

CITY OF MILWAUKEE

Form CA-43

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September 7, 2005

Alderman Michael J. Murphy
10th Aldermanic District
City Hall, Room 205

Re: Differential Pay for City Employees Called to Active Military Duty

Dear Alderman Murphy:

In your communication of March 28, 2005 you requested an opinion regarding the legal, administrative, collective bargaining and Internal Revenue Service issues that may be generated as a result of Common Council File No. 041221, an ordinance relating to providing differential pay for city employees activated into service who are members of the National Guard or reserve forces of the United States such that their regular City pay is equalized to their military pay as reflected on the leave and earning statement. We express the following thoughts regarding this proposal. First, such a proposal is expressly allowed under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 USC § 4301 *et seq.*, and specifically by § 4302, which provides as follows:

§ 4302. Relation to other law and plans or agreements

(a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

Additionally, Wis. Stat. § 45.51 provides as follows:

45.51 Employees or officers in military service.

- (1) The governing body of any county, town, city, village, school district, or technical college district may grant a leave of absence to any employee or officer who is inducted or who enlists in the U.S. armed forces for a period of military service of not more than 4 years unless such employee is involuntarily retained for a longer period. No salary or compensation of such employee or officer shall be paid, nor claim therefor exist during such leave of absence, except as provided in this subsection. If the employee's or officer's salary or compensation is less in the U.S. armed forces than was paid by the county, town, city, village, school district, or technical college district, that governmental unit may pay the employee or officer the difference between the salary or compensation paid by the armed forces and the salary or compensation that the employee or officer was paid by the county, town, city, village, school district, or technical college district at the time that he or she enlisted in or was inducted into the U.S. armed forces.
- (2) The governing body may provide for safeguarding the reinstatement and pension rights, as herein limited, of any employee or officer so inducted or enlisted.
- (3) No employee or officer who is appointed to fill the place of any employee or officer so inducted or enlisted shall acquire permanent tenure during such period of replacement service.
- (4) If the leave of absence under sub. (1) is granted to an elected or appointed official or employee and the official or employee has begun federal service, a temporary vacancy exists and a successor may be appointed to fill the unexpired term of the official or employee, or until the official or employee returns and files election to resume the office if the date of the filing is prior to the expiration of the term. The appointment shall be made in the manner provided for the filling of vacancies caused by death, resignation or otherwise, except that no election need be held to fill a temporary vacancy. The appointee has all the powers, duties, liabilities and responsibilities and shall be paid and receive the compensation and other benefits of the office or position, unless otherwise provided by the governing body. Within 40 days after the termination of the federal service, the elected or appointed official or employee, upon filing with the clerk a statement under oath of termination and that the official or employee elects to resume the office or position, may resume the office or position for the remainder of the term for which elected or appointed. The person temporarily filling the

vacancy shall thereupon cease to hold the office. . . .

Accordingly, we conclude that nothing in state or federal either requires or prohibits such a plan as envisioned by File No. 041221, and in fact, specific permission is granted for such a benefit under both state and federal law. Thus, whether or not to grant such a benefit is a matter left to policy judgment.

We urge, however, consideration of the following factors:

1. It is quite possible, following the disastrous results as exemplified by the attack on America on September 11, 2001 that City employees would choose to join the active forces of the United States military directly. As currently drafted, the provision only applies for members of the National Guard and reserve forces who also are City employees at the time of entrance into federal service. We note that an individual who voluntarily joins the active forces would not be included in the benefits accorded by File No. 041221.
2. The Internal Revenue Service requires that the income paid under such arrangements be reflected on a form 1099 that the employee receives at the end of the calendar year in which such payments are made. It is quite possible that the City employee who benefits from this arrangement would be unpleasantly "surprised" by the tax liability that would be due and owing at the end of the tax year. This is because no system for deductions would have been taken out, and the City employee involved may not have been sophisticated enough to file a quarterly estimate. We would urge that some form of education be given to the City employees receiving this benefit, so that they are aware of the fact that they would have to file quarterly estimates to avoid interest and penalties.

Very truly yours,



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c: Ronald D. Leonhardt, City Clerk
1033-2005-753