

CITY OF MILWAUKEE

Form CA-43

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July 11, 2002

To the Honorable Committee
on Finance & Personnel
of the Common Council
Room 205 – City Hall

Re: Settlement of Litigation Entitled *Bradley DeBraska, et al. v. City of Milwaukee*; U.S. District Court Case No. 96-C-402
(Fair Labor Standards Act)

Dear Committee Members:

This letter will respond to your request as articulated during the meeting of July 11, 2002 relative to the above-referenced matter for a brief history of this litigation. This request was associated with your request directed to the City Labor Negotiator for a summary of the fiscal ramifications associated with the settlement of this litigation. We are pleased to respond to your request as follows.

This litigation was commenced on April 8, 1996, and involves all police officers that are represented by the Milwaukee Police Association ("MPA"). The plaintiffs alleged at that time that the Milwaukee Police Department had violated the Fair Labor Standards Act with respect to numerous issues, including: the manner by which the Milwaukee Police Department afforded police officers access to accrued compensatory time off ("CTO"), compensation for time spent during roll call, commuting time, and appearances at disciplinary or other administrative hearings, compensation for time spent by canine officers in caring for police canines, and the compensability of time during which police officers are on sick-leave or injury-pay status.

On December 1, 1997, the City and the plaintiffs resolved some of the matters in this litigation by stipulation. On June 19, 1998, the District Court issued a decision and order on cross-motions for summary judgment with respect to the remaining issues granting summary judgment for the City on certain issues, granting summary judgment for the plaintiffs on other issues, and denying summary judgment to both parties on still other issues and ordering a trial on those issues. Subsequently, the parties entered into a settlement agreement resolving all issues on which either the plaintiff was granted summary judgment or upon which a trial had been ordered. This settlement agreement was approved by the Court and has been fully implemented.

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On November 19, 1998, the plaintiffs appealed on the remaining issues upon which the City prevailed on summary judgment before the District Court. Among these issues was the CTO issue referenced above. On September 2, 1999, the United States Court of Appeals for the Seventh Circuit in Chicago issued a decision reversing the District Court's determination of the CTO issue in favor of the City and affirming the District Court's determinations in favor of the City on the remaining issues. The CTO issue was remanded to the District Court. The remaining issues were not appealed further.

Following remand, the District Court invited the United States Department of Labor ("DOL") to file an *amicus* brief setting forth the DOL's position with respect to the CTO issue. The DOL did so in April 2000, aligning itself with the plaintiffs and setting forth its views as to what measures the City would be required to undertake in order to comply with applicable FLSA mandates. Among these measures would be a requirement that the City involuntarily call in police officers from off-duty status to replace police officers wishing to take accrued CTO, irrespective of the fact that the officers called in would normally be required to be paid overtime. The City strongly opposed the DOL's position in a submission to the District Court. Nevertheless, on September 26, 2000, the District Court issued a decision and order in favor of the plaintiffs, ruling that the Milwaukee Police Department's existing system for affording police officers access to their accrued CTO violated the FLSA. In so ruling, the District Court accorded considerable deference to the views of the DOL.

Following this ruling, the Court directed that proceedings be commenced as to applicable damages and remedies to be afforded to the plaintiffs. On October 26, 2000, the City filed a third-party complaint against the MPA alleging breach of promise as a consequence of commencing this litigation back in 1996. The parties thereupon entered into extensive negotiations in an attempt to reach a settlement on the issue of damages and remedies, which were at times bilateral and at other times assisted by a court-appointed mediator. On March 27, 2002, the District Court dismissed the City's third-party complaint against the MPA for lack of jurisdiction; the City thereupon refiled that case with the Milwaukee County Circuit Court as a state-law breach-of-contract action against the MPA.

