AS TO CHAIRMAN'S RECOMMENDATIONS

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TERM

CONCUR X

DISSENT

SALARY

CONCUR X

DISSENT

RETIREMENT

CONCUR X

DISSENT

HEALTH INSURANCE

CONCUR

DISSENT X

SHIFT CHANGES

CONCUR X

DISSENT

DISCIPLINARY

CONCUR

DISSENT X

GRIEVANCE PROCEDURE

CONCUR

DISSENT X

PAID TRAVEL TIME

CONCUR

DISSENT X

MULTI LEVEL CLASSIFICATIONS

CONCUR X

DISSENT

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PERSONNEL BOARD

CONCUR X

DISSENT

PAID LEAVE

CONCUR X

DISSENT

Please see attached Dissent for further details


Steve Berliner
Panel Member

Signed and dated this 21st Day of June, 2012

**DISSENT BY CITY APPOINTED PANEL MEMBER TO FINDINGS,
CONCLUSIONS AND RECOMMENDATIONS OF PANEL**

The City dissents to four (4) of the recommendations made by the fact finding panel regarding the following issues:

1. Health Insurance
2. Disciplinary Procedure
3. Grievance Procedure; and
4. Paid Travel Time.

These issues will each be addressed.

Health Insurance

The City had proposed an increase of \$200.00 per year to the contribution it makes to an employee's cafeteria plan, and no increase in the \$7,098.00 maximum annual cash out from the plan.

SEIU proposed a \$500.00 per year annual increase to the contribution amount and an increase to \$9,598.00 to the annual cash out limit.

The panel has recommended an annual contribution increase of \$500.00 (as proposed by SEIU) and a \$200.00 per year increase in the maximum cash out from the plan.

The City's witness, Tom Beckord, who was the only witness at the hearing, testified that given the current flux in the health insurance industry, the higher increase proposed by SEIU is not supportable. Premiums have increased in the past, but there is uncertainty that there will be further increases. Consequently, the City does not want to commit to large annual increases now, as anticipated changes in the industry (and legal rulings) could actually result in short term decreases in premiums.

The City also introduced evidence (City Exh. 5) showing that its current health benefit is very competitive with comparable public agencies. The City's minimum monthly contribution to the cafeteria plan of \$1,042.00 is vastly higher than all comparable agencies, except Coronado (at \$1,061). While the maximum monthly contribution is slightly below the survey median (by \$82.00 per month), the maximum benefit must be viewed in conjunction with the current maximum cash out. At \$592.00 per month, the cash out option is significantly higher than all agencies except El Cajon. Four agencies provide no cash out option. The current benefit is a competitive benefit and the City's \$200.00 annual increase to the health insurance benefit is most appropriate in the current economic and legal environment.

The only evidence presented regarding the SEIU's proposal to increase the annual cash out maximum by \$2,500.00 was that the maximum deduction under the City's IRS section 125 plan would decrease by law by \$2,500.00 per year. This plan allows employees to set aside pre-tax money for out of pocket health care and child care expenses. However, no evidence was presented as to why that change must be paid for by the City.

Based on the above, the City's proposal on health care is most appropriate under the relevant considerations and should be recommended by the panel.

Disciplinary Procedure

The City proposed expanding the pool of possible decisionmakers on employee discipline. Currently, the City Manager makes a final decision. The City proposed that the City Manager may propose three individuals as possible hearing officers, and SEIU will pick one, who will make a final decision. SEIU's proposal (Union Exh. 1, proposal 23) accepts the three person pool, BUT ONLY as an intermediate step in the process. It also proposes that a Personnel Board be created to render a final decision. The panel has recommended rejection of SEIU's Personnel Board proposal and the City concurs in that recommendation.

The panel chairman is recommending a third approach, binding arbitration as a final step in the process. Tom Beckord testified as to why that option is not in the City's interest. Binding arbitration gives authority to a third party, the arbitrator, to make decisions significantly impacting the City in the long term. However, the arbitrator does not have any responsibility for the consequences of his or her decision. It creates an untenable situation.

The parties agree to allowing the City Manager to propose three possible hearing officers, from which SEIU picks one. For that, and all the reasons listed above, the City's proposal is most appropriate and should be recommended by the panel.

Grievance Procedure

The City proposed that its grievance procedure be used in relation to separating employees in the limited circumstance when strict performance issues was not the underlying cause, such as medical separation or job abandonment. The evidence showed these employees would receive the same level of due process as any disciplinary matter and that the City was motivated to allow these employees to avoid the stigma of termination.

SEIU's proposal would have these proceedings ultimately handled by a Personnel Board (which both the City and the panel rejected).

The panel's proposal on grievance procedure is the same as it is for discipline. It provides binding arbitration as a final step. For the reasons described with regard to

discipline above, binding arbitration is inappropriate here and the panel should recommend the City's proposal.

Paid Travel Time

The City's proposal is for any employee that will be traveling for work reasons, first come to City administration so that it can be determined to what extent, if any, the time spent traveling is paid time. Tom Beckord testified that the federal rules in this area are confusing, that all the variables that must be considered make adopting a uniform set of rules very difficult, and that in the past, employees who have to travel were disappointed to find out the travel time was not paid time. The City's proposal was intended to allow employees faced with decisions as to whether to travel to make better informed decisions and to avoid disappointment.

SEIU's proposal was that all travel related to work be compensable time. The panel's recommendation is to compensate all who travel in a City vehicle (not just the driver), but otherwise requires prior authorization.

The City should not be compelled to pay for travel time in excess of what it is legally required to pay. A blanket rule on travel time will do just that. The City's proposal will allow employees, armed with prior knowledge as to whether travel time is compensable time, to make better decisions, avoid misunderstanding and disappointment, and allow the City to control its travel costs.

The panel should recommend the City's proposal.

By Steven M. Berliner
Steven M. Berliner
City Appointee to Fact Finding Panel

Date: 6/25/12