The parties were finally able to conclude a settlement agreement resolving the remaining issues associated with this litigation on June 6, 2002. This settlement agreement is the item currently before your Honorable Committee for approval. As indicated during the course of the July 11,

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2002 hearing, the members of the Committee are familiar with the terms and conditions of the settlement agreement; however, we do wish to emphasize the following salient items:

- This settlement would resolve associated pending disputes concerning accrued CTO and overtime within the Milwaukee Police Department, including the pending state-court breach-of-contract action filed by the City against the MPA, as well as disputes currently in interest arbitration between the City and the MPA concerning Article 15 of the City/MPA collective bargaining agreement entitled "Overtime."
- The settlement agreement will receive DOL approval. This is a very important item, as it will insulate the City from future liability on the issue of whether the items within the purview of the settlement comply with applicable requirements of the FLSA. Absent specific DOL approval such assurance cannot be made, and attempts to reopen the issue and obtain damages in future litigation would always be possible, whether from the MPA or from individuals who might be dissatisfied with the settlement.
- The system set forth in the settlement agreement for affording police officers access to accrued CTO is consistent with efficient administration of the Milwaukee Police Department's CTO system and are considerably less onerous than the requirements that would have been urged by the DOL were this litigation to continue. The proposed new system assures that "replacements" would be qualified to serve in place of police officers taking accrued CTO, places limits on the amount of time that police officers can serve as "replacements," and precludes involuntary call-ins of police officers to serve as "replacements."
- Furthermore, the proposed "replacement system" provides that "replacement" officers are to be paid at straight-time rates unless their total "hours worked" (including hours during which they serve as "replacements") exceed the applicable FLSA-mandated threshold for payment of overtime. That "threshold" for Milwaukee police officers is 86 actual hours worked per 14-day pay period. The FLSA permits certain non-FLSA contractual overtime entitlements (e.g., overtime for "extension of duty") to be offset against any FLSA-mandated overtime liability that might otherwise be incurred. Given the right of offset and the fact that officers who work over 86 hours in a pay period often have at least six hours of contractual overtime that can be used by the City for offset purposes (under the contract, almost all hours worked outside an 8-hour day or a 40-hour week is paid at time and one-half), it is anticipated that

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much of the time worked by "replacement" officers will be paid at straight-time rates, although it is possible that some of this time might be required to be paid as overtime.

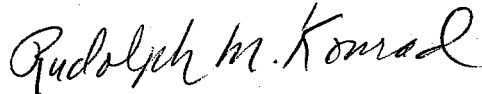
It must be emphasized that the "replacement" system set forth by the settlement agreement operates **only** when police officers would otherwise be denied requests to use accrued CTO. Of course, many such requests are granted. Whether or not a particular request is granted or denied depends upon prevailing staff levels and staffing requirements at each particular work location within the Milwaukee Police Department at the point in time for which CTO has been requested. This is an operational issue that the Milwaukee Police Department must deal with on an on-going basis.

While this office is not able to estimate the potential on-going fiscal impact of this settlement, we note that your Committee has requested that the City Labor Negotiator provide such an estimate to the best of his ability. In this respect, we would emphasize that: (1) damages would remain as an open item to be litigated in the event that this proceeding is not settled; (2) the dollar amount of attorney's fees and costs set forth in the settlement agreement represents a considerable compromise on the part of plaintiffs' counsel and, if the plaintiffs prevail, this amount would be considerably more than twice the agreed-upon amount; (3) the provisions of the settlement agreement concerning court-overtime minimums and maximum CTO accumulation levels are consistent with (indeed, somewhat more conservative than) those prevailing in most other similar jurisdictions; and (4) the "replacement" system set forth by the settlement agreement would in all likelihood prove considerably less costly, more flexible, and more favorable to the fiscal and operational interests of the City than the system for accessing accrued CTO as advocated by the DOL in its *amicus* brief to the District Court or (in all likelihood) any system that the City might be required to adopt in response to an unfavorable court ruling on remedies.

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If you have any further questions concerning this matter, we will be pleased to respond. We appreciate the Committee's attention to this very important item.

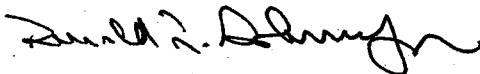
Very truly yours,



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